

ONTARIO
SUPERIOR COURT OF JUSTICE
(Small Claims Court)

CESALTINA FIUSA, GILBERTO FIUZA, and RICARDINA FIUZA
Plaintiffs

- and -

CREEKSIDE REAL ESTATE GROUP INC., ANDREW DOOLING, JACQUELINE
FERGUSON, THE CORPORATION OF THE CITY OF CAMBRIDGE and WATERLOO
(REGION) POLICE SERVICES BOARD
Defendants

* * * * *

P R O C E E D I N G S A T T R I A L
C O N T I N U A T I O N
(DAY FIVE)

BEFORE THE HONOURABLE MADAM DEPUTY JUDGE C. DICKENSON
on November 30, 2018 at KITCHENER, Ontario

APPEARANCES:

Mr. T. Ellis	Counsel for the Plaintiffs
Mr. F. Battiston	Counsel for the Respondent, Creekside Real Estate Group
Mr. A. Dooling	Unrepresented Respondent
Ms. J. Ferguson	Unrepresented Respondent

T A B L E O F C O N T E N T S

ONTARIO
SUPERIOR COURT OF JUSTICE

W I T N E S S E S

<u>WITNESSES</u>	<u>Exam.</u> <u>in-Chief</u>	<u>Cr-</u> <u>Exam.</u>	<u>Re-</u> <u>Exam.</u>
BUONVIVERE, Joseph		4	14
DOOLING, Andrew		28/37	

E X H I B I T S

<u>EXHIBIT NUMBER</u>		<u>ENTERED ON PAGE</u>
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Submissions by Mr. Ellis	41
Submissions by Mr. Battiston	48

* * * * *

Legend

[sic] - Indicates preceding word has been reproduced verbatim and is not a transcription error.
(ph) - Indicates preceding word has been spelled phonetically.

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FRIDAY, NOVEMBER 30, 2018

...UPON COURT COMMENCING (09:34:03)
...UNRELATED MATTERS DEALT WITH

R E C E S S (10:37:50)

U P O N R E S U M I N G : (10:52:55)

CLERK OF THE COURT: All rise. Court is resumed.
You may be seated.

THE COURT: I believe we're on day six, is that correct?

MR. BATTISTON: Indeed, it is.

THE COURT: Are we gonna finish today?

MR. ELLIS: Yes, I believe in the next two hours,
Your Honour.

THE COURT: Oh, all right, great. Okay. I believe,
Mr. Battiston, you had your client in the box,
correct?

MR. BATTISTON: Mr. Buonvivere had finished his
evidence in-chief and Mr. Ellis' cross-examine.

THE COURT: He needs to be cross-examined, okay. Mr.
Buonvivere, would you please step forward? He
doesn't need to be re-sworn. Sir, just could you
spell your name for the record again for us please.

MR. BUONVIVERE: Sure. It's B-U-O-N-V-I-V-E-R-E.

THE COURT: And, you're still sworn from the last
day.

MR. BUONVIVERE: Okay.

THE COURT: All right. Thank you.

JOSEPH BUONVIVERE: PREVIOUSLY SWORN

MR. ELLIS: The break, Your Honour, did help between last trial date because my cross-examination will be much shorter.

THE COURT: All right. Good to hear.

5
CROSS-EXAMINATION BY MR. ELLIS:

Q. Mr. Buonvivere, so how many rental properties do you own?

A. In Creekside, three.

Q. And, how big are your other rental properties? Like this one's half of a semi?

A. One's a condo and the other's a semi.

Q. So, if your tenants in your condo cause a noise disturbance, do you have to deal with it?

A. I would investigate it first.

Q. And, if the condo board came to you and said, there's a complaint you need to deal with it, how would you deal with it?

A. Unfortunate it's in Calgary. I'm not familiar with the laws there so the property manager would deal with that for me.

Q. But if there was a complaint from another condo owner in that condo building, would you have to go through the Residential Tenancy to evict that person?

A. In Calgary?

Q. Yes.

A. I'm not familiar with the *Residential Tenancy Act* there.

Q. Oh, okay. Where's your other unit?

A. In Cambridge.

Q. In Cambridge.

A. It's a semi.

Q. And so, if you had a complaint about noise how would you deal with dealing with that tenant? Say by-law, let's do a hypothetical that by-law charges your tenant with a noise complaint, what would you do?

A. Try to find the grounds where the noise originated from.

Q. Okay.

A. Investigate as I did here to see what could be - you know to mitigate that.

Q. So, you came here to do your best to mitigate the noise complaints?

A. Yes.

Q. So, can you tell the Courts what you did to mitigate those noise complaints?

A. Well, one is being attentive to both the tenants and the neighbours, you know, asks of me. You know, abiding by the by-law anytime they called, take their call, investigate you know understand what's going on. Talking to the police whenever they reached out to me. Talking to Andrew, you know, offer to provide some assistance to buy another system if that was the root of the problem.

Q. And what was the answer to that offer?

A. He didn't want to take it. He didn't see the need to change the stereo system.

Q. Okay.

A. So yeah, doing what I could to help facilitate conversation and listen to the by-laws - I guess them being called out, addressing their needs and not getting any direction from them that there was a problem. So I didn't really pursue it much more than I could.

Q. Do you know much about the *Residential Tenancies Act*?

A. Know a little bit.

Q. So, if there's disruption of reasonable enjoyment of a tenancy does it require a charge from by-law on a noise complaint in order to go through?

MR. BATTISTON: Well that's an unfair question, sorry, Your Honour. The question is, is the complaint being made by another tenant in the residential premises or by the neighbour because I think there's a substantial difference. I mean the answers to both of those questions so I have a problem in that Mr. Ellis is already asking Mr. Buonvivere about his understanding on a legal question but....

THE COURT: Yeah and that's not allowed.

MR. ELLIS: Okay.

THE COURT: He's not here to answer legal questions. He's here to testify to the facts as he knows and understands them.

MR. ELLIS: Okay.

MR. BATTISTON: But if he was, I'd ask him to be a little more specific about which particular aspect of that legislation that he wanted to question Mr. Buonvivere about but....

THE COURT: But it still, it's still his interpretation of the law and it doesn't really matter. So, stick to the facts.

MR. ELLIS: Okay.

Q. So, how many times did you attend the premises in order to try and resolve these issues?

A. Offhand I don't recall but I talked to the tenants and Cesaltina and by-law on many occasions throughout the span of their tenancy.

Q. So, you stated that you had previous tenants, three girls were the original. Was it three or four girls?

A. Three girls, yes.

Q. Three girls, and they lived there for several years?

A. Two and a half years.

Q. And the reason that they left?

A. They just wanted to find another place. The original group split up and they had another friend move in with them and things weren't working out well with her so they decided to go their separate ways.

Q. Okay and then your next set of tenants was a professional hockey player?

A. Yeah and his brother, wife and child.

Q. And, why did they vacate?

A. They bought a house in Guelph.

Q. So, it had nothing to do with the neighbours?

A. No, there was no complaints.

Q. So, then we come to this tenant, this tenancy and the noise complaints. So you don't remember how many times you attended the premises in order to try and deal with the issues?

A. Not physically being there but spoke to them dozens of times.

Q. What was the reason that you stopped coming?

A. Just lack of communication from both parties. By-law basically stopped calling me. They would basically call anytime there was a complaint and I would address it by phoning Andrew and Jacqueline and if Cesaltina called I'd return her call.

Q. Were you aware that by-law went to the City Solicitor in order to lay charges?

A. No.

Q. If you could go to Exhibit 2. I don't know if you have Exhibit 2.

THE COURT: Is it before him? I mean I don't know.

All right, so you want to look at Exhibit 2?

MR. ELLIS: Yes, Tab 4.

THE WITNESS: I just have my own here.

MR. ELLIS: I can give this copy, Your Honour.

THE COURT: Well, I'm still looking for my exhibit. Exhibit 2 is book 2 of the plaintiffs' trial brief, correct?

MR. ELLIS: Yes, that's correct.

THE COURT: Okay. Sir, do you have a book in front of you that looks like that?

THE WITNESS: No, I don't.

THE COURT: Okay, he doesn't have it.

THE WITNESS: Thanks.

MR. ELLIS: Q. If we could go to tab 4, page 11.

A. Okay.

Q. There is - this is when the big incident when you attended on - did you attend on June 1st or only on June 10th?

A. June 1st was a Sunday. I did not attend.

Q. Okay. But, you attended on?

A. June 10th.

Q. June 10th and...

THE COURT: Just for the record, we're referring to the year 2014?

MR. ELLIS: Yes, I apologize, Your Honour.

Q. And, what, what happened that day? What was, what was found that day?

A. So, to reiterate, we made prior arrangements with Ellis - sorry Sean Elliott rather - and met at the Dooling's house

around five p.m., went inside to set the tv at a normal listening level and then we went to the Fiuza residence.

Q. Okay.

A. Sean Elliott and myself went inside their house.

Q. Okay, and was - was anything found? Is this the day that the pillow the cushion went under the subwoofer?

A. No, not at that time.

Q. No? When did that happen?

A. I think prior to that. I think they tried to mitigate any sort of noise coming through the house.

THE COURT: Can you say who tried to mitigate?

THE WITNESS: Sorry, Andrew.

THE COURT: Andrew, all right.

MR. ELLIS: Q. And, would that of - okay, you can't testify to what Andrew did. So, if you could flip to the next page, page 12 at the very top the June 27th, Sean Elliott. Were you aware that Sean Elliott had went to the solicitor about trying to lay charges?

A. No.

Q. Okay, so he contacted you later that day, if you can go to the second one.

THE COURT: Second what?

MR. ELLIS: Q. The second, sorry June 27th, 2014 on that same page, page 12.

A. Mm-hmm.

Q. Sean Elliott at 5:00 p.m. spoke to the property owner. Is this when you were notified that they felt that there was no reasonable prospect of conviction?

A. On multiple occasions talking to Sean there was nothing that he found that would cause him to charge or necessity of charging them. That, I don't understand what that means.

Q. Okay.

THE COURT: First of all, we don't know who he's referring to when he's saying speak with property owner cause there's two property owners at the property, correct?

MR. ELLIS: That's correct.

Q. Did Sean Elliott call you on June 27th?

A. I don't recall. I'd have to check my records.

Q. Okay. Is that the last time you heard from by-law?

A. No.

Q. No, you heard from by-law after that?

A. I have a record of when I spoke to them. I'm not sure right now what days and times I spoke to them back then.

Q. Okay. Do you have that record with you?

A. I'd have to look through the document, yes.

MR. BATTISTON: I can assist, it's in your second affidavit Mr. Buonvivere.

THE COURT: Has that been filed as an affidavit?

MR. BATTISTON: That's Exhibit 12. Mr. Buonvivere you have your affidavit, correct?

THE WITNESS: Yes.

THE COURT: All right, just a minute please.

MR. BATTISTON: It's a second, it's a bound volume with two affidavits. It's the second one Mr. Buonvivere at paragraph 19. It talks about actions taken where you went through all the particulars....

THE COURT: What tab are you on?

MR. BATTISTON: It will be - there's a first affidavit under B which goes up to twelve exhibits. Then there's a blue page which separates essentially part one from part two which is the affidavit sworn on February 6th of 2018.

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Fiuza v. Creekside et al
J. Buonvivere - Cr-ex.

THE COURT: I've got a green page just before Tab B.

MR. BATTISTON: That's right, it's certainly well beyond Tab B but it's all forming part of....

MR. ELLIS: I don't have that in mine, being Exhibit 12.

THE COURT: I have in my - in the actual Exhibit book, Exhibit 12 starts out with a Tab A, notice of motion...

MR. BATTISTON: Yeah.

THE COURT: ...and supporting affidavit.

MR. BATTISTON: Yeah.

THE COURT: Tab B is a schedule B which consists of an affidavit of Mr. Buonvivere.

MR. BATTISTON: Yeah.

MR. ELLIS: It's section 12, Your Honour, Tab B. Like Tab 12.

THE COURT: Tab 12?

MR. BATTISTON: After Tab 12 there should be a blue page divider.

MR. ELLIS: Or a green page.

THE COURT: Okay, Tab 12 is Exhibit 12...

MR. BATTISTON: Continue flipping a page or two.

THE COURT: ...and then I've got a green page and then Tab B.

MS. DIBIASE: That's right.

MR. BATTISTON: Tab B is that's what that says. Mine doesn't have that then you have it, Tab B, sorry.

THE COURT: So, Tab B is his supplementary affidavit?

MR. BATTISTON: Correct.

THE COURT: Okay. Sir, are you able to find that?

THE WITNESS: Yes.

THE COURT: If you go to Tab B there should be a document looks like this, supplementary affidavit of yourself.

THE WITNESS: Yes.

THE COURT: All right.

MR. BATTISTON: You there? Paragraph 14 Mr. Buonvivere, will allow you to refresh your memory of the questions that you're being asked. Paragraph 19, actions taken.

MS. DIBIASE: I think he's waiting for the question again.

MR. ELLIS: Q. Oh, I apologize. So when was the last time you were contacted by by-law?

A. Based on my recollection and this, I believe it was sometime in June or July of 2014.

Q. Okay. And, when was the last time that you were involved with any of the issues with the continuous noise complaint?

A. My last conversation with Cesaltina, paragraph 40 in my affidavit, was July 26, 2014. That's the last time she contacted me about it.

Q. And do you have any recollection of what that conversation was about?

A. Just about the constant noise and getting these people out of my house type of thing.

Q. So, you feel that you did everything that you could possibly do to rectify the situation?

A. Yes.

Q. And, have you had any noise complaints with your new tenants?

A. Not through by-law, no.

Q. And you had issued a defendant's claim against the plaintiffs; is that correct?

A. That's correct.

Q. And, what was that for?

A. Just loss of revenue during the switchover of the tenancy.

Q. And, how much lost revenue did you have?

A. Thankfully not a lot; that's why we dropped the case.

Q. But did you not issue that after the new tenants had already moved in?

A. I don't remember the date.

Q. Okay. Do you have a property manager that deals with your properties in Cambridge or do you do them solely on your own?

A. I do it myself.

Q. So, you understand your obligations under the *Residential Tenancies Act* as a landlord?

A. Yes.

Q. Have you ever been there?

A. Where?

Q. To the Residential Tenancies Board?

A. No, I haven't.

Q. Okay. Did you tell Cesaltina that she should just put in ear plugs and deal with it.

A. No, not to deal with it. I recommended using ear plugs. I wear ear plugs myself every day - every night.

MR. ELLIS: Okay, those are all my questions, Your Honour.

RE-EXAMINATION BY MR. BATTISTON:

5 Q. Mr. Buonvivere if I can continue your view or your focus on the affidavit, your affidavit that is sworn February 6, 2018. Do you recall going through the particulars of that affidavit, correct?

A. Yes, I do.

10 Q. And, of course it's difficult to answer questions in a, in a vacuum but starting at paragraph 19 under the sub-heading, actions taken, are those all actual notations that you made at the - certainly at different times to verify when you responded, when you heard about complaints or what you did?

A. That's correct, yes.

15 Q. And they're all accurate as far as what has been set out in your affidavit?

A. Yes.

20 Q. So, if we start on paragraph 19 it seems to me that the Doolings moved in on February 1st but you first heard about a complaint on April 5th?

A. That's correct.

25 Q. And it was a Saturday?

A. That's correct.

30 Q. A lot of these complaints on weekends? Just while we're on the subject.

A. Yes, seems to be weekends, Saturday, Sunday.

35 Q. All right. And, some of them were during the day, times when certain people are active and outside, do you recall that?

A. Possibly.

40 Q. You don't recall. All right well April 5th; what happened on April 5th?

A. That was the first time I was approached or called by the by-law about a noise complaint so I was interested to hear

more and listened to - I'm not sure if it was Sean at the time, I suspect it was.

Q. You certainly got to know Sean a little bit as a result of your interactions with him, did you not?

A. Yes.

Q. You were on a first name basis with him? Did you have his number?

A. At the time I did.

Q. He had yours.

A. And e-mail address.

Q. And e-mail address. So, the first indication came to you and the first contact was through Sean, through the By-law Department?

A. That's correct, yes.

Q. And, what happened and what did you do?

A. I listened to what he was saying about the complaint. Didn't phone Andrew that night but I called him the next morning just to understand what has happened and speaking to Andrew just found out that there were other complaints prior to April 5th, 2014 that I wasn't aware of. So we just chatted about the situation and that was the end of it.

Q. For April 5th?

A. For April 5th, 6th, yes.

Q. 'Cause you noted in paragraph 20 what you did on April 6th, so that was the conversation you just referred to, right?

A. Yes.

Q. Okay, did the by-law officer tell you that there was a substantial reason for you to be aware of the complaint?

A. No, it was just more informational. He did not find a level of noise that would warrant a charge against the Doolings.

Q. On April 6th?

A. From the incident of April 5th or prior.

Q. April 5th, I'm sorry or prior for that matter, you already knew that?

A. Well in the conversation with him, yes.

Q. All right. So, you're home in Toronto, I guess?

A. Yes, well actually I was at a friend's that night.

Q. Sorry?

A. I was at a friend's that night that's why I remember....

Q. Oh, on April 5th, you remember that. I see and where was that, also in Toronto?

A. Woodbridge, yes.

Q. Woodbridge, Woodbridge, okay. Paragraph 21 the scene shifts over to May 31st. What happened on May 31st, 2014?

A. Cesaltina called me, we chatted about the noise complaints and you know just more her letting me know about the noise complaints and the noise from the tenants.

Q. And, you spoke to Mr. Dooling?

A. Yeah, it looks like later in that day the by-law called me as well.

Q. Okay, what happened?

A. Again, I was advised by them and I told them - or I spoke to the resident at 540, so Cesaltina, and then I spoke to the tenants.

MR. ELLIS: Your Honour?

THE COURT: What?

MR. ELLIS: Is this not testifying. This isn't re-examination of the questions that were asked in cross-examination.

THE COURT: Well, you asked him about the actions taken I understood it and that's from paragraphs 19 through to paragraphs 40.

MR. ELLIS: Okay.

THE COURT: Or actually beyond that. I mean, that was what you were cross-examining on and you had every opportunity to cross-examine on each and every paragraph if you wanted to.

5
MR. BATTISTON: Q. The number of entries for May 31st Mr. Buonvivere, what was the result and what was the nature of the problem?

10
A. Again, by-law when I was speaking to them could not find any unreasonable noise and never laid any charges. I did follow up with Andrew at the time. If I couldn't speak to him directly, I left a message and then we would talk afterwards.

Q. And after those conversations, what happened?

15
A. Everything just went on and I was notified either through Andrew or by-law.

20
Q. And those discussions continued on - well again Saturday, Sunday June 1st the discussions take place and nothing really - what did you decide by the end of the various discussions that took place on May 31st and June 1st?

25
A. I think that's when we decided with Sean Elliott and myself to do a house visit. He asked me if I would be up to that...

Q. Oh.

30
A. ... and that's when we coordinated that to go June 10th.

Q. On June 10th.

A. Yeah.

35
Q. That occurred and if you go to paragraphs 31, 32 you make references to what happened on June 10th, correct?

A. That's correct, yes.

40
Q. And, you've already testified that you went to the Doolings house and you went into the Fiuza house?

A. That's correct.

Q. And Sean Elliott was there with you?

A. Yes.

Q. And, we heard the results of that, correct?

A. Yeah.

Q. Yes?

A. There was no noise that we could hear when we're inside the house.

Q. Okay. Subsequent paragraphs and notations talk about June 23rd. What happened on June 23rd?

A. I had a voice message from Cesaltina on the 23rd of June 2014. I listened to it. I contacted Andrew, they weren't available so I just left a voice message saying that I was contacted by Cesaltina that day and just wanted to know what was going on.

Q. Did anything arise from those messages and those discussions?

A. No.

Q. You didn't hear from the by-law people though?

A. Not at that time, no.

Q. Then we move into July of 2014 and reports of what occurred on July 14th and that was a Monday?

A. Yes, so that was a Monday morning July 14, 2014. I was at a client's. I believe Cesaltina called me and complaining about the noise from the prior Sunday.

Q. When did you receive those calls? What time, what time do you recall?

A. I believe, I think it was around 9:30, 10:00 in the morning, Monday morning.

Q. In the morning? And, what was the message?

A. Just complaining about the noise from the night before.

Q. Okay and what did you do?

A. I tried to call - I believe I spoke to Andrew that morning.

Q. Paragraph 38, does that refresh your memory?

A. Yeah. Yes, so after talking to Cesaltina I phoned Andrew and spoke to him and just reiterated that I got a complaint and just want to hear his side of the story.

Q. And, what was his side of the story?

A. That he was just listening to music at a normal level or tv; whatever it may have been.

Q. Okay and that was the Monday you spoke with him?

A. Yes.

Q. And, later on that week there are incidents to report - an incident to report for July 19th as well?

A. Yeah, again another voice message received from Cesaltina on July 19th, 2014 and then I spoke to Andrew the following day 'cause I got the message in the middle of the night.

Q. Did you ignore any of these messages from Ms. Fiuza?

A. No, no, I would listen to the message. I wouldn't call her back directly. I would speak to Andrew and Jacqueline and if I happened to be available when she called, I would take her call.

Q. Okay and in paragraph 40 you indicate that the last time you heard - well tell us what happened - why is July 26th significant or relevant?

A. That was the last time I spoke to Cesaltina about the issues and haven't heard from her since.

Q. And when did you next hear about issues relating to noise at 542 Elgin Street?

A. Probably when we were served with papers for this trial or the lawsuit.

Q. By then the Doolings were still living in there; were still living in the premises correct? They moved out October 2015.

A. October 2015, they moved out. I'm not sure when the paperwork was filed.

Q. Yeah, because they were still in the house when you thought you were going to lose rent which was the concern for the counterclaim, right?

A. Yes.

Q. But, as it turns out you rented it right away, correct?

A. Yes. Yeah, a couple of weeks of vacancy which is fine. It's an advertising fee so I didn't worry about it.

Q. Paragraph 42 you've done - they forced a respond to these matters. You did review, you and Mrs. Buonvivere did a review of the records, correct?

A. That's correct.

Q. And what were your impressions once you had an opportunity to review all the hundreds of records that you were served with?

A. That their impression and what was communicated to us was in line, that there was no unreasonable noise and nothing for them to charge the Doolings with a noise complaint from a by-law perspective and police were involved and dispatched again. No charges were laid.

Q. Right so there was not only by-law but police were involved?

A. That's correct.

Q. Did you ever get calls from police?

A. I spoke to them a few occasions. Again, it was just more informational just to let me know what was going on.

Q. And, what was going on?

A. Just that there was a noise complaint and that they were called out for.

Q. Go to paragraph 48, Mr. Buonvivere. Is that - did you do some calculations based on those records, Mr. Buonvivere?

A. Yeah, my wife and I reviewed all the records and just counted the number of occurrences that the by-law and police were called out and still based on all that, all those visits found no evidence of noise.

Q. And if I can refer you to Tab 5, which is Exhibit 5 of that affidavit. Just keep flipping into the record that you have. Do you recall seeing this document in amongst all the other documents you received?

A. Yes, I do.

Q. And, this is from the By-law Department of Cambridge, correct?

A. Yes.

Q. And, as at November 3rd, 2014 by-law, Cambridge by-law informed that there were no more - by-law officers would no longer respond to the noise complaints. And this was after you had already ceased hearing about any of them in July, the previous July?

A. That's correct.

Q. And, if you flip over to the next page. We were also provided with this document which confirms how many calls....

THE COURT: You talking about Tab 6?

MR. BATTISTON: Yes.

Q. Which is an e-mail July 30th, 2014. It looks like it came from Waterloo Regional Police Service, is that correct?

A. Yes.

THE COURT: Who is the e-mail to?

MR. BATTISTON: Well something's blacked out but certainly Mr. Elliott, Shaun Elliott, is the officer in question.

Q. Is he not Mr. Buonvivere?

A. Yes.

MR. BATTISTON: Q. Elliot S is Shaun Elliott.

THE COURT: Right but he's copied but who is the e-mail to?

MR. BATTISTON: I don't know. It was blacked out. It's blacked out on mine.

THE COURT: Do you know Mr. Buonvivere?

THE WITNESS: No, I do not. I believe that was in Cesaltina's documents.

MR. BATTISTON: Q. Yeah, it was.

THE COURT: All right.

MR. BATTISTON: Q. Oh, well the salutation is, Hi Cesaltina so Mr. Buonvivere, do we assume that this was an e-mail sent to her?

A. Yes.

Q. Yes. I don't know why it was blacked out in the address line. Confirming all the calls that were made to Waterloo Regional Police and interestingly they end on July 27th which is the day after you ceased receiving phone calls from her, is that correct?

A. That's correct.

Q. Turn to Tab 8. This was another one of those documents that you were provided with, Mr. Buonvivere. Did you - were you aware of an incident of this nature taking place on October - in October 5th of 2014?

A. No.

MR. ELLIS: Again, Your Honour I never examined on these documents, these tabs. I examined on 12B.

5
THE COURT: Well, this book has been entered as an exhibit. I'm presuming when you enter things as exhibits, it's evidence that you want me to look at and consider in my deliberations. Would that be correct? If you have any issue with Mr. Battiston cross or examining on this that's one thing but....

MR. ELLIS: I do.

THE COURT: Okay and your issue is what because he didn't bring it up.

10
MR. ELLIS: He's on re-examination; not on in-chief.

THE COURT: All right. Mr. Battiston what do you have to say about that?

15
MR. BATTISTON: The question deals with the questions arising from what Mr. Buonvivere was required - what he felt he was required to do based on the complaints and this was a precursor to the question I want to ask.

Q. Why do you think this happened to these particular tenants, Mr. Buonvivere?

20
A. I personally think 'cause they're a little reserved and quiet and maybe she felt that, you know, she could you know enforce some power or control their life somehow.

25
Q. And what - this exhibit at Tab 8, does that give you any more insight and do you have any impressions that you formulated at the time once you became of this particular incident of Cesaltina being admitted for threatening to kill herself?

A. Where's that?

30
Q. Well what did you formulate as far as your impression about what was going on once you became aware of this?

A. Well, my impression of....

THE COURT: But, does that arise out of Mr. Ellis' cross-examination?

MR. BATTISTON: Okay, well....

THE COURT: Not clear about that.

MR. BATTISTON: Why he thought this was all happening, Your Honour, that's still part of the same question. If he hasn't answered.

THE COURT: In terms of Mr. Ellis' questions as to what?

MR. BATTISTON: That's fair. I don't need an answer to that question, Your Honour.

THE COURT: All right.

MR. BATTISTON: That's all. Thank you, Mr. Buonvivere.

THE WITNESS: Thank you.

THE COURT: All right. You may be excused Mr. Buonvivere. Thank you. You can leave the book right there, yes. Mr. Battiston, do you have any other witnesses?

MR. BATTISTON: I do not. Thank you, Your Honour.

THE COURT: Okay. I understand Mr. Dooling has filed an affidavit, correct?

MR. DOOLING: Yes.

THE COURT: Okay and Mr. Ellis will you be cross-examining Mr. Dooling on that?

MR. ELLIS: Yes, I will, Your Honour.

THE COURT: All right. Where's that affidavit located. Has it been marked as an exhibit?

MR. ELLIS: It has not.

MR. BATTISTON: Not yet.

THE COURT: Not yet. I know I saw it in the court file so it's just in the court file.

MS. DIBIASE: Not yet, nope.

MR. BATTISTON: No.

THE COURT: Okay. I know it was filed...

MR. BATTISTON: It was filed.

THE COURT: ...I think many, many months ago so let me just locate that and after Mr. Dooling is cross-examined is that the end of the case basically.

MR. BATTISTON: Evidence is completed, yes.

THE COURT: With except the closings?

MR. BATTISTON: Yes.

THE COURT: Okay. There's no defendants' claim any longer though, correct?

MR. BATTISTON: No.

THE COURT: Okay so we won't be going down that road. All right, the affidavit that is in the court file, just give me a minute please. It's the one filed with the court on February 14, 2018. It's a fairly lengthy affidavit. There's exhibits attached to it. Is that the one?

MR. ELLIS: It is the one, Your Honour.

MS. DIBIASE: Sworn February 9, 2018, our copy.

THE COURT: No, was filed.

MS. DIBIASE: Oh, I'm sorry.

MR. BATTISTON: February 9th. It was filed on the 14th.

THE COURT: Filed. I anticipate - yeah, let me just...

MR. ELLIS: It was filed way after the first day of trial, Your Honour.

THE COURT: Yes, it was but this thing has been going on for almost a year now. It looks like it was filed in advance of the trial date on February 27th. Oh, there it is at the back. February 9, 2018. All right.

Now Mr. Battiston even though there is no defendants' claim you are still an adverse party. Do you intend to do a cross-examination as well?

MR. BATTISTON: Where I think the information should be clarified, given...

THE COURT: Oh, okay, after Mr. Ellis....

MR. BATTISTON: ...an unrepresented litigant who might require some assistance in this matter.

THE COURT: Right, no I understand that. So Mr. Dooling would you please come forward and you have a copy of your affidavit with you? Thank you. If you'd like to approach the witness box.

CLERK OF THE COURT: Do you wish to swear on the holy book or affirm to tell the truth?

MR. DOOLING: I wish to affirm.

CLERK OF THE COURT: Affirm.

ANDREW DOOLING: AFFIRMED

CLERK OF THE COURT: Can you please state your name and spell it for the record.

MR. DOOLING: Andrew Dooling. A-N-D-R-E-W, D-O-O-L-I-N-G.

THE COURT: Thank you sir, you may stand or sit, whichever way you're comfortable, it's up to you. If you don't find that comfortable you can stand up it doesn't matter to me but...

MR. DOOLING: That's fine.

THE COURT: ...I do want to warn you that you are very, very soft spoken. So please make sure you keep your voice up. You don't have to speak directly into the microphone but just keep your voice up a little bit more and the microphones are very, very sensitive

so even if you hit it with a piece of paper it will reverberate throughout the courtroom. Okay?

MR. BATTISTON: You have to say yes.

MR. DOOLING: Yes.

THE COURT: Now, before we big his cross-examination shouldn't this be filed as an exhibit?

MR. BATTISTON: I think that's what Mr. Dooling intended. Mr. Dooling if you speak up you can say it.

MR. DOOLING: Yes.

THE COURT: You wish to file this as your evidence in-chief.

MR. DOOLING: Yes.

THE COURT: All right. Madam Clerk, I think this will be Exhibit Number 13.

EXHIBIT NUMBER 13: Affidavit of A. Dooling - produced and marked

THE COURT: Now, Mr. Dooling as you probably know with being here for six days now, generally people give all of their evidence orally but you have chosen to file an affidavit and that's fine. It is something that I will review. Mr. Ellis who represents the plaintiffs is going to now cross-examine you on what is contained in this affidavit and if you require any time to review anything, certainly you will be afforded an opportunity to do so before you answer the question. All right. Do you understand?

MR. DOOLING: Yes.

THE COURT: Okay. Mr. Ellis?

MR. ELLIS: Yes. Andrew.

CROSS-EXAMINATION BY MR. ELLIS:

5 Q. You stated that you moved out of your previous place. Why did you move out of 123 Glamis Road?

A. Me and my ex-wife, we moved into another, a bigger home.

10 Q. Okay, but doesn't this say that you moved out of here into Elgin? So, you moved into Elgin with your ex-wife?

A. No, I did not. I'm just gonna skip forward, I guess.

15 **THE COURT:** To another paragraph or, sir, or it looks like Mr. Ellis, to be fair to the witness he's not represented, so if you want to refer him the particular paragraph, you're cross-examining on that would be helpful so that...

MR. ELLIS: I apologize, Your Honour.

20 **MR. ELLIS:** Q. Paragraph 7 of page 1 of your affidavit.

THE COURT: Of schedule A. So, it's probably at the bottom.

25 **THE WITNESS:** Okay, well there is several years missing in between me living at 123 Glamis and moving into 542 Elgin Street.

MR. ELLIS: Q. Oh, okay. I apologize I didn't read it that way. So, when you moved into 542 Elgin Street, you had noise complaints?

A. From my neighbour at 542, yes.

30 Q. So, you had stated and I'm gonna look at the paragraph. You had stated that you were....

THE COURT: Where are we looking?

MR. ELLIS: I'm looking for the paragraph, I apologize Your Honour. It's paragraph 20 on page 3.

THE COURT: All right paragraph 20. Please read that paragraph sir.

THE WITNESS: To myself?

THE COURT: You can read it to yourself. You don't have to read it out unless counsel wants you to read it out but - are you satisfied he just reads it to himself?

MR. ELLIS: Yes.

THE WITNESS: Okay.

MR. ELLIS: Q. So, you had a good relationship with the neighbours when you moved in?

A. I would say we were not overly friendly but neighbourly.

Q. How soon after you moved in did the noise complaints start?

A. The very first day we moved in.

Q. Okay and were you listening to the music, were you watching tv, were you playing video games, what were you doing?

A. I believe that night I was listening to like an alarm clock radio as I had not had my stereo set up at the time.

Q. So, your stereo system, is it plugged into your tv when you're living there?

A. Yes, it was.

Q. So, when you'd turn off music and turn on tv is it still your stereo?

A. It is an option, yes.

Q. Did you use that option?

A. From time to time.

Q. And, was there - did you feel there was any bass vibration?

A. Not that I ever noticed, no.

Q. So, you feel at no point in time during living at 542 Elgin that your music or tv was ever too loud to cause bass vibration on the centre wall?

A. No, I do not.

Q. And, when your landlord offered to replace your stereo, why didn't you take him up on it?

A. I didn't see it was necessary.

Q. And you didn't - did you not agree to do mediation?

A. Originally, I refused and then I - after speaking to the mediator again I decided to - that I would - that I would be willing to do so. Then the Fiuzas were not willing at that time.

Q. How long after you had said, no did you agree to say yes?

A. I would imagine it was several weeks.

Q. Had any legal action started before you agreed to say, yes?

A. Not that I recall, no.

Q. Okay and you had stated that you go to work about 4:00 o'clock in the morning?

A. That's correct.

Q. So, what time do you normally get up?

A. About 4:00 o'clock would be the time I would wake up in the morning when my shift would start at 5:00 a.m.

Q. And how long would you be home after you get up?

A. Five minutes.

Q. Okay, so you just get up and run out the door.

A. Yeah.

Q. You don't turn on a radio or anything like that?

A. No time or the need to do so.

Q. Okay. You on page 5, paragraph 34, 35, this deals with the noise complaint of when you had your babies? You state that....

THE COURT: Sorry, can you just give me a second to read this please.

MR. ELLIS: Sorry.

THE COURT: All right. Go ahead.

MR. ELLIS: Q. You claim that at no point were you watching tv or listening to the radio before you left to have the baby, is that correct?

A. In paragraph 34?

Q. Yes.

THE COURT: Well actually it's paragraph 35.

MR. ELLIS: Thirty-five, yes. Second sentence.

THE COURT:

[As read] Jacqueline started to have a pregnancy concern around 10:00 p.m. on November 23rd, 2014 as she started bleeding and was quickly trying to figure out what to do next. We definitely did not play music or watch tv.

THE WITNESS: It's up until that time of 10:00 p.m. I believe Jacqueline might have been watching tv as I had just gotten home.

MR. ELLIS: Q. But you say in there, we definitely did not watch tv or play music?

A. Well originally the complaint seems to be coming at 1:04 a.m. but now we're talking at 10:00 p.m.

Q. Okay.

A. So yes at 1:00 a.m. no, there would not have been any noise in my home as there was nobody there.

Q. There's no chance that you left it on when you left?

A. Absolutely not.

Q. Okay. When did you - oh, if we could go to the next page, paragraph 38.

A. Sorry, you said 38?

Q. Yes. Can you tell us what date that is?

A. I do not recall as it is not on here.

Q. Would it be around June 1st, 2014 - or yeah June 1st, 2014?

A. Possibly, possibly.

Q. Okay. And you state that this was a temporary relief because the next day there was complaints called into by-law?

A. That's correct.

Q. If you could look at Exhibit Number 2 that's right in front of you up on top there. Page 11 of Tab 4. About halfway down the page it starts,

[As read] June 1st telephone conversation received voice message from property owner.

THE COURT: Do you see where that entry is, sir? It is, you see on that page, on page 11 there's one, two, three, four, five references to June 1st.

THE WITNESS: Yes.

THE COURT: And Mr. Ellis is referring you to the last one, is that correct Mr. Ellis?

MR. ELLIS: Yes, that's correct.

THE COURT: Okay.

THE WITNESS: Okay.

MR. ELLIS: Q. Does this bring your recollection to whether this is the day you put the subwoofer on the cushion?

A. Clearly, yes.

Q. So, you state in your sworn affidavit that there was a complaint made the next day about noise?

A. That's correct.

Q. Do you understand that this is the record of by-law that you're looking at in Exhibit Number 2?

A. Yes.

Q. And how many days is it from when you did the cushion 'til the next complaint?

A. One day, one day.

Q. June 1st to June 12th is one day, or June 10th I mean, sorry? June 1st to June 10th?

A. No, it is not but on my review of the actual filed complaint seemed to be a lot less than the actual visits from the by-laws and the police.

Q. Okay. Can you see the June 10th one there?

A. Yes.

Q. Do you see where, attended location, met with property owner? Was that the day that Joe came to your residence?

A. I would assume so, yes.

Q. Do you see the second paragraph there while it says,

[As read] While in living room bass audible, attempted to create resolutions with tenant.

A. Yes, I see that.

Q. So, the by-law officer notices when they go next door there's bass audible?

THE COURT: Well no that's not what it says.

THE WITNESS: It doesn't.

MR. ELLIS: I apologize, Your Honour. You are correct.

THE COURT: That could be in his living room.

MR. ELLIS: Yes.

THE WITNESS: Yes. Doesn't specify.

MR. ELLIS: Q. Yes. So, they tried to create a resolution with you to deal with the subwoofer placement?

A. Yes, they attempted to.

Q. And, did you agree to their resolutions?

A. Originally, I did, yes.

Q. So, it states in here,

[As read] Due to ongoing civil disturbances tenant will continue using subwoofer, offer to supply tenant with support device to alleviate the subwoofer vibrations.

A. Sorry, what is the question?

Q. Well this doesn't sound like you agreed to their resolution?

THE COURT: Okay, so what is your question?

MR. ELLIS: Q. My question is, is, did you agree to their resolution of dealing with the subwoofer?

THE COURT: And he said - his evidence was that he originally agreed to it.

MR. ELLIS: Q. On June 10th?

A. On one of the days yes, I did originally agree to....

Q. Was that date not June 1st when you agreed to put the subwoofer on a cushion?

A. Yes.

Q. But it wasn't on June 10th when they offered you?

A. No because the complaints had continued prior to that so it obviously was not resolving anything.

Q. My question is on June 1st it states that you removed the subwoofer from the floor?

A. Yes.

Q. And the next complaint under by-laws, Freedom of Information is June 10th where it states, music turned on, subwoofer on the floor.

A. Yes.

Q. So, you had moved the subwoofer between June 1st and June 10th back onto the floor and off of the cushion?

A. Yes, I did.

Q. But it appeared that the next complaint was when you put it back on the floor?

A. That's incorrect. There's inconsistencies in these actual reports where I know where the police were in my home - by-law and police were in my home multiple times a day that are not in these records.

Q. Okay.

A. Because I assume they didn't feel like filing the paperwork 'cause it wasn't worth their time or effort or I don't know. I was - it's not my job to do so but I know there was many occasions that the police and the by-law were in my home that it's not in these records.

Q. Okay.

A. Because I myself tried to obtain all of this Freedom of Information from the by-law and the police and it seemed a little shy from my account.

MR. ELLIS: Okay. You discussed and I'm just gonna, if I could have one second Your Honour. I just want to look at the....

Q. If we could go to paragraph 44 on page 7?

THE COURT: So, we're back into the affidavit?

MR. ELLIS: I apologize we're back to Exhibit 13, page 7.

THE COURT: Exhibit 13 and what paragraph?

MR. ELLIS: Forty-four, Your Honour. Forty-four and forty-five.

THE WITNESS: Yes.

MR. ELLIS: Q. You're stating that - why did these - why did this privately laid charge go away, do you know?

5 A. Because I agreed to move. I - or lack of evidence, one of the two.

Q. Is it not true that it was an agreement that if you vacated the premises the charges would be withdrawn?

A. Yes.

10 Q. Okay. You, you now live at 4 The Greenway?

A. Yes.

Q. And you say you get along very well with your neighbours?

15 A. I wouldn't say I get along well with them but I've never had any issues with them.

Q. Well here it says, we get along very well with our neighbours.

A. These neighbours have since moved but yes, the neighbours that were there, yes, I got along with them.

20 **THE COURT:** Where are you referring to Mr. Ellis?

MR. ELLIS: Oh, sorry paragraph 58, Your Honour, page 9.

THE COURT: If you're gonna jump around the affidavit say so.

25 **MR. ELLIS:** I apologize, Your Honour.

Q. So, do you get along with your neighbours that are there now?

30 A. Yes. I've had no issues with him. I've only actually spoken to the man once but I've never had any issues with him.

Q. And, at no point in time during the time that you were at 542 Elgin you felt that you had disrupted anybody's life next door?

A. No, I did not.

MR. ELLIS: Those are all my questions Your Honour.

THE COURT: Thank you. Anything?

MR. BATTISTON: I need two minutes to go to the bathroom is what I need, permitted, it won't be long at all.

THE COURT: All right. Well let's take a ten-minute break so I can review Mr. Dooling's affidavit in detail.

CLERK OF THE COURT: All rise. This court will stand down for ten minutes.

R E C E S S

(11:51:11)

U P O N R E S U M I N G:

(12:03:38)

CLERK OF THE COURT: All rise. Court is resumed. Please be seated.

THE COURT: Mr. Battiston?

MR. BATTISTON: Yes.

CROSS-EXAMINATION BY MR. BATTISTON:

Q. Mr. Dooling your affidavit was filed here in the court, is that correct?

A. Yes.

Q. You did that yourself?

A. Yes.

Q. And, it was sworn in front of a representative of the court, is that what happened when you filed the document, Mr. Dooling?

A. That's correct.

Q. On February 9th I think it was, 2018?

A. That's what it says here, yes.

Q. And you were asked at the time if the statements in the document were true and you swore that they were?

A. Yes.

Q. Are they still true today?

A. Yes.

Q. So, all the evidence about - well we heard about your work schedule. You start work at 5:00 a.m.?

A. That's changed now.

Q. Oh?

A. I'm on afternoons but at the time, yes.

Q. At the time. What time were you used to going to bed in those days?

A. Nine, 10:00 o'clock. Between 9 and 10.

Q. You listen to music while you're sleeping?

A. No, I don't.

Q. And you work as a welder?

A. That's correct.

Q. Outside structural work?

A. No, indoor.

Q. Indoor. Eight-hour shift?

A. Typically, ten.

Q. Ten hours. I guess you were tired by the time you got home at the end of the day?

A. Usually, yes.

Q. And when you moved in you had a young daughter?

A. Yes.

Q. How old was your daughter at the time?

A. I believe at the time she was five when we moved in.

Q. Five. Did you play music for her?

A. No. She had a stereo in her own bedroom that she liked to listen to.

Q. AC DC?

A. Probably not, no.

Q. Probably not, okay. And Mrs. Dooling, Jacqueline, also worked at the time?

A. That's correct.

Q. And what was her - what was the nature of her work schedule?

A. She worked the same hours I did. She was on somewhat of a different sleeping schedule than I was. She'd often go to bed earlier than I did.

Q. Earlier than 9?

A. She'd often yes and she got up earlier than I did.

Q. Earlier than 4?

A. Yes.

Q. And your daughter would also be awakened at that time?

A. In the last minute as we were going out the door, we would kinda whisk her out of bed...

Q. Wow.

A. ...off to my parents' house to be brought to school in the morning.

Q. Wow and then in November the twins arrived?

A. That's correct.

Q. Was there a lot of music playing in the house after 9?

A. No.

Q. Did your home life change dramatically on weekends when it - I mean you worked Friday. Saturday, neither one of you worked I assume?

A. I often worked Saturdays.

Q. Oh, you did as well?

A. Yes. So, Friday nights would have not been a party night.

Q. Did you have party nights?

A. No, we don't particularly have any friends so other than holidays or family nobody came to visit us other than family.

Q. So, parents?

A. Parents.

Q. Jacqueline's parents?

A. Jacqueline's brother once in a while would come to visit us.

MR. BATTISTON: All right. Those are all the questions I have. Thank you, Mr. Dooling.

THE COURT: Thank you Mr. Battiston. Mr. Dooling you may be excused. Thank you. It's about ten after twelve, do you wish to sum up now or would you rather have a lunch break and then sum up.

MR. BATTISTON: I have written submissions that I'd like to file, Your Honour. Oh, you both, do you both have written....

MR. ELLIS: No.

MR. BATTISTON: Only analysis on my part.

MR. ELLIS: I just got it this morning so I'm willing to do an oral submission, Your Honour. Mine won't be more than fifteen minutes. You've seen my submissions before.

THE COURT: All right. Let me ask Mr. Dooling and Ms. Ferguson do you wish to sum up. You do not have to but I'm giving you the opportunity if you wish.

MR. DOOLING: I believe everything we had to say is in our affidavit.

THE COURT: All right. Fair enough. All right Mr. Ellis if you want to do your closing submissions and then I will take Mr. Battiston's and then that will be the end of the matter.

MR. ELLIS: All righty, Your Honour.

SUBMISSIONS BY MR. ELLIS:

I do have a book of authorities that I've built that I've given to the other parties.

THE COURT: All right.

MR. ELLIS: I realize there's a lot of cases in there. Your Honour, I believe that this case is about an issue of disruption of reasonable enjoyment and private nuisance. I understand that the other parties believe that at no point in time because by-law did not file any charges that there was no possible way that there was a disruption of reasonable enjoyment of their neighbours. I understand that Mr. Battiston has stated that his client does not have an obligation to make sure that his tenant does not disrupt the adjoining party on the other side because he is not the landlord of both sides but I believe that they're vaguely taking on the interpretation of the *Residential Tenancies Act* where the landlord under s.64.1 has an obligation to make sure to not allow any substantial interference of the next door neighbour. That's at Tab 1, Your Honour of the Book of Authorities.

THE COURT: You say s.64.1?

MR. ELLIS: Yes, I did, Your Honour. There is an obligation of....

THE COURT: Mr. Ellis please. You put in here excerpts of the *Act*. It starts out with section 20 and goes to 23 and then you jump to section 24.1 and we're then under another part of the *Act*. So, have you picked and choose, chosen what you wanted out of here. Can you explain what....

MR. ELLIS: I only wanted section 64.1, Your Honour.

THE COURT: Okay.

MR. ELLIS: When I went for responsibility of landlords, they all came on the page, so I apologize. I only wanted section 64.

THE COURT: So, anything else in here isn't relevant?

MR. ELLIS: It is not relevant.

THE COURT: Okay because section 23 appears to be highlighted as well as does section 36 on page 2.

MR. ELLIS: It was highlighted from the printout, Your Honour. it wasn't highlighted by me.

THE COURT: Okay.

MR. ELLIS: I apologize that I should have had a better copy for you.

THE COURT: No, I just want to make clear that that's the only section.

MR. ELLIS: Yes, anything else other than 64.1, Your Honour. Your Honour there's - as you've heard through this testimony there's been a substantial amount of complaints for noise complaints. There's been an attempt by by-law to try to mediate and deal with the issues that have happened. There's - I understand that maybe some people are sensitive to

noise and some people are not but sixty complaints, Your Honour have to have some sort of substance to them. You have under Exhibit Number 2, Your Honour, Tab 4, page 11.

THE COURT: Okay, just a minute.

MR. ELLIS: It might be page 12, I apologize. Page 12, Your Honour, not page 11, I apologize, very top, June 27th.

THE COURT: Not there yet. Yes?

MR. ELLIS: You have Sean Elliott a by-law officer going to the City Solicitor in an attempt to lay charges. Obviously, Sean Elliott found something that would make him go to the solicitor because well it's my opinion, I apologize.

THE COURT: Your opinion isn't evidence.

MR. ELLIS: No, I know.

THE COURT: If you wanted to get his opinion you could have called him as a witness.

MR. ELLIS: No, I understand that.

THE COURT: It's not for you to address or provide us with some sort of opinion of Mr. Elliott that doesn't exist. All that says is what it says.

MR. ELLIS: Yes.

THE COURT: And, that is the only evidence that I can rely on.

MR. ELLIS: Okay, Your Honour. There's been several noise complaints as you saw on the document on page 11 of that same book, June 10th. Mr. Elliott, when visiting Mr. Dooling's house recognized, bass noise from the subwoofer in the living room. Now whether that's his living room or the plaintiffs' living

room, the by-law officer does acknowledge bass noise from the subwoofer, attempts to do some sort of mediation or give some sort of resolution to try and deal with the issue.

THE COURT: Where does it say bass noise on that page, page 11.

MR. ELLIS: Page 11, June 10th it says right in the second paragraph,

[As read] Wwhile in living room bass audible, attempted to create resolutions with the tenant.

THE COURT: Okay and that's at 5:00 p.m.?

MR. ELLIS: Yes.

THE COURT: And, that could have been in either living room?

MR. ELLIS: That could have been in either living room, I understand that but there is an acknowledgement that there is bass audible.

THE COURT: On that day?

MR. ELLIS: Yes. A lot of the days, Your Honour that you're going to read through on the by-law documents state that either nobody was there or they only listened outside of the unit, outside of the building. Bass noise on the outside of the building and bass noise on the centre wall of the building of a semi is going to be much different, Your Honour. There's no acknowledgement by any of the by-law officers or the police that at any point in time did they bring any testing equipment in order to test the audibility of bass or anything else to see whether or not it is grounds on disruption. There's a piece of case law Your Honour that I have at Tab 5 that is the

Supreme Court of British Columbia which is *Suzuki v. Monroe* where on....

THE COURT: Just a minute.

MR. ELLIS: Oh, I apologize.

THE COURT: Yes?

MR. ELLIS: That on page 15 it talks about common noise level.

THE COURT: What are the facts of that case?

MR. ELLIS: Pardon me? The facts of this case are a disruption of an air conditioner that is below the Suzuki's bedroom window and the Monroe's have an air conditioner that was too loud. The court has deemed an injunction that they're only allowed to use their air conditioner between certain times but that it was found to be a disruption of the Suzuki's life and there was an award made in that case. There's another case....

THE COURT: There any particular paragraph or paragraphs you wish to refer me to?

MR. ELLIS: Well, we can go through several of the paragraphs. If we go....

THE COURT: Well, what are you relying on in terms of this case?

MR. ELLIS: I'm relying on the fact that the courts have found that disruption of noise even an air conditioner outside of a bedroom window which everybody almost has an air conditioner on their property, that an air conditioner outside of somebody's window is still deemed as disruption of reasonable enjoyment. There was no by-law officers that came and deemed whether or not there's a charge

for noise disturbance of the inhabitants. This is an issue of noise and disruption of somebody's life because of noise caused by another party.

Your Honour if we were to flip over to Tab 7. Tab 7 is a defendant owner who is running a bar in Windsor and the complainant is a tenant that is living in a building across the street and it was found that the disruption of the noise from the bar was a disruption of the plaintiff argues that personally continues to suffer from sleep deprivation. The noise was still going on at the time of this trial. If we go to page 29 under the analysis, Your Honour, it says at 158...

THE COURT: Just a minute. Yes?

MR. ELLIS: ...

[As read] As stated at the outset rather than the defendants conduct, I must focus my inquiry on the harm suffered by the plaintiff.

Furthermore, the defendant's conduct may be lawful, approved by municipalities for example but still amount to an actionable nuisance".

Just because by-law did not charge in this situation Your Honour it does not mean that there was not a nuisance to the neighbours that were living on the other side of that semi wall.

THE COURT: What do you say is the tort of nuisance?

MR. ELLIS: Your Honour, if we can flip to page, if we can flip to page 26 of that same case, they do discuss the tort of nuisance as has been....

THE COURT: Where?

MR. ELLIS: It's at page 26.

THE COURT: Where?

MR. ELLIS: It's the first set of paragraphs, page 6, 1.12.

THE COURT: Yes?

MR. ELLIS:

As has been said the essence of the tort of nuisance is interference with the enjoyment of land, that interference need not be accompanied by negligence. If nuisance is one - nuisance one is concern with the invasion of the interest in the land and negligence once must consider the nature of the conduct complained of.

This conduct is the fact that there is a bass noise claiming. They're not claiming that it's loud party music in the case before you, not this case that we're discussing. This case here is about loud bass music from a bar that's playing music late at night on Friday, Saturdays and Sunday nights, which is disrupting the reasonable enjoyment of a tenant in a building across the street.

The case before you is an issue with noise, bass vibration, that is inhabiting the neighbours on the other side of a wall; not across the street.

If we were to go, I apologize Your Honour, just have one quick second. If we can go to Tab 8, Your Honour, page 8, paragraph - well it's under paragraph 27 but it's 133. It's from the case of *Anmore Development Corp. v. Burnaby*. It states in that paragraph,

[As read] A landlord may also be liable if when notified of a nuisance by a tenant he does nothing to put an end to it".

Yes, the landlord did come and listen to both sides but when he offered to buy a new stereo, try and deal with the issue and the tenant said, no, he didn't

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want it, the landlord just threw up his hands and said, well there's nothing I can do then.

Your Honour I believe the case that has been before you and the documents and testimony that you have heard shows that there was a nuisance of noise between the two parties causing the disruption and harm to the plaintiffs. Those are my submissions unless you have any other questions.

THE COURT: No, thank you Mr. Ellis and Mr. Battiston you have your - oh, did you want to make some oral submissions too?

SUBMISSIONS BY MR. BATTISTON:

With the written submissions I can probably just give you an overview and give you an idea of basically how I approached it. If you look to the table of contents which is right behind the second page, Your Honour.

THE COURT: I don't have yours?

MR. BATTISTON: Sorry?

THE COURT: I don't have your submissions.

MR. BATTISTON: Oh, didn't I hand them in?

THE COURT: No.

MR. BATTISTON: I'm sorry, that's why I'm looking at yours. Sorry, Your Honour.

THE COURT: Thank you.

MR. BATTISTON: So once you get beyond the front page, Your Honour I have a table of contents which explains what appears in each of the various tabs, introduction, well let me go through the table of

contents and then I'll make comments as I think are necessary because of course you can take the time to read it. Tab 2, 3, 4 and 5 quite remarkably four days of trial, Your Honour.

THE COURT: Well, I think there are more than that.

MR. BATTISTON: I've got, this is the fifth and there was one day we came which due to a scheduling glitch nothing was - took place that day.

So, four days of trial which we took great pains to summarize the evidence as we deemed was relevant for each of those respective days. Tab 1, sorry the introduction.

The Introduction is - puts things into perspective Your Honour in a number of different ways *visa vie* the involvement of Creekside and the Buonviveres in this matter and it supports my submission which I make in the submission section at Tab 6 that really Creekside was a residual defendant.

It appears from the tone from the number of e-mails, over four hundred e-mails, many of which, all of which were addressed either to Cambridge By-law Department or Waterloo Police that the plaintiffs really had their sites on pursuing claims against the By-Law Department and the police and indeed they did. Originally, they sued the By-Law Department, Waterloo Police alleging really breach of duty; alleging mishandling of the complaints.

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You heard the evidence by Ms. Fiuza as well as - actually the evidence of Mr. Fiuza was that he thought they did a good job. He did that from the perspective of having worked as a police officer in Portugal for many years so at minimum we have an inconsistency in the evidence but regardless the claim was made - the claims were made against the By-Law Department and Waterloo Police. Perhaps specifically Mr. Fiuza's comments were about the police and the question might not have been - but I think I asked him about the By-Law Department as well and he said they did a good job.

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But the claims originally were made against them alleging that they had not investigated this properly. They allowed - by doing so they didn't charge and thereby allowing the nuisance to continue and the disturbances to continue. They were defendants two and three. The Doolings were defendants one and two, right? I guess those were the numbers anyway the Doolings were the primary focus of the claim of course as being the parties allegedly causing the noise which resulted in the disturbance and the nuisance to the plaintiffs.

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The By-Law Department and police followed and when I - I'll finish the way I started which is way in the beginning, what's the claim against Creekside. Well, if you turn to page 3 in paragraph 14 the claim set out against Creekside is in two lines.

General damages, special damages for private nuisance, failure to protect and negligence against the defendants.

5 That's the claim. That's what we started with against Creekside, thereby supporting what I've said from the beginning they're the residual defendants which were, I don't know add-ons. That's what the word residual implies. That being the case, of course we have gone through the entire case at this point although I did get an admission from Mr. Ellis in the beginning that each of the plaintiffs were claiming \$8,000 for damages. So at least I had those particulars and we established those early.

10 I have a statement of issues there which a) lists the issues as I see them and b) right at the outset indicates what the position is that Creekside took in the beginning and takes as a result of having heard all the evidence.

15 There are duties, absolutely. In a reasonable world there is a duty to - upon a party to communicate and receive a communication. We've heard that. As a landlord you have to distinguish as I have done my best to do throughout the trial between a duty imposed by the *Residential Tenancies Act* and a duty imposed by common law. The whole issue regarding the *Residential Tenancies Act*, as I have implied and certainly as I state clearly at this point, is clearly inapplicable to the present case.

The *Residential Tenancies Act* and section 64 does not apply. The Buonvivere's...

THE COURT: Sixty-four point one, sorry.

MR. BATTISTON: Yes, 64.1. The Buonvivere's had no grounds to terminate the lease under the *Residential Tenancies Act* and I needn't spend a lot of time on it. There are no cases to support my friend's position on that. The case he provides - in fact I provided a case which you'll see at Tab 7 and what I did with the cases Your Honour, I didn't reproduce sixty-four pages of a case that really was relevant, may have been relevant for an excerpt or two.

So I provided you with summaries that in my view will assist you better and if - and one of the cases I have summarized for you is *TST* which is, I should have numbered the pages, I'm sorry Your Honour. The third page in which is a report which with all the cases even the cases that Mr. Ellis has provided. I agree with the facts. I agree with the application of the principles and I agree with the result but they're not applicable and I have stated as much in a very succinct way with respect to all the cases and you'll see that I've bolded comments on - in the excerpts that I've taken from Mr. Ellis' cases. And of course you can take the time to review those well. But, be that as it may, this *TST* case was a case of a landlord having done his best to deal with the complaint by another tenant in a multi-unit complex. The Court found he did respond; he received the communication. He responded. He investigated.

Assessed it and resolved it. Completely within the context of the *Act*.

5 The *Act* has no application in the present case, Your Honour and I'm sure you will see that clearly when you take a moment to review the cases and that's the only case 'cause Mr. Ellis does not have a case to support his position that Creekside could have terminated the lease.

10 So, if we go back to Tab 1 and the statement of issues, the duties as I see it that are imposed on a landlord are not to lease a particular premises when the use intended by the lease is in direct conflict with adjoining uses. When the use intended by the lease is likely to cause a disturbance to adjoining uses and each of the cases deal with, again a different fact situation 'cause each case has to be judged on its own facts. But I mean nightclub cases, I get it, absolutely. You put a nightclub in a row of two storey buildings, two storey residencies or adjoining any kind of residence and there's gonna be a problem. Nightclubs as we know and I believe there's been judicial notice taken that nightclubs generate inherently disturbing noises. That much is a given. So, the case that deals with the nightclub, absolutely. Does it apply here, no and I will get to it and I will layout particulars and I did in my submissions as to why.

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5 We have an asphalt client that gets set up in a sub-
division, yeah extreme case. I mean the principles
are correct but no - the facts in that case justify
the result (a) that the use was disturbing,
inherently disturbing because of the nauseous fumes
and of course the nuisance should cease and damages
flow *et cetera*.

10 So, we have a number of those and in Tab 7 in a
summary way I have responded say distinguishable
among the facts. The landlord and tenant issues do
not apply. But, primarily distinguishable on the
facts, but specifically Mr. Ellis in his oral
15 submissions as referred to that *Suzuki* case. Well in
that case we have an air conditioner which as I
looked at and I saw from one particular excerpt in
that case objective, supportable evidence that the
machine generated noise at 75 decibels. Clearly
measurable, clear evidence supporting a complaint
20 that could then be quantitatively analyzed and
assessed. An air conditioner running twenty-four,
seven under someone's window was deemed to be in that
case a nuisance because of its - the level of the
noise that it emitted. If that machine operated at
25 20 decibels there wouldn't be no case. There
wouldn't be any case. It would deem to be noise that
is not inherently deemed to be objectively a nuisance
or disturbing. Of course, dependent on the facts
which ties into what I'm saying after hearing four
30 days of evidence well how many days on behalf of the
plaintiffs?

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The first day was two hundred and thirty e-mails which I have commented on specifically, on specific e-mails and what I thought about them. The next day in my cross - between days two and three we got into cross-examination. You know e-mails saying self-serving which in my view I've made that comment many times - various times with respect to the e-mails that I've pointed out in my summary but self-serving e-mails telling By-Law Department and police, I have the recordings. Thank goodness for the recordings. I have spent twenty thousand dollars on the recordings and now I've got the evidence. Well, you know, scratch at the evidence a little bit and what'd you get. The recordings that were played in court which then required the plaintiffs to take a position to explain why nothing is heard on these recordings. The boom, boom, boom. The pressure on the chest. The thump, thump, thump which are somewhat remarkable at hearing the complaints. The number of complaints. The nature of the complaints. When it comes right down to it the smoking gun, quote unquote, provided by the recordings was non-existent. Even a scintilla of something might have been helpful to the plaintiffs but there was nothing.

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In fact, what we heard if you recall was a light chirping by a canary somewhere down in the basement of the plaintiffs' home. What do I say, what did we say at the time, the microphone's pretty sensitive and if there was anything to hear it would have been

in my view some objective measurement? Some objective support from my friend's case or the plaintiffs' case which also raises the question of the decibel meter. So many of the e-mails talked about decibel readings and decibel metres.

Well that evidence never came - never was tendered and never was entered into the record of this case. So do we have the *Suzuki* air conditioner case. In my view, not even close. In the *Suzuki* case it talks about the nature of the nuisance must be intolerable to an ordinary person.

Your Honour I can again have you turn to - darn I should have numbered these pages, one, two, three, the fifth page of Tab 7, is the front page is an excerpt of that case and my comments are in bold as I've done in each of these cases, Battiston comments, that's me. Distinguishable on the facts. This case was not a claim against an absentee property owner. It was a claim against the actual owners that operated the air conditioner. It is not applicable against Creekside and in any event, there was material objective evidence of a nuisance. But if you turn the next page, sorry Your Honour, you're having trouble?

THE COURT: Well, I'm having trouble finding your comments.

MR. BATTISTON: They're typed on....

THE COURT: Are you looking at Tab 6 or....

MR. BATTISTON: At Tab 7.

THE COURT: Tab 7, excerpts.

MR. BATTISTON: Page 5. Yeah, the front page of the case has my comments in bold on the bottom. What I did was I whited out the bottom half, you see?

THE COURT: I see what you've done, yeah.

MR. BATTISTON: Well, it gets to the point really quickly, Your Honour. So those are my comments. The facts in this case does not lend itself in the same kind of application *visa vie* the claims against Creekside but if you turn the page, at page 9, paragraphs 34 and 35 state the principles on which the plaintiffs' case relies. I don't think there's an argument about the fact that a tort of private nuisance is established when an act that indirectly causes physical injury to land or substantially interferes with the use of land or an interest. I get it. No argument. The quote at the bottom of the page is also established law.

[As read] What is an unreasonable invasion? All circumstances must of course be considered in answering this question. What may be the reasonable - what may be reasonable at one time or place may be completely unreasonable at another. It is certainly not every smell, whiff of smoke, sound of machinery or music which will entitle the indignant plaintiff to recover. It is impossible to lay down precise and detailed standards but the invasion must be substantial and serious and of such a nature that is clear according to the accepted concepts of the day that it should be an actionable wrong.

Wow, very well-articulated. I love that quote but a lot of, I would say every element that's laid out of the principle is inapplicable here. Doesn't exist here. The nature of the noise complained of - well you're in a residential neighbourhood, there's complaints about watching tv and listening to music at hours of the day that seem to me very reasonable to expect people are busy and moving about their houses as you can judge from some of the e-mails talking about being disturbed from a nap in the afternoon or you know 5:00 p.m. talking about feeling vibrations of bass, some audible bass.

Well, we also heard in the recording, Your Honour, the passing sound of vehicles, of automobiles in front of the house. That's what happens when people are active during the day. It is the ambient noise that must be considered. But, when we get into multiple, a multitude of e-mails about complaints of noise at night, eleven, twelve, 2:00 p.m., 4:00 a.m. It doesn't make sense. It doesn't make sense. We've got people that wake up at 3:00 o'clock and 4:00 o'clock in the morning.

I was scratching my head wondering how could possibly anyone have the energy to play music, let alone any music at all beyond 9:00 o'clock or 8:00 o'clock when (a) there's a young child in the house and then two babies in the house and people who go to sleep at 8:00 and 9:00 o'clock which is completely believable

5 given their work schedule. That's why I asked specifically, Saturdays do you turn into party animals? No. You heard the evidence by Mr. Doolings. His parents, Jacqueline's parents come to visit and they're babies in the house. So much of what we heard just doesn't make sense and do we get beyond self-serving evidence. You know the son.

10 I don't have to comment further except to say a partisan evidence dealing with and that letter was only like one day. We got, we got twenty months of history and one day there's a letter from the son and the daughter-in-law to say, yes, we heard noise that day. That really doesn't add too much to the plaintiffs' case. Was there any else objective - were there any other independent parties. The by-law people are independent. How many times did Sean Elliott show up? How many times do the Doolings secretly lower the volume to know - well you'll recall some of those e-mails that were read how the by-law officer was told to park down the street. Sneak up to the house and come and I will let you hear what I'm complaining about. Nothing. Four hundred and thirty-five e-mails, sixty occurrences, police, different by-law officers. Nothing to suggest - you don't need a charge, true but without a charge how else are you to conclude but that every one of those complaints was unjustified. The noise was not substantial. It was not inherently disturbing. It was not even at a volume where it was likely to be disturbing to a reasonable person.

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Mr. and Mrs. Fiuza's evidence on this point was obviously very thin and very veiled. All the evidence come from Cesaltina - comes from Cesaltina Fiuza who was the person in charge. The parents left it to her and boy did she apply herself. With my submission of view to get money from City of Cambridge By-Law Department and the police, they've got insurance what the heck, let's try.

Mr. and Mrs. Dooling, working people that they are were forced to move. They have exposure in this thing. They had it from the start in my view based on the evidence. There's two things I have to say. Creekside should have been let out of this action a long time ago because Mr. Buonvivere confirmed today the particulars of how many days. He didn't ignore any messages from Ms. Fiuza. Didn't ignore any messages from Sean Elliott. Came here from Toronto. Listened, assessed, analyzed, responded with some suggestions just because he was at a loss, didn't know what else to do but make a suggestion. Beyond that there was nothing else he could do.

I've been scratching my - well what does he do apply for an injunction based on evidence he doesn't have? The completely unsupportable suggestion or proposal or indeed directive that he should have terminated the lease was, I don't know how he would have done that. He certainly couldn't have done it under the *Residential Tenancies Act*. What case would he have

had for nuisance? He'd have to enlist the support of Ms. Fiuza who had no objective evidence supporting what she was saying. What else could Creekside have possibly done?

My view and I'll take you right to the end and say Creekside has no liability in this thing and should have been let out a long time ago. But, the second part to that is there isn't even any supportable, cogent, valid evidence that there was a nuisance. And that's really what I say as a result of my analysis at Tab 6, Your Honour.

I go through particulars at Tab 6 of the various statements I make supporting my submission that the case against Creekside should be dismissed. I'll give you a second to turn to Tab 6. You'll see a number of paragraphs that I have there. One, nineteen, twenty, twenty-eight, twenty-nine paragraphs which unfortunately was necessary by just the sheer volume of evidence in this thing but I can cut through all of that very quickly how Creekside's obligation was to respond.

Was to listen, assess, investigate and come up with the most reasonable response in the circumstances. I check off yes, yes, yes to how those duties were discharged by Mr. Buonvivere. Paragraphs 6 and onward talk about the specific days, the particulars. It reiterates what we heard again this morning, what was in Mr. Buonvivere's affidavit and what, what he

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added to or substantiated or added to by his verbal testimony. So it's un-contradicted that he responded. There's no evidence of any messages that he did not respond to and indeed those, regardless the communication ceased in July and after that time how can he, he cannot be responsible for anything because the intent was for the police to be responsible and the by-law people to be responsible because they let it continue for another year and two months beyond that.

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Does that tie in with the claim for damages. Absolutely by some, by some - for some reason there's any liability on the part of Creekside, they cannot be responsible for anything beyond July 27th - 26th, 2014 because they are not notified at all about what - or apprised in any way, shape or form after that time what happens at 542 Elgin because he could have assumed that it all went away and it was done, 'cause sometimes no news is good news. I didn't hear any more complaints, good. The problem is solved. But of course, that didn't happen.

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What negligence - I mean the claim against Creekside is negligence all right, despite my efforts to obtain particulars or to request particulars to substantiate what is the case against Creekside, I've had to impute that it's all about these duties and I've already responded and I did respond in my, in my submissions about how those duties were discharged.

5 I go onto paragraph 3 in my submissions, you know the review of all the records and the entries in the records, very faint bass heard. That's at paragraph 3, Your Honour. No complaints through - WRPS dispatched to address. Three (c) while speaking with the complainant could faintly hear unit's bass. Music volume at a reasonable level.

10 You know if there was a problem with what these entries were saying or what's to be interpreted, well I had Mr. Elliott subpoenaed here because I needed, in fact I subpoenaed half the By-Law Department in Cambridge because I wasn't sure these records would all be admitted without the necessity to call them and you recall the first day of trial the lawyer appeared, counsel appeared for the City of Cambridge and police in the event that there was an issue about the admissibility of the records.

15 Mr. Elliott agreed; the records were admitted. So we take these as statements of fact at this point and the fact that the records are accurate and the entries are accurate so in 3(c) when it says, you know the music volume at a reasonable level, I'm sorry my friend has no response to that. (E) talking about this whole consultation with the solicitor. spoke with solicitor, relayed details of noise complaints, no reasonable prospect of conviction. That's what the entry was. (F) all quiet on arrival, no music heard. How many times do people have to come when something isn't found or heard, if there's

any validity to these complaints? None. None of them. None. At paragraph 6 there's entries in the records of Waterloo Police.

At 6(a) complainant withdrew request. Not only was she making requests then she withdrew them; (b) no music heard. Multiple entries to this effect.

At paragraph 7 there's an entry, the Waterloo Police have an entry, complainant told us they spent \$20,000 on recording equipment. On the first day then with all due respect they had to make excuses why it didn't pick up any noise. Bizarre. Very bizarre.

And, you've already heard my submissions on which summarizes Creekside's position, that's at paragraph 10, 11 and 12.

Paragraph 19. Of all the duties, I asked the question,

[As read] Does the owner of a residential dwelling have a duty or legal responsibility to occupants of adjoining residences to ensure that those occupants have quiet enjoyment of their residences?

Five words, there is no such duty. One, two, three, four, five words, there's no such duty and my friend has no case law to support that. So, by the sheer reason that the complaints were made impose any additional duties on Mr. Buonvivere then what I've

already addressed? No, no. Do the complaints have any validity? That's what drives this whole thing or should have driven it from the beginning and that's how I get very specific in how I wrap it up.

Paragraph 20 is in any event were the complaints by the Fiuza's valid? Was there sufficient evidence for the noise alleged to be generating from the leased dwelling to be characterized as substantial or serious or of such nature that it is clear according to accepted concepts of the day that it should be an actionable wrong.

My wrap-up, the evidence is insufficient to make any of these findings. There's no reliable, objective, non-partisan evidence corroborating or supporting the evidence of the plaintiffs.

The fact that no notices or violations were issued by the City of Cambridge, the By-Law Enforcement Department is compelling. The fact that no notices or violations of charges were issued by the City of Waterloo Police Service is equally compelling. The evidence of the plaintiff Cesaltina Fiuza was self-serving, exaggerated, inflammatory and I must say creative.

The inconsistent statements made by Gilberto Fiuza and Ricardina regarding their health issues render the balance of their testimony unreliable and unbelievable. The meeting - the consultation with

5 the new doctor on August 14, 2014, more than five months after Mrs. Fiuza said she was dying little by little. They didn't even say any of that to their doctor. The moods, great. Sex life, fine. Anything else, nothing else. Definitely anything else they said in their testimony was rendered unreliable and unbelievable.

10 The complaints made at times and on dates when people are normally active or socializing lead to the reasonable and supportable conclusion that Ms. Fiuza had an acute sensitivity to noise let alone that she was home a lot. They were all home a lot. I don't know. I asked about hobbies. What did you do? How did you keep busy? None of those e-mails said oh we're watching a movie or we're making pasta or I'm making a soup. I got a pot in the oven, on the oven or in the oven - nothing.

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20 Oh, they were sitting around waiting for a sound which to me I can start by describing as an acute sensitivity to noise. If any noise was generated from the Dooling residence there was no evidence and the evidence is insufficient regarding that any of the reported episodes can support a finding that the noise was substantial or serious; certainly not enough to constitute a nuisance.

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30 And lastly, if any noise was generated from the Dooling residence it would have been due to television viewing or casual listening of music,

neither of which by their nature is an actionable wrong according to today's accepted standards nor at the times that are sometimes complained about which are normal times for living and just doing what people normally do during the day.

So, I've taken you basically in my conclusions, Tabs 2, 3, 4 and 5 summarize the days' events as each transpired as succinctly and as summary way as I possibly could, Your Honour. By the time I got to, I dunno couple of hundred e-mails you know I condensed that down to maybe twenty that I had comments about.

Certainly you recall the evidence under cross-examination how some of them were edited, some of the formats were questionable. They were sent to, they were sent to parties in the middle of the night knowing full well that there wasn't a response or going to be a response. The question I ask is where are all the e-mails of responses. I mean none of the four hundred and thirty-five e-mails actually contain a direct response from By-Law or police except in a coincidental way that a page that was photocopied or printed actually had a response but most of them were sent with no intention to receive a response.

We heard that from Ms. Fiuza when she responded to my question.

Secondly if there were answers it looks like they were all edited out anyway so what are we left with? Again what I believe to be e-mails containing

statements that are completely self-serving, exaggerated, escalation is implied by suing people.

In a quote,

[As read] We need to escalate this issue in order to resolve the issue, sent at 5:15 p.m. to the By-Law Department on June 12th, 2014.

You know, serious statements. They are confrontational statements and if the Cambridge By-Law Department was here today responding to these statements, these allegations, these criticisms, I'm sure, I'm sure they would have clear responses as far as what their and how their duty was discharged by each of their respective by-law officers that were criticized that they did the best they could in the circumstances and they acted properly. But be that as it may, I do note that as at July 27, 2014 that's the last communication involving my client because she confirms,

[As read] I will not be calling Joe again or speaking to him about this.

And, but you'll see in bold print on the right side I have comments about the statements in the e-mails as were specified and laid out there. So that's Tab 1 and day 2 is laid out at Tab 3, sorry to be confusing but Tab 3 is day 2. You'll recall Mr. Ellis was asked to wrap-up the whole evidence regarding the e-mails at which point he's jumping ten or fifteen at a time and of course each of those had entries like boom, boom, boom. Pressure on my chest. We couldn't

sleep. Again, they fall under the umbrella statements I have that they're exaggerated, they are self-serving and completely unsubstantiated.

5 But, number 2 my comment for that day was that no medical evidence was tendered. None of the documents were submitted for Ms. Fiuza. In fact, she said she did not go to the doctor but her parents' health suffered and we would hear evidence from them. End of story.

10 So, the \$8,000 for Ms. Fiuza I submit is just a non-starter based on that. There was an effort to tender the Audio Tech letter explaining why we didn't hear boom, boom, boom or pressure, whatever but I mean the audio recordings of course that evidence never made it as part of the official record at which point I cross-examined Ms. Fiuza and I have here a number of admissions that go on for pages, Your Honour.

15 I'm gonna let you take your time and read those because the admissions are that she called Mr. Buonvivere. Most of the questions confirmed that he responded. If she didn't like the answer that was, that was different but he did respond and she did respond and acknowledge - well sorry, he responded. She did acknowledge that he took steps to come, investigate, assess, make suggestions.

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30 But I go on in detail to make additional comments - actually list some of the admissions that we obtained

through cross-examinations and I will let you look at those or go through those as well.

5 Under the section, complaints, e-mails and phone calls confirms five hundred e-mails. I mean I've already; I suppose it's redundant if I keep referring to that but she testified that Sean Elliott and the other by-law officers were inexperienced and did not know how to assess her complaints regarding the by-law which she said was vague.

10 Okay, well, we never did establish through the evidence or my friend certainly didn't establish through the evidence what that statement was intended to mean but what we get is, is the basis of what they thought was a valid claim against the By-Law Department and the police. They were inexperienced, didn't do their job. They should be the ones being responsible here. Mind you they were let out within a couple of months of being brought into this action. We didn't hear why. We didn't hear when. All we heard was that the charges were withdrawn.

15 Sub-headings include the evidence regarding recordings, medication, relationship with existing tenants. Oh, she said, she has no issues with the new tenants. Interesting, we heard differently from Mr. and Mrs. Ford after they were forced to sit through days of this evidence. But you can read the balance of that Your Honour as far as what we deem to be the relevant excerpts and relevant statements made

under cross-examination. Like we live next to a club, exaggerated.

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Tab 4 is trial day 3 when - well the cross-examination of Ms. Fiuza continued and I've got fourteen points there that include e-mails complaining of noise even during normal hours of the day at number twelve under that sub-heading, Your Honour.

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Number 13 she's refer - referred to e-mails complaining of noise on Christmas Eve. You gotta stay quiet on Christmas Eve, come on. Paragraph 14 she was - refer to e-mails complaining of noise even on New Year's Eve when everybody in the Fiuza household just sitting at home waiting, listening for noise.

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Nelson Fiuza is examined, cross-examined and Regan Como[sic] is examined, cross-examined - what am I doing, cross-examined as well. Then the direct examination of Mr. Fiuza when I could barely hear what he had to say but interesting how in cross-examination his health, the answers regarding his health took on a completely different reality when we hear years before how he's diagnosed with mild anxiety syndrome with GERD, with medication that were too long to list and at Tab 5 I have the cross-examination notes and summaries of the - actually day 4 had the most for me to summarize.

We at that point got into the cross-examination of Gilberto Fiuza which goes on for pages, pages. The evidence of Jaimee Ford, examination and cross-examination. The evidence of Christopher Ford, examination and cross-examination. Evidence in-chief of Ricardina Fiuza and cross-examination of Ricardina Fiuza and the evidence in-chief of Joe Buonvivere. Day 4 was a busy day for us Your Honour and I have plenty of my notes laid out there at Tab 5 for you to refresh or perhaps to check if your notes were consistent with ours because I'm very confident that we summarized at least from the perspective of Creekside what statements we definitely rely on to support all the submissions I've made. I think that's it.

THE COURT: All right. Thank you, Mr. Battiston.

MR. BATTISTON: Thank you, Your Honour.

THE COURT: As the parties have pointed out we've had numerous days of evidence. We have numerous

documentary evidence that was filed. so I will be reserving my judgment and written Reasons will be provided at a later date. As you know I have three months within which to write my decision.

MR. BATTISTON: Can I...

THE COURT: Yes?

MR. BATTISTON: ...assume that based on your decision we will then be permitted to address costs?

THE COURT: Oh, after my decision, yes.

MR. BATTISTON: 'Cause I didn't say anything about that.

THE COURT: No, no, no and that's fine. My judgment will address the issue of costs in terms of making submissions because that is up in the air.

MR. BATTISTON: That's fair, as I would expect.

THE COURT: And once the decision is ready it will be provided to the court staff and they will provide each of you with a copy of that. The people who are represented, their representatives will get a copy and Mr. Dooling and Ms. Ferguson you will get a copy so please make sure everybody that your current addresses are in the court file.

MR. BATTISTON: Maybe via fax as well, Your Honour or e-mail, fax, e-mail, whatever makes it easier.

THE COURT: Fax, doesn't matter if you'd rather that's fine.

MR. BATTISTON: E-mails, I mean.

THE COURT: People want it by e-mail? Can it be sent by e-mail?

CLERK OF THE COURT: We don't send by e-mail.

THE COURT: They don't do e-mail so you can either get it faxed or mailed.

MR. BATTISTON: Do you have our fax? Do you want it sent to us? Can it deemed service if we get them? I'm sure, Mr. Dooling....

THE COURT: I don't make these rules or decisions.

MR. BATTISTON: Who has a fax anymore except offices, right?

THE COURT: Some people do have them on their home computers but if you have a preference as to how you want it delivered and if it can't be delivered by e-mail because the court staff do not do that then just let the court know how you would like to receive it. All right?

MR. BATTISTON: This is gonna be a difficulty for the Doolings if they don't have a fax though.

THE COURT: I understand that but....

MR. BATTISTON: It'll be mailed then?

THE COURT: It would be mailed, yeah that's the best we can do.

MR. ELLIS: Thank you, Your Honour.

THE COURT: All right so we are adjourned for the day.

C O U R T A D J O U R N E D

(01:06:26)

76.
Fiuza v Creekside et al
Certification.

FORM 2

Certificate of Transcript
Evidence Act, subsection 5(2)

5

I, **Gloria Scheerer**, certify that this document is a true and accurate transcript of the recording of ***Fiuza vs. Creekside et al*** in the Small Claims Court, Superior Court of Justice held at **85 Frederick St., Kitchener**, Ontario, taken from Recording No. **4411_CrtRm-504_20181130_090105_2_SCC**, which has been certified in Form 1 by Kaitlyn Beke.

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August 21, 2019

CCR, ACT

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(Date)

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(Signature of authorized person)

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