



# Civil Resolution Tribunal

Date Issued: February 18, 2020

File: ST-2019-006222

Type: Strata

Civil Resolution Tribunal

Indexed as: *Hannaford v. The Owners, Strata Plan LMS 4091*, 2020 BCCRT 186

**B E T W E E N :**

HELEN HANNAFORD

**APPLICANT**

**A N D :**

The Owners, Strata Plan LMS 4091

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Kathleen Mell

## **INTRODUCTION**

1. This dispute is about a pergola, which is a freestanding structure with a fabric covering on top. The applicant, Helen Hannaford (owner), owns a strata lot in the respondent strata corporation, The Owners, Strata Plan LMS 4091 (strata). The owner put up a pergola on her patio which she says does not violate the strata's bylaws. She requests an order that the strata withdraw its notice requiring removal

of the pergola. She also requests an order that the strata not levy fines. The owner represents herself.

2. The strata says that the pergola does violate the strata bylaws and after a hearing it ordered the owner to take it down by August 21, 2019. The strata says the pergola must be removed and that the owner will have to pay fines. The strata is represented by a council member.

## **JURISDICTION AND PROCEDURE**

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The tribunal must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the tribunal's process has ended.
4. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.
5. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
6. Under section 123 of the CRTA and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.
7. I note that since the Dispute Response, the strata indicated that on August 23, 2019 the pergola was removed and replaced by a large umbrella. It would appear that no

finer have been levied because the pergola was taken down. The issue of whether the large umbrella violates the bylaws is not before me. The owner still requests a decision on whether she can put the pergola on her patio.

## **ISSUE**

8. The issue in this dispute is whether the pergola violates the strata bylaws.

## **EVIDENCE AND ANALYSIS**

9. In a civil dispute such as this, the applicant must prove her claim. She bears the burden of proof on a balance of probabilities.
10. I will not refer to all of the evidence or deal with each point raised in the parties' submissions. I will refer only to the evidence and submissions that are relevant to my determination, or to the extent necessary to give context to these reasons.

### ***Does the pergola violate the strata bylaws?***

11. It is undisputed that the owner placed a freestanding pergola on her patio in July 2018. It is also undisputed that the patio is limited common property. In August 2018, the upstairs neighbours complained that the pergola interfered with their view.
12. On August 16, 2018, the strata sent the owner a letter saying that the pergola contravened bylaw 3(1)(e) which states that an owner must not use a strata lot, the common property, or common assets in a way that unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets, or another strata lot.
13. The letter also said that the owner was in contravention of bylaw 3(2)(d) which says an owner must not place any indoor-outdoor carpeting on any deck or balcony, or place any items on any deck, patio or balcony except free-standing, self-contained planter boxes, barbeque, summer furniture and accessories, or install any hanging baskets.

14. The strata also said that the pergola was most likely in violation of Section 71 of the *Strata Property Act* (SPA), which says that a strata corporation must not make a significant change in the use or appearance of common property or land that is a common asset unless certain terms are met. The strata told the owner to remove the pergola by August 25, 2018 or it would levy fines. The strata did not inform the owner she was entitled to a hearing.
15. The strata did not impose fines after this but on October 22, 2018 the strata sent another letter saying that the owner was in violation of bylaw 6(1) which says that an owner must obtain the written approval of the strata before making or authorizing an alteration to common property, including limited common property, or common assets. Again, the strata did not levy fines after this.
16. On January 10, 2019, the strata sent the owner another letter saying again that she was in violation of bylaw 3(1)(e). The letter indicated that the pergola was interfering with the use and enjoyment of another strata lot. The letter did not refer to the exceptions of summer furniture and accessories listed in bylaw 3(2)(d). However, it did say that larger umbrellas would be acceptable to address concerns of bird droppings because the large umbrellas were not permanent. No fines were levied after this letter and the evidence shows that the owner was attempting to find a resolution including changing the fabric colour of the pergola.
17. The attempted resolution did not work out and on July 2, 2019 the strata wrote the owner that she might be in violation of bylaw 3(1)(e) and SPA section 71. The owner requested a hearing, which occurred on July 23, 2019. After the hearing, the strata sent the owner a letter on July 30, 2019 saying that she was in violation of bylaw 3(1)(e) and the pergola had to be removed by August 21, 2019 or the strata would fine her.
18. In this dispute the strata says that the owner is in violation of bylaw 3(1)(e). The strata says that there was miscommunication between the strata and the property manager about which bylaws were contravened in previous letters and therefore this is the only bylaw contravention it is relying on.

***Does the pergola cause an unreasonable interference with the use and enjoyment of another strata lot?***

19. Essentially, the strata says that the owners took away part of the upstairs neighbours' view by putting up the pergola. It says this is in violation of the bylaw saying an owner must not use their strata lot in a way that unreasonably interferes with the rights of other persons to use and enjoy their strata lot.
20. The owner's position is that there is no unreasonable interference with the use and enjoyment of another strata lot and that the pergola is an allowable summer furnishing under bylaw 3(2)(d) and therefore exempt from bylaw 3(1)(e). The owner also points out that there is another pergola permitted by the strata on a different strata lot.
21. The strata argues that even if bylaw 3(2)(d) allows summer furnishings, the bylaw has to be read with the other bylaws which say that the owner is not allowed to cause a nuisance or interfere with another strata lot's owner's use and enjoyment of their property. The strata says nobody has complained about the other pergola.
22. In response, the owner says that the two bylaws read together create an ambiguity, or a lack of clarity, and because the strata drafted the bylaws creating the ambiguity, the ambiguity should be resolved in her favour and the pergola should be allowed. In law this called "*contra proferentem*" and means if the words are unclear then they should be interpreted in favour of the party who did not write them.
23. I accept the owner's submission that summer furnishings are generally allowed under bylaw 3(2)(d). The first question is whether the pergola is a summer furnishing. The owner says that *Merk v. The Owners, Strata Plan NW1263*, (*Merk*) considered a similar question and found that a gazebo is similar to an umbrella. Therefore, the owner argues, because a pergola is similar to a gazebo which is similar to an umbrella, and the strata allows umbrellas, pergolas should be allowed. It also notes that in *Merk* the tribunal member noted that the bylaws did not set out an exhaustive list of what could be put on the patio and she says the same reasoning should be applied here.

24. The strata says that *Merk* is not factually the same as this dispute because it deals with alteration bylaws. They say the issue is not whether a pergola or a gazebo is permitted under the bylaws, the question is whether the pergola unreasonably interferes with the use and enjoyment of the people who own the strata lot above.
25. I agree that the pergola is similar to an umbrella and that the strata specifically told the owner that a large umbrella was acceptable. Therefore, a pergola is not prohibited because it can be seen as a summer furnishing allowable under bylaw 3(2)(d). However, I also agree with the strata that it is still necessary to consider the impact of the pergola on the other strata lot owners.
26. The owner says that this is the same as a claim in nuisance and that the test asks whether the interference with the owner's use or enjoyment of the land is both substantial and unreasonable. A substantial interference with property must be more than trivial.
27. The strata says that they are not relying on bylaw 3(1)(a) that says an owner must not cause a nuisance but rather the wording of 3(1)(e) which says an owner must not unreasonably interfere with the right of another person to use and enjoy their strata lot. The strata says that the law of nuisance is a higher standard requiring substantial continued, repeated interference whereas under bylaw 3(1)(e) the interference only has to be unreasonable.
28. In *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462, the British Columbia Supreme Court said that nuisance in a strata setting is unreasonable continuing or repeated interference with a person's enjoyment and use of their strata lot. Therefore, there is no actual difference here and the test for nuisance is exactly the same regardless of whether the strata is arguing the pergola is a nuisance under bylaw (a) or (e).
29. The strata refers to *Strata Plan NW961 v. Leal (Leal)*, 1996 CanLII 3536 for the proposition that legitimate but competing interests of two owners must be balanced.

The strata points out that there the Court decided that a cover enclosure unreasonably interfered with the owners use and enjoyment of their strata lot.

30. I note that in *Leal* the patios were common property and not limited common property as is the case here. I find that *Leal* is not persuasive as it does not consider that there is a difference between what someone is allowed to do on common property compared to limited common property.
31. The owner points out that in past decisions, including *LeTexier v. The Owners of Strata Plan LMS 284*, 2019 BCCRT 940, the cited bylaw had the same wording as here and prevented an owner from using their strata lot in a way that unreasonably interfered with the rights of other owners to use and enjoy their strata lots. *LeTexier* dealt with canopy structures on rooftop patios and decided that a loss of view is not a legal nuisance and therefore did not unreasonably interfere with the rights of other owners.
32. The strata says that the facts here are different from *LeTexier* because it was unclear in that case how much interference was caused by the canopies. The strata says here 1/3 of the upstairs owners' floor to ceiling windows are cut off in the main rooms where they spend the majority of their day.
33. I first note that the owner says that bylaw 3(2)(d) specifically allows for the pergola as a summer furnishing and that it is not up all year. The evidence shows that the owner does not leave the tarp up during the winter months and therefore the upstairs neighbours do not have to see it all the time.
34. The owner submitted pictures of where the pergola is and find it is contained in the patio outside the owners' strata lot. Therefore, I find that the pergola is not appropriating space that belongs to the upstairs neighbours.
35. The strata also provided pictures taken from inside the upstairs neighbours' strata lot. I note that many of them appear to be from an angle almost at floor level and they are taken right up against the lower part of the window. They do not seem to represent what the upstairs neighbours see from their normal perspective. I find that

most of them are not representative of one's view in a regular daily position. Even the pictures which have a better angle show that the only views impeded are portions of the owner's strata lot below or the tennis court. The pergola fabric, when it is up, does not appear to interfere with the view of the scenery beyond this.

36. In commenting on the evidentiary value of the pictures, the strata says that to accurately depict the interference, the vantage point must be from the perspective of someone sitting in the upstairs neighbours' living room or dining room. I agree, but most of the pictures were not taken from this angle and there is no explanation about why. The strata says that the pictures cannot be taken now because the owners took the pergola down while waiting for the tribunal's decision. It does not explain why more pictures from these vantage points were not taken when the other ones were.
37. Based on the evidence, I find that the interference with the upstairs neighbours' view is modest and not significant enough to violate the bylaw. Therefore, the owner's summer pergola does not amount to her using her strata lot in a way that unreasonably interferes with the rights of other persons to use and enjoy their strata lot. Therefore, she is entitled to put the pergola on her patio.
38. In their submissions, the parties referenced the reasons why the owner wanted to place the pergola on the patio, one of them being to protect the patio furniture from bird droppings. The owner also submitted she wanted the pergola for protection from the sun and also for aesthetics. However, because the reason why the owner wanted the pergola is not relevant to my conclusion, I find I do not need to address this matter. I note that the strata asked to provide an additional reply on this issue. Because this issue had been brought up multiple times in prior evidence and submissions, and was ultimately irrelevant to my conclusion, I found it unnecessary to permit additional submissions.
39. Under section 49 of the CRTA, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable



dispute-related expenses. As the applicant was successful, I find she is entitled to have her \$225.00 tribunal fees reimbursed. There was no claim for expenses.

40. The strata must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the applicant owner.

## **ORDERS**

41. I order that the strata allow the owner to put up the pergola on her patio.
42. I order that within 30 days, the strata reimburse the owner her \$225.00 tribunal fees.
43. Under section 57 of the CRTA, a party can enforce this final tribunal decision by filing, in the Supreme Court of British Columbia (BCSC), a validated copy of the order which is attached to this decision. Once filed, a tribunal order has the same force and effect as a BCSC order.
44. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia (BCPC). However, the principal amount or the value of the personal property must be within the BCPC's monetary limit for claims under the Small Claims Act (currently \$35,000). Under section 58 of the CRTA, the owner can enforce this final decision by filing a validated copy of the attached order in the BCPC. Once filed, a tribunal order has the same force and effect as a BCPC order.

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Kathleen Mell, Tribunal Member