Civil Resolution Tribunal

Date Issued: March 31, 2020

File: ST-2019-008416

Type: Strata

Civil Resolution Tribunal

Indexed as: *Trent v. The Owners, Strata Plan EPS3454,* 2020 BCCRT 358

B E T W E E N :

BRANDON TRENT

APPLICANT

A N D :

The Owners, Strata Plan EPS3454

RESPONDENT

REASONS FOR DECISION

Tribunal Member: David Jiang

INTRODUCTION

1. This dispute is about a pergola on a balcony. A pergola is an outdoor structure consisting of a roofing grid supported by columns. The respondent, The Owners, Strata Plan EPS3454 (strata), is a strata corporation. The applicant, Brandon Trent (owner), owns a strata lot in the strata.

2. The parties agree that the strata's bylaws allow owners to keep patio furniture on their balconies. The owner seeks an order permitting him to keep the pergola on the basis that it is patio furniture, and removing all fines. The strata disagrees that the pergola is patio furniture and says it must be removed. The strata did not file a counterclaim.

3. The owner is self-represented. A strata council member represents the strata.

JURISDICTION AND PROCEDURE

4. 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.

5. 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.

6. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The tribunal may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

7. 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.

ISSUE

8. Does the pergola violate strata bylaws, and is the owner entitled to keep it?

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the applicant owner bears the burden of proof, on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.

10. The facts are largely undisputed. In July 2019, the strata received a complaint that the owner was building a pergola on his balcony. The owner's strata lot is located on the second floor and the strata plan shows the balcony is part of the owner's strata lot.

11. On July 15, 2019, the strata sent a letter to the owner advising that the pergola was potentially violating strata bylaws 6.1 and 6.2. Those bylaws prohibit unapproved alterations to limited common property. However, the strata subsequently abandoned this position, as shown in emails to the owner. The strata does not say the owner breached bylaws 6.1 or 6.2 in this dispute.

12. The strata then sent the owner an August 8, 2019 letter. The strata wrote that the pergola breached bylaw 32.

13. The strata's bylaws are registered in the Land Title Office. Bylaw 32 was amended on August 23, 2016. Bylaws 32(1) says the patios, decks, and balconies of each strata lot must not be used for storage. The bylaw further states that only patio furniture, barbeques and potted plants shall be placed on the patios, decks, or balconies.

14. The owner requested and attended an October 2, 2019 hearing with the strata council. The strata council subsequently decided not to levy any fines, but the owner had to remove the pergola by October 22, 2019. It sent this decision to the owner in an October 8, 2019 letter. The owner then filed his application for dispute resolution.

15. The parties take the following positions. The owner says the pergola is patio furniture, which is permitted on the balcony under bylaw 32. He says it provides shade and a place to hang potted plants, giving it a function like furniture. He also says that internet searches, mailed flyers, and public opinion classify pergolas as furniture, though he did not provide supporting evidence of this.

16. The strata says patio furniture is easily removed and taken out of view, such as an umbrella, table, or chair. The strata acknowledges the pergola is not affixed to the patio, but says it is large and difficult to move unless disassembled.

17. I will start by considering what is patio furniture under bylaw 32. The *Miriam-Webster.com Dictionary* defines furniture to include equipment that is necessary, useful, or desirable, such as movable articles used in readying an area, such as a room or patio, for occupancy or use.

18. There are previous tribunal decisions, which are not binding but discuss similar issues.

19. In *Hannaford v. The Owners, Strata Plan LMS 4091,* 2020 BCCRT 186, the tribunal considered whether a freestanding pergola on a patio violated strata bylaws. The pergola had a fabric covering on its top. The owner argued that the pergola should be considered "summer furniture and accessories" or "summer furnishings", which were allowed under the strata's bylaws. The tribunal agreed as it found the pergola was like a patio umbrella. The tribunal noted the strata in that dispute had advised the owner that a large umbrella was acceptable (paragraph 25). Ultimately, the tribunal ordered the strata to allow the owner to put up the pergola on her patio.

20. In *Hannaford* the tribunal referred to *Merk v. The Owners, Strata Plan NW 1263,* 2019 BCCRT 500. In *Merk,* the tribunal considered whether a gazebo and hot tub breached several of the strata's bylaws. Of particular interest, strata bylaw 6.1 allowed owners to place planters, patio furniture, or other similar items within any part of the owner's limited common property. The tribunal noted bylaw 6.1 did not apply as the patio was not limited common property. However, it found that in any event, bylaw 6.1 would not prohibit the hot tub or gazebo. It did not specifically list

those items as prohibited and did not set out an exhaustive list of what was permissible. The tribunal also found a gazebo was similar to a patio umbrella, as it was not permanent or affixed to the strata's building (paragraph 24).

21. In *Giddings et al v. The Owners, Strata Plan BCS 3620,* 2018 BCCRT 61, the tribunal had a different point of view. It found an unapproved gazebo was an alteration to limited common property, and that it required the strata's written permission under the bylaws (paragraph 33). The owners argued their gazebo was not a significant change to the use or appearance of common property because it was similar to patio umbrellas installed elsewhere in the strata complex. The tribunal disagreed. It noted that although the gazebo was not attached to the strata's building, it was a wooden structure with a polycarbonate roof. The tribunal found the roof was solid (rather than fabric) with a span of several feet, and it could not be collapsed or removed by a single person in a few minutes.

22. In *Allwest International Equipment Sales Co. Ltd. v. The Owners, Strata Plan LMS4591,* 2017 BCSC 1646, the BC Supreme Court considered a bylaw that excepted patio furniture, flower pots, and a barbeque from items that may be stored or kept on a patio. The court wrote that all the specifically listed items were chattels which were readily moveable and could be moved about on a patio. The court found the exceptions did not apply to a heat pump because it was not a chattel that could be similarly moved (paragraph 30). The court concluded that the heat pump and piping had to be removed as it breached other strata bylaws that required the owner to obtain the strata's permission for the alteration of limited common property.

23. I find it clear from the above decisions that a key aspect of whether something is patio furniture is how moveable it is. Both the definition of furniture and the authority of *Allwest International Equipment Sales Co. Ltd.* support the conclusion that "patio furniture" under bylaw 32 is chattel which is readily moveable or could be moved about on the balcony. As noted in *Giddings et al*, a collapsible structure is also considered more moveable.

24. Thus, the pergola at issue must be examined in order to determine whether it is patio furniture. I do not find the mere fact that pergolas may be categorized as patio furniture in catalogues or internet searches to be persuasive. Pergolas come in various shapes and sizes. In *Giddings et al,* the tribunal noted the owners' gazebo was not similar to the fabric-roofed gazebos shown in a catalogue photograph.

25. What about the owner's pergola? The parties provided several photos at various stages of its construction. It is currently a painted wooden structure that occupies the majority of the owner's balcony. There is no indication it is affixed. However, its 4 wooden columns are held in place by concrete footings. It is taller than the balcony door.

26. For the reasons that follow, I find the owner's pergola violates bylaw 32 and is not patio furniture.

27. I find the owner's pergola is not readily moveable chattel. While not affixed to the balcony, the photos show the pergola is large and heavy as it is made of wood and concrete. It is also rigid and cannot be folded like a tent or umbrella. Further, I find the photos show the pergola has little room to move on the balcony because its dimensions come close to the size of the balcony itself. This gives it a degree of permanence (or immovability) that is different from a patio umbrella or a table that may be moved at will.

28. The owner suggests that how moveable an object is does not affect whether it is furniture. He asks me to consider a hypothetical wooden bench so heavy that it is immovable. He says such a bench must be patio furniture. In light of the dictionary definition of furniture and the above decisions I disagree. I find this bench to be an extreme example that is not applicable to this dispute.

29. I acknowledge that in *Hannaford* the tribunal concluded the pergola in that dispute was summer furniture under the strata bylaws. However, the tribunal wrote at paragraph 25 that this was because the pergola was similar to a patio umbrella. That is not the case here, as the owner's pergola is largely immoveable and not

collapsible. Less signficantly, the photos show the owner's pergola provides limited cover as its roof is an uncovered grid.

30. In summary, I find the owner's pergola breaches bylaw 32. It does not fit within the category of patio furniture. I dismiss the owner's claims.

TRIBUNAL FEES

31. Under section 49 of the CRTA, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. The strata is the successful party. I do not order payment of any tribunal fees or dispute-related expenses as it did not claim any.

32. The strata corporation must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner.

ORDER

33. I dismiss the owner's claims and this dispute.

David Jiang, Tribunal Member