



Civil Resolution Tribunal

Date Issued: May 27, 2021

File: ST-2020-008536

Type: Strata

Civil Resolution Tribunal

Indexed as: *Holan v. The Owners, Strata Plan KAS 2116*, 2021 BCCRT 573

BETWEEN:

LINDA HOLAN

APPLICANT

AND:

The Owners, Strata Plan KAS 2116

RESPONDENT

AND:

LINDA HOLAN

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about alterations to common property (CP).
2. The applicant, and respondent by counterclaim, Linda Holan, owns a strata lot (SL13) in the respondent strata corporation, The Owners, Strata Plan KAS 2116 (strata). The strata is the applicant in the counterclaim.
3. Ms. Holan says the strata “inappropriately” asked her to remove a pergola she constructed on a patio next to SL13. She says she previously constructed a similar structure on the patio of a different strata lot she used to own in the strata without permission and was not asked to remove it. Ms. Holan also says the strata has no guidelines in place on pergolas or similar structures. She asks for an order that the strata reverse its decision that she remove the pergola.
4. In its counterclaim, the strata disagrees with Ms. Holan claims. It says Ms. Holan contravened the bylaws by installing the pergola without the strata’s prior written permission. The strata says it has guidelines about temporary structures on patios, but that Ms. Holan’s pergola is permanent, unsightly, and does not fit with the exterior appearance of the strata property. The strata asks for an order that Ms. Holan remove the pergola.
5. In response to the strata’s counterclaim, Ms. Holan maintains the strata has no relevant guidelines on patio structures and disagrees the pergola is unsightly.
6. Ms. Holan is self-represented, and the strata is represented by a strata council member.
7. For the reasons that follow, I dismiss Ms. Holan’s claims and find in favour of the strata.

JURISDICTION AND PROCEDURE

8. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT’s mandate is to provide dispute resolution services

accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

9. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, email, 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.
10. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.
11. Under section 123 of the CRTA and the CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

ISSUES

12. The issues in this dispute are:
 - a. Did Ms. Holan contravene the strata's bylaws by installing the pergola?
 - b. If so, is the strata's decision to require the pergola removed significantly unfair to Ms. Holan?
 - c. What is an appropriate remedy?

BACKGROUND AND EVIDENCE

13. In a civil proceeding such as this, the applicant Ms. Holan must prove her claims, and strata must prove its counterclaims, on a balance of probabilities.
14. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.

15. The strata is a residential strata corporation created in January 1999 under the *Condominium Act* that continues to exist under the *Strata Property Act* (SPA). It consists of 50 strata lots located in several buildings.
16. Ms. Holan's SL13 is a single-level apartment-style strata lot located on the main floor of a 2- storey building above an underground parkade. SL13 is an end unit so it has 1 strata lot beside it and another strata lot above it. The strata plan shows 2 patios next to SL13 (1 north-facing and 1 south-facing) that are both designated as limited common property (LCP) for the exclusive use of SL13. Based on the overall evidence, I find the pergola is located on the south-facing patio, which the parties refer to as the back patio. The strata plan shows the back patio is about 4.04 metres by 5.66 meters (or about 13.3 feet by 18.5 feet).
17. The photographs in evidence show the patio, which appears to be level with the floor of SL13, is below ground level surrounded by a vertical concrete wall with a metal handrailing on top of the wall. Based on the photographs, I estimate the patio to be about 5 feet below the top of the wall and about 8 feet below the top of the railing. Ms. Holan refers to the south-facing LCP patio as "the pit". The pergola is made of wood with 4 posts and wood boards spaced about 3 inches apart set along the top of the structure. The top of the pergola is level with the top of the handrailing. It takes up almost the entire patio area, except it is about 3 feet away from the building's exterior wall.
18. On January 24, 2020, the strata filed a complete new set of bylaws with the Land Title Office, except for the strata's pet and rental bylaws, which were amended. The resolution filed with the January 2020 bylaw amendment states the Standard Bylaws were repealed. There are no subsequent bylaw amendments, so I find the January 2020 bylaws are relevant to this dispute. I summarize the applicable bylaws as follows:
 - a. Bylaw 3(11) - Only "outdoor furniture, a barbeque, and a reasonable number of potted plants" are permitted to be kept on patios.

- b. Bylaw 6(1) - An owner must obtain the written approval of the strata council before making an alteration to CP, including LCP.
- c. Bylaw 6(3) - Among other things, no awning, shade screen, sun screen or patio enclosure can be hung, attached, or placed on CP or LCP without the prior written permission of the strata council, and
- d. Bylaw 7(16) – The items contained in bylaw 6(3) are considered alterations.

19. The undisputed evidence follows.

20. Prior to purchasing SL13 in February 2017, Ms. Holan owned and lived in a different strata lot in the strata and constructed a similar style pergola on a similar patio for that strata lot. She says the pergola at her previous strata lot existed for about 4 years and she was not asked to remove it. Ms. Holan served on the strata council during a time she owned the previous strata lot until about October 2020, when she resigned as a result of her dispute over the current pergola. She says she did not know council permission was necessary because it was not required for her prior pergola.

21. At some time before July 2020, Ms. Holan completed her pergola construction. On July 13, 2020, the strata property manager emailed Ms. Holan to say he believed the installed pergola required the strata council's permission. She responded that a council member had been "monitoring our every move" and that she had "been waiting for this to come up".

22. On July 21, 2020, Ms. Holan provided a written application to the strata for a "free standing pergola", which the strata considered at its July 22, 2020 council meeting and denied. The minutes note the following discussion items prior to the vote being taken (reproduced as written):

- a. If pergolas are allowed, their construction should be standardized by council to fit and finish.
- b. Fire egress issues.

- c. As it is freestanding there is potential to cause damage to common property.
 - d. Chicken wire was used and it is unsightly.
23. On July 31, 2021, the property manager wrote to Ms. Holan, formally denying her request for the pergola and asking it to be removed within 60 days. Reasons given in the letter for denying the pergola included that it detracts from the exterior appearance of the building, restricts access to the building exterior for maintenance, might not comply with the Fire Code, and might damage the CP should the pergola become unsecured from the patio.
24. On August 12, 2021, Ms. Holan requested the strata reconsider its decision to deny her pergola which resulted in the property manager advising on October 9, 2020 that the strata council was not interested in reconsidering its decision.
25. A strata council hearing was held on October 26, 2020 that did not resolve the issue.

ANALYSIS

Did Ms. Holan contravene the strata's bylaws by installing the pergola?

26. As noted above, the bylaws require an owner obtain the written permission of strata council before making alterations to CP. Based on the bylaws and the photographs of the installed pergola, I find it cannot be considered patio furniture. While it may have been designed to provide some degree of shade, it appears to be more of a privacy screen than a sunscreen. Under bylaws 6 and 7, I find the pergola is an alteration to LCP, so even if the pergola could be considered a sunscreen, Ms. Holan was required to obtain strata council permission.
27. In her submissions, Ms. Holan acknowledges she did not get council's permission before installing the pergola. I find Ms. Holan contravened bylaws 3(11) and 6(1). Her submission that she did not know permission was required is not a defence. Under the SPA, owners are required to follow the strata's bylaws.

Is the strata's decision to require the pergola removed significantly unfair to Ms. Holan?

28. Although Ms. Holan did not use these words, I find her submissions that the strata did not ask her to remove her first pergola, and that her neighbours and real estate agent provided positive comments about the new pergola, are arguments that the strata has treated her significantly unfairly.
29. As noted, the parties disagree about whether guidelines exist for pergolas or similar structures. Ms. Holan says that there are no guidelines, but says there should be. The strata says it does have guidelines for temporary, seasonal shade awnings and would have provided those guidelines had Ms. Holan requested permission. I have not been provided with any guidelines. In any event, I find the guidelines issue is not squarely before me. As such, I decline to comment further.
30. It is concerning that the strata has acknowledged authorizing temporary shades to be located on patios. Based on my reading of the bylaws, the strata does not have discretion to authorize placement of any items on patios other than those listed in bylaw 3(11). It is also concerning the strata would deny Ms. Holan's pergola for reasons of appearance as I have stated above when bylaw 3(11) does not appear to permit the pergola installation at all. These actions of the strata raise the issue of significant unfairness.
31. The CRT has jurisdiction to determine claims of significant unfairness under section 123(2) of the CRTA (formerly section 48.1(2)): *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164.
32. The courts and the CRT have considered the meaning of "significantly unfair" and have largely followed the interpretation adopted by the BC Court of Appeal (BCCA) in *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128. In *Reid*, the court said that actions are "significantly unfair" when they are burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable.

33. In *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, the BCCA established a reasonable expectations test, restated in *Watson* at paragraph 28 as follows:
- a. What is or was the expectation of the affected owner or tenant?
 - b. Was that expectation on the part of the owner or tenant objectively reasonable?
 - c. If so, was that expectation violated by an action that was significantly unfair?
34. More recently, the Court of Appeal determined the reasonable expectations test set out in *Dollan* should be considered as 1 factor in deciding whether significant fairness has occurred, together with all other relevant factors including the nature of the decisions and the effect of overturning it: *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173 at paragraphs 88 and 89.
35. Turning now to the *Dollan* test, I find it was reasonable for Ms. Holan to expect to be treated the same as any other owner and to expect the strata would apply its bylaws about patio alterations consistently among all owners.
36. On the evidence, I find the strata admitted to approving a free-standing, metal-framed canvas awning under bylaw 6(3). A photograph provided in evidence shows it is smaller in size and height than the wooden pergola constructed by Ms. Holan. It also appears to be collapsible, which Ms. Holan's pergola is not. Overall, I find the awning approved by the strata is dramatically different from Ms. Holan's pergola.
37. As for Ms. Holan's argument that the strata did not require her to remove her prior pergola, in her submissions, she admits the bylaws have changed. Those bylaws are not before me and do not apply to this dispute. It is the January 2020 bylaws that apply here, and they would not have applied 4 years ago when Ms. Holan constructed her prior pergola. I also note the parties agree Ms. Holan's prior pergola has since been removed by the current strata lot owner at the request of the strata.

38. For these reasons, I do not find the strata's denial of Ms. Holan's pergola application to be harsh, lacking in probity or fair dealing, done in bad faith, unjust or inequitable. As a result, I dismiss Ms. Holan's claim for significant unfairness.
39. It follows that the strata is entitled to an order Ms. Holan remove the pergola from the patio. I order she must do this within 30 days of the date of this decision.

CRT FEES AND EXPENSES

40. Under section 49 of the CRTA and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason to deviate from this general practice. I find the strata is the successful party and paid \$225 in CRT fees. I order Ms. Holan to reimburse the strata this amount. Ms. Holan is not entitled to reimbursement of \$125 she paid in CRT fees.
41. Neither party claimed dispute-related expenses, so I make no order for expenses.
42. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. Holan.

ORDERS

43. I order Ms. Holan's claims dismissed.
44. I order that within 30 days of the date of this decision, Ms. Holan must:
- a. Pay the strata \$225 for CRT fees, and
 - b. Remove the pergola from the LCP patio.
45. The strata is entitled to post-judgement interest under the *Court Order Interest Act*.

46. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under \$35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

J. Garth Cambrey, Vice Chair