Case Name:

Condominium Plan No. 8111679 v. Elekes

Between
The Owners: Condominium Plan No. 8111679, applicant,
and
Sean Lewis Elekes and Christa Elekes, respondents

[2003] A.J. No. 329
2003 ABQB 219
Action No. 0101-16199

Alberta Court of Queen's Bench
Judicial District of Calgary
Clark J.

Heard: October 16, 2002.
Judgment: filed March 6, 2003.
(21 paras.)

Counsel:

Bruce A. Millar, for the applicant.
Lorenz Berner, for the respondents.

REASONS FOR JUDGMENT

CLARK J.:—

INTRODUCTION

¶ 1 This is an application by The Owners: Condominium Plan 8111679 ("The Owners") for a declaration that the Respondents, Sean and Christa Elekes ("Elekes"), have violated by-law 55 of the Condominium by-laws of Willow Court Green by erecting a satellite dish on their condominium unit or on the common property. The Elekes, by cross-application seek a declaration that The Owners are guilty of improper conduct in so far as the Board or certain members thereof have exercised its powers in a manner that is oppressive or unfairly prejudicial to or that disregards the interests of the Elekes.

¶ 2 The Owners also seek the following: an order directing Mr. Elekes to remove his satellite dish; an order restraining Mr. Elekes from erecting a satellite dish; an order awarding The Owners all expenses incurred in enforcing the by-law purportedly relating

to satellite dishes, and an award of interest and costs to The Owners. For the reasons that follow, I dismiss The Owners application in its entirety and find in favour of Mr. Elekes.

¶ 3 The Elekes' purchased their condominium in the Willow Court Green on Bonaventure Drive, Calgary, in February 1999. At the time of this application, Mr. Elekes was the sole resident and owner of the unit. When it was purchased, the condominium had a by-law concerning Television Antennas that had been in effect since 1982. By-law 55 states:

> An Owner shall not permit, erect or hang over or cause to be erected or to remain outside any window or door or any other part of a Unit or on the Common Property or on the Parcel, clothes lines, garbage disposal equipment, recreational or athletic equipment, fences hedges, barriers, partitions, awnings shades or screens or any other matter or thing without the consent in writing of the Board first had and received. No television antenna or mobile telephone radio or short wave antenna, tower or similar structure or appurtenances thereto shall be erected on or fastened to any Unit except in connection with a common television antenna or cable system as authorized by the Board and then only in accordance with the regulations therefor which may be established by the Board.

¶ 4 Mr. Elekes noticed that satellite dishes were mounted on at least two other units in Willow Court Green and in October 2000 he wrote to the property manager to request permission to mount a satellite dish on his unit. Mr. Elekes consulted with a member of the Board who told him that it was very likely that he would receive permission to mount the satellite dish. Based on this conversation and the fact that other satellite dishes were present in the condominium complex, Mr. Elekes mounted a satellite dish on his unit. Mr. Elekes subsequently received a letter from the property manager of The Owners, indicating that the Board would table the matter to the next Annual General Meeting. The letter did not indicate that a satellite dish could not be mounted in the interim.

¶ 5 The property manager asserts that on 24 November 2000, a notice was sent to all residents of Willow Green Court asking that all satellite dishes be removed until the issue could be discussed at the next Annual General Meeting. Mr. Elekes claims he did not receive this notice. In February 2001, the Chairman of the Board of the Condominium contacted Mr. Elekes and asked that he remove the satellite dish. When Mr. Elekes asked why other residents were permitted to have satellite dishes, the Chairman refused to discuss the issue and justified another owner's dish on the basis that it could hardly be seen. On 18 February 2001, while he was away from his unit, Mr. Elekes' satellite dish was removed and the cable into his unit was cut. Mr. Elekes re-installed the satellite dish.

¶ 6 In late March 2001 Mr. Elekes received a letter from the Board's solicitor, ordering the removal of the satellite dish. The letter also alleged numerous other breaches of by-laws, including the removal of trim on the door of the storage shed adjacent to his unit, the presence of a "No Trespassing" sign on his mailbox, and incorrect placement of his mailbox.

¶ 7 In April 2001, the Chairman of the Board spoke with Mr. Elekes and indicated that it would not be a problem if the satellite dish was fastened on a post in his yard. Mr. Elekes thus removed the satellite dish from his unit and mounted it on a post as directed. Despite these representations, the Board subsequently removed the satellite dish from Mr. Elekes yard. Mr. Elekes re-installed the satellite dish and the pattern of the Board's removal and Mr. Elekes' re-installation repeated itself two further times in late May and June 2001.

¶ 8 An Annual General Meeting was held in June 2001 however, the Board did not fulfill its commitment to place the satellite dish issue before the owners for a vote. The Board refused to take any steps to assist in placing a special resolution proposing a by-law amendment, before the owners for a vote. Mr. Elekes therefore had a special resolution prepared and obtained the signatures of 75% of the units' residents to vary the by-law to clarify its application to satellite dishes. The special resolution ultimately failed because Mr. Elekes had not received the required percentage of total unit factors.

¶ 9 On 12 September 2001, Mr. Elekes removed the satellite dish from his yard and undertook not to re-install it in his yard or on his unit until clearly permitted to do so.

¶ 10 The Owners argue that the Board has a duty to enforce its by-laws. Section 37(1) of the Condominium Property Act states:

> A Corporation is responsible for the enforcement of its by-laws and the control, management and administration of its real and personal property and the common property.

¶ 11 The Owners further argue that even if the By-laws do not specifically address satellite dishes, they still have the authority to regulate the common property. Otherwise, the by-laws would have to list every possible eventuality and the Board would be unable to effectively protect the investment.

¶ 12 It is clear that by-law 55 does not specifically prohibit the use of satellite dishes. In effect, The Owners are asking the Court to make a determination that the phrase "similar structure", contained in by-law 55 applies to satellite dishes. I am unable to make this conclusion. By-law 55 prohibits the erection of antennae used to receive various forms of media. I do not think that a satellite dish is a structure similar to an 'antenna' as the word would have been used in 1982. Further, I prefer to adopt the reasoning of the British Columbia Court of Appeal in Buchbinder v. Strata Plan VR2096, [1992] B.C.J. No. 752 (C.A.), wherein the Court was asked to determine whether the erection of a garden shed was contrary to the by-laws of the Condominium. The Court cited the following statement from Fairwood Greens Homeowners' Association Inc. v. Young, [1980] WA-QL 851, 614 P.R. (2d) 219:

> Restrictions being in derogation of the common law right to use land for all lawful purposes will not be extended by implication to include any use not clearly expressed... nor will they be aided or extended by judicial

construction...

¶ 13 The British Columbia Court of Appeal concluded:

> ...this garden shed does not fall within the specific prohibitions of the by-law. It is not a change to the building's exterior and is not an addition to or an enclosure of the limited common property. To give such a broad interpretation to the by-law would make matters even more difficult for condominium owners trying to interpret ambiguous and generalizing by-laws. If the Strata Council wants to prohibit garden sheds, or similar free-standing structures, they can easily adopt such a course of action.

¶ 14 While I do not believe that By-law 55 can be interpreted broadly so as to include satellite dishes, if I am incorrect in this conclusion, the Board remains unable to enforce a rule against satellite dishes, due to its previous conduct. In Metropolitan Toronto Condominium Corp. No. 601 v. Hadbavny, [2001] O.J. No. 4176 (Sup. Ct. Just.), the Condominium Corporation applied to the Court for an order compelling an owner to remove his second dog, pursuant to the 'pet by-law'. The by-law limited the number of pets to one per unit. The evidence was clear that when the respondent purchased his unit, many residents had more than one pet. Shortly after the Applicant had purchased a second dog, one of the other residents complained to the Board about the Applicant having two dogs. The property manager wrote to the Applicant, demanding that the second dog be removed as it contravened the by-law. The Court stated at para. 21:

> I must conclude that when Mr. Hadbavny purchased his second dog, the existing pet rule was not being enforced, and must be deemed to have been unenforceable and unreasonable.

¶ 15 While the Court did not conclude that the Board had acted improperly toward the Applicant, it stated at para. 23:

> The difficulty here, and what has made the rule unreasonable, is the lack of enforcement, and then the capricious enforcement, against dogs only.

¶ 16 The Court ordered that the Applicant be permitted to retain his two dogs.

¶ 17 The facts of the case at bar lead to the same conclusion. Even if there was a rule that prevents residents from mounting satellite dishes, this rule was not enforced prior to Mr. Elekes mounting the dish on his unit. The rule is therefore unenforceable and the installation of the satellite dish is "akin to a pre-existing non-conforming use, on a common element to which no objection by other owners has been taken": York Condominium Corp. No. 122 v. Sibblis, [1989] O.J. No. 1828 (Dist. Ct.).

¶ 18 While I recognize the obligation of the Board to enforce its by-laws, in this case, The Owners acted in a manner that was oppressive and unreasonably prejudicial to the Elekes. The Alberta Court of Appeal discussed the meaning of oppression and unfair

prejudice in Keho Holdings Ltd. v. Noble, [1987] A.J. No. 334 (C.A.). At page 6 of the judgment, Haddad J.A. quoted from Elder v. Elder & Watson Ltd., [1952] S.C. 49 at 55:

> ...the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.

¶ 19 In Mott v. Leasehold Strata Plan LMS2185 UBC Properties Inc., [1998] B.C.J. No. 2730 (S.C.), Mott made an application for a declaration of oppression. The original plans for the condominium showed a large balcony. When Mott purchased the property he noted that the balcony had been developed as roof space. He made an application to the strata council to have the balcony developed as it was shown in the original plans. The strata council denied the application. The Court found that the council had improperly attempted to designate the balcony as limited common property. The decision made by the council was unfairly prejudicial to Mott. The Court stated at para. 34:

> ...it is clear that permission to alter 'must not be unreasonably withheld' under s. 115(h) of the Act. Accordingly, I am satisfied that any written permission required of the Strata Council has been unreasonably withheld as it seeks to deny access to and the use and enjoyment of that which as been designated for the exclusive use and enjoyment of Mr. and Mrs. Mott.

¶ 20 In this case, Mr. Elekes did everything he could to obtain permission prior to mounting his satellite dish. Though he was told that the matter would be tabled to the next Annual General Meeting for a vote of all the owners, this did not occur. The Owners did not follow the proper procedures in this matter. There is no evidence that the Board was given the authority to remove Mr. Elekes satellite dish. Further, once it was apparent that the majority of the residents (up to 75%) were in favour of an amended by-law dealing with satellite dishes, the Board should have addressed the issue. Finally, the Board treated Mr. Elekes in an oppressive and unfairly prejudicial manner. Though others had mounted satellite dishes to their units, action was only taken when Mr. Elekes mounted his.

¶ 21 I therefore find in favour of Mr. Elekes in this matter. I find that the behaviour of The Owners was highhanded and oppressive and I direct The Owners to cease their improper conduct. I further direct that there be a General Meeting to discuss the issue of satellite dishes and to determine whether individual owners will be permitted to erect satellite dishes on their units. Finally, Mr. Elekes shall have his costs on a solicitor and client basis. I acknowledge that the costs will be passed on to the owners by the Condominium Corporation by way of a special assessment. This issue is discussed in Vold v. Strata Corp. 202, [1993] B.C.J. No. 344 (S.C.). I agree with the findings in this case and I therefore order that Mr. Elekes be exempt from any assessment with reference to those costs.

CLARK J. QL UPDATE: 20030401 cp/e/qlmmm/qlcas