

Case Name:

**Poole v. Strata Plan VR 2506**

Between

Richard Poole, petitioner, and  
The Owners, Strata Plan VR 2506, respondent

[2004] B.C.J. No. 2544

2004 BCSC 1613

Vancouver Registry No. L041314

**British Columbia Supreme Court**

**Vancouver, British Columbia**

**Baker J.**

**(In Chambers)**

Heard: October 7, 2004.

Judgment: December 6, 2004.

(40 paras.)

*Real property law — Condominiums — Common areas — Unit holders — Duties of.*

Petition for declaration that Poole was entitled to use the entire roof of a condominium building. Poole was the owner of a condominium on the top floor of a building. He had enjoyed exclusive use of the roof of the building and had constructed and installed various structures and improvements. Poole and the Strata Plan VR 2506 had believed that the roof area was his limited common property, however they had recently found out that part of the roof was non-designated common property. The only way to access the non-designated common property on the roof was to walk through Poole's limited common property. He had not obtained the necessary permits from the City to make the improvements. The respondent Strata Plan VR 2506 was concerned that the improvements exceeded safe weight loads and had asked Poole to remove them and vacate the portion of the roof which was non-designated common property. Poole sought an injunction prohibiting Strata Plan VR 2506 from entering the roof, a declaration that he was entitled to use the entire roof and an order that Strata Plan VR 2506 provide him with consent to obtain permits from the City. Strata Plan VR 2506 sought an order that he be required to remove the structures and improvements.

**HELD:** Petition allowed. Poole and the Strata Plan VR 2506 were to enter into a 30-year lease for the non-designated common property on the roof for which Poole would pay \$1200 per year. Poole was ordered to bring the improvements within the load bearing capacity and to obtain permits from the City. The equities favoured allowing Poole to continue to enjoy the exclusive use of the entire roof area that he had been occupying. He had purchased the unit in good faith and had erected the improvements at considerable expense in the honest but mistaken belief that the area he was occupying was limited common property. If Poole was not permitted to continue to use the entire roof, it would not have been enjoyed by anyone as he was entitled to control access to the limited common property area.

**Statutes, Regulations and Rules Cited:**

Strata Property Act, ss. 43(1), 43(2).

**Counsel:**

Counsel for the Petitioner: G. Stephen Hamilton

QUICKLAW

Counsel for the Respondent: Mari A. Worfolk

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¶ 1 **BAKER J.**— A dispute has arisen between the Petitioner, who is a member of Strata Plan VR2506, and the Strata Corporation, over Mr. Poole's occupation and use of the roof of the building. Mr. Poole has brought this Petition seeking orders clarifying his rights and obligations and those of the Respondent.

¶ 2 Mr. Poole is the owner of a condominium with a street address of 900 - 1235 West Broadway, Vancouver, British Columbia. The building comprises nine floors, with 18 strata lots, four of which are commercial units. Mr. Poole's unit is a residential unit, known as unit 18, and it is located on the top floor of the building. Since purchasing his unit, Mr. Poole has enjoyed virtually exclusive use of the building's roof top area, located above his unit, on which he has constructed and installed various structures and improvements.

¶ 3 Until recently, both Mr. Poole and the other members of the Strata Plan believed that the roof top area was limited common property allocated to Mr. Poole's unit. Mr. Poole and the other owners have now discovered that only a portion of the deck is limited common property attached to Mr. Poole's condominium, and that the balance is non-designated common property. Mr. Poole concedes that he did not obtain the necessary permits from the City of Vancouver for the improvements he has made to the roof and the City of Vancouver has now directed that a permit be obtained, or the improvements be removed. Mr. Poole wishes to apply for the necessary permit, but requires the cooperation and assistance of the Respondent to provide the required authorizations.

¶ 4 The Respondent is concerned that the structures and plantings Mr. Poole has added to the roof exceed safe and permissible weight loads, and they have asked that he remove the structures he has erected, or that the Respondent be permitted to do so. They have also demanded that Mr. Poole vacate that portion of the roof that is not limited common property.

¶ 5 Mr. Poole is seeking an injunction restraining the respondents from entering onto the roof or interfering with his use of the entire roof top area and the improvements on the roof. He seeks a declaration that he is entitled to continue to have exclusive use of the entire roof, either temporarily or indefinitely. He seeks an order that the Respondent provide the necessary consents and documents to allow him to obtain necessary permits from the City of Vancouver for his improvements.

¶ 6 Mr. Poole is also seeking a declaration that the Respondent is in breach of its duty to repair and maintain the roof top area, and an order directing the Respondent, at no expense to himself, make such improvements as would be required to ensure that the roof can bear the weight of the improvements he has constructed. He seeks an order that he is entitled to an easement of support for the roof top area.

¶ 7 The Respondent opposes all of the relief sought by Mr. Poole and seeks an order that it be entitled to remove such of the improvements erected by Mr. Poole that cause the roof to exceed safe weight-bearing capacity. They also seek orders allowing them to remove all of Mr. Poole's improvements from that portion of the roof that is common property, an order restricting the number of persons who may be on the roof at any one time; an order allowing them to pass through Mr. Poole's limited common property at any time without notice to him for the purpose of accessing the common property; an order that Mr. Poole is not entitled to control the keying or alarming of the doors or staircase leading to the roof, and other ancillary relief.

#### FACTS

¶ 8 Mr. Poole purchased his strata lot on November 1, 1989, from the original developer of the building. Mr. Poole and the developer had entered into an agreement of purchase and sale on August 30, 1989 (the "purchase agreement"). The purchase price was \$750,000.

¶ 9 The purchase agreement included the following clause:

#### QUICKLAW

2. The agreement resulting from acceptance of this offer is conditional upon the following:

... the Vendor as an owner/developer filing at the Land Title Office a Strata Plan whereby an area of approximately 1000 sq. ft. of the exterior roof of the building containing the Property is designated as limited common property for the exclusive use of the owner of the Property pursuant to section 53(2) of the Condominium Act within four weeks of acceptance of this offer, subject only to the right of access upon reasonable notice to the roof by the Strata Council and its agents for the maintenance and repair of such utilities situate thereon for the common use of the owners of the Strata Plan.

¶ 10 When the purchase agreement was executed, the Strata Corporation had not yet been created. A strata plan was registered in the Land Title Office on October 20, 1989.

¶ 11 Mr. Poole believed that all of the roof area was limited common property allocated to his strata unit. The Strata Plan filed by the developer, however, designated part of the roof as limited common property and the balance as non-designated common property. The parties' evidence about the size of the two areas differs somewhat. The Strata Council says that approximately 880 square feet of the roof is limited common property attached to Mr. Poole's unit, and that approximately 662 square feet is common property. Mr. Poole estimates that approximately 738 square feet is limited common property, that the building's machine room occupies a further 488 square feet of common property and that there is about 400 additional square feet of common property.

¶ 12 The roof is accessed by a stairwell from the ninth floor of the building. There is only one door from the stairwell to enter onto the roof. Both the door at the bottom of the stairwell and the door at the top of the stairs leading onto the roof are located on Mr. Poole's limited common property.

¶ 13 There is no route to get to that part of the roof designated as common property except by crossing over Mr. Poole's limited common property. On the common property area, there is a utilities room or machine room, which contains machinery for the building, including the elevator machinery, and the hot water tanks for strata lots 17 and 18.

¶ 14 The Strata Corporation has investigated whether it would be possible to create access to the machine room which would not involve passage across the limited common property, but it has been determined that this is not possible.

¶ 15 After Mr. Poole completed the purchase of his unit, he constructed or installed numerous improvements on the roof. These include raised cedar decking, interlocking concrete pavers, gardens, two twelve inch deep ponds, several planters with bonsai, one 48" diameter, five 36" diameter and two 24" diameter pots planted with pine trees, some of which have grown to over 12 feet tall. He also constructed a large wooden gazebo that occupies approximately 800 square feet, and is located primarily on the area of the roof designated as common property.

¶ 16 At some point, Mr. Poole had a new lock installed on the door at the bottom of the stairwell to the roof, and had an alarm system attached to that door. Mr. Poole did not seek or obtain the consent of the Strata Council for any of these improvements.

¶ 17 There has been friction between Mr. Poole and the Strata Council or other strata owners from time to time, largely relating to difficulty in accessing the roof area for maintenance purposes, emergencies, and adjustments to the hot water tanks located in the maintenance room. Once a resident was stuck in a stalled elevator for several hours until Mr. Poole could be located and a key obtained to access the machine room on the roof. Some owners have complained that leaves and other debris from the plants on the roof fall onto their decks.

¶ 18 Mr. Poole says, however, that he has made access available when elevator repairs were necessary; for repairs for the maintenance of fresh air return for hallways in the building; and access for window washers.

¶ 19 There have been disagreements about who should have access to the keys for the doors that give access to the roof stairwell and the roof. Mr. Poole is concerned about unlimited access to the roof deck for reasons of privacy, security and concern that he could be liable to persons entering on to his limited common property without his knowledge or consent. On one occasion, maintenance people hired by the strata corporation accessed the deck without notice to Mr. Poole and set off his security alarm.

¶ 20 Until 2000, however, both Mr. Poole and the other owners in the building, and the managers hired to manage the building, believed that Mr. Poole was entitled to exclusive use of the roof top area.

¶ 21 In the fall of 2000, Mr. Poole listed his unit for sale. On a website containing details of the listing, there were pictures of the roof garden and gazebo that Mr. Poole had constructed and installed. The Strata Council were concerned about whether the weight of the improvements might jeopardize the safety of the roof structure. The Strata Council also obtained a copy of the Strata Plan and determined that part of the roof was common property. A letter was sent to Mr. Poole expressing concern about the construction on the roof, particularly on the common property. The Council pointed out that no approval had been given by the Strata Corporation for the improvements, and also that it appeared no building permits had been obtained. Mr. Poole has deposed that he believed that the developer had obtained the necessary permits in 1989, although the clause in the purchase agreement requiring the developer to do so had been removed before the closing date of the purchase.

¶ 22 Prolonged negotiations followed between Mr. Poole and the Respondent, without result. The City has notified the Corporation that because no permit was obtained, the improvements are to be removed. Mr. Poole has made inquiries of the City of Vancouver about obtaining a building permit. The Strata Corporation has refused to grant authorization to Mr. Poole to apply for any permit from the City. The City of Vancouver agreed to hold the matter in abeyance pending the outcome of this proceeding. No recourse is available against the Developer because Mr. Poole has ascertained that the developer, Pacific Place Development Corporation, was struck from the Register of Companies in October 1992.

¶ 23 On May 31, 2004, the Strata Council consented to an injunction restraining interference with Mr. Poole's use of the roof top area, without prejudice to any position the Respondent might take on the hearing of the Petition.

¶ 24 The parties are agreed that the weight of the present improvements exceeds the weight that the structure of the roof and roof supports is designed to bear. Mr. Poole submits that the building as constructed fails to conform to the requirements of the building code and he seeks an order that the Respondent be required to undertake construction to increase the load-bearing capacity of the roof and roof support structures. Mr. Poole's position is that the Respondent is obliged to alter the building such that the roof will accommodate a 100 pound per square foot load, and that if the building was so altered, most, and possibly all, of his improvements on the limited common property could remain.

¶ 25 In support of his position, Mr. Poole relies upon the opinion evidence of Russ Riffell. Mr. Riffell's opinion is that the roof was designed for and is capable of supporting a total load of 50 pounds per square foot, or more. Mr. Riffell is also of the opinion that the Vancouver Building Bylaw requires that roof decks be designed for an occupancy load of 100 pounds per square foot.

¶ 26 The Respondent's expert witness, engineer Thomas Wu, disagrees with Mr. Riffell about the interpretation of the Building Bylaw. It would be unusual if he did not disagree, since his firm was the structural engineer of record for the original construction of the building. Mr. Riffell's interpretation of the bylaw is that the roof is only required to support an occupancy load of 40 pounds per square foot and that the 100 psf load capacity is only required for exterior balconies.

¶ 27 Neither party had inquired of the City about the City's interpretation of the Bylaw, although Mr. Wu points out that the City issued an occupancy permit for the building when it was constructed, which would suggest that the City accepted the 40 psf interpretation at that time.

#### ANALYSIS AND CONCLUSIONS

¶ 28 Without the opportunity to hear the cross-examination of both experts, or other evidence to establish that it is more probable than not that one or the other expert is in error, there is no reasonable basis to choose between their opinions. As I view the matter, Mr. Poole has the onus to prove that the roof must be brought to 100 psf capacity and has failed to tip the scale and prove this on a balance of probabilities and therefore his application to compel the Respondent to bring the building to this standard is dismissed. I note in doing so that it would have been an extremely difficult and expensive project, if it is possible at all, and that Mr. Poole's submission that he should be exempt from sharing in the cost of the improvement was an unreasonable one, and was not strenuously advanced.

¶ 29 In relation to the other relief he seeks, Mr. Poole relies on s. 164 of the Strata Property Act, S.B.C. c. 43, which provides:

- (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
  - (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant,...
- (2) or the purposes of subsection (1), the court may
  - (a) direct or prohibit an act of the strata corporation...

¶ 30 Counsel assisted the court by providing a number of authorities, including: Ernest & Twins Ventures (PP) Ltd. v. The Owners, Strata Plan LMS 3259, [2003] B.C.J. No. 2710, 2003 BCSC 1769; Manton v. York Condominium Corp. No. 461 (1984), 10 C.L.R. 266, 49 O.R. (2d) 83, 1984 CarswellOnt 704 (Co. Ct.); Matthias v. The Owners, Strata Plan VR.2135, [2000] B.C.J. No. 592, 2000 BCSC 519; Mott v. Leasehold Strata Plan LMS2185 UBC Properties Inc. (1998), 20 R.P.R. (3d) 298, 1998 CarswellBC 2585; Moure v. The Owners, Strata Plan NW2099, [2003] B.C.J. No. 2071, 2003 BCSC 1364; Reid v. The Owners, Strata Plan LMS 2503, [2003] B.C.J. No. 417, 2003 BCCA 126; Taychuk v. Strata Plan LMS 744, [2002] B.C.J. No. 2653, 2002 BCSC 1638, 7 R.P.R. (4th) 302, 2002 CarswellBC 3108; Owners Strata Plan 1229 v. Trivantor Investments International Limited (1995), 4 B.C.L.R. (3d) 259 (S.C.), 1995 CarswellBC 188; AW-NM Ventures Ltd. v. Owners, Strata Plan LMS 2856, [2004] B.C.J. No. 1004, 2004 BCSC 666; Barnes v. Strata Corp. NW3160, [1997] B.C.J. No. 1081 (S.C.); Cater (Guardian ad litem of) v. Ghag Enterprises Ltd., [1991] B.C.J. No. 656 (S.C.); Fenby v. Strata Plan NW228, [2002] B.C.J. No. 1408, 2002 BCSC 936; Gentis v. Strata Plan VR368, [2003] B.C.J. No. 140, 2003 BCSC 120; and John Campbell Law Corp. v. Strata Plan 1350, [2001] B.C.J. No. 2037, 2001 BCSC 1342.

¶ 31 Of these, one of the most useful is the decision of Justice Wong in Matthias v. The Owners, Strata Plan VR.2135. In that case, Ms. Matthias was the owner of a strata title apartment. In fact, she had purchased the first unit in the building and at the time of doing so, had entered into a 99 year lease with the developer for the exclusive use of one or two rooftop patio areas. The lease provided that although the petitioner would have exclusive use of the rooftop area, the costs associated with the maintenance and reasonable wear and tear of the area, including structural maintenance, would be borne by all owners, in proportion to their unit entitlements in the Corporation. However, Ms. Matthias paid for the maintenance of the patio area herself.

¶ 32 By a special resolution later passed, the Strata Corporation approved the lease, and Ms. Matthias occupied the patio area exclusively for eleven years. Following a complaint by another owner, the strata corporation passed a bylaw to add the area of the leased space to Ms. Matthias' unit entitlement, thereby increasing substantially her proportionate share of the expenses of the entire building.

¶ 33 Although Justice Wong concluded that the original approval of the lease agreement by the Strata Corporation was invalid, he directed that Ms. Matthias be granted a 20 year lease over the roof patio; that she not be required to pay any monthly fee for the lease and that she was entitled to assign the lease without payment of an assignment fee.

¶ 34 The Respondent is concerned that Mr. Poole is using common property for his sole benefit, but their greatest concern is to address the safety issues posed by the weight of the improvements on the roof. The weight of the improvements Mr. Poole has constructed is excessive and a heavy snow load, or a large number of occupants on the roof could result in a problem for which all of the owners could be liable. There are also potential safety issues arising out of the elevation of some of the improvements, which raise the level of the deck to an unsafe height in comparison to the walls.

¶ 35 If safety issues can be satisfactorily addressed, however, the equities favour and allow Mr. Poole to continue to enjoy exclusive use of the entire roof area he has been occupying. He purchased his unit in good faith and has erected the improvements, at considerable expense, in the honest, if mistaken belief, that the area he was occupying was limited common property. Presumably, the price he paid for the property was related to the use of the limited common property.

¶ 36 Mr. Poole has used the roof deck for the past fourteen years, and until 2000, no issue was taken with his right to do so. There have been some problems, but those can be addressed by the terms of an order, and the expressed willingness of the parties to work together in a more cooperative fashion in the future.

¶ 37 The reality is that if Mr. Poole is not permitted to continue to use the area of common property located on the roof deck adjacent to his limited common property, that area will not be used or enjoyed by anyone. No member of the strata corporation will benefit from the common property, as no one can access that area of the roof without crossing Mr. Poole's limited common property and the authorities are clear that Mr. Poole is entitled to control access to the limited common property. Mr. Poole is entitled to refuse access over his limited common property if access is sought for purely recreational purposes, as opposed to necessary access for matters affecting the maintenance or security of the building.

¶ 38 If the safety issues are addressed, however, and Mr. Poole is permitted to lease the common property, however, everyone benefits, as the Strata Corporation receives additional income and Mr. Poole continues to enjoy the use of the deck as before. The parties obtained an opinion relating to a reasonable rental for the roof, and the valuator concluded that \$1200 a year, for a period of 99 years would be reasonable. I am of the view that a 99 year lease would be excessive, but that \$1200 a year is a reasonable rental fee, even if the term is shorter.

¶ 39 I have concluded, therefore, that the correct disposition of the Petition is to require Mr. Poole to address the issues of safety, and the lack of a building permit, but to allow Mr. Poole to continue to use the roof as he has been, subject to a lease with the Respondent.

¶ 40 I order that:

1. The Respondent shall enter into a lease with the Petitioner to lease to him for his exclusive use the common property portion of the roof deck currently used or occupied by him (with the exception, of course, of the machine room) for a period of 30 years, in return for which the Petitioner shall pay to the Respondent rent of \$1200 per year. In the event the Petitioner chooses not to enter into the lease, he shall immediately remove all

improvements that occupy or encroach upon that portion of the roof that is common property.

The Petitioner may assign the lease to any purchaser of his strata unit, but must deliver a copy of this order to the assignee, and provide the Respondent with a copy of the assignment.

2. Within 60 days, the Petitioner shall remove from the roof area sufficient of the improvements to reduce the weight load on the roof to bring it into accordance with the load-bearing capacity of the roof as presently constructed. The Petitioner may choose how to reduce the load, but the sufficiency of the reduction shall be determined by the Respondent's engineer. In the interim, if there is a heavy snowfall, the Petitioner shall take immediate steps to have the snow removed in order to avoid the additional weight of the snow placing undue pressure on the roof.

In the event that the Petitioner does not comply with the order to remove or reduce the weight of the improvements as ordered above, the Respondent may take steps to do so and the cost incurred to bring the weight of the improvements within acceptable standards, in the opinion of a structural engineer, shall be payable by the Petitioner to the Respondent.

3. The Petitioner shall forthwith apply for and take all necessary steps to obtain all permits required by the City of Vancouver for the improvements on the limited common property and the common property areas of the roof deck.
4. The Respondent shall provide all necessary consents and authorizations to allow the Petitioner to apply for and obtain the necessary permits from the City of Vancouver, and shall make best efforts to assist the Petitioner to obtain the permits.
5. The Petitioner shall bear the expenses of maintaining those portions of the roof deck occupied by him under the terms of the lease in a safe and orderly manner and shall comply with all federal, provincial and municipal laws and regulations in relation to the occupancy and use of the deck and shall refrain from causing a nuisance to other owners by his use of the deck.
6. The Petitioner shall not allow more than 15 persons to be present on the roof deck at any one time.
7. The Petitioner shall provide the management company and the President or the Respondent with a key or keys to the doors accessing the roof and the stairwell of the roof, in order that access made be had to the machine room, for emergencies, for regular maintenance, and for inspection of the roof in order to ensure compliance with the terms of this order, and for all other purposes reasonably related to the safety and good maintenance of the building. Except in case of emergency, the Respondent shall provide the Petitioner with 24 hours written notice of the Respondent's intention to access the

roof. In case of emergency, the Respondent shall make best efforts to contact the Petitioner by telephone before accessing the roof, and shall in any case advise him in writing that access has been had and for what purpose, within 24 hours after the roof has been accessed for emergency purposes.

8. The owners of unit 17 shall be granted access to the machine room for the purpose of repairing, replacing or adjusting the hot water tank associated with their unit upon giving 48 hours' written notice to the Petitioner of their intention to obtain access. The management company or the President may then allow the owners of unit 17 to use the key to access the roof in the circumstances set out in this paragraph.
9. The parties are at liberty to apply for further directions. The Petitioner is at liberty to apply for an extension of the 60 day period set out for removal/reduction of the improvements in the event that he can demonstrate that it would cause undue hardship to comply with the order within 60 days. On any application for an extension, the Petitioner must demonstrate that he has made best efforts to comply with the 60 day time frame, and that any further delay will not pose a significant risk to the safety of the building and its occupants.
10. The Petitioner is exempt from sharing in the Respondent's costs of responding to this Petition.
11. The parties shall each bear their own costs.

BAKER J.

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