

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : THERESA INCORONATA PTY LTD and THE OWNERS OF CHEVRON STRATA PLAN 6146 [2020] WASAT 119

MEMBER : MS N OWEN-CONWAY, MEMBER
MR M HOULAHAN, SENIOR SESSIONAL MEMBER

HEARD : 28 JULY 2020

DELIVERED : 7 OCTOBER 2020

FILE NO/S : CC 997 of 2019

BETWEEN : THERESA INCORONATA PTY LTD
Applicant

AND

THE OWNERS OF CHEVRON STRATA PLAN
6146
Respondent

FILE NO/S : CC 244 of 2020

BETWEEN : THE OWNERS OF CHEVRON STRATA PLAN
6146
Applicant

AND

THERESA INCORONATA PTY LTD
Respondent

Catchwords:

Amendment of unit entitlements - Unfair and anomalous - Valuation

Legislation:

Land Information Authority Act 2006 (WA)

Strata Titles Act 1985 (WA) (as at 1 May 2020), Sch 5, cl 30(1)

Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 3(2)(a), s 4, s 4(1), s 5(1)(c), s 14, s 14(2), s 15, s 16, s 16(1), s 16(4), s 32(1), s 103H, s 103H(2), s 103H(5), s 115, s 115(3)

Valuation of Land Act 1978 (WA)

Result:

Application in CC 997 of 2019 successful

Application in CC 244 of 2020 dismissed

Category: B

Representation:

CC 997 of 2019

Counsel:

Applicant : Ms R Cosentino

Respondent : Mr M Atkinson

Solicitors:

Applicant : MGB Legal

Respondent : Atkinson Legal

CC 244 of 2020

Counsel:

Applicant : Mr M Atkinson

Respondent : Ms R Cosentino

Solicitors:

Applicant : Atkinson Legal

Respondent : MGB Legal

Case(s) referred to in decision(s):

REASONS FOR DECISION OF THE TRIBUNAL:***The application***

1 On 8 July 2019 the proprietor of Lot 8 on Strata Plan 6146 (Lot 8) comprised in Certificate of Title Volume 2615 Folio 341 lodged an application with the Tribunal. The proprietor of Lot 8 sought an order pursuant to s 103H of the *Strata Titles Act 1985* (WA) (ST Act) to amend the schedule of unit entitlements registered in respect of Strata Plan 6146 (strata plan). That proceeding is allocated the Tribunal reference number CC 997 of 2019.

2 On 19 February 2020 The Owners of Chevron Strata Plan 6146 lodged an application with the Tribunal seeking an order pursuant to s 16(1) of the ST Act to amend the schedule of unit entitlements registered in respect of the strata plan. That proceeding is allocated the Tribunal reference number CC 244 of 2020.

3 The proprietor of Lot 8 is the applicant in CC 997 of 2019 and the respondent in that proceeding is The Owners of Chevron Strata Plan 6146.

4 The Owners of Chevron Strata Plan 6146 is the applicant in CC 244 of 2020 and the respondent in that proceeding is the proprietor of Lot 8.

5 For the purposes of these reasons, and ease of reference, the proprietor of Lot 8 shall be referred to as the Owner throughout and The Owners of Chevron Strata Plan 6146 shall be referred to as the Strata Company throughout.

The strata plan

6 The strata plan identifies a strata scheme that totals seven lots and common property. The strata plan was first registered under the predecessor of the ST Act on 26 July 1978 in respect of a parcel of land comprised in Certificate of Title 2039 Folio 341. The current registered schedule of unit entitlements, comprising part of the strata plan, is the consequence of a re-subdivision in 2005, pursuant to the ST Act of what was Lot 1, as drawn on the original earlier strata plan registered in 1978 and some common property so that those two areas were combined into one lot, now known as Lot 8. The re-subdivision occurred in August 2005. Lot 8 comprises 98m² and the strata plan

notes that the boundaries of all lots including Lot 8 are as provided for by s 3(2)(a) of the ST Act.

7 The Strata Company is the entity that was created by operation of s 32(1) of ST Act upon registration of the strata plan under the ST Act (as provided for by s 4 of the ST Act) following re-subdivision in 2005. The Strata Company is constituted by the registered proprietors, from time to time, of all of the lots comprised in the strata scheme as shown on the strata plan. The built form of the strata scheme, in conformity with the strata plan, comprises a multiple level building situated at 122 Marine Parade Cottesloe in this State.

8 It is common cause that Lots 2-7 inclusive are residential lots and that Lot 8 is a commercial lot.

The Tribunal proceedings

9 The proprietors of Lots 2-7 inclusive are not separately joined as parties to either proceeding, despite the Tribunal providing an opportunity for participation in the proceedings by any one or more of those proprietors by orders made on 10 January 2020. The Tribunal notes the proprietor of Lot 3 at the Annual General Meeting (AGM) held on 6 February 2020 did express the view that he did not agree with the valuations of the lots as proposed by the Strata Company's valuer. Nonetheless the proprietor of Lot 3 voted in favour of the motion authorising the Strata Company's application to the Tribunal in CC 244 of 2020 and implicitly the Strata Company's proposed schedule of unit entitlements.

10 In the absence of any participation in the proceedings by the proprietors of Lots 2-7 and notwithstanding the position of the proprietor of Lot 3 at the AGM, the Tribunal concludes that the proprietors of Lots 2-7 inclusive all agree that the Strata Company's proposed unit entitlements is the basis upon which the Tribunal should make an order.

11 The proceeding in CC 997 of 2019 was the subject of orders for directions on 11 occasions and the proceeding in CC 244 of 2020 was the subject of orders for directions on five occasions, four of which were concurrent with the directions orders made in CC 997 of 2019. Both parties were at all times legally represented.

What is this dispute about?

12 As both the Owner and the Strata Company agree that the schedule of unit entitlements registered in respect of the strata scheme require amendment, there is no dispute between the parties that an order should be made. For the reasons explained below there is no real dispute that the order should be made in the Owner's application in CC 997 of 2019. The dispute between the parties is whether the schedule of unit entitlements should be amended as advanced by the Owner or by the Strata Company. Each party has provided a proposed schedule of unit entitlements which is supported by certificate of a licensed valuer (in the case of the Strata Company's claim on CC 244 of 2020) or a licensed valuer's reported statement of opinion (in the case of both valuers in both proceedings).

13 The table below indicates the proposals by comparison to the current position:

Lot	Current Unit Entitlement	Owner's Proposed Unit Entitlement	Strata Company's Proposed Unit Entitlement
Lot 2	22/100	20/100	202/1000
Lot 3	13/100	10/100	113/1000
Lot 4	10/100	9/100	98/1000
Lot 5	22/100	20/100	202/1000
Lot 6	13/100	10/100	113/1000
Lot 7	10/100	9/100	98/1000
Lot 8	10/100	22/100	174/1000
Total strata scheme	100/100	100/100	1000/1000

14 The proposed unit entitlement allocation for Lot 8 is what is in dispute between the parties. It is common cause between the parties that their respective expert valuers do not disagree about the values

(and therefore unit entitlements) of each of the other lots (Lots 2-7) as a proportion of the aggregate value (or aggregate unit entitlements) of the whole strata scheme, save and except for the consequential changes that result from their differing opinions on the proportionate value to of Lot 8 as against the aggregate value of the strata scheme.

15 The difference of opinion of the value of Lot 8 as a proportion of the aggregate value of the whole of the scheme in unit entitlement percentage terms is a difference of 4.6% (that is, $22 - 17.4 = 4.6$).

16 The competing positions before the Tribunal is whether the value to be ascribed to Lot 8 in unit entitlement terms should be 22% or 17.4% of the aggregate of the unit entitlements of the strata scheme. This difference of opinion comprises the dispute that is to be determined by the Tribunal.

The hearing

17 The proceedings were listed for a concurrent hearing on 28 July 2020. The Tribunal had made an order that the evidence in one proceeding also be the evidence in the other proceeding. Each party presented its position in opening and closing submissions. The respective parties' experts gave oral evidence concurrently. The following documents were specifically exhibited:

- Exhibit 1 - lease of Lot 8 undated
- Exhibit 2 - strata plan
- Exhibit 3 - report by Mr Eftos dated 22 May 2019
- Exhibit 4 - statement by Mr Eftos dated 27 March 2020
- Exhibit 5 - joint report following expert conferral dated 29 November 2019
- Exhibit 6 - Mr Eftos' addendum to the joint report dated 25 February 2019
- Exhibit 7 - Curriculum Vitae of Mr Eftos
- Exhibit 8 - minutes of the AGM of the Strata Company dated 6 February 2020
- Exhibit 9 - s 16(2)(a) certificate dated 18 February 2020 attached

- Exhibit 10 - s 77(b) of the ST Act certificate
- Exhibit 11 - ground licence dated 1 July 2015
- Exhibit 12 - business name search 'Cottesloe Beach Café'
- Exhibit 13 - report by Mr Eftos dated September 2017
- Exhibit 14 - report by Mr Garmony dated 4 October 2019
- Exhibit 15 - Mr Garmony's addendum to the joint report dated 13 January 2020
- Exhibit 16 - Tenancy Schedule
- Exhibit 17 - handwritten notes by Mr Eftos

The ST Act and legal principles

18 Both proceedings were commenced prior to the substantive amendments to the ST Act which came into force and effect on 1 May 2020. The provisions of the ST Act as it was prior to the amendment on 1 May 2020, applies to these proceedings (cl 30(1) of Sch 5 of the ST Act) as amended on 1 May 2020. The schedule of unit entitlements is a document registered with the Registrar of Titles when the original lot comprising the parcel, over which the strata scheme is to operate, was subdivided or re-subdivided under the ST Act into lots and common property (s 4(1) and s 5(1)(c) of the ST Act). The function and purpose of the schedule of unit entitlements is to determine:

- a) the voting rights of a proprietor;
- b) the quantum of the undivided share of each proprietor in the common property; and
- c) subject to s 36(1)(c) of the ST Act, the proportion payable by each proprietor of contributions levied under that section;

as provided for by s 14 of the ST Act.

19 The ST Act provides for the registered schedule of unit entitlements to be altered. Section 15 of the ST Act provides for a reallocation of unit entitlements by a resolution without dissent at a

general meeting. Section 16 of the ST Act empowers the Tribunal to make an order amending an original schedule of unit entitlements (or an amended schedule of unit entitlements) in certain circumstances. Section 16(4) of the ST Act provides:

- (4) Except where in the circumstances of a particular application the State Administrative Tribunal is satisfied that there are good and sufficient reasons for not making an order under this subsection, the State Administrative Tribunal shall -
 - (a) determine every application under this section by the allocation to each lot in the scheme of a unit entitlement that bears in relation to the aggregate unit entitlement of all lots delineated on the strata/survey strata plan a proportion not greater than 5% more or 5% less than the proportion that the value of each lot bears to the aggregate value of all the lots delineated on the plan; and
 - (b) order that the schedule of unit entitlement registered in respect of the scheme be amended in accordance with the allocation of unit entitlements made under paragraph (a).

20

The Tribunal's power to make an order pursuant to s 16 of the ST Act is limited to varying all the unit entitlements for each lot but so that in each case the unit entitlement allocated is within a 5% +/- tolerance of the proportional value of each lot and the aggregate value of the strata scheme. No such limitations apply in the case of s 103H of the ST Act which also empowers the Tribunal to order the amendment of 'the schedule of unit entitlement registered in respect of the scheme'. Section 103H(3) of the ST Act relevantly provides:

- (3) On the making of an application under subsection (1), the State Administrative Tribunal may make an order under this section if satisfied that -
 - (a) the proportion that the unit entitlement of any lot in the scheme bears to the aggregate unit entitlement of all lots in the scheme is not consistent with the proportion that the value of that lot bears to the aggregate value of all lots in the scheme; and
 - (b) that the lack of consistency is sufficiently great as to be unfair or anomalous.

21

Where the Tribunal is satisfied that there is good reason to not make an order pursuant to s 16 of the ST Act, it need not make an order

pursuant to that provision. In this proceeding the Owner made an application pursuant to s 103H of the ST Act well prior to the application by the Strata Company's application pursuant to s 16 of the ST Act. The parties in both proceedings agree that, that fact alone is sufficient good reason for the Tribunal to not make an order pursuant to s 16 of the ST Act. Further, the limitations on the Tribunal's power to make an order under s 16 of the ST Act are in the Tribunal's view too restrictive to grant the relief required and sought on the facts of these proceedings. Section s 103H of the ST Act authorises the Tribunal to consider the inconsistency between value and unit entitlements so as to avoid an unfair or anomalous outcome for all lot proprietors. There is indeed an anticipated increase of unit entitlements for Lot 8 of 12% on the Owner's case and 7.4% on the Strata Company's case and a variation of 13% (Owner's position) or 7.6% (Strata Company's position) between Lot 8 and other lots (for example, Lot 7) where there is no variation between Lot 8 and those same lots on the current schedule of unit entitlements.

22 The Tribunal concludes (and it was not otherwise contended) that the order amending the schedule of unit entitlement shall be made by the Tribunal pursuant to s 103H of the ST Act and the Strata Company's application pursuant to s 16 of the ST Act shall be dismissed.

The agreed position of the parties

23 The parties agree that:

- a) the schedule of unit entitlements registered in respect of the strata plan and the subject of a licensed valuer's certificate dated 15 April 2005 requires amendment;
- b) the current schedule of unit entitlements for the lots in the strata plan is inconsistent with the requirements of s 14(2) of the ST Act (ts 8, 28 July 2020);
- c) the amendment is principally to the unit entitlements to be allocated to Lot 8 with consequential amendments to each of the other lots (Lots 2-7); and
- d) the parties' respective expert valuers do not dispute the valuation mechanism (market value) for the assessment of the capital value within the meaning of the *Valuation of Land Act 1978* (WA), the relevant sales

evidence nor rental market evidence of the mutually identified comparable properties (ts 8, 27 July 2020).

24 The parties' respective expert valuers differ only as to which of the relevant sales and rental evidence is most comparable to Lot 8 and their consequential opinions of the value of Lot 8 and the unit entitlement for Lot 8.

Lot 8

25 Lot 8 is not a residential dwelling lot but rather a commercial retail lot. Both parties agree that the highest and best use for all of the lots is to be adopted in any valuation of the strata scheme. The parties agreed that the highest and best use for Lots 2-7 inclusive is as residential dwellings and for Lot 8 is as retail food outlet/restaurant/café.

26 Lot 8 is currently occupied by the Owner's tenant who operates a retail food outlet/café/restaurant from Lot 8, and certain common property pursuant to a licence granted by the Strata Company and also from land beyond but abutting the parcel pursuant to permission from the local municipal council. The size of Lot 8 is 98m². It is the value of Lot 8 that must be determined in this proceeding and not the value of the retail/food outlet/restaurant/café operated partly from Lot 8.

27 It was agreed between the parties that their respective valuers' opinions were achieved on the basis of the Owner's tenant's business being operated pursuant to a lease of Lot 8, a licence of certain common property granted by the Strata Company and local municipal council permission to occupy land beyond but abutting the parcel. The Tribunal was provided with a lease between the Owner and Paraskevi Voula Nelson undated, for the term of five years commencing on 1 July 2012 and which term expired on 30 June 2017 and a licence granted by the Strata Company to L&H Family Investments Pty Ltd as the licensee dated 1 July 2015, the term of which has expired (30 June 2016). There was no evidence of the local municipal council's permission to allow the tenant of Lot 8 to operate the café on land beyond the parcel. All parties and their experts have advanced their case on the basis that the above facts are agreed.

The valuation evidence

28 The Strata Company filed an *aide memoir* identifying the differences of opinion of each of the parties' valuers as follows:

Lot 8: 98 m²	Garmony	Eftos
Capital Value	\$ 1,200,000	\$ 1,600,000
Capital rate / m²	\$ 12,245 / m ²	\$ 16,326 / m ²
Rental rate / m²	\$ 700 / m ²	\$ 900 / m ²
Capitalisation rate	5.75%	5.5%
Unit Entitlement	174 / 1000	220 / 1000

29

It is common cause that:

- a) the rent payable under a lease has a bearing on ascertaining the capital value of a property including an individual strata lot;
- b) some caution needs to be adopted by a valuer in considering the rent payable of comparable properties to ascertain if the rent payable is the outcome of negotiation based on market conditions rather than peculiarly personal considerations relevant to that tenant or that landlord;
- c) there was no material change in the market value of Lot 8 or the strata scheme between 22 May 2019 (Owner's valuer's valuation date) and 4 October 2019 (Strata Company's valuer's valuation date);
- d) the market value for Lot 8 had not altered between the dates of valuation and the date of the hearing; and
- e) the COVID-19 pandemic and any legislation concerning the same had not had any quantifiable impact on the market value of Lot 8 or the strata scheme (ts 77, 117-118, 28 July 2020).

30 The joint report of the parties' respective valuers identifies the sales evidence and the rental evidence of a number of properties. No one property serves as entirely comparable either in terms of sale price or rental return.

31 The properties closest to Lot 8, in geographical terms, comprise two commercial lots situated at 110-112 Marine Parade Cottesloe. As to the first lot (referred to as 'Shop 1' in the evidence of the valuers), it is substantially larger than Lot 8 at 164m². Mr Eftos, the valuer for the Owner is of the view that Shop 1 is 'directly comparable' although larger than Lot 8. Mr Eftos notes that the rent payable for Shop 1 is \$1,075 per m². Mr Garmony, the valuer for the Strata Company, is of the opinion that Shop 1 is the subject of a 'long term sitting tenant with annual rent reviews to CPI + 2%'. He comments that the rental sum 'appears to be holding over rent. T[r]eat with caution.'

32 As to Shop 2 Mr Eftos notes that it is smaller in size than Lot 8, being 86m² and operates as a café. In his opinion, Shop 2's rent of \$1,606 per m² is reflective of it being a smaller shop (resulting in a higher price per m²) and that it is in a slightly better location on the Cottesloe café strip than Lot 8. Mr Garmony agrees that Shop 2 is in a superior location to Lot 8. However, he notes that the passing rent has been the subject of 5% rental increases since 2009 and does not in his opinion reflect the market rent.

33 It is Mr Garmony's view that the negotiated rent by a sitting tenant may be higher than market rent on account of that tenant having a vested interest in remaining at the site of the business the tenant has established. Mr Eftos stated that in his opinion 'it's difficult to generalise' on this issue and that there may be circumstances where the sitting tenant may drive a harder bargain and achieve a lower rent than market rent because it has been a very good tenant and the landlord does not wish to trade in the market. The Tribunal considers that it is indeed not possible to generalise on such motivations between tenants and landlords when considering passing rent. There is in fact no market rental evidence or information before the Tribunal of such comparably located properties to that of Lot 8.

34 It should be noted further that the current rent paid by the Owner's tenant is \$1,280 for Lot 8. The 52m² of common property that the Owner's tenant occupies for the purpose of operating its business is at a cost of \$840 per m². Mr Eftos considers the rent for Lot 8 to be high 'based on other evidence and general market knowledge' but does

not say what evidence or general knowledge and Mr Garmony discounts these rents on the basis that 'passing rentals are not relevant to the assessment of capital values' but proceeds to consider passing rent of other properties. Further the Tribunal notes that the terms of both the lease of Lot 8 and the licence of the common property have expired and expired some time ago and appears to represent a holding over position under the lease and licence. At first blush this may suggest that the rental payable under the lease and licence is outdated. However, the Tribunal has to have regard to the fact that the tenant remains in occupation apparently on those terms. The fact that there has been no new negotiated lease may give rise to an inference that the rental amounts are commensurate with market rent rather than simply infer that the rental rates were struck in different market conditions. Again, there is no evidence or information that assists the Tribunal in drawing one inference over the other from the holding over rental payable in respect of Lot 8 or the licence fee payable for the common property. There is no information concerning the land beyond the parcel at all.

35 In Mr Garmony's opinion the most comparable property is that at 112 Oxford Street Leederville, which he considers to be a superior landholding in a superior location. The area of this property is 49m² (much smaller than Lot 8) and achieves a rental of \$756-775m². This property is in a café strip but not near the ocean or river with ocean or a river vista. Mr Eftos considers this property smaller and poorly orientated by comparison to other lots (it has a small frontage than does Lot 8) and generally an inferior landholding in an inferior location to that of Lot 8 which he says has a wide frontage across the road from Cottesloe Beach.

36 In Mr Eftos' opinion the most comparable rental property is 'Grill'd' in Leederville, on the corner of Newcastle and Oxford Streets. Mr Eftos noted the rent had recently been reduced from \$1,150 to \$950 per m². He considered this property to be a superior property and in a superior location. Mr Garmony considered this property to be a superior property and a superior retail location. He agreed the rent had been reduced to \$950 per m². There was a degree of criticism of Mr Eftos' failure to disclose the fact that he has a family member who holds an interest in that transaction or property but in circumstances in which all the relevant details are agreed the Tribunal considers that that non-disclosure is not relevant. Mr Garmony also notes that the Grill'd site is larger than Lot 8 at 138m² which might account for the rental return to be higher than his preferred comparable property. The

Tribunal notes that by comparison to Lot 8, Grill'd is a lot larger and applying Mr Garmony's own reasoning might justify the market rent for Lot 8 being higher albeit it's is not as modern shop of as well located as Lot 8. The Tribunal also notes that Grill'd does not have an oceanic or river vista.

37 Another property that both valuers considered is 151 Marine Parade Cottesloe from which the business of the 'Blue Duck' operates. This property comprises 500m² and for that reason alone is not comparable to Lot 8.

38 Mr Garmony identified Suite 1, 662 Newcastle Street, Leederville which returns a rental of \$620 per m². Mr Eftos considers this an inferior property.

39 At this point the valuers have identified the range of \$1,280 per m² to \$620 per m². A number of other properties are considered by both valuers but are not comparable either because of location or size.

40 In terms of sales evidence, there is simply nothing comparable. Mr Eftos identified 36 Napoleon Street with a sale price of \$2,060,000 in March 2017 as a best comparator. It is not a good comparator as it is a green title lot with a building. Mr Garmony considered 39 Mends Street, South Perth which sold for \$9,027 per m² for a 565m² property in July 2019. He considered this property because, like Lot 8, it is located in a 'tourist' area of the South Perth foreshore but he acknowledges it is far larger and newer than Lot 8. Mr Garmony considered Unit 2, 131 Royal Street, East Perth that sold for \$11,720 per m² in July 2018. Mr Garmony estimated a passing rent of \$265,200 per annum plus outgoings for this property which equates to approximately \$469 per m² per annum. Both valuers agree this property is in an inferior location to Lot 8, is far larger and a newer structure than Lot 8. In truth it is not comparable at all.

41 Ultimately, Mr Garmony asserted that there is no sales evidence or information to support a value of more than \$12,500 per m² for Lot 8. Whilst there is sales evidence and information generally it is not sufficiently comparable to Lot 8 in terms of location, size or time to place any confidence on the sale prices achieved. Further the lack of comparable sales evidence may be the result of the fact that the leased commercial retail properties similar to Lot 8 particularly in the Cottesloe and Marine Parade location are very tightly held and change hands infrequently.

Consideration

42 On the whole the following factors suggest to the Tribunal that Mr Eftos' evidence of opinion on the value of Lot 8 is to be preferred:

- a) the special location of Lot 8 facing Cottesloe beach front, albeit interrupted by a road;
- b) the tourist location of Lot 8; and
- c) the location of Lot 8 is very suitable for local and passing trade along the foreshore in Cottesloe.

43 The Tribunal considers that the rental evidence is the most apposite in this proceeding. It is not for the Tribunal to attempt to perform a further valuation. The role of the Tribunal is to consider which of the expert opinions is most persuasive. The information concerning Shop 1 and Shop 2 is significant to the Tribunal. These properties are the most comparable in terms of location and notwithstanding the fact that the passing rents for each of Shop 1 and Shop 2 are not wholly reflective of the market value and there must be some reduction for that fact, the Tribunal considers that Mr Eftos' opinion of the value of \$900 per m² per annum for Lot 8 is much closer to the likely market value for Lot 8 given its location, size and its age. Mr Eftos' rental return of \$900 per m² per annum represents a significant reduction from the passing rent of Shop 1 and Shop 2. Further the Tribunal does not consider the rental for 112 Oxford Street Leederville to be comparable in terms of size and particularly location (it not being in a tourist type location (not having a water front vista)). The Tribunal accepts on the whole, the evidence of the Owner's valuer that more probably than not Lot 8's market or capital value is \$1,600,000 based on \$900 per m² per annum at a 5.5% capitalisation rate.

44 There is no evidence that any retail/commercial restaurant/café of the size of Lot 8 would rent for as little as \$700 along Marine Terrace Cottesloe. Mr Garmony's preferred comparable rental value of \$700 per m² per annum results in a value of \$1,200,000 after applying a capitalisation rate of 5.75% (and higher than that applied by Mr Eftos). Mr Eftos noted some unique features of the café operated from Lot 8, such as being amenable to local customers strolling along the beach strip, local customers patronising the café as they took their pet dog for a walk, tourists visiting Cottesloe, which features put Lot 8 in a different category to café's in other shopping strips or even along the

riverfront. Mr Garmony's valuation does not place as much weight on the special features of Lot 8 (and Shop 1 and Shop 2) arising from its geographical location along the beach in Cottesloe.

45 As to the capitalisation rate, there is no clear reasoning provided by either of the expert witnesses to resolve the difference between. That rate is a rather arbitrary figure that is intended to be a reflection of what investors' expectations are of returns on assets, which expectations change depending on market conditions that vary from time to time. On the whole the Tribunal prefers the evidence of Mr Eftos largely as his rental return valuation appears far nearer the passing rent for Shop 1 and Shop 2 which are similarly located to Lot.

46 Consequently, the Tribunal concludes that the unit entitlement calculation by the Owner's valuer, based upon a value for Lot 8 at \$1,600,000 is preferable to that calculated by the Strata Company's valuer, based upon a value of Lot 8 of \$1,200,000. Accordingly the Tribunal finds on the evidence before the Tribunal on the balance of probabilities that the value of each of Lots 2-8 and the respective unit entitlements based thereon are as identified by Mr Eftos as follows:

Lot	Value	Unit entitlement
Lot 2	1,400,000	20/100
Lot 3	735,000	10/100
Lot 4	670,000	9/100
Lot 5	1,400,000	20/100
Lot 6	735,000	10/100
Lot 7	670,000	9/100
Lot 8	1,600,000	22/100
Total	7,210,000	100/100

47 Accordingly, the Tribunal concludes and finds that the schedule of unit entitlements registered in respect of the strata scheme is inconsistent with the value of the lots and particularly Lot 8.

Although agreed, the Tribunal finds further that the inconsistency especially in relation to Lot 8 is sufficiently great as to be unfair and anomalous. The current schedule of unit entitlements therefore represents a significant departure from and inconsistency with the value of the Lots. If the current schedule of unit entitlement is not amended by the Tribunal the inconsistency between the proportional value of each lot and the schedule of unit entitlements would result in unfair representation of each lot proprietor in terms of contributions to the cost of the strata scheme, their respective share in common property and voting rights that is anomalous and inconsistent with the provisions of s 5 and s 14 of the ST Act. Therefore the current schedule of unit entitlements must be amended to reflect the true proportional value of the lots and particularly Lot 8 to the aggregate value of the strata scheme.

Orders

CC 997 of 2019

Neither party in the proceedings has provided the Tribunal of a minute of proposed orders.

Accordingly the Tribunal makes the following order in CC 997 of 2019:

1. Pursuant to s 103H(2) of the *Strata Titles Act 1985* (WA) the schedule of unit entitlements dated 15 April 2005 and registered in respect of Strata Plan 6146 by the Registrar of Titles is hereby amended in terms of the schedule attached hereto and marked 'A':

Lot	Unit entitlement	Vol. Fol.
Lot 2	20/100	1508 - 191
Lot 3	10/100	1508 - 192
Lot 4	9/100	1508 - 193
Lot 5	20/100	1508 - 194
Lot 6	10/100	1508 - 195

Lot 7	9/100	1508 - 196
Lot 8	22/100	2615 - 564
Aggregate	100/100	

2. Pursuant to s 103H(5) and s 115 of the *Strata Titles Act 1985* (WA) the applicant, Theresa Incoronata Pty Ltd and the proprietor of Lot 8 on Strata Plan 6146, shall within 14 days of the date of this order lodge a certified copy of this order with the Land Information Authority established by the *Land Information Authority Act 2006* (WA) together with the prescribed fee for lodgement and registration of this order by the Registrar of Titles on Strata Pan 6146 as provided for by s 115(3) of the *Strata Titles Act 1985* (WA).

CC 244 of 2020

The following order is made in CC 244 of 2020:

1. The application made pursuant to s 16 of the *Strata Titles Act 1985* (WA) is dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MS N OWEN-CONWAY, MEMBER

7 OCTOBER 2020