

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : FAY and THE OWNERS OF FORREST AVENUE
PLAZA STRATA PLAN 7411 [2023] WASAT 110

MEMBER : MS A KING, MEMBER
MR J MARTIN, SESSIONAL MEMBER

HEARD : 9 NOVEMBER 2023

DELIVERED : 17 NOVEMBER 2023

FILE NO/S : CC 663 of 2023

BETWEEN : ROBERT FAY
Applicant

AND

THE OWNERS OF FORREST AVENUE PLAZA
STRATA PLAN 7411
First Respondent

MICHAEL DYER
Second Respondent

HUI LI
Third Respondent

SANDRA TOBY
Fourth Respondent

GAVIN FOSTER
Fifth Respondent

Catchwords:

Strata Titles Act 1985 (WA) - Amendment of unit entitlements - Whether if allocated at the time of application, schedule of unit entitlements would require amendment - Whether unit entitlements proportionate to the value of each lot relative to the sum of the value of all the lots in the strata titles scheme - Capital valuation

Legislation:

Strata Titles (General) Regulations 2019 (WA), Pt 7, reg 54, reg 55, reg 55(3)
Strata Titles Act 1985 (WA), s 3, s 37, s 37(2), s 37(3), s 37(4), s 38, s 38(5)
Strata Titles Amendment Act 2018 (WA)
Valuation of Land Act 1978 (WA), s 4

Result:

Application is dismissed

Category: B

Representation:

Counsel:

Applicant	:	In Person
First Respondent	:	No appearance
Second Respondent	:	In Person
Third Respondent	:	In Person
Fourth Respondent	:	In Person
Fifth Respondent	:	No appearance

Solicitors:

Applicant	:	N/A
First Respondent	:	N/A
Second Respondent	:	N/A
Third Respondent	:	N/A
Fourth Respondent	:	N/A
Fifth Respondent	:	N/A

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

Blakeney and The Owners of Westcourt West Perth Strata Plan 37494

[2022] WASAT 84

Maludra Pty Ltd and Ors and Owners of Windsor Towers & Ors

[2012] WASAT 160

The Owners of Claisebrook Heights Strata Plan 11880 and Thompson

[2020] WASAT 125

REASONS FOR DECISION OF THE TRIBUNAL:

(The application was heard on 9 November 2023. An oral decision was delivered on 17 November 2023. The following reasons comprise the reasons that were delivered orally, subject only to minor editing).

Introduction

1 This is a proceeding in which the applicant applied to the Tribunal under s 38(5) of the *Strata Titles Act 1985* (WA) (**ST Act**) for authority to amend the schedule of unit entitlements for a strata scheme, Strata Plan 7411, known as Forrest Avenue Plaza, Padbury, Western Australia (the **strata scheme**). The applicant is Robert Wesley Fay, the owner of Lot 2 and Lot 3 of the strata scheme. The respondents are the owners of the strata scheme.

2 By application dated 9 May 2023, the applicant is seeking the following orders (**Proposed Orders**):

- (1) Pursuant to s 38(5) of the ST Act, the Tribunal authorise the amendment of the schedule of unit entitlements registered in respect of strata plan 7411 for the property known as Forrest Avenue Plaza, 4 Alexander Road, (Corner Forrest Road) Padbury, Western Australia be amended by being deleted and replaced by the schedule of unit entitlements set out in the report of Joseph Agnello dated 10 January 2023.

Procedural history

3 A directions hearing was held on 2 June 2023 and various programming orders were made by the Tribunal. The matter was then adjourned to further directions on 27 June 2023, 25 July 2023, 15 August 2023 and 14 September 2023.

4 On 15 August 2023 the Tribunal ordered that the first respondent has elected not to participate in the hearing and will abide by the decision of the Tribunal. It further ordered that by 22 August 2023 each party must file with the Tribunal and give to the other party a written statement of all of the dates in September, October and November 2023 on which they or their witnesses will not be available to attend a final hearing of this matter.

5 The order made on 15 August 2023 adds by order 4 that an expert witness must acknowledge in his or her evidence that he or she has read the Tribunal's information sheet entitled 'Guide for experts evidence' and agrees to be bound by the expert's duties stated in that document.

6 On 14 September 2023 the Tribunal ordered that parties are responsible for ensuring the attendance of any witnesses they intend to call at the final hearing. The matter was listed for final hearing on 9 November 2023.

7 The applicant attended the hearing and did not call any witnesses.

8 The second and third respondent attended the hearing. The fourth respondent attended at about 11.30 am and remained as an observer.

Evidence before the Tribunal

9 The applicant presented the following documents at the hearing which the Tribunal accepted as evidence:

- (1) Report of Mr Joseph Agnello, certified practising valuer, dated 10 January 2023 (Exhibit 1);
- (2) A Strata Plan for the Strata scheme 7411 (Exhibit 2);
- (3) Landgate Schedule (Certificate of Licensed Valuer) of Unit Entitlements dated 29 March 2023 (Exhibit 3);
- (4) Minutes of meeting EGM dated 30 November 2021 (Exhibit 4);
- (5) Strata Roll of Strata Scheme 7411 (Exhibit 5);
- (6) Document titled Explanation of situation and expected outcome by Mr Fay, undated (Exhibit 6);
- (7) Approved levy schedule to 1 July 2022 (Exhibit 7); and
- (8) Document created by Robert Fay dated 9 November 2023 (Exhibit 8).

The regulatory framework

10 In these reasons, any reference to a legislative provision or to 'the Act' is, unless otherwise specified, a reference to the *Strata Titles Act 1985* (WA), as amended by the *Strata Titles Amendment Act 2018* (WA) (which commenced on 1 May 2020).

11 Section 38 of the ST Act relevantly provides:

- 38. Requirements for registration of amendment of schedule of unit entitlements**

- (1) An amendment of a schedule of unit entitlements may only be registered —
- (a) in conjunction with an amendment of the scheme plan to give effect to a subdivision; or
 - (b) if the amendment is authorised by resolution without dissent of the strata company; or
 - (c) if the amendment is authorised by order of the Tribunal.

...

- (5) The Tribunal may, on the application of a strata company or the owner or registered mortgagee of a lot in a strata titles scheme, authorise the amendment of the schedule of unit entitlements for the scheme if satisfied that, if unit entitlements were to be allocated at the time of the application, the schedule of unit entitlements would require amendment for compliance with section 37(2).

- (6) If the Tribunal makes an order under this section, the applicant for the order must lodge a copy of the order certified by the Tribunal with the Registrar of Titles for registration of the amendment of the schedule of unit entitlements.

12

Section 37 of the ST Act relevantly provides:

37. Schedule of unit entitlements

...

- (2) When allocated, the proportion that a unit entitlement of a lot bears to the sum of the unit entitlements of all the lots in the strata titles scheme must not be greater than 5% more, or 5% less, than the proportion that the value of the lot bears to the sum of the value of all the lots in the strata titles scheme.

- (3) The value of a lot is —

- (a) in a strata scheme — the capital value; and

...

- (4) Without limitation, the regulations may prescribe matters relating to the determination of the value of a lot[.]

13 The term 'capital value' is defined in s 3 of the ST Act as having the meaning given in the *Valuation of Land Act 1978* (WA) (**Valuation of Land Act**), s 4 of that Act provides as follows:

capital value of land means the capital amount which an estate of fee simple in the land might reasonably be expected to realize upon sale — provided that where the capital value of land cannot reasonably be determined on such basis, the capital value of such land shall be the sum of, first, the unimproved value of the land, and, secondly, the estimated replacement cost of improvements to the land after making such allowance for obsolescence, physical depreciation, and such other factors as are appropriate in the circumstances.

14 Regulation 54 of Pt 7 of the *Strata Titles (General) Regulations 2019* (WA) (**ST Regulations**) relevantly provides in determining the capital value of a lot:

54. Determining capital value of a lot

- (1) For the purposes of section 37(4), a determination of the capital value of a lot in a strata scheme that is made for the purposes of registering a schedule of unit entitlements, or an amendment of a schedule of unit entitlements, must be made in accordance with this regulation.
- (2) A licensed valuer must determine the capital value of a lot as if it had the standard level of internal fit out and finishes for that lot.
- (3) The standard level of internal fit out and finishes for a lot is the level of fit out and finishes that the licensed valuer determines to be a reasonable representation of the average expected level of fit out and finishes for lots in the strata scheme of that property type and of commensurate age.
- (4) The standard level of internal fit out and finishes for a lot must be determined by the licensed valuer after —
 - (a) conducting a physical inspection of the parcel of land the subject of the strata scheme; and
 - (b) conducting an internal inspection of as many lots in the strata scheme as is reasonably practicable to enable the licensed valuer to make a reasonable assessment of the average expected level of fit out and finishes for lots of

the same property type and of commensurate age; and

- (c) taking into account any relevant information obtained from the strata company or on the strata plan.

- (5) A licensed valuer must include in the capital value of a lot any buildings within the lot that have planning approval or approval under any other written law, whether or not shown on the strata plan.

15 Regulation 55 relevantly provides, in relation to certificates by a licenced valuer, as follows:

55. Certificate by licensed valuer

- (1) For the purposes of section 37(6), a certificate by a licensed valuer in relation to a schedule of unit entitlements, or an amendment of a schedule of unit entitlements, must be in an approved form.
- (2) The certificate must specify the date on which the licensed valuer issued the certificate.
- (3) The date of issue of the certificate must be no more than 2 years before the application to register the schedule, or amendment, is made to the Registrar of Titles.
- (4) In addition, if the certificate includes a determination that a stage of subdivision is or is not a significant variation under Part 6, the certificate must comply with any requirements for the certificate specified in that Part.

Issues for determination

16 The principal issue to be determined by the Tribunal is:

- (1) whether, if unit entitlements for the Scheme were to be allocated today, the schedule of strata unit entitlements currently on the strata plan (**Current Schedule**)¹ would require amendment by reference to the requirements of s 37(2) of the ST Act.

¹ Strata Plan, Exhibit 2.

- (2) that in turn requires consideration by the Tribunal of whether there is sufficient evidence by reference to the ST Regulations² to determine:
- (a) whether, within a 5% tolerance, the unit entitlements in the Current Schedule are proportionate to the capital value of each of the lots relative to the whole of the Scheme, and if not then;
 - (b) whether, within a 5% tolerance, the unit entitlements in the Proposed Schedule are proportionate to the capital value of each of the lots relative to the whole of the Scheme.

History of the Scheme and matters not in dispute

17 The original form of the Scheme was created by the registration of Strata Plan 7411 on 19 December 1979 which described the Scheme as:³

A single storey brick and tile building.

18 At the time of registration, the aggregate of the unit entitlements was 100, as comprised as follows:

- (a) Lots 2, 3, 4, 5, 7 = each allocated 10-unit entitlements;
- (b) Lot 1 = allocated 30 unit entitlements;
- (c) Lot 6 = allocated 20 unit entitlements;

19 In or about **1987**⁴ the aggregate of unit entitlements was 1000, with the following entitlements:

- (a) Lot 1 = allocated 221 unit entitlements;
- (b) Lot 2 = allocated 79 unit entitlements;
- (c) Lot 3 = allocated 79 unit entitlements;
- (d) Lot 4 = allocated 106 unit entitlements;
- (e) Lot 5 = allocated 106 unit entitlements;

² ST Regulation, reg 54.

³ Exhibit 1.

⁴ Exhibit 1.

- (f) Lot 6 = allocated 186 unit entitlements;
- (g) Lot 7 = allocated 96 unit entitlements; and
- (h) Lot 8 = allocated 127 unit entitlements.

20 Further amendments were made in the year **2000**⁵ as follows:

- (a) Lot 1 = now subdivided;
- (b) Lot 2 = allocated 79 unit entitlements;
- (c) Lot 3 = allocated 79 unit entitlements;
- (d) Lot 4 = allocated 106 unit entitlements;
- (e) Lot 5 = allocated 106 unit entitlements;
- (f) Lot 6 = allocated 186 unit entitlements;
- (g) Lot 7 = allocated 96 unit entitlements;
- (h) Lot 8 = allocated 127 unit entitlements;
- (i) Lot 9 = allocated 75 unit entitlements;
- (j) Lot 10 = allocated 97 unit entitlements; and
- (k) Lot 11 = allocated 49 unit entitlements.

21 In **2000** the aggregate of unit entitlements remained 1000.

Orders sought

22 The applicant is seeking orders, consistent with the report of Joseph Agnello and set out in the Landgate approved form (Certificate of Licensed Valuer)⁶ that the allocated unit entitlements of each of the units of the strata scheme be further amended as follows:

- Lot 1 = now subdivided;
- Lot 2 = allocated 70 unit entitlements;
- Lot 3 = allocated 70 unit entitlements;
- Lot 4 = allocated 90 unit entitlements;
- Lot 5 = allocated 90 unit entitlements;

⁵ Exhibit 1.

⁶ Exhibit 3.

Lot 6 = allocated 200 unit entitlements;
Lot 7 = allocated 80 unit entitlements;
Lot 8 = allocated 100 unit entitlements;
Lot 9 = allocated 110 unit entitlements;
Lot 10 = allocated 120 unit entitlements; and
Lot 11 = allocated 70 unit entitlements.

23 In addition, the applicant is seeking orders that the owners of Strata scheme 7411 instruct the Council of Owners (COO) to undertake various actions including, that the COO compare boundaries and areas of each lot.

24 Those orders were not pursued at the time of the hearing.

The valuation evidence

25 The Report filed in support of the application was prepared by Mr Joseph Agnello on 10 January 2023 (**Agnello report**) who describes himself as a fellow of Australian Property Institute, Certified Practising Valuer with a Licensed Valuer number 648 in Western Australia.

26 Mr Agnello dated his report 10 January 2023 and it comprises of two pages.

27 The Agnello report states on page 2:

Following is my reassessment of the shopping centre's unit entitlements, which in my opinion, better reflect each of the strata units and their individual unit entitlement.

28 It then sets out a table of recommended unit entitlements.

29 No further evidence to support the opinion of Mr Agnello was provided to the Tribunal.

Applicant's submissions

30 The applicant submits that the Agnello report and the (Landgate approved form titled Certificate of Licensed Valuer) meets the criteria in s 38(5) and s 37(2) of the ST Act and supports the orders sought.

31 The applicant is the owner of two lots of strata scheme 7411 and is applying to the Tribunal for an order to have the whole of strata scheme 7411, (a shopping centre comprising of 10 shops) revalued for the purposes of determining a fairer distribution of Unit Entitlements (UE).⁷

32 The applicant submits that from the year 2000, the UE's have been disproportional to the capital values of each lot. He submits that the Agnello report complies with the ST Act and the ST Regulations and highlights that the current UE valuations are incorrect. As an example, he submits that the UE for an 83 square metre shop has a lower UE than a shop of 40 square metres and the UE's are therefore wrong.

33 The applicant contends that in order to assess the appropriate UE's it is not necessary to take into account the 'level of fit out' of each lot, by which is meant the extent, quality and condition of the fixtures.

The respondents' submissions

34 The respondents did not lodge any expert evidence.

35 The Tribunal received written submissions from Ms Sandra Toby dated 18 July 2023. There being no objections, the Tribunal had regard to her written submissions in lieu of her giving evidence.

36 Ms Toby is the owner of Lot 6, the property with the largest square metre footprint. However, this lot is placed on the corner of the L-shape of the overall building, with approximately one third of the floor space tucked into the corner, so that only two thirds of the property has frontage to the car park. In addition, she submits that the only entrance to this commercial space is via a single-width door placed right in the corner of the L-shape. She contends that Lot 6 does not lend itself to a simple calculation based on square metres.

37 Mr Michael Dyer gave evidence at the hearing. He submitted that the floor area would be one of the factors for consideration but that the Tribunal must also take into account the amenities, outlook and other aspects of each lot in order to determine capital values and unit entitlements.

38 Mr Dyer contends that the Agnello report does not provide any basis for the changes to the UE's other than it is his opinion. There is no mention of any individual valuation of the lots or that any

⁷ Exhibit 6.

inspections were done or even attempted to be done, to determine a capital value of the lots. Mr Dyer in his written submissions and highlighted in his oral evidence contends that:

... I have had the floor area of Lot 10 professionally surveyed by McCallum Surveys with a resultant measurement of 99.96 square meters not the 109 listed on Mr Agnello's review. Lot 10 is almost 10% smaller than that shown on Mr Agnello's table[.]

39 Mr Dyer adds:

... In my opinion the Agnello review is flawed mathematically, it is incomplete and does [not] meet the requirements of the Strata Titles Act 1985, particularly on Capital Valuation as defined in the Valuation of Land Act 1978 (WA) and should therefore be disregarded by the Tribunal.

40 In summary, he contends that there has been no capital valuations provided by the applicant to meet the requirements of s 37(2) of the ST Act and that the application should be dismissed.

41 Ms Hui Li attended the hearing and gave evidence.

42 Ms Hui Li is the owner of Lot 9 which she submits she has owned since 2005. She agrees with the submissions of Mr Dyer.

Consideration and findings of the Tribunal

43 The Tribunal has considered the Agnello report⁸ which is dated 10 January 2023.

44 The Tribunal notes Mr Agnello failed to comply with the order of the Tribunal made on 15 August 2023 in that the expert failed to acknowledge in his report that he has read the Tribunal's information sheet entitled 'Guide to giving expert evidence' and agrees to be bound by the expert's duties stated in that document.

45 Further, the Tribunal is not satisfied that, in preparing his report, Mr Agnello has fulfilled the prescribed requirements relating to determining the value of a lot (s 37(4) of the ST Act; reg 54 of the ST Regulations) for the reasons set out below.

46 In the matter of the *The Owners of Claisebrook Heights and Thompson*,⁹ the Tribunal, in granting the application to amend unit

⁸ Exhibit 1.

⁹ *The Owners of Claisebrook Heights Strata Plan 11880 and Thompson* [2020] WASAT 125 at [29].

entitlements, examined the valuation evidence and noted amongst other matters that the report:

- (a) gave the date of inspection and valuations as at the relevant date;
- (b) the report was noted as being directed to assessing the 'current market value of the individual strata lots' in the Scheme for the purpose of reassessing unit entitlements;
- (c) described the complex, size and shape;
- (d) noted the varying standards of lots with individual owners having carried out renovations and modifications throughout the years; and
- (e) states (at para 5.5) that the valuation analysis is based on a direct comparison approach and outlines the market evidence (in the form of comparable sales in the area) relied upon for that purpose.

47 The Agnello report does not state the date of assessment, only the date the report was prepared. It also fails to state the date on which the units were inspected and on what, if any, information Mr Agnello relied upon to reach his conclusions.

48 It makes no reference to assessing the Capital Value of each lot for the purposes of determining the Reallocation of Unit Entitlements based on the existing strata plan by having first established individual capital values of the lots.

49 In the matter of *Maludra Pty Ltd and Ors and Owners of Windsor Towers*¹⁰ it was held that the definition of 'capital value' in the Valuation of Land Act, and therefore the value referred to in the ST Act, is the market value, which must take into account all the circumstances which might affect that value. Those circumstances will include improvements to the land and, in the case of the lots in the strata scheme, the level of fit out of those lots.¹¹

50 The need to conduct a physical inspection of the scheme property including inspections as was reasonably practical including a

¹⁰ *Maludra Pty Ltd and Ors and Owners of Windsor Towers & Ors* [2012] WASAT 160 at [107].

¹¹ *Ibid.*

cross-section of lots was taken into consideration in the matter of *Blakeney and The Owners of Westcourt West*.¹²

51 The Tribunal finds that the Agnello report makes no comparisons to recent sales of commercial strata title premises in Padbury, Western Australia or other comparable premises in the surrounding suburbs and in particular makes no reference to considerations of any need to adjust for size or configuration, location within the development, any variations in access considerations, level of fit out or other circumstances which might affect the value of the lots for the purposes of assessing the capital values to arrive at the unit entitlements.

52 There is no reference to any basis of value, methodology or assumptions made by Mr Agnello.

53 Mr Agnello was not called to give evidence and the Tribunal lacked information as to his experience in undertaking valuations for the purposes of assessing unit entitlements.

54 The Agnello report is less than two pages in length and is lacking in supporting information or detail for the basis of the opinions expressed. The report was not supported by oral evidence or further documentary evidence.

55 The Tribunal rejects the submissions made by the applicant that Exhibit 8, a document the applicant created, supports the Agnello report and demonstrates by dividing the UE by the size (m²) of the lot, that the current UE's are incorrect.

56 The Tribunal finds that this approach, on its own or alternatively when considered with the Agnello report, fails to satisfy s 37 of the ST Act. In simple terms it is not supported by any evidence of how this approach relates to capital value (by reference to the ST Regulations) for the Tribunal to determine:

- (a) whether, within a 5% tolerance, the unit entitlements in the Current Schedule are proportionate to the capital value of each of the lots relative to the whole of the Scheme; and if not then
- (b) whether, within a 5% tolerance, the unit entitlements in the Proposed Schedule are proportionate to the capital value of each of the lots relative to the whole of the Scheme.

¹² *Blakeney and The Owners of Westcourt West Perth Strata Plan 37494* [2022] WASAT 84 at [33].

57 The applicant further seeks to rely on the Landgate form signed by Mr Agnello as further evidence in support of the application. The Tribunal finds that the completed Landgate form does not amount to valuation evidence.

58 Finally, the Tribunal is not satisfied that the Agnello report provides a firm view. It states merely that 'upon review of the current unit entitlement, from the amendments made in 2000, it is my opinion that the individual unit entitlements *do not necessarily* (Emphasis added) reflect the correct proportions ...' adding that:

- (a) Lot 8 appears high;
- (b) Lot 9 appears too low;
- (c) Lot 10 appears low; and
- (e) Lot 11 appears marginally low.

59 The Tribunal finds that Mr Agnello failed to provide a valuation report detailing bases of value, methodology, evidence to support each lots capital value and the basis/calculations of the assessment of the UE which meets the definitional requirements of capital value in accordance with s 37(3) of the ST Act being the capital value which an estate in fee simple in the land might reasonably be expected to realise upon sale.

60 The Tribunal finds that the report does not meet the criteria set out in s 38(5) and s 37(2) of the ST Act with reference to reg 54 of the ST Regulations¹³ accordingly the Tribunal finds that it does not support the orders sought.

Should the Tribunal exercise its discretion, under s 38(5) of the ST Act, to either amend or refuse the amendment of the schedule of unit entitlement?

61 The question of how the Tribunal might exercise its discretion under s 38(5) of the ST Act, is such that it can only be exercised in circumstances where the criteria in s 37(2) of the ST Act have been satisfied.

¹³ ST Regulations, reg 54.

62 In summary for the reasons set out above the Tribunal is not satisfied that it should make the orders sought and accordingly the application must be dismissed.

Orders

The Tribunal orders:

1. The application is dismissed.

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

MS A King, MEMBER

17 NOVEMBER 2023