The Court of Appeal for Bermuda

CIVIL APPEAL No 12 of 2012

Between:

DIRECTOR OF LAND VALUATION

Appellant

-v-

SAMUEL ANDREW BANKS

Respondent

Before: **Zacca, President**
Ward, JA
Baker, JA

Appearances: Mr. Jonathan Small, QC and Mr. Martin Johnson for the Appellant
Lord Pannick, QC and Mr. Jeffery Elkinson for the Respondent

Date of Hearing: **18 March 2013**

Date of Judgment: **13 June 2013**

JUDGMENT

Baker, JA:

1. The Director of Land Valuation appeals against the decision of Kawaley CJ dated 27 July 2012. He has two grounds of complaint; both are points of law. The first is the true construction of section 5(1) of the Land Valuation and Tax Act 1967 ("The Act") and the second is the Chief Justice's decision to uphold the decision of the Land Valuation Appeal Tribunal to admit valuation evidence when considering an objection to the valuation list.

2. It is necessary to give a brief account of the facts to set the two issues in context. Mr. Banks, the Respondent, owns a property in Paget known as Gatewood ("the property"). The appellant as the Director of Land Valuation is

responsible for the administration of Bermuda's land valuation regime which forms the basis on which land tax is calculated. Mr. Banks and the Director disagree about the amount of land tax that is payable in respect of the property. The case was first heard by a tribunal chaired by Arthur Jones ("The Jones Tribunal"). It decided two matters in relation to Mr. Banks' objection to the Director's proposal of 31 December 2008 for the inclusion of the property in the 2004 Valuation List. These were (1) that the valuation units were not capable of beneficial occupation until the certificates of use and occupancy had been issued ("the date beneficial occupation" point) and (2) that there were three valuation units on the property rather than one, and that the Director had to provide an annual value for each unit separately as section 5(2) of the Act applied. ("the number of valuation units" point). The decision was given in summary form although if either party had chosen to appeal within the statutory 21 day period a further "report" could have been requested.

3. The case next came before a tribunal chaired by Kenneth Robinson ("The Robinson Tribunal") which considered Mr. Banks' objection of 27 October 2010 to the Director's proposal of 29 September 2010 for the inclusion of the three units in the 2009 Valuation List.

4. The Director sought to appeal against both decisions to the Supreme Court. Before turning to the issues arising on appeal from the Chief Justice and going into the statutory context it is helpful to describe the somewhat complex procedural chronology.

Chronology

- On 1 January 2004 the 2004 valuation began.
- On 10 December 2008 building approval was granted following completion of the three units on the property.
- On 31 December 2008 the Director proposed to amend the 2004 valuation list to include Mr. Banks' property as a single valuation unit with an annual rental value of $852,000 ("the 2008 proposal").
- On 14 January 2009 Mr. Banks served notice of objection to amend the 2008 proposal.

- On 31 December 2009 the draft 2009 valuation list was placed on deposit. It listed Mr. Banks' property as a single valuation unit with an annual rental value of $768,000.
- On 1 January 2009 the 2009 list began.
- On 28 June 2010 Mr. Banks served notice of objection to the draft 2009 valuation list.
- On 1 July 2010 the draft 2009 valuation list was confirmed by the chairman of the tribunal pursuant to section 22 of the Act.
- On 10 September 2010 the parties were sent the Jones Tribunal's determination of Mr. Banks' objection to the 2008 proposal.
- On 29 September 2010 the Director proposed ("the 2010 proposal") to amend the confirmed 2009 valuation list to include Mr. Banks property as three separate units with an annual rental value of $600,000 for the main house, $75,000 for the pool house, and $45,000 for the staff apartment.
- On 27 October 2010 Mr. Banks served notice of objection to the 2010 proposal.
- On 23 October 2011 the Robinson Tribunal determined the annual rental values of $300,000 for the main house, $40,000 for the pool house, and $20,000 for the staff apartment.
- On 4 November 2011 the Director appealed against both the Jones and the Robinson Tribunals' decisions on essentially three grounds: (1) the number of units point, (2) the date of beneficial occupation point and (3) the decision to admit evidence of market value ("the evidence point").
- On 28 March 2012 the Chief Justice refused the Director's application for an extension of time to appeal the Jones Tribunal decision.
- On 27 July 2012 the Chief Justice in a reserved judgment dismissed the Director's appeal. He concluded that the Robinson Tribunal was correct on the evidence point, that the number of units point and the date of beneficial occupation points had been finally determined in Mr. Banks' favour by the Jones Tribunal but nevertheless went on in the public interest to give his

reasoned conclusion on both points notwithstanding they had become academic between the Director and Mr. Banks, having been finally resolved by the Jones Tribunal. On these academic points he found in favour of the Director on the former but against him on the latter.

5. The two issues the Court of Appeal is invited to consider are the number of units point and the evidence point. The date of beneficial ownership point forms no part of the appeal.

The Number of Valuation Units Point

6. Two matters require the attention of this Court (1) whether the point is now academic or moot and (2) if so whether the Court nevertheless hear argument and decide it in the public interest as urged by Mr. Small QC on behalf of the Director.

7. In his grounds of appeal the Director makes it clear that he does not seek to appeal the Chief Justice's conclusion at paragraphs 28 and 30 to 33 that the Director had no standing to challenge the Jones Tribunal's decision that the property consists of three valuation units rather than one. This is what the Chief Justice said:

> "30. In my judgment it is clear on the face of the two Tribunal decisions and the record of the Robinson Tribunal hearing that the Appellant has no standing to challenge the finding by the Jones Tribunal which was essentially adopted by the Robinson Tribunal that the Property consists of three valuation units. Mr. Drabble rightly submitted that the matter could be analysed in more than one way leading to the same inevitable conclusion.
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> 31. Firstly and quite simply, the Robinson Tribunal was considering an objection to a proposal by the Director which was based on the existence of three valuation units. It was not open to the Director before that Tribunal to unilaterally redefine the matter of which the Tribunal was seized. The number of units issue was not or not validly a matter the Robinson Tribunal was entitled to or purported to determine. The force of this analysis was not greatly enhanced by the embellishment that the Respondent's counsel added to this point with the contention that the Appellant was not in technical legal terms a person

aggrieved with standing to appeal his own three-unit proposals.

32. Secondly and no less simply, I find that the Appellant lacks the standing to pursue this point as a ground of appeal against the decision of the Robinson Tribunal because of the doctrine of *res judicata* or issue estoppel. The very issue of how many valuation units the Property consisted of was determined by the Jones Tribunal in a decision which the Director did not appeal. It would be a manifest and gross abuse of the statutory procedure for dealing with objections to permit the Appellant to re-litigate the number of units issue in circumstances where:

(a) he failed to launch a timely challenge to the decision of the Arthur Jones Tribunal on this issue;

(b) he followed the directions of the Jones Tribunal and made proposals based on the existence of three valuation units;

(c) the Robinson Tribunal has conducted a two day hearing of the objection to the Director's proposals based on the existence of three valuation units.

33. The Appellant advanced no or no viable basis for re-opening the narrower aspect of the number of units point which was decided as between the same parties to the present appeal by the Jones Tribunal and not appealed."

8. The Chief Justice went on to conclude at the end of his judgment that his findings on the construction of section 5 were recorded in the public interest and had no impact on the status of Mr. Banks' property which had been determined by the tribunals and was not open for the Director to challenge. Absent any appeal against that conclusion it is, in my judgment, unarguable that the number of units point is not academic.

9. Mr. Small advanced a vigorous argument why the Court should nevertheless hear argument and rule on the number of units issue. The law is set out in the speech of Lord Slynn of Hadley with which the other members of the House agreed in *R v Secretary of State for the Home Department ex-parte Salem* [1999] 1 AC 450 at 456G

> "My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se...
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> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.
>
> I do not consider that this is such a case. In the first place, although a question of statutory construction does arise, the facts are by no means straightforward and in other cases the problem of when a determination is made may depend on the precise factual context of each case....
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> In the second place, Mr. Pannick, on the basis of instructions from both the Home Office and the Department of Health and Social Security, told us that only in a few cases has this question arisen."

10. Lord Pannick QC on behalf of Mr Banks submits that is not one of those rare cases in which the Court should embark on considering an issue that is academic between the parties. Judgments are most helpful if they determine live issues. The meaning of section 5 of the Land Valuation Act should not be determined in a factual vacuum; particular facts in a particular case are required. There is no evidence to suggest that many other cases are pending or anticipated, either on the same facts or otherwise.

11. The Chief Justice concluded that section 5 (1) of the Act does not apply to high-end residential properties such as that owned by Mr. Banks but only to units supporting a main dwelling house used for some business or commercial purpose and that is the matter Mr. Small submits should be reconsidered by this Court. However, Lord Pannick points out, that if the Court does decide to

hear the appeal that is moot it should look at the meaning of the whole of section 5 including section 5(2) and not just section 5(1).

12. Mr. Small's argument is that this is a very important point; 758 other properties could be affected. The Chief Justice's decision is of high persuasive authority and, he submits, if it is wrong, as he contends it is, it should not be allowed to stand. A new five year list will begin on 1 January 2014 and a lot of tax turns on the result. That is why the Chief Justice allowed the point to be argued as a matter of public interest and this Court should do likewise.

13. In my judgment that facts are likely to differ from case to case and I am not persuaded that there are other identical cases or similar cases in the pipeline or that there is any other pressing reason why this court should consider and rule on the point.

14. Zacca P inquired in the course of argument as to the effect of the Chief Justice's ruling and I think it is common ground that it is res judicata as between the Director and Mr. Banks absent a change of circumstances or legislation. As to its wider application, it is of strong persuasive authority but open to reconsideration in another case should the Director be advised that that is an appropriate course.

15. I would therefore not exercise the Court's undoubted discretion to consider what is now an academic point as this is not one of those rare cases in which it would be appropriate to do so.

The Evidence Point

16. Land tax in Bermuda is calculated accordingly to the annual rental value of the unit i.e the annual amount of rent the unit could be expected to attract on the open market. The regime was introduced following a report by Mr. J.D Trustram Eve in 1966. In his report he said he felt sure that a valuation of annual rental values would be fully supported by actual rents. He advocated a provision in the legislation making fairness and equity the predominant factor in making valuations for the tax.

17. The parties' respective positions can be summarised as follows. Lord Pannick submits that when a tribunal considers an objection to a proposal by the

Director for the annual rental value of a property in the valuation list it can hear evidence of the rents that similar properties attract. Mr. Small submits that the structure of the Act is such that this is only permissible in cases where the valuation list is a draft list and not a confirmed list and as the tribunal in the present case was considering a confirmed list the evidence was not admissible.

18. The Director did not object to the admission of such evidence before it was given and indeed the chairman of the tribunal, Mr. Robinson, had written to the parties before the hearing saying that he expected valuation evidence.

19. The Robinson Tribunal heard and accepted evidence from Ms Chris Dapena, Marketing Director of The Property Group. She had 21 years' experience in the valuation field. Her evidence was that the highest market rent ever achieved in Bermuda was $35,000 per month and that was prior to the summer of 2008 whereafter rents had been falling. The highest monthly rent since then was $28,000. One Bermuda property in the "high-end luxury" rental category attracted a market rent of $20,000 per month prior to January 2011 but on becoming vacant the asking figure was decreased to $17,000 and later $15,000 without attracting a tenant. She also said that the annual rental value proposed by the Director for Mr. Banks' property on 29 September 2010 would exceed the top tax rate in Bermuda. She was cross-examined but no evidence was lead to challenge or contradict her evidence as to the levels of market rent achieved in the Bermuda "high-end luxury" rental category.

20. The Director appears to have taken objection to the relevance of Ms Dapena's evidence as something of an afterthought. At paragraph 29 of its determination the Robinson Tribunal said this:

> "The Tribunal understands that, consequent upon his submissions and evidence on both the 29 September and 5 October 2011 hearing dates, the Director takes the view the Tribunal should <u>not</u> consider evidence of rental values in Bermuda as at the date of deposit of the Draft 2009 Valuation List or before confirmation of the 2009 list. Rather it is the Director's position that the Tribunal shall only consider whether the ARVs in the 2009 List are *...fair one with another.* This view is held because (according to his submission) the

> Director regards the 2009 List after its 1 July 2010 confirmation to be conclusive of the ARVs for valuation units in it, including the ARVs proposed for the units. Accordingly, consideration of evidence of the rental values of other valuation units is (in the Director's submission) not relevant to the issue before the Tribunal. For this reason the Director did not adduce evidence of rental values at the hearing."

21. That contention was rejected by the Tribunal but it does however encapsulate the core of Mr. Small's submission before us. In the result the Tribunal concluded that the cumulative annual value for the units was $360,000 made up of $300,000, $40,000 and $20,000 for each of the three units and directed the Director to amend the 2009 list accordingly and refund the overpayment of land tax since 1 January 2010. The Director had been proposing a cumulative annual value of $720,000, i.e. twice the figure adjudged by the Tribunal to be appropriate.

The Relevant Statutory Provisions

22. It is necessary next to look at the relevant provisions of the Act.

Section 1(1) defines annual rental value

> ""annual rental value" means the rent at which a valuation unit might reasonably be expected to let from year to year if the tenant undertook to bear the cost of internal repairs, and the landlord to bear all other reasonable expenses necessary to maintain the valuation unit in a state to command that rent, but excluding any element attributable to any tax payable under this Act."

Section 3 requires the Director to prepare a draft valuation list and section 4 provides that in preparing it:

> "....regard should be had to the annual rental values of valuation units to be included therein as a whole, with the object of ensuring fairness of annual rental values between valuation units, one with another."

By section 9 the draft valuation list has to be deposited in each post office in Bermuda no later than 30 June in the year in which it is prepared.

Section 11 gives any person aggrieved the power to object and section 14 prescribes the grounds of objection which include:

> "(a) That the annual rental value of any valuation unit appearing therein is incorrect or unfair having regard to other annual rental values in the draft valuation list."

Section 17 deals with proposals of the Director for amendments to the draft list.

Section 19 provides for the creation of a land valuation appeal tribunal and section 20 spells out its functions. It has to consider the objections to the draft valuation list, the proposals of the Director for its amendment and the objections to such proposals.

Section 20 (3) is important and provides:

> "(3) In considering objections and proposals by the Director, the Tribunal shall have regard to –
>
> (a) annual rental values current on the date of the deposit of the draft valuation list concerned; and
> (b) The object of ensuring the annual rental values in the draft valuation list are fair one with another."

Section 21(3) provides, inter alia, for the right to call evidence relating to the proposal or objection.

Section 22 provides for confirmation of the draft valuation list whereupon it becomes the valuation list from 1 July in the year in which it is deposited under section 9.

23. One moves on then to proposals for amendments to the confirmed list which are dealt with in section 25. The structure of the section is to follow, as appropriate, the procedure for amending the draft list. By subsection (2) various provisions relating to amendments to the draft list are applied mutatis mutandis to the confirmed list. These include sections 14, 20 and 21. Subsection (3) expressly disapplies certain provisions, most particularly section 20(3)(a) does not apply to ***proposals*** by the Director for the amendment of the valuation lists. The draftsmen, however, retains section 20(3)(a) in relation to

objections. Thus in considering an objection to a proposal to amend the confirmed list the tribunal still has to have regard to annual rental values.

24. Two other provisions require mention. The first is that the valuation list is reviewed every five years (section 26) and the second section 28 which provides:

> " Subject to this Act, the valuation list from time to time in force shall, for the purposes of this Act, be conclusive of the annual rental value of any valuation unit therein notwithstanding that any objection or proposal of the Director or any appeal under this Part remains undetermined:
>
> Provided that on the final determination of any such objection, proposal or appeal the valuation list shall be construed subject to the final decision thereon and the Director shall amend the valuation list accordingly."

25. The Chief Justice dealt summarily with the evidence point rejecting the proposition that the statutory scheme operates in such a way as to deprive a tax payer of the right to challenge the annual rental value assessment when an objection has been filed in time (as in the present case) but not considered before the confirmation of a valuation list in which it is contained. He referred to section 28 emphasising the proviso and saying that in his view the intention of the provision was clear. However, if there was any ambiguity the construction contended for by the Director would be inconsistent with the Bermuda Constitution and he would reject it. He said the Robinson Tribunal was correct in its conclusion that it could consider the merits of the valuation objection which had been timely filed in relation to the draft list and never determined without fault on the tax payer's part.

26. The cornerstone of Mr. Small's argument is that there is a fundamental distinction in approach to be taken by the Tribunal between proposals to amend and objections to the draft list on one hand and an objection to a proposal to amend the confirmed list on the other. His contention is that where there is an objection to a draft list both sections 20(3)(a) and (b) are in play. In those circumstances the Tribunal does have to have regard to annual rental values and thus valuation evidence is admissible, but where the list is confirmed not draft only section 20(3)(b) applies; the Tribunal does not have

regard to valuation evidence but only to whether rental values in the lists are fair one with another.

27. There is, in my judgment, a fundamental difficulty of construction with this submission. Section 26(3) only disapplies section 20(3)(a) with regard to *proposals* and not *objections*. The remainder of the subsection is expressly retained by section 25(2). Accordingly Mr. Small's construction requires the words *"objections and"* to be read into section 25(3) immediately before the word *"proposals."* This would be a surprising omission on the part of the draftsman and, as Lord Pannick points out, there is good reason for the distinction between the proposals to amend a confirmed list and objections to those proposals. A proposal to amend a confirmed list must still be considered and approved by the tribunal (because section 25(2) applies section 17(1) and 20(1) to a confirmed list). If, however, there is no objection to the proposal it is uncontroversial and there is no need for the Tribunal to go into valuation evidence. If, on the other hand, the proposal is controversial there are good reasons why annual rental values should be considered. In the first place a person included in the list by virtue of a proposal to amend a confirmed list will have had no prior opportunity to challenge the annual rental values in that list; if the owners of comparable properties have not challenged annual rental values which apply to their properties and the owner of the new inclusion is limited to arguing only that annual rental values are not fair "one with another" he will be forced to bear a tax liability based on an annual rental value which is incorrect. Also, the Director would be able to render his valuation decisions immune from evidence based challenge simply by waiting until confirmation of the valuation list before seeking to amend it. This would seem to me to be manifestly unfair.

28. I am quite unpersuaded that there is any basis for a distinction between the treatment of objections to the draft list and the confirmed list as submitted by Mr. Small. Such a distinction does not accord with the natural and obvious reading of the Act. Nor is there any reason why the draftsman should have wished to create such a distinction. Furthermore it would be liable to produce a manifest injustice.

29. Were Mr. Small's construction correct it would not prevent the tribunal from taking into account valuation evidence if it felt it appropriate to do so. The word "shall" in section 20(3) indicates what the tribunal must have regard to. If section 20(3)(a) is deleted and annual rental values do not *have* to be taken into account there is nevertheless no prohibition against taking them into account.

30. I accept Lord Pannick's submission that under section 14(a) read with section 25(2) and 25(3) it is open to an aggrieved party to object to any amendment proposal on the grounds that "the annual rental value of any valuation unit appearing (in the list) is incorrect or unfair having regard to other annual rental values in the draft list". It is also the case that the right to produce evidence (section 21(3)) applies to the hearing of objections to both the confirmed and draft lists (see section 25(2)).

31. Lord Pannick makes the point that the Director does not challenge the factual findings of the Tribunal. The Director was proposing an annual rental value totalling $720,000 but the valuation evidence admitted and accepted by the tribunal was that nothing approaching this could be obtained – a finding not challenged by the Director whose argument is limited to whether the evidence was admissible under the Act; although he concedes it would have been had the objection been to the draft rather than the confirmed valuation list. Acceptance of Ms Dapena's evidence leads to the Tribunal's inevitable conclusion that the annual rental values proposed by the Director are "incorrect and unfair" (see section 14). It is to be noted that the annual rental value in section 1 is defined by the amount of rent that can be received. The stark issue in the present case is whether market value evidence is admissible to establish this. In my judgment it is, regardless of whether the objection is to the confirmed or the draft valuation list. I am unpersuaded by Mr Small's argument that once the list has been confirmed public confidence and policy dictate that thereafter there should be consistency in the list. The exercise of considering an objection is much simpler and less time consuming, he argues, if valuation evidence is not to be taken into account, but that is not a good reason in my judgment for achieving an unjust result.

32. A point was made about the structure of section 20(3), but I do not see any conflict between section 20(3)(a) and section 20(3)(b). The tribunal must have regard to both and decide in an individual case the weight to be attached to each.

33. As is apparent from the foregoing, the Director's case would in any event fail if the Tribunal in the present case was considering an objection to the draft valuation list rather than to the confirmed list. Mr Small's argument is that it is quite clear that the Robinson Tribunal considered an objection to the confirmed list and the confirmed list alone. In this regard it is relevant to refer to the chronology of events. On 31 August 2010 the Jones Tribunal heard Mr. Banks' objection to the 2008 proposal; that was in respect to the 2004 confirmed list. But on 28 June 2010 Mr. Banks had objected to the way in which the units had been included in the 2009 Draft List. That objection remained undetermined at the time of the hearing before the Robinson Tribunal in September and October 2011. Thus, prior to the Robinson Tribunal hearing there where two extent objections; one made on 28 June 2010 to the draft list and one made on 27 October 2010 to the "by then" confirmed list. The Director sought clarification as to which was to be determined and Mr. Banks' advocate emailed that he wished the hearing be used to hear his objection to the confirmed 2009 list only. Mr. Robinson confirmed this on behalf of the Tribunal by email of 20 September 2011 saying the hearing would be limited to the objection submitted by Mr. Banks on 27 October 2010. The email however went on:

> "It is also agreed that the ground of the objection is that the said valuation list is incorrect or unfair, within the context of section 14(a) of the Land Valuation and Tax Act 1967 as regards valuations proposed in respect of the three (3) units indicated in the objection...it is acknowledged that the objection incorporates a submission that the annual rental values for the three units exceeds expected rental value."

Mr. Banks chose not, to ask the Tribunal to determine his objection to the draft list. Mr Small submits that this was for tactical reasons but I think this was more a matter of practicality because neither Mr Banks nor his advisers

had any reason to believe at that time that anything significant turned on a distintion between the draft and the confirmed list. At any rate Mr small submits that the Tribunal was bound to follow the regime required by the Act for dealing with objections to the confirmed list ie the the evidence should not have been admitted.

34. The Director's argument on this issue seems to me to be wholly without merit and ignores the practicality of the situation. The Jones Tribunal had conclusively determined the number of units points in favour of Mr. Banks. It told the Director to issue a new proposal for the property including three valuation units and that is what the Director did on 29 September 2010. It is not correct, as submitted by the Director, that if Mr. Banks had pursued his challenge to the 2009 draft list that would have brought the number of units again into issue. It is true that Mr. Banks' property had been included in the 2009 draft list as a single unit but that issue had been resolved by the Jones Tribunal and not appealed.

35. Mr. Banks' objection to the draft list was never withdrawn. As Lord Pannick points out it is obvious why the parties and the Robinson Tribunal took the course that they did. The draft list had been superceded by the confirmed list. In the absence of any reason to believe that it made any difference, for reasons of practicality and common sense, the parties focused their attention on the extant decision rather than continuing to examine one that had been abandoned, but Mr. Banks still had the right to challenge the entry in the 2009 Draft List and no doubt would have done so had the Director taken the point at the time of the email exchanges before the Robinson Tribunal hearing that valuation evidence was only admissible on a challenge to the draft list. The reality of the situation is that it was apparent to all that valuation evidence would be called. Indeed as late as 26 September the Chairman of the Tribunal contacted both sides and said his thinking was that annual rental values of 5-8 other similar properties would be helpful. I cannot accept that the Director was deprived of an opportunity to present valuation evidence. As Lord Pannick points out the Director could easily have been prepared to adduce such evidence in case he was unsuccessful in persuading the Tribunal it could not

have regard to it, but he chose not to do so. Indeed the Tribunal adjourned from 29 September 2011 to 5 October 2011, but he still did not seek to do so.

36. There is no doubt that the hearing before the Robinson Tribunal proceeded on the basis of an objection to the confirmed list. However the objection to the draft list was never withdrawn by Mr Banks and in reality subsumed within the hearing and, as the Chief Justice pointed out, section 28 of the Act provides that the confirmed list must be construed subject to the final decision on any objection that remains undetermined. As Mr Banks succeeds on other grounds I prefer not to express a concluded view on whether, in the circumstances, the Robinson Tribunals' decision could be treated as resolving Mr Banks' objection to the draft list.

37. The Director fails on the evidence issue because Mr. Banks was entitled to call valuation evidence on an objection in relation to the confirmed list. Even if Mr. Small is correct on the statutory construction point, which in my view he is plainly not, the tribunal would still have a discretion, as opposed to an obligation to consider evidence of annual rental values.

Conclusion

1. The number of units point was decided in favour of Mr. Banks by the Jones Tribunal on 10 September 2010 and there has been no appeal and it is not appropriate for this Court to revisit it on an academic basis.
2. On the true construction of section 20(3) the Robinson Tribunal was right to admit valuation evidence on Mr. Bank's objection to the Director's proposal for an amendment to the confirmed list.
3. I would therefore dismiss the appeal.

Signed

Baker, JA

I agree Signed

Zacca, P

I agree Signed

Ward, JA