SUPREME COURT OF QUEENSLAND

CITATION:	*Ballymaloe Pty Ltd v. Retail Shop Leases Tribunal & Anor* [2003] QSC 369
PARTIES:	**BALLYMALOE PTY LTD** **ACN 093 253 029** (applicant) **v.** **RETAIL SHOP LEASES TRIBUNAL** (first respondent) **and** **JIMWAY PTY LTD** **ACN 010 632 989** (second respondent)
FILE NO:	5482 of 2003
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	31 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	14 August 2003
JUDGE:	Helman J.
CATCHWORDS:	ADMINISTRATIVE LAW – EXCESS OF JURISDICTION – whether Retail Shop Leases Tribunal is in excess of its jurisdiction in upholding valuer's decision – whether valuer is independent as required by the Act – meaning of 'independent valuer' *Judicial Review Act* 1991 ss. 18(2), 41 *Retail Shop Leases Act* 1994 ss. 5, 28(3), 88(1) & 109(3)(a) *Craig v. South Australia* (1995) 184 C.L.R. 163 *R. v. Essex Justices, ex parte Perkins* [1927] 2 K.B. 475 *R. v. Lilydale Magistrates Court* [1973] V.R. 122 *R. v. Williams, ex parte Phillips* [1914] 1 K.B. 608
COUNSEL:	J.M. McKenna S.C. for applicant M. Jarrett for second respondent
SOLICITORS:	Clarke Dowling for the applicant C.W. Lohe, Crown Solicitor for the State of Queensland, for the first respondent Lang Hemming & Hall for the second respondent

[1] This is an application for relief under the *Judicial Review Act* 1991 in relation to a decision of the Retail Shop Leases Tribunal made on 23 May 2003. The Tribunal found that a determination of current market rent by Mr Gregory Clarke, specialist retail valuer, made on 29 November 2002 was valid and binding as between the applicant, Ballymaloe Pty Ltd, and the second respondent, Jimway Pty Ltd. The ground of the application is that the Tribunal's decision was invalid and made without jurisdiction, or alternatively in excess of jurisdiction, by reason of its 'failure to disregard the common law of waiver (and analogous doctrines) and to apply the express terms of section 28(3) of the *Retail Shop Leases Act* 1994 (Qld)' to decide the validity of the determination. Ballymaloe seeks an order quashing the decision of the Tribunal, a declaration that the decision was invalid and made without jurisdiction or in excess of jurisdiction, and a declaration that the determination was ineffective to fix the rental as the valuer was not 'independent of the interests of the lessor and lessee' as required by s. 28(3).

[2] So far as it is relevant, s. 88(1) of the *Retail Shop Leases Act* provides that the Tribunal's hearing of a retail tenancy dispute and the Tribunal's order must not be questioned in a proceeding other than a proceeding based solely on either or both of the following grounds –

> (a) the Tribunal had or has no jurisdiction, or has exceeded its jurisdiction, in the hearing or in making the order;
>
> (b) there has been a denial of natural justice.

There was no suggestion before me that (b) had any application to this case. Section 18(2) of the *Judicial Review Act* provides that that Act does not affect the operation of s. 88 of the *Retail Shop Leases Act*.

[3] At all times relevant to this application Jimway was the lessee of retail shop premises on the ground floor of the Civic Arcade at 65-69 Adelaide Street, Brisbane. Ballymaloe was at all relevant times the lessor. The lease is registered lease no. 703446321. Jimway conducts a newsagency called Civic Arcade News in the premises. The term of the lease began on 27 June 1998 for an initial term to expire on 26 June 2002. It contained provisions for two options for renewal, each of four years: clauses 17.1 and 17.3. Clause 16.3 provided for the procedure to be adopted in determining the rent for the option periods:

> 16.3 **RENT REVIEW FOR OPTION PERIODS:** The annual rent for the first lease year of each of the Option Periods granted pursuant to Clauses 17.1 and 17.3 hereof shall be determined in the following manner:
>
> 16.3.1 the annual rent shall be the current market rent which shall be the rent which a willing Lessor is prepared to accept from a willing Lessee for the demised premises with vacant possession on the assumption that the same has been maintained in good and substantial repair order and condition as required by this Lease;
>
> 16.3.2 the current market rent shall be agreed upon between the Lessor and the Lessee but if not so agreed by one (1) month prior to the commencement of the lease year under

review the same shall be determined by such Specialist Retail Valuer (as defined by Section 5 of the Retail Shop Lease Act 1994) as may be agreed upon between the Lessor and the Lessee but if not so agreed by twenty-one (21) days prior to the commencement of the lease year under review then by such Specialist Retail Valuer as shall be nominated by the Chief Executive pursuant to the provisions of Section 28 (2) of the said act;

16.3.3 any such Specialist Retail Valuer so acting shall be deemed to be acting as an expert and not as an arbitrator and his determination shall be final and binding on both parties;

16.3.4 if the current market rent is agreed upon between the Lessor and the Lessee as aforesaid the same shall be recorded in writing and signed by or on behalf of each of the parties hereto and a copy furnished to each party however if the current market rent is determined by the Specialist Retail Valuer as aforesaid the determination of such Valuer shall be reduced to writing and a copy thereof signed by such Valuer shall be furnished to each party;

Section 28 of the *Retail Shop Leases Act* provides for rent review on the basis of current market rent:

28.(1) This section applies if –

(a) rent under a retail shop lease is to be reviewed on the basis of the current market rent of the leased shop; and

(b) the lessor and lessee can not agree on the current market rent within 1 month after the review date.

(2) The current market rent is to be determined by a specialist retail valuer agreed by the lessor and lessee, or failing agreement, nominated by the chief executive.

(3) The valuer may carry out the determination only if the valuer is independent of the interests of the lessor and lessee.

In a letter dated 21 March 2002 Jimway gave notice to Ballymaloe of its exercising the first option. Ballymaloe accepted exercise of the option on 25 March 2002. The rent for the last year of the initial term was $90,312 per annum, excluding goods and services tax, when the option was exercised. Ballymaloe and Jimway were unable to agree on the rent for the second four years. A meeting took place on 2 May 2002, when their disagreement became manifest. Negotiations followed between them and, from panels of valuers discussed by their representatives, they chose as valuer Mr Gregory Clarke of McGee Isles Love Pty Ltd, which trades as McGees National Property Consultants. Mr Ross Clarke, solicitor and director of Ballymaloe, and Mr Malcolm Macrae, specialist retail valuer and retail tenancy and business consultant of Retailers Association of Queensland Limited acting for Jimway, were aware at the time that Mr Gregory Clarke was chosen and that

McGee Isles Love had a business association with Ballymaloe in that it acted as a letting agent for vacant premises in the building.

[4] Mr Gregory Clarke received submissions from Ballymaloe and Jimway as to what the new rent should be. Ballymaloe contended for $98,800 per annum and Jimway for $39,000 per annum. Mr Gregory Clarke inspected the building on 4 November 2002, apparently failing to notice a sign in the window of a shop next to Jimway's in the building showing that McGees were acting as letting agents for the building, and on 29 November 2002 gave his determination that the new rent should be $60,500 per annum, which sum included $5,500 goods and services tax. Mr Gregory Clarke's decision was accepted by Jimway but not by Ballymaloe.

[5] In an affidavit sworn on 14 April 2003 Mr Gregory Clarke deposed to his being one of three directors in McGee Isles Love and his holding of one of two shares in his family company Mixon Pty Ltd. Each director earns a base salary and then takes a share of the profits. The issued capital of McGee Isles Love is 100 fully paid ordinary shares. Mixon holds forty-five shares, the family company of another director forty-five, and the other director ten. McGee Isles Love has three business units: agency, valuation, and management. Broadly speaking, each of the directors controls a business unit. Mr Gregory Clarke controls the valuation unit. Despite that loose arrangement the income and expenditure for all three units is consolidated.

[6] Mr Gregory Clarke swore that on 6 December 2002 an employee of McGee Isles Love spoke to him about the rent determination. Mr Gregory Clarke's account of that and what followed is in paragraphs 15 to 20 of his affidavit:

> 15 On December 6, 2002 Chris Tsianakas, who is an employee (not a director) of McGees spoke to me about the rent determination. He told me he had spoken to Ross Clarke and that Ross Clarke was not happy with the rent determination and might sue McGees. He told me that McGees had been doing work for Ballymaloe in respect of leasing of areas within the building and had been engaged by Ballymaloe to find a purchaser for the building.
>
> 16 Naturally this meant that Ballymaloe and McGees were in a commercial relationship in which McGees was likely to be earning money for work it would do for Ballymaloe. That revealed to me that I was not independent of the interests of the Lessor in accordance with Section 28(3) of the Retail Shop Leases Act.
>
> 17 Although I was aware of Section 28(3) prior to my appointment, at the time of my appointment I did not check to see if I was independent. It was not my practice at that time to check whether I was independent of the interests of the Lessor or Lessee, but it now is.
>
> 18 If I had known of the relationship between Ballymaloe and McGees at the time I was appointed, I would have declined the appointment.
>
> 19 As I set out in my letter of December 6, 2002 to the parties, it was my view that I was not independent of the interests of the Lessor and consequently, I had no alternative but to set aside the rent determination. On December 6, 2002 I telephoned Ross Clarke. He

did not wish to discuss the rent determination with me. I issued my letter of December 6 because I thought it was the only course of action open to me.

20 At no stage was I pressured by the other directors and owners of McGees or by Ross Clarke or by the threat of litigation to set aside the rent determination. It was a professional decision I made when the relationship between McGees and Ballymaloe was revealed to me.

[7] Mr Gregory Clarke notified Ballymaloe and Jimway of what he had learnt on 6 December 2002 in letters dated that day, which, omitting formal parts, were as follows:

> I refer to our telephone conversation on 6 December 2002 regarding my above Determination.
>
> It has come to my attention this morning that the firm, of which I am a Director, McGee Isles Love Pty Ltd (trading as McGees National Property Consultants) sold the above property to the current owner in 2001 and has recently been endeavouring to lease vacant space within the building.
>
> I was not aware of these facts when I accepted the joint appointment. If I had been, I would have declared a conflict of interest and declined the appointment.
>
> I therefore consider my determination has not been made in accordance with the Retail Shop Leases Act 1994, as Section 28(3) states:
>
> > *"The valuer may carry out the determination only if the valuer is independent of the interests of the lessor and lessee"*.
>
> As I now do not consider myself independent of the interests of the lessor, I request written acceptance from both parties for my determination to be set aside and another specialist retail valuer jointly appointed.
>
> If I had known at the time of accepting the joint appointment that I was not able to comply with my professional responsibilities as an expert, I would not have proceeded with the determination.
>
> Under the circumstances I believe that if any party associated with the process is not prepared to accept my determination, then it should be set aside and another independent valuer appointed.
>
> In acceptance of setting my determination aside, would you please return your copy of the document, together with covering letter and invoice, so the file can be noted and an appropriate credit note issued.

[8] Ballymaloe accepted Mr Gregory Clarke's request but Jimway refused it.

[9] By notice of dispute filed at the Retail Shop Leases Registry on 20 December 2002 Jimway sought an order that the valuation be upheld.

[10] The Tribunal recorded that there was uncontradicted evidence that the valuer did not know that McGee Isles Love was already acting for Ballymaloe when he accepted the appointment as valuer:

> However, there is uncontradicted evidence that the Valuer did **not** know that his firm was already acting for the Lessor when he accepted the "joint appointment". According to the Valuer's evidence, McGees carries on business in three more or less discrete "units", and it was a unit other than the Valuer's that, unknown to him, was already acting for the Lessor. The Valuer's first knowledge of that relationship was acquired on 6 December 2002, about one week after the decision in question was made. On these points the Valuer is supported by Mr Tsianakis, an employee of McGees "agency unit" (as distinct from the Valuer's "valuation unit"): Affidavit of Christopher Tsianakis 14 April 2003 paras 9, 10, 13; Affidavit of G D Clarke 14 April 2003 paras 8, 15, 17, 20. See also the Affidavit of Malcolm Macrae 21 March 2003 para 22. Counsel for the Lessor made a guarded concession to the same effect, but in view of the contradicted evidence no such concession was needed.

(There is an obvious typographical error in the last sentence of that paragraph: 'contradicted' should read 'uncontradicted'.)

[11] The Tribunal noted that, as the parties before it agreed, the facts of the case (including the valuer's forty-five per cent. interest in McGee Isles Love) were 'substantially undisputed', leaving the only real questions as:

(a) Whether s. 28(3) of the *Retail Shop Leases Act* applies when parties 'purport to choose a valuer without resorting to the Act';

(b) If so, whether there had been a 'breach' of s. 28(3); and

(c) If so, whether the valuation in issue was void.

Those questions could not be resolved, the Tribunal observed, by the 'hindsight' of the valuer or by reference to the fact, sworn to by Mr Ross Clarke on 2 March 2003 in an affidavit, that he was not aware of s. 28(3) until after the valuer's decision was made.

[12] The Tribunal recorded that it had been presented with two interpretations of the word 'independent' in s. 28(3). For Ballymaloe it was contended that that provision is mandatory and imported into the Act 'all the equitable rules relating to conflicts of interest, and all the common law principles of apprehended bias'; accordingly it was immaterial that the valuer did not know of McGee Isles Love's 'prior associations' with Ballymaloe; it was enough that, on the undisputed facts, there arose a reasonable apprehension that the valuer could not approach his task with an open mind so that his decision could not stand. On behalf of Jimway it was argued that, in enacting s. 28(3), the legislature, 'in a manner consistent with the relatively informal methods of adjudication sanctioned by the Act, deliberately avoided terms of legal art in favour of the ordinary word "independent" '. That word, so the argument for Jimway continued, was to be taken literally, so that if the valuer, as an individual person, did not know of McGee Isles Love's other commitments to Ballymaloe there was no breach of s. 28(3). Further, the valuer was an expert witness, not an adjudicator such as a commercial arbitrator, and so he was not affected by the rules as to bias, which were designed 'for judicial and quasi-judicial functionaries'.

[13] The Tribunal's conclusions were expressed thus:

> In our view the Lessor cannot have it both ways. The Lessor seeks to have all the benefits of the fiduciary and apprehended bias rules while ignoring the limitations thereto. Assuming (without deciding) that s 28(3) imports into the Act all the subtleties of fiduciary duties and apprehended bias, the Lessor cannot simultaneously rely on those doctrines and reject their qualifications, namely the rules as to disclosure and waiver.
>
> In our view the Act does not intend to deprive the parties of their capacity to waive bias or a conflict of interests. Where there is knowledge and free acceptance of prior associations between a valuer's firm and a lessor there is no threat to the policy of a fairer, more certain environment for lessees – **a fortiori** when the party alleging bias is not the one who would normally be entitled to complain.
>
> Just as there is no operative bias when a waiver occurs, so, too, there is no lack of independence, within the meaning of s 28(3), when a lessor and a lessee freely accept a prior association between a valuer (or his firm), as in this case. This applies, **a fortiori** if (as was argued) the Valuer's appointment is not covered by s 28(2).
>
> It is unnecessary for us to decide what the effect of s 28(3) would be if a valuation were affected by an interest that is not disclosed.
>
> In our judgment the Valuer's decision of 29 November 2002 stands, and, so far as it extends, determines the rights and duties of the parties to this case. We find that the procedure prescribed by the lease/sublease of the subject premises, executed on 22.10.98, for determining the annual rent for the first lease year of the option period commencing on 27 June 2002 has been followed by the claimant and the respondent.
>
> <u>It is ordered that:</u>
>
> The determination of Gregory Dixon Clarke, specialist retail valuer made on 29 November 2002 is valid and binding as between the claimant and the respondent.

[14] As I understand the Tribunal's reasons for its decision, its answer to its question (a) was that s. 28(3) does apply in the circumstances defined in that question, and its answer to question (b) was that there had been no 'breach' of s. 28(3) in this case. The reason given for the latter conclusion was that since both lessor and lessee were aware of all of the relevant facts as to the valuer's association with the lessor, and, notwithstanding that knowledge, waived any objection to his undertaking the valuation, there had been no 'breach' of s. 28(3): there was no 'operative bias' and so no lack of independence. The Tribunal, then, concluded that the valuer had been independent of the interests of the lessor and lessee not because he had made his determination without knowledge of, and therefore not influenced by, his financial interest in his determination, but rather because the parties had conferred independent status upon him by their fully informed waiver of any objection to his undertaking the valuation.

[15] The Tribunal's jurisdiction to hear the dispute between the parties derives from s. 109(3)(a) of the *Retail Shop Leases Act* which provides that a Tribunal has jurisdiction to hear a retail tenancy dispute about the procedure for the determination

of rent payable under a retail shop lease, but not the actual amount of the rent. The expressions 'retail tenancy dispute' and 'retail shop lease' are defined in s. 5, the definitions section, but no issue arose at the hearing before me concerning their application to the dispute between the parties or to the lease; nor was there any issue as to the Tribunal's jurisdiction to hear the dispute.

[16] The argument for Ballymaloe was that the Tribunal erred in law in failing to construe s. 28(3) 'as imposing a mandatory pre-condition upon the jurisdiction of the specialist retail valuer' and that s. 88(1) and the *Judicial Review Act* permit that error to be reviewed because it involved the Tribunal's exceeding its jurisdiction. The Tribunal's jurisdiction, so Ballymaloe's argument continued, being confined to determining retail tenancy disputes about the procedure for the determination of rent payable under a retail shop lease, is not empowered to resolve such disputes about procedures 'by reference to irrelevant inquiries about waiver arising from a fundamental misunderstanding of the meaning of s. 28(3) …'

[17] No submissions were made on behalf of the Tribunal as first respondent, it indicating it would abide the decision of the court.

[18] On behalf of Jimway the application was resisted on the ground that the Tribunal had not exceeded its jurisdiction, that while its reasons were expressed in part by reference to the issue of waiver, those reasons disclosed that it found as a matter of fact that the valuer did not lack independence 'for the purposes of s. 28(3) …' The true position, Jimway's argument continued, is that the application is nothing more than an impermissible attempt to review the Tribunal's finding of fact.

[19] The ordinary or natural meaning of the words of s. 28(3) shows that the valuer's independence of the interests of lessor and lessee is mandatory: the words 'only if' indicate that. It is not necessary to go further than that in deciding that issue, but, as submitted on behalf of Ballymaloe, there are other indications in the Act that reinforce that conclusion: s. 19 which prohibits contracting out of the Act; s. 20, which provides that the Act prevails over inconsistent leases; and s. 36, which provides that certain rent review provisions of leases are void, including a requirement that the determination of the current market rent of the leased shop be made other than in accordance with the Act (paragraph (c)). There is no proper basis, I think, for concluding that the parties to a retail shop lease can, by agreement, circumvent the requirement of s. 28(3), nor, I think, can reliance be placed on waiver or estoppel in justifying failure to comply with the requirement; the provision is clear and admits of no exceptions. It follows that the Tribunal was in error in determining the dispute against Ballymaloe on the ground of waiver of objection.

[20] In *Craig v. South Australia* (1995) 184 C.L.R. 163 at p. 176 Brennan, Deane, Toohey, Gaudron, and McHugh JJ. observed that, in considering what constitutes jurisdictional error, it was necessary to distinguish between, on the one hand, inferior courts that are amenable to certiorari, and, on the other, those other tribunals exercising governmental powers which are also amenable to the writ. Referring to the latter their Honours said:

> At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law.
> …

> If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it. (p. 179)

Those words apply as much to the relief sought on this application as they do to a writ of certiorari since the relief sought on this application is a prerogative order in the nature of, and to the same effect as, certiorari: s. 41 of the *Judicial Review Act*.

[21] In this case the Tribunal identified a wrong issue and asked itself a wrong question when it considered the question of waiver and so fell into jurisdictional error. Section 88 constitutes no obstacle to Ballymaloe's obtaining the orders its seeks, provided of course it appears that the requirement of s. 28(3) was not satisfied.

[22] When the valuer agreed to undertake the valuation and make his determination he was unaware of his financial interest in the determination, as the Tribunal recorded. That meant that he made his determination at a time when his mind was not affected in any way by concern for his financial interest. In the *Oxford English Dictionary* (2nd ed., 1989) the word 'independent' is relevantly defined as 'Not depending on others for the formation of opinions or guidance of conduct; not influenced or biased by the opinions of others; thinking or acting, or disposed to think or act, for oneself. (Of persons, their dispositions, etc.)' (Vol. VII, p. 848). In that sense the valuer was, as a result of his ignorance, perfectly independent of the interests of lessor and lessee. The determination the Tribunal was called upon to make was in essence one of fact: was the valuer independent of the interests of lessor and lessee? In the unusual circumstances of this case he was; his determination was independent in the sense – the relevant sense – given in the dictionary. The Tribunal itself recorded the relevant facts that must lead to that conclusion, and, although it put its decision on another footing, had it directed its attention to the question of fact it was called upon to determine, there was only one finding it could have made: that the requirement of s. 28(3) had been met. The Tribunal, then, reached the correct conclusion but for the wrong reason.

[23] On behalf of Ballymaloe it was argued, however, that '[w]hatever the precise boundaries of the concept of "independence" required by s. 28(3), it is plain that a valuer lacks that quality when:

> (a) he is a director and substantial shareholder of the lessor's own firm of property consultants in relation to the subject property.
>
> (b) he has a direct financial interest in the outcome of his deliberation.
>
> (c) he is in a position of substantial conflict of interest and duty.'

That argument necessarily rested on two, related, propositions: first, that in the absence of any suggestion of actual bias the word 'independent' should be construed generally in accordance with the apprehension of bias principle that applies to

questions of the independence and impartiality of judicial officers (see *Ebner v. Official Trustee* (2000) 205 C.L.R. 337, at pp. 344-346 per Gleeson C.J., McHugh, Gummow, and Hayne JJ; and secondly, following from the first, that the test to be applied in such cases is not subjective but objective so that lack of awareness of an association by a valuer is irrelevant. An example of the application of the latter principle to a judicial officer, a solicitor who was clerk to justices, is *R. v. Essex Justices, ex parte Perkins* [1927] 2 K.B. 475.

[24] I am not persuaded that either proposition is correct. The position of valuer as expert who deals privately with a dispute about rent is materially different from that of a judicial officer, a public official, sitting in a court of law in which public confidence must be maintained. While true independence is of course a requirement for a valuer, questions of appearance are not conclusive; a less circumscribed approached to the question of independence is called for, in my opinion. Consistently with that approach, if a valuer makes a determination that is demonstrably independent in the sense defined in the dictionary the valuer may properly be taken to be independent. It will of course be an unusual case indeed – as this one is – in which a valuer who, if one were to apply an objective test would be treated as lacking independence, could nevertheless be found to have been independent of the interests of lessor and lessee when making a determination. Strong evidence indeed would be required to overcome the inference of lack of independence that should in general be drawn from evidence of a valuer's financial interest in the result of a determination. Independence in this context is an attribute required of the workings of the mind of a valuer, and so the test is, in the end, subjective. Although evidence of objective facts, without more, will usually be sufficient to disqualify a valuer, in this case the evidence of independence is so clear as to overcome the effect of the evidence of the valuer's financial interest in the result.

[25] Although Ballymaloe would, strictly speaking, be entitled to the quashing order and the first declaration it seeks because the Tribunal, for the reasons I have given, fell into jurisdictional error in making its decision, I shall refuse it that relief. That is because if I were to adopt that course and then reconsider the full record of the evidence and submissions before the Tribunal, as I was invited to do by Ballymaloe, I should merely reinstate the Tribunal's order, because the valuer was independent of the interests of lessor and lessee at the relevant time.

[26] I should add one further comment before concluding.

[27] I referred in the course of the hearing to the possibility of the refusal of relief on discretionary grounds: that the valuer was, as shown by the evidence before the Tribunal, independent in the relevant sense; and that Jimway, the party more likely to be adversely affected by the association between the valuer and Ballymaloe, did not challenge the valuer's determination. Another possible basis for the discretionary refusal of the relief sought would be Ballymaloe's acceptance, with knowledge of its association with the valuer, of his appointment: see *R. v. Williams, ex parte Phillips* [1914] 1 K.B. 608 and *R. v. Lilydale Magistrates Court* [1973] V.R. 122 in which certiorari was refused. It is not necessary for me to consider this question of discretion further, but I should add that since it seems the Tribunal could not refuse relief on a discretionary ground, it is difficult to maintain the proposition that this court could do so in reviewing the Tribunal's decision. The question before this court is the correctness or otherwise of that decision, so far as s. 88

permits it to be considered. In the cases I have mentioned the courts were reviewing primary proceedings, whereas in this case the court is reviewing the review of a primary proceeding, the valuation.

[28] The application will be dismissed. I shall invite further submissions on costs.