Neutral Citation No. [2010] NICA 30 | *Ref:* **COG7883**

Judgment: approved by the Court for handing down | *Delivered:* **30/06/10**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

KEITH HOLYWOOD

Appellant;

-and-

THE LAW SOCIETY OF NORTHERN IRELAND

Respondent.

_____

IN THE MATTER OF AN APPLICATION BY KEITH HOLYWOOD FOR JUDICIAL REVIEW
AND
IN THE MATTER OF A DECISION OF THE LAW SOCIETY OF NORTHERN IRELAND

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Before: Higgins LJ, Coghlin LJ and McLaughlin J

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COGHLIN LJ

[1] This is the judgment of the court.

[2] This is an appeal by Keith Holywood ("the appellant") from a decision of Weatherup J dismissing the appellant's application for judicial review of a decision by the Judicial Committee of the Law Society of Northern Ireland ("the Society") dated 9 March 2007. The Judicial Committee had refused to relax or dispense with the requirements of the Solicitors Admissions and Training Regulations 1988 ("the Regulations") so as to permit the registration of the appellant as a student solicitor of the Society. Mr Martin O'Rourke appeared on behalf of the appellant while the respondent was represented by Mr David Scoffield. We are grateful to both counsel for their carefully prepared and clearly delivered written and oral submissions.

Factual background

[3] The appellant is 32 years of age and he graduated from the Queen's University Belfast in July 2002 having obtained an upper second class honours degree in law. He intended to enter professional practice but, for personal reasons, he did not apply to the Institute of Professional Legal Studies ("the Institute") in Belfast but went instead to England where he attended the College of Law in Chester. He obtained a Diploma in Legal Practice Certificate ("LPC") from the latter institution in 2003.

[4] Due to a change in his personal circumstances the appellant then returned to Northern Ireland rather than completing the two years of professional training with a practising solicitor that is required in order to qualify to practice in England and Wales. Since his return to Northern Ireland the appellant has worked both in a solicitor's office and with the Citizens Advice Bureau ("CAB") in Newry and South Down.

[5] The appellant wished to achieve registration as a student with the Society in Northern Ireland in order to qualify as a solicitor in this jurisdiction. Accepting that he did not qualify for registration as a student solicitor under any of the "five gateways" provided by Regulation 8 he applied to the Education Committee of the Society for relaxation or dispensation of the requirements of Regulation 8 in accordance with Regulation 18. The Education Committee initially considered the appellant's application on 28 September 2006. The Committee acknowledged and confirmed the appellant's view that he did not meet the criteria for registration under Regulation 8 and advised him that it did not have the power to consider his application for relaxation of/dispensation with the other requirements of that regulation in accordance with Regulation 18. The appellant subsequently applied to the Judicial Committee of the Council of the Society under Regulation 18 for relaxation or dispensation of the requirements of Regulation 8.

[6] In a decision issued on 9 March 2007 the Judicial Committee refused the appellant's application for waiver under Regulation 18. The Judicial Committee reached the conclusion that the Regulations were not unlawful, that the decision in Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova [2003] EUECJ C-313/01 ("Morgenbeser") did not apply to the appellant and that it was not within the powers of the Committee to effect a policy change by means of the waiver provisions of Regulation 18.

[7] The appellant exercised his statutory right to appeal from the decision of the Judicial Committee to the Lord Chief Justice pursuant to Article 6 of the Solicitors (Northern Ireland) Order 1976 ("the 1976 Order") who adjourned the hearing of the appeal pending the outcome of the applicant's challenge to the lawfulness of the Regulations by way of judicial review. The appellant

was granted leave to apply for judicial review and invited by the court to apply to the Education Committee for admission pursuant to Regulation 8(5) as suggested by the Judicial Committee. The appellant made such an application but was refused admission by a decision of the Education Committee dated 28 August 2008. He appealed from that decision to the Judicial Committee which dismissed his appeal by letter dated 10 November 2008. The appellant then lodged a further appeal to the Lord Chief Justice and requested that it should be joined with is earlier appeal. The appellant then proceeded with his application for judicial review which was dismissed by Weatherup J on 21 May 2009 as recorded above.

[8] It seems that, as a consequence of the difficulties that he had encountered in complying with the Regulations, the appellant applied at least once for a place on the Institute of Professional Legal Studies but that his application was unsuccessful.

[9] The grounds of the appellant's application for judicial review have been set out in the Order 53 statement and helpfully summarised at paragraph 17 of his skeleton argument as follows:

(*i*) The 1988 Regulations are unlawful in that they have not been maintained in accordance with the jurisprudence of the ECJ – specifically the Morgenbesser decision

(*ii*) Whether or not the Regulations are unlawful the Society's reason for not amending Part II – "Registration and Selection" – of the Regulations in order to give clear expression to the Morganbesser principle is itself unlawful and ultra vires the enabling statute.

(*iii*) If the Regulations can be rendered lawful in Morganbesser situations by the judicious use of the waiver provisions of Regulation 18 the Society's refusal to similarly apply the waiver in the appellant's case is improperly motivated or is alternatively irrational.

The legal framework

[10] The relevant articles of the 1976 Order provide as follows:

> "Part II – Qualifications and admission.
>
> *Qualifications for practising as solicitor*
>
> Part IV A person shall not be qualified to act as a solicitor unless –
>
> (*a*) he has been admitted as a solicitor;

(*b*) his name is on the roll;

(*c*) he has in force a certificate issued by the Registrar in accordance with the provisions of this Part authorising him to practice as a solicitor (in this Order referred to as a 'practising certificate').

Admission of Solicitors

5-(1) Subject to paragraph (5), a person shall not, after the commencement of this Article, be admitted as a solicitor unless he has obtained a certificate from the Society that they are satisfied –

(*a*) that he has complied with the requirements applicable to him by virtue of Regulations made under Article 6; and

(*b*) as to his character and his fitness to be a solicitor …

Regulations as to the education, training etc, of persons seeking admission or having been admitted as solicitors

6-(1) The Society may make Regulations with respect to the education and training of persons seeking admission or who have been admitted as solicitors and (without prejudice to the generality of the foregoing) such Regulations may prescribe –

(*a*) the education and training, whether by service under apprenticeship or otherwise, to be undergone by persons seeking admission as solicitors;

(*b*) the examinations or other tests to be undergone by persons seeking admission as solicitors;

(*c*) the qualifications, experience, conduct, duties and responsibilities of persons seeking admission as solicitors or solicitors providing apprenticeships (including the remuneration

payable under such apprenticeships) under the Regulations;

(*d*) the circumstances in which apprenticeships may be transferred or discharged or education or training of persons seeking admission as solicitors may be abridged, extended or terminated;

(*e*) the control and discipline of persons seeking admission as solicitors, including requirements to be imposed in consequence of contraventions of the Regulations;

(*f*) the circumstances in which a person seeking admission as a solicitor may apply to the Society to waive the application of any provision of the Regulations in his case or to review any decision taken by the Society in respect of him for the purposes of the Regulations and the procedure for such applications;

(*g*) the education, training and examination or other tests to be undergone by persons who have been admitted as solicitors;

(*h*) the charging and application by the Society of fees to be paid by persons undergoing education and training for the purposes of the Regulations;

(*i*) such transitional and incidental matters as the Society may think necessary.

(2) Regulations under paragraph (1) may make the opinion, consent or approval of the Lord Chief Justice, or of any examining or other body or authority named in the Regulations, or of the Society or the Council or any Committee of the Council material for the purposes of any provision of the Regulations.

(3) subject to Regulations made under paragraph (1)(*f*), on any application by a person seeking to be admitted as a solicitor, the Society may –

(*a*) waive the application of any provision of the Regulations under paragraph (1) to that person; or

(*b*) review any decision taken by the Society with respect to that person under these Regulations."

[11] Part II of the relevant 1988 Regulations provides as follows:

"Part II
Registration and Selection

(5) .. A person who intends to seek admission as a solicitor shall apply to the Society for registration as a student.

(6) The Secretary shall maintain a Register of Students.

(7) An applicant for registration shall before 1 July in the relevant year, time in this respect to be of the essence, lodge with the Secretary

(*1*) A Petition in such form as the Committee may by resolution lay down;

(8) An applicant who has complied with Regulation 7 shall be registered (subject to Regulation 9) but such registration shall be conditional upon the student producing proof to the satisfaction of the Society that he,

(1) (*a*) Possesses a degree in law acceptable to the Committee and satisfies the Society by way of examination or otherwise that he has attained a level of knowledge acceptable to the Society of the following subjects, namely;

Law of Evidence
Company Law, and

(*b*) has been offered a place at the Institute or Graduate School or

(2) (*a*) Possesses a degree acceptable to the Committee in another discipline; and

(*b*) satisfies the Society by way of examination or otherwise that he has attained the level of knowledge acceptable to the Society of the following subjects, namely;

Constitutional Law, Tort, Contract, Criminal Law, Equity, Land Law, Evidence and Company Law and

(*c*) has been offered a place at the Institute or Graduate School.

(3) Has served in an executive capacity

(*a*) as a bona fide law clerk or employee of a solicitor for a continuous period of seven years; and

(*b*) attained the age of 29 years; and

(*c*) has satisfied the Committee as to his standard of general education and knowledge and experience of the work of a solicitor or,

(4) Has been admitted as a solicitor or called to the Bar in any jurisdiction within the Commonwealth or the Republic of Ireland and, in the case of a barrister, has procured himself to be disbarred, or

(5) Has satisfied the Committee that being a person of not less than 30 years of age, he has acquired such special qualification and/or experience as to render him to be accepted as a registered student.

Part VI
Miscellaneous and General

(18) Without prejudice to any of the powers contained in these Regulations, the Council may, in any case (including a case of non-compliance with the

> Regulations) in which it considers that the circumstances justify such a course, relax or dispense with any particular requirement of the Regulations on such terms as they may be appropriate."

[12] The Regulations have been supplemented in the following ways:

(i) The Solicitors Admission and Training (Mutual Recognition) Regulations 1990 supplemented the 1988 Regulations to provide that any applicant fulfilling the requirements of EC Directive 89/48/EEC (on Mutual Recognition of Education and Training in the EU), should apply to the Law Society for registration as a student under Regulation 8(4) or 8(5).

(ii) The Solicitors Admission and Training (Amendment) Regulations 1994 supplemented the 1988 Regulations by providing, inter alia, that all registered students to whom Regulation 8(1) or (2) applied should serve an apprenticeship for two years from registration to include the time spent at the Institute and should attend such lectures or courses of study and pass such examinations in such additional subjects as the Law Society should determine.

(iii) The Solicitors Admission and Training (Amendment) Regulations 2008 supplemented the 1988 Regulations to provide, inter alia, for the introduction of the Graduate School at Magee College (the "Graduate School") as an alternative to the Institute from 1 September 2008.

(iv) On 11 October 2006 the Law Society resolved that any requirements as to age in the Regulations should not be enforced, at the discretion of the President of the Law Society, pending the review and formal amendment of the Regulations.

The EU Legal Framework

[13] Article 39 EC provides that freedom of movement for workers shall be secured within the Community and Article 43 EC prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State within the framework of the provisions therein contained. Council Directive 89/48/EEC establishes a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years duration.

[14] In Morganbesser the applicant, a French national, obtained a law degree in France but did not qualify as an advocate in France. She worked for some time with a law firm in France and then commenced working for a legal practice in Italy. She sought to register with the Bar Council in Genoa as a trainee lawyer but was unable to do so because she had neither qualified as a

lawyer in France nor was she the holder of a recognised legal diploma from an Italian university. The European Court of Justice ("ECJ") held that authorities regulating admission to the legal profession in Italy were required to make an overall assessment of the experience and skills obtained by the applicant in France. That obligation extended to all diplomas, certificates and other evidence of formal qualifications as well as to the relevant experience of the person concerned, irrespective of whether they were acquired in a Member State or in a third country. It was the duty of the competent authority to examine in accordance with principles laid down by the ECJ whether, and to what extent, the knowledge certified by the diploma granted in another Member State and the qualifications and professional experience obtained there, together with the experience obtained in the Member State in which the candidate sought enrolment, must be regarded as satisfying, even partially, the conditions required for access to the activity concerned.

[15] The Council of the Bars and Law Societies of the European Union ("CCBE") has provided guidance to Bars and Law Societies in relation to the Morganbesser decision. The CCBE advised that the decision essentially extended the right of mobility to those still in training and not yet fully-qualified lawyers. Bars and Law Societies were encouraged to press for the establishment of Competent Authorities to perform the task of comparative holistic assessment of applicants' competences to carry out the professional role of "lawyer" in the host country. In particular:

> "National competent authorities should already have a list of subjects required in their own Member States. This list should be normally reduced to a smaller list of topics 'knowledge of which is essential in order to be able to exercise the profession'. (Article 1(*g*) of Directive 89/48/EEC). This is the yardstick against which the migrant applicant's professional qualification should be judged, taking into account objectively justified contextual differences, …."

Such differences may include the objective nature and duration of the studies and practical training, the different legal frameworks and the different fields of activity of the profession in the Member States.

[16] The principles laid down in Morgenbesser have been applied by the ECJ in Pesla v Justizministerium Mecklenburg-Vorpommern [C-345/08]. In that case the court confirmed that provisions of national law adopted for the purpose of laying down the knowledge and qualifications needed in order to pursue a particular occupation must not constitute an unjustified obstacle to the effective exercise of the fundamental freedoms guaranteed by Articles 39 EC and 43 EC. The authorities of a member State are obliged to take into consideration the professional qualification of the person concerned by

comparing his or her qualifications with the professional requirements laid down by the national rules. At paragraph 40 of its judgment the court said:

> "40. If that comparative examination of diplomas results in the finding that the knowledge and qualifications attested by the foreign diploma correspond to those required by the national provisions, the Member State must recognise that diploma as fulfilling the requirements laid down by its national provisions. If, on the other hand, the comparison reveals that the knowledge and qualifications attested by the foreign diploma and those required by the national provisions correspond only partially, the host Member State is entitled to require the person concerned to show that he has acquired the knowledge and qualifications which are lacking."

The development of legal education in Northern Ireland

[17] The Armitage Committee on Legal Education in Northern Ireland was appointed by the then Minister of Education on 28 February 1972 and delivered its report in May 1973. The Committee saw as the basic problem common to both branches of the profession the almost complete lack of any satisfactory form of direct professional training. It also recorded the almost complete absence of shared courses, apart from degree courses. The separate nature of such professional training as did exist meant that the two branches of the profession were in large part unaware of each others' problems which had led to difficulties that would not have arisen had each branch been aware of the pressures under which the other was required to work. The Committee recorded that any course of training followed in England would, of necessity, be deficient in Northern Ireland Law and Practice and that it would therefore be necessary for some provision to be made within Northern Ireland to remedy such a defect. The Committee was unable to recommend that students should receive their professional training for entry to the profession in Northern Ireland largely in England noting, in the course of doing so, the excessive costs and risk of a "brain drain", and expressed the view that the case for establishing an Institute of Professional Legal Studies within Northern Ireland was unassailable. At paragraph 65 of the report the Armitage Committee recorded that:

> "Northern Ireland has a distinct and separate legal system. Whilst there are large areas of statute law modelled on the statutes of the United Kingdom, these Acts have been adapted by the Northern Ireland Parliament to the needs of Northern Ireland. A

> separate body of relevant case law exists as a result of the decisions of the Northern Ireland Courts. Some grounding is also required in Northern Ireland Constitutional Law and the Northern Ireland Legal System whilst Land Law, Conveyancing and Family Law are materially different from the position in England. Differences in Civil and Criminal procedure are also highly important in practice."

Ultimately the Committee recommended that academic and vocational legal training should, as far as possible, be integrated into a coherent whole and that the content of the vocational course of training should be largely common to both branches of the profession. The Committee recommended that such an integrated course of professional vocational training should be provided at an Institute of Professional Legal Studies (the "Institute") situated close to the Law Faculty at Queen's University in Belfast.

[18] In October 1979 a Royal Commission Report on Legal Services in the United Kingdom was published. In dealing with Northern Ireland the report referred to the welcome afforded by the profession to the establishment of the Institute and confirmed that a number of their members had been impressed by the work being done by the Institute and, in particular, the close working relationship that had developed between the Institute, the University and the profession itself which was lacking in England and Wales. The Commission took the opportunity to observe that there were three systems of legal education within the United Kingdom which had developed in different ways and expressed the view that it was essential to review the new system in Northern Ireland in three years time.

[19] The task of reviewing legal education in Northern Ireland was assigned to the Bromley Committee which reported in April 1985. The Committee expressed itself to be firmly of the opinion that the public interest required the maintenance of proper legal services to the community and that this in turn involved the maintenance of professional standards together with the highest level of training and equality of opportunity for the most able to enter the profession. The first concern of the Committee was to determine the best form of professional legal training for Northern Ireland and the shape that it should take in the future. In furtherance of that purpose the Committee expressed its first and principle recommendation to be the retention of the Institute. The Committee recorded that it, and most of its correspondents, had been convinced by the experience of the previous seven years that an institute provides the best form of training for the legal profession. However, it did note that training at an institute could not replace training on the job and, accordingly, expressed the view that it was of the utmost importance that training at an institute and training in practice should be more closely integrated. The Committee recommended that all

intending solicitors should be apprenticed for a period of two years of which the first three months would be spent in the office, the next twelve at the Institute, and the final nine months back in the office. It was also envisaged that the student would work in his Master's office during the Institute vacations.

[20] The system of solicitors' legal education in Northern Ireland has been considered by the courts in this jurisdiction upon a number of previous occasions. In Re C H; Re The Solicitors (Northern Ireland) Order 1976 [2000] NI 62 the appellant, who was aged 26 and had worked in an executive capacity as a law clerk for approximately three years, claimed that the Law Society could and should have exercised its powers under Regulation 18 to dispense with the requirements of Regulation 8(3) and admit him to the register as a student solicitor. Carswell LCJ in delivering the judgment of the court referred to the substantial over-subscription to places on the full-time course at the Institute and went on to observe at page 67:

> "The Council of the Law Society accordingly has a firm policy not to allow the provision for law clerks to be used as a back-door method of entering for those who have been unable to obtain admission to the Institute by means of its regular entrance procedure. I can see considerable merit in this policy, for it was the clear intention of the Bromley Committee that the full-time course at the Institute, which the Committee regarded as very valuable, should be the standard method of entry to the profession and that other routes should be regarded as exceptions. This being so, the Law Society is in my opinion correct to apply the provisions of Reg 8(3) with some strictness and to be slow to dispense with its requirements. …
>
> The dispensing power under Reg 18 is conferred upon the Council of the Law Society so that it may retain a measure of flexibility and treat an exceptional case upon its merits. I think that the Council should be slow to exercise it so as to dispense with the requirements of Reg 8(3) and should do so only in a truly exceptional case, where there are reasons which would make it wrong to refuse the registration of an applicant, who does not satisfy the strict requirements of the 1988 Regulations."

[21] Carswell LCJ confirmed those views in the subsequent case of Re George Burns; Re The Solicitors (Northern Ireland) Order 1976 [unreported NIQBD 24 September 1999] when considering the case of an appellant who

had passed the Common Professional Examination in core legal subjects at De Montfort University Leicester and had also obtained the LPC at Nottingham Trent University. The Lord Chief Justice noted that such qualifications entitled him to be accepted as a trainee solicitor in England and, ultimately, to be admitted as a solicitor after completion of a two year period of training. At that stage, after admission in England and Wales, he would have been entitled to be admitted as a solicitor in Northern Ireland under the relevant reciprocal arrangements. Instead of following such a course the appellant had taken up employment with a firm of solicitors in Northern Ireland and applied to the Law Society Education Committee to admit him as a solicitor. His application had been refused and he had been informed that the Law Society in Northern Ireland, in common with the other UK and Irish Law Societies, did not allow split training. Carswell LCJ again acknowledged the strong feelings of the Law Society in Northern Ireland that it should not allow further in-roads into the requirement that solicitors should obtain recognised legal qualifications and follow the full-time vocational course at the Institute before being admitted to practice in this jurisdiction. He confirmed that he could see considerable merit in this policy and, in his opinion, the Society was correct in insisting with some strictness on the requirements of Regulation 8(2) being satisfied and being slow to accept special cases under the powers contained in Regulation 8(5). He went on to say:

> "I consider that it should require a truly exceptional case to be established before it should allow registration under Regulation 8(5). Although the appellant's commitment to his chosen profession is manifest, and it will undoubtedly involve expense and the hardship of separation from his family for him to complete his training in England, I am unable to differ from the conclusion reached by the Society. In my judgment it was correct in deciding that it should not accept his application for registration as a student."

Accordingly, the appeal was dismissed.

[22] In November 2007 the Law Society of Northern Ireland undertook a major wide-ranging review of the structure and process of postgraduate vocational education and training required in order to be admitted as a solicitor. A Consultation Paper was issued with a covering letter from the then President of the Society that included the following paragraph:

> "These issues arise at a time when society in Northern Ireland is changing, the nature of legal practice is changing and the demands of clients and regulation are increasing. Our current education model was

> crafted over 30 years ago. I now believe that, as we look to the future of our profession it is important that we consider whether our existing requirements for admission as a solicitor are fit for purpose in these changing circumstances. It is in the public interest that the high standard to which solicitors have been educated in the past continue to apply in the future."

[23] The review was undertaken by the Education Review Working Group ("ERWG") a sub-committee of the Society's Education Committee. Based on the findings produced by the first consultation paper the ERWG issued a second consultation paper in November 2009. The ERWG recorded that, having considered the arguments for alternative systems of training, it remained strongly of the view that an integrated system of education provided the best model of vocational training. In such circumstances it recommended that the integrated system of in-office and in-class training should continue. There should be no change in the present requirement to spend four months in-office prior to commencing a calendar year attending a vocational training provider followed by a final eight months in-office. Whilst recognising that the law and procedure in England and Wales more closely approximated the law and procedure in this jurisdiction than was the case in Scotland, the group recorded that significant differences continued and referred to Land Law and Conveyancing practice, Civil Litigation, Fair Employment and Tribunals and some aspects of Criminal practice, Wills, Probate, Administration of Estates, Planning and Constitutional Law. However, the ERWG also accepted that it could be argued that there were overlapping subjects and skills taught in the in-class vocational training offered in either Scotland or England and Wales and expressed the view that it might be possible in conjunction with the Institute and the Graduate School to excuse a partly qualified applicant from Scotland or England and Wales from attending some of the courses at the vocational training provided in Northern Ireland. The Group did not consider that mere attendance for a part or all of the vocational training course in England and Wales or Scotland, for which no competition was required and many spare places were available, should exempt an applicant from competing for a place at one of the two vocational training providers in Northern Ireland. Consideration was also given to the question as to whether or not a partly-qualified applicant should be required to have an apprenticeship in place before attending the Institute. The Group considered that this was essential given the integrated nature of training as without an office in which to be an apprentice an applicant could not and would not receive equivalent in-class training which was based upon the assumption that all present in that class were also receiving training in-office.

[24] The Group also gave consideration to the Morgenbesser case and noted that a Morgenbesser sub-committee had been formed for the purpose

of examining in detail on a case by case basis the nature of any part-qualifications obtained by an EU Member State applicant and identifying areas of equivalence of training that would not need to be repeated as well as areas of difference or incomplete training that would require to be undertaken by such an applicant at the Institute or Graduate School. The ERWG was concerned to ensure that a flexible response should be provided to each partly-qualified applicant from an EU Member State which could make an individual assessment of such an applicant's training and then devise an individual requirement for any additional training for such an applicant.

[25] The ERWG carefully considered the benefits of the integrated in-office and vocational training which it recommended should continue. It noted that the model of vocational training in Northern Ireland was markedly different from the vocational training experienced in either Scotland or England and Wales, jurisdictions in which the integrated approach was not present. At paragraph 18.4 the Group made the following observations:

> "As stated earlier at paragraph 6.28 the ERWG consider that there are a number of strengths inherent in the integrated system. It is not simply a difference in timetabling; integrated model v sequential model. From an educational perspective, integration changes the culture and working and learning environment of the course. Training in an integrated system gives a greater understanding of the practical working environment. Apprentices who are students of the Law Society are, from the outset of their training, part of the profession and they are exposed to the needs and expectations of their firms and clients. Training in the sequential model can lead the course to be viewed as another stage in academic training, removed from the office, thereby losing the benefits of the integrated model which is essential to successful vocational training."

Discussion

The argument that the 1988 Regulations are unlawful.

[26] - (*i*) Mr O'Rourke submitted that the Regulations are unlawful because they have not been maintained in accordance with the jurisprudence of the European Court of Justice ("ECJ"), in particular, the decision in Morgenbesser. He argued that the Society should have amended the Regulations in order to provide specifically for Morgenbesser applicants. We reject that submission. The Mogenbesser decision does not oblige competent

authorities to promulgate regulations specifically to accommodate Mogenbesser applicants. Whilst it is clear that the Regulations were drafted prior to the decision in Morgenbesser, we consider that there is no reason why Regulation 8(5) could not be utilised by a Morganbesser applicant who wished to show that he had "… acquired such special qualifications and/or experience as to render him suitable to be accepted as a registered student." In the course of applying the Morgenbesser decision in Pesla the ECJ specifically referred to relevant qualifications/experience saying at paragraph 37 of the judgement:

> "37. Accordingly the authorities of a Member State, when considering a request by a national of another Member State for access to a practical training period with a view to exercising a regulated profession at a later date, must take into consideration the professional qualification of the person concerned by comparing the qualifications attested by his diplomas, certificates and other formal qualifications as well as by his relevant professional experience with the professional requirements laid down by the national rules."

While no individual has yet applied to the Law Society for registration based upon the principles set out in Morganbesser and Pesla, prima facie, we do not consider that there should be any real difficulty in bringing such an application within the Regulations which must be interpreted flexibly and purposively so as to comply, as far as possible, with EU jurisprudence - see Marleasing SA v La Comercial Internacionale de Alimentation SA [1990] ECR 1-4135. It is accepted by the Society that the age provision within Regulation 8(5) is no longer applied. Any residual difficulties arising from the Regulations could be dealt with in accordance with the waiver provisions of Regulation 18. The ERWG gave particular consideration to the implications of the Morgenbesser case in its consultation paper of November 2009 and suggested that an opportunity should be taken to update the Regulations with specific provisions relating to applicants from outside the jurisdiction. To that end, as we have noted above, a Morgenbesser sub-committee has been formed, thereby complying with the obligation to establish an identifiable competent authority in accordance with CCBE advice. In our view such a development is quite consistent with the actions of the Group charged with the task of carrying out an overall review of the current arrangements for training solicitors for the purpose of ensuring that they remain appropriate and relevant. However, it does not make the present Regulations unlawful and we respectfully agree with the learned trial judge who concluded that mechanisms exist within the Regulations for the Law Society to meet its obligations to a Morganbesser applicant.

(*ii*) Mr O'Rourke also advanced a submission that the respondent's use of Regulation 18 as a means of addressing the Morgenbesser principle was itself unlawful insofar as it required the "mandatory invocation of a discretionary power". That submission seems to have been based upon leaving Regulation 8(5) out of account on the ground that a Morgenbesser applicant could not comply with its requirements and, therefore, would be compelled to rely upon Regulation 18 providing automatic waiver of Regulation 8 together with acceptance of the proposition that an application to register with the Society made by either an intrastate or interstate applicant would require consideration of two separate matters, namely:

(*a*) eligibility to apply for registration;

(*b*) suitability for registration.

In such circumstances, since he/she would otherwise be ineligible to apply and unable to exercise the EU right to freedom of movement, the exercise of the waiver power under Regulation 18 in favour of the Morgenbesser applicant becomes mandatory.

(iii) As we have indicated at (*i*) above we consider that a Morgenbesser application could be validly considered in accordance with Regulation 8(5) which, for that reason, cannot be left out of account. In our view both interstate and intrastate applicants are perfectly eligible to apply to be registered in accordance with Regulation 8(5), with or without further reliance upon Regulation 18. As the learned trial judge observed it is not possible to predict whether a Morgenbesser applicant would be treated as having acquired special qualifications and/or experience and each would have to be assessed individually to determine whether or not additional training was required. It is possible that the level of qualification/experience of such an applicant might be so inadequate or irrelevant as to warrant refusal of registration or, alternatively, the applicant might be required to attend one of the recognised providers to remedy the inadequacies. After such individual and detailed assessment it might be necessary to dispense with some aspect/s of the Regulations but the fact that such circumstances provided a legitimate basis for the exercise of that power would not deprive it of its discretionary character. The EU principle of freedom of movement between Member States would clearly be a relevant factor to be taken into account.

Unlawful reasoning

(i*v*) Mr O'Rourke further submitted that the Society's reason for failing to amend the Regulations or refusing to do so was unlawful being improper

insofar as it was based upon a desire to restrict artificially the number of persons entering the profession. While Professor Bromley referred in 1983 to the Society being in favour of a limitation of numbers, this court rejected an attack upon the legality of the Regulations based upon a submission that their introduction was primarily motivated by such an objective in In Re Kelly and Sheils Application [2000] NI 103. In delivering the judgment of the court in that case Carswell LCJ referred, inter alia, to the Society's willingness to consider other establishments for professional training, apart from the Institute, as inconsistent with such motivation. Such a development subsequently occurred with the recognition of the Graduate School and was duly catered for by the Society passing the supplementary Solicitors Admission and Training (Amendment) Regulations in 2008. In any event the recommendation of the EWRG to set up a sub-committee to discuss the implications of exempting applicants who have completed part of their training in England and Wales or Scotland together with the establishment of a sub-committee to consider Morgenbesser applicants is difficult to reconcile with a dominant motivation to restrict numbers. Accordingly we are not persuaded that a desire to restrict numbers has played any significant role in the motivation of the Society.

Differentiation of the cases

(*v*) Mr O'Rourke argued that there was no basis for differentiating between a Morganbesser applicant and the appellant for the purpose of deciding whether or not it was appropriate to waive Regulation 8 in accordance with the provisions of Regulation 18 and to do so was irrational. Morgenbesser was concerned with preserving the right of establishment when moving between Member States. The appellant accepts that Community law permits Member States to afford different treatment within the domestic legal system and, as an intrastate applicant, he is not able to rely directly upon Morgenbesser rights. In Camille Petit v Office National de Pensions [1992] EUEJC-153/91 the ECJ observed:

> "As the Court has consistently held, the provisions of the Treaty on freedom of movement and the regulations implementing those provisions cannot be applied to activities which are confined in all respects within a single Member State."

Since there is no EU obligation to treat the appellant as having Morgenbesser rights we are not persuaded that the appellant has established that his case should be considered upon the same basis as a Morgenbesser applicant as a matter of Community law.

(vi) As we have noted above the Society has not yet been requested to consider an application from a Morgenbesser applicant. If and when it does

so, assuming that no relevant amendment has yet been completed and it is not possible to accommodate the application within the provisions of Regulation 8(5), it may be necessary for the Society to consider waiving some of the Regulations in accordance with Regulation 18. All of which, for the present, must be regarded as speculative. In our view, such a situation did not arise in relation to the appellant. There is no evidence that the respondent simply regarded the appellant as ineligible to apply for registration which is said to be the "core" of the appellant's case. Indeed, he was invited to apply under Regulation 8(5).

(vii) However, when considering the merits of the appellant's case, in the context of possible recourse to Regulation 18, the Education Committee would have been completely familiar with the nature and extent of his qualifications and experience which have been recognised in the context of the distinctive patterns of development of legal professional training within the different UK jurisdictions and analysed in some detail over the years in the various reports referred to earlier in this judgment. The Education Committee would also have been legitimately entitled to take into account the views of Carswell LCJ in Burns and CH when reaching their decision upon the appellant's application. In CH the appellant had obtained a LPC in England but wished to be registered as a student in accordance with, inter alia, Regulation 8(5) to complete his two years training in Northern Ireland. He submitted that doing so would provide him with more relevant training and experience. The Society argued that to accede to the application would permit individuals to opt out of attendance at the full-time integrated course at the Institute and it was in that context that Carswell LCJ accepted that there was considerable merit in the Society's policy in being slow to accept special cases under Regulation 8(5) which he felt should be reserved for truly exceptional cases. In our view the appellant remained at all times eligible to apply but, in such circumstances, the decision not to exercise the Regulation 18 power of waiver in his favour was one that the Society was entitled to take Taking such factors into account, as the Society clearly did, we are not persuaded that its decision to reject the appellant could in anyway be stigmatised as irrational.

Accordingly, the appeal must be dismissed.