CARC3150 15 February 2000

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY DENISE KELLY AND FEARGHAL SHIELS FOR JUDICIAL REVIEW

CARSWELL LCJ

Introduction

This is an appeal against a decision of Kerr J given on 13 October 1999, whereby he dismissed the appellants' application for judicial review. As set out in the grounding statement, the application purported to seek judicial review of decisions of the Law Society of Northern Ireland, the Council of Legal Education (Northern Ireland) and the Institute of Professional Legal Studies refusing to admit the appellants to the postgraduate course run by the Institute to provide training for those seeking to become admitted as solicitors. As the case was presented before the trial judge in the Queen's Bench Division and on appeal it was clear that the issue at stake was the validity of the provision in the regulations made by the Law Society whereby an applicant for registration as a student of the Society must establish that he has been offered a place in the Institute. The case made by the appellants was that that provision was *ultra vires* the enabling legislation and void, and they sought a series of consequential remedies.

The Statutory Provisions

The admission of solicitors is governed by the Solicitors (Northern Ireland) Order 1976, as amended by the Solicitors (Amendment) (Northern Ireland) Order 1989. The 1988 Regulations were made before the latter Order was passed and for present purposes only the 1976 Order is relevant. Article 5(1) prescribes who may be admitted as 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."

Article 6(1) empowers the Law Society to make regulations governing the education and training of persons seeking admission as solicitors:

"**6.**-(1) The Society may, with the concurrence of the Lord Chief Justice, make such regulations as they think proper with respect to the education, training, qualifications, conduct, experience and control of persons seeking admission as solicitors, and (without prejudice to the generality of the foregoing) such regulations may make provision with respect to all or any of the following matters -

(*a*) where the Society so think fit, service by such persons under indentures of apprenticeship, including the requirements for admission to apprenticeship, the imposition of restrictions or conditions as to entering into such indentures by either party thereto, the conditions and duration of apprenticeship, the registration of indentures of apprenticeship, the reckoning of service thereunder, the conduct, duties and responsibilities of the respective parties thereto and the transfer or discharge of indentures of apprenticeship;

(*b*) the courses of study or other training (whether provided by the Society or otherwise) to be followed by such persons, including the requirements for admission thereto and for attendance at lectures, classes, debates or other teaching or instruction;

(*c*) the examinations (whether held by the Society or otherwise) to be passed by such persons, including the eligibility of candidates for such examinations, the subjects for, and the mode of conducting such examinations, the standards of proficiency to be obtained thereat, the times, places and notices thereof and the conditions upon which any exemption may be granted from any such examination or any part thereof and the issue of certificates or other confirmation of having passed or been exempted from any such examination or part thereof;

(*d*) the control and discipline of such persons, including requirements to be imposed in consequence of contraventions of the regulations;

(*e*) the charging and application by the Society of fees to be paid by such persons;

(*f*) such transitional and incidental matters as the Society think necessary."

The Law Society exercised the power conferred by Article 6 by making the Solicitors Admission and Training Regulations 1988 (the 1988 Regulations). By Regulation 7 any person who intends to seek admission as a solicitor must apply to the Society for registration as a student, lodging indentures of apprenticeship between himself and a solicitor acceptable to the Society's Education Committee. Regulation 8 prescribes the conditions which must be satisfied before the student's registration becomes unconditional:

> "An applicant who has complied with Regulation 7 shall be registered (subject to Regulation 9), but such registration shall be conditional upon the registered 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 in the Institute; 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 a level of knowledge acceptable to the Society, of the following subjects namely:-
>
> Constitutional Law;
> Law of Tort;
> Law of Contract;
> Criminal Law;
> Equity;
> Land Law;
> Law of Evidence;
> Company Law; and
>
> (c) has been offered a place in the Institute; or

(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) 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 in 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 qualifications and/or experience as to render him suitable to be accepted as a registered student."

The "Institute" is defined as the Institute of Professional Legal Studies, a postgraduate centre forming part of The Queen's University of Belfast and concerned solely with the professional training of persons intending to become barristers or solicitors.

The Appellants' Applications to the Institute

The appellants are both employed at present as law clerks in a Belfast firm of solicitors. Each failed to obtain a place in the Institute for the year 1999-2000 and so was unable to satisfy the Law Society's conditions for registration as a student. They both claim, however, that they have reached an educational standard which would fit them to be admitted as solicitors after receiving proper professional training.

Denise Kelly obtained a degree in law from Queen's University, with Second Class Division One honours. She had applied for a place at the Institute in 1997, and was accepted conditionally on

obtaining 2.1 honours, being ranked 29th in the list of candidates. She was unable to take up the place because she failed one subject in her degree examinations and had to re-sit the paper, with the consequence that she did not obtain her degree by the date required by the Institute. She applied again in 1998 for admission to the Institute in the year 1999-2000, but was unsuccessful in the entrance procedures and was not offered a place.

Fearghal Shiels obtained a degree in law from Queen's University with Second Class Lower Division honours. He applied for admission to the Institute for the year 1997-98 and again for 1998-99, but was unsuccessful both times in obtaining a place. He applied once more for the year 1999-2000 and again was not accepted, this time being ranked 265th in the entrance procedures.

The History of the Institute

Before the Institute was set up intending solicitors (other than law clerks who had served for seven years or more) had to obtain a university degree approved by the Law Society and serve a three-year apprenticeship with a practising solicitor. The Law Society arranged lectures for the apprentices and held examinations which they were required to pass before they could be admitted as solicitors. In 1972 a committee was set up by the Government, chaired by Professor AL Armitage, with the task of considering and making recommendations upon the education and training for professional qualifications in the legal profession. Its conclusion in its report, published in 1973, was that the existing system provided inadequate training for entry into either branch of the profession and that the case for change was overwhelming. It recommended that a postgraduate professional law course of one year's duration should be provided at Queen's University by an institute to be known as the Institute for Professional Legal Studies, which would provide training for students in both branches of the legal profession. The governing body should be the Council of Legal Education, comprised of representatives of the judiciary, Bar and solicitors, together with members from Queen's University. The Committee considered, on the evidence before it, that –

> "the present needs of both branches of the Profession will be met by a vocational course with an entry of 50 students, the great majority of whom will become solicitors."

The Institute was established as recommended and took in its first student intake in 1977. It had accommodation for 50 students, all of whom received postgraduate bursaries from the Department of Education. Demand for places exceeded supply from the beginning and entry became highly competitive. By the early 1980s the number of applicants was about double the number which could be accepted, notwithstanding an increase in the bursaries in 1979-80 to 70 per year, corresponding to an expansion of the intake of the Institute to 70 places. Both branches of the profession argued that the number of places should be greatly enlarged and maintained an alternative route of entry into the profession, through which significant numbers qualified. The Department of Education opposed the expansion of student numbers beyond the level which it considered the profession could absorb. Although it would have been willing to agree to the admission of some fee-paying students, it wished to see the alternative routes of entry discontinued and made it clear that it would not fund the Institute or the students on an open-ended basis. The Department has consistently maintained this stance up to the present, as appears from the affidavit of Mrs Isobel Anne Fenton, now Director of the Institute.

It was against this background that the Bromley Committee, chaired by Professor PM Bromley, was set up in 1983 to review the work of the Institute and consider the issue of professional education and its funding. The core recommendation in its report, published in 1985, was that the alternative courses be discontinued and that the sole postgraduate route of entry into the legal profession should be through a full-time course at the Institute.

In Chapter 5 of its report the Committee dealt with the issue of student numbers and selection. It recorded that in 1980 the Law Society had expressed support for a policy of open admission to the solicitors' profession without restriction of numbers. It stated, however, in paragraph 5.7 of the report that in the Society's evidence to the Committee "it seemed that they were

in favour of a limitation on numbers, as there was some evidence of overcrowding in the profession, but that they found it difficult to assess the manpower requirements of the profession". This statement may have as its foundation the passage in the Law Society's written submission to the Committee, in which it stated at paragraph 4.1:

> "Local solicitors associations have expressed disquiet at the numbers of solicitors being admitted to the profession. There is evidence of overcrowding. This inevitably leads to
>
> (a) Unemployment.
>
> (b) A reduction in professional standards and quality of work produced."

No reference to numbers appeared in the Society's further written submission, and the issue could not be described as having been prominent in the written material which it put before the Committee.

In paragraph 5.8 of its report the Committee expressed its own firm opinion that it was essential to plan for firm student numbers and recorded in paragraph 5.10 that

> "from evidence we received it seemed that there was a clear feeling on both sides of the profession that numbers should not expand beyond the present level".

Its recommendation on numbers was as follows:

> "We therefore recommend a maximum intake of 90 full-time students for the three academic years commencing with 1986/87, that being approximately the number admitted at present to both sides of the profession through the Institute and by the alternative routes. We further recommend that for these three years not more than 20 of those 90 full-time students should be admitted each year to the barristers' course and not more than 70 to the solicitors' course and that before the triennial review becomes due a report should be prepared by each branch of the profession as a basis for deciding the desirable intake to the Institute in each of the following three years."

The Bromley Committee concluded Chapter 5 of its report by examining in detail the method of selection for places at the Institute, and it is clear that its consideration was predicated upon a continued demand for places which exceeded the number available. It appears, moreover,

from paragraph 5.20 of the report that the Committee recognised that the restriction of intake by means of its proposed selection test would result in the rejection of applicants who had thitherto been acceptable to the profession. Miss Kelly also points out in paragraph 6(g)(i) of her affidavit that the offer of a place to a student in any given year is determined not by absolute standards of ability measured in the test but by comparative performance in competition with those who sought entry in that particular year.

The Law Society accepted the conclusions and recommendations of the Bromley Report. It discontinued the alternative method of entry and made the 1988 Regulations, whereby all students, apart from the excepted categories, have to obtain the offer of a place at the Institute before their registration with the Society becomes unconditional. An affidavit was sworn on behalf of the Law Society by Mr Comgall McNally, a past President of the Society, who has served on its Education Committee and on the Council of Legal Education for some years and was a member of the steering committee which set up the Institute and of the Bromley Committee. Mr McNally denied the appellants' claim that the regulations were made in order to limit numbers. He went on in paragraphs 8 to 10 to reject the suggestion that the Institute was designated as the establishment into which students had to be accepted in order to cap the intake numbers at a level dictated by its capacity:

> "8. I beg to refer to paragraph 4 of the Society's submission entitled `Student Numbers'. The Society did not seek in that submission, and has not sought, to limit the numbers in the way suggested in the Applicants' affidavits. The reason for the inclusion in the Society's Regulations of the requirement of the offer of a place at the Institute is that the Institute is the only educational establishment in Northern Ireland which provides the professional education and training recommended by both Armitage and Bromley. Between 1977 and the date of the swearing hereof no other educational establishment has provided, or sought to provide, the professional educational and vocational training which the Society requires and the requirement at paragraph 8(1)(b) and 8(2)(c) of the 1988 Regulations, reflects the historical and current state of affairs.

9. Any numerical limit of students admitted to the Institute is not controlled by the Society. The Society has not stipulated the number of students who can be registered as students of the Society.

10. In order for the Society to fulfil its statutory obligations under Article 6 of the 1976 Order it requires to ensure that students of the Society meet the criteria for professional education and vocational training identified in the Armitage and Bromley reports, whose recommendations were accepted and followed by the Society. It is of paramount importance for the Society that those students registered with the Society receive the necessary education and vocational training properly to prepare them to be Solicitors. The Society, by requiring that students for registration have a place at the Institute, ensures that it complies with the provisions of, inter alia, Article 6(1)(b) and (c) of the 1976 Order."

Counsel for the Law Society stated on instructions, supported by the minutes of a meeting of the Society's Council held on 3 June 1999, that if another establishment were established which would be capable of providing suitable professional training, the Society would be prepared to consider amending its regulations to specify that establishment in addition to or in place of the Institute.

The Judge's Decision

In the judicial review application in the Queen's Bench Division the appellants attacked the 1988 Regulations as being void because they had been made, not for the permitted statutory purpose of the provision of training for students, but for the purpose of limiting the intake. This policy, it was submitted, was void as being *ultra vires* the enabling legislation and as being anti-competitive.

They also suggested that the Institute had collaborated in this policy by restricting the number of applicants that it was prepared to admit.

The learned judge held that any regulation purporting to be made under Article 6 of the 1976 Order which sought to restrict the number of entrants on a basis other than merit (by which he clearly meant fitness or aptitude for professional training) would be *ultra vires*. He did not deal with the argument based on competition law because it was not developed to any extent in the course of the hearing before him. He went on to hold that because of the limit on the number of places at the Institute there was a *de facto* restriction on the number of solicitor students registered with the Law Society each year which was based on considerations other than merit.

He went on to hold that although the Institute restricted the intake to a specified number each year it was not wrong to do so. It was entitled to decide upon the maximum number of places by reference to operational constraints, and to have regard to the expressed intention of the Department of Education to withdraw funding if the numbers exceeded what was acceptable to it.

The judge concluded by considering whether the Law Society was responsible for the restriction in numbers. He accepted the averments in Mr McNally's affidavit concerning the Law Society's reason for specifying the Institute in the regulations and the assurance given by counsel on the Society's behalf that it would be prepared to consider including another educational establishment if one which provided an acceptable level of training were to be set up. He concluded that the limit on numbers was effectively operated and controlled by the Department of Education, not the Law Society. He therefore dismissed the application for judicial review.

The Purpose of the 1988 Regulations

At the hearing in this court the appellants did not pursue the case against the Institute which they had made below and sought a remedy only against the Law Society. They confined their arguments to an attack on the validity of the 1988 Regulations, the essence of their case being a challenge to the *vires* and legality of those parts of the Regulations which imposed the requirement

that a student must produce proof that he has been offered a place in the Institute before his registration becomes unconditional. They based this case on two grounds, first, that the requirement in the regulations was *ultra vires* the enabling legislation and, secondly, that it constituted an anti-competitive protection of a monopoly and as such either was void or required justification by the Law Society.

The appellants did not produce any authority in support of the latter proposition. The Competition Act 1998 has not yet come into force and cannot affect the issue. We are unaware of any other statutory provision or rule of law which might have the effect for which the appellants contended, nor did they refer us to any. We shall therefore restrict our consideration of the issues to those which centre round the power of the Law Society to pass regulations which require students to obtain a place at the Institute.

Article 6 of the 1976 Order empowers the Law Society to make regulations with respect to the "education, training, qualifications, conduct, experience and control" of persons seeking admission as solicitors. We agree with the judge's conclusion that this power would not extend to making regulations for the purpose of restricting the numbers of students accepted by the Society. It is on its face a power to prescribe how the students are to be educated and trained, not how many should be accepted, and we should be reluctant to imply a power to restrict numbers from the wording of the enabling provision Article 6. Whether the Law Society possesses such a power apart from Article 6 is a matter which we are not required to decide in this appeal and we reserve our opinion on the issue.

On behalf of the appellants it was submitted that –

(a) (i) the indivisible single purpose of the Law Society in making the 1988 Regulations was to provide for the training of students while imposing a limit on numbers;

(ii) alternatively, if these were two separate and distinct purposes, they were of equal standing and importance, with the consequence that it could not be said that the training purpose was the true or dominant purpose;

(b) (i) even if it is not established that the restriction of numbers was a purpose of the Law Society when it made the regulations, it was such an important effect of the making of the regulations that it sufficed to render them invalid now;

(ii) alternatively, when that effect became so obviously apparent, the Law Society was under a duty to review the regulations and amend them to remove the restriction of numbers.

The classic expression of the principle governing the *vires* of subordinate legislation is that it must come within the purposes for which the power to make it was conferred. So Lord Davey said in *Scott v Glasgow Corporation* [1899] AC 470 at 492:

> "… the power of making bye-laws entrusted to a municipal or other public authority is so given for the purpose only of better enabling them to perform their general duties, and ought not to be used for any collateral or outside purpose."

The use of the concept by the courts has been summarised in de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th ed, para 6-061:

> "The principle has been expressed in different ways. Sometimes it is said that decision-makers should not pursue `collateral objects', or that they should not pursue ends which are outside the `objects and purposes of the statute'. On other occasions it is said that power should not be `exceeded' or that the purposes pursued by the decision-maker should not be `improper', `ulterior', or `extraneous' to those required by the statute in question. It is also said that `irrelevant considerations' should not be taken into account in reaching a decision. All these terms of course `run into each other' and `overlap'."

Lord Denning MR expressed it with lucid simplicity in *R v Governor of Brixton Prison, ex parte Soblen* [1963] 2 QB 243 at 302, when he said:

> "If it was done for an authorised purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful."

When dealing with administrative decisions the principle is now more commonly expressed in terms of taking only the proper considerations into account, terminology usually traced back to the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. This is, however, only a difference of name and not of principle, for, as Lord Greene himself remarked in his judgment at 228, the exercise of the discretion conferred "must be a real exercise of the discretion", and that principle applies equally to delegated legislation and administrative decisions.

Duality of Purposes

Where the court comes to the conclusion that the action called in question was done with the object of achieving two or more purposes, one within and one outside the limits of the enabling power, then it has to apply an appropriate test in order to determine whether the action is a valid exercise of the power. The traditional test is whether the permitted purpose was the actor's true or dominant purpose, but other tests have also been applied by the courts and the difficulties, both in determining the correct approach and in applying it, are such that the question has been described in a much-quoted phrase in de Smith, Woolf & Jowell (*op cit*, para 6-077) as a "legal porcupine". In that work it is stated that at least six separate tests have been applied where plural purposes or motives are present. The learned editors list them as follows:

(1) What was the true purpose for which the power was exercised?

(2) What was the dominant purpose for which the power was exercised?

(3) Would the power still have been exercised if the actor had not desired concurrently to achieve an unauthorised purpose?

(4) Was any of the purposes an authorised purpose? If so, the presence of concurrent illicit purposes does not affect the validity of the act.

(5) Were any of the purposes pursued an unauthorised purpose? If so, and if the unauthorised purpose has materially influenced the actor's conduct, the power has been invalidly exercised because irrelevant considerations have been taken into account.

(6) Would the decision-maker have reached the *same* decision if regard had been had only to the relevant considerations or to the authorised purposes?

The fourth test is not supported by the learned editors, we think rightly. The third seems to us to specify a matter which will constitute evidence tending to show what was the true or dominant purpose of the actor, rather than constituting an actual test. The High Court of Australia appears to have taken the same view in *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 106, where it said:

> "But in our opinion it is still an abuse of the Council's powers if such a purpose is a substantial purpose in the sense that no attempt would have been made to resume this land if it had not been desired to reduce the cost of the new road by the profit arising from its re-sale."

Similarly, test (6) seems to us to deal with evidence relating to the application of test (5). The apparently formidable list is reduced then to two main tests, the true or dominant purpose (which seem to us to be synonyms) and that framed in terms of irrelevant considerations having a substantial or material influence upon the decision.

The true or dominant purpose test is succinctly summarised in Wade & Forsyth, *Administrative Law,* 7th ed, p 436:

> "Sometimes an act may serve two or more purposes, some authorised and some not, and it may be a question whether the public authority may kill two birds with one stone. The general rule is that its action will be lawful provided that the permitted purpose is the true and dominant purpose behind the act, even though some secondary or incidental advantage may be gained for some purpose which is outside the authority's powers."

Judicial authority may be found for the proposition, if indeed it is required, in the old case of *Westminster Corporation v London and North Western Railway Co* [1905] AC 426 and in the dissenting judgment of Denning LJ in *Earl Fitzwilliam's Wentworth Estates C Ltd v Minister of Town and Country Planning* [1951] 2 KB 284 at 307, where he said :

> "If Parliament grants a power to a government department to be used for an authorized purpose, then the power is only validly exercised when it is used by the department genuinely for that purpose as its dominant purpose. If that purpose is not the main purpose, but is subordinated to some other purpose which is not authorized by law, then the department exceeds its powers and the action is invalid."

Wade & Forsyth suggest at page 439, however, that the doctrine of irrelevant considerations may be an alternative route to the same result, though the view is expressed in Supperstone & Goudie, *Judicial Review,* 2nd ed, para 5.42 that this may offer a lower threshold of illegality. Megaw J adverted to the difficulty involved in the varying terminology in a passage in his judgment in *Hanks v Minister of Housing and Local Government* [1963 1 QB 999 at 1020-21 which bears repetition:

> "I confess that I think confusion can arise from the multiplicity of words which have been used in this case as suggested criteria for the testing of the validity of the exercise of a statutory power. The words used have included `objects,' `purposes,' `motives,' motivation,' `reasons,' `grounds' and `considerations.' In the end, it seems to me, the simplest and clearest way to state the matter is by reference to `considerations.' A `consideration,' I apprehend, is something which one takes into account as a factor in arriving at a decision. I am prepared to assume, for the purposes of this case, that, if it be shown that an authority exercising a power has taken into account as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power, then the exercise of the power, normally at least, is bad. Similarly, if the authority fails to take into account as a relevant factor something which is relevant, and which is or ought to be known to it, and which it ought to have taken into account, the exercise of the power is normally bad. I say `normally' because I can conceive that there may be cases where the factor wrongly taken into account, or omitted, is insignificant, or where the wrong taking into account, or omission, actually operated in favour of the person who later claims to be aggrieved by the decision.
>
> As typical of the decided cases which have dealt with the problem in this way, I refer to the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*:
>
> > `When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court

> of appeal. When discretion of this kind is granted the law recognises certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters'."

In several modern cases the Queen's Bench Division has adopted the test of material, significant or substantial irrelevant considerations. In *R v Inner London Education Authority, ex parte Westminster City Council* [1986] 1 All ER 19 at 36 Glidewell J expressed the opinion that tests (1) and (5) of those set out in de Smith, Woolf & Jowell achieve much the same result and that the simplest and clearest way to state the matter is by reference to "considerations". In *R v Lewisham London Borough Council* [1988] 1 All ER 938 at 951 Neill LJ said that if a "bad" reason or purpose demonstrably exerted a substantial influence on the relevant decision the court can interfere to quash the decision. The same approach is to be found in judgments of Forbes J in *R v Rochdale Metropolitan Borough Council* [1982] 3 All ER 761 at 769 and May LJ in *R v Broadcasting Complaints Commission, ex parte Owen* [1985] QB 1147 at 1176. We consider that it provides a useful alternative to the test of true or dominant purpose, and that each constitutes an application of the basic principle that the donee of a power must act within the limits of the discretion conferred upon him.

Conclusions

We can now proceed to state our conclusions by applying these principles to the facts of the case:

1. In order to judge the validity of the 1988 Regulations it is necessary to ascertain the purpose or purposes of the Law Society at the time when it made them. The subsequent effect, if it was foreseeable at that time, may tend to prove the purpose, but it is not in itself the criterion.

2. On the facts we conclude, as did the judge, that the limit on numbers has at all material times been effectively determined by the Department of Education and not by the Law Society. That does not, however, conclude the matter, for the Law Society was at the time of the discussions leading up to the production of the Bromley Report aware that the demand for places in the Institute exceeded its capacity, which operated as a *de facto* limitation on the numbers entering the solicitors' profession. Although the Society would have preferred to maintain its own alternative method of entry, it entertained some feeling that a restriction on numbers was desirable.

3. We do not consider that the Law Society's reasons or motives in making the regulations were mixed to such a degree that they cannot be disentangled, as counsel argued in *Ex parte Owen.* It seems to us that the main reason for making the 1988 Regulations was because the Society considered that it had to accept the conclusion of the Bromley Committee that the Institute provided the best method of training for its students and that it should make it the exclusive route of entry, discarding the alternative option thitherto kept open. The Committee's recommendation was quite clear, that the Institute should be the sole place for the provision of training, and the Law Society was faced with Hobson's choice. In our opinion the question of limitation of numbers was not absent from the Society's contemplation, but it constituted only a minor and incidental consideration or purpose.

4. We do not accept the appellants' contention that the Law Society in making the 1988 Regulations had a single, indivisible purpose of restricting numbers. Nor do we consider that the purpose of limiting numbers was of equal standing with that of the provision of the most suitable means of training students, for in our opinion the latter far outweighed the former.

5. Whether one applies the test of true or dominant purpose or that of irrelevant considerations having a material or substantial influence upon the decision, one must in our opinion reach the same conclusion. In our judgment the true or dominant purpose of the Law Society in making the 1988 Regulations, whereby it required its students to attend full-time courses at the Institute, was to provide for their education and professional training by the means which in its judgment provided the best training. The consideration of limiting the numbers entering the profession did not in our opinion have a material or significant, let alone a substantial, influence upon the decision to make the regulations. If one judges the matter in terms of tests (3) and (5) above, the Society would still have stipulated training at the Institute even if it had no desire to limit numbers and that desire did not materially influence its conduct in making the regulations.

6. It was suggested that the Law Society is sheltering behind the Institute's limit on numbers in order to maintain a restriction on entry for its own ends, and that this tends to throw doubt on the purpose of its original adoption in the 1988 Regulations of the requirement that all students must attend the Institute. The recommendation of the Bromley Committee was so unequivocal that one cannot now criticise the Law Society for failing to include other possible methods of training which had no actual existence. In any event, the willingness of the Society to consider other establishments which might be set up to provide suitable professional training for students supports Mr McNally's averment that it did not choose the Institute in order to restrict numbers.

7. We do not accept the appellants' proposition that the Law Society was bound to review from time to time the effect of the requirement that its students attend the Institute course. We consider that the validity of the 1988 Regulations has to be judged as at the time when they were made. If we are wrong in that, however, we would hold that the Society has evinced a willingness to consider other establishments for professional training – although none has yet appeared over the horizon – and has satisfied any obligation to keep the matter under review.

We accordingly conclude that the 1988 Regulations are valid and that the appellants have not made out a case for any of the remedies which they seek. The appeals must therefore be dismissed.

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

IN THE MATTER OF AN APPLICATION BY DENISE KELLY AND FEARGHAL SHIELS FOR JUDICIAL REVIEW

_____

JUDGMENT

OF

CARSWELL LCJ

_____