Neutral Citation Number: [2009] IEHC 91

THE HIGH COURT

JUDICIAL REVIEW

2008 593 JR

BETWEEN

BOARD OF MANAGEMENT OF ST. MOLAGA'S NATIONAL SCHOOL

APPLICANT

AND

SECRETARY GENERAL OF THE DEPARTMENT OF EDUCATION AND SCIENCE, KEVIN MEEHAN, ANN O'SULLIVAN AND PADDY HOGAN

RESPONDENTS

AND

A. AND B.

NOTICE PARTIES

JUDGMENT of Ms. Justice Irvine delivered on the 17th day of February, 2009

The within judicial review proceedings centre upon two decisions made by the second, third and fourth named respondents herein on 25th April, 2008. On that date the aforementioned respondents, in their capacity as members of an appeals committee established under s. 29 of the Education Act 1998, concluded that St. Molaga's National School ("St. Molaga's"), Balbriggan, Co. Dublin had the capacity to accept C and D the daughters of A and B as students and accordingly recommended to the first named respondent that they should be enrolled with immediate effect.

The Parties

The applicant in the within proceedings is the board of management of St. Molaga's. The board of management ("the Board") is a statutory board established pursuant to s. 14 of the Education Act 1998 ("the Act"). The Board comprises two nominees of the school's patron, the Catholic Archbishop of Dublin; the school principal, Mr. Bill O'Toole; a teachers representative; two parents' representatives; and two representatives of the wider community.

The second, third and fourth named respondents are members of an appeals committee established under s. 29 of the Act to hear appeals against certain decisions made by a board of management including a decision to refuse to enrol any particular student. That appeals committee had three members comprising its chairperson, Mr. Kevin Meehan a former principal of a post-primary school, Ms. Ann O'Sullivan a primary school inspector and Mr. Paddy Hogan also a retired principal of a post-primary school.

The notice parties, A and B are the parents of C and D who were refused enrolment by the Board of St. Molaga's in February, 2008 on the basis that the school had no capacity to accept them as students.

The first named respondent is the party to whom the appeals committee must report and who is charged with notifying the decision of the appeals committee to those concerned. Section 29 of the Act empowers the first named respondent to give such directions to the Board as appear to be expedient for the purposes of remedying any complaint upheld.

By order of Peart J. dated 26th May, 2008, the applicant was granted leave to apply for judicial review seeking to quash the decisions of the appeals committee and also the direction of the first named respondent dated 25th April, 2008, that C and D be enrolled as students in St. Molaga's. The statement grounding the application for judicial review was delivered on 23rd May, 2008 and the statement of opposition on 16th July, 2008. The proceedings were heard on affidavit and both parties delivered written submissions which have been fully considered by the Court.

The Legal Issues

The applicant seeks to quash the decision of the appeals committee on the following alternative bases, namely:-

(a) That the appeals committee in reaching its decision acted *ultra vires* in that it exceeded its jurisdiction under s. 29 of the Act in purporting to conduct the type of wide ranging investigation which it carried out.

(b) That if the appeals committee had the power to conduct the wide ranging inquiry which it carried out, that its decision should in any event be quashed by reason of the fact that:-

(i) it took into account matters which were irrelevant to the issue which it had to decide and/or

(ii) it failed to take into account in its considerations matters which were material to its decision and/or

(iii) its decision was irrational in all of the circumstances.

An order of *certiorari* is sought against the direction made by the first named respondent that C and D be enrolled as students in St Molaga's on the basis that if the appeals committee has acted *ultra vires* or if its decisions were null and void then it follows that the direction of the first named respondent made on the basis of such decisions must be quashed

The respondents deny that the appeals procedure provided for in s. 29 of the Act is in any way confined or constrained in the manner alleged by the applicants. The appeals committee further denies that it took into account matters which were immaterial to its considerations or failed to take into account matters which were material to its considerations. The appeals committee denies that its decisions were irrational as contended for by the applicant and all respondents deny that the applicant is entitled to the relief claimed.

The Facts

The facts in the present case are to be gleaned from the fulsome affidavits and exhibits filed by the parties. On behalf of the applicant, two affidavits were sworn by Catriona O'Reilly, the chairperson of the Board of St. Molaga's. The respondents filed two affidavits. The first of these was sworn by Mr. Peter Rafferty, an Assistant Principal Officer in the post-primary administration section of the Department of Education and Science ("the Department"). The second affidavit was sworn by Mr. Kevin Meehan, the chairperson of the appeals committee.

Because of the extensive nature of the challenge to the decision of the appeals committee, it is necessary to set out the facts which emerge from the aforementioned affidavits and exhibits in some detail.

St. Molaga's is a senior primary school with classes from third to sixth year inclusive. St. Molaga's is a recognised national school under the patronage of the Catholic Archbishop of Dublin and is situated in Balbriggan. From sometime late in the 1800s until 1987 it shared the same campus as a junior primary school, namely, St. Peter and Paul's Junior National School ("St. Peter and Paul's"). Children consequently transferred automatically from one school to the other. In 1987, St. Molaga's moved to a new site approximately 1km away from St. Peter and Paul's.

On 30th September, 1998, St. Molaga's had a total of 238 children enrolled. Ten years later, on 30th September, 2007, it had increased its number of students to a total of 457. The 30th September in any year is an important date in the educational calendar as it is the number of students in a recognised school on that date that determines the number of teachers who will be funded by the Department in the subsequent school year. Hence, for the school year 2007/2008 the number of teachers would have been determined by reference to the school's valid enrolment as of 30th September, 2006 as per Primary Circular 0020/2007. St. Molaga's had a total teaching staff of 24 including 16 mainstream teachers for the school year commencing September, 2007.

For many years prior to 2007, St. Molaga's had sought assistance from the Department to provide additional permanent accommodation for the school. Due to the fact that the school had doubled in size over the previous ten year period, a significant number of the classes within the school were being taught on a permanent basis in twelve prefabricated classrooms. It is not denied that for some nine years prior to March, 2007, the Board had lobbied parents, public representatives and Ministers in the hope of obtaining additional permanent accommodation. St. Molaga's had at all times advised the Department that it was anxious and willing to expand its school subject to obtaining additional permanent classrooms.

As a result of deteriorating conditions within the school, the perceived risks to the health and welfare of students and teachers alike and concerns regarding the ability of the school to deliver an appropriate standard of education to its students, the Board, according to the evidence, was forced as of March, 2007 to reflect upon the school's capacity and its admissions policy. On 5th March, 2007, the Board resolved that the school could no longer continue to expand without further permanent accommodation. It accordingly wrote to the Department by letter dated 6th March, 2007, wherein it summarised the more significant matters which had informed its decision that for the following four years it would have to confine enrolment in St. Molaga's to students who were leaving second class in St. Peter and Paul's. In particular, the letter referred to the fact that conditions in the school constituted a danger to staff and pupils alike. The letter advised the Department of the unhealthy environment provided by prefabricated classrooms, the lack of P.E. facilities, the shortage of storage facilities and ancillary rooms for other activities, the inadequacy of the kitchen and of a fire risk due to the strain on the electrical system generated by the prefabricated classrooms.

As a result of the aforementioned decision of the Board in September, 2007, St. Molaga's admitted only those children who had previously been pupils of St. Peter and Paul's. It admitted 120 students into its third year including two special needs students. In much of the documentation exhibited in these proceedings the special needs students are referred to as "S.N." students. At the same time St. Molaga's had 109 students in fourth year of whom 11 were special needs students, fifth year had 117 pupils, 7 of whom were special needs students and sixth year had 111 of whom 4 were special needs students.

The evidence established that St. Molaga's had an enrolment policy which, according to the notes exhibited to the respondents' affidavit, had been reviewed by the Board shortly prior to January, 2008. That policy, which was exhibited in Ms. O'Reilly's first affidavit at exhibit "A", set out the priority to be afforded to applicants applying for enrolment to St. Molaga's. The first category of students prioritised were those leaving second class in St. Peter and Paul's Junior School followed by brothers and sisters of children already in the school and thereafter Catholic children of the parish.

The notice parties and their children were residing in Balbriggan in February, 2008. The memorandum of the hearing of the s. 29 appeal records that the notice parties were aware, prior to moving to Balbriggan, that they would find it difficult to obtain places for their children in the local schools. Notwithstanding this fact they moved to Balbriggan because, according to the record of the appeal hearing, it was nicer and cheaper than the location in which they had been living. They wished their daughters to go to St. Molaga's because it was a Catholic school and closest to their home. At the time of the appeal, they had applied to get their daughters into other schools in the locality without success.

The notice parties sought enrolment for their children over the telephone in February, 2008. They were advised that the school was full and they were notified of this fact in writing on 6th February, 2008. At the time St. Molaga's refused to enrol C and D, the Board had already rejected similar applications from 41 other students since September, 2007.

The notice parties appealed the refusal of the Board to enrol C and D and this appeal was heard by the appeals committee sitting at the Bracken Court Hotel, Balbriggan on 1st April, 2008. Prior to that hearing a process of facilitation,

as provided for by the Act, had taken place and had proved unsuccessful with the applicant contending that the school had no capacity to accept C into fourth class or D into third class. In the course of the facilitation process, Mr. Bell, the facilitator, prepared a table identifying the numbers of students in each of the classes in St. Molaga's as of March, 2008. This table was forwarded to the appeals committee and is exhibited in the respondents' affidavit.

From the documentation exhibited on the application it appears that the school principal, for the purposes of representing the Board at the appeal hearing relied upon the following matters in support of the decision of the Board not to enrol C and D, namely:-

1. The school's principal responsibility was to those students who were already in its school. The school needed to run to a standard which could not be achieved if the numbers of students were not curtailed in accordance with the decision of the Board of March, 2007.

2. The physical condition of the school and in particular its use of prefabricated classrooms was not satisfactory for the long term education of students.

3. The school had only 15 classrooms out of which it had to operate 16 mainstream classes. In addition it had no classroom to deal with non-teaching needs such as the psychological evaluation of students, the assessment of special needs students etc. On such occasions the principal was obliged to hand his office over to such activities thus placing him in a position where his work had to be carried out from a desk in the main corridor. Health checks were carried out in public areas disrupting other activities and in particular P.E.

4. The Board had to have regard to the physical safety and psychological welfare of students and teachers alike and for this reason the school needed to curtail its numbers in the manner determined in March, 2007.

5. Repeated requests for assistance from the Department to provide additional permanent accommodation had been rejected. It was, according to the Board, the negligence on the part of the Department and the local authority that had led to the shortage of school places in Balbriggan. Had the Department even carried out a cursory glance at the proposed development plan it should have anticipated the need to provide significant additional school places in Balbriggan. This, it had singularly failed to do. It had refused further assistance to allow St. Molaga's expand to meet the needs of the ever growing local community.

6. The Board had already rejected 41 students prior to rejecting C and D on the basis that the school was full.

7. The school had applied its enrolment policy and there was nothing repugnant or unlawful about that policy.

8. The Board was concerned over health and safety issues. A fire had occurred as a result of the overloading of the E.S.B. supply as a consequence of the demands generated by the large number of prefabricated buildings.

9. The number of students in the school justified St. Molaga's having a 17th mainstream teacher. With 448 students the school could have sought finance for a 17th teacher. St. Molaga's actually had 457 students i.e. 9 over the number which would have justified an application to the Department for such funding. The school, however, had not sought funding for an additional teacher as the school had no classroom where such a teacher could carry out teaching duties.

10. Finally, Mr. O'Toole, the teachers' representative on the Board, sought to validate the Board's decision by relying upon the Department's Circular 0020/2007. That circular directed schools to endeavour to "ensure" that it would maintain its average class size to 27 students. Mr. O'Toole emphasised that given that St. Molaga's had a total student population of 457 students in 16 classes, it had 25 more pupils than was thought desirable by the Department. In reaching his calculations he also relied upon the contents of Department Circular 09/99 which advised that in relation to student numbers, all special needs children should be counted for the purposes of determining the size of mainstream classes. However, even if he excluded these children, Mr. O'Toole indicated that the school would have 433 students which again was just over the level deemed acceptable by the Department.

In addition to his submissions, Mr. O'Toole volunteered to bring the committee to inspect the school premises to demonstrate the conditions within which students and teachers were expected to function. This was declined as was his offer to show the appeals committee the file of papers supporting the Board's efforts to obtain funding from the Department or public representatives for additional facilities for the school.

The Decisions of the Appeals Committee

The appeals committee having heard the evidence in respect of the appeal of C obtained the agreement of both parties that it would consider its decision in relation to D on the same evidence that had been submitted in C's case.

The appeals committee upheld the appeal of the notice parties in respect of each of their daughters and notified the secretary of the Department to this effect in a written report which was forwarded to the applicant by letter dated 25th April, 2008. The decision of the appeals committee in each case was stated to have been made on the basis that St. Molaga's had the capacity to enrol each of the children. The appeals committee in its report stated that in arriving at its decisions it took into account a range of issues including the following:-

"• The oral and written presentations of both parties

- St. Molaga's is the choice of school of C's parents who now reside in the parish of Balbriggan
- St. Molaga's National School is the nearest school to the family home
- The concern expressed by the parents of both girls regarding their future education
- The expressed willingness of St. Molaga's National School to facilitate all pupils who apply for enrolment should the

school have sufficient permanent accommodation to do so

- The Board of Management's desire to procure permanent accommodation for a 24 teacher school
- Difficulties of the school in maintaining the E.S.B. supply within an increased number of prefabricated buildings
- The school's implementation of Circular 09/99 with regard to the integration of pupils from the dyslexia units."

Having regard to the wide ranging attack on the decision of the appeals committee it is important to refer in some detail to the content of the replying affidavits delivered on behalf of the respondents and also to some of the relevant documentation.

The Replying Affidavits

Mr. Peter Rafferty, Assistant Principal Officer in the Department of Education, advised the Court that as of September, 2007 there were 93 students in second year in St. Peter and Paul's whom it was anticipated would transfer to St. Molaga's in September, 2008. He stated that the sixth year in St. Molaga's had 107 students and that consequently there would be an overall reduction of 14 students in the school in the following academic year i.e. 2008/2009. Mr. Rafferty agreed that the Department's Circular 0020/2007 required class numbers to be kept as low as possible and that the differential between the number in the largest class and the smallest class should be kept to a minimum. He agreed that St. Molaga's as of 30th September, 2007, had 458 students and confirmed that at 448 students the school could have applied for the appointment of a 17th class teacher. Mr. Rafferty made no reference to Ms. O'Reilly's affidavit wherein she advised the Court that St. Molaga's had no classroom wherein an additional teacher could teach and that accordingly the appointment of a seventeenth teacher was futile. Mr. Rafferty referred to the fact that the school had been assigned 2 special class teachers, one temporary special class teacher, three learning support resource teachers and one temporary teacher for language support. Finally, at para. 5 of his affidavit Mr. Rafferty advised the Court that in the context of a s. 29 appeal, issues concerning the provision of resources to a school, such as permanent accommodation or accommodation which can physically and safely be maintained by a school, were not matters within the appeals committee's control or area of responsibility.

Mr. Meehan, chairman of the appeals committee, in his affidavit stated that the issue at the centre of the appeal was the capacity of the school to accept the notice parties' children as students at St Molaga's. He confirmed that the committee relied upon the matters set out in its decision and asserted that the committee took into account the Departmental Circulars 09/99 and 0020/2007. Mr. Meehan noted that C was seeking entry into fourth year and D entry into third year. He referred to the number of mainstream students in the fourth year classes as being 24, 25, 24 and 25 respectively. In advising the Court as to these statistics, Mr. Meehan excluded from his calculations the 11 special needs students in that year notwithstanding the content of Departmental Circular 09/99 to which he states the Committee had regard and which advised that special needs children should be included for the purpose of calculating the number of children in mainstream classes, a matter to which the Court will return later. Mr. Meehan made no mention of the numbers of students in the third year classes into which D was seeking entry but advised the court that St. Molaga's had, in other years, shown a willingness to breach the average class size of 27 students as advised was acceptable by the Department in its third year classes.

Mr. Meehan went on to refer to clause 2 of the school's enrolment policy which gave preference to siblings of existing students. He advised the Court that C and D were of above average academic ability and that consequently the committee had concluded that they would not prove an undue burden on teaching resources if enrolment was directed. Mr. Meehan stated that there was no evidence before the committee that there was a physical limitation on the capacity of any classrooms in which C and D might be taught if enrolled and that the appeals committee had also considered the inter-relationship between the special needs classes and mainstream classes in coming to its conclusion as to the school's capacity to enrol both C and D.

The appeals committee, according to Mr Meehan, concluded that if C and D were enrolled that the class sizes in St. Molaga's would either not exceed an average of 27 or the number of students which the applicant had shown itself prepared to accept in previous years. He also stated that the appeals committee, in reaching its decision, had considered the provisions of ss. 6(e), 9(m) and 15(2)(d) of the Act. Mr. Meehan concluded his affidavit by asserting that the committee did not act *ultra vires* and that its decision was rational and reasonable. He also denied that the committee had taken into account irrelevant considerations and/or that it had failed to take into account any relevant considerations in coming to its decision.

Relevant Documentation

Given that the applicant and the respondents have each placed significant weight upon the content of a number of departmental circulars, I propose to detail the content of these circulars insofar as they are relevant to this judgment.

Departmental Circular No. 09/99 entitled "Circular to Boards of Management and Principal Teachers of National Schools" deals with the procedures for establishing special classes for children with special educational needs. This document makes it clear that children who require special education should be counted on the ordinary roll of students for staffing purposes. The circular also reminds schools that special needs children should be integrated where possible within mainstream classes according to their level of needs and attainments.

The purpose underlying Circular 09/99 appears to have been to encourage national schools to accept students with special educational needs arising from a wide range of disabilities. As already noted earlier in this judgment, the Department provides funding for teachers at recognised schools depending upon the numbers of children in mainstream classes. By requiring special needs children to be counted as part of mainstream classes the Department presumably was trying to ensure that when children with special needs were integrated with non-special needs children for those subjects where they are educated together, that the class sizes would not prove to be excessively unwieldy in terms of the delivery of education or stressful from a teaching perspective. I do not believe it unreasonable to suppose that in the absence of a direction of this nature that certain schools might be reluctant to accept significant numbers of children with special educational needs.

Departmental Primary Circular 0020/2007 is a circular which principally deals with the regulations governing the appointment and retention of teachers in recognised schools. At clause 11 it provides the following advice to boards of

management, principal teachers and teaching staff in primary schools namely:-

> "11. Class sizes
>
> The staffing schedule is structured to ensure that all primary schools will operate to an average mainstream class size of 27 pupils. Posts allocated on the basis of this schedule are specifically for mainstream classes and should be deployed accordingly. School authorities are requested to ensure that the number of pupils in any class is kept as low as possible, taking all relevant contextual factors into account (e.g. classroom accommodation, fluctuating enrolment). In particular, school authorities should ensure that there is an equitable distribution of pupils in mainstream classes and that the differential between the largest and smallest classes is kept to a minimum.
>
> The attention of the Department has been drawn to the existence of very large classes in a limited number of schools. Given the level of staffing which the schedules allow, the Department considers that apart, perhaps, from exceptional accommodation constraints, there is no reason for the existence of very large classes in any particular school.
>
> The Department's Inspectorate will monitor the deployment of staff and class sizes and, where necessary, discuss with school authorities the basis on which school policy decisions in this regard have been made, and report to the Department, where appropriate."

What is clear from the content of Circular 0020/2007 is that there is nothing in the circular which precludes a school having classes which are greater than 27. However, it is clear that the Department views 27 as something close to the maximum number of students which it considers satisfactory in any class insofar as schools are asked to ensure that they will operate to this average and keep class numbers as low as possible. In this respect, the final paragraph of clause 11 seems to give a fair indication as to how the Department views its role in terms of the control it might expect to have in relation to class sizes. The circular suggests that the Department, through its inspectorate, will keep itself appraised of class sizes in recognised schools and may ask a school which has classes larger than 27 to explain its failure to comply with the directions in the circular.

St. Molaga's National School Enrolment Policy

The aims and objectives of St. Molaga's National School are set out in its enrolment policy and these include:-

> "To enable each child to live a full life as a child, to develop to their full potential through the provision of a constructive learning environment and the delivery of a broad curriculum and to enable them to obtain skills and interests to enhance their leisure time outside school."

The enrolment policy gave priority to students seeking admission to St. Molaga's in the following order:-

> "1. Pupils enrolled in second class in St. Peter and Paul's Junior National School on the last day of the school year, who is seeking enrolment into third class at the beginning of the next school year.
>
> 2. Brothers and sisters of children in the school.
>
> 3. Catholic children of the parish.
>
> 4. Catholic children who live outside the parish.
>
> 5. All the children who live within the parish boundaries but are not Catholic applying for a placement are entitled to a place if there are vacancies after the groups from 1 – 4 have been allocated.
>
> 6. All children who apply to the school and are not Catholic and are not residents within the parish boundaries are entitled to a place in the school if there are vacancies in the school after the groups from 1 – 5 have been allocated places."

Section 29 of the Act

The relevant provisions of s. 29 are as follows:-

> "29(1) Where a board or a person acting on behalf of the board –
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> …
>
> (c) Refuses to enrol a student in a school, or
>
> …
>
> the parent of the student, or in the case of a student who has reached the age of 18 years, the student, may, within a reasonable time from the date that the parent or student was informed of the decision and following the conclusion of any appeal procedures provided by the school or the patron, in accordance with section 28, appeal that decision to the Secretary General of the Department of Education and Science and that appeal shall be heard by a committee appointed under subsection (2).
>
> (2) For the purposes of the hearing and determination of an appeal under this section, the Minister shall appoint one or more than one committee (in this section referred to as an 'appeals committee') each of which shall include in its membership an Inspector and such other persons as the Minister considers appropriate.
>
> (4) In hearing and determining an appeal under this section an appeals committee shall act in accordance with such procedures as may be determined from time to time by the Minister following consultation with patrons, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers and such procedures shall ensure that –

(a) the parties to the appeal are assisted to reach agreement on the matters the subject of the appeal where the appeals committee is of the opinion that reaching such agreement is practicable in the circumstances,

(b) hearings are conducted with the minimum of formality consistent with giving all parties a fair hearing, and

(c) appeals are dealt with within a period of 30 days from the date of the receipt of the appeal by the Secretary General, except where, on the application in writing of the appeals committee stating the reasons for a delay in determining the appeal, the Secretary General consents in writing to extend the period by not more than 14 days.

(5) On the determination of an appeal made under this section, the appeals committee shall send notice in writing of its determination of the appeal and the reasons for that determination to the Secretary General.

(6) Where –

(a) an appeals committee upholds a complaint in whole or in part, and

(b) it appears to the appeals committee that any matter which was the subject of the complaint (so far as upheld) should be remedied,

the appeals committee shall make recommendations to the Secretary General as to the action to be taken.

(7) As soon as practicable after the receipt by the Secretary General of the notice referred to in subsection (5), the Secretary General –

(a) shall, by notice in writing, inform the person who made the appeal and the board of the determination of the appeals committee and the reasons therefore, and

(b) in a case to which subsection (6) applies, may in such notice give such directions to the board as appear to the Secretary General (having regard to any recommendations made by the appeals committee) to be expedient for the purpose of remedying the matter which was the subject of the appeal and the board shall act in accordance with such directions."

1. Jurisdiction/Power of the Appeals Committee under Section 29 of the Act

The first issue for the Court is the extent of the jurisdiction of the appeals committee under s. 29 of the Act of 1998. Thereafter, it must consider whether or not the appeals committee exceeded that jurisdiction.

The applicant submits that, whilst s. 29 of the Act is silent as to the scope of the appeal provided for, the appeal is one which is limited to a review of the lawfulness of its decision to refuse enrolment. It submits that the appeals committee had no jurisdiction to interfere with its decision which it contends was a management decision made in accordance with a valid enrolment policy and based upon management considerations. The applicant asserts that the only body competent to decide upon the capacity of a school is the board of management and that such a decision it is beyond the remit of the Minister, the Department and even the school's patron. This being so, it is, according to the applicant, inconceivable that the appeals committee, which the applicant describes as an *ad hoc* committee, could have been intended to have the power to second guess a decision of a board of management as to a school's capacity.

The respondents assert that the appeals committee is not constrained in the manner contended for by the applicant. The appeal provided for by s. 29 is alleged by the respondents to constitute a broad and flexible remedy and is one which is not confined to providing a method whereby a decision of a board of management can be reviewed. The respondents further submit that the appeals committee is not bound by the terms or confines of a particular enrolment policy. Not only is it entitled to look at the lawfulness of that policy and whether it was applied correctly but it may also consider all of the circumstances surrounding a refusal to enrol. In other words, the respondents contend for the right to conduct a full inquiry into any decision made by a board of management which results in a refusal to enrol a student even if that decision is based on management considerations and further submit that their powers extend to the right to reverse any such decision.

The respondents rely upon the totality of the Act and also upon its long title in support of their assertion that the legislation was intended to constitute a radical overhaul of the system of education in Ireland. They submit that s. 29 of the Act was intended to give parents, for the first time, a right to challenge a school's decision not to enrol their child as a pupil irrespective of whether or not the decision was made by the lawful application of a valid enrolment policy.

Given that the decision the subject matter of the within proceedings is one which principally involves a decision made as to a school's capacity, it is important for the Court to briefly reflect upon the nature of that decision and the considerations that inform a decision of that kind.

Having considered the evidence in the present case, the Court is of the view that a decision made as to a school's capacity is a sophisticated decision and is not one which is amenable to scrutiny by reference simply to any mathematical formula, numbers exercise or an examination of the physical dimensions of school classrooms. Such a decision must involve the consideration of a wide range of issues which include the Board's obligations under health and safety legislation, its responsibilities as the employer of its teaching staff, its obligations regarding both the extent and the standard of education to be delivered, the requirements of the Department regarding the curriculum as well as the physical and emotional welfare of its students. Any Board in deciding upon the capacity of its school will further have to have regard to its common law and statutory obligations as occupier of the school premises.

Many of the matters which will inform a Board's decision as to its school's capacity can be gleaned from the letter written by St. Molaga's to the Department in March, 2007. That letter gives some insight into the considerations involved and also lends weight to the applicant's assertion that the issue of a school's capacity is indeed a management issue. The decision is one which is likely to include, *inter alia*, a consideration of the existing number of students in the school

including those whom it is anticipated may seek entry from any feeder school, the likely number of teachers and the facilities available for them, the condition and size of the schools premises, the facilities available on the campus, the standard of education it desires to deliver and the range of extra-curricular activities to be provided.

If the Court is correct in the view that it takes as to the considerations that potentially feed into a board of management's decision as to a school's capacity, the acceptance of the respondents' submission as to the extent of the appeal provided for under s. 29 of the Act would make it very difficult for a board of management to plan with any degree of certainty for the school's future. The issue as to the school's capacity could be continually altered by ongoing decisions of various appeals committees exercising their powers under s. 29 of the Act. By way of example, on the respondents' case each of the 41 students to whom enrolment was denied by St. Molaga's were entitled under s.29 to seek a full appeal of the Board's refusal to enrol them as students. If they were refused enrolment by any other school, as appears likely, they would have similar rights in relation to each such refusal. Then consider the type of matters which the committee states it considered in coming to its conclusion on this appeal *i.e.* past numbers of pupils in the school, future numbers of pupils in the school, the academic ability of the student seeking enrolment, the number of teachers in the school, the physical dimensions of the classroom, the reasons for the student wishing to attend that particular school *etc*. It appears to this Court that a board could spend its entire time defending such appeals in a scenario where one appeals committee on one day could decide that a school had no capacity to enrol a particular student only for the same or a different committee to come to an alternative conclusion the following day in relation to a different student, thus rendering it impossible for a board to manage its school on a day to day basis or plan for its future.

Interpretation of Section 29 of the Act of 1998

The decision made by the appeals committee must fall within the substantial powers conferred upon it under the Act and the question this Court must address is precisely what power was conferred on that committee by the implementation of s. 29 given that the applicant contends that the committee was in error as to its own power. Was it intended that the appeals committee would have the wide ranging powers contended for by the respondents or was it the intention of the legislature to provide, through the mechanism of s. 29, something akin to a regulator who would have the right to review complaints made against boards of management regarding their refusal of enrolment so as to ensure that it had acted lawfully in accordance with a valid enrolment policy, that it had not acted in a discriminatory or invidious manner and that its decision in all of the circumstances was not irrational?

As an aid to the interpretation of s. 29, it is fundamental for the court to look firstly at s. 29 in the context of the Act as a whole. Thereafter, there is ample authority to suggest that a court may legitimately look for assistance to certain other materials. In this regard the applicant relies upon what is referred to as the "informed interpretation rule" which provides that courts should infer that the legislature, when settling the wording of an enactment, intended the courts to be fully informed as to all such matters as may *illumine* the text. In *Halsbury's Laws of England*, Vol. 44 (1), 4th Ed., (London, 1995) at para. 1414 the informed interpretation rule is described as follows:-

> "The informed interpretation rule is a rule under common law that the court must infer that the legislature, when settling the wording of an enactment, intended it to be given a fully informed, rather than a purely literal interpretation. Accordingly, the court does not decide whether or not there is any real doubt as to the legal meaning of the enactment, and if so what way to resolve it, until it has first discerned and considered, in the light of the facts to which the enactment is being applied, the context of that enactment, including all such matters as may illumine the text and make clear the meaning intended by the legislature in the factual situation of the instant case."

Whilst it has been suggested by Dodd in *Statutory Interpretation in Ireland* (Dublin, 2008) at para. 8.06, that perhaps the informed interpretation rule as described above might be somewhat broader than what would be accepted in Ireland, he nonetheless endorses the rule to the following extent:-

> "In Ireland, it is usually safe to presume that it is intended by the legislature that the courts be fully informed as to legal matters relevant to an enactment (as opposed to any and all matters that potentially aid interpretation), and that interpretation is to proceed from such an informed standpoint."

Accordingly, the Court in coming to its conclusions has firstly looked at the provisions of s. 29 itself and has thereafter considered that section in the context of the entirety of the enactment. The Court has tried to identify the scheme of education in Ireland which was envisaged by the Act of 1998 as a whole prior to deciding where in that scheme s. 29 was intended to fit and the likely purpose behind the appeals mechanism. In addition to these matters the Court has also considered the Act of 1998 and s. 29 thereof against the backdrop of the Constitution, the common law and the history of the education system in Ireland, all of which this Court believes are matters material to its conclusions.

Given that the respondents contend that the Act of 1998 was intended to constitute a radical overhaul of the relationship between the State and recognised schools such as to permit the State through the s.29 appeals committee to reverse management decisions with all of the consequences that flow from such power, it is, I believe, relevant to examine the situation which pertained in Ireland prior to the implementation of the Act of 1998 in seeking to validate the respondents' assertions.

Prior to the Act of 1998, the courts had cause to consider on many occasions the relationship between primary schools and the Department of Education. In particular, in *Crowley v. Ireland* [1980] I.R. 102, the Supreme Court dealt with the obligations of the Department under the Constitution. In that case, the plaintiffs were students in a school who were affected by a teacher's strike. The plaintiffs claimed, *inter alia*, a number of reliefs including an order directing the State defendants to provide them with free primary education. The State defendants appealed against a High Court judgment given in favour of the students. In the course of that appeal Kenny J. considered the obligations on the State arising from the provisions of Article 42(4) of the Constitution. In his judgment he referred to the obligation of the State being one which was limited to "provide for" education for the plaintiffs but concluded that the State was not obliged to supply it directly. In particular at p. 126 of this judgment he noted:-

> "However, the State is under no obligation to educate. The history of Ireland in the 19th century shows how tenaciously the people resisted the idea of State schools. The Constitution must not be interpreted without

> reference to our history and to the conditions and intellectual climate of 1937 when almost all schools were under the control of a manager or of trustees who were not nominees of the State. That historical experience was one of the State providing financial assistance and prescribing courses to be followed at the schools; but the teachers, though paid by the State, were not employed by and could not be removed by it: this was the function of the manager of the school who was almost always a clergyman. So s. 4 of Article 42 prescribes that the State shall provide *for* free primary education. The effect of this is that the State is to provide the buildings, to pay the teachers who are under no contractual duty to it but to the manager or trustees, to provide means of transport to the school if this is necessary to avoid hardship, and to prescribe minimum standards."

In more recent times, the Department of Education made its understanding of its role in education clear in a number of cases wherein children who were sexually abused whilst at national school sought to render the schools patron and/or the boards of management of their schools and/or the Department, Ireland and the Attorney General liable for their injuries on the basis of the alleged control which those parties exercised over the relevant school and its teaching staff. In all such cases the State respondents denied control over the management of the national schools concerned and defended the claims based upon the assertion that the role of the State had been limited to agreeing a curriculum, providing funding for the employment of teachers and provision of premises and to providing an inspectorate to maintain teaching standards in such schools. In this regard, the most recent decision of the Supreme Court in *O'Keeffe v. Hickey, the Minister for Education & Science, Ireland and the Attorney General* [2008] I.E.S.C. 72 is of some assistance.

Whilst the decision in *O'Keeffe* relates to events which happened long prior to the implementation of the Act of 1998, the decision is undoubtedly of assistance in seeking to demonstrate the historical relationship between boards of management and the Department and in seeking to ascertain whether it is likely that it was the intention of the legislature to so radically depart from that relationship in providing for an appeals committee that was intended to have the power to control and direct boards of management in relation to what in the present case amounts to a management issue.

In *O'Keeffe*, the plaintiff was assaulted some 35 years previously by a teacher at a school run by a private religious group which was recognised by the State as a national school. She later sued the teacher and received a substantial award of damages which she had not been able to recover. Thereafter, Ms. O'Keeffe sued the State defendants claiming that they were liable to compensate her either directly or vicariously. The learned trail judge dismissed the allegations of negligence against the State and no appeal was taken from that finding. However, the case proceeded by way of appeal on the grounds of alleged vicarious liability on the part of the State defendants for the wrongdoing of the teacher concerned. The State defendants asserted that they were not liable on the basis that they did not run or own the school or appoint the teachers. The State submitted that its role was to fund the school as mandated by the Constitution and to pay the teachers whom the religious officials appointed. The State accepted that its functions included the laying down of the academic syllabus and its role in inspecting how the curriculum was taught to students by the teaching staff. It maintained that it was excluded from the running of the school and that that function had been conferred on the religious authorities by long standing legal arrangements over many years. The defendants contended that the State was significantly removed from the management and control of private schools who they pointed out were run on behalf of the school's patron by the boards of management.

In his lengthy and learned judgment, Hardiman J. set out the history of national education in Ireland from as early as 1833. He referred to the system as being one which was largely State funded but entirely clerically administered and that this system was in conformity with the State's obligations under Article 42.4 of the Constitution which was to "provide for", free primary education and in that connection to "endeavour to supplement and give reasonable aid to private and corporate educational initiative". He stated as follows regarding the constitutional obligations of the State:-

> "Moreover, the reference to reasonable aid to 'private and corporate educational initiative' aptly describes the practice already long established in 1937, which has continued since, whereby the State 'provided for' the availability of free primary education very largely by making available to private groups, religious or otherwise, financial aid or assistance for the provision of primary education."

In the context of vicarious liability, Hardiman J. considered the level of control of the State over the activities of recognised national schools and their teaching staff prior to concluding as follows:-

> "We have already seen, in the historical portion of this judgment, that the State involvement in the governance of national schools, for historical reasons, is indirect not to say oblique and general rather than particular. The role which the State might otherwise have occupied is, by their own urgent desire, occupied by the Churches and other voluntary bodies, in this case the Catholic Church."

The learned trial judge in concluding that the State could not be liable for the tortuous or criminal acts of the plaintiff's teacher stated as follows:-

> "Accordingly it seems to me that the State defendants cannot be liable for the first-named defendants' tortious and criminal acts on the ordinary and established principles of vicarious liability. The perpetrator was not the Minister's employee: the latter did not employ him or direct him. He was employed by the patron and directed and controlled by the manager. The latter, according to one of the expert witnesses at the trial 'was the direct governor of the school'. The Minister laid down rules for national schools but they were general in nature and did not allow him to govern the detailed activities of any individual teacher. He inspected the schools for their academic performance, other than religious instruction, but it did not go further than that. He was, to paraphrase the words of Kenny J., deprived of the direct control of the schools, and of the enormous power which that brings, because 'there was interposed between the State and the child the manager or the committee or board of management'. Equally, the Minister did not appoint the Manager or the teacher or directly supervise him. This, indeed, was the essence of the "managerial system."

Hardiman J. concluded that on the evidence he could not see how the Minister had any scope whatsoever to make any personal judgment about the individuals the subject matter of Ms. O'Keeffe's complaints. He referred to the indirect role of the Minister and the State in relation to the management and control of schools in the following fashion:-

> "All these factors tending to distance the Minister and the State authorities from the management of the school and the control of the first-named defendant are direct consequences of the long established system of education, described above and mandated in the Constitution whereby the Minister pays and, to a certain extent, regulates, but the schools and the teachers are controlled by their clerical managers and patrons. It is not the concern of the Court either to endorse or to criticise that system but merely to register its existence and the obvious fact that it deprives the Minister and State of direct control of schools, teachers and pupils."

The question that this Court must consider, in the light of decisions such as that of the Supreme Court in *O'Keeffe*, is the extent to which the provisions of the Education Act 1998 in any real way demonstrate an intention on the part of the legislature to change the relationship which previously existed between the respective parties to such an extent that s. 29 can be viewed as empowering the appeals committee to conduct the wide ranging type of hearing contended for by the respondents in the present case. In other words was the Act intended to realign the relationship between the parties to the education system such that the Court should conclude that the State, which was formally only indirectly and obliquely involved in education, created a statutory committee with the power to involve itself in and/or reverse decisions made by a board of management?

The Act of 1998 provides the structural system for education in Ireland and the Act sets out the rights and duties of those parties who are involved in that system. The legislation is described by Glendenning in *Education and the Law*, (Dublin, 2008) at para. 6.29 in the following terms:-

> "In legislating for a complex system, which, for the most part, has not previously been subject to legislation, the Act seeks to respect the traditions and diversity of the school system while incorporating such contemporary concepts as partnership, transparency and accountability."

The legislation clearly sets out the respective roles of the State, the patron, the board of management and the appeals committee. The role of the Department is set out in a number of sections which, *inter alia*, include at s. 12 its responsibility to provide funding and grants to recognised schools, at s. 13 its obligation to implement and render effective the programme of education in Ireland by providing for inspection of the teaching standards in schools and at s. 30 its role in the creation of the curriculum and the subjects to be taught.

The Court has not detected any statutory provisions which might encourage it to the view that the legislature intended that the Department or any committee established under the Act would be afforded the right to either make or reverse management decisions lawfully made. Whilst the Act introduces in a formal way the concepts of partnership and consultation between those parties primarily involved in education, namely teachers, parents, the local community, the Department, the school's board of management and its patron, the Act nonetheless maintains the pre-existing demarcation between the roles of the State, the board of management and patron. Further, whilst the Act formalises structures designed to promote cooperation, transparency and accountability there is nothing in the legislation demonstrating any intention on the part of the State to resile from its pre-existing indirect role in the management of national schools.

A good example of the type of partnership, transparency and accountability introduced by the Act of 1998 is to be found in s. 14 of the Act which deals with the composition of boards of management of recognised schools. The composition of the board must be agreed between patrons of schools, national associations of parents, recognised school management organisations, recognised trade unions and staff associations representing teachers and the Minister. Such a provision to my mind suggests that it is unlikely that it was the intention of the legislature to grant to a s. 29 appeals committee a right to reverse a decision lawfully made by a board of management thus constituted. Why would the legislature have required that the composition of a board of management would have to meet with the approval of such a wide range of interest groups if it was not for the purpose of permitting the State to continue its relatively indirect role in the running of recognised national schools whilst seeking to ensure that those schools were managed in the best interests of all parties involved in the education process through ensuring that management decisions would be infused and informed by the needs and knowledge of such interest groups?

Of further assistance to the Court in endeavouring to assess the extent of the power vested in a s. 29 appeals committee is to look at the problem that the State was seeking to address in enacting that provision. The problem which became the subject matter of the appeal in the present case was the acute lack of school places for the rapidly expanding population in the Balbriggan area. It can be fairly asked whether the legislature, when it enacted s. 29, intended that section to be used to resolve an appeal which had nothing to do with the enrolment policy of any school or its application but with the problem of too many students for too few school places. The Court concludes that it was never intended that the s. 29 appeals committee would involve itself in making decisions which were destined to find places for students in local schools. This is a problem which is addressed by s. 27 of the Education (Welfare) Act 2000. Under that legislation the National Education Welfare Board was established and charged with making all reasonable efforts to find a school place for a child refused enrolment in another recognised school. In default, the Minister is obliged, under the Education (Welfare) Act 2000, to make other arrangements to ensure the child receives a minimum education and to monitor the progress of the child's education.

The legislation when taken as a whole is much more consistent with the inference that it is solely the right of the board of management, who runs the school on behalf of the patron, to make all management decisions including a decision as to the school's capacity in terms of the numbers of children which it can educate at any given time. It is the board of management under s. 14(2) of the Act of 1998 that is charged with the functions assigned to the school by the legislation. The school's obligations in terms of the provision of education to students is set out fully in s. 9 of that Act. An insight into the breath and depth of the responsibilities of a board of management in terms of its obligations to provide education to a qualitative standard having regard to the needs of its students by controlling its resources is best demonstrated by a reading of s. 9 of the Act which provides as follows:-

> "9. A recognised school shall provide education to students which is appropriate to their abilities and needs and, without prejudice to the generality of the foregoing, it shall use its available resources to –
>
> (a) ensure that the educational needs of all students, including those with a disability or other special educational needs, are identified and provided for,

(b) ensure that the education provided by it meets the requirements of education policy as determined from time to time by the Minister including requirements as to the provision of a curriculum as prescribed by the Minister in accordance with section 30,

(c) ensure that students have access to appropriate guidance to assist them in their educational and career choices,

(d) promote the moral, spiritual, social and personal development of students and provide health education for them, in consultation with their parents, having regard to the characteristic spirit of the school,

(e) promote equality of opportunity for both male and female students and staff of the school,

(f) promote the development of the Irish language and traditions, Irish literature, the arts and other cultural matters…

(m) subject to this Act and in particular section 15 (2) (d), establish and maintain an admissions policy which provides for maximum accessibility to the school."

How and in what circumstances the obligations set forth at s. 9 above can be met are matters that require an intimate knowledge of the workings of a school and can only, in the opinion of the Court, be adjudicated upon by body such as a board of management, comprised, as it is, of members who bring to that body a wide range of knowledge and experience. Surely, the board of management, having regard to the provisions of s. 14(1) of the Act, must be the body best positioned, because of its composition and state of knowledge, to make decisions such as that which pertains to a school's capacity? If the Court is correct in this respect it seems unlikely that the legislature intended that the committee established by s. 29 of the Act would have a right to reverse such a decision once the same was lawfully made in accordance with a valid enrolment policy.

Apart from the guidance to be gleaned from s. 9 of the Act, s. 15 provides that it is the duty of the board of management to manage the school on behalf of the patron and for the benefit of the students and their parents and obliges the board to perform its functions in the manner specified at s. 15(2). Once again, these provisions seem inconsistent with an assertion that a s. 29 appeals committee should have the power to reverse a decision of a board of management which may have been made for the purposes of providing the appropriate education for which it had responsibility under s. 15(1).

Having regard to the provisions of ss. 9, 14 and 15 of the Act and in particular having regard to the composition of the board of management which was clearly designed to ensure that management decisions were made with due regard to the needs of the school's students, their parents, the teaching staff, the community and other interested parties, it would take very clear language in s. 29 of the Act to convince me that it was the intention of the legislature to establish a committee that would have the right or power to reverse a management decision made by a board of management. Having considered the demarcation of duties, rights and obligations as provided for in the Act of 1998 as a whole, I must conclude that there is nothing in the language of s. 29 which is so plain or unmistakable as to lead me to such a conclusion. Further, if the Court were to construe s. 29 in the manner contended for by the respondents, the appeals committee could force a board of management, who has no appeal from its decision, to enrol more students that it considered was safe, thus potentially exposing the board to litigation in respect of which the committee would undoubtedly contend it had no liability.

For the aforementioned reasons, I reject the respondents' submission that s. 29 provides a broad and flexible remedy which allows the appeals committee substitute its own judgment on a management issue such as the capacity of a school for that of the Board itself. I believe it is far more likely that what the legislature intended to provide in s. 29 of the Act was something akin to a professional regulator who would operate an appeals procedure that was transparent and accessible to parents of children who were refused enrolment where they might complain about the lawfulness of that decision. In this respect, the Court takes some comfort from the use of the word "complaint" in s. 29(6) of the Act. Accordingly, I conclude that the substantive power conferred by s. 29 is limited to providing a student who is refused enrolment with the type of review referred to above. In purporting to substitute its opinion for that of the board of management as to the school's capacity, I conclude that the committee acted *ultra vires* the substantive powers conferred upon it by s. 29 of the Act of 1998.

2. If the Power of the Appeals Committee is as Contended for by the Respondents, have the Appellants Established a Right to have its Decision Quashed?

Lest the Court is wrong in its conclusions regarding the extent of the powers of the s. 29 appeals committee, the Court will proceed to consider the other issues raised by the applicant which are whether or not the decision of the appeals committee should be quashed on the grounds that:-

(a) it based its decision on a number of considerations that were irrelevant to its determination;

(b) it excluded material from its considerations that it ought to have considered and/or;

(c) in all of the circumstances the decision was irrational.

The applicants in the present case rely upon the decision in *Anisminic v. Foreign Compensation Commission* [1969] 2 A.C. 147 in support of its assertion that the decision of the appeals committee ought to be quashed on the basis that, in reaching its decision, it took into account matters irrelevant to its considerations and/or excluded matters which it should have included within its considerations to the extent that the decision should be deemed a nullity.

Lord Reid at p. 171 stated:-

"…[T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in

the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

In addition to relying upon the decision in *Anisminic* which was approved of by Keane J. in *Killeen v. Director of Public Prosecutions* [1998] 1 I.L.R.M. 1, the applicant also relies upon a submission that the decision should in any event be quashed as being irrational. In this regard, both parties accept that the court's jurisdiction to quash a decision made by a tribunal or committee such as that involved in the present case is to be found in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 and in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R 39.

In *Keegan*, the test to be applied in terms of irrationality and/or unreasonableness is to be found in the judgment of Henchy J. at p. 658 where he states:-

> "I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted *ultra vires*, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, *inter alia*, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

The significant onus that lies upon an applicant seeking to have a decision quashed on the grounds of irrationality and/or unreasonableness was outlined by Finlay C.J. in *O'Keeffe v. An Bord Pleanála* where at p. 71 of his judgment he stated as follows:-

> "…[T]he circumstances under which the court can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare."

The learned Chief Justice endorsed the judgment of Henchy J. in *Keegan* before himself advising on the circumstances in which the court might intervene. At pp. 71 and 72 he concluded:-

> "The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that, (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.
>
> …
>
> I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

It is as against the backdrop of the aforementioned jurisprudence that the Court has sought to ascertain whether by virtue of the matters included or excluded from its considerations the appeals committee should be considered to have acted outside of its jurisdiction. Thereafter, the Court has considered the assertion that the decision of the appeals committee is irrational as defined by Henchy J. and Finlay C.J. in *Keegan* and *O'Keeffe v. An Bord Pleanála*.

2(a) Irrelevant Considerations.

If the respondents are correct in their submission that the s. 29 appeal is one which entitles the appeals committee to reverse a decision of the board of management, then the appeals committee must, in reaching its decision, have regard to all matters which the board of management considered material to its decision as to the school's capacity. It cannot be the case that the appeals committee can contend that it has the power to reverse a decision of the board of management on a management issue without considering all of the matters which the board deemed critical to its decision. Accordingly, prior to deciding each of the legal issues referred to above it is important to record, from the evidence before the Court, the material relied upon by the board of management in making its decision not to accept any further students into St. Molaga's with effect from the commencement of the school year in September, 2008 save for those transferring from St. Peter and Paul's Junior School. The matters material to the board's decision appears to have included the following:-

> (a) the physical limitations of the school which included a lack of classrooms for teaching and a lack of classrooms for non-teaching use such as the psychological assessment of students, medical examinations, meetings with parents and a myriad of other activities requiring such space.
>
> (b) the lack of physical space for staff in terms of staff room and canteen facilities.
>
> (c) the numbers of children already in all of the classes in the school and in particular the overall number of children within the school which was above the guidance given by the Department in terms of average class sizes.
>
> (d) the fact that the school had numbers of children which would have justified a 17th teacher and that the school did not apply for such a teacher due to a lack of classrooms.
>
> (e) the school had had the experience of providing education in class sizes somewhat beyond those advised by the Department in earlier years and had concluded that the same provided for intolerable conditions for students and teachers alike.
>
> (f) the desire to provide proper education to an acceptable standard and quality as per its statutory obligations under s. 9 of the Act of 1998, including non-curriculum subjects such as concerts, career

guidance, P.E. and other non-syllabus education.

(g) health and safety issues including concerns for the physical and mental welfare of students and staff deriving from the number of pupils in the school and the demand on the electrical supply generated by the 12 prefabricated classrooms in the school which was, according to the chairperson of the board of management, "physically full to the brim to the extent" that it was "extremely difficult to operate".

It is perhaps easiest to approach this aspect of the judgment by evaluating the range of issues which the appeals committee recorded it had regard to for the purposes of reaching its decision that:-.

"St. Molaga's National School has the capacity to enrol C."

The decision of the committee which is set out earlier in this judgment refers to eight matters set out in bullet point format which it took into account in reaching its conclusions. Many of the matters allegedly relied upon by the appeals committee in the affidavit filed on its behalf are not mentioned in its decision and I will return to these later. Insofar as the decision itself is concerned the issues referred to at bullet points 2, 3 and 4 could not have been of any relevance to the decision unless the school had capacity to accept C and D as students. For example, the desire of the notice parties to send their children to St. Molaga's or the fact that it was the school nearest to their family home were not matters which should have engaged the committee. Either the school had the capacity to accept additional students or it did not.

The fifth matter taken into account by the committee was the expressed willingness of St. Molaga's to facilitate all pupils who applied for enrolment if the school had sufficient permanent accommodation. Once again this was not a matter relevant to the committee's decision given that the Board had concluded that the school did not have sufficient permanent accommodation to admit any further students. Similarly, the desire of the board of management to procure permanent accommodation for a 24 teacher school was an irrelevant consideration. What the committee was being asked to consider was whether or not the school had the capacity to accept two further students, one of whom had sought enrolment into a third year class and the other into a fourth year class, as of February, 2008. The board of management's long held and stated desire to increase its student numbers with the assistance of further permanent accommodation which had not been forthcoming, notwithstanding a period of nine years of lobbying, was not a matter which the committee was entitled to consider in reaching its decision.

Insofar as the committee indicated that it had considered the school's difficulties in maintaining its E.S.B. supply due to the increased number of prefabricated buildings, this is a matter which was potentially material to its decision and it had the right to take into account. However, any consideration of this fact was incapable, in the view of this Court, of being weighed in favour of the decision ultimately reached.

The final matter recorded in the decision of the appeals committee was the school's implementation of Circular 09/99 with regard to the integration of pupils from the "dyslexia unit". That circular provides that children with special needs should be counted for the purposes of calculating the number of students in mainstream classes. This being so, it is difficult to see how compliance by St. Molaga's with Circular 09/99 in its integration of pupils from the dyslexia units could have been a matter which weighed in favour of the appeals committee's decision that the school had the capacity to accept C and D unless it consciously decided to use the circular in a manner and for a purpose for which it was never intended *i.e*. to create the appearance of capacity in a class by discounting special needs students from its numbers when counting the size of mainstream classes. The appeals committee appears to have relied upon the existence of special classes for students with special needs so as to discount the numbers in the classes into which C and D had sought enrolment which was contrary to the stated intention of the circular, namely to ensure that schools had staffing levels based upon the integration of those children in mainstream classes.

The Court, having considered the content of the written decision of the appeals committee, has concluded that the issues referred to at bullet points 2, 3, 4, 5 and 6 of the decision should not have informed the committee's judgment on the appeal. The remaining matters referred to in the decision of the appeals committee, whilst potentially material to their considerations, were not matters which provided any basis upon which the committee could have concluded that the school had capacity to accept C and D as students and are therefore material to the reasonableness and rationality of the appeals committees decision..

Insofar as the replying affidavits have purported to set out further matters seeking to justify the committee's decision, but which were not referred to in the written decision, I now propose to deal with these notwithstanding the fact that it is difficult to know the extent to which they truly impacted upon that decision or whether the same are reasons given *ex post facto*, for the purposes of seeking to further justify the written decision.

In Mr. Rafferty's affidavit, he refers to the predicted intake from St. Peter and Paul's in September, 2008 and to the number of students due to leave sixth class in St. Molaga's in June, 2008 and concludes that there would accordingly be a reduction of fourteen students in St. Molaga's as of September, 2008. The Court concludes that this was not a matter which the committee was entitled to consider. C and D were not seeking enrolment as of September, 2008. They were seeking enrolment as of February, 2008. It was the capacity of the school at that point in time which was in issue. The fact that some six months later the school might have a smaller number of students was not a matter that could have justified supplanting a management decision that the school was full to capacity in February, 2008. If St. Molaga's, on reviewing the school's capacity as of September 2008, had decided that it could increase its student population then the Board should have been entitled to proceed to consider all applications in accordance with the priorities provided for in its enrolment policy rather than having that right usurped by the appeals committee decision that it should enrol two additional students into classes that would not in any event be affected by such a reduction some six months in advance of any reduction materialising.

The chairperson of the appeals committee, Mr. Meehan, in his affidavit denied the applicant's assertions that the committee failed to take into account the Departmental Circulars 09/99 and 0020/2007 before setting out a number of points which he stated were of "particular significance" to the committee's decision. Paragraph 10 of his affidavit reads as follows:-

"10. I say and believe that in finding that the school did have capacity for these two children, the following points were of particular significance:-

(i) the table of class numbers entitled '*enrolment numbers in St. Molaga's S.N.S. March 2008*' which was attached to the facilitator's report (and which was uncontested) shows four classes for fourth year

with mainstream numbers in each class of 24, 25, 24 and 25 respectively. C, one of the notice parties' children, would have been entering fourth class;

(ii) D would have been entering third class and the school, in its own evidence, stated that it made no distinction between the third and fourth class. The School had already shown a willingness to breach the average of 27 students per class for third class. Clause 2 of the school's own enrolment policy gives preference to siblings of students already attending;

(iii) The previous school records for both C and D showed that they had above average academic ability. In those circumstances, the committee was of the view that they would not prove an undue burden on the teaching resources of the class in which they would be placed;

(iv) There was no specific evidence offered to the appeals committee by the applicant that there was limited physical capacity in any of the classrooms which would prevent the admittance of an extra student;

(v) As stated above, the appeals committee did consider the contents of Circulars 09/99 and 0020/2007 with which they were familiar. In respect of Circular 09/99 which provides for a pupil ratio of 11:1 in specific learning disability units, the applicant's school had 24 students in three classes. Circular 09/99 requires schools to make arrangement for the appropriate integration of children with special educational needs into mainstream classes according to their level of needs and attainments. The appeals committee had this in mind when assessing the level of integration which was taking place in the school and how this would impinge on available capacity. The evidence of the committee was that there was partial integration of the students in a special learning disability unit. Integration was for one class period per day and only for a limited number of subjects and activities such as S.E.S.E, religious education, physical education, swimming and school tours. In respect of Circular 0020/2007 the appeals committee was aware that it provided for an average class size of 27 students. Posts allocated on the basis of this schedule are specifically for mainstream classes and should be deployed accordingly. School authorities are requested to ensure that the numbers of students in any classes are kept as low as possible, taking all relevant contextual factors into account such as classroom accommodation and fluctuating enrolment. In particular, school authorities should ensure that there is an equitable distribution of students in mainstream classes and that the differential between the largest and smallest classes is kept to a minimum. I see that the committee had the content of this circular in mind and actually considered it when reviewing the table of class sizes contained in the facilitator's report;

(vi) This means that the classes in the school would either not exceed an average of 27 or the number which the applicant itself had shown it is prepared to have in its class;

(vii) Furthermore, the applicant's school stated in evidence that they did not operate a waiting list. In those circumstances, when the appeals committee held that there was capacity in the school and that the notice parties' children should be enrolled, it directed that enrolment should be made with immediate effect."

The Court accepts Mr. Meehan's evidence that the appeals committee considered the matters referred to at para. 10 of his affidavit. Unfortunately, the Court must nonetheless conclude that a number of those matters were either irrelevant to the committee's considerations or were matters which were incapable of validly or rationally affording the committee a basis for reversing the Board's decision.

Firstly, insofar as the committee purported to rely upon the school's enrolment policy regarding siblings, it is clear that such a policy was only relevant if the student applying for enrolment already had a sibling within the school. It was not open to the committee to use that policy to, so to speak, "piggyback" D into third year, the year with the greatest number of pupils in the school, on the basis of a finding that C could be accommodated in one of the fourth year classes which had the lowest average class sizes for the four years in St. Molaga's.

Insofar as the committee relied upon the alleged above academic ability of C and D, this was a matter which the committee, in the view of this Court, was not entitled to rely upon. The very fact that the committee purported to rely upon matters such as the academic ability of the student applying for enrolment, fortifies the Court in its view that the s. 29 appeals committee was never intended to have the power to reverse a decision of a board of management in relation to a school's capacity. If it did have that power and was entitled to include in its considerations the academic ability of a student refused enrolment the consequences of such a finding must be carefully considered. If, for example, some or all of the 41 students refused enrolment by St. Molaga's had appealed the decisions of the Board, how would the relevant appeals committees have set about deciding those appeals? Would they have conducted inquiries into the academic ability of every child refused enrolment? Would the children with above average academic ability have succeeded in having the decision of the board of management reversed and would those with below average academic ability have failed in the same task? Is it to be inferred from Mr. Meehan's affidavit that the decision of the Appeals committee would have been different had it not been for the fact that C and D were of above average academic ability?

The Court does not accept that the appeals committee was entitled to take into account as one of its considerations the academic ability of any student refused enrolment. If it had such a right, the system of enrolment in a school could be rendered invidious and/or discriminatory. Apart from this very fundamental concern, the Court also views the appeals committee's reliance upon the academic ability of C and D as being entirely misplaced and of no value in circumstances where the committee had no knowledge of the abilities or disabilities of the children in the classes into which C and D had sought admission. Therefore the committee could not have been in a position to assess whether or not additional children placed into those classes, irrespective of their academic ability, would prove an unacceptable burden on the teaching staff or interfere with their ability to deliver the type of education required to meet the needs of those students already in those classes.

Insofar as the committee allegedly took into consideration the Departmental Circulars 09/99 and 0020/2007, the Court concludes that those circulars, having regard to the class numbers in St. Molaga's in February, 2008 could not have afforded the committee any justification for reversing the board's decision as to the school's capacity. Once again this is also a matter which informs the Court's judgment as to the reasonableness of the appeals committee's decision. In certain

circumstances, the Court acknowledges that the content of Circular 0020/2007 might be of relevance in considering whether or not a board's decision that a school had no capacity to enrol a student had been rationally made. For example, if a board of management contended that its school had no capacity to enrol a particular student solely on the basis of class numbers, in circumstances where perhaps the class into which the student had sought admission had a number of students manifestly below the Department's upper guideline of 27 students, the Circular might be evidence upon which it might be contended that the decision of the board was unreasonable or irrational. However, this is not such a case.

Insofar as the committee considered the number of students actually in the school as of the time of the application, it is disarming to note the approach of the appeals committee to the contents of the Departmental circulars referred to above. The appeals committee considered C's application first, presumably on the basis of the lower numbers of mainstream students in the fourth year classes into which she was seeking entry. It then proceeded to calculate the numbers of students in those classes contrary to the provisions Circular 09/99 and using that calculation decided she could be accommodated in one of those classes. Mr. Meehan refers to the classes in fourth year as having 24, 25, 24 and 25 students and excludes the special needs students who when included within these numbers would bring the class sizes to 27, 28, 27 and 27 respectively. Having concluded that there was room for C in one of the fourth year classes in reliance upon student numbers calculated otherwise than in accordance with the Department's own circular, the committee failed to carry out the same exercise in relation to D. Had it done so, it would have been forced to acknowledge that, even discounting the special needs students, those classes had 28, 31, 28 and 31 students respectively. In this regard, St. Molaga's was educating its third year students in class sizes significantly above the level that the Department requested the school to "ensure" it would not exceed in Circular 0020/2007.

It is difficult to accept that the appeals committee was entitled to include within its considerations the contents of Circulars 09/99 and 0020/2007 other than as a guide as to whether or not the decision by the board of management was one which was rational or reasonable in all of the circumstances. In any event, neither circular, if interpreted in the manner intended by the Department, provides any basis to support a conclusion that the school had the capacity to enrol C and D as students as of February, 2008.

The first part of the statement made by Mr. Meehan to the effect that the admission of C and D into fourth and third classes respectively would "mean that the classes in the school would either not exceed an average of 27 or the number which the applicant itself had shown it is prepared to have in class" is incorrect. Including the special needs students, as advised by Circular 09/99, each class in fourth year had 27 or 28 students. Each third class had either 29 or 31 students. Insofar as the committee included within its considerations the alleged flexibility of the board in other years to accommodate a greater numbers of students in its school and in particular in its third year classes, the Court concludes that this was not a matter which the committee was entitled to rely upon in reversing the Board's decision. The committee was not privy to the conditions within the school during the years when it had accepted a larger number of students nor was it appraised of whether or not the Board was satisfied that in those years the school had been in a position to comply with its obligations to its students, their parents and its teaching staff. This is a case, in which the board of management had previously had experience of trying to accommodate larger numbers in its classes prior to reassessing the school's capacity and its admission's policy in March, 2007. This is not a case where the board had no experience of trying to provide education in classes with larger student numbers. Accordingly, if the committee believed that the numbers of students in the school's classes in previous years was relevant, it was obliged to have regard to the issues which had caused the board to conclude that it could not manage those class sizes whilst meeting its obligations in terms of the provision of an appropriate standard of education in an environment that had regard for the health and welfare of students and teachers. It is untenable for the committee to suggest that the board was in some way estopped from denying admission to C and D based upon the fact that in previous years it had accommodated a greater number of students in its school.

For all of the aforementioned reasons, the Court concludes that the decision of the appeals committee should be quashed by reason of the fact that its decision was, by and large, based on considerations which were irrelevant to its determination.

2(b) Relevant Considerations

If it be the case that the appeals committee was entitled to conduct the broad ranging type of full appeal contended for by it, the Court concludes that there were matters which the appeals committee should have taken into account as being relevant to its considerations in terms of the school's capacity, to which it did not have regard. The committee should not have confined its decision to a consideration of the provisions of ss. 6(e), 9(m) and 15 (2)(d) of the Act of 1998. The appeals committee was also obliged to have regard to the stated difficulties of the board of management in implementing many of the objectives of the legislation as outlined in s. 6(a) – (f) inclusive of the Act in coming to any conclusion as to the school's capacity.

Whilst it may be correct to state that the board's complaint regarding the non-provision by the Department of additional accommodation was not a matter for the committee's consideration, it is certainly the case that the committee was obliged to have regard to the direct effect of the lack of such resources on all of the areas of concern to the school's board of management. This the committee did not do whilst simultaneously rejecting the board's offer to demonstrate the limitations generated by the lack of such resources by an inspection of the school premises.

The committee appears largely to have failed to consider the obligations of the board of management under s. 15 (a) – (g) inclusive and seems to have approached the issue of the school's capacity by reference almost exclusively to the numbers of children in each class and upon the board's failure to produce evidence that the physical dimensions of the relevant classrooms would not preclude the enrolment of C and D.

The Court is driven to the view that whilst the appeals committee has contended for the right to conduct a full appeal on a management issue, it nonetheless appeared determined to avoid considering issues which had been material to the board's decision as to the school's capacity. The decision of the board was based largely on irrelevant considerations and was made in circumstances where it did not consider many of the matters which were critical to a true analysis as to a school's capacity.

2(c) Reasonableness / Irrationality

In all of the circumstances of the case and applying the test provided for in *Keegan and O'Keeffe v. An Bord Pleanála*, the court concludes that, if the s. 29 appeals committee had the power to reverse the board of management's decision as to

the school's capacity, a concept that this Court rejects, its decision was unreasonable and/or irrational. Many of the reasons for the Court's conclusions are set out earlier in this judgment. There was simply no valid evidence to support the decision of the appeals committee if the issue of a school's capacity is the type of sophisticated decision referred to earlier in this judgment. Many of the matters relied upon by the appeals committee to support its decision were incapable of validly or rationally affording the committee a basis for reversing the board's decision. The notice parties produced no evidence in support of their assertion that C and D could be accommodated by St. Molaga's in circumstances where the school's capacity was assessed against the statutory and common law obligations of the board of management and the legal responsibilities attaching thereto. The decision of the committee excluded significant matters which it should have considered and failed to consider other matters which it ought to have considered to the extent that the ultimate decision flies in the face of reason and common sense and had no valid evidential basis.

Summary and Conclusion

The board of management of St. Molaga's had been trying for a period of nine years prior to 2007 to continue expanding its school in the face of a lack of resources and in particular, permanent physical accommodation. It had doubled its number of students in the ten years prior to 2007 and with regret in March 2007, its board of management decided that the school was full to capacity and that it could no longer justify trying to expand its school by the use of further prefabricated buildings having regard to the standard of education it hoped to provide, the welfare of students and teachers alike and the suitability of the accommodation within the school for the proper provision of education.

Having regard to the school's special relationship with St. Peter and Paul's Junior School, with whom it had been associated for well in excess of 100 years and which was in effect its feeder school, it decided to implement a policy whereby it would take in only students from St. Peter and Paul's for a period of four years in the hope that it might thereby be in a position to provide for its pupils an acceptable standard of education in an environment which provided adequately for the welfare of pupils and teachers alike.

The board's decision was made in March, 2007 and was notified to the Department in writing. Further, in keeping with the said decision, the school implemented its altered policy with effect from September, 2007 as a result of which by February, 2008, being the time at which the notice parties applied to have their children enrolled in the school, St. Molaga's had rejected applications for enrolment from approximately 41 students. At that time, every class in the school had in excess of 27 pupils including special needs children and the school had not been in a position to keep its average size to that which the Department in Circular 0020/2007 had asked the school to "ensure" that it would not exceed. As of the date of its refusal to enrol C and D, the school exceeded the guidance from the Department by 25 students. Further, St. Molaga's had 9 students in excess of the number that would have justified the appointment of a 17th teacher but as it had no spare classroom it was futile to seek to make such an appointment. Accordingly, the school was operating on a lesser number of teachers than was thought acceptable. It had also had the experience in previous years of trying to deliver education to a larger number of students and had found that the school was physically unable to safely or satisfactorily accommodate such numbers. With such numbers the Board had concluded that it could not comply with its obligations to deliver a standard of education appropriate to the needs of its students and was concerned that by trying to continue to educate such numbers that it was jeopardising the physical and mental welfare of both students and teachers alike. Against such a backdrop the school refused the enrolment of some 41 children who had applied for a place in St. Molaga's for the year 2007/2008 prior to refusing similar applications by the children of the notice parties.

The Court concludes that the appeals committee acted *ultra vires* the powers conferred on it by s. 29 of the Education Act 1998 in purporting to carry out a full appeal into what was an effective decision as to a school's capacity based on management considerations. The power of the appeals committee under s. 29, in the opinion of this Court, was one intended to be confined to a right to review the lawfulness and/or reasonableness of a board's decision to refuse enrolment.

If the Court is in error as to its interpretation of the powers conferred upon the appeals committee by s. 29 and the committee had the power to conduct the full appeal contended for by the respondents, the Court nonetheless concludes that its decision should in any event be quashed. The committee in reaching its decision did so based on a significant number of matters which were immaterial to its considerations and it further failed to have regard to other matters which were material to its considerations to the extent that its decision must be viewed as unlawful. Finally, the Court views the decision of the appeals committee as one which in all of the circumstances must be viewed as irrational. The decision of the appeals committee was based upon considerations which should not have informed its decision. Its decision was further based upon the content of two Departmental Circulars which provided no basis to support its reversal of the decision of the Board and was made in circumstances where the notice parties produced no evidence to contest the Board's decision as to the school's capacity.

The Court can understand that the committee was well motivated. It clearly sympathised with the notice parties who had decided to move to Balbriggan in the knowledge that they would have difficulty enrolling their children in schools in that locality and who had been unsuccessful in this regard. However, it is not the function or role of a s. 29 appeals committee to sort out a problem which is one of a shortage of school places in an expanding community. That problem is one to be addressed in accordance with s. 27 of the Education (Welfare) Act 2000, by the National Educational Welfare Board.

In all of the circumstances of the case the Court Concludes:-

1. That the committee acted *ultra vires* its powers;

2. If the Court is wrong in relation to its decision that the appeals committee acted *ultra vires*, the Court nonetheless concludes that the decision of the committee must be quashed on the basis that in reaching its decision it either failed to consider matters to which it was mandated to have regard and/or also included within its considerations matters irrelevant to its decision to the point that its decision must be declared a nullity;

3. In the further alternative, the Court concludes that the decision of the appeals committee was not supported by any credible evidence and was irrational in the context of the decisions in *O'Keeffe v. An Bord Pleanála* and *Keegan* thus justifying the Court directing that the decision be quashed.