Neutral Citation Number: [2010] IEHC 311

THE HIGH COURT

2009 1303 JR

BETWEEN

DIGITAL MESSENGER LIMITED

TRADING AS SWORDS EXPRESS

APPLICANT

AND

MINISTER FOR TRANSPORT

RESPONDENT

AND

DUBLIN BUS/BUS ÁTHA CLIATH

NOTICE PARTY

JUDGMENT of Mr. Justice McMahon delivered on the 30th day of July, 2010

Introduction

1. Under s. 7 of the Road Transport Act 1932 (hereinafter referred to as "the Act of 1932) no person shall carry on a passenger road service, save under and in accordance with a licence granted under that Act. Anyone wishing to carry on such a service must apply for the appropriate license from the relevant minister by completing the prescribed forms. The Minister has discretion to grant or refuse an application for a passenger licence in all cases, except where there is an application for an annual passenger licence by a person who already carries on an existing service. In such cases the Minister's discretion is limited and he cannot refuse an application, except on limited and specific grounds such as inefficiency; infrequency of service; inadequate organisation and equipment *etc.* (Section 11(2)).

2. The licensing regime established by s. 7 of the Act of 1932 does not apply to the notice party in this case. It is exempt by virtue of s. 24 of the Transport Act 1958 (hereinafter referred to as "the Act of 1958"). The regulation applying to the notice party (in effect "the Board") is set out in s. 25 of that Act and, because of its significance for this case, I set it out in full:-

> "(1) The Board shall not, without the consent of the Minister, initiate any passenger road service or alter any passenger road service for the time being operated by it so as to compete with a licensed passenger road service.
>
> (2) If any question arises whether any existing or proposed service or alteration does or would so compete the question shall be referred to the Minister whose decision shall be final.
>
> (3) The Board shall comply with such directions as may be given to it by the Minister for the purposes of this section."

3. The effect of s. 25(1) of the Act of 1958 is that if the notice party, as an exempt person, wishes to initiate or alter an existing passenger road service, which competes with another licensed service, it must first get the consent of the Minister for Transport (hereinafter referred to as "the Minister"). Much of the dispute in this case centres around the meaning of the phrase used in s. 25(1) "so as to compete". To appreciate fully the background to the dispute, one other significant piece of information is relevant. The notice party is entitled to various subsidies for its services when its services do not compete with other non-subsidised service providers. Such subsidies were considered necessary if the notice party was to provide services on uneconomic routes to areas which were not heavily populated. The logic seems to have been that if there is competition in providing the service or in servicing the route, the argument for a subsidy would not hold up and indeed, such a subsidy might be anti-competitive. The parties agreed in submissions to the Court, however, that the dispute here does not primarily relate to the State subsidies given to the notice party, (which involves the question of E.U. law primarily) but rather is one where the applicant alleges that the decision taken by or on behalf of the Minister notified to the applicant by letter on the 17th August, 2009, is in breach of national legislation and, in particular, is in breach of s. 25 of the Act of 1958 quoted above.

The relevant history of the applicant's involvement in the provision of road services

4. On the 19th April, 2005, the applicant applied for a road passenger licence under the Act of 1932. The application related to the provision of a road passenger service from Swords to Dublin city centre *via* the anticipated Port Tunnel. Because of the growing population in Swords, the applicant saw an opportunity to compete with the notice party's existing service on this route. The applicant calculated that the new route proposed by it could be covered in 35 minutes, and that the service would be quicker, more frequent and in more comfortable coaches than the existing service provided by the notice party, *i.e.* the 41X service which took 60 minutes for a similar trip and was available only on a limited schedule. Although the applicant's fare would be higher than the notice party's fare, it calculated that it could win a significant segment of the relevant market with this new proposal.

5. The applicant was awarded a licence on the 30th October, 2007. It was an annual licence. The applicant operated this service through a subcontractor (Eirebus Limited) and operated it seven days a week between the hours of 6.00am and 8.20pm at a fare which varied between €3.00 and €4.00 per journey. Although the Department of Transport (hereinafter referred to as "the Department") subsequently alleged that the applicant did not always adhere to the licensed schedule, this allegation is not central to the issue to be determined and, in any event, it did not prevent the Department from renewing the applicant's licence as recently as

the 10th December, 2009.

6. Encouraged by the success, the applicant applied for a second passenger licence in or around February, 2008 (hereinafter referred to as "the B1 application") which it made in accordance with the licensing guidelines furnished by the Department.

7. Responding perhaps to this competition from the applicant, the notice party had made a series of applications to the Minister between March, 2008 and June, 2008 to re-route the 41X service from Swords to the city centre through the Port Tunnel. As already noted, under s. 25(1) of the Act of 1958, if the proposed new route would operate "so as to compete" with a licensed passenger road service, the consent of the Minister was required. If, however, no issue of competition is raised by the proposed route, the new route is merely "noted" by the Department. Initially, the Department considered that the notice party's proposal to alter its route was in competition with the applicant's service and that the Minister's consent was required. Because of the implications of this finding, the notice party revised its proposal and resubmitted it to the Department on or about the 5th June, 2008. In or around the 12th June, 2008, the Department in effect determined that the new proposal was such that it did not compete with the applicant's service through the Port Tunnel. In that event, the proposal had merely to be "noted" by the Department in order for the notice party's proposal to proceed. Incidentally, since there was a finding of "no competition", it also meant that subsidies could be used to underwrite the route. Presumably, because of this, the notice party was able to provide the service at a fare of €2.30.

8. The applicant herein contested the Department's finding of "no competition" and argued that there is competition within the meaning of s. 25(1) of the Act of 1958 and accordingly, the Minister's consent was required before such a service would be provided. It initiated judicial review proceedings on the 30th June, 2008. On the 28th October, 2008, a settlement was reached between the parties, it provided:-

> (i) That the Minister would engage consultants to assist in determining whether there was or was not competition between the proposed notice party's route *via* the Port Tunnel and the existing applicant's route. This was a central element to the compromise and the consultants subsequently appointed were Booz & Co.
>
> (ii) That the Minister would "use best endeavours" to decide the second licensing application of the applicant, that is, the "B1 application" within three months of his decision to be delivered after the Booz & Co. report.

9. In its report dated the 26th February, 2009, (hereinafter referred to as "the First Booz & Co. Report"), the consultants made the following finding: "Our view is that the 41X was in competition (prior to the re-routing decision) and still is in competition with the Sword's Express (post the re-routing decision)." This meant that if the proposed re-routing of the 41X was to take place it would require ministerial consent.

10. On the 27th March, 2009, the Department wrote to the applicant's solicitors informing them "that the Minister proposes to confirm the continued operation of route 41X on the basis of the retention of its current routing, which incorporates the use of the Port Tunnel". The word "confirm" must be equated with the word "consent" as used in s. 25(1) of the Act of 1958. Before making its decision, however, the applicant was requested to make final submissions for the Minister's consideration. This letter from the Department replaced an earlier letter dated the 23rd March, 2009, to the applicant's solicitor wherein it was said that the Minister "has decided" to confirm the notice party's route through the Port Tunnel. The applicant's solicitor replied alleging that the Minister was in breach of paras. 6 and 7 of the settlement agreement signed on the 28th October, 2008. It was alleged, also in breach of the agreement, that a timetable had not been adhered to and documents had not been forwarded to the applicant. Further, the applicant's B1 application had not been dealt with by the Department in the order in which it should have been, and that by dealing with the notice party's re-routing application first, it was in breach of the "first come, first served" principle set out in its own guidelines.

11. By letter dated the 3rd April, 2009, to the applicant's solicitor, the Minister's position was clarified. It was indicated that the Minister had decided that there was competition between the two services in question and on the second related, but separate, issue of ministerial consent (required by s. 25(1) of the Act of 1958), it was indicated that the "Minister is minded to give consent" and this, according to the Department, did not form part of the terms of settlement. Before doing so, however, the applicant was again given an opportunity to make submissions by the 15th April, 2009. The applicant's solicitor then demanded a copy of the ministerial decision that there was competition between the notice party and the applicant. The applicant also pointed out by letter dated the 7th April, 2009, that since the Minister had decided that competition existed between the two services, the 41X service was operating without the consent required by s. 25(1) of the Act of 1958. The applicant's solicitor demanded the cessation of this service forthwith. Finally, by letter dated the 8th April, 2009, a copy of the Minister's decision was sent with an indication that it was "based on the attached memorandum". The Minister's decision was dated the 23rd March, 2009.

12. The Department in its letter of the 15th June, 2009, to the applicant summarises the position relating to the history of the matter and it is useful to reproduce the relevant part of this letter:-

> "I refer to previous correspondence in relation in particular to the outcome of the inquiry under section 25(2) of the Transport Act 1958 in relation to the re-routing of the 41X bus service.
>
> As you will recall the inquiry determined that the 41X service is in competition with the bus services provided by Digital Messenger. On 27th March 2009 the Minister informed your Company and Dublin Bus that he proposed to confirm the continued operation of the 41X service, subject to his consideration of final submissions from both parties. Having considered those submissions, the Minister has confirmed to Dublin Bus the continued operation of the 41X service on its current routing from Swords to Belfield through the grant of his consent under Section 25(1) of the 1958 Act. As the grant of that consent is based on the determination that the 41X is in competition with a licensed service, Dublin Bus have also been advised that state funding cannot be allocated to that service. It is open to the Company to submit proposals for an altered service so as not to compete with the licensed service."

13. The Department then indicated that new changes had been introduced to its guidelines. Concerning the B1 application, the letter also drew attention to the fact that a third party had applied for an express bus service from Swords, prior to the applicant's application, and that that application would be dealt with first. It also sought clarification of the applicant's B1 application.

14. The applicant's response was that this letter confirmed to it for the first time: (a) that the Minister had granted consent under s. 25(1) of the Act of 1958 to the notice party to operate the 41X service on its current routing; (b) that the service is in competition with its licensed service; and (c) that the granting of the Minister's consent is dependent on no State funding being allocated to the 41X service. It objected also to the fact that the Minister's department refused to order the cessation of the notice party's 41X service, which was explained by the Department that to do so would be "wholly unreasonable and unfair on Dublin Bus and the

travelling public". The applicant said that failure to do so was an unreasonable act by an administrative body.

15. I pause here at this point to suggest that the settlement agreement of October, 2008 had, on the face of it, been breached under the requirements mentioned in paras. 6 and 7 of the agreement, and also that the applicant's solicitors were correct when they said that the 41X service was operating in breach of s. 25(1) of the Act of 1958, insofar as the Minister's consent had not been issued at that time. At that point, the Department's stance was that the Minister had decided to give his consent, but that it was subject to submissions to be made by the interested parties. In these circumstances, the Department argued that since the notice party acted in ostensible compliance with the law in 2008, and as there was a public interest in the provision of the new service by the notice party, it would be wholly unreasonable and unfair on the notice party and the travelling public to direct the cessation of that service pending the making of such submissions and their subsequent consideration by the Minister. I am not impressed with this argument at this stage. The fact is that the notice party did not have the Minister's consent at the time and no equivocation by the Department could ignore the statutory requirement. I will deal with this in more detail later in this judgment.

16. In correspondence around this time, the Department also indicated to the notice party that it had a choice:-

> (i) to seek the consent of the Minister; or
>
> (ii) to revise the route so that it would not be in competition with the applicant's route.

17. The suggestion that a revised route might obviate the need to make a finding of competition with the applicant's services came from a reading of the First Booz & Co. Report itself. Although there was a finding of competition by the consultants, that is, a finding in favour of the applicant, nevertheless, the basis for this conclusion was that the re-routing proposal of the notice party could still be considered to worsen the competitive position of the applicant's service. In other words, the reason there was competition was because the notice party continued to have a "competitive advantage" over the applicant's service. Having found that there was competition the report went on to say "the decision to allow 41X to continue to stop at Ballintrane Wood stop on Forrest Road is the most controversial issue." This appeared to identify the Ballintrane stop as the single feature which tipped the advantage in the notice party's favour.

18. In its letter of the 15th June, 2009, to both parties, the Department accepted the finding of competition and indicated that the Minister proposed to give the necessary consent. It then went on to say:-

> "As the grant of that consent is based on the determination that the 41X is in competition with a licensed service, Dublin Bus have also been advised that State funding cannot be allocated to that service. It is open to the Company to submit proposals for an altered service so as not to compete with the licensed service."

19. Taking the prompt from the Department, the notice party wrote to the Department the next day with a further re-routing application. This application was confined to one proposal: the removal of the Ballintrane stop.

20. According to the Department, since the notice party chose to resubmit a revised route, the decision to grant consent under s. 25(1) of the Act of 1958 by the Minister was effectively "bypassed". The notice party submitted its proposed revised route, which involved dropping the Ballintrane pickup stop from the earlier route. On receipt of this, the Department asked Booz & Co. to advise it. In its second report (hereinafter referred to as "the Second Booz & Co. Report"), Booz & Co. again analysed the problem in terms of the "competitive advantage" that would result from the removal of the Ballintrane stop and concluded that by removing this single stop, a level playing field would be restored between the notice party and the applicant and that, accordingly, the notice party would not have a competitive advantage thereafter. Based on this report and explicitly relying on its reasoning, the Department concluded that no consent was required under s. 25(1) and the new proposal would only have to be noted by the Department. In a letter to the applicant's solicitor dated the 4th September, 2009, the Department, in reviewing the position between the parties, made the following statement:-

> "Having considered the report from Booz, my Department advised your client of its proposed decision on 29th July, 2009, and sought comments. In the absence of any response to that, the decision was finalised. Based on the consideration of the Booz reports and my Department's own examination, that decision was grounded on the fact that the revision of the 41X service had removed the basis of competition identified in the original Booz report. As a result, my Department is satisfied that there is no competition on this route."
>
> This letter was signed by the Minister.

21. The applicant's complaint is that the decision made by the Minister and notified on the 17th August, 2009, that there was no competition between the applicant and the notice party, was flawed, since it was based on the Second Booz & Co. Report which did not address the question of competition as it should have, but instead, addressed the question of "competitive advantage". The applicant states that s. 25(1) of the Act of 1958 does not refer to "competitive advantage", but to competition, and, where there is competition, the Minister's consent is required.

22. In a report commissioned by the applicant from Compecon Ltd. (7th December, 2009), the following conclusion expresses the applicant's argument succinctly:-

> "Conclusions.
>
> In my opinion, the terms 'competition' and 'competitive advantage' do not have the same meaning from an economics perspective. The second Booz & Co. report does not contain sufficient evidence to justify reaching a different conclusion to that contained in the original report that the two services were in competition. Indeed, the second report appears not to address the issue of whether the services are in competition at all, but rather, to address a different question of whether changes in the 41X service have removed a competitive advantage previously enjoyed by Dublin Bus."

23. Earlier in the report, the following statement occurs:-

> "A finding that the two services are competing on a level playing field is clearly not the same as a finding that they do not compete. There is, thus, no reason advanced in the second report which would justify reversing the conclusion contained in the original report that the two services compete with one another. If anything, the conclusion that a competitive advantage has been removed, tends to confirm that the services are in competition since it would not make sense to talk about one service having a competitive advantage, relative to the other, unless they were in competition."

24. The applicant commenced these judicial review proceedings on the 21st December, 2009, challenging the decision of the Minister, which was notified to it by letter dated the 17th August, 2009.

The meaning of Section 25 of the Road Transport Act 1958

25. What, then, does s. 25 mean? Any attempt to answer this must appreciate the full context in which this section is set. The overall context is the regulatory scheme that governs the provision of passenger services in the State. Under s. 7 of the Road Transport Act 1932, any person wishing to provide such a passenger road service must first have a licence. It is an offence to provide such a service without such a licence. The notice party is exempt by virtue of s. 24 of the Act of 1958 from such a licensing regime. Instead, its activities in this area are governed by s. 25 of the Act of 1958. As an exception to the general licensing regime, it is appropriate to comment at the onset that s. 25 should be given a restricted interpretation; the general principle that an exception to the general rule should be interpreted in such a way as to derogate as little as possible from the general rule applies.

26. What s. 25 provides is that even though the notice party does not require a licence to operate a passenger road service, it is not permitted to do certain things relating to passenger road services without the Minister's consent: it shall not "without the consent of the Minister, initiate any passenger road service or alter any passenger road service for the time being operated by it so as to compete with a licensed passenger road service". The notice party can, of course, initiate and alter its passenger road services which do not compete with existing passenger road services. It is clear that if the notice party applied to vary its bus service from Dublin to Belfast, there would be no competition with the applicant's Swords to Dublin service. No question of ministerial consent would arise. But the facts here represent the other extreme of the spectrum. The two services here broadly cover the same route, to a great extent. Certainly, at first blush, it would be much more difficult to suggest that there was no competition between the services, particularly when the Department had already held that the routes were in competition with each other.

27. The structure of the legislative regime, of which s. 25 is a central feature, clearly attempts to supervise the exempted bodies when they compete with those operators who are subjected to heavier regulation. This supervisory role is delegated by the Oireachtas to the Minister. The legislation is primarily concerned with such exempted bodies who initiate or alter its passenger road services "so as to compete" with licensed operators.

28. In analysing s. 25 as it applies to the facts of this case, it is clear that there are two questions to be considered: first, does the alteration of the 41X route proposed by the notice party fall within s. 25(1), and, in particular, is it something introduced "so as to compete" with the existing passenger road service of the applicant. If it does not compete then no question of ministerial consent arises, and the alteration is merely noted by the Department. If it does compete, however, the Minister's consent is required, and this gives rise to the second question: should the Minister give his consent? This is an entirely separate issue from the first question and the Minister, in determining whether to consent or not, has a good deal of discretion. It is at this stage of the process that the Minister will be concerned with the impact of the alteration and the question of fairness between the parties. To consent or to withhold consent is a value judgment for the Minister, which if reasonably made would be difficult to challenge, and would be successfully challenged only if "wholly unreasonable" under the *O'Keeffe* criteria. (*O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39)

29. The phrase "so as to compete with" is not without difficulty. Ignoring the context, it is capable of different interpretations. It could mean:-

(i) where the new or altered service is <u>intended</u> to compete with existing licensed services; or

(ii) where the new or altered service has <u>the effect</u> of having an impact on competition with existing licensed services; or

(iii) where the new or altered service has the effect of having a <u>negative</u> effect on existing licensed services; or

(iv) where the new or altered service is in a competitive context with the existing licensed services.

30. I am satisfied that (i) is not the interpretation intended by the Oireachtas. It is unlikely, in my view, that the Oireachtas was in any way concerned with the intentions or motives of the exempted body in such situations. Nor do I think that option (ii) or option (iii) is what was meant. The Minister and notice party argue in favour of option (iii). This involves an investigation of whether the proposed variation disadvantages the applicant. It is interesting to note that when the same parties urged the court to turn away from and ignore the approach adopted to such questions in modern "competition law", they justified their position by saying that it cannot have been contemplated that "compete" in the context of the Act of 1958 contemplated such a micro-economic analysis. But that is what option (iii) here would involve: a micro-analysis of the proposal's effect on the applicant's service. Further, such an analysis might also have to face another argument after its finding: will any negative effect suffice or must it be a <u>significant</u> negative effect also?

31. I do not believe that the Oireachtas intended to front-load the process in this way. In my view option (iv) above is the proper way to interpret s. 25. If there is a *prima facie* issue of competition, the matter becomes an issue for the Minister at the consent stage of the process. That is where issues of competitive impact and unfairness should be subjected to scrutiny. And in this it should be noted that the Minister will have wide discretion and his decision can only be challenged on the well known principles set out in *O'Keeffe (supra)*. If an investigation has to take place at an earlier stage of the process (i.e. the "compete" stage) as would be the case in (ii) or (iii) above to determine whether s. 25(1) applies, it would effectively render unnecessary any investigation or assessment by the Minister to determine whether he should consent to the notice party conduct or not. What is more likely, in my view, is that the Oireachtas identified as possibly undesirable, or at least something that should be scrutinised by the Minister, the situation where a licensed provider of a service is faced with a new or altered service from an exempted service provider. It is in such a situation that some sort of supervision for unfairness would be required. It would be reasonable, in such circumstances, for the Oireachtas, in such a case, to demand that the matter should be referred to the Minister who, within the ambit of wide discretion, should determine the matter. We are not concerned, at this juncture, however, with the facts which the Minister should take into account in reaching his decision, but, rather, we are concerned with what triggers the consent issue under s.25(1) in the first instance.

32. When the notice party proposed to change its 41X service in 2007, by re-routing its service, the applicant argued that this was something that was caught by s. 25(1) and, accordingly, something that required the Minister's consent. The initial applications by the notice party between March, 2007 and June, 2008 were considered by the Department to be in competition with the applicant's service and, therefore, required ministerial consent under s. 25(1). The modified application, however, of the 5th June, 2008, wherein the notice party proposed to drop the Ballintrane stop, was deemed by the Department not to be in competition and was merely noted by the Department.

33. The applicant challenged the Department and commenced judicial review proceedings in 2008. By settlement reached between the

parties in October, 2008 it was agreed that consultants would be engaged to advise the Minister. The principal issue was whether or not competition exists between the respective services of the parties. As already noted, the reason this was of importance was that if the notice party's activity was within s. 25(1), the Minister's consent was required, whereas if no competition existed, the proposal would fall outside s. 25(1) and no ministerial consent was necessary. Therefore, the notice party's proposal was only required to be noted by the Department. The question of whether the Minister should consent if the matter fell within s. 25(1) was not mentioned in the settlement document. The First Booz & Co. Report found that there was competition before and after the notice party's application to re-route the 41X service through the Port Tunnel. The Department accepted this. This, of course, meant that the Minister's consent was required for the alteration and that the Department's earlier recommendation to the contrary was wrong. It also followed that when the notice party was operating its altered 41X service through the Port Tunnel, it did not have ministerial consent, was misled by the Department and was in breach of s. 25(1) until this was remedied by ministerial consent, subsequently given on the 23rd March, 2009, but not communicated until the 8th April, 2009.

34. After the publication of the First Booz & Co. Report, there was an exchange of letters between the Department and the notice party, and the Department suggested that if the notice party dropped the Ballintrane stop on the 41X route, the Minister's consent would not be required. When the notice party proposed to do this, it notified the Department on the 11th June, 2009, and the Department once more consulted Booz & Co. who concluded "that, by removing the Ballintrane Wood stop from the route 41X, Dublin Bus no longer has any competitive over Swords Express (the applicant) in the Sword's village area". The Minister decided on the basis of the Second Booz & Co. Report and indeed on the Department's own analysis (see Department's letter, the 4th September, 2009, to the applicant) that there was then no competition between the services, and the revised route was merely noted by the Department. Indeed, it took the view that the proposal to move the single bus stop may benefit the applicant and, accordingly, no consent was required under s. 25 of the Act of 1958.

35. In taking this position, the Minister, in my view, erred. Section 25(1) does not speak of "competitive advantage" or "competitive disadvantage". All it requires is competition between the relevant parties. If there is competition, the matter should go to the Minister, who presumably has to give consent before the proposal can then go ahead. It is clear that in relying on the Second Booz & Co. Report, which address the issue of "competitive advantage" only and not "competition" per se, the Minister was taking something into account which was not of statutory concern.

36. It is my view that much of what is discussed in both Booz & Co. reports is addressed to the second question of consent rather than the first question of "to compete", as the terms are used in s. 25. The first report, in particular, firmly concludes that the notice party's proposals are in competition with the applicant's service, before and after the application was made. Having determined this, it then spent much of the remainder of the report examining the competitive advantage which the notice party's proposal would not have over the applicant's services. This in a sense was logical for the consultants, since having found competition, the question of ministerial consent arose and, in that context, fairness would be a factor for the Minister to take into account. It must constantly be borne in mind, however, that the two questions are separate and arise sequentially in the process envisaged in the legislation.

37. In the Second Booz & Co. Report, however, there was a much deeper investigation of the competitive advantage aspect, rather than the initial issue to be addressed, that is, the question of competition or no competition. It is difficult to understand how Booz & Co. could have found competition between the two services in the first report, but found no competition in the second report. Moreover, it is even more difficult to understand how the Minister, in relying on the Second Booz & Co. Report, reached his decision notified in August, 2009, that there was no competition in the alteration proposed by the notice party and, accordingly, that no consent was required.

38. I can only assume that there was confusion as to which question was being asked of it.

39. These views are those supported by the views of the experts engaged by the applicant. Commenting on the Second Booz & Co. Report, Mr. Massey, the expert engaged by the applicant, made the following statements:-

> "The above statements indicate that the report found that the competitive advantage which it had found Dublin Bus enjoyed in its original report had been removed as a result of dropping a particular stop from that route. In effect it concludes that this change has restored a level playing field between the parties. It is not possible to comment on whether or not such a conclusion is justified without having specific information on the actual routes. Whether or not such a conclusion is correct would not appear to be the relevant issue, however.
>
> It is my understanding that the Minister must decide whether or not a Dublin Bus service is in competition with a licensed service and must take certain actions if that is the case. The second report advised the Minister that Dublin Bus no longer enjoyed a competitive advantage over Swords Express due to the removal of a stop. It did not state that the Dublin Bus service was not in competition with Swords Express. Indeed the second report did not address that question at all."

40. My conclusion, therefore, on this issue is that the Minister's decision (notified to the applicant on the 17th August, 2009), finding that the notice party's re-routing application was not in competition with the applicant's service, was in error insofar as it was informed by considerations relating to "competitive advantage" rather than considerations of pure competition only.

41. The second issue for determination in this case relates to the applicant's application for a second licence (the B1 application). The applicant's complaint in relation to this process is twofold: First, it complains that there was an unreasonable delay between February, 2008, when its application was made and July, 2010 when it eventually received a (negative) decision. Second, it complained that the Department did not adhere to the proper sequence in determining the notice party's application on the 27th March, 2009, (which was only lodged in March/June 2008) that is some sixteen months before the applicant's application, when its own guidelines established a principle of first come, first served.

42. With regard to what I might call the "pure delay" argument, the only excuse given by the Department is that the applicant's application was queued behind another application by a third party, and until this application was dealt with, the Department could not, under its own rules, consider the B1 application. It is true that the Department did at one point in correspondence seek clarification from the applicant whether the B1 application was in addition to or in substitution of the applicant's original licence. I am not, however, convinced that this was a serious factor which delayed consideration of the B1 application as it does not seem to have featured prominently in the correspondence thereafter.

43. Neither of these excuses, in my view, justifies a delay of almost two and a half years. No details have been provided about the third party's application and, in any event, the first come, first served principle can never justify wholly inordinate delay. This is especially so where the licence is for a commercial activity and where the queue necessarily involves competitors. If it were otherwise, an applicant who is second in line might never have its case considered as long as the first application remains unresolved.

The duty to process applications with reasonable expedition applies to all applicants, and not just to those first in line.

44. It is ironic also that while the Department was proffering its guidelines as a reason for delay in dealing with the B1 application, at the same time it was ignoring the very same guidelines in dealing with the notice party's re-routing application before the applicant's application, stating that the guidelines are just guidelines and have no binding force. It also emphasised that the guidelines are of "general" application only and are not invariably applied. There is, however, no evidence before the Court that the notice party's re-routing application is special so that it should not be bound by the normal queuing process. Further, I cannot see, when the Minister, in reversing his earlier decision, decided that the notice party's re-routing application was in competition with the applicant's service, making ministerial consent necessary, how the Department then allowed the notice party to continue the service without final ministerial consent. Surely, the notice party did not have the required consent to run the service at that time.

45. In a letter dated the 9th April, 2009, the Department justified its position in the following way:-

> "As Dublin Bus acted in ostensible compliance with the law in making the 2008 alterations to the 41X; and as there is a public interest in the provision of that service, it would be wholly unreasonable and unfair on Dublin Bus and the travelling public to direct the cessation of that service during the time afforded to you to make submissions the closing of which is 15th April, 2009. We await your formal submission on the matter."

46. It seems to me that similar reasoning could be advanced for dealing with the B1 application first, since both services, it had been held, were in competition with each other and this meant that the interest of the public in continuing the services applied equally in both cases.

47. By way of summary, it is my view that the Minister's approach to this matter can be criticised for the following reasons:-

> (i) Although the guidelines were only guidelines, they nevertheless were procedures which the Department set down as binding on itself. They were publicised and, as a public authority, it was intended that in normal circumstances the first come, first served principle should apply. No special case was made out why the notice party's application should have been given priority in this instance.
>
> (ii) While the Department invoked the guidelines against the applicant when it refused to consider the B1 application before the third party application, in contrast, it refused to apply the same principle when the notice party's application was being considered. The Department relied on the guidelines in the first instance, but ignored it in the second instance and in both cases the inconsistency worked against the applicant.
>
> (iii) The Department, because of the privileged position of the notice party as an exempt body, should have been hypersensitive to the competing interest of the private licence operators in applying the guidelines. In dealing with the notice party first, the Department was not only ignoring its own guidelines, but was doing so where the person being favoured was already an exempt body and already had an advantage over the applicant. To ignore the guidelines in such circumstances doubly disadvantaged the applicant.
>
> (iv) In taking the notice party's application first, the Department not only allowed the notice party priority over the applicant, but also allowed the notice party to jump the queue in respect of the third party. (The third party did not appear to complain, but since the Court has no details of what happened to the third party's application, the Court can only surmise in this regard.)

48. Furthermore, in considering the delay, it must be recognised that the Minister had in the settlement agreement of October, 2008 undertaken to "use his best endeavours" to determine the B1 application within three months of his determination as to whether or not competition existed between the applicant and the notice party. This determination was made on the 27th March, 2009, and had the settlement timetable been adhered to, the applicant should have had a determination of the B1 application by the 27th June, 2009. In fact, the B1 decision was not made until July, 2010. The Minister argues that it is open to the applicant to sue for breach of the settlement agreement if he so wishes, but that is not a point that should be taken in the judicial review proceedings before the Court. I disagree. It must be borne in mind that this settlement was made as a compromise to the first judicial review proceedings, where the very same issues were in dispute between the same parties. The agreement was made in a judicial review context, so it cannot be said that it was purely a private agreement in that sense. Further, the courts have a general duty to deal with matters in such a way as to bring finality to the dispute between the parties insofar as possible: *interest rei publicae ut sit finis litem*. Given the history of the litigation between the two parties, I would be shirking in my responsibility if I were to ignore the settlement agreement in these proceedings. There is no evidence before the Court that the Minister "made his best endeavours" in this case as promised. There was no reason why it should not have given the B1 decision much earlier in my view.

49. It is also significant to say that when the Department entered into the settlement agreement in October, 2008 with the applicant, it entered into a legal obligation in full knowledge that there were guidelines in existence and which, in any event, according to the Department, have no legal effect. It is reasonable to interpret the undertaking in the settlement agreement in these circumstances as having been made by the Department with the intention that it was to derogate from the normal practice set out in the guidelines. The Minister's undertaking was not qualified by reference to the guidelines or to the notice party's interest which could have been done had it been intended to subordinate the three month commitment to these other interests. In these circumstances, it is reasonable to argue that the Minister should have adhered to the legally binding three month time limit in the context of the B1 application.

50. In any event, as I have already intimated, leaving aside the settlement agreement as a consideration, I am prepared to hold that the delay in dealing with the B1 application was such as to be unacceptable in the licensing system established by the Oireachtas and entrusted to the Department for administration. It is my view that under the regime, the delay was unreasonable.

51. By letter dated the 21st June, 2010, the Department wrote to the applicant indicating that it had now finalised its position and did not accept the applicant's request for a deferral of its decision. In its letter it indicated that the Department intended to reject the B1 application, but stated that "as the matter is subject to upcoming court proceedings the Department will defer making this decision final until 5th July, 2010 in order to allow you time to seek the intervention of the court in the event that you believe you have grounds to do so". In a further letter dated the 9th July, 2010, the Department repeated its determination to reject the B1 application primarily, it appears, on the basis that the applicant had not provided evidence that he had the resources to provide the service applied for. The final paragraph of the letter again refrains from making the decision final, however. It declares:-

> "However given the proximity of the forthcoming judicial review the Department will wait until the hearing is finished

before finalising this application. The Department will then move to reject the application, unless the court rules on the issue."

52. In view of this correspondence, the question arises for the Court as to what relief is appropriate in the circumstances. Strictly speaking the decision is not final but the Department's intention is determined and unequivocal. It does, however, appear to invite the Court to rule on the matter if it is disposed to do so.

53. Although the Court has given its view in relation to the Department's delay in dealing with the B1 application and the incorrect sequencing of the application, the Court is not in a position to challenge the Department's decision on its merits.

54. Bearing in mind the reliefs sought and the arguments made by the parties to the Court, I have decided to make the following orders:-

(1) An order of *certiorari* quashing the decision of the respondent notified to the applicant by letter dated the 17th August, 2009, that the altered route 41X passenger road service between Swords and Dublin city centre via the Port Tunnel, as operated by the notice party, did not compete with the services provided by the applicant herein known as Swords Express.

(2) An order of *certiorari* quashing the decision of the respondent notified to the applicant by letter dated the 17th August, 2009, authorising or permitting the notice party to operate an altered route 41X passenger road service between Swords and Dublin city centre via the Port Tunnel.

(3) A declaration that the respondent had unlawfully delayed in making a decision upon the application made in or around February, 2008 by the applicant for a passenger road service licence.