[redacted]

[1961] 3 All E.R.

MERCHANDISE TRANSPORT, LTD. v. BRITISH TRANSPORT COMMISSION AND OTHERS.

ARNOLD TRANSPORT (ROCHESTER), LTD. v. BRITISH TRANSPORT COMMISSION AND OTHERS.

[COURT OF APPEAL (Sellers, Devlin and Danckwerts, L.JJ.). June 29, 30, July 3, 4, 5, 6, 7, 10, 28, 1961.]

Road Traffic—Licence—Public carriers' licence—Transport Tribunal's appellate jurisdiction—Objection—Whether tribunal limited to objection—Precedent—Previous decisions not to inhibit tribunal examining the merits of each case.

On appeal from a decision on an application for a carrier's goods vehicle licence the appellate tribunal is not confined to the objection preferred by an objector, but may review the exercise of the discretion of the tribunal on the application (see p. 503, letter I, and p. 511, letter G, post; but cf. p. 506, letters G and H, p. 517, letter B, and p. 520, letter A, post).

British Transport Commission v. *Bristow* ((1955), 30 Traf. Cas. 217) approved.

Although the Transport Tribunal may by reasoned judgments properly and desirably disclose and establish principles on which it proceeds, yet the tribunal, like any other tribunal charged by statute with the exercise of a discretion, is still bound before deciding a particular case to examine it on the merits, and the tribunal's previous decisions must not be allowed to inhibit it from doing that (see p. 507, letters A to D, p. 500, letter G, p. 518, letters G and H, and p. 521, letter I, post).

Dictum of JENKINS, L.J., in *R.* v. *County Licensing (Stage Plays) Committee of Flint C.C., Ex p. Barrett* ([1957] 1 All E.R. at p. 122) adopted.

Road Traffic—Licence—Public carriers' licence—Application—Subsidiary company's application—Undertaking to carry only parent company's goods on outward journeys—Uneconomic competition for return loads—Parent company already having C licence—Conditional B licence appropriate—Whether relationship between subsidiary and parent company could be considered.

H. Ltd., who were large manufacturers of furniture, carried their goods locally in their own C licence vehicles, and on long hauls in A licence vehicles owned by and licensed to its wholly owned subsidiary, M. Ltd. H. Ltd. proposed to transfer their C licence vehicles to M. Ltd. On an application by M. Ltd. for a variation of their A licence to enable them to use thereunder, in addition to their own vehicles already used thereunder, the vehicles proposed to be transferred to them by H. Ltd., H. Ltd. offered to undertake not to apply for additional C licences and M. Ltd. undertook, if their application were granted, to use the vehicles proposed to be transferred only, on outward journeys, for the carriage of H. Ltd.'s goods, thus leaving them free to act as public carriers only on return journeys. The licensing authority dismissed M. Ltd.'s application, but on appeal the Transport Tribunal granted it. On appeal to the Court of Appeal,

Held: the variation of the A licence should have been refused for the following reasons—

(i) the type of licence truly appropriate was a B licence, since conditions could be attached to such a licence, whereas conditions could not (save for one particular type of condition mentioned in s. 174 (2) of the Road Traffic Act, 1960) be attached to an A licence, and the appropriate condition in the present case could be precisely formulated; moreover, on an application for a B licence all existing B licensees, as well as A licensees, could be heard, and the question of conditions as to return loads which did afford opportunity for uneconomic competition with *public* hauliers would be open; accordingly, either the application should have been dismissed

or a conditional B licence might have been offered (see p. 502, letter I, p. 503, letter F, p. 509, letter E, and p. 513, letter A, post).

(ii) in considering the application of M. Ltd. the relationship between M. Ltd. and H. Ltd. was material and had the consequence in the present case (where M. Ltd. was a wholly owned transport subsidiary of H. Ltd.) that M. Ltd.'s application should receive no better treatment than an application by H. Ltd. would have received (see p. 513, letter A and p. 503, letter G, post); and (per DANCKWERTS, L.J.) it was against the policy of the Road Traffic Act, 1960, that a C licence holder should be able, by forming a subsidiary company and transferring vehicles to it, to compete with public carriers holding A licences (see p. 518, letters D and E, and cf. p. 503, letter G, post).

Appeal allowed.

Road Traffic — Licence — Public carriers' licence — Application — Contract A licence existing—Proposed substitution of A licence—Owner of goods carried under contract supporting application—Question whether proposed change in his best interests irrelevant to the grant of application.

A. Ltd., who were carriers, held a contract A licence authorising the use of their vehicles for the exclusive purpose of fulfilling a contract to carry G. Ltd.'s goods. A. Ltd. now applied for an unrestricted A licence so as to enable them to carry other goods on return journeys. A. Ltd. proposed to work with other carriers, some of whom would carry G. Ltd.'s goods on those other carriers' return journeys, to provide a scheduled service. G. Ltd. supported A. Ltd.'s application and proposed to renounce their existing contract with A. Ltd. and enter into the proposed new arrangement but the licensing authority refused the application principally on the ground that he thought that the existing contract was more in the interests of G. Ltd. than the proposed new arrangement and on appeal the Transport Tribunal held that an A licence ought to be granted, and referred back to the licensing authority the question of quantum of vehicles.

Held: this ground was irrelevant, for G. Ltd. must be accepted as the best judges of their own interests (see p. 505, letter B, p. 514, letter E, and p. 521, letter G, post); in the circumstances the court would not interfere with the Transport Tribunal's decision.

Appeal dismissed.

[**Editorial Note.** In regard to decisions of the Transport Tribunal as precedents, it should be noted that by statute the tribunal have power to review their decisions; see Transport Act, 1947, Sch. 10, para. 4. For a consideration of the appellate jurisdiction from the Transport Tribunal, although not in relation to goods vehicle licensing but in relation to a railway charges scheme, see *British Transport Commission* v. *London County Council* ([1953] 1 All E.R. 801).

As to the discretion of the licensing authority, see 33 HALSBURY'S LAWS (3rd Edn.) 752-754, paras. 1275, 1276; as to the discretion of the Transport Tribunal on appeals from the licensing authority, and as to appeals therefrom to the Court of Appeal, see ibid., 768, para. 1316, text and notes (i)-(l); and for cases on these subjects, see respectively 8 DIGEST (Repl.) 262-281, *1683-1807* and 298-301, *1922-1981*.

As to the doctrine of stare decisis in special courts or tribunals, see 22 HALSBURY'S LAWS (3rd Edn.) 805, para. 1693.

For the Road Traffic Act, 1960, s. 164, s. 166, s. 168, s. 173, s. 174, s. 175, see 40 HALSBURY'S STATUTES (2nd Edn.) 853, 855, 857, 861, 865.]

Cases referred to:

Allison's Transport (Contractors), Ltd. v. *British Transport Commission*, (1955), 30 Traf. Cas. 238.

Barratt & Co., Ltd. v. *London, Midland & Scottish, London & North Eastern & Great Western Ry. Cos.*, (1936), 24 Ry. & Can. Tr. Cas. 127; 8 Digest (Repl.) 281, *1810*.

British Transport Commission v. *Bristow*, (1955), 30 Traf. Cas. 217.

Cattell v. *British Transport Commission*, (1958), 31 Traf. Cas. 179.

Daimler Co., Ltd. v. *Continental Tyre & Rubber Co. (Gt. Britain), Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 2 Digest (Repl.) 219, *515*.

Edwards v. *Bairstow*, [1955] 3 All E.R. 48; [1956] A.C. 14; [1955] 3 W.L.R. 410; 28 Digest (Repl.) 397, *1753*.

King v. *British Transport Commission (No. 2)*, (1957), 31 Traf. Cas. 77.

R. v. *County Licensing (Stage Plays) Committee of Flint C.C., Ex p. Barrett*, [1957] 1 All E.R. 112; [1957] 1 Q.B. 350; 121 J.P. 80; [1957] 2 W.L.R. 90; 3rd Digest Supp.

Road Transport, Ltd. v. *British Transport Commission*, (1957), 31 Traf. Cas. 50.

Salomon v. *Salomon & Co.*, *Salomon & Co.* v. *Salomon*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 9 Digest (Repl.) 30, *11*.

Stepney B.C. v. *Joffe*, *Stepney B.C.* v. *Diamond*, *Stepney B.C.* v. *White*, [1949] 1 All E.R. 256; [1949] 1 K.B. 599; [1949] L.J.R. 561; 113 J.P. 124; 26 Digest (Repl.) 483, *1624*.

Unit Construction Co., Ltd. v. *Bullock*, [1959] 3 All E.R. 831; [1960] A.C. 351; [1959] 3 W.L.R. 1022; 3rd Digest Supp.

Appeals.

These were two appeals by objectors to applications for carrier's A licences from decisions of the Transport Tribunal allowing appeals by applicants against decisions of the licensing authority refusing their applications for licences. The appeals were heard consecutively, but the judgments were reserved and then delivered together.

In the first appeal British Transport Commission and sixty-two other objectors appealed against the decision of the tribunal dated Jan. 13, 1961, allowing the appeal of Merchandise Transport, Ltd. against the decision of the Licensing Authority for the Metropolitan Traffic Area given on June 17, 1960, refusing their application for a variation of their A licence N2250724 by adding seventy-one vehicles and forty-eight vehicles authorised to be hired without drivers.

The facts are stated in the judgment of SELLERS, L.J.

E. S. Fay, Q.C., and *D. L. MacDonnell* for the objectors.

Maurice Lyell, Q.C., and *C. R. Beddington* for the applicants.

In the second appeal British Transport Commission and twenty-three other objectors appealed against the decision of the tribunal dated Jan. 13, 1961, allowing the appeal of Arnold Transport (Rochester), Ltd. against the decision of the Licensing Authority for the South Eastern Traffic Area given on July 13, 1960, refusing their application for a public A carrier's licence in respect of forty vehicles of a total unladen weight of 225½ tons.

The facts are stated in the judgment of SELLERS, L.J.

E. S. Fay, Q.C., and *J. R. C. Samuel-Gibbon* for the objectors.

C. R. Beddington for the applicants.

Cur. adv. vult.

July 28. The following judgments were read.

SELLERS, L.J.: I have prepared two separate judgments.

MERCHANDISE TRANSPORT, LTD. v. BRITISH TRANSPORT COMMISSION AND OTHERS.

This is the first goods vehicle licensing appeal from the Transport Tribunal to this court and quite properly the argument has travelled over a wide area covering matters incidental to, as well as those more directly involved in, the appeal.

Counsel for the appellant objectors commenced his submissions by a consideration of the extent of this court's jurisdiction. It is to be found in s. 17 of the Railway and Canal Traffic Act, 1888, which permits no appeal on a question of fact but expressly empowers this court to draw all such inferences as are not inconsistent with the facts expressly found and are necessary for determining the question of law and this court is given such powers for that purpose as if the appeal were an appeal from a judgment of a superior court. This court may make any order which the commissioners (now the Transport Tribunal) could have made and its decision is final except where there has been a difference of opinion between any two appellate courts. It was conceded by counsel on behalf of the respondent [the applicants for variation of their carriers' A licence] that that section governs this appeal and it becomes unnecessary to set out the tortuous statutory route which the section (1) has taken.

The cases which have been cited have been in relation to earlier relevant statutes, in particular the Road and Rail Traffic Act, 1933, the Transport Acts, 1947 and 1953, and much of the argument has been in relation thereto; but the Road Traffic Act, 1960, consolidated, with corrections and improvements, the relevant enactments, and it will be more convenient and perhaps now more helpful to make reference only to the provisions of this Act which came into operation, as far as material here, on Sept. 1, 1960. The hearing before the licensing authority was in May, 1960, and before the Transport Tribunal, on appeal, in November, 1960.

Part 4 of the Act of 1960 deals with the regulation of carriage of goods by road. By s. 164 a "carrier's licence" is required by a person who uses a goods vehicle for the carriage of goods (a) for hire or reward, or (b) for or in connexion with any trade or business carried on by him with some exceptions not here material. The classes of carriers' licences and acts authorised thereby are set out in s. 166 in three classes: A public carrier's licences; B limited carrier's licences; C private carrier's licences; and s. 168 stipulates conditions which apply or may be applied in the circumstances stated, some of which call for consideration in the present case.

It is difficult to summarise the differences in the classes without being as exhaustive as the sections of the Act. The public carrier's licence conveys by its name the nature of the trade to which it refers and, apart from contract A licences under special provisions in s. 174, it refers to the general carriage of goods for the public within the locality and according to the nature of the goods contemplated. The A licence only permits the carriage of goods of others and not carriage for or in connexion with any other business carried on by the holder of the licence, except goods carried incidentally to his haulage business. The B licence may be used for two alternative purposes, either private carriage or for hire and reward subject to conditions. The C licence does not permit the holder to use his vehicle for any but his own goods unless specially authorised in an emergency and an application for a C licence cannot be refused by the licensing authority if there is no objection to the character and conduct of the applicant: s. 174 (3). The private carrier, therefore, cannot make inroads on the traffic which is to be carried under A licences for it permits of no return loads not owned by the holder and no question of competition arises. Under a B licence competition may arise, but as I read the Act it is subject to control and gives rise to the main issue in this case. Section 174 (1) gives full power in his discretion to the licensing authority to grant or refuse an application for a licence, subject to the Act and to a right of appeal to the Transport Tribunal by a person aggrieved: s. 175 (1) and (2).

Before considering the procedure governing the granting of carriers' licences it is convenient to turn to the facts which brought the applicants to require

(1) The statutory route is traced in 31 HALSBURY'S LAWS (3rd Edn.) 828, para. 1345, note (o).

and apply for additional A licences. Harris Lebus, Ltd. are large manufacturers of furniture with premises at Tottenham for the manufacture of cabinet furniture and at Reading for upholstered furniture. I read from the detailed findings of the licensing authority:

"3: From 1928 until 1949 Harris Lebus, Ltd. used public hauliers, but after nationalisation they found the services of British Road Services not altogether satisfactory and went in for C hiring, supplying the drivers themselves. *They continued to use British Road Services to some extent* but as business expanded they started to build up their C licensed fleet. After denationalisation they formed Merchandise Transport, Ltd., the applicants, in 1955 as a separate road haulage company to tender for British Road Services' units and they were granted thirteen special A licences for nineteen vehicles and three trailers which were later converted to ordinary A licences. The applicants are a wholly owned subsidiary of Harris Lebus and many of the directors are common to the two companies. Ninety-eight shares are held by Harris Lebus, Ltd. and two by Mr. A. Lebus. In 1957 the applicants acquired C. E. Dormer (Leyton), Ltd., and in 1958 C. E. Dormer (Islington), Ltd. Ninety-eight shares of each company are held by the applicants and two by Mr. Chidwick, secretary of Harris Lebus, Ltd. These acquisitions brought the applicants to thirty-eight additional vehicles on A licence and two on B licence. The two Dormer companies have now no customers of their own, as their fleets have been amalgamated with the applicants' fleet. Mr. Forrest, the transport manager of the applicants, estimates that of the total carryings of the combined fleet sixty-one per cent. is for Harris Lebus and that 95½ per cent. of the 39 per cent. carried for other customers represents return loads. Thus to all intents and purposes the three haulage companies work entirely for Harris Lebus on outward journeys. The A licensed vehicles are said to be used mainly on long haul work, the local work being done mainly by Harris Lebus vehicles on C licence and C hiring. The vehicles of all four companies are said to be garaged at one place.

"4: The principal object of the applications is stated to be to form a single integrated fleet of A licensed vehicles primarily to serve the extensive transport needs of Harris Lebus, Ltd. It is claimed that there would then be simplification of record keeping, ability to interchange drivers and general economy on overheads. It is not denied that there would be a considerably increased opportunity to carry return loads and that there might be a certain amount of abstraction from existing hauliers."

The application by the applicants, dated Feb. 5, 1960, to the Metropolitan Licensing Authority was for a variation of an A licence so as to permit them to use in addition to the vehicles then authorised thereunder (a) 112 Luton (furniture) vans and seven articulated units (tractors and trailers) and (b) seven Luton vans "to be acquired". At the date of the application all the vehicles (other than the seven vans "to be acquired") were the subject of a C licence held by Harris Lebus, Ltd., and were in regular operation. In these circumstances what was sought to be achieved was not inappropriately referred to as a "switch" from the manufacturers to their subsidiary and controlled company, the applicants. It was a "switch" on a considerable scale.

The licensing authority refused the application and his conclusion and findings are stated in the decision of June 17, 1960, as follows:

"As in deciding this application I have to have regard to the public interest, I do not think it would be right to ignore the obvious implications of a grant. It may be that there are not many large C licensed operators who by the simple device of establishing a transport subsidiary would be able profitably to switch to A licence activities; but obviously there are some and there is substance in the fears of some objectors that