Although counsel for the objectors maintained his argument to the contrary, I think that the licensing authority was not entitled to refuse the respondents a licence, as he did, because he thought that the existing contract for seven years which did not expire until June, 1965 (but which of course could be renounced by agreement) was more in the interest of Gyproc than the proposed new arrangement. Gyproc supported the application and I think that they must be accepted as the best judges of their own interest. Both the contracting parties are free and friendly and are entitled to look after themselves. In this matter I entirely agree with the Transport Tribunal. I think it was irrelevant. In any case I am inclined to think that advantages would accrue to both, for there is a basis of economy in running which, while not perhaps producing a reduction in rates, might well prevent increases or reduce their extent. Clause 6 of the contract provides for the rates to be agreed from time to time. It may be that the licensing authority adopted this course thinking it was an acceptable ground, not covered by adverse authority, for refusing the licence which he thought ought not in all the circumstances to be granted. The Transport Tribunal's hand was perhaps felt to be pressing too hardly on him and I hope our two decisions will, in future, tend to lighten the pressure and give recognition to the scope which the statutory power of "full discretion" establishes.

The objectors in this case did not call any evidence but it would appear probable by inference that the scheme envisaged would mean some abstraction of traffic from the railways or other public carriers. This was a matter for secondary consideration. It is difficult to say that the Transport Tribunal gave any regard, secondarily, to the interests of persons providing facilities for transport which, having regard to the contemplated trading, would include those who are interested in carrying what would be the applicant's return traffic. The Transport Tribunal expressed their views thus:

> "Once it is accepted that the applicants and Gyproc were as free to agree to 'unmake' their contract as they were to make it, the case, as indeed the licensing authority perceived, presented no difficulty. The evidence entitled the applicants to say 'We are asking for a licence to enable us to carry for Gyproc as public hauliers. Gyproc want us to carry for them in that capacity. There is no evidence that any other haulier can do their work'. Evidence to this effect has always been treated as justifying the grant of an A licence."

That I think means justifying in itself the grant of an A licence.

I think that is an indication and illustration of the rigidity complained of by the objectors in both these cases. The past decisions may well have fitted the cases which they decided, but here the existing contract A licence *was* fulfilling all Gyproc's needs and the licensing authority and the tribunal in these circumstances were clearly not bound to grant an A licence on the basis that Gyproc's traffic would not otherwise be carried and both were bound, as I see it, before doing so to regard all the provisions of s. 174 (4), primary and secondary, and to exercise a discretion in the light of all these relevant considerations.

On the other hand, whilst the tribunal held that an A licence ought to be granted they sent the application back for the licensing authority to assess the number of vehicles to be allowed and with this direction or guide:

> "He will no doubt before doing so think it desirable to require the applicants to provide him with the latest possible particulars of the amount of work which had been performed under the contract A licence. We suggest for his consideration that he should also require of them further information about the 'trunking system' with which, Mr. Atkins (4) said, the applicants were 'experimenting'. Under that 'system' some of the Gyproc traffic was to be carried from Rochester to South Wales not by

(4) A director of Arnold Transport (Rochester), Ltd.

the applicants' vehicles but by South Wales hauliers as 'return loads'. To the extent to which any such system was in operation the need for the services of the applicants' vehicles in the case of the Gyproc traffic would obviously be reduced."

That still leaves some scope in the licensing authority to limit the quantum so that it will do as little damage as possible to those already established to whom consideration should be given. I feel some doubt about it but I am not prepared to interfere in this case with what the tribunal has ordered and I would therefore dismiss the appeal.

DEVLIN, L.J.: In these two cases we have to consider the machinery whereby road licences are granted to goods vehicles. Most of it was originally enacted by the Road and Rail Traffic Act, 1933. That statute, subject to some amending legislation, was the statute in force at the time when these proceedings began. All of this has now been re-enacted in the Road Traffic Act, 1960; and as we are told that it would be more convenient to refer to the provisions of that Act, I shall do so. The appeal is from the decision of the Transport Tribunal, a body which is authorised by s. 175 (1) to hear appeals from persons who are aggrieved by the decision of the licensing authority. It is unnecessary to set out the complicated route (5) by which appeals from the decisions of the Transport Tribunal come to this court. It is agreed that they are governed by the Railway and Canal Traffic Act, 1888, s. 17. We may not entertain any appeal on a question of fact although we have a certain power to draw inferences of fact. Subject to this, we may make any order which the tribunal could have made.

The grant or refusal of a road licence is essentially a matter of discretion. The application is made in the first instance to the licensing authority of the appropriate district and he has "full power in his discretion" to grant or refuse it; s. 174 (1). On an appeal from him the tribunal has power "to make such order as it thinks fit": s. 175 (3). The question has therefore arisen how far on this appeal we are bound by the exercise of the discretion of the tribunal. It is agreed that it is to the tribunal that we have to look in this respect and not to the licensing authority; they may substitute their discretion for that of the licensing authority. But they are not, in my opinion, when they sit, as they usually do, as an appellate tribunal without hearing the witnesses, free to substitute their own findings of fact without good cause for those findings of the licensing authority which are based on and derive their force from his observation of the witnesses; if they did that, they would commit an error of law, for that is a limitation inherent in the nature of appellate work. Apart from this, the question is to what extent we can interfere with the discretion exercised by the tribunal. On the one side it is agreed that we should not interfere unless we discover some error of principle, such as may cause an appellate court to differ from the decision of a judge in chambers. It is conceded on the other side that if there lies at the root of the exercise of the discretion any error of law, we are entitled to correct it and, if necessary, to exercise our own discretion, making such order as the tribunal itself could have made. I need not explore the territory that lies between these limits since in my opinion both cases fall outside them. I am satisfied in the first case that the tribunal has fallen into an error of law; in the second case I am not satisfied that there is as much as an error of principle.

The other question on discretion is whether the tribunal can fetter—and, if so, whether it has fettered—the exercise of the discretion by the licensing authorities and by itself. It is said by counsel for the objectors that the tribunal has constructed a rigid system of rules embodied in reported cases which licensing authorities are required to follow as binding precedents. He submits that that

(5) See footnote (1), p. 498, ante.

A is wrong; and this submission arises for consideration particularly in the second case. In my opinion a series of reasoned judgments such as the tribunal gives is bound to disclose the general principles on which it proceeds. I think that that is not only inevitable but also desirable. It makes for uniformity of treatment and it is helpful to the industry and to its advisers to know in a general way how particular classes of applications are likely to be treated; but the B tribunal may not in my opinion make rules which prevent or excuse either itself or the licensing authorities from examining each case on its merits. That is a power which the High Court has assumed. If the High Court has made a rule for the proper administration of justice generally—as, for example, that there should be no communication of any sort between a party and a juror—the court will enforce the rule without inquiring whether the breach of it in a particular C case has actually caused any injustice. There is no warranty for an inferior court making rules of that sort; and in my opinion it would not be open to a tribunal charged by statute with a duty to decide each case as a matter of discretion, to inhibit itself from going fully into the facts. I respectfully adopt what JENKINS, L.J., said on a similar point in *R. v. County Licensing (Stage Plays) Committee of Flint C.C., Ex p. Barrett* (6): a tribunal must not pursue consis- D tency at the expense of the merits of individual cases. If the discretion is to be narrowed, that must be done by statute; the tribunal has no power to give its decisions the force of statute.

It is necessary now to say something about the framework of the relevant sections of the Act. Section 166 divides licensees into three classes—A, B and C: public, limited and private. The fundamental distinction is between the E public and the private carrier. The private carrier is a man who uses his vehicle for delivering his own goods; and unless he has misbehaved himself in some way, he is entitled to his licence as of right: s. 174 (3). Such a vehicle will normally be empty on the return journey and it would therefore pay the private carrier to solicit a load back at a very cheap rate. If he were allowed to do this, there would be unfair or uneconomic competition with the public carrier or A F licensee whose function is to carry goods generally for hire or reward. It is plainly the policy of the Act to prevent this. The C licensee or private carrier is forbidden, except when authorised in an emergency, to carry goods for hire or reward: s. 166 (4) and s. 168 (3). The Act also provides for the possibility that a public carrier or A licensee may have as well a different business in which he delivers his own goods and forbids such a carrier from using his A licence G vehicles for carrying such goods: s. 168 (1). In between these two main categories, the Act provides for what have come to be regarded as three other categories. Although there is only one other class mentioned in the Act, the B licence, this licence has come to be used for two rather distinct purposes; and there is also a modification of the A licence, which although it has no official name is known as the contract A licence. It is convenient to deal with that H first. Although in form it is a modification of the A licence, in substance it is a variant of private carriage. Instead of carrying his own goods, a trader may find a carrier who is prepared under contract to set aside vehicles exclusively for the trader's goods. Such a carrier may obtain a licence in the same way as a C licence as of right, but he is then subject to the essential disability of the C licensee, namely, that he may not carry any other person's goods in that I vehicle: s. 174 (2).

The next category to be considered is that of the public carrier who is prepared to submit to some restriction. The A licence in theory gives the carrier power to travel all over the country and to carry what goods he wants. The only condition which can be imposed on him is that which I have already noticed, namely, that if he carries on another business, he may not transport the goods of that other business. In the limited or B licence conditions can be imposed:

(6) [1957] 1 All E.R. at p. 122; [1957] 1 Q.B. at pp. 367, 368.

s. 168 (1). The carrier may be limited to a specified district, to travel between specified places, to certain classes or descriptions of goods, or to the carriage of goods only for specified persons. A public carrier who wanted only a limited licence of this sort should apply for a B licence. But it appears that there are public carriers who, while not wishing to bind themselves stringently, are prepared to submit to what in effect are restrictions of a more general character. In his application an applicant must state "the facilities for the transport of goods intended to be provided by the applicant" (s. 172 (2) (a)). The wider the facilities for which he asks, for example in the area to be covered or in the classes of goods to be carried, the less likely he is to get his licence. So he is not likely to ask for more than he hopes to get. This statement is not binding on him as a condition would be. If he goes outside the facilities for which he has asked, he does not, as in the case of a B licensee who breaks a condition, commit a criminal offence; but s. 178 (1) (d) provides that if for the purposes of an application the applicant has made a statement of intention or expectation which has not been fulfilled, the licensing authority may revoke, suspend or curtail his licence. No doubt, therefore, the penalty for departure from the statement of intention by an A licensee is practically as effective as that for the breach of a condition by a B licensee; but the revocation of the licence is discretionary and I presume that the departure from the intention would have to be more than trivial; the procedure is useful in the sort of case where the restraint which is acceptable to the carrier does not lend itself easily to the formulation of a rigid condition. I have observed that a word such as "mainly" often qualifies a statement of intention, so that the question would be whether the carrier poached outside the area mentioned in his application or made a regular trade in classes of goods which he had not included in it.

Finally, in the third category, there is the private carrier who wants to be relieved to some extent of his disability from carrying other people's goods. He, too, can apply for a B licence and that is why I have said that that one class seems to include two categories. Under a B licence he can not only carry goods of his own but he can also carry other people's goods for hire or reward subject to conditions. These may include, in addition to those I have already mentioned, any condition imposed "in the public interest and with a view to preventing uneconomic competition": s. 168 (2) (d). That is the protection given to the A carrier who would otherwise start from a position of economic disadvantage in that he would have to compete with the surplus capacity of the private trader.

In the first case the nominal applicant for an ordinary A licence is Merchandise Transport, Ltd. Their application was refused by the licensing authority and granted by the tribunal. This applicant company is a wholly owned subsidiary of Harris Lebus, Ltd., who are manufacturers of furniture on a very big scale and therefore have to have at their disposal a fleet of furniture vans for delivering their goods. The applicant company, together with two subsidiaries of their own, handles or wishes to handle all this transport. The application in this case is in respect of a number of vehicles known as Luton vans which have hitherto been used by Harris Lebus, Ltd. for delivery of their furniture on C licence; it is proposed that they should be transferred to the applicant company and used by that company on A licence for the transport of "mainly new furniture, any distance, and on return, goods suitable for carriage in Luton vans". It is said that the object of this transfer is to simplify record-keeping and administration. Two witnesses, who are officers of both companies, spoke about this and were examined and cross-examined on the point; and the licensing authority who heard them came to the conclusion

> "that the driving motive behind all these applications is not the customer's wish to change his business method, but the desire of the organisation of which the customer is the head to carry return loads in all their vehicles."

A I do not think that the tribunal anywhere rejects this finding; as one made by the licensing authority who heard and saw the witnesses, I think that it should be accepted. It is not suggested that the applicant company was formed simply for the purpose of getting round the Act; but the situation that will result is that by a "simple device", as the licensing authority rightly describes it, the Harris Lebus group will be put in the position of a manufacturer who can carry B his own goods to their destination and pick up return loads where he can get them without having to submit to the conditions which on the grant of a B licence would probably be imposed to protect public carriers.

An A licence is not granted as a matter of course and it is open to existing A licensees to object on certain grounds, principally that the grant of it would increase capacity above requirements. The British Transport Commission, C for whom Mr. Fay appears, heads the list of objectors who gave evidence at the hearing. In the course of the hearing, and I suppose in order to meet some of the objections, the applicants gave an undertaking that they would not on outward journeys seek to carry any traffic other than Harris Lebus' goods. Effect was given to this by means of "a statement of intention" within s. 178 (1) (d). In my opinion this was not correct. It is a precise limitation, capable D of exact enforcement, and should be made the subject of a condition and of a limited licence in accordance with the design of the Act. I do not say that the line between a statement of intention and a condition must always be drawn too meticulously; but if it is completely blurred, if as in this case a restriction on trade of a sort for which a B licence was clearly designed is imposed on an A licence by way of a statement of intention, injustice may result. All existing E A licensees and B licensees may oppose an application for a B licence; but only an A licensee may oppose an application for an A licence: s. 173 (3). If the distinction between a condition and a statement of intention is not observed and application is made for an A licence in cases where a B licence is for this reason the appropriate one, what is in effect a B licence will be granted without existing B licensees having had an opportunity to be heard. This ground is in F my judgment sufficient to justify the refusal of the A licence in this case. But although it was taken by counsel for the objectors before us, it does not appear to have been pressed below; and I shall therefore proceed to consider the essential matter in issue, on which the licensing authority took one view and the tribunal the other.

Before doing so, it will be convenient to see just what advantage the Harris G Lebus group gains by applying for an A rather than for a B licence. They have consented to carry Harris Lebus' goods only on their outward journeys. Since the main object of the enterprise is to deliver Harris Lebus' furniture, the concession does not involve much sacrifice, though I dare say they would have liked to have kept their hands entirely free. What they insist on retaining is their freedom to pick up return loads; if they had not wanted that, they could have H got a contract A licence as of right. They do not, however, they told us, wish to cut rates on return loads. It may be asked therefore why they are not willing in accordance with the commercial realities of what they are doing to apply for a B licence enabling them to carry their own goods on the outward journey and other traders' goods on the return. The answer lies in the different conditions which are laid down either by the Act or have been followed as a matter of prac- I tice in relation to the burden of proof and which distinguish the application for the A licence from that for the B licence. On an application for an A licence existing A licensees can object on the ground (I shall give the exact phraseology later on) that their existing capacity is already sufficient and that the grant of any additional services would be in excess of requirements. When such an objection is taken, as in this case, the onus of proof is on the objector: s. 173 (5). But when an application is made by a C licensee to switch to a B licence so that he can carry return loads, the practice is to put the onus of proof the other way round. In *Barratt & Co., Ltd.* v. *London, Midland & Scottish, London & North*