JURISDICTION

BRITISH AIRWAYS BOARD AND BRITISH CALEDONIAN AIRWAYS LTD.
v. LAKER AIRWAYS LTD AND OTHERS

House of Lords, 19 July 1984,
The Times, 20 July 1984

The facts are briefly noted in (1984) Australian I.L. News 244. The House of Lords allowed Laker's appeal from the Court of Appeal, The Times 27 July 1984; (1984) QB 142, which had reversed the decision of Parker J.

Mr. David Johnson QC, Mr. Michael Crystal, QC, Mr. Richard Hacker and Mrs Rosalyn Higgins for Laker; Mr. Leonard Hoffmann, QC and Mr. Jonathan Sumption for British Airways; Mr. Colin Ross-Munro QC and Mr. David Donaldson, QC for British Caledonian; Mr. Peter Scott, QC and Mr. Timothy Walker for the secretary of state and the Attorney General.

Solicitors: Durrant Plesse; Richards Butler & Co; Herbert Smith & Co; Treasury Solicitor.

The House held that the plaintiffs had to show that it would be unconscionable for Lake Airways Ltd (now in liquidation) to pursue an antitrust action against them in the United States District Court for the District of Columbia for triple and punitive damages totalling US$1,050m. Accordingly, they were not entitled to an injunction restraining Laker from continuing that action against them.

It was common ground that these allegations disclosed no cause of action that was justiciable in an English court, the Clayton Act being, under English rules of conflict of laws purely territorial in its application and any English cause of action for conspiracy being ruled out under a well-established principle of law because the predominant purpose of acts of British Airways and British Caledonian complained of had been the defence of their own business interests.

In the result, their Lordships were confronted in the civil actions with a case in which there was only a single forum that was of competent jurisdiction to determine the merits of the claim, and that single forum was a foreign court.

For an English court to enjoin the claimant from having access to that foreign court was, in effect,to take on itself a one-sided jurisdiction not only to determine the claim on the merits against the claimant but also to prevent its being decided on the merits in his favour.

That posed a novel problem, different in kind from that involved where there were alternative fora in which a particular civil claim could be pursued: an English court and a court of some foreign country both of which were recognized under English rules of conflict of laws as having jurisdiction to entertain proceedings against a defendant for a remedy for acts or omissions that constituted an actionable wrong under the substantive law of both England and that foreign country.

The House rejected the agreement in that Laker having had the benefit of being admitted to the "scheduled airlines' club", could not in good conscience complain of conduct by fellow members that was permitted by the club's rules.

This argument was fallacious. By obtaining the air transport licence to operate the relevant scheduled air service the parties had voluntarily submitted themselves to a regulatory regime which, so far as their operations within the territorial jurisdiction of the United States were concerned, had required that each of them

should become subject to American domestic law including American antitrust laws.

The plaintiffs had previously argued before Parker J. appeared to have been largely focused on the public policy of the United Kingdom in relation to the enforcement of American antitrust laws against United Kingdom nationals as the principal ground on which Laker should be restrained from proceeding with its American action.

The public policy of which it was legitimate for an English court to take account included the Protection of Trading Interests Act, 1980. Lord Diplock agreed with Parker J's analysis of this question and conclusion that the Act did not assist the plaintiffs.

On the appeal by Laker, the House rejected the submission. The Secretary of State for Trade and Industry had not, however, acted ultra vires in making the Protection of Trading Interests (US Antitrust Measures) Order (SI 1983 No 900) and two general directions under the Protection of Trading Interests Act 1980. These had prevented the plaintiffs from complying without the Secretary's consent with an order to produce documents made by Judge Greene in a U.S. District Court. Laker had argued that the Secretary of State ought to have given reasons for making the order and directions that were more explicit than those contained in the actual recitals to them, which did no more than state the conclusions that the Secretary of State had reached.

Where the decision of a minister was one that concerned international relations between the United Kingdom and a foreign sovereign state, a very strong case needed to be made out to justify a court of law in holding the decision to be ultra vires on the ground in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1948) 1 KB 223) that it was one that no reasonable person holding the office of minister on whom the discretion to make it was conferred could have reached. His Lordship agreed with the Court of Appeal that Laker did not come anywhere near doing so. According to a news report in The Times 20 January 1984, Laker's liquidator did not see the ruling on the Secretary of State's order and directions as a handicap, as all the information was already in the U S

New Caledonia

In the note in this issue on New Caledonia, we referred to a proposed bill which had been introduced into the French parliament. Legislation was passed on 2 August 1984, but details are not yet available. We anticipate that we should be able to publish this in our next issue.