



UNC
SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 10 | Number 2

Article 8

Spring 1985

Recent Development

North Carolina Journal of International Law and Commercial Regulation

Follow this and additional works at: <http://scholarship.law.unc.edu/ncilj>



Part of the [Commercial Law Commons](#), and the [International Law Commons](#)

Recommended Citation

North Carolina Journal of International Law and Commercial Regulation, *Recent Development*, 10 N.C. J. INT'L L. & COM. REG. 533 (1985).

Available at: <http://scholarship.law.unc.edu/ncilj/vol10/iss2/8>

This Comment is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

RECENT DEVELOPMENT

Clipping Laker's Wings and Telling it to Fly: *British Airways Board v. Laker Airways*

As a moth is drawn to the light, so is a litigant drawn to the United States - Lord Denning, MR.¹

Conflicts between the courts of Great Britain and the United States in matters of procedure, extraterritorial application of domestic law, and foreign forums have increased as American courts increasingly have become a more favorable forum in which to bring suit.² In *British Airways Board v. Laker Airways*³ the House of Lords, while allowing a British corporation to pursue its antitrust claim in United States courts, made clear that the British government would not permit the United States to compel British companies to participate in what the British consider wasteful legal proceedings.

British Airways arose out of the bankruptcy and liquidation of Laker Airlines in 1982. Laker sued multiple defendants, including British Airways and British Caledonian, under the Sherman and Clayton Acts, alleging that defendants had conspired to cause Laker to fail financially.⁴ That suit prompted the two British defendants to apply to the Queen's Bench Division for an injunction to restrain Laker from going forward with the United States action,⁵ alleging that such a suit would be contrary to public policy and unjust to defendants.

The Queen's Bench refused to grant the injunction, stating that if Laker could not pursue its remedy in the United States, it effectively would be left without a remedy, because a cause of action for antitrust violations is recognized only in the United States.⁶ The court also rejected public policy arguments that had been derived from the Protection of Trading Interests Act of 1980,⁷ because,

¹ *Smith Kline & French Laboratories v. Bloch*, [1983] 2 All E.R. 72, 74.

² *Id.* at 74-75.

³ [1984] 3 W.L.R. 413.

⁴ For a complete discussion of the United States action, see Note, *Holding the Antitrust Line: Laker Airways v. Sabena, Belgian World Airlines*, 10 N.C.J. INT'L L. & COM. REG. 251 (1985).

⁵ [1983] 3 All E.R. 375. For a discussion of the Queen's Bench and Court of Appeal decisions, see ALL E.R. REV. 1983 at 94-96.

⁶ [1983] 3 All E.R. at 390-395.

⁷ *Id.* at 389-390.

although the Act prevents Laker from recovering punitive damages,⁸ there is no indication that Parliament intended the Act to be a condemnation of antitrust actions generally.⁹ Therefore, the court ruled that Laker was entitled to proceed with its action.

Plaintiffs appealed, and in June 1983, shortly before the hearing of the appeal, the Secretary of State for Trade and Industry issued directions¹⁰ prohibiting United Kingdom designated airlines from complying with any requirements for the production of documents or commercial information in the United States action and any requirements or prohibitions imposed on them by the antitrust laws as a result of the United States action.¹¹ Laker applied for leave to apply for judicial review of the orders. When that leave was denied, Laker appealed to the Court of Appeal, where plaintiff's and Laker's appeals were heard together.¹²

The Court of Appeal took the view that the order issued by the Secretary of State made all the difference in the world. The court believed that the order made the issue wholly untriable and on that basis alone held that Laker should not be allowed to proceed in the United States action.¹³

The House of Lords reversed. In the most complete speech delivered, Lord Diplock noted that the House of Lords was confronted with a case that could be decided only in a foreign court.¹⁴ "For an English court to enjoin the claimant from having access to that foreign court is, in effect, to take upon itself a one-sided jurisdiction to determine the claim upon the merits *against* the claimant but also to prevent its being decided upon the merits *in his favour*."¹⁵ This case differed from other *forum conveniens* cases in its presentation of a question that could not be pursued successfully in the English courts.¹⁶

What the Lords gave with the left hand, they took away with the right. After setting forth the case for allowing Laker to proceed with its action, the Lords denied Laker's appeal in the application for judicial review against the Secretary of State.¹⁷ Responding to Laker's contention that the order was *ultra vires*,¹⁸ Lord Diplock summarily stated: "Where the decision is one which concerns international relations between the United Kingdom and a foreign sovereign state a

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 376; Protection of Trading Interests (U.S. Antitrust Measures) Order 1983.

¹¹ *Id.*

¹² *Id.* at 395.

¹³ *Id.* at 404-408.

¹⁴ [1984] 3 W.L.R. at 420.

¹⁵ *Id.*

¹⁶ *Id.* at 420-21.

¹⁷ *Id.* at 431.

¹⁸ *Id.*

very strong case needs to be made out to justify a court of law in holding the decision to be ultra vires In the instant case, I agree with the Court of Appeal that Laker does not come anywhere near doing so.”¹⁹

The result reached by the House of Lords places Laker in a very difficult position. While allowing Laker to pursue its claim, the Lords have ratified a governmental decision that effectively takes away any opportunity that existed for Laker to prove its case, at least so far as the British defendants are involved.²⁰ Further, even if Laker is able to demonstrate its case, the Lords have assured that no remedy will be available to Laker with respect to the British defendants.²¹ Quite simply, the House of Lords in *British Airways* was paying mere lip service to the concept of forum conveniens, while once again issuing a very clear statement to United States courts²² that United States procedure and antitrust regulation is not welcome in Great Britain.

—KEITH MERVIN DUNN

¹⁹ *Id.* at 432.

²⁰ The decision, of course, does not affect Laker's ability to pursue its claim with respect to the other defendants. See generally Note, *supra* note 4. It is interesting that the House of Lords, while denying Laker the right to discovery, nevertheless stated that the Secretary of State could allow discovery where it would help defendant's case. [1984] 3 W.L.R. at 433-34.

²¹ The Protection of Trading Interests Act 1980 § 5 prohibits the enforcement in the United Kingdom of judgments of foreign courts for multiple claims or damages. [1984] 3 W.L.R. at 429.

²² See, e.g., *Smith Kline & French Laboratories*, 2 All E.R. at 72; *In re Westinghouse Elec. Corp. Uranium Contract Litig.*, [1978] A.C. 547.

