

# Editorial

## House of Fraser

At the time of writing, Lonrho's appeal to the House of Lords in the *House of Fraser* case is pending, but whatever the final outcome the case is surely destined for a place in the textbooks – not least for the light it throws upon the continuing uncertainties surrounding the scope of judicial review. Lonrho sought to challenge the decisions by the Secretary of State for Trade and Industry, Lord Young: (a) not to refer the 1985 takeover of House of Fraser by the Al Fayed brothers to the Monopolies and Mergers Commission; and (b) to defer publication of the DTI report into the affair pending investigations and possible prosecutions by the Serious Fraud Office and the DPP.

A strongly constituted Divisional Court (Watkins and Mann LJ and McCowan J) decided unanimously on January 17 that both ministerial decisions were ones that no reasonable minister could have made. So far as the refusal to refer to the MMC was concerned, the court held, citing *Padfield v Minister of Agriculture, Fisheries and Food*, that the fact that the minister gave no reasons for his decision could reasonably lead to the inference that he had no reasons to give. And their Lordships were unimpressed by the argument that publication of the inquiry report might prejudice the outcome of any criminal proceedings that might ensue.

Three days later the Court of Appeal (Dillon, Mustill and Stocker LJ), with equally confident unanimity, reversed the decision (reasoned judgments were handed down on January 23). The Court held that the minister's decisions were matters for him alone; that whether or not the advice given to the minister by the Serious Fraud Office was correct, his decision to follow that advice was not so unreasonable that no minister could reasonably have taken it; and that the *Padfield* principles relating to the absence of reasons were less axiomatic than the court below had held them to be. With the score 3-all, the Court gave leave to appeal to the Lords, and in view of the statutory time limit for references to the MMC (set to expire on January 22) the Court ordered a reference to be made forthwith, on the understanding that it would proceed only if Lonrho won on appeal.

Mr David Oliver QC, for House of Fraser, told the Court of Appeal that if that decision of the Divisional Court

were allowed to stand in its present form, it would "represent a major landmark in the breakdown of trust between the courts and ministers of the Crown". Trust is a slightly odd word to use in this context, but it is clear what he meant. The courts must not usurp the role of the executive and substitute their own administrative and policy judgments for those of ministers. Which is what the appellants (by implication, successfully) contended had happened in the court below. But surely the very nature of "reasonableness" and the application of the *Wednesbury* doctrine, half encourages the courts to do just that? Two strong appellate courts looked at the same facts and decided to draw the line in quite different places. The House of Lords may help to lay down more guidelines for the future exercise of judicial discretion, but ultimately each case demands difficult choices to be made in the context of particular facts.

Then there is the matter of ministers failing to give reasons. In the absence of such reasons the process of judicial review itself is seriously impeded. This is an area of administrative law where the UK administrative law has much to learn both from European and Commonwealth practices, and its to be hoped that this case will prompt serious debate on the subject.

## European Community Information

### Sir Leon in Europe

Sir Leon Brittan, the new Commissioner responsible for Competition Policy, has announced that air transport, telecommunications and energy are to be three priority areas for his attention in the near future. Delivering the Procter and Gamble Lecture at Newcastle University on January 27 Sir Leon, recently confirmed as one of the six Commission Vice-Presidents, gave the first indication of his thinking when he said he intended to ensure that the forces of competition applied equally to all sections of the economy within the Community.

Referring to air transport he said a number of measures had already been taken in order to introduce some degree

of competition into this highly regulated field, but added:

"These measures were only the beginning and more ambitious plans must follow. I believe much greater liberalisation of this sector must be achieved as quickly as possible in the interests of all concerned, and I intend to pursue this goal. Air traffic is still too expensive in Europe and this is largely due to a plethora of restrictive practices by airlines and governments."

Turning to telecommunications and energy, Sir Leon said these were two other highly regulated industries "where competition policy has an important part to play in order to remove the many distortions which currently impede trade and stand in the way of enterprise". He said he would be actively considering the most appropriate next steps needed in this direction. He concluded by saying that now we were in the final straight of the race to complete the single internal market by the end of 1992, it was his task to ensure that in this crucial stage "the temptation to retrench into protectionism and restrictive practices is resisted".

Sir Leon also spoke of implementing the proposed Mergers Regulations which is currently being negotiated in the Community. He said he would continue to seek agreement in this by the Council of Ministers and the EC.

### Lawson attacks monetary union schemes

Addressing the Royal Institute of International Affairs recently, Chancellor Nigel Lawson attacked proposals for economic and monetary union in Europe. He said union raised issues which went to the heart of sovereignty and warned that the UK would not accept any further amendment to the Treaty of Rome to give effect to such union. The Chancellor appeared to aim his attack at the 17-man inquiry into economic and monetary union, headed by Commission President Jacques Delors, which will report to the Madrid EC Summit in June. The Delors Committee, which has been meeting monthly since last September, is now starting the crucial final drafting phase of its work.

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