Michaelmas Term
[2010] UKSC 52
On appeal from: 2010 EWCA Crim 1910

JUDGMENT

R *v* Chaytor and others (Appellants)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lady Hale
Lord Brown
Lord Mance
Lord Collins
Lord Kerr
Lord Clarke

REASONS GIVEN ON
1 December 2010

FOR THE ORDER MADE ON
10 November 2010

Heard on 18 and 19 October 2010

First Appellant
Nigel Pleming QC
Julian Knowles
(Instructed by Steel &
Shamash Solicitors)

Second Appellant
Edward Fitzgerald QC
Joseph Middleton
(Instructed by Steel &
Shamash Solicitors)

Third Appellant
Nigel Pleming QC
Rebecca Trowler

(Instructed by Steel &
Shamash Solicitors)

Respondent
Lord Pannick QC
Louis Mably
James Segan
(Instructed by Crown
Prosecution Service
Special Crime Division)

Intervener
(written submissions)
Alun Jones QC
Rupert Bowers
(Instructed by Keystone
Law Limited)

LORD PHILLIPS

Introduction

1. Each of the appellants has been committed for trial at the Crown Court on charges of false accounting. I shall refer to them as "the defendants". The charges relate to claims in respect of parliamentary expenses and are alleged to have been committed when each defendant was a serving member of the House of Commons. A fourth defendant, Lord Hanningfield, who is a member of the House of Lords, faces similar charges. Each defendant and Lord Hanningfield is facing a separate trial but each of them has raised an important point of law. Each claims that criminal proceedings cannot be brought against him because they infringe parliamentary privilege. A single preparatory hearing pursuant to section 29 of the Criminal Procedure and Investigations Act 1996 was held to consider this point in relation to all four defendants. On 11 June 2010 Saunders J, sitting in Southwark Crown Court, ruled against the four defendants. All four appealed to the Court of Appeal. On 30 July 2010 that court, Lord Judge CJ, Lord Neuberger MR and Sir Anthony May, President of the Queen's Bench Division, dismissed their appeal. On 14 September 2010 the court certified that the appeal had raised a point of law of general public importance, refused permission to appeal to this court and granted a representation order for one leading counsel, one junior counsel and one solicitor to represent the four defendants jointly in the event of an application to this court for permission to appeal and any consequent appeal.

2. The defendants, but not Lord Hanningfield, sought permission to appeal. Lord Hanningfield sought permission to intervene. Permission was granted to him to intervene in writing for the limited purpose of drawing attention to any distinction between expenses schemes and privileges in the two Houses of Parliament. At the opening of the hearing the court granted permission to appeal.

3. On 10 November the court ordered that each of the three appeals be dismissed, for reasons to be delivered in due course. These are my reasons.

The charges

4. Each of the defendants has been charged with false accounting contrary to section 17(1)(b) of the Theft Act 1968, which provides in so far as material:

"False accounting

(1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another,-

…(b) in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular;

he shall, on conviction on indictment, be liable to imprisonment for a term not exceeding seven years.

(2) For purposes of this section a person who makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document. "

5. Mr Morley is charged with making use of monthly expenses claim forms for additional costs allowance which, initially, claimed as mortgage interest sums which were in part repayments of capital and, latterly, made claims for repayment of mortgage interest after the mortgage had been repaid.

6. Mr Chaytor is charged with making use of an expenses claim form for incidental expenses provision in relation to two invoices relating to the supply of IT services when no such services had been supplied. He is further charged with making use of expenses claim forms for additional costs allowance in respect of payments of monthly rent when such payments had never been made.

7. Mr Devine is charged with making use of expenses claim forms for additional costs allowance and personal additional accommodation expenditure in respect of invoices relating to cleaning and maintenance services when no such services had been supplied. He is further charged with submitting expenses claim forms in respect of communications allowance and supporting invoices in respect of the supply of stationery when no such stationery had been supplied.

8. The claim forms which form the subject matter of all charges were submitted to the Fees Office of the House of Commons. Form ACA2 in respect of

additional costs allowance contains a declaration, signed by the Member in the following form:

> "I confirm that I incurred these costs wholly, exclusively and necessarily to enable me to stay overnight away from my only or main home for the purpose of performing my duties a Member of Parliament."

The issues of fact in each case would seem to be whether the expenses claimed were incurred and not the purpose for which they were incurred.

Entitlement to and administration of allowances

9. The entitlement of Members of Parliament to claim certain expenses dates back to 1911, but the system under which the claims with which the present appeals are concerned was introduced in 1971 and the circumstances in which such allowances and expenses may be claimed are determined by Resolutions of the House. On 29 January 2004 the House passed a Standing Order establishing the House of Commons Members Estimate Committee ("the Estimate Committee"), which is chaired by the Speaker. One of the functions of this Committee is to report to the House from time to time on the provisions of the Resolutions of the House relating to "expenditure charged to the Estimate for the House of Commons: Members", as codified and modified by the Committee. In effect the House itself is responsible for the overall scheme of allowances and the Estimate Committee is responsible for the detail.

10. The House of Commons (Administration) Act 1978 created the House of Commons Commission ("the Commission") consisting of the Speaker, the Leader of the House, a Member nominated by the Leader of the Opposition and three other Members, not being Ministers, appointed by the House. Under Schedule 1 to this Act the Commission is a body corporate. The primary functions of the Commission are to appoint the staff in the House Departments, to determine their numbers, and to determine their remuneration and other terms and conditions of service (section 2).

11. The various House Departments include the Department of Finance and Administration. This is divided into three main offices. One of these is the Fees Office. Until recently this performed the functions of receiving claim forms for allowances and expenses, which might be submitted in person or by post, considering the claims and making payments in relation to claims that appeared to be properly made.

The claim to privilege

12. The defendants contend that the Crown Court has no jurisdiction to try them in respect of these charges on the ground that this would infringe parliamentary privilege. This claim to privilege has two bases. The first is article 9 of the Bill of Rights 1689 ("article 9"). This provides:

> "That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."

13. The defendants further rely on privilege that has its origin before 1689 and which is wider than, and embraces, article 9. This has customarily been described as the "exclusive cognisance of Parliament" but has also been described in argument as "exclusive jurisdiction". I shall use the former description.

Who decides the issue?

14. In the 17th and 18th centuries there was a dispute between the courts and the House of Commons, often acrimonious, as to who was the final arbiter of the scope of parliamentary privilege. This dispute was largely resolved in the course of the 19th century. In *Stockdale v Hansard* (1839) 9 Ad & E 1 at pp 147- 148 Lord Denman CJ said of the argument that the House of Commons was a separate Court with exclusive jurisdiction over the extent of its privileges:

> "Where the subject matter falls within their jurisdiction, no doubt we cannot question their judgment; but we are now enquiring whether the subject matter does fall within the jurisdiction of the House of Commons. It is contended that they can bring it within their jurisdiction by declaring it so. To this claim, as arising from their privileges, I have already stated my answer: it is perfectly clear that none of these Courts could give themselves jurisdiction by adjudging that they enjoy it."

15. It is now accepted in Parliament that the courts are not bound by any views expressed by parliamentary committees, by the Speaker or by the House of Commons itself as to the scope of parliamentary privilege. On 4 March 2010 the Clerk of the Parliaments wrote to the solicitor acting for Lord Hanningfield a letter that had received the approval of the Committee for Privileges. This stated:

> "Article 9 limits the application of parliamentary privilege to 'proceedings in Parliament.' The decision as to what constitutes a 'proceeding in Parliament', and therefore what is or is not admissible as evidence, is ultimately a matter for the court, not the House."

This statement was correct. It applies as much to the House of Commons as to the House of Lords, and to an issue as to the scope of the exclusive cognisance of Parliament as it does to an issue as to the application of article 9.

16. Although the extent of parliamentary privilege is ultimately a matter for the court, it is one on which the court will pay careful regard to any views expressed in Parliament by either House or by bodies or individuals in a position to speak on the matter with authority. In *Stockdale v Hansard* at p 157 Lord Denman CJ commented:

> "The authority to which the Attorney General last appealed is one to which particular attention is due: I mean the report of the committee appointed by the late House of Commons to examine the subject"

albeit that the comments that he went on to make suggest that in the event the report did not carry the weight that he had suggested that it deserved. Both Saunders J and the Court of Appeal attached weight to views expressed or to be implied within Parliament both as to the scope of parliamentary privilege in general and as to whether such privilege attaches on the facts of these appeals.

The decision of Saunders J

17. Saunders J referred at para 19 to concessions made by the prosecution which narrowed the issues. The first was that the scheme for the payment of expenses as prescribed by resolution of the Houses of Parliament was covered by privilege either under article 9 or as part of the "exclusive jurisdiction" of the House. This meant that the High Court would have no power judicially to review the scheme. The second was that the administration of the scheme by officials in the Fees Office "under the supervision of a committee" was also covered by parliamentary privilege. Saunders J expressed reservations about this concession, but treated it as correctly made. The third was:

> "While an instinctive reaction might be that, while honest claims are covered by privilege, dishonest ones are not, the prosecution accept that, if the submission of forms by an MP is covered by privilege then dishonest claims are also covered. That is because, in order to

> prove dishonesty, the prosecution would have to question the document, which is not permitted if it is covered by privilege."

Saunders J held that he was satisfied that this concession was properly made. It is not altogether easy to reconcile this with an earlier finding at para 18 that "in the context of criminal charges parliamentary privilege should be narrowly construed", but I understand that what he meant was that, because it has the effect of ousting criminal jurisdiction, parliamentary privilege should be narrowly construed.

18. At para 6 Saunders J also recorded an area of ground common to all, or nearly all, counsel. Privilege did not attach to criminal conduct within the House which was not connected to the activities of the House. Such conduct could be described as "ordinary criminal conduct". This covered such criminal offences as an assault in the corridors of the House, theft of another Member's money, or a sexual offence, none of which related to parliamentary activity or proceedings in Parliament.

19. Addressing the exclusive jurisdiction of Parliament, Saunders J held that the submission of a claim form fell to be distinguished from the subsequent processing of the form. Even if the latter was covered by privilege, the former was not. Privilege covered actions which were part of the collective processes of Parliament. Claiming expenses was not such an action. It was a voluntary individual activity for the benefit of the individual and not of direct benefit to Parliament.

20. So far as article 9 was concerned, Saunders J considered that this essentially protected freedom of speech in Parliament. The protection extended to some actions that were incidental to exercising that freedom of speech, making a claim for expenses could not properly be said to be one of them. Accordingly the privilege claimed was not made out.

The decision of the Court of Appeal

21. In the Court of Appeal the Crown withdrew its concession that the administration of the allowances and expenses scheme by officials in the Fees Office under the supervision of a committee was covered by parliamentary privilege. At para 69 the Court of Appeal approached this withdrawal "with caution", commenting:

> "The issue in these appeals is not whether the actions of officials in allowing the defendants' expenses claims is or may be privileged,

> but whether in submitting their claims, and making the allegedly false statements contained in them to the officials, the defendants were taking part in proceedings in Parliament, within the ambit of article 9 and privilege, as explained in the relevant authorities."

22. The Court of Appeal attached considerable weight to indications from within Parliament that the defendants' claims were not covered by privilege, to which I shall return in due course, but went on to consider arguments advanced on behalf of the defendants. At paras 74 and 75 the court rejected the submission that making a statement to officials in the Fees Office could be equated with making a statement to the House or to a parliamentary committee:

> "A claim for expenses is not submitted to any other member of the House, nor even to the Speaker or Lord Speaker or to his or her office: it is submitted to an official in the Fees Office, and although that official is appointed by and is an agent of the House, he is not officiating in connection with the business carried on within the Chamber or within a committee. He is merely carrying out an administrative task, albeit one mandated by the relevant House, and one subject to the detailed rules approved by that House."

23. The Court of Appeal went on to develop the theme that claiming expenses had nothing to do with the essential, or core, functions of a Member of Parliament. In doing so, however, the court repeatedly considered this question in relation to the presenting of *dishonest* claims for expenses:

> "In truth, it is impossible to see how subjecting dishonest claims for expenses to criminal investigation would offend against the rationale for parliamentary privilege…" (para 76).

> "It would therefore be curious if privilege were to apply to the member who defrauded the Fees Office by submitting a false claim for expenses…" (para 77).

> "…the decision to set up, and the terms of the system could not be subject to the court's jurisdiction. Be that as it may, it does not then follow that the dishonest operation of this system by individual members is excluded from it" (para 78).

> "on the basis that the implementation of the scheme might constitute a proceeding in Parliament, it does not follow as a matter of logic,

> convenience or principle, that the dishonest actions by a member when making his claim should be immune from criminal prosecution" (para 78).
>
> "It can confidently be stated that parliamentary privilege or immunity from criminal prosecution has never ever attached to ordinary criminal activities by members of Parliament" (para 81).
>
> "The stark reality is that the defendants are alleged to have taken advantage of the allowances scheme designed to enable them to perform their important public duties as members of Parliament to commit crimes of dishonesty to which parliamentary immunity or privilege does not, has never, and, we believe, never would attach. If the allegations are proved, and we emphasise, if they are proved, then those against whom they are proved will have committed ordinary crimes. Even stretching language to its limits we are unable to envisage how dishonest claims by members of Parliament for their expenses or allowances begin to involve the legislative or core functions of the relevant House, or the proper performance of their important public duties" (para 82).

24. Counsel for the defendants submitted that claiming expenses was part of a scheme that was covered by privilege in that the payment of expenses was necessary to enable, or for the purpose of enabling, Parliament to perform its core or essential parliamentary business, to which article 9 related. This was the whole object of the system of allowances. More particularly, counsel submitted that the Court of Appeal had erred in principle in examining this issue on the premise that the claims for expenses were dishonest. Privilege from criminal prosecution would be nugatory if it did not apply to criminal conduct.

25. I consider that there was force in this criticism. The concept of an "ordinary crime", the origin of which I shall identify in due course, is only of value in the present context where it describes an act which has no connection with the conduct of parliamentary business, as counsel rightly agreed – see para 18 above. Making claims for parliamentary allowances does not fall into this category. Such claims form part of the business of Parliament, giving that phrase a broad meaning. The issue is whether business of this nature amounts to proceedings in Parliament, within the meaning of article 9, or is otherwise privileged from scrutiny in the criminal courts because it falls within the exclusive cognisance or jurisdiction of Parliament. It is not appropriate to approach that question on the premise that the claims are dishonest.

Article 9

26. I propose to start by considering article 9, because the issues in relation to article 9 are relatively narrow and clear cut, compared to those that arise in relation to the exclusive cognisance of Parliament.

Jurisprudence

27. Much of the jurisprudence in relation to article 9 relates to what constitutes *impeaching or questioning* proceedings in Parliament – most notably *Pepper v Hart* [1993] AC 593. The meaning of those words is not in issue in the present case and so I shall not refer to authority dealing with that question. What is at issue is the reach of the phrase "*proceedings in Parliament*".

28. The Bill of Rights 1689 reflected the attitude of Parliament, after the Restoration, to events in the reign of Charles I, and in particular the acceptance by the Court of King's Bench that parliamentary privilege did not protect against seditious comments in the Chamber – *R v Eliot, Holles and Valentine* (1629) 3 St Tr 293-336. The primary object of the article was unquestionably to protect freedom of speech in the House of Commons. The question is, having regard to that primary object, how far the term "proceedings in Parliament" extends to actions that advance or are ancillary to proceedings in the Houses. *Erskine May, Parliamentary Practice*, 23rd ed (2004), summarises the position as follows at pp 110-111:

> "The term 'proceedings in Parliament' has received judicial attention, (not all of it in the United Kingdom) but comprehensive lines of decision have not emerged and indeed it has been concluded that an exhaustive definition could not be achieved. Nevertheless, a broad description is not difficult to arrive at. The primary meaning of proceedings, as a technical parliamentary term, which it had at least as early as the seventeenth century, is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual Member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking."

29. One of the problems when considering the scope of article 9 is that decisions on parliamentary privilege frequently make no mention of the Bill of Rights. That is true of *Bradlaugh v Gossett* (1884) 12 QBD 271. The plaintiff, Bradlaugh, had been elected to the House of Commons. He required the Speaker to call him to the table to take the oath and the Speaker declined to do so and the House resolved that the Serjeant at Arms should exclude Bradlaugh from the House. Bradlaugh then sought an injunction restraining the Serjeant at Arms from complying with the resolution. The court refused the injunction. Lord Coleridge CJ held, at p 275:

> "What is said or done within the walls of Parliament cannot be inquired into in a court of law…The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive."

30. Stephen J was less categorical. He held, at p 278:

> "I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute law which has relation to its own internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable".

These statements do not distinguish between the narrow privilege under article 9 and the broader exclusive cognisance of Parliament. More pertinent are some comments made by Stephen J as to what was not covered by privilege. At p 283 he stated:

> "The only force which comes in question in this case is such force as any private man might employ to prevent a trespass on his own land. I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice."

Stephen J pointed out at p 284 that, while *Elliot* established that nothing said in Parliament by a member as such could be treated as an offence by the ordinary courts, the House of Lords had carefully avoided deciding the question whether the Court of King's Bench could try a Member for an assault on the Speaker in the House. His was a cogent statement of opinion that parliamentary privilege, including that conferred by article 9, will not preclude a criminal prosecution in

respect of the conduct of a Member merely because it has taken place within the House of Commons.

31. While *Pepper v Hart* was concerned with the circumstances in which reference could be made to proceedings in Parliament, Lord Browne-Wilkinson made the following comment on the object of article 9, at p 638:

> "Article 9 is a provision of the highest constitutional importance and should not be narrowly construed. It ensures the ability of democratically elected Members of Parliament to discuss what they will (freedom of debate) and to say what they will (freedom of speech)…In my judgment, the plain meaning of article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal, for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed."

32. Lord Browne-Wilkinson made a similar observation when giving the judgment of the Judicial Committee of the Privy Council in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at p 334. These observations are of limited assistance when considering the extent to which article 9 applies to actions that are incidental or in some way connected to proceedings on the floor of either House or in parliamentary committee.

33. The suggestion that article 9 should not be narrowly construed conflicted with an observation of Viscount Radcliffe when giving the advice of the Judicial Committee of the Privy Council in *Attorney General of Ceylon v de Livera* [1963] AC 103 at p 120. Section 14 of the Bribery Act of Ceylon made it an offence to offer an inducement or reward to a member of the House of Representatives for doing or forbearing to do any act "in his capacity as such member". The issue was the scope of those words. Viscount Radcliffe drew an analogy with article 9. He said:

> "What has come under inquiry on several occasions is the extent of the privilege of a member of the House and the complementary question, what is a 'proceeding in Parliament'? This is not the same question as that now before the Board, and there is no doubt that the proper meaning of the words 'proceedings in Parliament' is influenced by the context in which they appear in article 9 of the Bill of Rights (1 Wm & M, Sess 2, c 2); but the answer given to that somewhat more limited question depends upon a very similar

> consideration, in what circumstances and in what situations is a member of the House exercising his 'real' or 'essential' function as a member? For, given the proper anxiety of the House to confine its own or its members' privileges to the minimum infringement of the liberties of others, it is important to see that those privileges do not cover activities that are not squarely within a member's true function."

34. Alleged bribery of members in respect of their participation in the proceedings on the floor of one of the Houses of Parliament or in committee has raised the question of whether the connection between the act of bribery outside Parliament and the undoubted "proceedings in Parliament" to which the bribe relates renders the former subject to article 9 or similar privilege.

35. In *Ex p Wason* (1869) LR 4 QB 573 the issue was whether a prosecution would lie against three persons, two of whom were members of the House of Lords, for conspiring to deceive the House. The court held that it would not. Cockburn CJ held at p 576:

> "It is clear that statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person. And a conspiracy to make such statements would not make the persons guilty of it amenable to the criminal law."

Blackburn and Lush JJ agreed. Lush J ended his short judgment with the following statement:

> "I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House."

36. It is not clear whether the reasoning of the court was that the act of conspiring was itself subject to privilege or that, as the object of the conspiracy was not an indictable offence, no indictment could lie for the conspiracy itself.

37. *Ex p Wason* was distinguished by the Supreme Court of Ontario in *R v Bunting* (1885) 7 OR 524, where it was held that a conspiracy to bring about a change in the Government of Ontario by bribing members of the Legislative

Assembly to vote against the Government was an indictable offence at common law committed at the time of the conspiracy itself and within the jurisdiction of the ordinary courts.

38. *Ex p Wason* has also been cited by the Supreme Court of the United States in the context of considering the ambit of the "Speech or Debate" clause in article 1, section 6 of the Constitution. This provides that "for any speech or debate" in either House, Senators or Representatives "shall not be questioned in any other place" – see *United States v Johnson* (1966) 383 US 169 and *United States v Brewster* (1972) 408 US 501. Each case involved an allegation of bribery to purchase support in proceedings in the House. In the latter case Burger CJ gave the opinion of the court. At p 518 he commented:

> "The very fact of the supremacy of Parliament as England's highest tribunal explains the long tradition precluding trial for official misconduct of a member in any other and lesser tribunal."

This is not an accurate summary either of parliamentary privilege in this jurisdiction or of the reason for it, but the issue of interpretation facing the Supreme Court mirrors that raised by article 9 and some of the reasoning in *Brewster* is relevant to consideration of the scope of that article.

39. At p 524 Burger CJ commented:

> "As we noted at the outset, the purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process. But financial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation. Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence."

40. Burger CJ went on to hold that prosecution for bribery did not infringe the Speech and Debate clause because there was no need to show that the defendant in fact fulfilled the alleged illegal bargain. It was the acceptance of the bribe that constituted the offence. Brennan J, with whom Douglas J joined, delivered a powerful dissent. He held that one count actually charged that the defendant committed the act for which the bribe was paid, so that the defendant's conduct in

the House would have to be investigated. Other counts, which merely charged receipt of the bribe, put in question the defendant's motive for the legislative acts which followed, even if those acts did not have to be considered by the court.

41. Similar reasoning to that of Brennan J led the Supreme Court of India to hold that Members of Parliament were protected by privilege from prosecution for bribery in respect of voting in parliamentary proceedings: *Rao v State* (1998) 1 SCJ 529.

42. In 1992 a prosecution was brought against a Member of Parliament, Mr Harry Greenway, for the common law offence of bribery to use his position as a Member of Parliament to further the interests of a company in his constituency. He applied to have the indictment quashed on the ground, inter alia, that the prosecution was precluded by parliamentary privilege. Buckley J dismissed the application [1998] PL 357. He referred with approval to comments of Lord Salmon in debate in the House of Lords (Hansard (HL Debates), 6 December 1976, col 631). Lord Salmon had chaired a Royal Commission on Standards of Conduct in Public Life and the debate was on its Report, Cmnd 6524 (1976). The passages cited by Buckley J were:

> "To my mind equality before the law is one of the pillars of freedom. To say that immunity from criminal proceedings against anyone who tries to bribe a Member of Parliament and any Member of Parliament who accepts the bribe, stems from the Bill of Rights is possibly a serious mistake."

> "Now this [the Bill of Rights] is a charter for freedom of speech in the House. It is not a charter for corruption. To my mind, the Bill of Rights, for which no one has more respect than I have, has no more to do with the topic which we are discussing than the Merchandise Marks Act. The crime of corruption is complete when the bribe is offered or given or solicited and taken."

43. Buckley J made the following comments (pp 361-362,363):

> "It is important to note that which Lord Salmon pointed out, namely, that corruption is complete when the bribe is offered or given, solicited or [sic] taken. If, as is alleged here, a bribe is given and taken by a member of Parliament, to use his position dishonestly, that is to favour the briber as opposed to acting independently and on the merits, the crime is complete. It owes nothing to any speech,

> debate or proceedings in Parliament. Proof of the element of corruption in the transaction is another and quite separate consideration. Privilege might well prevent any inquiry by a court into Parliamentary debates or proceedings. However, it is not a necessary ingredient of the crime that the bribe worked. A jury will usually be asked to infer corruption from the nature of and circumstances in which the gift was given. I cannot see that article 9 in any way prevents that…
>
> That a Member of Parliament against whom there is a prima facie case of corruption should be immune from prosecution in the courts of law is to my mind an unacceptable proposition at the present time. I do not believe it to be the law. The Committee of Privileges is not well equipped to conduct an enquiry into such a case, nor is it an appropriate or experienced body to pass sentence. Unless it is to be assumed that it would be prejudiced in his favour, I cannot see that it would be in the Member's own interest for the matter to be dealt with by the Committee. The courts and legislature have over the years built up a formidable body of law and codes of practice to achieve fair treatment of suspects and persons ultimately charged and brought to trial. Again, unless it is to be assumed that his peers would lean in his favour, why should a Member be deprived of a jury and an experienced judge to consider his guilt or innocence and, if appropriate, sentence? Why should the public be similarly deprived?"

44. These decisions in relation to bribery lend support for a narrow construction of article 9. If *Greenway* was rightly decided it leads inexorably to the conclusion that submitting claims for expenses falls outside the definition of "proceedings in Parliament" in article 9. The nexus between bribes intended to influence what is said and proceedings in the House is much closer than the link between submitting a claim for expenses and taking part in such proceedings. Indeed, it is the closeness of the former nexus that raises a question as to whether *Greenway* was correctly decided. The dissent in *Brewster* is food for thought. Accusing a Member of Parliament of taking bribes in exchange for statements to be made in the House will necessarily raise an inference that any statements that were subsequently made were corruptly motivated, even if this forms no part of the criminal inquiry.

45. The same point can, however, be made where a Member of Parliament affirms outside the House a statement made in the House. Such an affirmation can found a claim in defamation. This may well involve a challenge to the good faith of the defendant in affirming the statement, which will inferentially challenge his good faith in making the original statement. Lord Bingham dealt with this point when giving the advice of the Judicial Committee of the Privy Council in

Buchanan v Jennings (Attorney General of New Zealand intervening) [2005] 1 AC 115, at para 13:

> "It is common ground in this appeal that statements made outside Parliament are not protected by absolute privilege even if they simply repeat what was said therein. That proposition, established by *R v Abingdon* (1794) 1 Esp 226 and *R v Creevey* (1813) 1 M & S 273 was more recently applied by the High Court of Ontario in *Stopforth v Goyer* (1978) 87 DLR (3d) 373 and the Supreme Court of the United States in *Hutchinson v Proxmire* (1979) 443 US 111, 126 et seq. In such a case there will inevitably be an inquiry at the trial into the honesty of what the defendant had said, and if the defendant's extra-parliamentary statement is found to have been untrue or dishonest the same conclusion would ordinarily, although not always, apply to the parliamentary statement also. But such an inquiry and such a conclusion are not precluded by article 9, because the plaintiff is founding his claim on the extra-parliamentary publication and not the parliamentary publication."

46. Lord Bingham went on to hold that it made no difference that, in that case, the repetition of what had been said in Parliament was merely by reference. At para 17 Lord Bingham tested this conclusion for compliance with the principle underlying the absolute privilege accorded to parliamentary statements, namely the right of Members of Parliament to speak their minds in Parliament without any risk of incurring liability as a result. He concluded that liability for repeating outside Parliament what had been said within did not conflict with this principle.

47. The jurisprudence to which I have referred is sparse and does not bear directly on the facts of these appeals. It supports the proposition, however, that the principal matter to which article 9 is directed is freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament.

48. If this approach is adopted, the submission of claim forms for allowances and expenses does not qualify for the protection of privilege. Scrutiny of claims by the courts will have no adverse impact on the core or essential business of Parliament, it will not inhibit debate or freedom of speech. Indeed it will not inhibit any of the varied activities in which Members of Parliament indulge that

bear in one way or another on their parliamentary duties. The only thing that it will inhibit is the making of dishonest claims.

49. Some reliance was placed by the defendants on the terms of section 13 of the Defamation Act 1996, which are as follows:

> "13.- *Evidence concerning proceedings in Parliament*
>
> (1) Where the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, he may waive for the purposes of those proceedings, so far as concerns him, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament.
>
> (2) Where a person waives that protection-
>
> (a) any such enactment or rule of law shall not apply to prevent evidence being given, questions being asked or statements, submissions, comments or findings being made about his conduct, and
>
> (b) none of those things shall be regarded as infringing the privilege of either House of Parliament.
>
> (3) The waiver by one person of that protection does not affect its operation in relation to another person who has not waived it.
>
> (4) Nothing in this section affects any enactment or rule of law so far as it protects a person (including a person who has waived the protection referred to above) from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament.

> (5) Without prejudice to the generality of subsection (4), that subsection applies to –
>
> > (a) the giving of evidence before either House or a committee;
> >
> > (b) the presentation or submission of a document to either House or a committee;
> >
> > (c) the preparation of a document for the purposes of or incidental to the transacting of any such business;
> >
> > (d) the formulation, making or publication of a document, including a report, by or pursuant to an order to either House or a committee; and
> >
> > (e) any communication with the Parliamentary Commissioner for Standards or any person having functions in connection with the registration of members' interests.
>
> In this subsection 'a committee' means a committee of either House or a joint committee of both Houses of Parliament."

50. Reliance was placed on the reference in subsection (4) to protection from legal liability for words spoken or things done "for the purposes of or incidental to, any proceedings in Parliament" and in subsection (5)(b) to "the presentation or submission of a document to either House or a committee". I do not consider that these provisions advance the defendants' case. Section 13 is not capable of extending the ambit of article 9. Subsection (4) cannot found a submission that any words spoken or things done that are incidental to proceedings in Parliament have automatically to be treated as part of those proceedings. The reference to submission of a document to either House or a committee envisages the submission of documents for the purpose of the deliberations of the House or committee in question. No comparison can be drawn between this and the presentation of claims for allowances or expenses to the Fees Office.

The views of Parliament

51. I now turn to views expressed in Parliament as to the ambit of article 9. Once again it is not always easy to differentiate between comments that bear on this narrow privilege as opposed to the broader exclusive cognisance of Parliament.

52. The report of the Select Committee on the Official Secrets Acts 1938-1939 ("the 1939 Report") included the following:

> "2. The privilege to which Your Committee were directed by the order of reference to have due regard is that usually referred to as the privilege of freedom of speech. This privilege is declared by the Bill of Rights in the following terms:- 'That the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.'
>
> 3. The article in the Bill of Rights is not necessarily an exhaustive definition of the cognate privileges. But even assuming that it is, the privilege is not confined to words spoken in debate or to spoken words, but extends to all proceedings in parliament. While the term 'proceedings in parliament' has never been construed by the courts, it covers both the asking of a question and the giving written notice of such question, and includes everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business.
>
> 4. The privilege of freedom of speech being confined to words spoken or things done in the course of parliamentary proceedings, words spoken or things done by a member beyond the walls of parliament will generally not be protected. Cases may, however, easily be imagined of communications between one member and another, or between a member and a minister, so closely related to some matter pending in, or expected to be brought before, the House, that though they do not take place in the chamber or a committee room they form part of the business of the House, as, for example, where a member sends to a minister the draft of a question he is thinking of putting down or shows it to another member with a view to obtaining advice as to the propriety of putting it down or as to the manner in which it should be framed."

It is noteworthy that the Committee envisaged the need for a *close relationship* of communications outside the House to business within it in order to attract privilege. The conclusion of the Committee was later agreed by the House – CJ (1938-39) 480.

53. The Joint Committee on the Publication of Proceedings in Parliament in its Second Report in 1970 HL 109, HC 261 recommended that "proceedings in Parliament" should be defined by statute, and offered the following definition at para 27:

> "(1) For the purpose of the defence of absolute privilege in an action or prosecution for defamation the expression 'proceedings in Parliament' shall without prejudice to the generality thereof include
>
> a) all things said done or written by a Member or by any officer of either House of Parliament or by any person ordered or authorised to attend before such House, in or in the presence of such House and in the course of a sitting of such House, and for the purpose of the business being or about to be transacted, wherever such sitting may be held and whether or not it be held in the presence of strangers to such House: provided that for the purpose aforesaid the expression 'House' shall be deemed to include any Committee sub-Committee or other group or body of members or members and officers of either House of Parliament appointed by or with the authority of such House for the purpose of carrying out any of the functions of or of representing such House; and
>
> b) all things said done or written between Members or between Members and officers of either House of Parliament or between Members and Ministers of the Crown for the purpose of enabling any Member or any such officer to carry out his functions as such provided that publication thereof be no wider than is reasonably necessary for that purpose.
>
> (2) In this section 'Member' means a Member of either House of Parliament; and 'officer of either House of Parliament' means any person not being a Member whose duties require him from time to time to participate in proceedings in Parliament as herein defined."

No effect was given to this recommendation.

54. The Joint Committee on Parliamentary Privilege Report of 1999 HL 43-1; HC214-1 ("the 1999 Report") gave detailed consideration to article 9. At para 12 it commented:

> "Freedom of speech is central to Parliament's role. Members must be able to speak and criticise without fear of penalty. This is fundamental to the effective working of Parliament, and is achieved by the primary parliamentary privilege: the absolute protection of 'proceedings in Parliament' guaranteed by article 9 of the Bill of Rights 1689. Members are not exposed to any civil or criminal liabilities in respect of what they say or do in the course of proceedings in Parliament. There is no comprehensive definition of the term proceedings in Parliament, although it has often been recommended there should be. Proceedings are broadly interpreted to mean what is said or done in the formal proceedings of either House or the committees of either House together with conversations, letters and other documentation directly connected with those proceedings."

55. At para 103 the Committee expressed the view that Members' correspondence did not form part of parliamentary proceedings:

> "Article 9 protects *parliamentary* proceedings: activities which are recognisably part of the formal collegiate activities of Parliament."

The Committee did not recommend the extension of parliamentary privilege to cover Members' correspondence. It commented at para 110:

> "There is another consideration. Article 9 provides an altogether exceptional degree of protection, as discussed above. In principle this exceptional protection should remain confined to the core activities of Parliament, unless a pressing need is shown for an extension."

56. Each House has agreed a set of rules and guidance governing the conduct expected of its members. The Parliamentary Commissioner for Standards is appointed to monitor the operation of the Code of Conduct of Members of the House of Commons and to advise the Committee on Standards and Privileges on the interpretation of the code. In 15 December 2002 the Mail on Sunday published

an article alleging that Mr Michael Trend MP had improperly submitted claims in respect of additional costs allowance in respect of a London home which he did not occupy. The Commissioner for Standards submitted a memorandum on the matter which concluded that Mr Trend had claimed additional costs allowance in breach of the rules relating to that allowance. In a post script under the heading "The Criminal Law" he commented:

> "The decision whether Mr Trend or any other Member who may be shown to have wrongly claimed parliamentary allowances should face a criminal prosecution is one for the police and prosecuting authorities, not for me. As the briefing note on the law on obtaining by deception at Annex C makes clear, there are a number of ingredients to the offence which would have to be proved if a prosecution were to succeed; achieving this would not necessarily be easy. However, the point that needs to be made here is that claiming an allowance is not a proceeding in Parliament and the provisions of parliamentary privilege do not apply. Members of Parliament are no less subject to the criminal law in this respect than anyone else. They must have its provisions in mind at all times like anyone else, and decisions about whether it should be invoked against them must be taken applying the same tests as would be applied to any other citizen."

57. On 8 February 2010 the Speaker made a statement to the House about the application of the sub judice rule in relation to the prosecutions of the three defendants, in the following terms.

> "I wish to make a statement to the House about the application of the sub judice rule.
>
> Once criminal proceedings are active by a charge having been made, cases before the courts shall not be referred to in any motion, debate or question. The House will be aware that charges have been made against three Members of the House and that therefore the sub judice rule applies to their cases. The matter is therefore before the courts, and the House and Members would not wish to interfere with the judicial process, risk affecting the fairness of a criminal trial or, furthermore, prevent such a trial taking place."

The last sentence does not suggest that the Speaker had any concern that the trials of the defendants might constitute a breach of the privilege enjoyed by Parliament.

58. It is possible that the Speaker had already received orally the advice of the Clerk of the House that was conveyed to him in writing on the following day. This included the following paragraph:

> "In order to make the case that privilege applies to claims it would be necessary to establish that they are indeed transactions of business of the House or one of its Committees. Although I accept that the ACA scheme arises from Resolutions of the House, the proposition that all actions or claims under it are proceedings, seems to me to be unsustainable. The House agrees to many things by Resolution – for example to build a new building – but that does not mean that all activities in connection with its erection are "proceedings". Proceedings must imply, in the words of the Joint Committee on Parliamentary Privilege, "formal collegiate activities of Parliament" – rather than merely the consequences of decisions that either House has taken. It also seems to me to be pertinent to the consideration of claims under the ACA scheme being protected that throughout the House's involvement in Freedom of Information cases in respect of publication of claims and expenses, the House has never sought an exemption under section 34 of the Act which covers matters deemed to infringe parliamentary privilege."

59. None of these expressions of Parliamentary views lends support to the suggestion that submitting claims for allowances and expenses constitutes proceedings in Parliament for the purposes of article 9. On the contrary they all suggest, either expressly or by implication, that the submission of such claims falls outside the protection of that article. The recovery of allowances and expenses to defray the costs involved in attending Parliament, or travelling on Parliamentary business, has no closer nexus with proceedings in Parliament than incurring those expenses.

60. The question was asked rhetorically of what the position would be if Members had to go before the Estimate Committee, or even the House, to ask for their expenses. It was submitted on behalf of the defendants that in that event their claims would constitute proceedings in Parliament and be protected by privilege, and that the same was true of claims made to the Fees Office as that office was acting on behalf of the House in receiving and considering the claim forms. The answer is that the submission and consideration of allowances and expenses claims is essentially a matter of administration, properly to be performed by officials, and that it would be absurd for this exercise to be performed by a committee or by the House.

61. There are good reasons of policy for giving article 9 a narrow ambit that restricts it to the important purpose for which it was enacted – freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown's judges. The protection of article 9 is absolute. It is capable of variation by primary legislation, but not capable of waiver, even by Parliamentary resolution. Its effect where it applies is to prevent those injured by civil wrongdoing from obtaining redress and to prevent the prosecution of Members for conduct which is criminal. As to the latter, Parliament has no criminal jurisdiction. It has limited penal powers to treat criminal conduct as contempt. These once included imprisonment for a limited period. As to this Lord Denman CJ commented at p 114 in *Stockdale v Hansard:*

> "The privilege of committing for contempt is inherent in every deliberative body invested with authority by the Constitution. But, however flagrant the contempt, the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known than this limitation of it. Though the party should deserve the severest penalties, yet, his offences being committed the day before a prorogation, if the House ordered his imprisonment but for a week, every Court in Westminster Hall and every Judge of all the Courts would be bound to discharge him by habeas corpus."

Imprisonment has not been imposed in recent times and the same is true of the theoretical power to fine. Nor is it clear that Parliament is in a position to satisfy all the requirements of article 6 which apply when imposing penal sanctions – see *Demicoli v Malta* (1991) 14 EHRR 47.

62. Thus precedent, the views of Parliament and policy all point in the same direction. Submitting claims for allowances and expenses does not form part of, nor is it incidental to, the core or essential business of Parliament, which consists of collective deliberation and decision making. The submission of claims is an activity which is an incident of the administration of Parliament; it is not part of the proceedings in Parliament. I am satisfied that Saunders J and the Court of Appeal were right to reject the defendants' reliance on article 9.

Exclusive cognisance

63. This phrase describes areas where the courts have ruled that any issues should be left to be resolved by Parliament rather than determined judicially. Exclusive cognisance refers not simply to Parliament, but to the exclusive right of each House to manage its own affairs without interference from the other or from

outside Parliament. The boundaries of exclusive cognisance result from accord between the two Houses and the courts as to what falls within the exclusive province of the former. Unlike the absolute privilege imposed by article 9, exclusive cognisance can be waived or relinquished by Parliament. Thus in 1980 Parliament agreed to a resolution which permitted reference to be made in court to certain Parliamentary papers which, up to then, had been subject to a claim of exclusive cognisance – see *Erskine May* at p 105. The areas subject to exclusive cognisance have very significantly changed, in part as a result of primary legislation.

64. The exclusive cognisance of Parliament was originally based on the premise that the High Court of Parliament had its own peculiar law which was not known to the courts. The 17th edition (1814) of *Blackstone's Commentaries on the Laws of England* observed at pp 158-159:

> "It will be sufficient to observe, that the whole of the law and custom of parliament has its original from this one maxim; 'that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates and not elsewhere'."

65. In *Stockdale v Hansard* at p 118 Denman CJ said of all internal proceedings of the House of Commons:

> "With respect to them, I freely admit that the Courts have no right to interfere, nor, perhaps, any regular means of obtaining information."

66. I have already cited at paras 29 and 30 passages from the judgments of Lord Coleridge CJ and Stephen J in *Bradlaugh v Gossett* which are relevant in the present context.

67. It is, of course, always open to Parliament by legislation to provide for the courts to encroach on matters falling within its exclusive cognisance, or even on article 9 privilege, as did the Parliamentary Elections Act 1695, the Parliamentary Oaths Act 1866, the Perjury Act 1911, and the Defamation Act 1996 - see *Erskine May* at p 115. These statutes expressly address matters that were previously subject to privilege under article 9, or the exclusive cognisance of Parliament.

68. Where a statute does not specifically address matters that are subject to privilege, it is in theory necessary as a matter of statutory interpretation to decide a number of overlapping questions. Does the statute apply within the precincts of the

Palace of Westminster? If it does, does it apply in areas that were previously within the exclusive cognisance of Parliament? If so, does the statute override the privilege imposed by article 9? In practice there are not many examples of these questions being considered, either within Parliament or by the courts. If Parliament accepts that a statute applies within an area that previously fell within its exclusive cognisance, then Parliament will, in effect, have waived any claim to privilege.

69. The 1939 Report is an example of Parliament considering whether privilege was overridden by statute. In two cases the courts considered the application of the Licensing Acts within the precincts of the Palace of Westminster. In *Williamson v Norris* [1899] 1 QB 7 Lord Russell of Killowen CJ considered a submission that the Houses of Parliament, in the regulation of their internal arrangements as to the sale of liquor, were entirely outside the control of the law as to licensing. He stated that he was very far from being satisfied that this proposition was correct, but decided the case on another point.

70. In *R v Graham-Campbell, Ex p Herbert* [1935] 1 KB 594 Mr A P Herbert had laid two informations at Bow Street Police Station for summonses against fifteen named Members of Parliament, who were members of the Kitchen Committee of the House of Commons and the manager of the Refreshment Department of the House alleging the unlawful sale of alcohol without a licence contrary to the Licensing (Consolidation) Act 1910. The Chief Metropolitan Magistrate held that the Members of Parliament were not susceptible to the jurisdiction of the court because they were protected by the privileges of the House. On application for orders in the nature of mandamus, Lord Hewart CJ upheld the decision and the reasoning of the magistrate. Only as an afterthought did he express the view that the majority of the provisions of the 1910 Act were inapplicable to the House of Commons. Avory and Swift JJ agreed, albeit that Avory J devoted most of his judgment to the question of whether the Act on its true construction applied to the House of Commons.

71. The Joint Committee on Parliamentary Privilege Report HL paper 43-1, HC 214-1 (1998-99) ("the 1999 Report") states at para 15 that since this case Acts of Parliament have been taken not to apply within the precincts of either House in the absence of express provision that they should apply and that the legislation that has been taken not to apply includes the Health and Safety at Work etc Act 1974 and the Data Protection Acts 1984 and 1998 but that in practice Parliament voluntarily abides by some of these statutory provisions.

72. The 1999 Report returns to this topic under the heading "Right of each House to administer its internal affairs within its precincts". It comments at para 240 that each House has the right to administer its internal affairs within the parliamentary precincts. It continues at para 241:

> "In one important respect this heading of privilege is unsatisfactory. 'Internal affairs' and equivalent phrases are loose and potentially extremely wide in their scope. On one interpretation they embrace, at one edge of the spectrum, the arrangement of parliamentary business and also, at the other extreme, the provision of basic supplies and services such as stationery and cleaning. This latter extreme would be going too far if it were to mean, for example, that a dispute over the supply of photocopy paper or dismissal of a cleaner could not be decided by a court or industrial tribunal in the ordinary way. Here, as elsewhere the purpose of parliamentary privilege is to ensure that Parliament can discharge its functions as a legislative and deliberative assembly without let or hindrance. This heading of privilege best serves Parliament if not carried to extreme lengths."

73. A little later the Report considers the dividing line between matters that fall within this type of parliamentary privilege and those which fall outside it. This lies at the heart of these appeals and merits quotation in full:

> "246 Putting aside the activities of individuals, there is a need to distinguish between activities of the House which call for protection under this head of privilege and those which do not. The Palace of Westminster is a large building; it requires considerable maintenance; it provides an extensive range of services for members; it employs and caters for a large number of staff and visitors. These services require staff and supplies and contractors. For the most part, and rightly so, these services are not treated as protected by privilege. It is difficult to see any good reason why claims for breach of contract relating to catering or building services, for example, should be excluded from the jurisdiction of the courts, or why a person who sustains personal injury within the precincts of Parliament should not be able to mount a claim for damages for negligence. This has been formally recognised in the Parliamentary Corporate Bodies Act 1992. Under this Act each House established a corporate officer who can sign contracts on behalf of the House and sue or be sued.
>
> 247 The dividing line between privileged and non-privileged activities of each House is not easy to define. Perhaps the nearest approach to a definition is that the areas in which the courts ought not to intervene extend beyond proceedings in Parliament, but the privileged areas must be so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament's sovereignty as a legislative and deliberative assembly. One example is the Speaker's decision on

> which facilities within the precincts of the House should be available to members who refuse to take the oath or affirmation of allegiance. Another example might be steps taken by the library of either House to keep members informed upon matters of significant political interest. Such steps, if authorised by the presiding officer of the House, would properly be within the scope of the principle and not amenable to orders of the court.
>
> 248 It follows that management functions relating to the provision of services in either House are only exceptionally subject to privilege. In particular, the activities of the House of Commons Commission, a statutory body appointed under the House of Commons (Administration) Act 1978, are not generally subject to privilege, nor are the management and administration of the House departments. The boundary is not tidy. Occasionally management in both Houses may deal with matters directly related to proceedings which come within the scope of article 9. For example, the members' pension fund of the House of Commons is regulated partly by resolutions of the House. So too are members' salaries and the appointment of additional members of the House of Commons Commission under section 1(2)(d) of the House of Commons (Administration) Act. These resolutions and orders are proceedings in Parliament, but their implementation is not."

74. The foundation of the modern system of administration of the House of Commons is the House of Commons (Administration) Act. This established the Commission and gave it corporate status, so that it is capable of suing and being sued. In 1992 each House took full responsibility for managing its own internal administration, which included responsibility for the maintenance of the structure of the Palace of Westminster – see *Erskine May* p 233. In that year, as the 1999 Report explains, the Parliamentary Corporate Bodies Act was passed – a necessary practical step to facilitate the bringing of actions in contract and tort arising out of the internal administration of the House. This has rendered easier, and implicitly contemplates, inroads into areas that previously fell within the exclusive cognisance of the House. Statutory inroads have been made by express provisions of the Employment Act 1990, the Trade Union Reform and Employment Rights Act 1993 and the Employment Rights Act 1996 – see *Erskine May* at pp 115 to 116.

75. So far as actions in contract and tort are concerned arising out of the internal administration of the House the courts are unlikely to accept the submission, in the unlikely event that it is advanced, that their jurisdiction is precluded because of the exclusive cognisance of the House. The reasoning of

Judge Russell, sitting in the Industrial Court in *Bear v State of South Australia* (1981) 48 SAIR 604 is likely to be followed.

76. Different considerations apply to claims for judicial review in relation to the conduct by each House of its internal affairs. The courts will respect the right of each House to reach its own decision in relation to the conduct of its affairs. Two examples will illustrate this. In *Re McGuinness's Application* [1997] NI 359 the applicant sought to challenge by judicial review the decision of the Speaker that those who had not complied with the requirements of the Parliamentary Oaths Act 1866 would be denied certain of the facilities of the House. Kerr J dismissed his application. He held at p 6 :

> "I am quite satisfied that, whether it qualifies as a proceeding in Parliament or not, the Speaker's action lies squarely within the realm of internal arrangements of the House of Commons and is not amenable to judicial review."

77. In *R v Parliamentary Commissioner for Standards, Ex p Al Fayed* [1998] 1 WLR 669 the Parliamentary Commissioner for Standards had published a report relating to a complaint by the applicant against a Member of Parliament. The applicant sought permission to challenge this by judicial review. The application was refused by Sedley J and renewed before the Court of Appeal. Lord Woolf MR gave a judgment with which the other members of the court agreed dismissing the application. He said, at p 673:

> "The focus of the Parliamentary Commissioner for Standards is on the propriety of the workings and the activities of those engaged within Parliament. He is one of the means by which the select committee set up by the House carries out its functions, which are accepted to be part of the proceedings of the House. This being the role of the Parliamentary Commissioner for Standards, it would be inappropriate for this court to use its supervisory powers to control what the Parliamentary Commissioner for Standards does in relation to an investigation of this sort. The responsibility for supervising the Parliamentary Commissioner for Standards is placed by Parliament, through its standing orders, on the Committee of Standards and Privileges of the House, and it is for that body to perform that role and not the courts."

78. In summary, extensive inroads have been made into areas that previously fell within the exclusive cognisance of Parliament. Following *Ex p Herbert* there appears to have been a presumption in Parliament that statutes do not apply to

activities within the Palace of Westminster unless they expressly provide to the contrary. That presumption is open to question. In 1984 three Law Lords, Lord Diplock, Lord Scarman and Lord Bridge of Harwich, on the Committee for Privileges expressed the view that sections 2-6 of the Mental Health Act 1983 applied to members of the House of Lords, although the Act did not expressly so state.

Crime and Parliament

79. I have considered the encroachment by the laws of contract and tort on areas that previously fell within the exclusive cognisance of Parliament and pointed out the distinction that must be drawn between such claims and applications for judicial review. I now come to consider the position where an act is committed which, absent any question of parliamentary privilege, would constitute a crime falling within the jurisdiction of the criminal courts.

80. Parliament has never challenged, in general, the application of criminal law within the precincts of Parliament and has accepted that the mere fact that a crime has been committed within these precincts is no bar to the jurisdiction of the criminal courts. In May 1812 John Bellingham was indicted, tried and convicted of the murder of the Prime Minister, Spencer Percival, at the entrance to the lobby of the House of Commons. Bellingham was not a Member of Parliament, but it would have made no difference had he been.

81. Where a crime is committed within the House of Commons, this may well also constitute a contempt of Parliament. The courts and Parliament have different, overlapping, jurisdictions. The House can take disciplinary proceedings for contempt and a court can try the offender for the crime. Where a prosecution is brought Parliament will suspend any disciplinary proceedings. Conversely, if a Member of Parliament were disciplined by the House, consideration would be given by the Crown Prosecution Service as to whether a prosecution would be in the public interest. In 1988 Mr Ron Brown MP damaged the mace in the course of a heated debate and declined to apologise. The House exercised its penal powers in relation to both the damage to the mace and the lack of respect for the authority of the Chair. The Director of Public Prosecutions subsequently halted an attempt to bring a private prosecution.

82. *Erskine May* records at pp 162-163 that in cases of breach of privilege which are also offences at law, where the punishment which the Commons has power to inflict would not be adequate to the offence, or where for any other reason the House has thought proceeding at law necessary, either as a substitute for, or in addition to, its own proceedings, the Attorney General has been directed

to prosecute the offender. It is of note that in two of the cases cited the Attorney General was directed to prosecute witnesses to parliamentary committees for "wilful and corrupt perjury" – CJ (1860) 258 and CJ (1866) 239. No instance is cited beyond the 19th century and a footnote records that on two occasions in the 1970s the House authorities informally invited the police to consider prosecuting those responsible for gross misbehaviour in the gallery.

83. Thus the House does not assert an exclusive jurisdiction to deal with criminal conduct, even where this relates to or interferes with proceedings in committee or in the House. Where it is considered appropriate the police will be invited to intervene with a view to prosecution in the courts. Furthermore, criminal proceedings are unlikely to be possible without the cooperation of Parliament. Before a prosecution can take place it is necessary to investigate the facts and obtain evidence. The powers of the police in respect of these activities are contained in the Police and Criminal Evidence Act 1984. I am not aware that any court has had to consider the extent to which, if at all, the provisions of this Act apply within the Palace of Westminster. What occurs is that Parliament permits the police to carry out their investigations within the precincts. I shall give some examples of this cooperation which are of particular relevance in the context of these appeals.

84. On 3 April 2008 a meeting took place between the Chairman of the Committee on Standards and Privileges, the Parliamentary Commissioner for Standards and the Commissioner of Police of the Metropolis. Following this an agreed statement was released:

> "All parties agreed that, other than in the limited context of participation in proceedings in Parliament, Members of Parliament are in no different position in respect of alleged criminal behaviour than any other person. The Chairman reiterated the Committee's belief in the general principle that criminal proceedings against Members, where these are considered appropriate, should take precedence over the House's own disciplinary proceedings. The meeting discussed how the respective parties might coordinate their activities to ensure the effective delivery of this principle.
>
> Where the Metropolitan Police receive information which suggests a Member of Parliament may have committed a criminal offence, they will take the decision on whether to institute inquiries on their own initiative, on the same basis as they would in any other case, and without regard to whether the same information had formed any part of a complaint to the Parliamentary Commissioner. The Metropolitan Police undertook to inform the Parliamentary Commissioner in the

normal course of events if they were considering initiating criminal inquiries into a Member, with a view to establishing whether the alleged conduct was also the subject of a complaint under the Code.

The Parliamentary Commissioner confirmed that he had regard, where appropriate, to the possibility of criminal behaviour when investigating complaints he received against Members of Parliament. He would continue the practice in specific cases of liaising with the Metropolitan Police or other relevant force whenever he considered it appropriate to do so, initiating the process at the earliest opportunity. All parties welcomed this.

If at any point in his investigation of a complaint, the Parliamentary Commissioner considers that there are sufficient grounds to justify reporting the matter to the police for them to consider a criminal inquiry, he confirmed that he would submit a recommendation to that effect to the Committee on Standards and Privileges who would decide whether such a report should be made. Where this was done, the Chairman confirmed that the Committee would normally expect the Parliamentary Commissioner to suspend his inquiries until the question of possible criminal proceedings had been resolved. The Parliamentary Commissioner and the Committee would follow similar procedures if informed by the police that they are considering initiating criminal inquiries into a matter which was also the subject of a complaint.

The Chairman also confirmed that if in the course of the Committee's consideration of the outcome of the Commissioner's investigation of a complaint it concluded that there were sufficient grounds to justify a report to the police, it would normally expect to advise the House accordingly, and defer reporting substantively on the complaint until the question of possible criminal proceedings had been resolved."

85. On 27 November 2008 the offices of the Conservative front bencher, Mr Damian Green, were searched by the police without a warrant. On 8 December 2008 the Speaker issued a protocol setting out future procedures where the police sought to execute a search warrant in the House, the most material part of which provides as follows:

"1. Responsibility for controlling access to the precincts of the House has been vested by the House in me. It is no part of my duties

as Speaker to impede the proper administration of justice, but it is of equal concern that the work of the House and of its Members is not necessarily hindered."

2. The precincts of Parliament are not a haven from the law. A criminal offence committed within the precincts is no different from an offence committed outside and is a matter for the courts. It is long established that a Member may be arrested within the precincts.

3. In cases where the police wish to search within Parliament, a warrant must be obtained and any decision relating to the execution of that warrant must be referred to me. In all cases where any Officer or other member of the staff of the House is made aware that a warrant is to be sought the Clerk of the House, Speaker's Counsel, the Speaker's Secretary and the Serjeant at Arms must be informed. No Officer or other member of the staff of the House may undertake any duty of confidentiality which has the purpose or effect of preventing or impeding communication with these Officers.

4. I will consider any warrant and will take advice on it from senior officials. As well as satisfying myself as to the formal validity of the warrant, I will consider the precision with which it specifies the material being sought, its relevance to the charge brought and the possibility that the material might be found elsewhere. I reserve the right to seek advice of the Attorney General and Solicitor General.

5. I will require a record to be provided of what has been seized, and I may wish to attach conditions to the police handling of any parliamentary material discovered in a search until such time as any issue of privilege has been resolved."

86. On 30 September 2010 Mr Andrew Gibson, a budget officer in the Fees Office, was sentenced to 9 months imprisonment after pleading guilty to three counts of obtaining money transfers by deception. He had drawn up false invoices in the names of three former Members of Parliament. It is reasonable to assume that this prosecution was brought with the assistance of the House authorities.

87. The court was provided with information that on 12 October 2010 the Standards and Privileges Committee agreed that the Parliamentary Commissioner for Standards should report to the Metropolitan Police Service the conduct of Mr Denis MacShane MP in relation to claims for expenses. According to the

procedures agreed between the Committee, the Commissioner and the Metropolitan Police an inquiry by the Commissioner into a complaint against Mr MacShane was suspended until the question of possible criminal proceedings was resolved.

88. In the course of the hearing of these appeals the court was informed that, with the consent of the defendants, the Fees Office had provided the prosecution with documentation in relation to the defendants' claims for allowances and expenses.

Conclusions

89. Parliament by legislation and by administrative changes has to a large extent relinquished any claim to have exclusive cognisance of the administrative business of the two Houses. Decisions in relation to matters of administration are taken by parliamentary committees and it has been common ground before the Court that these decisions are protected by privilege from attack in the courts. The 1999 Report distinguishes, however, between such decisions and their implementation, expressing the view that the latter is not subject to privilege. I consider that view to be correct.

90. Where the House becomes aware of the possibility that criminal offences may have been committed by a Member in relation to the administration of the business of Parliament in circumstances that fall outside the absolute privilege conferred by article 9, the considerations of policy to which I have referred at para 61 above require that the House should be able to refer the matter to the police for consideration of criminal proceedings, or to cooperate with the police in an inquiry into the relevant facts. That is what the House has done in relation to the proceedings brought against the three defendants.

91. The area of activity to which these prosecutions relate is administrative. The payment of allowances and expenses had until recently been entrusted to the Fees Office by the Commission, a body set up for the purposes of administration – see paras 9 to 11 above. These administrative tasks are now performed by the Independent Parliamentary Standards Authority, set up under the Parliamentary Standards Act 2009. The House has asserted a disciplinary jurisdiction over claims that have been made for allowances and expenses and, to that end, the Members Estimate Committee set up a review of such claims under Sir Thomas Legg. The House has not, however, asserted exclusive cognisance, or jurisdiction, in respect of such claims. On the contrary, on 20 July 2009 the Committee excluded from the claims referred to Sir Thomas any that were under investigation by the police.

92. Even if the House were not co-operating with the prosecuting authorities in these cases, I do not consider that the court would be prevented from exercising jurisdiction on the ground that they relate to matters within the exclusive cognisance of Parliament. If an applicant sought to attack by judicial review the scheme under which allowances and expenses are paid the court would no doubt refuse the application on the ground that this was a matter for the House. Examination of the manner in which the scheme is being implemented is not, however, a matter exclusively for Parliament. It was not suggested that Members have a contractual entitlement to allowances and expenses, but if they were to have such contractual rights, I see no reason why they should not sue for them. If a question were raised as to whether allowances and expenses were taxable, the court would be entitled to examine the circumstances in which they were paid. Equally there is no bar in principle to the Crown Court considering whether the claims made by the defendants were fraudulent. This is not to exclude the possibility that, in the course of a criminal prosecution, issues might arise involving areas of inquiry precluded by parliamentary privilege, although that seems unlikely having regard to the particulars of the charges in the cases before us.

93. For these reasons I am satisfied that neither article 9 nor the exclusive cognisance of the House of Commons poses any bar to the jurisdiction of the Crown Court to try these defendants. That is why I decided that each appeal should be dismissed.

LORD RODGER

94. The appellants are three former Members of Parliament who are charged with false accounting, contrary to section 17(1)(b) of the Theft Act 1968 ("the Theft Act"). The first count on the indictment against Mr Morley, for example, is in these terms:

> "**STATEMENT OF OFFENCE**
>
> False accounting, contrary to section 17(1)(b) of the Theft Act 1968.
>
> **PARTICULARS OF OFFENCE**
>
> ELLIOT MORLEY, between 1 April 2004 and 28 February 2006, dishonestly, with a view to gain for himself or with intent to cause loss to another, in furnishing information for the purpose of making allowance claims, produced or made use of documents required for an accounting purpose, namely 19 Form ACA2 claim forms, which

> to his knowledge were or may have been misleading, false or deceptive in a material particular, in that they stated he was paying £800 per month in mortgage interest, when in fact he was paying a lesser amount."

The appellants have not suggested that the indictments do not disclose an offence under English law or that the counts are otherwise defective.

95. The argument which has eventually brought these appeals to this Court arises out of an aspect of the indictments which does not emerge immediately, even from the particulars of the offences: at the relevant time Mr Morley and the other appellants were MPs. The reference to Form ACA2 is, however, a reference to a form which MPs used for submitting claims for allowances to the Fees Office of the House of Commons. When submitting such claims MPs had to sign a declaration to the effect that they had incurred the costs in question "wholly, exclusively and necessarily to enable [them] to stay overnight away from [their] only or main home for the purpose of performing [their] duties as a Member of Parliament." The argument for the appellants is that the counts refer to the submission of claims by MPs to an office of the House of Commons and that, in these circumstances, a prosecution is "precluded by parliamentary privilege, by reference either to article 9 of the Bill of Rights or to the exclusive jurisdiction of Parliament to regulate its own affairs."

96. As it existed at the relevant time, the system for payment of Members' allowances had been created by, and continued to rest solely on, Resolutions of the House of Commons. A request for the necessary funds to pay the allowances was included in the Members Estimate which was laid by the Treasury each year as part of the Government's Main Supply Estimates. The Members Estimate Committee was responsible for oversight of the expenditure on the allowances. The Committee on Members' Allowances advised the Members Estimate Committee on this matter. In his role as Accounting Officer, the Clerk of the House of Commons was responsible for compiling the necessary accounts and was accountable to the House for the money spent. The Members Estimate Audit Committee advised the Clerk of the House in this connexion.

97. The various allowances available to Members were set out in the "Green Book", on which the Committee on Members' Allowances advised the Speaker, the Members Estimate Committee and the Leader of the House. Moreover, if any question arose as to the application of the rules in the Green Book, a Member could refer it to the Committee on Members' Allowances, from which there was an appeal to the Members Estimate Committee. The administration of the system of allowances (including payment of the allowances) was handled by an office, usually referred to as "the Fees Office", within the Operations Directorate. If the

Fees Office refused a Member's claim to an allowance, the Member could appeal to the Committee on Members' Allowances and from there to the Members Estimate Committee.

98. A further point to notice about the indictments is that the particulars of the offences do not specify where the MPs are alleged to have been when they submitted the claims. For all we know, they could have completed the forms at home, whether in England or in Scotland, and sent them in by post. Equally, they could have completed the forms while in the House of Commons and have submitted them in person to the Fees Office. It does not matter since, on either view, the misleading information would have been furnished to the Fees Office of the House. But, to test the point taken by the appellants, it is best to assume that the allegation is that they completed the forms in the House of Commons and submitted them in person. So all stages of the alleged offence would have taken place within the precincts of the House of Commons.

99. The Theft Act extends to England and Wales. In other words, it forms part of the law of England and Wales. The Houses of Parliament and their dépendances are in England and so the criminal law of England applies to what is done there. The most famous illustration of this elementary point is, perhaps, the murder of the Prime Minister, Mr Spencer Percival, in the lobby of the House of Commons in 1812. John Bellingham was arrested, prosecuted, tried for murder at the Old Bailey, convicted and executed – all according to the common law of England. If the assassin had been a fellow MP, then by the law of England he too would have committed murder. The same would have applied if the MP had assassinated the Prime Minister in the chamber of the House of Commons. Less dramatically, if a Member of Parliament were to steal money from a fellow Member's wallet in a room in the House of Commons or from the till in the Members' Dining Room, he would commit theft under section 1 of the Theft Act. Similarly, if a Member intentionally damaged one of the statues of former Prime Ministers in the lobby of the House of Commons, he would commit criminal damage under section 1 of the Criminal Damage Act 1971.

100. Equally – to come to the present cases – if a Member of Parliament dishonestly, with a view to gain for himself, submitted a claim form which to his knowledge was false in a material particular, the law of England would apply. The Member would commit an offence under section 17(1) of the Theft Act, even if he completed the form in the House of Commons and submitted it in person to the Fees Office.

101. As already noted, the appellants say, however, that their prosecution in the Crown Court for this offence is "precluded by parliamentary privilege, by reference either to article 9 of the Bill of Rights or to the exclusive jurisdiction of

Parliament to regulate its own affairs." An invocation of parliamentary privilege is apt to dazzle lawyers and judges outside Parliament. In *Wellesley v Duke of Beaufort* (1831) 2 Russ & M 639, 660, Lord Brougham LC warned courts of justice against acceding to claims of privilege "the instant they hear that once magical word pronounced." A few years later, in *Stockdale v Hansard* (1839) 9 Ad & E 1, 112, Lord Denman CJ remarked that the privileges are "well-known, it seems, to the two Houses, and to every Member of them, as long as he continues a Member; but the knowledge is as incommunicable as the privileges to all beyond that pale." Happily, it is unnecessary on this occasion to penetrate too deeply into these mysteries – if mysteries they be.

102. The appellants' formulation of their argument might seem to suggest that article 9 of the Bill of Rights deals with matters that would not necessarily fall within the exclusive jurisdiction of Parliament to regulate its own affairs. A moment's reflection shows, however, that, unless a matter did fall within the exclusive jurisdiction of Parliament – with the result that it did not fall within the legitimate jurisdiction of the ordinary courts of the land, whether civil or criminal, or of any other body – article 9 could not itself legitimately purport to exclude all consideration of the matter outside Parliament. In other words, article 9 cannot be intended to apply to any matter for which Parliament cannot validly claim the privilege of exclusive cognizance.

103. Indeed, as the distinguished Clerk of the House of Commons, Sir Gilbert Campion (later Lord Campion), pointed out in his Memorandum to the Select Committee on the Official Secrets Acts in 1939, the relevant words in the Preamble to the Bill of Rights make this clear:

> "Whereas the late King James the Second by the Assistance of diverse evill Councellors Judges and Ministers imployed by him did endeavour to subvert and extirpate the Protestant Religion and the Lawes and Liberties of this Kingdome…
>
> By Prosecutions in the Court of Kings Bench for Matters and Causes *cognizable onely in Parlyament* and by diverse other Arbitrary and Illegall Courses…
>
> And thereupon the said Lords Spirituall and Temporall and Commons pursuant to their respective Letters and Elections being now assembled in a full and free Representative of this Nation takeing into their most serious Consideration the best meanes for attaining the Ends aforesaid Doe in the first place (as their Auncestors in like Case have usually done) for the Vindicating and Asserting their auntient Rights and Liberties, Declare…" (Emphasis added).

Sir Gilbert added: “The mischief the statute was intended to remedy was therefore the drawing into examination in inferior courts of matters cognizable only in Parliament.” See the Committee’s Report, p 24.

104. Therefore, even though the appellants put their case by reference to both article 9 and the exclusive jurisdiction of the House of Commons, in truth there is really only one basic question: does the matter for which the appellants are being prosecuted in the Crown Court fall within the exclusive jurisdiction or cognizance of Parliament – or, more particularly, of the House of Commons? If so, then the appellants must prevail; if not, neither article 9 of the Bill of Rights nor any other doctrine gives them a right to have the prosecution stopped on the ground of parliamentary privilege.

105. The expression, “the High Court of Parliament”, makes the point that Parliament has a certain power of judicature – as do the two Houses in their separate capacities. In exercising this jurisdiction the Houses apply the law and custom of Parliament (lex et consuetudo parliamenti). Cf *Kielley v Carson* (1843) 4 Moo PC 63, 89, per Parke B. The present case concerns the House of Commons. Since about the time of *Floyd’s Case* (1621) the Commons have accepted that they have no power to punish except for a contempt of their House: *F W Maitland, The Constitutional History of England* (1908), p 245. Obviously, therefore, the House neither has, nor claims to have, any power to try anyone for an offence under English criminal law. If, for example, someone steals money within the precincts of the House of Commons, the House cannot try him for the contravention of the Theft Act: only the ordinary courts can do that. So, when Mr Andrew Gibson, a budget officer in the Fees Office, obtained the transfer of money by submitting false invoices to the Office in the names of three former MPs, he was prosecuted for a contravention of section 15A of the Theft Act and pleaded guilty at Southwark Crown Court, where he was sentenced to nine months imprisonment on 30 September 2010.

106. In such cases the most that the House itself could do would be to treat the conduct as a contempt of the House and, in the exercise of its power of judicature, punish the offender, not for the criminal offence, but for his contempt of the House. Of course, the power to treat conduct as contempt of the House is potentially open to abuse and it was in fact abused in the past, to restrain and punish a wide variety of acts to which MPs happened to take exception. In *Wellesley v Duke of Beaufort* (1831) 2 Russ & M 639, 658-660, Lord Brougham LC denounced past abuses. A catalogue of examples is attached to the report of the speech of counsel for the plaintiff in *Stockdale v Hansard* (1839) 9 Ad & E 1, 12-13.

107. It is not suggested that such abuses would readily occur nowadays. On the contrary, today's House of Commons is unlikely to use its power to take proceedings for contempt against a thief or fraudster operating within its precincts – if only because the police and the ordinary criminal law and courts are much better adapted to dealing with such cases. In former times, when the House rightly considered that a matter could be better dealt with by the ordinary courts than by the House under its contempt jurisdiction, it either ordered the Attorney General to institute criminal proceedings in the appropriate court or presented an address to the Sovereign, asking for such proceedings to be commenced. See the examples in the *Second Report from the Select Committee appointed to consider of the Proceedings had, and to be had, in respect of the several papers signed "Francis Burdett"*, 15 June 1810, in *J Hatsell, Precedents of Proceedings in the House of Commons* vol 1, 2nd ed (1818), pp 294-295 and 302-303; and in *Erskine May, Parliamentary Practice*, 23rd ed (2004), p 163 n 1. Today, the House authorities would presumably contact the police and leave the matter in their hands. In Mr Gibson's case, for example, Scotland Yard was called in as a result of information uncovered in the course of Sir Thomas Legg's investigation of MPs' expenses.

108. Therefore the mere fact that the House *could* treat a matter as one of contempt does not mean that the House *must* do so. On the contrary, if the conduct in question would also constitute an offence under the ordinary criminal law of England, then the individual can be prosecuted in the criminal courts in the usual way. The jurisdiction of the House to deal with the matter as one of contempt overlaps with the jurisdiction of the ordinary courts to deal with it as a criminal offence. In short, the matter does not fall within the exclusive cognizance of Parliament.

109. The examples I have given concerned offenders, hypothetical and actual, who were not Members of Parliament. But, in principle, the same must apply to MPs who commit an "ordinary crime", such as theft. Admittedly, it is possible to find passages in the authorities which are so widely stated that they might seem to imply that even an ordinary crime committed by a Member of Parliament within the precincts of the House of Commons would fall within the exclusive cognizance of the House.

110. For example, in his *Commentaries on the Laws of England*, 17th ed (1814), vol 1, Bk 1, chap 2, pp 158-159, under reference to Coke's *Institutes*, Blackstone says that the whole of the law and custom of parliament has its original from this one maxim:

> "that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere.''

Similarly, in *Stockdale v Hansard* (1839) 9 Ad & E 1, 114, referring to the two Houses of Parliament, Lord Denman CJ says that "whatever be done within the walls of either assembly must pass without question in any other place."

111. These very generalised statements have, however, to be seen in the context of the actual practice of the House. Despite their wide terms, as pointed out in para 107 above, it was, for example, the practice of the House of Commons to direct the Attorney General to prosecute someone who was alleged to have committed perjury when giving evidence to a committee of the House: *James Welsh* (1860) CJ 258; *Henry Chambers* (1866) CJ 239.

112. More particularly, however, for centuries the House of Commons has not claimed the privilege of exclusive cognizance of conduct which constitutes an "ordinary crime" – even when committed by a Member of Parliament within the precincts of the House.

113. In this context the expression "ordinary crime" occurs in the judgment of Stephen J in *Bradlaugh v Gossett* (1884) 12 QBD 271, 283, where he said: "I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice." Although his use of the expression has been criticised, Stephen J was clearly drawing a distinction between an "ordinary crime" (such as theft) and a crime (such as sedition) which a Member of Parliament committed by saying something in the exercise of his freedom of speech in the House. What the Member said in the House would fall within the exclusive cognizance of the House and would be protected by article 9 of the Bill of Rights. The House of Commons alone could consider the matter and decide what sanction, if any, should be applied to the MP. So he could not be prosecuted for the crime in the ordinary courts and, if any attempt were made to prosecute him, the House would intervene to stop the prosecution in order to protect the privilege of freedom of speech and debate of the House itself and, simultaneously, the particular Member's exercise of that privilege.

114. In expressing the view that a Member of Parliament could be prosecuted for an ordinary crime committed in the House of Commons, Stephen J referred to the case of *Sir John Elliot* (1629) 3 St Tr 293. In 1629 Sir John Elliot and two others were prosecuted in the King's Bench for uttering seditious words in the House of Commons and for laying violent hands on the Speaker. The defendants took a plea to the jurisdiction of the court because "these offences are supposed to be done in parliament, and ought not to be punished in this court, or in any other, but in parliament." The court overruled the plea and the defendants were convicted. In 1667, after the Civil War and the Restoration, a report of the trial was published and came to the notice of the House of Commons: (1629) Cro Car 181. The House

resolved that the judgment had been illegal and against the freedom and privilege of Parliament. A conference was arranged with the House of Lords. Mr John Vaughan (later Sir John Vaughan, the Chief Justice of the Common Pleas) spoke on behalf of the Commons. He argued, at col 317, that the judges had craftily dealt with the allegations of seditious speech and of violence to the Speaker together:

> "So that perhaps whatsoever was criminal in the actions might serve for a justification of their rule, and might make it seem in time to become a precedent, and a ruled case against the Liberty of Speech in Parliament, which they durst not singly and bare-faced have done."

Mr Vaughan went on to say, at col 318:

> "[I]t is very possible the Plea of those worthy persons, Denzil Hollis, Sir John Elliot, and the rest, was not sufficient to the jurisdiction of the court, if you take in their criminal actions altogether; but, as to the words spoken in parliament, the court could have no jurisdiction while this act of 4 Hen 8 is in force, which extends to all members that then were (or ever should be,) as well as Strode; and was a public general law, though made upon a private and a particular occasion."

115. On a writ of error at the instance of Denzil Hollis (by now, Lord Hollis), the House of Lords held, at cols 333-334, that the original judgment should be reversed. It can be inferred from the Report by the Chief Justice (Sir John Kellynge), at col 332, that the House criticised the original decision on essentially the same basis as had been advanced by Mr Vaughan, viz, that the judges had treated the allegation of seditious words and the allegation of violence to the Speaker together. In the Chief Justice's view, the allegations should have been considered separately since, even if an allegation of violent trespass to the person could or should "perhaps" (forte) be heard and decided in the King's Bench, nevertheless whatever is said and published in the House of Commons by a serving Member of the House should not be heard or decided anywhere else than in Parliament.

116. Although, as Stephen J noted in *Bradlaugh v Gossett* (1884) 12 QBD 271, 284, the House of Lords was careful not to express a concluded view on the matter, the indication that the charge relating to the violence to the Speaker could have been tried in the King's Bench is pretty clear. Indeed, it was under reference to this case that Maitland was able to say, "We may take it to be law that an

ordinary crime, such as theft committed by a Member in the House, might be punished in the ordinary courts in the ordinary way": *Constitutional History of England*, p 321.

117. Moreover, the simple fact is that, since 1667, the House has never claimed a privilege of exclusive cognizance in a case where a Member has committed an ordinary crime in the House or its precincts. The Attorney General (Sir Thomas Inskip KC) drew attention to this in his argument in *R v Graham-Campbell, Ex p Herbert* [1935] 1 KB 594, 597-598. He submitted that it showed that there was nothing to bar a prosecution in such a case:

> "Coke was expressing an opinion in support of the view now contended for when he said that the exercise of the 'power of judicature' of the House of Commons was 'best understood by reading the judgments and records of Parliament at large, ... and the book of the clerk of the House of Commons, which is a record ....': see Institutes, Part IV, c 1, Of Judicature. Admittedly, a person committing an ordinary felony or misdemeanour, even on the very steps of the Speaker's chair, would not be protected by the privilege of the House, but would be amenable to the jurisdiction of the criminal courts. That, however, is merely because the House has never claimed the right to adjudicate on such matters. Adapting the words of Coke, there is no record of such a privilege having been exercised, and it can, therefore, be taken not to exist."

118. That remains the position to this day. I have therefore no doubt that, if the offences with which the appellants are charged are to be regarded as "ordinary crimes", then – even assuming that they are alleged to have been committed entirely within the precincts of the House – the appellants can be prosecuted in the Crown Court. The only question, therefore, is whether there is any aspect of the offences which takes them out of the category of "ordinary crime" and into the narrower category of conduct in respect of which the House would claim a privilege of exclusive cognizance.

119. In theory, even though the allegations are of false accounting, that could be the position. In *Ex p Wason* (1869) LR 4 QB 573, for example, an information alleged that three members of the House of Lords had entered into a conspiracy. Conspiracy is, in itself, an "ordinary crime". But it was held that a charge of conspiracy to make statements which the members of the House knew to be untrue, in order to frustrate a petition to the House, was not cognizable by the criminal law since it concerned statements to be made, or actually made, in the

House. That was considered to take the alleged conspiracy into an area of conduct which would be cognizable only by the House of Lords itself.

120. In the present cases the charges arise out of claims for allowances that the appellants are alleged to have submitted to the Fees Office. As explained at paras 96-97 above, at the time, the system for claiming and paying allowances rested on Resolutions of the House and was supervised by the Members Estimate Committee, with the assistance of the Committee on Members' Allowances. It was very much a matter over which the House exercised exclusive control, except in relation to the laying of the relevant estimate. Moreover, a system of allowances can rightly be seen as providing a necessary support to Members in carrying out all their parliamentary activities, including their core activities. It is therefore quite possible that the rules of the system would have fallen within the area for which the House would claim exclusive cognizance. And it may be that the same could have been said of decisions by the Fees Office and, on appeal, by the supervising Committees, as to a particular claim by a Member for payment of an allowance. A challenge to any of these matters in the ordinary courts by a Member or by anyone else might well have called into question decisions taken by Committees of the House, or on their behalf, on a matter which was intended to be under the exclusive control and cognizance of the House and its Committees.

121. Obviously, the offences which the appellants are alleged to have committed could not have been committed if the House of Commons had not established and operated the system for payment of Members' allowances. But it is equally true that a hypothetical Member could not steal from the till in the Members' Dining Room if the Administration Committee did not consider that the Dining Room should continue to operate and to provide a service to Members. The Dining Room merely provides the setting for the theft, however. Prima facie, therefore, a charge against a Member of theft from the till would not call into question any decision of that Committee or of the House in relation to the Dining Room or other refreshment services. So the alleged conduct would not, in my view, fall within the area for which the House would claim the privilege of exclusive cognizance. A theft of that kind would be an "ordinary crime" which could be prosecuted in the ordinary courts. Doubtless, the House could also treat it as a contempt of the House, but this would be in the exercise of an overlapping, not an exclusive, jurisdiction.

122. Similarly, in the present case, the appellants' alleged conduct could well be regarded as an affront to the system of Members' allowances established by the House – and, so, as a contempt of the House, which the House could punish in the exercise of its power of judicature. But even though the alleged offences presuppose the existence of the allowances system, nothing in the particulars in the indictments indicates, or even suggests, that the prosecution of the charges would raise any issue as to decisions of the House or of its Committees, or of any officers

or employees acting on their behalf, as to the system or its operation. Nor would the prosecution touch on any other core activities of Members of the House which the privilege of exclusive cognizance exists to protect – their right, for example, to debate, to speak, to vote, to give notice of a motion, to present a petition, to serve on a committee, and to present a report to the House. In short, there is nothing in the allegations against the appellants which relates in any way to the legislative or deliberative processes of the House of Commons or of its Members, however widely construed. The charges against the appellants are simply charges that they have committed the "ordinary crime" of false accounting in circumstances where, it so happens, the allegedly misleading information was furnished to the Fees Office of the House of Commons. The allowances system merely provides the setting for the alleged offences, which are "ordinary" crimes. Therefore they can be prosecuted in the Crown Court. Again, the potential jurisdiction of the House in contempt is an overlapping, not an exclusive, jurisdiction.

123. The very fact that the House authorities co-operated with the police in the investigations which led to the charges against the appellants suggests, at least, that the House authorities do not see the allegations as falling into the category in respect of which the House would claim the privilege of exclusive cognizance. The fact that the Speaker has not intervened to assert the privilege points in the same direction.

124. If the privilege of the House to exercise exclusive cognizance in cases of this kind had previously been established, then the appellants might have been able to assert that privilege, even if the House authorities had chosen not to: *Wellesley v Duke of Beaufort* (1831) 2 Russ & M 639, 655, per Lord Brougham LC. It is unnecessary to express a view on this point, however, since the position in the present cases is different: the appellants are claiming a privilege which the House has not asserted in the past in these circumstances and which it has not asserted on this occasion. The Court is entitled to notice, and to draw an inference from, that clamant silence.

125. I am accordingly satisfied that the prosecution does not infringe article 9 of the Bill of Rights by impeaching or questioning the freedom of speech, the freedom of debates or the freedom of proceedings of the House or of its Members. I am equally satisfied that the prosecution is not precluded on any other basis relating to the Commons' privilege of exclusive cognizance.

126. Of course, the Court can judge the situation only as it stands at present. If the trial goes ahead, it may turn out that, contrary to expectations, some issue arises which is said to touch on the core activities of MPs or of the House itself. If that were actually so, the proceedings might be trespassing on an area for which the House would claim exclusive cognizance and to which article 9 would apply.

In that event the Speaker or the House authorities might seek to intervene. It would be up to the presiding judge, with the assistance of counsel, to decide what should be done. In the meantime, however, there is nothing on the face of the indictments which would justify this Court in preventing the appellants' trial from proceeding.

127. For these reasons, which I understand to coincide in substance with those advanced by Lord Phillips, I favoured dismissing the appeals.

LORD HOPE, LADY HALE, LORD BROWN, LORD MANCE, LORD COLLINS, LORD KERR

128. We have read the judgments of Lord Phillips and Lord Rodger. We agree with them and for the reasons they give we too considered that these appeals should be dismissed.

LORD CLARKE

129. My reasons for agreeing that these appeals should be dismissed were those given by Lord Phillips and, subject to what follows, by Lord Rodger. I add a few words of my own limited to the second type of privilege relied upon, which is known as "exclusive cognisance".

130. It is to my mind plain from Lord Phillips' analysis of this principle that it is a privilege which belongs to Parliament and not to individual members. This is I think clear from the fact that, unlike the privilege provided for in article 9 of the Bill of Rights, Parliament can waive or relinquish it. It seems to me to follow logically from that conclusion that it is for Parliament, and not the individual member to rely upon it. In his paras 79 to 83 Lord Phillips has demonstrated that Parliament has never asserted the privilege in cases of the kind at present before the court. He then gives examples based on these and similar cases in recent times at paras 84 to 88. In the light of the practice of Parliament over many years he then concludes in paras 89 to 92 that Parliament has never asserted the privilege in such cases and, subject to the possibility of an Act of Parliament conferring such a privilege, that it is not now open to it to do so. I agree with him that it follows that it is not open to the appellants to do so.

131. Even if it were open to Parliament to rely upon the privilege in cases of this type, since Parliament has the right to waive or relinquish the right to do so, I do not think that an individual member could rely upon the privilege if Parliament has

waived or relinquished the right in the particular case. It appears to me that, on the basis of the facts stated by Lord Phillips between paras 84 to 91, Parliament has waived or relinquished any right it might otherwise have had to claim the privilege. Having referred the investigation of allegations such as those made against the appellants to the police with a view to possible prosecution and having co-operated with the police, I do not see how Parliament could now assert the exclusive cognisance relied upon. In these circumstances it seems to me that it is not open to the appellants as individual members to do so.

132. I recognise that this conclusion may be inconsistent with the statement made by Lord Brougham LC in *Wellesley v Duke of Beaufort* (1831) 2 Russ & M 639 at 655, which is referred to by Lord Rodger at para 124 above. Lord Brougham's statement, which did not form part of the judgment and was no more than a view expressed in the course of the argument, was in these terms:

> "If a Court of Law or of Equity, upon due deliberation, entertains an opinion that a Member of either House of Parliament has privilege of Parliament, that Court is, in my judgment, bound to give him the benefit of his privilege, and to give it him with all its incidents, even although the House to which he belongs abandons it as a claim of right; for a Court knows nothing judicially of what takes place in Parliament till what is there done becomes an Act of the Legislature."

133. That principle may apply to the article 9 privilege but I do not think that it can apply to the exclusive cognisance privilege. It is inconsistent with Lord Phillips' conclusion at para 63 above that exclusive cognisance can be waived or relinquished by Parliament. Based on p 105 of the 23rd edition of *Erskine May* on *Parliamentary Practice*, Lord Phillips refers to a 1980 resolution which permitted reference to be made in court to certain Parliamentary papers which had up to then been subject to a claim for exclusive cognisance. It appears to me to follow from those statements that, where Parliament has waived or relinquished the privilege in respect of a particular matter, no individual member can rely upon it. In so far as Lord Brougham expressed a different view, I would not accept it. The reason he gives sounds odd to modern ears. I do not think that it can properly be said today that a court knows nothing judicially of what takes place in Parliament till what is there done becomes an Act of the Legislature. In these circumstances I would not accept that Lord Brougham's statement, which was after all only made arguendo, is correct today.