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Neutral Citation Number: [2010] EWCA Crim 1910
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
Mr Justice Saunders

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30th July 2010

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE MASTER OF THE ROLLS
and
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION

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Between :

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	- and -	
	David Chaytor (1) **Elliot Morley (2)** **James Devine (3)** **Lord Hanningfield (4)**	

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Lord Pannick QC, Mr L Mably, Mr J Segan and Miss H Laws for the Crown
Mr N Pleming QC and Mr J. Knowles for David Chaytor
Mr E. Fitzgerald QC and Mr J Middleton for Elliot Morley
Mr G. Millar QC and Miss R Trowler for James Devine
Mr A Jones QC and Mr R Bowers for Lord Hanningfield

Hearing dates : 29th and 30th June 2010

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Judgment **The Lord Chief Justice of England and Wales:**

1. We have all contributed to the judgment of the court.

2. Each of these appellants (who will be described in this judgment as the defendants) is due to stand trial at the Crown Court at Southwark facing allegations of false accounting contrary to section 17 (1)(b) of the Theft Act 1968, in relation to their claims for expenses as members of Parliament. The detailed allegations need no recital. An essential ingredient common to all of them is that the defendant in question acted dishonestly. Three of the

defendants were members of the House of Commons, and one was, and is, a member of the House of Lords.

3. The issue of parliamentary expenses, the arrangements by which they are claimed, and in some cases the amounts claimed and the items for which claims were made, has excited huge public interest, and certainly on occasions, profound concern. Inevitably, the closest attention has focussed on those members who have been prosecuted in connection with their claims. Just because of the publicity which the cases have attracted it remains to be emphasised that none has been convicted, each is presumed to be innocent, and the evidence in support of the allegations made against them has not yet been tested, evaluated and judged by a jury.

4. At a preparatory hearing ordered under section 29 of the Criminal Procedure and Investigations Act 1996, (the 1996 Act) Saunders J examined the stark question of law; whether criminal proceedings against the defendants are precluded by parliamentary privilege. Saunders J decided that they were not: hence these appeals. They raise important questions of public interest about the nature and ambit of Parliamentary privilege, which require examination in depth.

Parliamentary Privilege

5. Properly understood, the privileges of Parliament are the privileges of the nation, and the bedrock of our constitutional democracy. Members of the House of Commons are elected to represent the community on the basis of universal suffrage. Subject to limited processes of delay and amendment in the House of Lords, the members of the House of Commons are responsible for the enactment of the legislation by which the country is governed. Among the privileges enjoyed by members of Parliament is the privilege of freedom of speech. Because it is now so long established, it is easy to underestimate its pivotal role in our democracy. Privilege is a concept which has, in recent times, developed unfortunate connotations, but freedom of speech is described as a privilege because that is how it was described during the struggles of the 17th century to establish the principle that members of Parliament should be entitled as a matter of incontrovertible right to speak their minds with total freedom. Subject only to self imposed parliamentary ordinance, this is nothing more and nothing less than an absolute, uncircumscribed, and indeed cherished, entitlement.

6. The value to the community of this principle is perhaps nowhere better demonstrated than the debate in the House of Commons in May 1940 when the military campaign was in tatters, and our forces had been forced into an ignominious departure from Norway. In one of the most significant speeches ever delivered to Parliament, Leo Amery launched a direct personal attack on the Prime Minister, criticising him for his "reasoned, argumentative case for our failure", when "wars are won, not by explanations after the event but by foresight, by clear decision and by swift action". The efficient conduct of the war required leadership of "vision, daring, swiftness and consistency of decision". The speech culminated in the words of Oliver Cromwell despatching the Long Parliament, "depart, I say, and let us have done with you. In the name of God, go". It is easy to overlook that this was an attack on the leader of the nation at a time of war, and difficult to

think of many assemblies where a member would have dared to speak in such terms at such a time, or indeed where such language would have been permitted. Spoken in Hitler's Reichstag, Leo Amery would simply have disappeared, never to be seen again. It is a manifestation of our privilege – that is, the privilege of the community – that he was able to speak freely in our Parliament, as he did, at the time when he did.

Eliot's Case

7. Reference was made in argument to the case of Sir John Eliot. Despite its antiquity the case is relevant to the issues which arise in this appeal. Taking a complicated situation very briefly, in 1629 proceedings were taken against Eliot and other members of the House of Commons for making seditious speeches in Parliament and in effect, also, for contempt in resisting the Speaker's proposed adjournment of the House and conspiracy to keep him in his chair by physical force. A great point of principle was at stake. Eliot and others demurred to the jurisdiction of the King's Bench. It did not extend to what they had said and done in Parliament. The plea *nihil dicit* meant that conviction would be inevitable, but if they defended themselves at all, their contention that Parliament was the only body with jurisdiction over these matters would be totally undermined. In a rapidly developing situation, Eliot and his colleagues would not compromise. An unfinished paper written by Eliot, which, because of illness, he was unable to present to the court, has survived. His self-acknowledged dilemma was that if he did not submit he would incur the censure of the Court, but if he did, his act would be considered "a prejudice to posterity" and "a danger to Parliament". So he would be silent, just because his duty was to Parliament. Effectively these ideas were summarised in his paper, *An Apology for Socrates*, written in the Tower, where he died in 1632. Holles and Valentine remained imprisoned there for 11 years.

> "…the spirit of political liberty brought to life by the Petition of Right was immeasurably strengthened by the martyrdom of Eliot. He had died for a cause which was understood by only a few Englishmen at the time, freedom of speech in the House of Commons." (From The Life of Sir John Eliot by Harold Hulme)

8. The reverberations from Eliot's case lasted for the next 60 years. In July 1641 the Commons resolved that the "exhibiting of the information" against Eliot, Holles and Valentine, "being members of the Parliament for matter done in Parliament", was breach of the privilege of Parliament. And in December 1641 the 15th article of the Grand Remonstrance spoke directly of Eliot as one who "died by the cruelty and harshness of his imprisonment, which would admit of no relaxation, not withstanding the imminent danger of his life did sufficiently appear by the declaration of his position; and his release, or at least his refreshment, was sought by many humble petitions…"

9. The decision of the court of King's Bench was reversed by the House of Lords in [1668] 3 ST 331-333 on the basis that the judgment had dealt with the issues of the force used against the Speaker at the same time as it addressed the issue of seditious speech, when the two were distinct, and should have been dealt with separately.

> "…the charge of uttering seditious words in the House, which was

> fully answered by the plea of Privilege, was mixed up with the charge of causing a riot in the House, which was not. Under these circumstances, the judges could hardly do otherwise and overrule a plea to the jurisdiction, because, as to part of the charge, they had jurisdiction; as a matter of fact, their action in so doing was not assigned as a cause of error when that case was reversed by the House of Lord".

(See, *A History of English Law*, by W.S. Holdsworth, volume 6 page 269)

10. In 1689, in the context of proceedings involving the Sergeant-at-Arms a few years earlier, (*Jay v Topham* 12 ST 822), when he was called to account in the House of Commons for his decision, Pemberton CJ told the House that:

> "There was no error assigned in over-ruling the plea to the jurisdiction of the court, but only this, that it was in the body of the information said, that did speak some words in Parliament, which the court of King's bench could not try, because by the judgment of the lords' house they were not cognizable at law; for the members of this House have always had a freedom of speech here: and upon that account it was reversed. But I must tell you that in my lord Vaughan's report he did allow that, as to the miscarriage that was alleged in laying hands upon the speaker, the court of King's bench had a jurisdiction".

(Quoted in Holdsworth at volume 6, page 269, footnote 4)

11. In short, the courts had no jurisdiction over any words spoken in Parliament by a member of Parliament, but the jurisdiction to consider criminal offences committed in the House remained. The essential question in these appeals is whether this principle has been altered by subsequent developments, and in particular article 9 of the Bill of Rights.

The Bill of Rights

12. The willingness of men like Eliot to sacrifice their freedom for the principles in which they believed, provides the context to article 9 of the Bill of Rights 1688 Will and Mary sess2 c2 WM, "an Act declareing the Rights and Liberties of the Subject…". In a clear reference to Eliot's Case the Heads of Declaration related, among other complaints, "Illegal prosecutions", and referred to "Prosecutions in the Court of King's Bench the Matters and Causes cognizable onely in Parlyament and by diverse other Arbitrary and Illegall Courses".

13. Among the "Subject's Rights", (which clearly demonstrates that this is a right given to Parliament on behalf of the nation as a whole) article 9 declared:

> "Freedom of Speech.

> 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".

14. This provision has remained in force for over 300 years. Its importance cannot be overestimated. It has never been questioned. It is not questioned in these proceedings. No one has suggested that parliamentary privilege should be diminished. These appeals are concerned with its ambit, and whether it extends to criminal proceedings against members of Parliament for fraudulent claims for parliamentary expenses. We simply record that on a first reading, and save always in relation to freedom of speech, it is difficult to read into article 9 that members of Parliament are immune from prosecution for criminal conduct on the grounds of privilege just because the crime in question was committed in Parliament.

Abuse of Privilege

15. In the flurry of excitement which had culminated in the Bill of Rights, and in its immediate aftermath, the privileges claimed by Parliament were abused. For example, as a result of their decision in *Jay v Topham,* itself, Pemberton CJ and another judge, Sir Thomas Jones, were held to have breached privilege and they were incarcerated until the prorogation of Parliament.

> "Our respect and gratitude to the Convention Parliament ought not to blind us to the fact that this sentence of imprisonment was as unjust and tyrannical as any of those of arbitrary power for which they deprived King James of his Crown." (per Lord Denman CJ in *Stockdale v Hansard* [1839] 9Ad and El 1 at 134)

16. The abuse of privilege did not stop there. By the time *Stockdale v Hansard* itself was decided there had been an astonishing range of claims for privilege. Some are identified in the report of counsel's argument in *Stockdale v Hansard.* They extended to killing the rabbits of a member of the House of Lords and fishing in the pond of a member of the House of Commons. These absurdities were address by Lord Brougham LC in *Wellesley v The Duke of Beaufort* [1831] 2 Russ and My 639 at 659, where a member of Parliament was claiming parliamentary immunity from the consequences of having abducted his child:

> "…how incumbent it is upon the courts of law to defend their high and sacred duty of guarding the lives, the liberties, and the properties of the subject, and protecting the very existence of the Houses of Parliament themselves, against wild and extravagant, and groundless, and inconsistent notions of privilege."

This was a salutary warning that if claims for parliamentary privilege were grotesquely exaggerated, there might very well be a groundswell of public sentiment in favour of their reduction, and consequent damage to Parliament and its processes.

The ambit of "proceedings in Parliament"

17. No further relevant statutory explanation or definition of the phrase in article 9, "proceedings in Parliament", has been given in this jurisdiction. Our attention has been drawn to Section 13 (5)(b) of the Defamation Act 1996 which recognises that the "protect (ion)…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" referred to in section 13 (4), extends to "the presentation or submission of a document to either House or a Committee". However that is as far as the statutory provision goes: it does not amplify or explain article 9. Section 13 (5) extends the scope of the "words spoken or things done" in section 13 (4), but those words are governed by the earlier words "any enactment or rule of law *insofar* as it protects a person from legal liability.." (our emphasis). Therefore it does not assist in the determination of the extent of the privilege granted by article 9.

18. Erskine May – Parliamentary Practice (23rd edition) - suggests that:

> "The primary meaning of proceedings, as a technical Parliamentary term, which it had at least as early as the 17th century, is some form of 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 recognised 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. Officers of the House take part in its proceedings principally by carrying out its orders. …Strangers may also take part in the proceedings…, for example by giving evidence".

As we shall see, this analysis is not entirely comprehensive, but, significantly, it underlines that the privilege of individual members is concerned with what may be described as their involvement in the legislative process.

Report of a Joint Committee of Both Houses

19. A joint Committee of both Houses was set up to investigate the issue of parliamentary privilege and to make recommendations. Its report (HL Paper 43-1, HC 214 – 1), 1999, provides, if we may say so, a valuable study of the principal issues. In a passage in the "executive summary" of the Report, cited with approval by Lord Bingham of Cornhill in *Buchanan v Jennings (Attorney General of New Zealand intervening*) [2005] 1 AC 115, the Joint Committee said that "the legal immunity" afforded by article 9 was "comprehensive and absolute" and that it should therefore "be confined to activities justifying such a high degree of protection…". To the same effect, when discussing the right of each House to administer its own affairs, the Committee observed that this "heading of privilege best serves Parliament if not carried to extreme lengths".

20. In paragraph 7, the Committee explained that the "principal purpose" of article 9 was "to

ensure that the House could initiate business of its own, and to protect members from being brought before the courts by the Crown and accused of seditious libel", it also "reasserted the long established claim not to be answerable before any court for words spoken in Parliament". Paragraph 38 described the existing immunity as "wide" and "absolute" and reflected the views expressed in *Erskine May*. Some of the limitations to privilege were identified at paragraph 101; "a casual conversation between members… even during a debate is not protected, nor an assault by one member on another". It thus appears to the Committee that an offence of violence by one member on another does not fall within the ambit of privilege, and, if so, for the moment we ask rhetorically, why, beyond words spoken in Parliament, should it extend to any criminal activity at all?

21. At paragraph 110 the Committee suggested that the "exceptional protection afforded by article 9 should" remain confined to the core activities of Parliament" unless good reason to the contrary was established. At paragraph 119 it identified a particular area of "uncertainty" in relation to the registration of members' interests, but went on to state that the procedures involved were "part of the machinery brought into being by each House for the better conduct of its business", and that accordingly they were "under the sole control of each House and not subject to supervision by courts of law". The Committee considered that "these procedures also qualify, or should qualify, for the protection afforded by article 9", on the ground put forward in paragraph 120 that "the registers are an integral part of the procedures…" and accordingly, "it is not open to a court to adjudicate upon whether a member should have registered a particular interest, or to draw an adverse inference from his failure to do so" (para 121).

22. Later in the report the full extent of parliamentary privilege was examined. At paragraph 240, the Committee stated that "Each House has the right to administer its internal affairs within the parliamentary precinct" in order to ensure "that Parliament can discharge its functions as a legislative and deliberative assembly "without let or hindrance". (para 241). In the following paragraph, the Committee concluded that it was "clear" that any "privilege does not embrace and protect activities of …members…simply because they take place within the precincts of Parliament". Yet later in the Report at paragraph 248, the Committee said that the resolutions or orders governing members' salaries "are proceedings in Parliament, but their implementation is not". This discussion suggests that while the scheme for payment of parliamentary expenses or allowance falls within the ambit of proceedings in Parliament, the privilege does not extend to claims for expenses or allowance, if made dishonestly.

23. The report of the Committee has been very valuable to our consideration of the issues which arise in this appeal. The unifying thread running through the passages we have identified confirms that the privilege of individual members, where it arises at all, is the privilege of Parliament.

The Authorities

24. Our understanding of the ambit of article 9 has been illuminated by a number of decisions of high authority, which we must now consider. In the result, as we shall see, we cannot discern any significant difference between the principles revealed by the decisions of the

courts and the views advanced on behalf of the Committee.

25. We must begin by examining the trilogy of 19th century decisions which confirmed the entitlement of Parliament to manage its own affairs but also demonstrated some of the limitations on parliamentary privilege, at a time when, as we have seen in the context of abuse of privilege, concerns were becoming prevalent. In his judgment in *Prebble v Television New Zealand Limited* [1995] 1 AC 321, quoted with approval by Lord Bingham of Cornhill in a judgment of the Privy Council in *Buchanan v Jenkins* [2205] 1 AC 115 at 124, Lord Browne-Wilkinson explained:

> "So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in the performance of its legislative functions and protection of its established privileges."

He referred to *Burdett v Abbott* (1811) 14 East 1, *Stockdale v Hansard* and *Bradlaugh v Gossett* [1884] 12 QBD 271. These decisions are said to confirm that the courts would not allow anything done by members "within the walls of Parliament" to be challenged. We were indeed much pressed with the phrase and we have examined the authorities with it in mind. However Lord Browne-Wilkinson's reference to "walls" was metaphorical rather than physical and his language underlined that was unchallengeable was what was done or said within the walls of Parliament either when its legislative functions were being performed, or its established privileges protected.

26. *Burdett v Abbott* (1811) affirmed the entitlement of Parliament to manage its own affairs. Article 9 was not directly engaged. Burdett was a member of Parliament who brought an action against the Speaker for forcible arrest and imprisonment following his own breach of the privileges of the House. After prolonged historical examination of a vast body of precedent Burdett's claim was dismissed.

> *"*The privileges which belong to them seem at all times to have been, and necessarily must be inherent in them, independent of any precedent: it was necessary that they should have the most complete personal security, to enable them freely to meet for the purpose of discharging their important functions, and also that they should have the right of self protection: I do not mean merely against acts of individual wrong: for poor and impotent indeed would be the privileges of Parliament, if they could not also protect themselves against injuries and affronts offered to the aggregate body, which might prevent or impede the full and effectual exercise of their Parliamentary functions. This is an essential right necessarily inherent in the supreme Legislature of the kingdom… the right of self-protection implies, as a consequence, a right to use the necessary means for rendering such self-protection effectual… such a body must be a priori be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions might be…it must also have the power of protecting itself from insult an indignity wherever offered, and by punishing those who offer it." (per Lord

Ellenborough CJ at 137)

Whether the summary powers exercised in the way in which they were exercised on behalf of Speaker in *Burdett* would produce the same result nowadays is, we suspect, open to question. However it is considered, the decision reflects the ancient understanding of Parliament as the High Court of Parliament of which Burdett was in contempt. Bearing in mind the abuses of privilege to which we have referred at paragraph 16, the judgment clearly links the privileges of Parliament to the exercise of its functions.

27. In *Stockdale v Hansard*, the Court of Queen's Bench decided that the publisher of debates in Parliament could be sued for publishing a libellous statement which, when it was made in the House, was privileged under article 9. At 208-210, Lord Denman CJ referred to the privileges of the House of Commons being based on "the necessity that the House…and the members thereof should in no way be obstructed in the performance of their high and important duties". Having said that article 9 confirmed the protection of "freedom of speech, the debate or proceedings in Parliament, from impeachment or question in any place out of Parliament", Coleridge J observed that "the House should have exclusive jurisdiction to regulate the course of its own proceedings and animadvert upon any conduct there in violation of its rules, or derogation from its dignity, stands upon the clearest grounds of necessity". Littledale J had no doubt that both Houses were entitled to deal with contempts or insults offered to the House, and an immunity "as to any other thing which may appear to be necessary to carry on and conduct the great and important functions of their charge". However he rejected the submission that the privilege of the House of Commons extended to the publication of papers which contained defamatory matter. Patterson J noted the absence of any argument that Parliament could vest with impunity a breach of the law by anyone. His essential thesis was that the privileges of the House depended on the necessity of ensuring that members should not be obstructed in any way when performing their duties.

28. Despite to our eyes, the extraordinarily wide-ranging arguments of the Attorney General, the court held that "the onus of shewing the existence and legality of the power now claimed", that is, the power of the House of Commons to extend its privileges to the authorised publishers of its proceedings outside its precincts, lay upon the publishers, and they had "entirely failed" to discharge that onus. In short, privilege was confined physically within the walls of the House, and within the House applied to the performance of the "high and important duties" of members.

29. In *Bradlaugh v Gossett*, the court held that no action could lie against the Sergeant-at-Arms for excluding an elected member from the House of Commons pursuant to a resolution of the House. Lord Coleridge CJ said at 275 that "what is said or done within the walls of Parliament cannot be inquired into in a court of law", because "the jurisdiction of the Houses over their own members, their rights to impose discipline within their walls is absolute and exclusive". He went on to underline that the principle extended to the Sergeant-at-Arms, just because the Houses "cannot act by themselves as a body: they must act by officers".

30. Matthew and Stephen JJ agreed. Stephen J noted, at 278, 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…". He then went on to address the question whether the protection of article 9 extends to criminal offences committed within Parliament by members. The short answer is that, save in the context of words spoken in Parliament by members in their capacity as such, it does not. Stephen J was an acknowledged 19th century master of the principles of criminal law. He enunciated the classic exposition of the relevant principle in unambiguous language:

> "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. One of the leading authorities on the privilege of Parliament contains matter on the point and shows how careful Parliament has been to avoid even the appearance of countenancing such a doctrine".

That authority was *Eliot's* Case.

31. This statement of principle has never been challenged in any subsequent authority. Equally, it has never been suggested that Stephen J was limiting his observations to crimes committed within the House by non-members, or that his observations in relation to members of the House were limited to offences where unlawful force had been used. We can find nothing in *Burdett v Abbott* which suggests that the principle of self-protection for the privileges of Parliament embraces privilege against lawful process for criminal activities by members in the House. *Stockdale v Hansard* does not support the proposition that the privileges of the House, critical as they are to the proper performance of its constitutional functions, extend beyond the performance of those functions. In *Bradlaugh v Gossett* Stephen J did not discern anything in either of these decisions which might be productive of a privilege against prosecution for alleged criminal activities committed by a member in the House. He said in terms that he knew of no such authority. Coleridge CJ expressly agreed with him. Plainly therefore he did not mean to imply that a crime committed by a member of Parliament physically "within the walls" of the House was protected by privilege. In short, the reasoning of the court was directed to the protection of parliamentary privilege without any suggestion that either *Burdett v Abbott* or *Stockdale v Hansard*, or indeed any other authority, watered down Stephen J's statement of principle. Indeed it appears that the Joint Committee accepted it without reservations.

32. Properly analysed, these decisions addressed problems which did indeed fall "within the walls" just because they were essential to the performance of Parliament's functions. They do not, however, begin to come anywhere near judicial recognition that members of Parliament are immune from proceedings for criminal behaviour in Parliament.

33. We must now address more recent authorities. In *Att-Gen of Ceylon v de Livera* [1963] AC 13, section 14(a) of the Ceylon Bribery Act (no 11 of 1954) was addressed. The offer of any "gratification" to a member of the Senate or House of Representatives" in his capacity "as such" was prohibited. The Privy Council addressed what was described as the "affinity" between the parliamentary concept and the practices of the United Kingdom and Ceylon. In the context of the meaning of a "proceeding in Parliament" as they appear in article 9, the Board held that it applied in the circumstances in which a member of the

House was 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 these privileges do not cover activities that are not squarely within a member's true function".

After examining four post-war cases where the ambit of "proceedings" in Parliament was examined by Reports of Committees, the Board continued:

> "The most, perhaps, that can be said is that, despite reluctance to treat a member's privilege as going beyond anything that is essential, it is generally recognised that it is impossible to regard his only proper functions as a member as being confined to what he does on the floor of the House itself. In particular, in connection with his approaches to or relations with Ministers, …it is recognised that his function can include actions other than the mere putting down and asking of a Parliamentary question."

It therefore appears that in deciding whether privilege applies, or not, the focus of attention is the performance of the member's Parliamentary function.

34. In *British Railways Board v Pickin* [1974] AC 765 the issue was whether the courts could inquire whether the enactment of a Private Act could be impeached in the courts on the ground that its passage through Parliament was procured by fraud or marred by irregularity. The response of the House of Lords was unequivocal and uncomplicated. It is summarised in the observations of Lord Morris of Borth-y-Gest at p 790:

> "It must surely be for Parliament to lay down the procedures which are to be followed before a Bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and construe its Standing Orders and further to decide whether they have been obeyed: it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach. It would be impracticable and undesirable for the High Court of Justice to embark upon an inquiry concerning the effect or effectiveness of the internal procedures in the High Court of Parliament or any inquiry whether in any particular case those procedures were effectively followed."

The principle established, or more accurately, repeated in *Pickin* clarifies, if clarification were needed, something of the extent of Parliamentary proceedings as understood in article

9. The matters identified by Lord Morris are plainly integral to the legislative process.

35. As is well known the decision in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 relaxed some of the prohibition against the use by the courts of Parliamentary material as an aide to statutory construction. However, the arguments addressed to the House of Lords, and the way in which they were dealt with, are illuminating. The Attorney General contended that "a decision to use Hansard to construe a statute" would be regarded by the House of Commons as a grave step, inconsistent with article 9, on the basis that analysis in court of what was said in the course of proceedings in Parliament could "easily lead to questioning" of proceedings in Parliament within the meaning of article 9. The argument was rejected. Allowing the court to consider what was said during debates or proceedings in Parliament as an aide to statutory construction did not infringe Article 9. On this issue, the view of the House was unanimous. Lord Browne-Wilkinson explained at p.638 that:

> "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)… 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 monarch, to discuss what they, as opposed to the monarch, chose to have discussed. Relaxation of the rule will not involve the courts in criticising what is said in Parliament. The purpose of looking at Hansard will be …to give effect to the words used so long as they are clear. Far from questioning the independence of Parliament and its debates, the courts will be giving effect to what is said and done there."

36. The question whether proceedings in Parliament were being "impeached" or "questioned" has been considered relatively recently in a number of cases. (*Toussaint v the Attorney General for St Vincent and the Grenadines* [2007] 1 WLR 2825, *R (Bradley) v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin) and *R (Federation of Tour Operators and others) v HM Treasury and others* [2007] EWHC 2062 (Admin). They demonstrate that statements made in Parliament may be admitted in evidence before the courts without their admission contravening the prohibition against questioning or impeaching the parliamentary process. No further analysis is needed. In deference to the submission by Mr Alun Jones QC for Lord Hanningfield, we should add that if these appeals are unsuccessful and the prosecution of the defendants continues, the issue whether an individual question or questions or even the deployment of evidence may impinge on parliamentary privilege will have to be decided as and when it arises in the course of the trial. The present appeals are confined to the issue of principle.

37. Richard Prebble was a Minister in New Zealand who took defamation proceedings against a television company identifying 12 features of the programme which were defamatory of him. The television company asserted, among other defences, that 7 of these items were true. Some reliance was placed on what the plaintiff and other ministers had said in the House of Representatives. The Court of Appeal in New Zealand upheld the decision of

the trial judge that the particulars of justification based on what had been said in the House of Representatives contravened article 9 and should be struck out. In *Prebble v Television New Zealand Limited* [1995] 1 AC 321 the issue was addressed in the Judicial Committee of the Privy Council. Lord Browne-Wilkinson at p 334 described the "basic concept underlying article 9" as:

> "the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they have to say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect."

(See, to the same effect, *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 and *Hamilton v Al Fayed* [2001] 1AC 395).

38. As the report of the Joint Committee underlines, the protection of article 9 is not confined to freedom of speech. It is well exemplified in re *McGuinness's Application* [1997] NI 359. Kerr J (as he then was) considered an application by an elected member of Parliament for leave to apply for judicial review of the Speaker's decision that if he chose not to take his seat in the House because he refused to take an oath or affirm allegiance to the Sovereign, he would be excluded from using the services which would otherwise be open to him. One ground on which the application was resisted was that the court did not have jurisdiction to entertain the challenge. The application for leave to apply for judicial review was dismissed. Kerr J concluded that the Speaker's decision "could not be challenged by way of judicial review…" The Speaker's announcement in the House of Commons of action taken by her on behalf of the House to regulate the use by members of services which are ancillary to their work within the Chamber must therefore be considered to be a proceeding in Parliament and immune from judicial intervention. By virtue of article 9 "…control of its own internal arrangements has long been recognised as falling uniquely within Parliament's domain and superintendence from which the court's intervention is excluded".

39. We also note *R v Parliamentary Commissioner for Standard, ex parte Al Fayed* [1998] 1 WLR 669, where the attention of the court was focussed on the responsibilities of the Parliamentary Commissioner for Standards. In the context under consideration the Commissioner was working under the supervision of the Committee of Standards and Privileges in circumstances which were "directly related to what happened in Parliament". The functions of the Committee constituted part of the proceedings of the House. Accordingly the application for leave to apply for judicial review in relation to the report of the Commissioner for Standards was refused. Neither *Re Mcguinness* nor *Ex parte Al Fayed* suggests or implies any relaxation of the principle that a criminal offence committed

by a member of Parliament in Parliament itself is not justiciable in the criminal courts.

40. The limits of parliamentary privilege, and, apart from its abuse in earlier time, the continuing reasons for limiting its ambit, were identified in *R v Greenaway* (Unreported) (1992) Central Criminal Court. The question was whether a member of either House of Parliament may be prosecuted in the criminal courts for alleged offences of bribery and corruption. In his ruling on the jurisdiction question, Buckley J observed that it was common ground that in general, members of Parliament are subject to the criminal law and that it would be "unacceptable" for a member of Parliament to be immune from prosecution in the courts of law when there was prima facie evidence of corruption. Without it being suggested that he was questioning or impeaching words spoken in Parliament, he adopted the observations of Lord Salmon that:

> "To my mind equality before the law is one of the pillars of freedom. To say that immunity from criminal proceedings against …any member of Parliament who accepts the bribe, stems from the Bill of Rights is possibly a serious mistake…(the Bill of Rights) is a charter for freedom of speech in the House. It is not a charter for corruption….the crime of corruption is complete when the bribe is offered or given or solicited and taken."

This seems to be entirely consistent with the observations of Stephen J in *Bradlaugh v Gossett*.

41. The principle of equality before the law, and the application of the criminal law to all citizens identically remains fundamental to the rule of law itself. In *Sharma v Browne-Antoine* [2007] 1 WLR 780 at paragraph 14, Lord Bingham, for the Privy Council, said:

> "The rule of law required that, subject to any immunity or exemption provided by law, the criminal law of the land should apply to all alike. A person is not to be singled out for adverse treatment because he or she holds a high and dignified office of State, but nor can the holding of such an office excuse conduct which would lead to the prosecution of one not holding such an office. The maintenance of public confidence in the administration of justice required that it be, and be seen to be, even-handed. "

42. This broad statement can be said to beg the question which arises in these appeals, because of the qualification implicit in the reference "subject to any immunity…". The general thrust of the principle, however, cannot be doubted. We are all equally subject to the law. It must be applied equally to every citizen, including members of Parliament. Any asserted immunities or exemptions against criminal proceedings asserted on their behalf must therefore be justified by reference to some further, over-arching principle, and they can only begin to come into contemplation in the context of the performance by Parliament of its core constitutional functions.

Concurrent Jurisdiction of Parliament and the Courts

43. Before discussing the issues specific to the present appeals, we must address one further area of the argument relating to broad principles.

44. It is now established beyond argument that the application of parliamentary privilege in any particular situation is ultimately decided by courts. As Lord Browne-Wilkinson observed in *Pepper v Hart*:

> "Although in the past the courts and the House of Commons both claimed the exclusive right to determine whether or not a privilege existed, it is now apparently accepted that it is for the court to decide whether a privilege exists and for the House to decide whether such privilege has been infringed,"

45. Some matters are clearly subject to parliamentary privilege, and therefore they fall within the exclusive jurisdiction of Parliament. (See, for example, *Burdett v Abbott* and *Bradlaugh v Gossett*). Other matters fall within the exclusive jurisdiction of the courts. (See, for example, *Stockdale v Hansard*). Other matters are less clear. The Joint Committee observed that the precise delineation of the boundaries of parliamentary privilege is neither "tidy" nor "easy to define". *Erskine May*, at pp 110-111, explained that "comprehensive lines of decision have not emerged". In her chapter in Oliver and Drewery on *The Law in Parliament*, pp 73 and 87, Patricia Leopold described the situation as one of "confusion and uncertainty", saying that "the present situation with respect to the application of the civil and criminal law to members and proceedings in Parliament is a morass". Even accepting the accuracy of this description, it is unsurprising that the law in this area has not been developed in great detail, not least because the fundamental features of the constitutional settlement of 1689 have not been seriously threatened.

46. It would be to the public disadvantage for the constitutional arrangements which govern the relationship between the courts and Parliament to be tested to destruction. As Lord Browne-Wilkinson explained in *Prebble*, "The courts and Parliament are both astute to recognise their respective constitutional roles". What therefore is required is a process which readily identifies when the issue of principle really matters (as it does in the present appeals) and must be decided, and where, in truth, such interest as there may be is largely academic.

47. There will be occasions when as a matter of practical reality both Parliament and the courts can assert jurisdiction. Thus, for example, a prosecution of a member of Parliament, Mr Ron Brown, after he had allegedly damaged the Mace, was stayed by the Director of Public Prosecutions (*The Times,* 23 April and 9 June 1988) after the House of Commons had exercised its own disciplinary functions in respect of both criminal damage to the Mace and the challenge to the authority of the Speaker (HC Deb vol 131, 19 April 1988, cols 929-253). The police, the prosecuting authorities, and the courts are better equipped and more experienced than Parliament in the investigation and examination of criminal allegations. When members commit a minor criminal offence, not covered by parliamentary privilege, which simultaneously constitutes a breach of the rules of Parliament itself, as a matter of principle, such a case would not be subject to the exclusive jurisdiction of Parliament. In some such cases, it will be more appropriate for Parliament to deal with the matter, as it did in the case of Mr Ron Brown, and in others the criminal

courts will provide the more appropriate forum.

48. We acknowledge that in many instances, it would be unfair on an individual member of Parliament, if both Parliament and the courts sought to exercise jurisdiction, so that in effect, he or she would twice be put in jeopardy. Once Parliament has exercised its authority over an area of behaviour which constitutes a breach of parliamentary rules, the Director of Public Prosecutions would be likely exercise his judgment that a prosecution would not be in the public interest. There might indeed in any event be an unanswerable argument that a criminal prosecution in such circumstances might of itself constitute questioning or impeaching the disciplinary proceedings which had already taken place in Parliament. Equally, if either House took the view that particular conduct constituted a breach of its rules but also, if proved, amounted to a criminal offence which could not be efficiently addressed through its own processes, or where the conduct in question ought, in any event, to be examined in the ordinary, public processes of the court, the likelihood is that it would allow those processes to take their normal course. The principles of comity between the courts and Parliament are no less important than their mutual recognition of their respective and distinct constitutional roles.

49. We have approached this aspect of the argument on the basis that the statement agreed in April 2008 between the Chairman of the Committee on Standards and Privileges, the Parliamentary Commissioner for Standards and the Commissioner of Police of the Metropolis when they discussed the handling of complaints against members which alleged breaches of the relevant Code of Conduct for Members which might also raise questions of criminal liability, accurately reflects the views of Parliament. It is recorded that the Committee believed "in the general principle that criminal proceedings against Members, where these are considered appropriate, should take precedence over the House's own disciplinary proceedings".

50. In the present appeals it is clear, as we shall see, that Parliament has decided that the ordinary processes of the criminal law should be followed. If the alleged conduct constitutes a breach of the rules of either House, that will be addressed at the conclusion of the criminal proceedings. The possibility that there might be concurrent jurisdiction to deal with any of the allegations made against the defendants in these cases presents us with no difficulties.

The Essential Facts – Discussion

51. We must now examine how the principles we have identified should be applied to the instant cases.

52. We understand that since 1971 members of Parliament have been entitled to claim allowances or expenses. The rules on the claims which can be made are set out in the *Guide to Members' Allowances,* known as the "Green Book", published by the House of Commons Department of Resources, usually referred to as the "Fees Office", in accordance with resolutions of the House. The way in which the arrangements for members' allowances operated was summarised in different ways by the appellants. Drawing from the Members' Estimate Committee's First Report of Session 2009-10

February 2010, entitled *Review of Past ACA Payments HC348*, Mr Nigel Pleming QC explained how this Committee is a Committee of the House of Commons appointed under standing orders, comprising the membership of the House of Commons Commission, with responsibility for codifying and keeping under review the resolutions of the House and the provisions of the Green Book, relating to expenditure charged to the estimates. The Speaker of the House of Commons is the chairman of this Committee.

53. All parliamentary allowances are administered and managed by the operations directorate at the Department of Resources, known as Fees Office. Its officials are not civil servants, but servants of the House. Claims by members are delivered by hand or sent in by post to the Fees Office post room in the House of Commons. They are then validated by the "Validation Team" in the Fees Office. After validation, payments are made by the accounts payable section of the Fees Office drawn on the House of Commons members' bank account.

54. The Green Book itself sets out the framework of rules under which parliamentary allowances, including the additional costs allowance ("ACA") are administered. These rules are derived from Resolutions of the House and updated from time to time by the Committee. Members of Parliament have been required at all material times to ensure that their use of the allowance arrangements is conducted strictly in accordance with the rules laid down in the Code of Conduct.

55. The arrangements for the operation of the system for payment of allowances in the House of Lords plainly varies, but the distinctions are unimportant.

56. We adopt Saunders J's characteristically clear summary of the essential facts. Both Houses of Parliament have schemes for the payment of allowances and expenses to compensate them for expenditure in carrying out their parliamentary duties. What can be claimed and paid as expenses and allowances are set out in rules which are prescribed by resolutions of each house. These rules are detailed and are available to members. Claims for expenses and allowances are made by individual members in claim forms which they then submit to the appropriate office of the House. Members are required to certify that the expenses claimed were incurred in carrying out their duties as members and they are entitled to the allowance for expenses that they are claiming. It is the submission of these forms that provides the subject matter of counts on the indictments preferred in this case. When a member makes a claim, that claim is processed by officers of whichever of the two Houses the member belongs. The officers decide the entitlement of the member on the basis of what he or she has claimed. The officers who decide the entitlement work under the supervision of the appropriate committee of that House.

57. On the basis of a more detailed analysis of the arrangements it was suggested on behalf of the defendants, in summary, that the submission of the claims for expenses, whatever description may be appropriate, forms part of "proceedings" in Parliament. All the Schemes were created by Parliament to enable its members to perform their responsibilities. The submission of the claim form sets these processes in motion, and in the present prosecutions the Crown is seeking to question or impeach them. The Fees Office is part of the House of Commons, consisting of officers of the House. In receiving claim forms it was acting on behalf of the House, and in validating the forms, and making

arrangements for the repayment of expenses thus validated, it was still acting on behalf of the House.

58. It is therefore contended that the submission of claims for expenses constitute proceedings for the purposes of article 9, and that the present prosecutions of the defendants constitute an infringement of article 9 and, by seeking to adjudicate about matters which fall within the exclusive jurisdiction of Parliament call into question the principle of the separation of powers.

59. It was common ground before us, as it was before Saunders J, that

> "The scheme for the payment of expenses as prescribed by resolution of the Houses of Parliament is covered by privilege… this means, for example, that the High Court would have no power to judicially review the scheme".

That area of agreement is consistent with, for example, the decision in *Re McGuinness*. It does not however address claims by individual members for payment of their expenses.

60. It was also common ground that if the submission of expenses forms was covered by privilege, then the privilege would extend to dishonest claims. This concession proceeded on the basis that proof of dishonesty would involve the prosecution questioning the document, and if that process itself is covered by privilege, then such questioning of the document would be impermissible.

61. In summary therefore the issues put before by Saunders J, and before us, addressed the question whether the submission of the expenses form could be covered by privilege in two alternative ways, because either:

> "(i) it is part of the expenses scheme and as such is part of the business of Parliament and comes under its exclusive jurisdiction…or under Article 9, or
>
> (ii) it comes within the ambit of proceedings in Parliament as part of the members' core activity or is so closely associated with it that it is covered by Article 9".

62. It was conceded by the Crown before Saunders J, although, on his suggestion that the concession merited reconsideration, was withdrawn before us that

> "The administration of the scheme by officials in the fees office under the supervision of a committee is also covered by Parliamentary privilege".

63. The appellants strongly urged that the Crown's position before Saunders J was correct, and that the concession should not have been withdrawn.

64. The concerns expressed by Saunders J on this point were based on a variety of considerations. He referred to the Report of the Joint Committee on Parliamentary Privilege (1999) where, at para 248, it was recorded that "It follows that management functions relating to the provision of services in either House are only exceptionally subject to privilege". It was countered that an examination of the context in which this observation was made reveals that at least some "management" issues did fall within the ambit of proceedings. Examples given in the same paragraph related to the members' pension fund and members' salaries. However it is plain that the Report, acknowledging that what it described as the boundary was not "tidy", accepted that there were exceptional situations which would be subject to privilege, which it identified. However no express reference was made to the expenses issue in the context of the exceptions, and in relation to the resolutions and orders which regulated the pension fund and salaries of members it was expressly asserted that "their implementation is not".

65. Saunders J also noted the opinion dated 9th September 2009 from the Clerk of the House to the Speaker recording that, although he accepted that the ACA expenses scheme arose from Resolutions in 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 its erection are "proceedings". Proceedings must imply, in the words of the Joint Committee on Parliamentary Privilege, "formal collegiate activities of Parliament"…it also seems to me to be pertinent to the consideration of claims…being protected that throughout the Houses 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". The opinion ends:

> "I cannot, on the face of it, see a direct enough connection between the workings of the ACA system and proceedings to warrant them being considered as matters covered by parliamentary Privilege".

66. It is suggested that in this opinion the writer does not express a view as to whether the payment of expenses is covered by parliamentary privilege. In our view however, the reservations expressed on the point by the Clerk of the House are unequivocal. As we shall see, we agree with them.

67. We were invited to consider the letter dated 2 March 2010 from the Clerk of the Committee to Mr Morley in relation to "payment of the resettlement grant" as providing support for the appellant's submissions on this question. However this letter was not directed to the question whether such grants fell within the ambit of "proceedings" covered by privilege.

68. Our attention was also drawn to the message to all Members of the House from the Estimate Committee dated 3 December 2009 informing members that they would be entitled to appeal against recommendations by Sir Thomas Legg in relation to repayments of expenses by individual members. It is argued that the process was created to make good the opportunity which, because of parliamentary privilege, would not be available at the behest of an individual member who wished to challenge these rulings. The Legg

Review was, as it seems to us, properly described as "internal proceedings" of the House, reflecting the way in which the House had decided to address what had become a notorious problem. It did not operate to bring the claims for expenses within the ambit of parliamentary privilege if, at the time when the claims were made, they did not fall within its ambit.

69. We have approached the withdrawal of the Crown's concession before Saunders J with caution, but we agree with the position it has now taken. 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.

70. We are fortified in this conclusion by the realities. Parliament is rightly jealous of any actual or potential infringement of its privileges. If there were parliamentary concern about a possible breach of privilege arising from a prosecution based on fraudulent claims for expenses by members, we have no doubt that formal steps would have been taken by the Speaker and Lord Speaker to raise the question with the court. As it is, we know from the evidence that the report by Sir Thomas Legg dated 1st February 2010 into the "second home allowance" that his terms of reference expressly prohibited him from dealing with any such cases where the member in question was under investigation before 20 July 2009 by the Parliamentary Commissioner for Standards, or at any stage by the police. In this process, the police were not acting as agents on behalf of the Speaker or Lord Speaker conducting inquiries on their behalf. They were performing their responsibilities of conducting investigations into evidence of possible crime.

71. This approach was entirely consistent with the Memorandum submitted by the Parliamentary Commissioner for Standards investigating complaints of misuse of his allowances by Mr Michael Trend, then a member of Parliament. In the report dated 13th February 2003 he recorded, at paragraph 46,

> "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 the prosecuting authorities, not for me…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. The members of Parliament are no less subject to the criminal law in this respect than anyone else…"

72. According to the 4th Report of Session 2009-10 of the House of Lords Committee for Privileges, following allegations in national newspaper of misuse by a member of Parliament of the Reimbursement Scheme, the Clerk of the Parliaments started an investigation into the allegation, which was suspended while the Metropolitan Police conducted their own investigations into whether a criminal offence had been committed. No question of privilege was raised. After the Crown Prosecution Service decided that the

member should not be prosecuted, the Clerk of the Parliaments resumed his investigation and referred the case to the Sub-Committee on Lords' Interests.

73. From the opinion of the Clerk of the House to Mr Speaker dated 9th September 2009, we know that in the event of any question of parliamentary privilege arising in any forthcoming trial, "the House would certainly be represented in any hearing on admissibility of evidence" and that the solicitor acting for at least one of the defendants was assured on 4 March 2010 that " the House reserves the right to intervene in any case before the courts, in order to prevent what it considers to be an inappropriate use of privileged material". In short, it is reasonable for us to anticipate that if the present proceedings were believed by Parliament itself to constitute a potential breach of privilege, that view would have been made known to the court. Although in our examination of the question whether parliamentary privilege arises we must make our own decision on the facts and the law, it is not without significance that on this issue of principle Parliament decided that it is not appropriate to intervene either in the context of the police investigation, or the decision of the Director of Public Prosecutions that there should be a prosecution, nor indeed in the context of the hearing before Saunders J and before us.

74. We must address some of the remaining submissions advanced on behalf of the defendants. While it can fairly be described as making a statement, the submission of a claim for expenses does not involve the member in question making a statement in, or to, either House or to a Committee of either House. If the procedure for making such claims required the member to stand up in the House, and address it, or address a Committee of members and/or peers, there would then be a serious question whether the words spoken, even if spoken dishonestly, would fall within the privileged ambit of article 9 in the context of freedom of speech, so as to preclude any challenge, or "question" of "impeaching" the claim in the criminal courts. But that does not assist these defendants, and we do not have to address it. Even if article 9, or some wider privilege, might render a particular statement immune from suit if made in either House or to a Committee of either House, it does not follow that the same statement should be immune from suit when made in different circumstances; the question is whether privilege attaches to the particular circumstances in which the "statement" is made, and whether those circumstances attract the privileges necessary for the proper functioning of Parliament.

75. 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.

76. More specifically, it seems to us that submitting a claim for expenses has nothing to do with "the need to ensure the member's entitlement to speak freely without fear"; nor does it involve the exercise of his or her "real" or "essential" functions or his or her "core activities". It is true that a member may need to spend money and recover expenses or allowances in order to perform these functions, but that does not render the incurring and claiming of expenses or allowances a core or essential activity of Parliament: indeed the incurring and claiming of expenses would be, as we have already suggested, classic

ancillary activities. If it were otherwise, a member travelling to and from Parliament might be thought to be immune from prosecution for dangerous driving, or evading payment for his rail ticket. In truth, it is impossible to see how subjecting dishonest claims for expenses to criminal investigation would offend against the rationale for parliamentary privilege, or obstruct any member of the House from performing his or her duties.

77. It was suggested on the defendants' behalf that the correct approach should be for privilege to attach to any dealing that a member might have with the House, in his capacity as such. That has its initial attraction, but on examination the consequences would be strange. Thus, for example, if a member were to assault an official of the Fees Office because his claim for expenses was refused or delayed, this would surely be ordinary crime which happened to be committed in Parliament by a member of Parliament: it would be an insult to Parliament to dignify it with some adjective or epithet which implied otherwise, or excuse it on the basis of parliamentary privilege. And, precisely the same principle would apply if the official of the Fees Office assaulted the member of the House. Violent actions by either would have nothing to do with the exercise by the member, or for that matter, the official, of his parliamentary responsibilities. 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 to the very same official.

78. It was further suggested that the expenses reimbursement system was set up, administered and closely regulated by parliament, and that its administration and decision-making processes should, as was conceded by the prosecution, be subject to parliamentary privilege. We have already addressed this concession, and its withdrawal. It was argued that it is impossible to fillet out the submission of a claim for expenses from the rest of the exercise and conclude that the claim alone is exempted from the principles of privilege. However this case is concerned, exclusively, with the submission of such claims. We are solely concerned with applications made by individual members. It was further submitted that, consistently with *Bradlaugh v Gossett* and *Re McGuinness*, 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. Therefore, although an attempt to seek judicial review of any decision of the Fees Office might be refused either on the ground of an alternative remedy, that is, the right to refer the matter to a parliamentary committee, whose decision in turn could not be challenged for reasons of parliamentary privilege, or additionally 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.

79. Some, albeit limited, reliance was also placed on the discussion about the register of members' interests in the report of the Joint Committee. It is hard to draw much assistance from the discussion because the report proceeds on the basis that it is an "area of uncertainty", and it is quite possible to treat an entry in the register as a formal statement direct to the House for what the Committee described as "the better conduct of its business". The same cannot be said about the expenses reimbursement scheme, where the claim by an individual member cannot sensibly be treated as a statement to the House, subject to privilege on the basis of freedom of speech or the proceedings of the House. In the end, while the system enables a member better to perform his duties, it is not directly concerned with the conduct of the business of the House or his responsibilities there: at the

very most, it is ancillary to them.

Conclusion

80. If we may respectfully say so, we are not in the least surprised that no attempt has been made by the Speaker or Lord Speaker to seek to intervene in these proceedings, nor even to draw the attention of the court to any potential difficulty in the context of parliamentary privilege, nor even to ask the court to reflect on the possibility that parliamentary privilege may be engaged.

81. 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. With the necessary exception in relation to the exercise of freedom of speech, it is difficult to envisage circumstances in which the performance of the core responsibilities of a member of Parliament might require or permit him or her to commit crime, or in which the commission of crime could form part of the proceedings in the House for the purposes of article 9 of the Bill of Rights. Equally we cannot discern from principle or authority that privilege or immunity in relation to such conduct may arise merely because the allegations are based on activities which have taken place "within the walls" of Parliament.

82. 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. In our judgment no question of privilege arises, and the ordinary process of the criminal justice system should take its normal course, unaffected by any groundless anxiety that they might constitute an infringement of the principles of parliamentary privilege.

83. The decision of Saunders J was correct. The appeals will be dismissed.

Reporting Restrictions

84. At the hearing before Saunders J, in a careful ruling reflecting the provisions of section 37 of the 1996 Act, he concluded that while his judgment should not be subject to reporting restrictions, the hearing itself, and therefore the submissions advanced to him should not be published. His judgment was widely reported. The precise terms of his order need no attention.

85. The same question was raised in the context of the present appeals against his decision. We addressed the question of reporting restrictions, and the extent to which, if any, the

statutory restrictions on reporting should be lifted on 29 June. We decided that there should be no such restrictions. These are our reasons.

86. Section 37 of the 1996 Act provides:

> "(1) Except as provided by this section—
>
> (a) no written report of proceedings falling within subsection
>
> (2) shall be published in Great Britain;
>
> (b) no report of proceedings falling within subsection (2) shall be included in a relevant programme for reception in Great Britain.
>
> (2) The following proceedings fall within this subsection—
>
> (a) a preparatory hearing;
>
> (b) an application for leave to appeal in relation to such a hearing;
>
> (c) an appeal in relation to such a hearing.
>
> (4) The Court of Appeal may order that subsection (1) shall not apply, or shall not apply to a specified extent, to a report of –
>
> (a) an appeal to the Court of Appeal under section 35(1) in relation to a preparatory hearing,
>
> (7) Where there are two or more and one or more of them objects to the making of an order under subsection (3), (4) or 5 the judge or the Court of Appeal or the [Supreme Court] shall make the order if (and only if) satisfied after hearing the representations of each of the accused that it is in the interests of justice to do so; and if the order is made it shall not apply to the extent that a report deals with any such objection or representation."

Subsections 8 and 9 disapply the provisions relating to reporting restrictions, but for the purposes of the present appeal their recital is unnecessary.

87. The critical statutory provision therefore is that no report of the proceedings, and these appeals in particular, should be made unless this court is satisfied, and only if it is satisfied, that it is in the interests of justice for the proceedings to be reported. The statutory prohibition, and the circumstances in which it may be lifted, are both expressed in unequivocal terms.

88. They derive from the relatively new concept of the preparatory hearing, introduced in serious or complex fraud cases by the Criminal Justice Act 1987. In effect, in an appropriate case, rulings of law, including rulings relating to the admissibility of evidence,

may be made before the case is opened to the jury. No one in the present appeals suggested that the extension of the preparatory hearing procedure under the 1996 Act did not or should not apply to the question raised before and addressed by Saunders J. Significantly, however, he was not examining the admissibility of evidence said by the Crown to establish that any of the appellants acted dishonestly. Indeed, as it seemed to us, none of the matters which would arise for consideration at any future trial had or could have had any bearing on our decision whether the principles of parliamentary privilege apply. In other words the appeals had nothing to do with any alleged dishonesty. They were confined to a narrow but important issue of constitutional law.

89. The position of the appellants was not identical. The three former members of Parliament objected to the making of any order: the member of the House of Lords took the same position, but with the important variation that if the reporting restrictions did not extend to the judgment, then it should be open to the media to publish the submissions advanced on his behalf. By the time the argument was advanced before us, the submissions on all sides addressed the practical reality that once the judgment of Saunders J had been given, the prospect of this court declining to permit publication of its own judgment was remote in the extreme. The essential argument related to publication of the arguments and submissions on behalf of the appellants and the Crown.

90. In their submissions before Saunders J and those advanced to us, close attention was paid to the media coverage of the broad issue of the expenses claimed by members of Parliament, with particular reference to these cases.

91. We studied all this material. We understand that if the appeals in relation to parliamentary privilege are not sustained, it will be submitted to Saunders J that the proceedings should be stopped in any event on the grounds that a fair trial cannot now take place. The issue of abuse of process was not before us for decision, and nothing in this judgment should be taken as an indication, either way, of any view that the court may have formed. In essence, however, it was submitted that following the press conference held by the Director of Public Prosecutions of 5 February 2010, there was a "wave of media reporting", which included coverage of comments by senior national political figures, in which, so it was argued, the appellants were criticised for the fact that the issue of Parliamentary privilege had arisen, and indeed that in reality they were guilty of these offences and, but for the parliamentary privilege issue, they were bereft of any defence. Complaint was also made that following the committal proceedings, a great deal of media reporting flouted the automatic reporting restrictions provided by section 8(1) of the Magistrates Court Act 1980. Another issue which attracted public criticism related to the successful applications by three of the defendants for Legal Aid. The material before us drew attention to letter columns in newspapers, coverage and comment away from what is described as the mainstream press, numerous Facebook threads, and Google searches.

92. All these matters, and we have summarised them in broad outline without giving specific examples, will no doubt be deployed at any abuse of process hearing. However they also formed part of the background in which we examined the contention that it would be contrary to the interests of justice for the restrictions on reporting of the proceedings in this court to be lifted.

93. Reliance was placed on the emphatic language used in the judgment of Griffiths LJ in *R v Leeds JJs ex p Sykes* [1983]1 WLR 132 at 134A-135B, in the context of section 8(2A) of the Magistrates Court Act 1980 (the 1980 Act), which prohibited the reporting of committal proceedings unless the court, and only if the court was satisfied that the interests of justice required it. He observed:

> "The position, prima facie, is that there is to be no reporting of committal proceedings…it is quite clear from the wording…that there is burden upon he who wishes the proceedings to be reported to satisfy the justices that it is in the interests of justice to do so. Colloquial, but easily understandable, and emphatic words are used".

He reflected that "the interests of justice incorporate as a paramount consideration that the defendants should have a fair trial…if the ground of objection is that the very reason that led Parliament to provide that, as a general rule, proceedings should not be reported, namely that there is a risk that the proceedings if the proceedings are widely reported, the reports may colour the views of the jury which ultimately has to try the case", then the ban on reporting should remain. The obvious correctness of this approach is beyond argument.

94. The provisions of section 37 of the 1996 Act differ from section 8(2A) of the 1980 Act, under consideration in ex parte *Sykes*. That said, however, both as a matter of first impression, and after careful reflection, whatever other consideration may arise, it is an inevitable consequence of statutory references to the interests of justice in the context of reporting restrictions of proposed criminal proceedings, that if the fairness of any subsequent trial would thereby be prejudiced, the restrictions on reporting should remain. And for present purposes we could see no distinction between the entitlement to a fair trial at common law, so vividly described by Lord Bingham of Cornhill CJ as the "birthright" of every citizen in this jurisdiction, and the provisions of Article 6 of the European Convention of Human Rights, which requires that any criminal trial should take place before an "independent and impartial tribunal".

95. There are equally well established principles, both at common law, and under the Convention, that criminal proceedings should normally take place in public, and that the media generally provides an essential element in the process by which open justice, and ultimately a fair trial, is secured. There is, however, a distinction between the criminal trial which, assuming it runs smoothly, results in a verdict, and if the defendant is convicted, sentence, and the arrangements relating to a preparatory hearing, which, whatever its outcome, does not culminate in a conviction and sentence. In that respect, it is similar to the committal proceedings in contemplation in the 1980 Act, and as such is part of the process by which the case is eventually heard by a jury.

96. On the other hand, while committal proceedings under the 1980 Act did not represent nor form part of the trial, at the Crown Court the preparatory hearing is part of the trial itself. That led us on to this further reflection, that in the course of any trial, submissions and argument on questions of law, such as admissibility of evidence, or whether there is a case to answer, are conducted in the absence of the jury and are never reported, at least until the trial is concluded. The reason is simple: if they were, the fairness of the trial process might

be impugned. In the end once the trial has concluded, the reporting restrictions no longer apply, so that the process of public disclosure of the arguments is merely postponed, not permanently banned.

97. These considerations help to explain the clear statutory restriction on reporting of the preparatory hearing, or any appeal arising from the decision in the preparatory hearing. The fairness of the trial before the jury is paramount. The obvious public importance of the issue of parliamentary privilege which will be addressed in these appeals does not and cannot represent such an overwhelming and unusual feature that it should, in effect, outweigh the statutory provisions. The imperative is a fair trial, and that imperative cannot be compromised.

98. All that said, we had no difficulty with the proposition that the issue of Parliamentary privilege, as it may apply in the present case, is of sufficient importance to require us to address the question whether the statutory prohibition on reporting should be lifted. Moreover, as we have said, it was highly significant that the arguments on the appeal, and the eventual judgment, had nothing whatever to do with any of the facts or evidence relied on by the prosecution or the defence on the dishonesty question. On the face of it there would be no need for anyone, in any of the appeals, on either side, or for that matter for the court, to examine the evidence bearing on the issue of dishonesty, or to make any observations about the evidence, at any rate, in any way which could or might affect the jury at trial. These proceedings relate to the nature and ambit of Parliamentary privilege, and nothing more. That is not a question which will ever be addressed by or arise for the decision of the jury.

99. So, taking the starting point as the statutory prohibition, we examined the concerns relating to the possible impact of the removal of reporting restrictions on any later trial based on what the appellants contended was the unfair reporting and comment which has attended these proceedings, effectively from the very outset. We understand these concerns, but we do not agree that there is any realistic prospect that a future trial might be prejudiced by the removal of reporting restrictions. If not, the public interest in the issue of principle raised in the appeal assumed significant importance.

100. We were informed that an open letter has been written on behalf of the large number of media organisations comprising most of the main television and print media in this country. We are assured that the media "have no desire to jeopardise the trial". They believe that there is a "genuine legitimate public interest in reporting the argument as it proceeds, and not merely the judgment". It is pointed out that since the concerns expressed by Saunders J about some previous publicity, the Attorney General issued guidance to the media on 7th June 2010, and that the judgment of Saunders J itself gave further directions to the media about the need to avoid prejudicial comment, and that there has been no direct criticism of the way in which the media covered Saunders J's judgment.

101. We have no power to prevent media reporting of the fact of this appeal, or of any of the specific matters identified in section 37(9) of the 1996 Act. Irresponsible reporting, prejudicial to the fair trial of the appellants, will be dealt with under the Contempt of Court Act 1984, and would, in any event, be deployed by counsel on behalf of the appellants as

additional material, reinforcing the submission that the publicity engendered by the case as a whole had damaged the prospects of a fair trial.

102. We satisfied ourselves that honest and responsible reporting of the proceedings, including the arguments and submissions on each side would not undermine the prospects of a fair trial of the issues to be resolved by the jury. As the issue in the appeals involves purely legal questions of importance to our constitutional arrangements, we concluded that the public interest required that reporting restrictions should be lifted, and that this could be safely ordered without any consequent diminution in the prospect of a fair trial. Accordingly we made the order.

103. The order was subject to two further considerations. First, if any counsel decided that it was appropriate or necessary for his submissions to address questions of fact or evidence which in due course would be considered by a trial jury, he could indicate it in advance, and we would consider whether to impose a temporary restriction on any reporting. In the event this did not arise. Second, we emphasised that the need for responsible reporting of the proceedings extended to the reporting of the ruling which we gave on 29th June.