Divisional Court has granted leave to appeal to the House of Lords on all issues raised in the application.

The appeal to the House will not be the only occasion on which the spotlight is cast on the reverse onus provisions of U.K. law as a challenge to the confiscation sections of the Drug Trafficking Act 1994 is presently before the European Commission (*Phillips* v. *United Kingdom* (41087/98)). However, their Lordships' decision will provide an early and revealing indicator of the extent of judicial ambitions in this area.

IVAN HARE

PARLIAMENTARY PRIVILEGE AND DEFAMATION

IN the past five years, the conceptual ambiguities of Parliamentary privilege have come to haunt the courts with a vengeance. Ancient constitutional questions such as what constitutes a "proceeding" in Parliament and what counts as "questioning" a proceeding—encapsulated in colourful nineteenth-century cases like *Stockdale* v. *Hansard* (1839) 9 Ad. & E. 1, the *Case of the Sheriff of Middlesex* (1840) 11 Ad. & E. 273, and *Bradlaugh* v. *Gossett* (1884) 12 Q.B.D. 271—have been at the forefront of a clutch of recent decisions. In *Prebble* v. *Television New Zealand* [1995] 1 A.C. 321, the Privy Council gave new bite to Parliamentary privilege by ruling (in relation to the New Zealand Parliament) that it would be an abuse of both Article 9 of the 1689 Bill of Rights—which prohibits courts from questioning the freedom of speech and debates or proceedings in Parliament—and of a broader principle of mutuality of respect between Parliament and the judiciary, to allow any party to litigation to "bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading" (above, at 337). As a result, domestic courts stayed two libel actions brought by Members of Parliament, on the basis that the claims and defences involved raised issues whose investigation would infringe Parliamentary privilege (see, *e.g.*, *Allason* v. *Haines, The Times*, 25 July 1995). Parliament responded by enacting section 13 of the Defamation Act 1996, allowing individual MPs to waive Parliamentary privilege in order to bring defamation actions. But in an apparent reassertion of the spirit of *Prebble*, the Court of Appeal expressly approved—albeit outside the context of defamation—the Privy Council's wide definition of privilege as a matter of domestic law (*R.* v. *Parliamentary Commissioner for Standards, ex p. Fayed* [1998] 1 W.L.R. 669, noted [1998] C.L.J. 6).

The Court of Appeal has now considered—in *Hamilton* v. *Fayed* [1999] 3 All E.R. 317—the implications of *Prebble* for defamation actions, given the subsequent enactment of section 13. The case arose from the infamous

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"cash for questions" saga. The defendant alleged that the plaintiff, a former MP, had sought and accepted money, gifts and hospitality from him in return for asking particular questions in Parliament. The plaintiff's original libel action—against the newspaper which first published the defendant's allegations—was one of the two which were stayed after *Prebble*. The action was restarted after the passage of section 13, but later collapsed. After the defendant repeated his allegations in a television programme, the plaintiff sought to bring a fresh action, but in the meantime the Parliamentary Commissioner for Standards and the Committee of Standards and Privileges (the Parliamentary Standing Committee which oversees the Commissioner's investigations) had accepted that many of the defendant's allegations were made out. Giving judgment for the Court of Appeal, Lord Woolf M.R. asserted that "[t]he key question" was thus whether a current or former Member of Parliament could bring defamation proceedings in respect of statements made concerning their activities and conduct as an MP, when the Commissioner and Committee had already considered the matter.

Essentially, the Court of Appeal maintained the *Prebble* approach to what constitutes a "proceeding", but took a more restrictive view of when a proceeding is "questioned". Lord Woolf M.R. had already concluded in *R.* v. *Parliamentary Commissioner for Standards, ex p. Fayed* (above) that the work of the Commissioner fell within the scope of "proceedings" in Parliament, and confirmed in *Hamilton* v. *Fayed* that both the Commissioner's inquiries *and* the hearings and reports of the Committee did so—whether under Article 9 or the wider principle of mutuality of respect identified in *Prebble*. However, the airing in a libel action of matters considered by the Commissioner did not *necessarily* entail any "questioning" of those proceedings. Lord Woolf M.R. suggested that Article 9

> goes only to prohibit (a) the attachment by the courts of any form of legal penalty to a member of Parliament (or, no doubt, any person taking part in proceedings in Parliament) for anything said in Parliament, and (b) direct criticism by the courts of anything said or done in the course of parliamentary proceedings.

Courts could not criticise the procedures adopted by the Commissioner for Standards, but provided that a libel action did not entail criticism, it was not prohibited by Article 9.

Lord Woolf suggested that the wider principle from *Prebble* should be understood as meaning that "the courts will not challenge or assault, by any order of their own, an assertion of authority issued by Parliament pursuant to Parliament's own procedures". This flowed from judicial recognition of Parliament's legislative sovereignty, and prohibited courts from challenging the actions of the Commissioner and Committee—for example by making an order striking down their conclusions, or by attaching legal

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sanctions to them. But a court could, without challenging Parliament, hear the plaintiff's case and arrive at a different assessment of the factual merits of the defendant's allegations. It should only refuse to hear the plaintiff's claim if it would undermine Parliament's authority for it to arrive at a result that was inconsistent with the Commissioner's conclusions. In the present context, there was no evidence that the plaintiff's libel action threatened Parliament's authority. In addition, section 13 conclusively favoured the plaintiff's right to bring a libel action. The fact that the Commissioner and Committee had investigated the plaintiff's conduct did not affect his ability to waive privilege by invoking section 13, the policy of which was to allow "such defamation claims as this to be brought irrespective of the demands of parliamentary privilege".

Hence, while *Prebble* stipulated that reliance in a defamation action on matters falling within the scope of Parliamentary privilege *automatically* violates Article 9 and the wider principle, *Hamilton* v. *Fayed* requires the possibility of violation to be established on a case-by-case basis—with *certain* actions being allowed to proceed. In reality, it is hard to see how the Court of Appeal could have arrived at a different conclusion given the policy of section 13. Unfortunately, the court was required to interpret the *Prebble* reasoning as supporting a conclusion which is entirely inconsistent with *Prebble* (and with previous domestic interpretations of the case) on its facts. This begs the question—which only the House of Lords can answer—whether *Prebble* can continue to be seen as strong authority for English courts, given the existence of section 13. A still deeper question—to which section 13 provides no answer—relates to the circumstances in which politicians should be able to sue in defamation *quite apart* from the rules of Parliamentary privilege, given current judicial concern to protect freedom of expression (an issue in relation to which there is sharp divergence in the cases: *cf. Derbyshire County Council* v. *Times Newspapers* [1993] A.C. 534; *Goldsmith* v. *Bhoyrul* [1998] Q.B. 459; *Lange* v. *Australian Broadcasting Corporation* (1997) 145 A.L.R. 96; *Reynolds* v. *Times Newspapers* [1998] 3 W.L.R. 862). It is to be hoped that the House of Lords will soon have the chance to clarify these matters.

NICHOLAS BAMFORTH

RESCISSION OF SETTLEMENT FOR MISTAKE AND NON-DISCLOSURE

MR. Naeem and Mr. Mohammad ("the plaintiffs") were employed by the Bank of Credit and Commerce International SA ("B.C.C.I."). They were made compulsorily redundant in 1990. In 1998, the plaintiffs, seeking to take advantage of the decision of the House of Lords in *Malik* v. *B.C.C.I.* [1997] 3 All E.R. 1, sued B.C.C.I. for "stigma damages"—damages designed to compensate the plaintiffs for the difficulties they had experi-

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