offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". It follows that if the common law offence is sufficiently uncertain that it is unclear whether the defendant had committed a crime at the time of acting or failing to act, then the defendant should not be convicted. The inherent fluidity of the common law offences may be inconsistent with human rights jurisprudence, and the solution will probably have to be their replacement by statutory offences which identify the ambit of the crime with greater precision. This might be particularly necessary in the tax context to prevent the offence of cheating the public revenue from becoming unworkable

GRAHAM VIRGO

ANTISUIT INJUNCTIONS AND THE BRUSSELS CONVENTION

THE law concerning antisuit injunctions continues to develop, albeit in a conceptually unsatisfying, piecemeal fashion. English courts are increasingly concerned about the problem of extraterritoriality—witness Lord Goff's strictures about comity in *Airbus Industrie GIE* v. *Patel* [1998] 1 W.L.R. 686 (H.L.). But their cautious language conceals a readiness to grant relief in novel situations. A recent example is *Turner* v. *Grovit* [1999] 3 All E.R. 616, where, in the course of proceedings for constructive dismissal brought by Mr. Turner before an English employment tribunal, his employers sued him in Spain for repudiating his contract of employment. The Court of Appeal unhesitatingly restrained the Spanish proceedings. They were an abuse of process, intended solely to vex Mr. Grovit in the pursuit of his claim before the employment tribunal.

This approach is sound in principle:

(1) There is authority that English courts can restrain foreign proceedings that interfere with the process of the English court. Relief is justified, for example, where a defendant is sued abroad for properly providing evidence in English proceedings (*Bank of Tokyo* v. *Karoon* [1986] 3 W.L.R. 414, C.A.), or where foreign proceedings otherwise undermine an English court's control of its own procedure: *South Carolina Insurance Co.* v. *Assurantie Maatschappij "de Zeven Provincien" NV* [1986] 3 W.L.R. 398 (H.L.).

(2) The principle of comity is not infringed. A persistent complaint against antisuit injunctions is that foreign courts should regulate their own proceedings. But, whatever its strength

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elsewhere, this charge is irrelevant where such proceedings are an abuse of *English* process, an issue uniquely within an English court's province. Relief is granted because the foreign proceedings harass a party before the English court who is entitled to its protection, not because they are vexatious *per se*.

(3) To rely upon abuse of process is no challenge to the Brussels Convention, which leaves intact the procedural rules of contracting States: *Kongress Agentur Hagen GmbH* v. *Zeehaghe BV* [1990] E.C.R. I-1860 (E.C.J.). The Convention is concerned with jurisdiction, not with the vexatious conduct of litigants; with competence, not with due process.

But the decision in *Turner* is problematic nonetheless. Why, for example, was abuse of English process relied upon at all? Unless used to enforce English jurisdiction agreements, antisuit injunctions are normally granted if foreign proceedings are in themselves vexatious or oppressive, a principle famously articulated in *SNI Aérospatiale* v. *Lee Kui Jak* [1987] A.C. 871 (P.C.). This principle was not relied upon in *Turner*, perhaps because it operates only if the English court is the natural forum, a possibly inappropriate requirement in cases involving the Brussels Convention, given that the allocation of jurisdiction under the Convention does not depend upon the doctrine of *forum non conveniens*. But the Court of Appeal raised no such objection in similar circumstances in *Fort Dodge Animal Health Ltd.* v. *Akzo Nobel NV* [1998] F.S.R. 222. And *Aérospatiale* could presumably have applied in *Turner* on the basis that the English court, having sole competence under the Convention, was automatically the appropriate forum.

Again, was the Court of Appeal truly concerned with whether the Spanish proceedings were an abuse of *English* process? The telling reference to *Lonrho plc* v. *Fayed (No. 5)* [1993] 1 W.L.R. 1489 suggests that the true basis of the court's approach is that foreign proceedings not brought *bona fide* are an abuse of process whatever their impact on English proceedings. Certainly, the judgment is concerned more with whether the Spanish action was itself vexatious than with the integrity of the parallel English proceedings. This recalls the approach adopted in *Aérospatiale*, on which, conspicuously, the applicant had not relied. Indeed, it is tempting to see the reliance upon abuse of process in *Turner* as something of a disguise, as a vehicle for introducing *Aérospatiale* principles indirectly into a case involving the Brussels Convention, appropriately shorn of the problematic requirement that the English court should be the natural forum.

Of greater concern, the court accepted without pause that relief was also justified because the Spanish court had misapplied the

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Brussels Convention by wrongly assuming jurisdiction, the English courts being first seised under Article 21. This is plausible where the English court has jurisdiction under Article 16, as in *Fort Dodge*, and defensible, if suspect, in cases involving Article 17: *Continental Bank NA* v. *Aeokos* [1994] 1 W.L.R. 588. But otherwise such intervention offends the principle that only a court whose jurisdiction is invoked may determine its competence under the Convention. Although dismissed without explanation in *Turner*, this principle was clearly articulated by the Court of Justice in *Overseas Union Insurance Ltd.* v. *New Hampshire Insurance Co.* [1991] E.C.R. I-5439. It is also reflected in Article 28, which forbids a court from denying recognition to judgments given in breach of the Convention's rules of jurisdiction, implying that foreign courts alone are entitled to determine their competence.

Turner also provokes unease in more general ways. Perplexingly, Laws L.J. describes the English court's jurisdiction in *Turner* as "exclusive", although it depended not on Article 16, or on Article 17, but on Article 2. A mere solecism, perhaps. But did the Court of Appeal really suppose that the employment tribunal had exclusive jurisdiction *sensu stricto*, as in *Continental Bank*? If so, its approach to jurisdiction is seriously flawed—although it also becomes more explicable.

More remarkably, no consideration was apparently given in *Turner* to several arguments, and much relevant material, upon which the outcome surely depended. There is no reference to Article 28, nor to the decisions in *South Carolina Insurance*, *Karoon* or *Fort Dodge*, nor, more surprisingly, to the European Court decisions in *Kongress Agentur* and *Overseas Union Insurance*. True, the Court of Appeal's conclusions concerning abuse of process are probably correct (although for stronger reasons than those provided), and the overall result may be unaffected. But the questions in *Turner* v. *Grovit* were more controversial, and the answers more readily discernible in authority, than the Court of Appeal apparently assumed. It is certainly striking that such an important decision rests on such insecure foundations.

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LEGAL ADVICE PRIVILEGE: A MATTER OF SUBSTANCE

THE doctrine of legal professional privilege comprises two categories. The first, "legal advice" privilege, protects communications between client and lawyer for the purpose of

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