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.

RICHARD FENTIMAN

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

eliciting or giving legal advice. The second category, known as "litigation" privilege, concerns communications between a lawyer and a non-party, or a client and a non-party, if made predominantly in respect of litigation, criminal or civil, whether pending or contemplated, and whether in England or elsewhere. An example of this second category is a confidential "sounding" by a client or lawyer of a potential witness.

General Mediterranean Holdings S.A. v. *Patel* [1999] 3 All E.R. 673 (Toulson J.) concerns only the legal advice category. This litigation concerned GMH's acquisition of shares in companies owned by Patel. GMH alleged that Patel had fabricated an appearance of financial buoyancy ("the bills of exchange scam"). Patel, who was advised by M, a firm of solicitors, denied this. However, just before trial, Patel admitted the fraud and the case then settled. GMH applied for a wasted costs order of £500,000 against Patel's solicitors.

The solicitors, anxious to avoid this burden, contended that a new rule allowed them to disclose to the court details of privileged material passing between them and its client, Patel, during a criminal investigation of the bills of exchange scam. This rule, appearing in Civil Procedure Rules 1998 ("C.P.R."), Part 48, r. 7(3)), states:

> For the purposes of this rule, the court may direct that privileged documents are to be disclosed to the court and, if the court so directs, to the other party to the application for an order.

However, M's attempt to divulge privileged secrets was opposed both by Patel and by the Law Society, which intervened in the litigation. Toulson J. agreed with these objections. He held that the new rule is invalid because it lies beyond the delegated law-making powers conferred upon the Rule Committee by the Civil Procedure Act 1997.

Under this Act, the new Rule Committee's law-making powers include rules which "modify the rules of evidence as they apply to [civil] proceedings" (schedule 1, paragraph 4). The former Supreme Court Rule Committee's competence was confined to matters of "practice and procedure". In *Re Grosvenor Hotel (No. 2)* [1965] Ch. 1210, C.A., Lord Denning M.R. and Salmon L.J. held that "practice and procedure" did not include matters of "evidence", or *a fortiori* matters of substantive law.

The 1997 Act's promoters miscalculated if they hoped that the additional phrase "modify the rules of evidence" would enable the Rule Committee to tinker with the various privileges, including

legal advice privilege. The distinction between substantive law and adjectival law (procedure and evidence) was emphasised in the *Grosvenor* case, which concerned public interest immunity, formerly known as "Crown Privilege". Salmon L.J. thought that this privilege involves not just matters of "evidence" but also of "substantive law". This *dictum* served as a warning that the Rule Committee, even brandishing its slightly widened powers contained in the 1997 Act, would be overstretching itself if it ventured to override legal advice privilege, as by enacting C.P.R. 48.7 (3), quoted above.

Toulson J. held that legal advice privilege has a substantive application because it creates a tie of confidentiality between lawyer and client, an equitable obligation which can be remedied by injunction and damages. This is illustrated by the recent discussion of injunctions to prevent lawyers from acting in litigation against former clients, and of the imperfection of "Chinese Walls", in *H.R.H. Prince Jefri Bolkiah* v. *KPMG* [1999] 2 W.L.R. 215, 225, H.L., *per* Lord Millett, noted by T. Petch, [1999] C.L.J. 485. Indeed, three Commonwealth supreme courts have also noted the substantive dimension of the legal advice privilege: the House of Lords in *R.* v. *Derby Magistrates' Court, ex p. B* [1996] A.C. 487, 507; the High Court of Australia in *Carter* v. *Northmore Hale Davy & Leake* (1995) 183 C.L.R. 121, 132, 159–160; and the Supreme Court of Canada in *Descoteaux* v. *Mierzwinski* (1982) 141 D.L.R. (3d.) 590, 601–603. These decisions go further and emphasise that a client's right to consult a lawyer regarding his or her legal rights is a fundamental aspect of justice.

Toulson J. noted that the fundamental nature of confidential legal consultation is recognised by both the European Court of Justice and the European Court of Human Rights (*A.M. & S. Europe Ltd.* v. *Commission of the European Communities* (Case 155/79) [1982] E.C.R. 1575, 1610–1613; *Silver* v. *U.K.* (1983) 5 E.H.R.R. 347, *Campbell* v. *U.K.* (1992) 15 E.H.R.R. 137, and *Niemietz* v. *Germany* (1992) 16 E.H.R.R. 97).

Finally, the judge considered some rules of construction. He noted the rule that, in the absence of express language or necessary implication, general legislative words do not derogate from fundamental rights of the common law (p. 691, citing *R.* v. *Secretary of State for the Home Department, ex p. Simms* [1999] 3 W.L.R. 328, 341, H.L.). This rule of construction is applied with special vigour when the primary statute contains general words which delegate to a Minister or statutory body a power to promulgate secondary legislation (p. 692, citing *R* v. *Secretary of State for the Home Department, ex p. Leech* [1994] Q.B. 198, 211–

212, C.A.). There is also a strong presumption against Parliament intending a statute to operate to impair an existing substantive right (*ibid.*, noting Bennion, *Statutory Interpretation* (3rd edn., 1997), pp. 235–242).

A final point concerns litigation privilege. Toulson J. was not directly concerned with that second species of legal professional privilege, although he discussed it briefly (pp. 693G–694C). Could the Rule Committee lawfully introduce a rule requiring a party to disclose even unused witness material or expert reports (*cf.* the ominous comments of Scott V.-C. in *Secretary of State for Trade & Industry* v. *Baker* [1998] Ch. 356, 363–364, 366–370, C.A.)? This is hardly an instance of a fundamental right. But is it decisive that the communication is confidential? The point might prove a nice one.

N.H. Andrews

PROCEDURAL ANOMALIES

For centuries, English criminal procedure regarded the "surprise witness" as a legitimate weapon, for the prosecution as well as the defence. In a case in 1823 Park J. complained that the defendant had seen the depositions in advance of trial. "The prosecutor or his solicitor might have access to them, but not the party accused. For what would be the consequence if the latter had access to them? Why, that he would know everything which was to be produced in evidence against him—an advantage which it was never intended should be extended towards him ..." (J.F. Stephen, *History of the Criminal Law of England* (1883), vol. I, p. 228).

During the nineteenth century this attitude changed, to the extent that the defendant acquired the right to advance notice of the evidence the prosecution proposed to call against him in cases that were to be tried on indictment. However, this change did not apply to summary trial in the magistrates' courts, where the prosecutor could still spring evidential surprises on him.

This mattered little in the days when summary trial was reserved for truly trivial cases, but as the jurisdiction of the magistrates' court was gradually extended, so it began to matter more. During the 1970s and 1980s, there was public pressure to extend "advance disclosure" to summary trial. To this the Government reluctantly gave way, in 1977 promoting legislation that eventually led to the Magistrates' Courts (Advance Information) Rules 1985, which are still in force. These give the magistrates' court defendant some