

A Ting Lei Miao Respondent
and
Chen Li Hung & Others Appellants

B
(Court of Appeal)
(Civil Appeal No 178 of 1997)

C
Mortimer V-P, Godfrey and Rogers JJA
25-27 February and 2 July 1998

D *Conflict of laws — bankruptcy — trustees in bankruptcy — suing for debtors' movables in Hong Kong courts — trustees recognised if foreign order provided for extra-territorial effect — if foreign law provided that trustees had right to sue in their own names, then trustees had right of action to sue in Hong Kong*

E *Public international law — non-recognition by sovereign of government of domestic province — PRC sovereign did not recognise Taiwanese government — consequences — limited range of acts, those necessary for peace and good order among citizens of Taiwan still recognised — whether rights of trustees in bankruptcy appointed by Taiwanese court to sue for movables situate in Hong Kong recognised*

F 法律衝突——破產——破產管理人——在香港法院就債務人的動產提出訴訟——若外地命令訂定命令在外地亦有效力則管理人獲承認——若外地法律規定管理人可以本人名義提出訴訟，則管理人在香港有訴訟權

G 公共國際法——主權國不承認國內省份的政府——中國大陸不承認台灣政府——後果——仍然承認部分行為，即為社會安寧及台灣市民有良好秩序所需的行為——是否承認台灣法院委任的破產管理人就香港的動產提出訴訟的權利

H P was adjudged bankrupt by a Taiwanese court and Ts were appointed trustees in bankruptcy (the bankruptcy order). P commenced an action in Hong Kong against Ds, the registered owner of Hong Kong shares, claiming that the shares were held on trust for him; and for a transfer of the shares to him. Ts applied to be joined as plaintiffs. It was ordered that before this application be resolved preliminary issues, I such as whether the bankruptcy order should be recognised and given effect to; and whether the bankruptcy order should be recognised as having effect over P's assets in Hong Kong, be tried. The Judge giving judgment before 1 July 1997, ruled that as the United Kingdom did not recognise Taiwan, either *de jure* or *de facto*, the bankruptcy order would not be recognised. Ds appealed raising two J issues. First, whether trustees in bankruptcy appointed by a foreign state and suing for debtors' movables, were recognised by Hong Kong courts. Following the handover, the sovereign was no longer the United Kingdom but the PRC and Taiwan no longer a foreign country but a domestic province of the PRC with a

government not recognised by the PRC. Therefore given that the issue of the recognition of Taiwan now had to be approached afresh, the second issue raised was, whether in spite of the non-recognition by the PRC of the Taiwanese government and courts, could Hong Kong courts give effect to orders of Taiwanese courts, specifically in this case, a bankruptcy order.

Held, allowing the appeal by a majority (Rogers JA dissenting) that:
Rights of trustees in bankruptcy for debtors' movables in Hong Kong

- (1) The general rule was that trustees in bankruptcy appointed by a foreign court were recognised by the Hong Kong courts at common law provided that the judgment of the foreign court had extra-territorial effect and the foreign order gave the trustees in bankruptcy right over the bankrupt's movable assets (Dicey & Morris, *Conflict of Laws*, (12th ed.), rr.167, 169). (See pp.129C-I, 136F-G.)
- (2) This was notwithstanding that the foreign insolvency proceedings might be of a very different nature from those in Hong Kong and that a decree in such proceedings could not be equated with a foreign judgment. (See p.136G-H.)
- (3) Even though under the relevant foreign law the bankrupt's property might not have been vested in the foreign trustees in bankruptcy, if such trustees had a right to sue in their own names for choses in action due to the bankrupt, that gave them a right which Hong Kong, by the comity of nations would treat as though it were a right of action at common law (*Alivon v Furnival* (1834) 1 Cr M & R 277 and *Macaulay v Guaranty Trust Co of New York* (1927) 44 TLR 99 followed). (See pp.130B-H, 136H-137A.)
- (4) Here, on the expert evidence the bankruptcy order had extra-territorial effect and under Taiwanese law, Ts had the right to sue for P's shares in Hong Kong. Therefore the Court would recognise the right of Ts to prosecute their claim in Hong Kong. (See pp.129I-130A, 137B-C.)
- (5) (*Per Rogers JA dissenting*) On the expert evidence the bankruptcy order did not cover assets outside Taiwan. Further, the basis of recognising the right of the trustees to sue was comity of nations and there was no scope for the application of comity in respect of the Taiwanese government, a government exercising power in defiance of the sovereign. (See pp.146B-H, 149A-150J.)

Effect of non-recognition of Taiwan

- (6) There was a common law principle that a limited range of acts by those actually in control of a territory but without any lawful validity or authority, might be recognised and acted upon by the Hong Kong courts in the interests of common sense and justice, provided that the relevant acts did not directly help the usurper, were not contrary to public policy, and were not inimical to the rights of the lawful sovereign. This was on the basis that where a lawful sovereign was ousted for the time being by a usurper, the sovereign still remained under a duty to do all he could to preserve law and order within that territory; and, as he could not do it himself, an implied mandate was given to his subjects to do what was necessary for

- A the maintenance of law and order. The limited range of acts were those acts necessary to peace and good order among citizens, such as acts sanctioning and protecting marriage and the domestic relations, acts governing the course of descents and acts regulating the conveyance and transfer of real and personal property (*Texas v White* (1868) 7 Wallace 700 (74 US), *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, *Re James (an insolvent) (A-G intervening)* [1977] Ch 41 and *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] 1 QB 205 considered). (See pp.131C-134J, 137C-I.)
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- C (7) A recognition of the rights of the trustees in bankruptcy appointed by the Taiwanese court to sue for movables situate in Hong Kong which were part of P's estate accorded with common sense and justice, and provided a necessary remedy for the creditors. Such recognition was not contrary to public policy and did not involve any recognition of the legality of the Taiwanese courts. Nor was it in any way inimical to the interests of the sovereign power. (See pp.135A-C, 137I-138B.)
- D (8) (*Per Rogers JA dissenting*) A clear distinction had to be drawn between recognising the existence of a state of affairs, eg the marital status of a person or the ownership of goods on the one hand and recognising and giving effect to an order of a foreign unrecognised court, particularly where recognition entitled trustees acting under the direction of that court to bring proceedings in Hong Kong. (See p.144C-F.)
- E (9) (*Per Rogers JA dissenting*) If the Court were to give effect to the bankruptcy order, it would unwittingly become part of the judicial process of Taiwan, namely the process of administration of assets in what was in effect a rebel territory under the control of a court of the rebel government. (See p.147A-C.)
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- G Mr Benjamin Yu SC and Mr Godfrey WH Lam, instructed by Lau, Chan & Ko, for the appellants.
Mr Ronny KW Tong SC and Mr KL Lui, instructed by Philip Pang & Co, for the first respondent.
- H Mr Denis KL Chang SC and Mr Erik Sze Man Shum, instructed by Stevenson Wong & Lai, for the second respondent.
Mr Charles PT Chiu, instructed by J Chan, Yip, So & Partners, for the third respondent.

Legislation mentioned in the judgment:

Basic Law of the Hong Kong Special Administrative Region art.19, art.19 para.3
Bankruptcy Ordinance (Cap.6) s.58
Rules of the High Court (Cap.4, Sub.Leg.) O.14A, O.33 r.3

Cases cited in the judgment:

Adams v Adams [1971] P 188
Alivon v Furnival (1834) 1 Cr M & R 277

Carl Zeiss Stiftung v Rayner & Keeler (No 2) [1967] 1 AC 853
 Folliot v Ogden 1 Hy B1 123
 Galbraith v Grimshaw [1910] AC 508
 Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd [1978] 1 QB 205
 James (an insolvent) (A-G intervening), Re [1977] Ch 41
 Macaulay v Guaranty Trust Co of New York (1927) 44 TLR 99
 Madzimbamuto v Lardner-Burke [1969] 1 AC 645
 Solomons v Ross (1764) 1 Hy B1 131n
 Somalia v Woodhouse [1993] QB 54
 Texas & White (1868) 7 Wallace 700 (74 US)

Other materials mentioned in the judgment:

Dicey & Morris, *The Conflict of Laws* (12th ed.) r.167(2), r.169 at p.1175
 Grotius, *War and Peace* (De Jure Belli ac Pacis, Bk 1 Ch 1 Sect IV)
 General Assembly, 52nd Session, Supplement No 17 (A/52/1 Annex 1)
 (UNCITRAL Year Book, Vol. XXVIII: 1997, Pt.3)

Mortimer V-P:

This is an appeal against orders of Patrick Chan J (as he then was) on 27 June 1997. He held that two preliminary issues should be answered in the negative.

The Background

I take the background from the judgment below. On 20 October 1990, the plaintiff, former President of the Fortune Group of Companies in Taiwan was adjudged bankrupt by the Taipei District Court. He and his companies were insolvent. By the same order, the appellants – four Taiwanese attorneys in law – were appointed trustees in bankruptcy.

On 2 August 1991 the present action was commenced by the trustees but in the name of the plaintiff. It is alleged that the plaintiff is the registered owner of 3,500,000 out of 5,000,000 issued and fully paid-up shares in Hotel Nikko Hong Kong Ltd. Another 1,250,000 shares paid for by the plaintiff but registered in the name of either the first or the second defendant are alleged to be held in trust for the plaintiff.

The action is contested and has reached the discovery stage.

On 6 May 1993 the trustees in bankruptcy commenced proceedings against the first defendant in the Taipei District Court for the return of 1,000,000 shares registered in her name. The Taipei District Court gave judgment in favour of the trustees. The first defendant appealed to the Taiwan High Court the appeal was dismissed. She then appealed to the Taiwan Supreme Court. There her appeal was allowed and the case was remitted to the Taipei District Court for a further hearing. She failed to attend the further hearing with the result that her appeal was dismissed. In Taiwan therefore the judgment in favour of the trustees stands, all avenues of appeal having been exhausted.

Events leading to the trial of the preliminary issues began on 6 October 1995. An application was made to amend the writ by adding the trustees in

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A bankruptcy as plaintiffs. This and an earlier application under O.14A for the determination of a question of law by the plaintiff were adjourned for argument.

In the meantime, however, the plaintiff had a change of heart and wished to take over the conduct of the action himself with the consequence that on 11 December 1995 the trustees in bankruptcy applied for leave to intervene to be joined as plaintiffs in the action, and for an order that they, in their capacity as trustees in bankruptcy, should have the conduct of the proceedings.

The summons of 11 December 1995 came before Leonard J in June 1996. He ordered four preliminary issues to be determined under O.33 r.3 but with two of these to be tried first. They were the subject of the trial below.

The preliminary issues

D The two issues for our consideration are:

- (a) whether in all the circumstances of this case, this Honourable Court should recognise and give effect to the Order of the Taipei District Court dated 20 October 1990;
- (b) whether in all the circumstances of this case, this Honourable Court should recognise the said Order of Taipei District Court as having effect over the assets of Ting Lei Miao situated in Hong Kong.

F The order of the Taiwanese Court

The order of the Taipei District Court dated 20 October 1990 (Exhibit KCC-1) is before us. The effect of the order was that the plaintiff Ting Lei Miao was adjudged bankrupt and the four appellants were "elected" the trustees in bankruptcy. Later, the trustees in bankruptcy took proceedings in the Taipei District Court for the recovery of one million shares in the Nikko Hotel - the subject of the present proceedings. On 14 March 1994 judgment was given in their favour in the following terms:

The defendant shall deliver as shown in the schedule the share certificate (serial number of the certificate is 32) for one million shares of the Hong Kong Company Hotel Nikko Hong Kong Ltd to the plaintiffs and shall assist in the registration of transfer of the shares to the plaintiffs.

The significance of that order in these proceedings is that the Taipei court implicitly recognises the right of the trustees in bankruptcy to the debtors' movables outside Taiwan.

The hearing below

Patrick Chan J (as he then was) gave judgment before 1 July 1997. He was assisted by a certificate from the Foreign & Commonwealth Office on the

recognition accorded by the United Kingdom Government to Taiwan. The Judge was of the view that:

The British attitude as indicated in the certificate is the same as that taken by the government of the People's Republic of China. Hence the impending transfer of sovereignty on 1 July 1997 would not make any difference. Furthermore, a statement by the Chief Justice and President of the Supreme People's Court in China, Mr Ren Jian Xin, showed that there is a tendency of the PRC to recognise the civil activities and rights of Taiwanese residents according to the regulations of the Taiwan region as having factual validity.

This may be so. But the certificate is no longer relevant to any decision made by this Court after the handover. It follows that if the recognition of Taiwan or its courts is fundamental to our decision, the court must address relevant questions to the Chief Executive. His answer is conclusive on the question of recognition of a foreign entity. *A fortiori* it must be conclusive upon the recognition or otherwise of a rebel administration presently in control of a province of the PRC. It is a fundamental principle that the courts and the executive must speak with one voice upon such matters. Initially, therefore, it is for this Court to decide whether it is necessary in order to resolve the issues in this appeal to make appropriate enquiries of the executive. No counsel has submitted that it is necessary to make those enquiries but should we not agree they have assisted by providing suggested draft questions.

Is it necessary to address questions to the Chief Executive?

The Basic Law of the Hong Kong Special Administrative Region provides by art.19 para.3:

The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over actions of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

The question is, therefore, whether any "such questions arise in the adjudication" of this case. If they do, the appeal must be adjourned for the necessary enquiries. As Taiwan is a province of the PRC, foreign affairs are not involved. Further, this case does not concern defence in any way. However, the recognition of a rebel government in control of national territory is a matter for the executive at common law whether or not this is provided for in the Basic Law. In consequence I would hold that if recognition of the Taiwanese court – contrasted

A with giving effect to an order of that court – is essential to our decision questions must be addressed to the Chief Executive.

B Only if this appeal can be determined on a worst case scenario should we undertake an adjudication. Initially I would approach this appeal, therefore, on the basis that Taiwan is a province of the PRC presently under the control of a rebel government without recognition of any kind.

C *If the trustees in this case had been appointed by a court in a foreign state recognised by the PRC, could they sue for the debtors' movables in the HKSAR courts?*

D I pose this question for primary consideration because if the answer to this is no, that is an end of the appeal. If the answer is yes, initial issues concerning the effect of the orders of the Taiwanese courts will be resolved.

E The relevant rules in Dicey and Morris, *The Conflict of Laws* (12th ed.) are:

F Rule 167(2) [Hong Kong] courts will recognise that the courts of any ... foreign country have jurisdiction over a debtor if:

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- H (a) he was domiciled in that country at the time of the presentation of the petition; or
 - I (b) he submitted to the jurisdiction of its courts, ... by appearing in the proceedings.

J And,

K Rule 169 – An assignment of a bankrupt's property to the representative of his creditors under the bankruptcy law of any other foreign country whose courts have jurisdiction over him in accordance with r.167(2) is, or operates as, an assignment of the movable of the bankrupt situate in England.

L The general rule is that trustees in bankruptcy appointed by a foreign court are recognised by the Hong Kong courts at common law provided that the judgment of the foreign court has extra-territorial effect. That is provided that the foreign order gives the trustees in bankruptcy rights over the bankrupt's movable assets wherever situate.

M The initial question therefore is whether the order of the Taiwanese court appointing the trustees gives them rights over the bankrupt's shares in Hong Kong. The answer may be found in the later Taiwanese proceedings.

N Whereas it is strenuously argued on the basis of expert evidence and the judgment of the Taiwanese Supreme Court that the order in the District Court does not have extra-territorial effect under Taiwanese law, I find myself driven to agree with Mr Yu SC for the appellants that on this point the order of the Taiwanese court of 14 March 1994 is conclusive. It made an order in favour of the trustees in respect of shares which are in part the subject of the present

proceedings. I acknowledge at once that the appellate proceedings in Taiwan blurred the issue until their conclusion but they are now exhausted. The order of the District Court stands. That order takes effect in respect of shares in a Hong Kong company situate in Hong Kong.

The remaining question is whether the trustees in bankruptcy have the right to sue in Hong Kong courts in order to recover the assets in Hong Kong for distribution.

On this the law is settled. The trustees do have the right to sue in the Hong Kong courts. This follows from the long established authority of *Alivon v Furnival* (1834) 1 Cr M & R 277 at p.295 where Park B dealing with the rights of French Syndics – the equivalent of trustees in bankruptcy – said:

... the property in the effects of the bankrupt does not appear to be absolutely transfer to these syndics in the way that those of a bankrupt are in this country; but it should seem that the syndic's act as mandatories or agents for the creditors; the hold free or any two or one of them having the power to sue for and recover the debts in their own names. This is a peculiar right of action, created by the law of that country and we think it may be by the committee of nations, be enforced in this as much as the right of foreign assignees or curators, or foreign incorporations, appointed or created in a different way from that which the law of this country requires.

This was followed in *Macaulay v Guaranty Trust Co of New York* (1927) 44 T.L.R. 99 at p.100 per Clauson J who said that:

... the above case was an authority for the proposition that, if receiver of assignees in bankruptcy had, according to the law of the country they had been appointed, a right to sue in their own names for choses in action due to a body or person in respect of whose property they had been appointed receivers or assignees that gave them a right which this country, by the comity of nations would treat as though it were a right of action at common law on evidence that in fact the operation of the orders appointing them gave them a right to recover choses in action in the country in which they were appointed.

Finally, it is relevant to make reference to the affirmation dated 11 April 1997 of Chen Chin Lung, the legal representative of the trustees in bankruptcy, who points out in the final paragraph:

... that all our works carried out in the capacity of trustees of the plaintiff for the benefit of the creditors have been supervised by the Taipei District Court. We have to seek the prior approval of the Taipei District Court before we embark on any of our work. The Taipei District Court is fully aware that powers of attorney have been executed by the plaintiff at our request authorising us to commence legal proceedings in his name in

A Hong Kong and our application to apply for joinder in the present proceedings. These were all approved by the Taipei District Court. Besides, all our expenditure incurred in the present proceeding was taken out from the estate of the plaintiff with the approval of the Taipei District Court.

B Without hesitation, therefore, I would hold that if Taiwan were a foreign country recognised by the PRC the trustees in bankruptcy would be entitled to sue in Hong Kong to recover the bankrupt's shares.

C *Is it open to the Hong Kong courts to recognise any rights of the trustees in bankruptcy?*

D But Taiwan is not a foreign country. The common law principles concerning sovereignty and recognition either *de jure* or *de facto* of foreign governments are not directly in point. Of course, on questions of sovereignty and recognition, whether domestic or foreign, the courts and the executive must speak with one voice.

E So far as this appeal is concerned therefore the position is fundamentally different from that at first instance before 1 July 1997. We must approach our decision on the basis that Taiwan is subject to PRC sovereignty, and that the government of Taiwan has no legal foundation, but it is allowed – temporarily at least – to remain in effective control. The Taiwanese courts which made the orders relevant to this appeal are not recognised by the Hong Kong courts.

F The issue for our consideration is whether – in spite of the acceptance of these fundamental propositions – the Hong Kong courts will give effect to any orders or decisions of the Taiwanese courts, and if so, whether our courts will give any effect to the order appointing the trustees in bankruptcy.

G The possibility that some validity could be given under the common law as applied in England to acts and laws flowing from unrecognised institutions was voiced by Lord Wilberforce in *Carl Zeiss Stiftung v Rayner & Keeler (No 2)* [1967] 1 AC 853 at p.954B:

H My Lords, if the consequences of non-recognition of the East Government "government" were to bring in question the validity of its legislative acts, I should wish seriously to consider whether the invalidity so brought about is total, or whether some mitigation of the severity of this result can be found. As Locke said: "A government without laws is, I suppose, a mystery: in politics, inconceivable to human capacity and inconsistent with human society;" and this must be true of a society – at least a civilised and organised society – such as we know to exist in East Germany. In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interests of justice and common sense,

where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question. These ideas began to take shape on the termination of the Civil War (see *US v Insurance Companies*), and have been developed and reformulated, admittedly as no more than dicta, but dicta by Judges of high authority, in later cases. I mention two of these, *Sokoloff v National City Bank 93* and *Uplight v Mercury Business Machines Co Inc 94* a case which was concerned with a corporate body under East German law. Other references can be found conveniently assembled in *Professor DP O'Connell's International Law* (1965) Vol I pp.189 et seq. No trace of any such doctrine is yet to be found in English law, but equally, in my opinion, there is nothing in those English decisions, in which recognition has been refused to particular acts of non-recognised governments, which would prevent its acceptance or which prescribes the absolute and total invalidity of all laws and acts flowing from unrecognised governments. In view of the conclusion I have reached on the effect to be attributed to non-recognition in this case, it is not necessary here to resort to this doctrine but, for my part, I should wish to regard it as an open question, in English law, in any future case whether and to what extent it can be invoked.

This was based upon propositions expressed in the United States Supreme Court in the civil war cases. A situation which is not entirely irrelevant to that in the present appeal.

References to the principle that some validity may be given to usurper's acts by reason of an implied mandate from the lawful sovereign are to be found in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645. This is traced back to Grotius, *War and Peace* (De Jure Belli ac Pacis, Bk I Ch IV Sect XV) (see pp.735G-736B):

We have spoken of him who possesses, or has possessed, the right of governing. It remains to speak of the usurper of power, not after he has acquired a right through long possession or contract, but while the basis of possession remains unlawful. Now while such a usurper is in possession, the acts of government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that one to whom the sovereignty actually belongs, whether people, king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the courts.

At p.729B Lord Reed refers to the principle as follows:

It may be that there is a general principle, depending on implied mandate from the lawful Sovereign, which recognises the need to preserve law & order in territory controlled by a usurper.

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A Whereas Lord Pearce in his minority decision says at p.732:

I accept the existence of the principle that acts done by those actually in control without lawfully validity may be recognised as valid or acted upon by the courts, with certain limitations namely (a) so far as they are directed to and reasonably required to ordinarily orderly running of the State, and (b) so far as they do not impair the right of citizens under the lawful (1961) Constitution, and (c) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful sovereign. This last, ie (c), is tantamount to a test of public policy.

In *Re James (an insolvent) (A-G intervening)* [1977] Ch 41, Lord Denning MR accepted the principle as did Scarman and Lane LJJ. At p.70G agreeing with Lord Denning, Scarman LJ said:

He [Lord Denning] invokes the doctrine of recognition of the *de facto* Judge, and the doctrine of implied mandate or necessity. I agree with much of the thinking that lies behind the judgment. I do think that in an appropriate case our courts will recognise the validity of judicial acts, even though they be the acts of a judge not lawfully appointed or derive their authority from an unlawful government.

F The principle was again considered in *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] 1 QB 205. Lord Denning MR considered the conflicting authorities and at p.218G said:

I would unhesitatingly hold that the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised by Her Majesty's Government *de jure* or *de facto*: at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations, and so forth; and furthermore that the courts can receive evidence of the state of affairs so as to see whether the body is in effective control or not.

At p.228 Roskill LJ was more cautious. (This was an application for an interim injunction.) He said:

... having regard to the observations of their Lordships in the House of Lords in *Carl Zeiss Stiftung v Rayner & Keele Ltd* (No 2) [1967] 1 AC 853, and in particular to those of Lord Reid and Lord Wilberforce, it is clear that at some future date difficult questions may well arise as to the extent to which, notwithstanding the absence of recognition, the English courts will or may recognise and give effect to the laws or acts of a body which is in effective control of a particular area or place.

Having regard to this extensive body of persuasive albeit *obiter* authority, I accept the existence of a common law principle that a limited range of acts by those actually in control of a territory but without any lawful validity or authority may be recognised and acted upon by the Hong Kong courts on the basis that the sovereign power has an interest in the proper regulation of the affairs of its subjects within the territory concerned provided that the relevant acts do not directly help the usurper, are not contrary to public policy, and are not inimical to the rights of the lawful sovereign.

The difficulty is in the application of the principles. Lord Wilberforce refers to "private rights", or acts of everyday occurrence, or perfunctory acts of administration but the greater assistance is found in *Texas v White* (1868) 7 Wallace 700 (74 US) cited in *Mudzimbanuto v Lardner-Burke* [1969] 1 AC 645 at p.727:

... it is all historic fact that the government of Texas, then in full control of the state, was its only actual government; and certainly if Texas had been a separate state, and not one of the United States, the new government, having displaced the regular authority, and having established itself in the customary seats of power; and in the exercise of the ordinary functions of administration would have constituted, in the strictest sense of the words, a *de facto* government, and its acts, during the period of its existence as such, would be effectual, and, in almost all respects, valid. And, to some extent, this is true of the factual government of Texas, though unlawful and revolutionary, as to the United States. It is not necessary to attempt any exact definitions, within which the acts of such a state government must be treated as valid, or invalid. It may be said, perhaps with sufficient accuracy that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens and other acts of like nature, must, in general, be regarded as invalid and void.

Conclusion

The principle that a limited category of usurper's acts may have legal validity by reason of an implied mandate from the lawful sovereign is rooted in history. It received modern recognition in the US Supreme Court in civil war cases. More recently it has been recognised by the House of Lords and the Privy Council but – so far as I am aware – has never been applied by either.

I accept the principle, as did the Judge below, but does it apply in this case?

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A Clearly it is in the sovereign's interest that acts "necessary to the peace and good order" of its citizens in Taiwan should be respected. A recognition of the rights of the trustees in bankruptcy appointed by the Taiwanese court to sue for movables situate in Hong Kong which are part of the bankrupt's estate accords with common sense and justice, and provides a necessary remedy for the creditors. Such recognition of the status of the trustees in bankruptcy is not contrary to public policy and does not involve any recognition of the legality of the Taiwanese courts. Nor is a recognition of the rights of the trustees in bankruptcy to sue in Hong Kong in any way inimical to the interests of the sovereign power.

C For these reasons, I would answer the two preliminary issues in the affirmative and would allow the appeal.

Godfrey JA:

D Introduction

This is an appeal from an order of Patrick Chan J, made on 27 June 1997, on the trial of two preliminary issues: (1) as to whether the court should recognise and give effect to an order of the Taipei District Court made on 20 October 1990 by which, among other things, one Ting Lei Miao ("the bankrupt") a Taiwanese resident, was adjudicated bankrupt; and (2) as to whether the court should recognise that order as having effect over the assets of the bankrupt situated in Hong Kong.

F The Judge rejected the case of the trustees appointed by that order ("the trustees") that these issues should be decided in the affirmative; and they now appeal.

G The background

H The bankrupt is or was the owner of 3,500,000 shares in Hotel Nikko Hong Kong Ltd ("Hotel Nikko"). Claims adverse to the bankrupt have been made in relation to those shares. The trustees seek to resist those claims. The Taiwanese courts have, since 20 October 1990, recognised the trustees' claim to the disputed shares.

The judgments below

I The Judge decided these issues before the People's Republic of China ("the PRC") resumed sovereignty over Hong Kong on 1 July 1997. The Judge, rightly, ignored the pending change (although he did note the trustees' submission, supported by a statement made by the Chief Justice and President of the Supreme People's Court of the PRC, that there was a "tendency" of the PRC to recognise the civil activities and rights of Taiwanese residents according to the regulations of the Taiwan region as having factual validity). Since the government of the United Kingdom did not recognise Taiwan, either *de jure* or *de facto*, the Judge refused to recognise the order of 20 October 1990.

The change of sovereignty

We have now to deal with the case *after* the change of sovereignty. In my judgment, we must put on one side the attitude of the UK government towards Taiwan. We must now concern ourselves instead with the attitude of the PRC government. The judgment below, therefore, is no longer relevant, and we must approach the matter afresh.

The effect of the order of 20 October 1990

The effect of an order such as this, if made in Hong Kong, would have been to vest the property of the bankrupt in the trustees: see s.58 of the Bankruptcy Ordinance (Cap.6). Accordingly, the trustees, suing as "the trustees of Ting Lei Miao, a bankrupt", would have been entitled to institute an action here for a declaration as to the bankrupt's beneficial entitlement to shares in a company incorporated in Hong Kong against any person claiming an interest in those shares adverse to that of the bankrupt, together with all necessary and consequential relief.

The order would be treated as having effected an involuntary assignment of the bankrupt's property, by virtue of the statute, from the bankrupt to the bankrupt's trustees in bankruptcy.

But the bankruptcy proceedings with which we are now concerned are *foreign* bankruptcy proceedings. Does this make any difference, since, apparently, it is not disputed that the Taipei District Court had jurisdiction to make the adjudication made by its order of 20 October 1990? In my judgment, it does not.

It has been settled for centuries, in England and Wales, that the court may recognise, and give effect to, foreign bankruptcy proceedings where no question has arisen as to the jurisdiction of the foreign court over the bankrupt (see *Solomons v Ross* (1764) 1 Hy Bl 131n) notwithstanding that the foreign insolvency proceedings may be of a very different nature from ours and that a decree in such proceedings pronounced by a foreign court cannot be equated with a foreign judgment (indeed, in some countries insolvency may occur [without] the intervention of any court proceedings at all).

Not surprisingly, therefore, it is not a condition precedent to the recognition by our courts of a foreign insolvency proceeding that it, too, should operate to vest the bankrupt's property in his trustees by way of assignment: see, eg *Alvon v Furnival* (1834) 1 Cr M & R 277, in which an action was successfully brought in England by syndics of a French bankrupt, although as was noted (at p.296):

The property in the effects of the bankrupt does not appear to be absolutely transferred to those syndics in the way that those of a bankrupt are in this country ...

So I have no doubt that if the trustees in our case have, according to Taiwanese law, a right to institute in their own name proceedings to recover the shares in

A dispute here, that gives them a right which should be treated here as if it were a right of action at common law (for support for this conclusion reference may be made to the judgment of Clauson J in *Macaulay v Guaranty Trust Co of New York* (1927) 44 TLR 99, at p.100).

The order of 20 October 1990 gave the trustees appointed by that order the right to institute an action to recover the shares in question here, as the subsequent proceedings in Taiwan clearly demonstrate. Since the evidence establishes that Taiwanese law authorises the trustees to do so, and to take proceedings in Hong Kong for the purpose, our courts should, in my judgment, recognise the right of the trustees to maintain and prosecute their claim here.

However, there remains one further question to be decided. Should our courts refuse that recognition of the order of the Taipei District Court which they would otherwise afford to it on the ground that (as is the fact) Taiwan is, not a foreign state with a government recognised by the People's Republic of China (the sovereign power under which, although administering a separate legal system, our courts here operate), but a province of the People's Republic of China under a government not so recognised?

The fact that the People's Republic of China does not recognise the present government of Taiwan is *not*, in my opinion, an impediment to the claim of the trustees, by virtue of the order of 20 October 1990, to recover the shares in dispute here for the benefit of the bankrupt's estate. No question of public international law arises. We are concerned here only with the rules governing the administration of the estate of a bankrupt under the law of his domicile.

This is a matter of private international law. Only private rights are involved. In such a case, it is clearly "in the interests of justice and common sense" (see *Carl Zeiss Stiftung v Rayner & Keeler (No 2)* [1967] 1 AC 853, per Lord Wilberforce at p.954) that our courts should afford the same recognition to the order of the Taipei District Court in insolvency proceedings as it would afford to an order of any other court of competent jurisdiction in similar proceedings. I would found this conclusion on the juridical basis explained by Lord Denning MR in *James (an insolvent) (A-G intervening), Re* [1977] Ch 41 at p.62, where he remarks (following Grotius) that where a lawful sovereign is ousted for the time being by a usurper the lawful sovereign still remains under a duty to do all he can to preserve law and order within the territory: and, as he cannot do it himself, he is to be held to give an implied mandate to his subjects to do what is necessary for the maintenance of law and order rather than expose them to all the disorders of anarchy. In my judgment, the People's Republic of China, the lawful sovereign here, should be treated as recognising the same necessity for the exercise of a bankruptcy jurisdiction by the courts of Taiwan as it would recognise for Hong Kong or for any other part of its territory. As we are reminded in the Preamble to the Constitution of the People's Republic of China:

Taiwan is a part of the sacred territory of the People's Republic of China. It is the lofty duty of the entire Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.

It would be, as it seems to me, entirely inconsistent with this aspiration for a court in our part of the People's Republic of China to refuse to recognise the orders in bankruptcy of a court of competent jurisdiction in what the People's Republic of China regards as another part, especially since (as I understand) the mainland courts are themselves expected to recognise Taiwanese judgments.

I too would allow this appeal; reverse the Judge; and decide both of the preliminary issues raised here in favour of the trustees.

Rogers JA:

This is an appeal from a judgment of Patrick Chan J (as he then was) given on 27 June 1997. The judgment was in respect of two preliminary issues. It could perhaps be noted in passing that these were the first of four preliminary issues which have been ordered to be tried in this action.

Background

The plaintiff, Mr Ting Lei Miao, was adjudged bankrupt in the Taipei District Court, Taiwan, on 20 October 1990. Mr Ting had been the President of the Fortune Group in Taiwan. We have been told that this Group had taken deposits from the general public in Taiwan. Apparently, there were more than 100,000 investors who had deposited a total of 48.9 billion NTD with the Group. In July 1989, the Group stopped paying principal and interest to the investors. Mr Ting was held responsible for the liability of the Group and adjudged bankrupt by the Taiwan Court.

The appellants in this appeal are the four trustees in bankruptcy of Mr Ting. They were appointed by the Bankruptcy Order of 20 October 1990.

History of these proceedings

This action was commenced by writ on 2 August 1991. As originally formulated, the claim is one by Mr Ting against the defendant in respect of a total of one and a quarter million shares in Hotel Nikko Hong Kong Ltd which the plaintiff claimed were held in trust for him by the defendants. One million shares were claimed from the first defendant and the remainder from the second. It is said that a careful perusal of the statement of claim would show that the claim was in fact being made by Mr Ting's trustees in bankruptcy.

That is not so. Paragraphs 7 and 9 contain references to the Mr Ting's attorneys. That is quite a different from a reference to trustees in bankruptcy. On the face of it without more, an attorney acts at the direction of, in the interests of and on behalf of his or her principal. A trustee in bankruptcy may have powers of attorney but acts at the direction of the appointing authority (in this case the Court in Taiwan) and in the interests of the creditors, particularly where those interests conflict with those of the bankrupt.

The claim in the original statement of claim, and as the pleadings stand at present, is a claim by Mr Ting for a declaration that the shares are held on trust for him and there is then a claim for the transfer of the shares in the name of the

defendant to the plaintiff or at his direction or that of his authorised attorneys. As the statement of claim stands at present the attorneys are not parties to the action and there is no suggestion that the attorneys are claiming in their own right still less is there any issue between the attorneys and the plaintiff as to who is entitled to the shares.

At the commencement of these proceedings, Mr Ting was held in custody in Taiwan. The proceedings were commenced in his name by solicitors acting under authority of a power of attorney.

The trustees thereafter took proceedings in the Taipei District Court in their own names against the first defendant claiming the same one million shares which had been claimed in these proceedings. Mr Ting was not a party to those proceedings. Judgment was obtained in the Taipei District Court on 14 March 1994. An appeal was dismissed the following year by the Taiwan High Court. However, on further appeal to the Supreme Court of Taiwan, the matter was remitted back to the High Court. It appears however that when the matter went back before the High Court, the defendant failed to appear at the hearings either in January or March 1997. Accordingly on 8 March 1997 the High Court of Taiwan issued a notice to the effect that the defendant's appeal was regarded as withdrawn. This seems to have been akin to a default judgment but the effect of the Taiwan proceedings will be considered later.

In July 1995, the trustees sought to rely upon the judgment in Taiwan to obtain summary relief based on it in these proceedings. That application has still to be heard. At about the same time, the plaintiff himself apparently challenged the validity of the powers of attorney upon which the trustees relied and sought to take over the conduct of this action.

Consequently, shortly prior to the hearing of the notice of motion for summary relief an application was taken out by solicitors instructed by the trustees acting in the name of the plaintiff for leave to amend the writ by adding the trustees as plaintiffs to the action and amending the statement of claim.

Again that application has not yet been disposed of and upon the plaintiff being represented by new solicitors, application was made on behalf of the trustees to intervene in the Action, either in addition to or in substitution for the plaintiff, in their capacity as trustees in bankruptcy of the plaintiff and to have conduct of the proceedings as the plaintiffs in the action.

That application then came before Leonard J in June 1996. Leonard J ordered under O.33 r.3 a total of four preliminary issues to be tried. One of the preliminary issues, at least, is a double question. The order was that two of the issues should be tried before the remaining two issues. The first two issues were heard before Patrick Chan J in April 1997 and it is against his judgment in those two issues that this appeal is brought.

Before turning to the issues themselves, I would comment that the procedure of ordering preliminary issues is one which should be used sparingly. Unless there are clear indications that there will be a saving of proceedings and costs in whichever way the preliminary issue is decided, it is often to the disadvantage of all concerned to have the issues in a case divided. Furthermore, the difficulty of defining the preliminary issue prior to the full facts emerging can mean that

at the preliminary issue stage, the final contentions of the parties are not fully ventilated. A

Here the position is even more tenuous. The preliminary issues do not arise on the pleadings at all. As I have pointed out, the issues on the pleadings as they stand at present are between Mr Ting and the first defendant. The issues which are the subject of the preliminary issues arise, if at all, on the draft amended pleadings, between the trustees, who are not yet parties to the proceedings, and the plaintiff and were directed to be tried as part of a process of resolving an interlocutory application to determine whether leave to amend and join parties should be allowed. For my part, I consider that such a procedure should not have been followed. The difficulties have been exacerbated in this case because the wording of the issues has been imprecise and such that reference to the draft pleadings is necessary to determine what it is that is sought to be determined by the issues. B

The preliminary issues

The questions which fall to be decided have been framed as follows.

- (a) Whether in all the circumstances of this case, this Honourable Court should recognise and give effect to the Order of the Taipei District Court dated 20 October 1990 (a copy of which is exhibited as KCC-1 to the affirmation of Ku Chia Chun filed on 11 July 1995); C
- (b) Whether in all the circumstances of this case, this Honourable Court should recognise the said Order of the Taipei District Court as having effect over the assets of Ting Lei Miao situated in Hong Kong. D

The Judge below decided both issues in the negative. E

Change of circumstances since the judgment

Whereas in most instances where there has been a change of law between the time the cause of action arose and the date of hearing, the rights of the parties must be decided on the basis of the law as it stood at the time of the accrual of the cause of action, in this case, immediately after the judgment in the Court below there was the change of sovereignty. It is unnecessary to consider whether that would affect the outcome of this case. What is necessary is to consider this case in the light of the sovereignty which now exists. F

Since Hong Kong is now part of the People's Republic of China, the Constitution, ie that adopted by the Fifth National People's Congress on 4 December 1982, is applicable in Hong Kong being part of the People's Republic. Although the effect in Hong Kong of parts of the Constitution may be altered by the Basic Law, clearly parts of the Constitution are applicable in Hong Kong. G

In the Preamble of the Constitution, it is stated:

A Taiwan is part of the sacred territory of the People's Republic of China. It is the lofty duty of the entire Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.

B Whilst Professor Yash Ghai may be correct in a passage in his work *Hong Kong's New Constitutional Order* which was drawn to our attention to the effect that:

C China's views of its own and Hong Kong's relationship with Taiwan change periodically, which may make it difficult for Hong Kong to establish a clear and coherent external relations policy with Taiwan.

D that is not a relevant consideration. The Preamble to the Constitution makes it clear that as far as the law of the People's Republic of China is concerned, Taiwan is to be considered as part of the People's Republic of China but that a state of affairs exists whereby the integrity of the People's Republic has been broken.

E At the date of the judgment below, Taiwan was on any footing a foreign country. Now it is part of the same sovereign country as is Hong Kong, namely the People's Republic of China. It is however governed by a government that is not recognised by the People's Republic of China. For the purposes of this appeal, I consider that it should be treated as equivalent to a territory with a rebel government.

F Whereas, for my part, I would have wished a certificate to be obtained from the Chief Executive perhaps not under art. 19 of the Basic Law but under the inherent jurisdiction in relation to the questions set out below, I am alone in that, but it seems that that would probably only be a matter of caution as the matter should be proceeded upon on the basis I have just outlined.

Proposed questions

H Question 1: Whether the People's Republic of China, in treating Taiwan as part of the territory of the People's Republic of China, recognises the government of the Republic of China situate in Taiwan as the *de jure* or *de facto* government of Taiwan?

I Question 2: Whether the People's Republic of China recognises the present regime situate in Taiwan as exercising a delegated authority from the Central People's Government?

Preliminary issue (1)

J I have set out above the wording of the first preliminary issue. I would draw attention to the following points which I consider arise out of this issue. The first is the use of the words "recognised" and "give effect to" and the second is that what is to be recognised and given effect to is the order of the Court on 20 October 1990, namely the Order whereby Mr Ting was adjudged bankrupt.

This no doubt is a reflection of the basis upon which the trustees' case is intended to be put. In the draft statement of claim exhibited "HKC-3" to the affirmation of Hong Kam Cheung of 6 October 1995, the new para.4 recites the Order of 20 October 1990 whereby Mr Ting was adjudged bankrupt and the trustees were appointed by the Court in Taiwan as trustees in bankruptcy. Paragraph 5 of the draft amended statement of claim reads as follows:

The trustees-in-bankruptcy appointed by the Court in Taiwan have the right and capacity to bring legal proceedings for the purpose of recovering the assets of the bankrupt.

The other major new paragraph in the draft statement of claim is para.6 which refers to a further power of attorney. That matter is therefore irrelevant to the present questions.

I would observe, at this stage, that the way the draft statement of claim has been phrased and the question for determination is therefore not whether certain assets should be regarded as belonging to the trustees but whether the Court Order should be recognised and given effect to. Paragraph 5 of the draft statement of claim does not refer to any of the orders of the Taiwan Court in the proceedings by the trustees against the first defendant; nor does it purport to base any claim on the effect of the orders of 14 March 1994 or 8 March 1997 in those proceedings; nor does it plead that the assets previously owned by Mr Ting are now the property of the trustees. I recognise, of course, that the draft statement of claim pre-dates the order of 8 March 1997 but it was drafted and put forward after the Taipei District Court judgment in March 1994. Paragraph 5 of the draft statement of claim pleads the right to bring proceedings in a Hong Kong Court to recover assets of the bankrupt, not, I would point out, assets the property in which has been transferred to the trustees. What the Court is being asked by the question is whether a right to bring proceedings should be accorded to the Taiwanese trustees in bankruptcy for these purposes. That as, I understand it, is the relevant recognition and effect, which is under consideration in the first issue.

It has to be borne in mind that the trustees in bankruptcy are in the process of administration of an estate in Taiwan. The distribution of any sums recovered will be made under the Taiwan rules relating to distribution of assets. The whole process is being conducted under the direction of the Taiwan Court. Mr Chen Chin Lung, a lawyer and one of the trustees in bankruptcy of Mr Ting's estate made an affirmation on 1 December 1995. In para.8 of that affirmation Mr Chen states that the administration of Mr Ting's assets was done under the supervision of Bankruptcy Court in Taiwan. From time to time the trustees reported to the Bankruptcy Court the steps taken in recovering Mr Ting's assets. Not only therefore would the result of such recognition and the giving of effect to the order be to give a right of audience to a person holding office by virtue of that order but it would be to assist in the administration of the bankrupt's estate which is being done under the direction of the Court in Taiwan.

A. Mr Yu SC in his admirable argument, relies upon the statements in the various speeches and judgments which draw attention to the practical difficulties of failing to recognise the existence of a state of affairs in jurisdictions where the government is neither recognised as a lawful government nor a government in fact.

B. The start of the submission is a passage in the speech of Lord Wilberforce in the case of *Carl Zeiss Stiftung v Rayner & Keeler (No 2)* [1964] 1 AC 853. That case concerned the ownership of trademarks used in respect of products of a business which had become divided because of the division of Germany.

C. East Germany was a State set up under Soviet authority but was unrecognised as a State particularly by the United Kingdom. Questions of recognition of government acts therefore came into play. The House of Lords reiterated the firmly established principle that the question whether a foreign state ruler or government is or is not sovereign is one on which the Courts accept as conclusive the statements provided by the Government. The conclusion in the case was that although the East German Government was not recognised by the Government of the United Kingdom, its acts should be recognised by the English Courts as lawful, not because they were acts of a sovereign state, but because they were acts done by a subordinate body which had been set up by the Soviet Republic which was recognised by the United Kingdom.

F. The difficulty of not recognising the acts of the East German Government (called the Democratic Republic of Germany) was exemplified in the speeches. If, for example, civil marriages were not recognised, children would be regarded as illegitimate. Furthermore, if divorces granted in the German Democratic Republic were not recognised, confusion would be bound to exist, causing considerable complications for those wishing to remarry outside East Germany. Further examples were given that companies incorporated in the German Democratic Republic would not be able to sue or be sued in the United Kingdom.

G. The solution found in that case whereby recognition could be accorded to the organs of the German Democratic Republic by reason of their establishment under the aegis of the Soviet Union sufficed to avoid such difficulties. However at p.954 Lord Wilberforce said:

H. My Lords, if the consequences of non-recognition of the East German "government" were to bring in question the validity of its legislative acts, I should wish seriously to consider whether the invalidity so brought about is total, or whether some mitigation of the severity of this result can be found. As Locke said: A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society, and this must be true of a society -- at least a civilised and organised society -- such as we know to exist in East Germany. In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interests of justice and common sense,

where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question. These ideas began to take shape on the termination of the Civil War (see *US v Insurance Companies*), and have been developed and reformulated, admittedly as no more than dicta, but dicta by Judges of high authority, in later cases.

In this respect, Lord Wilberforce's speech was clearly tentative. Furthermore, his reference in his speech to the United States authorities did not, find favour with others, for example, Lord Reid.

Two points arise from Lord Wilberforce's observations at this part of his speech. In the first place, this was said in the context of referring to private rights or acts of everyday occurrence and perfunctory acts of administration. That is quite different from the Courts recognising and giving effect to an Order of a foreign unrecognised Court particularly if that recognition entails allowing a person appointed a trustee by that Court purporting to act in that capacity and under the direction of that Court in carrying out present functions which that Court is supervising. In my view, there is a clear distinction to be drawn between recognising the existence of a state of fact, for example, the marital status of a person or the ownership of goods, or as was relevant in the *Carl Zeiss Stiftung v Rayner & Keeler (No 2)* [1964] 1 AC 853, the existence or otherwise of a body corporate on the one hand and recognising and giving effect to an order of a Court in these circumstances on the other. In the second place, the speech of Lord Wilberforce was made in the context of the recognition or otherwise of foreign governments. In the present case, as I have indicated, the government in question is an unrecognised government of another part of the People's Republic of China. Issues of diplomacy and recognition of foreign governments are therefore not in question. What is in question is what recognition a sovereign state should give to an unrecognised government of part of its own territory.

This latter issue was dealt with in part in the case of *James (an insolvent) (A-G intervening), Re* [1977] Ch 41. In that case, James had been declared bankrupt in the High Court of Rhodesia. At the time he was declared bankrupt, the former colony of Southern Rhodesia had made a Unilateral Declaration of Independence. In the circumstances that were held to exist, there could be no equivocation and the position of the United Kingdom Government was that Rhodesia was still a colony and that the Government of Rhodesia was an illegal government. The position of the Courts in Rhodesia was that allegiance was no longer owed to the United Kingdom. In the circumstances, therefore, as far as the Courts of the United Kingdom were concerned Rhodesia was a rebel territory and the Courts of Rhodesia were exercising jurisdiction in a rebel territory. The case arose because the trustees in bankruptcy appointed by the Rhodesian Court were seeking to recover assets of the insolvent in the United Kingdom. The particular provisions under which they purported to act related to the High Court in England having jurisdiction in the matter because the order in question was an order of a British Court.

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A Lord Denning MR in a dissenting judgment examined the duties of the citizens of Southern Rhodesia after UDI had been declared. In particular, he examined the duties of those responsible for law and order, for example, the Judges and the police. He pointed out that if the normal tasks were not carried out, murderers would go free, thieves would go unpunished and the civil law would be unenforced. In a passage at p.62 of his judgment, Lord Denning referred to the fundamental duty of the Crown to maintain law and order in the rebel territory and specifically by authorising the Judges and officers of the Court despite the fact that they may have been appointed by the illegal regime to carry on with their normal task of enforcing the law. He went on:

If such authority was not given expressly, it is at least to be implied. I lugo Grotius himself said as much. When a lawful sovereign is ousted for the time being by a usurper, the lawful sovereign still remains under a duty to do all he can to preserve law and order within the territory; and, as he can no longer do it himself, he is held to give an implied mandate to his subjects to do what is necessary for the maintenance of law and order rather than expose them to all the disorders of anarchy: see his book on *War and Peace* (De Jure Belli ac Pacis, Book I, Ch. IV Sect. XV) as translated in 1738.

Scarman LJ clearly had sympathy with the views expressed. At p.70, he says that he agreed with much of the thinking which lay behind the judgment. He went on to say:

I do think that in an appropriate case our courts will recognise the validity of judicial acts, even though they be the acts of a Judge not lawfully appointed or derive their authority from an unlawful government.

However, he added in the next sentence:

But it is a fallacy to conclude that, because in certain circumstances our courts would recognise as valid the judicial acts of an unlawful court or a de facto Judge, therefore the court thus recognised is a British court.

On that issue, he parted company with the Master of the Rolls and held that the Courts of Rhodesia were not British Courts. Geoffrey Lane LJ at p.77 said that he agreed with what had been said by Sir Jocelyn Simon P in *Adams v Adams* [1971] P 188 insofar as he had declined to recognise the validity of the acts of any judge appointed after UDI because his appointment was *ex hypothesi* illegal and void. It is true to say that earlier in his judgment the Judge had said that it was unnecessary to decide whether the Courts of Rhodesia could rightly be described as Courts at all in the eyes of the law of England.

Whereas therefore, it may be possible to say that there is judicial support for the proposition that recognition should be given to a state of affairs or facts existing whether as a result of a judicial pronouncement or not, in a rebel

territory, such a proposition did not find favour with the whole Court and judicial assistance was regarded as appropriate by Lord Denning alone.

Rights of the foreign trustee in bankruptcy to sue in Hong Kong to recover property

Two cases were cited for the proposition that foreign trustees in bankruptcy were entitled to sue even though the effect of the bankruptcy did not appear to be an absolute transfer of the property of a bankrupt to the trustees. The first was the case of *Alivon v Furnival* (1834) 1 Cr M & R 277. Parke B was there dealing with the right of syndics appointed in France to sue to recover property of the bankrupt in England. He said:

The property in the effects of the bankrupt does not appear to be absolutely transferred to these syndics in the way that those of a bankrupt are in this country; but it should seem that the syndics act as mandataries or agents for the creditors; the whole three or any two or one of them having the power to sue for and recover the debts in their own names. This is a peculiar right of action, created by the law of that country; and we may think it may by the comity of nations be enforced in this, as much as the right of foreign assignees or curators, or foreign corporations, appointed or created in a different way from that which the law of this country requires.

That case was cited and relied upon in the decision of Clauson J in *Macaulay v Guaranty Trust Co of New York* (1927) 44 TLR 99 at p.100. Again, that Judge referred to the comity of nations as being the basis for recognition of the right.

Whilst clearly comity is different and distinct from reciprocity, there is here no scope or occasion for any consideration of a comity of nations. As I have pointed out, this matter is not a matter of international relations but a matter of national sovereignty. In my view, it would be extending the comity of nations too far to apply the reasoning of Grotius to the circumstances of this case which would imply that judicial assistance were to be given to the acts of the judiciary in Taiwan. In my view, there can be no scope for the application of comity in respect of a government exercising power in defiance of the sovereign in part of the territory of the sovereign.

Reason for not recognising and giving effect to the Order

As I have already stated, it would in my view be open to the Court to recognise the existing state of affairs even in that part of the sovereign territory where the authority of the sovereign is disputed. This would include recognition of marriages, divorces and the transfer of property. However, as I have already pointed out that is not the question which arises on the first preliminary issue in this case. The draft statement of claim does not rely upon an allegation that y right of property vests in the trustees but rather having referred to the Order

A of the Taiwan Court on 20 October 1990 the claim is that the trustees have the right and capacity to bring legal proceedings for the purpose of recovering the assets of the bankrupt. If the Court were to accede to this application, it seems to me, that the Court in Hong Kong would be assisting in the distribution of assets of Mr Ting being undertaken by a government which is not merely an unrecognised government but is exercising power in the Republic of China contrary to the wishes and intent of the sovereign government. If the Court were so to act, it seems to me, it would unwittingly become part of the judicial process of Taiwan, namely the process of administration of assets in what is in effect a rebel territory under the control of a Court of the rebel government.

C There are further and other matters which seem to me also to militate against giving effect to the Bankruptcy Order in the manner sought. It is at once apparent from the very fact of this action that Mr Ting's financial affairs are not confined to Taiwan. There are clearly assets in Hong Kong alleged to belong to Mr Ting. D No inquiry, for example, has been conducted or at least drawn to the attention of this Court as to whether there are creditors of Mr Ting in Hong Kong. With increasing international trade and business conducted in more than one jurisdiction, the questions raised by insolvency of those conducting such businesses have raised and are continuing to raise considerable problems. As E increasing difficulties have been encountered, the United Nations has adopted a draft model law which has been prepared by the United Nations Commission on International Trade Law in respect of cross-border insolvency: see the records of the General Assembly, 52nd Session, Supplement No 17 (A/52/1 Annex 1) F (UNCITRAL Year Book, Vol. XXVIII: 1997, Pt.3). This draft model law relates to co-operation between Courts in respect of cross-border insolvencies. It is fair to say that experience has shown in other jurisdictions that problems have arisen where assets and liabilities of a single debtor exist in more than one jurisdiction. Each jurisdiction is concerned to see that its own creditors receive a just proportion of the assets. Insofar as it has been possible, the Courts have G hitherto resolved difficulties which have arisen in respect of distribution of assets by the adoption of protocols such as that which was adopted in the case of the *Maxwell* insolvency in England and New York.

H For the Court to recognise and give effect to the Bankruptcy Order in the manner sought in this Action it would mean that were creditors to exist in Hong Kong, the Court would be assisting in the judicial process whereby those creditors would lose the benefit of the assets which were the subject of the Action or the Court would have in some way to co-operate with the Courts of I Taiwan, at least to the extent of giving effect to a protocol approved by both Courts.

J In my view, the Judge below was correct at p.18 of his judgment where he said that the *locus standi* of the applicants rested entirely on the order of 20 October 1990 and that in making the application they were seeking to participate in the action as officers of the Taipei District Court. In effect therefore the Court was being asked to do more than ever to recognise the validity of an order of a Taiwanese Court it is asked to give effect to it in a particular manner. That in my view should not be done in the circumstances.

What I have said is strictly in the context of the question which has been framed in the context of the draft pleadings that were before the Court, the application to rely on which prompted the Court to order the trial of a preliminary issue. As I have made plain this does not affect the recognition by the Court of a state of affairs which may be shown to exist such as the ownership of assets.

Alternative argument

It was submitted on behalf of the appellant that there is clearly an authority in Taiwan which is capable of exercising effective control of that territory on a permanent basis. Indeed, it was pointed out that Taiwan has formal diplomatic relations with 31 nations. The reason for the non-recognition of the Taiwan government is based on policy considerations rather than strict legal considerations. Encouraged by the case of *Somalia v Woodhouse* [1993] QB 54, it was said that the Courts in Hong Kong should reach their own conclusion as to whether there was a government which should be recognised.

The recognition of a government is, in my view, a matter for the executive. As has been pointed out in many of the cases and referred to by the Judge at p.10 of his judgment, the executive and the judiciary should speak with one voice and there would be a clear danger of them speaking with different voices should the Court adopt such an approach as has been advocated. Furthermore, the Court should not be involved in assessing the political situation in the territory where there has been an unconstitutional change in power or authority. The third reason given in the judgment below that different Courts may speak with different voices in respect of the same foreign government depending on the evidence adduced, again, in my view, is a valid point and one which would militate against adoption of such an approach.

The report of the Chief Justice and President of the PRC Supreme People's Court quoted in the affirmation of Qi Rui Qing and cited in the judgment below is consistent with the above approach. What is reported to have been said is:

... The Supreme People's Court of the PRC announced in April 1991 that on the basis that it does not contravene the laws of the PRC and damage the public interest of the society, the civil activities of a Taiwan resident in Taiwan and the civil rights obtained by a Taiwan resident in accordance with the regulations of the Taiwan region can be recognised as having its factual validity. Regarding the civil judgments made by the Courts of Taiwan region, the question of recognition on the validity can also be resolved in accordance with the aforesaid principles depending on the different circumstances ...

It appears to me that this approach is entirely in accordance with the approach I have outlined above. Recognition is given to a factual state of affairs whether it be status of marriage or divorce or ownership of property but recognition is not given to Orders of Court which entitle trustees acting under the direction of that Court to bring proceedings in this jurisdiction.

A Second Issue

The second issue would only fail to be determined if the first issue were found in favour of the appellants. Nevertheless, I will also deal with this briefly. The question turns upon whether the Court should recognise the Order of the Taipei District Court (namely that of 20 October 1994) as having effect over the assets of Mr Ting situated in Hong Kong. The basis of the decision below was that the appellants had failed to discharge the onus of showing that Bankruptcy Order in Taiwan encompassed assets in Hong Kong.

On one approach to this issue this matter is important. Rule 169 of Dickey & Morris, *The Conflict of Laws*, (12th ed.) at p.1175 provides that:

An assignment of a bankrupt's property to the representative of his creditors under the bankruptcy law of any other foreign country whose courts have jurisdiction over him in accordance with r.167(2) is, or operates as, an assignment of the movables of the bankrupt situate in England.

The commentary on that rule however states that:

The effect in England of the assignment of a debtor's property under the bankruptcy law of a foreign country is subject to certain limitations:

(1) The assignment only takes place if under of the law of a foreign bankruptcy provision is made for the extraterritorial effect of the bankruptcy.

In the Court below, the evidence was analysed and the conclusion was arrived at that it had not been established on the evidence that the Taiwanese bankruptcy law was such as to effect an assignment of property outside Hong Kong.

The first and most obvious point that was made was that the Bankruptcy Order of 20 October 1990 contained a schedule of the assets which were transferred to the trustees in bankruptcy. Not only were the shares the subject of this action not included in that list but there was no mention of any asset other than an asset based in Taiwan.

Proceedings by the trustees against the first defendant in Taiwan

The outcome of proceedings in Taiwan by the trustees does not assist either. Action was commenced by the trustees against the first defendant in Taiwan claiming transfer of the 1 million shares held by the first defendant in the Hotel Nikko Hong Kong Ltd. In the judgment on 14 March 1994, the District Court held that the Bankruptcy Order extended to property of the debtor or bankrupt in a foreign country. It was also held that the effect of the Bankruptcy Order was that all property that belonged to the bankrupt and his claims on property to be exercised in the future should be vested in the trustees. The matter was appealed to the High Court of Taiwan which held that the intent of the Taiwan

legislation was to protect the interests of the creditors in Taiwan and the Bankruptcy Orders made in Taiwan should not be interpreted as having no effect on the property of the bankrupt in foreign countries. The High Court acknowledged however that there was a difficulty of enforcement but that since that case was, as I shall refer to below, an action in personam that difficulty was removed.

That case then proceeded to the Supreme Court on further appeal and at the conclusion of the judgment there, the Supreme Court held:

The trial court in this case though admitting the fact that there is no reciprocal recognition of judgments, however found that the bankruptcy order of the Taipei District Court had effect on properties of the bankrupt situated in Hong Kong. As a result, the trial court found that the relevant shares belong to the bankruptcy estate. Such findings against the appellant were hasty. The reasoned assertions and complaints made in the appeal that the judgment of the original trial was improper and the judgment should be annulled are not without reason.

The matter was therefore remitted for re-trial. As I have already pointed out, it appears that at the re-trial, judgment was given in favour of the trustees but the judgment appears to be more in a form of default judgment. It was not one on the merits which could show the relevant law of Taiwan.

Trustees action based on right to bring proceedings

The conclusion in respect of the evidence that it was established that the Bankruptcy Order of 20 October 1990 did not cover assets outside Taiwan is in my view correct and indeed was attempted to be skilfully avoided by Mr Yu SC. It was said that the correct question was whether under the laws of Taiwan the trustees in bankruptcy have the power to enforce the bankrupt's right of action to recover assets situated outside Taiwan. They like the syndics in *Alivon v Furnival* (1834) 1 Cr M & R 277 were acting as mandatories or agents for the creditors and not as assignees.

This explanation of the cause of action does indeed, it seems to me, explain the basis of the proceedings by the trustees against the first defendant in Taiwan. The District Court had specifically stated that it conceded that there was jurisdiction to hear the case because it was a civil dispute between two nationals of Taiwan. Paragraph 4 of the judgment of the High Court went further and the conclusion of that paragraph explained that the action was an action *in personam* based upon a termination of trust relationship between Mr Ting and the first defendant. That termination had been effected by the trustees. The trustees being the persons exercising the right of management, disposal or commencement of proceedings in Taiwan, the question of whether the shares were held abroad and should not be considered as part of the property of the bankrupt was irrelevant to the action which was one for enforcement of the

CA

A Whereas this explanation of the proceedings would fall within the scope of the second issue, in my view, it does nothing to assist the trustees' case and indeed it damages it. That would be so for two reasons.

B In the first place, reliance upon this argument would not entail a recognition by the Hong Kong Court of a state of affairs existing in Taiwan but would be the active assistance in the operation of an executive function of trustees appointed by a Taiwan Court under the Taiwanese bankruptcy law, the trustee being subject to Court control and periodic reporting to the Court. The ultimate destination of the proceeds would be subject to the control of the bankruptcy Court in Taiwan according to the rules of the distribution of assets in Taiwan.

C In the second place, as I have already noted, the recognition and facilitation of the commencement of proceedings by foreign trustees in bankruptcy is based on comity. In the present circumstances, this Court could not accord comity to the authorities or Courts of Taiwan.

D As shown by r.169 of Dicey & Morris, *The Conflict of Laws* (12th ed.) an assignment of a bankrupt's property under the bankruptcy law of a foreign country operates as an assignment if the foreign bankruptcy law provides for extra-territorial effect of the bankruptcy. It is therefore crucial to show that extra-territorial effect. For that purpose the Hong Kong statute law as to bankruptcy is irrelevant. In respect of the case of *Solomons v Ross* (1764) 1 Hy Bl 131n to which reference has been made, according to the report of *Folliott v Ogden* 1 Hy Bl 123 Lord Loughborough said he had been counsel in *Solomons v Ross* and that the case was decided solely on the principle that the assignment of the bankrupts' effects to the curators was an assignment for valuable consideration. In any event Lord Loreburn said of that case in *Galbraith v Grimshaw* [1910] AC 508 at p.511:

G I am not prepared to accept and act upon the case which is scantily reported ... I am not prepared to accept that case as an authority against the rule or the principle to which I have adverted.

H The rule to which Lord Loreburn was referring was that an assignment as a result of a foreign bankruptcy could not prevail over a previous garnishee order in England. Nevertheless, Lord Loreburn's strictures emphasise the need for caution in relying upon general rules said to come from that case.

Conclusion

I In my view this appeal should be dismissed in respect of both issues.

Mortimer V-P:

J By a majority the appeal is allowed. The two preliminary issues are answered in favour of the trustees.

We have not dealt with the question of costs. If an order cannot be agreed between the parties, the matter must be re-listed for argument.