Judgment in Case *Ting Lei Miao v Chen Li Hung & Others*, Hong Kong, PR China

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Summary of the decision: Summary of the decision: while the PRC does not recognise the Taiwanese sovereignty, Taiwanese court orders concerning private rights are still recognised.

Cited international law materials: international law doctrine, draft model law elaborated by the United Nations Commission on International Trade Law

Key words: non-recognised courts, doctrine of public policy, Taiwan, non-recognition

TING LEI-MIAO
V. CHEN LI HUNG AND OTHERS

CACV000178/1997

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

1997, No. 178
(Civil)

BETWEEN

TING LEI-MIAO

Plaintiff
(1st Respondent)

and

CHEN LI-HUNG
Alias CHAN CHEN LI-HUNG

1st Defendant
(2nd Respondent)

CHAN KAI-YUNG

2nd Defendant
(3rd Respondent)

AND

(1) KU CHIA-CHUN

(2) YEH DAH-IN

(3) CHEN CHIN-LUNG

(4) LIOU CHIH-POUNG

Applicants
(Appellants)

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Coram: Hon Mortimer, V.-P., Godfrey and Rogers, JJ.A. in Court

Dates of Hearing: 25, 26 and 27 February 1998

Date of handing down Judgment: 2 July 1998

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J U D G M E N T

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Mortimer, V.-P.:

1. 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

2. 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 1,250,000shares paid for by the plaintiff but registered in the name of either the 1st or the 2nd defendant are alleged to be held in trust for the plaintiff.

3. The action is contested and has reached the discovery stage.

4. On 6 May 1993 the trustees in bankruptcy commenced proceedings against the 1st 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 1st defendantappealed to the Taiwan High Court the appeal was dismissed. She then appealed to the Taiwan Supreme Court. There her appeal was allowedand the case was remitted to the Taipei District Court for a further hearing. She failed to attend the further hearing with the resultthat her appeal was dismissed. In Taiwan therefore the judgment in favour of the trustees stands, all avenues of appeal having beenexhausted.

5. Events leading to the trial of the preliminary issues began on 6 October 1995. An application was made to amend the writ by addingthe trustees in bankruptcy as plaintiffs. This and an earlier application under O14A for the determination of a question of law bythe plaintiff were adjourned for argument.

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

7. The summons of 11 December 1995 came before Leonard J in June 1996. He ordered four preliminary issues to be determined under O33r3 but with two of these to be tried first. They were the subject of the trial below.

The preliminary issues

8. 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 TaipeiDistrict Court dated 20th October 1990;

(b) whether in all the circumstances of this case, this Honourable Court should recognised the said Order of Taipei District Courtas having effect over the assets of Ting Lei Miao situated in Hong Kong."

The order of the Taiwanese Court

9. 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 plaintiffTing lei-miao was adjudged bankrupt and the four appellants were "elected" the trustees in bankruptcy. Later, the trustees in bankruptcytook proceedings in the Taipei District Court for the recovery of one million shares in the Nikko Hotel – the subject of the presentproceedings. 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 millionshares of the Hong Kong Company Hotel Nikko Hong Kong Ltd to the plaintiffs and shall assist in the registration of transfer of theshares to the plaintiffs."

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

The hearing below

11. P. Chan J (as he then was) gave judgment before 1 July 1997. He was assisted by a certificate from the Foreign & CommonwealthOffice 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 1st July would not make any difference. Furthermore, a statement by the Chief Justiceand President of the Supreme People's Court in China, Mr Ren Jian Xin, showed that there is a tendency of the PRC to recognise thecivil 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 ifthe 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 enquiriesof the executive. No counsel has submitted that it is necessary to make those enquiries but should we not agree they have assistedby providing suggested draft questions.

Is it necessary to address questions to the Chief Executive?

12. The Basic Law provides by Article 19 para.3:

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

The question is, therefore, whether any "such questions arise in the adjudication" of this case. If they do, the appeal must be adjournedfor the necessary enquiries. As Taiwan is a province of the PRC, foreign affairs are not involved. Further, this case does not concerndefence in any way. However, the recognition of a rebel government in control of national territory is a matter for the executiveat

common law whether or not this is provided for in the Basic Law. In consequence I would hold that if recognition of the Taiwanesecourt – contrasted with giving effect to an order of that court – is essential to our decision questions must be addressed to theChief Executive.

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

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?

14. 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 isyes, initial issues concerning the effect of the orders of the Taiwanese courts will be resolved.

15. The relevant rules in "The Conflict of Laws" Dicey and Morris 12 Ed are:

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

(a) he was domiciled in that country at the time of the presentation of the petition; or

(b) he submitted to the jurisdiction of its courts, … by appearing in the proceedings."

And,

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

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

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

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

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

20. On this the law is settled. The trustees do have the right to sue in the Hong Kong courts. This follows from the long establishedauthority of **Alivon v Furnival** 1834 1 CM&N 278 at 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 abankrupt are in this country; but it should seem that the syndic's act as mandatories or agents for the creditors; the hold freeor 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 offoreign assignees or curators, or foreign incorporations, appointed or created in a different way from that which the law of thiscountry requires."

21. This was followed in **Maclauly v Guarantee Trust Co of New York** 1927 TLR 99 at 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 thecountry 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 whoseproperty they had been appointed receivers or assignees that gave them a right which this country, by the committee of nations wouldtreat as though it were a right of action at common law on evidence that in fact the operation of the orders appointing them gavethem 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 thetrustees 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 supervisedby 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 usto commence legal proceedings in his name in Hong Kong and our application to apply for joinder in the present proceedings. Thesewere all approved by the Taipei District Court. Besides, all our expenditure incurred in the present proceeding was taken out fromthe estate of the plaintiff with the approval of the Taipei District Court."

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

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

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.

23. 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 legalfoundation, but it is allowed – temporarily at least – to remain in effective control. The Taiwanese courts which made the ordersrelevant to this appeal are not recognised by the Hong Kong courts.

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

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

"My Lords, if the consequences of non-recognition of the East Government 'government' were to bring in question the validity of itslegislative acts, I should wish seriously to consider whether the invalidity so brought about is total, or whether some mitigationof the severity of this result can be found. As Locke said: 'A government without laws is, I suppose, a mystery in politics, inconceivableto 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 cannotbe pressed to its ultimate logical limit, and that where private rights, or acts of everyday occurrence, or perfunctory acts of

administrationare concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interests of justice and commonsense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realitiesfound 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 *Upright 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 assembledin Professor D.P. O'Connell's International Law (1965) vol I, pp189 et seq. No trace of any such doctrine is yet to be found in Englishlaw, but equally, in my opinion, there is nothing in those English decisions, in which recognition has been refused to particularacts of non-recognised governments, which would prevent its acceptance or which prescribes the absolute and total invalidity of alllaws and acts flowing from unrecognised governments. In view of the conclusion I have reached on the effect to be attributed to non-recognitionin 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 entirelyirrelevant to that in the present appeal.

25. References to the principle that some validity may be given to usurper's acts by reason of an implied mandate from the lawful sovereignare to be found in **Madzimbamuto v Lardner-Burke**[1969]1 AC 646. This is traced back to Grotius – De Jure Belli ac Pacis, Bk 1 Ch. IV, Sect. XV (see 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 afterhe has acquired a right through long possession or contract, but while the basis of possession remains unlawful. Now while such ausurper is in possession, the acts of government which he performs may have a binding force, arising not from a right possessed byhim, 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 whichwould result from the subversion of laws and suppression of the courts."

At 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 topreserve law and order in territory controlled by a usurper."

Whereas Lord Pearce in his minority decision says at 732:

"I accept the existence of the principle that acts done by those actually in control without lawfully validity may be recognised asvalid or acted upon by the courts, with certain limitations namely (a) so far as they are directed to and reasonably required toordinarily 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 policyof the lawful Sovereign. This last, i.e. (c), is tantamount to a test of public policy."

26. In **In Re James (An Insolvent)** [1977] Ch. 41, Lord Denning MR accepted the principle as did Scarman and Lane LJJ. At 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. Iagree with much of the thinking that lies behind the judgment. I do think that in an appropriate case our courts will recognise thevalidity of judicial acts, even though they be the acts of a judge not lawfully appointed or derive their authority from an unlawfulgovernment."

The principle was again considered in **Hesperides Hotels v Aegean Holidays Ltd** [1978]1 QB 205. Lord Denning MR considered the conflicting authorities and at 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 controlof a territory even though it has not been recognised by Her Majesty's Government de jure or de facto: at any rate, in regard tothe 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 effectivecontrol or not."

At 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 the *Carl Zeiss* case [1967] l AC 853, and in particular to those of Lord Reid and Lord Wilberforce, it is clear that at some future date difficultquestions may well arise as to the extent to which, notwithstanding the absence of recognition, the English courts will or may recogniseand give effect to the laws or acts of a body which is in effective control of a particular area or place."

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

28. 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 **Madzimbamuto's** case at 727:

"… it is all historic fact that the government of Texas, then in full control of the state. was its only actual government; andcertainly if Texas had been a separate state, and not one of the United Slates, the new government, having displaced the regularauthority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of administrationwould have constituted, in the strictest sense of the words, a de facto government, and its acts, during the period of its existenceas 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 theacts of such a slate government must be treated as valid, or invalid. It may be said, perhaps with sufficient accuracy that actsnecessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domesticrelations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providingremedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, mustbe regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or supportof rebellion against the United States, or intended to defeat the just rights of citizens and other acts of like nature, must, ingeneral, be regarded as invalid and void."

Conclusion

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

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

31. 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 Kongwhich 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 recognitionof the legality of the Taiwanese courts. Nor is a recognition of the rights of the trustees in bankruptcy to sue in Hong Kong inany way inimical to the interests of the sovereign power.

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

Godfrey, J.A.:

Introduction

33. 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 whetherthe court should recognise and give effect to an order of the Taipei District Court made on 20 October 1990 by which, among otherthings, one Ting Lei-miao ("the bankrupt") a Taiwanese resident, was adjudicated bankrupt; and (2) as to whether the court shouldrecognise that order as having effect over the assets of the bankrupt situated in Hong Kong.

34. 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.

The background

35. The bankrupt is or was the owner of 3,500,000 shares in Hotel Nikko Hong Kong Limited ("Hotel Nikko"). Claims adverse to the bankrupthave been made in relation to those shares. The trustees seek to resist those claims. The Taiwanese courts have, since 20 October1990, recognised the trustees' claim to the disputed shares.

The judgment below

36. 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 theChief Justice and President of the Supreme People's Court of the PRC, that there was a "tendency" of the PRC to recognise the civilactivities and rights of Taiwanese residents according to the regulations of the Taiwan region as having factual validity). Sincethe government of the United Kingdom did not recognise Taiwan, either de jure or de facto, the judge refused to recognise the orderof 20 October 1990.

The change of sovereignty

37. 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 nowconcern ourselves instead with the attitude of the PRC government. The judgment below, therefore, is no longer relevant, and we mustapproach the matter afresh.

The effect of the order of 20 October 1990

38. 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 anaction here for a declaration as to the bankrupt's beneficial entitlement to shares in a company incorporated in Hong Kong againstany person claiming an interest in those shares adverse to that of the bankrupt, together with all necessary and consequential relief.

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

40. 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 jurisdictionto make the adjudication made by its order of 20 October 1990? In my judgment, it does not.

41. It has been settled for centuries, in England and Wales, that the court may recognise, and give effect to, foreign bankruptcy proceedingswhere no question has arisen as to the jurisdiction of the foreign court over the bankrupt (see **Solomons v. Ross** (1764) 1 H.Bl. 131n) notwithstanding that the foreign insolvency proceedings may be of a very different nature from ours and that a decree in such proceedingspronounced by a foreign court cannot be equated with a foreign judgment (indeed, in some countries insolvency may occur within theintervention of any court proceedings at all).

42. Not surprisingly, therefore, it is not a condition precedent to the recognition by our courts of a foreign insolvency proceedingthat it, too, should operate to vest the bankrupt's property in his trustees by way of assignment : see, e.g. **Alivon 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 ofa bankrupt are in this country ….."

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

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

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

46. 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 disputehere for the benefit of the bankrupt's estate. No question of public international law arises. We are concerned here only with therules governing the administration of the estate of a bankrupt under the law of his domicile. This is a matter of private internationallaw. Only private rights are involved. In such a case, it is clearly "in the interests of justice and common sense" (see **Cart Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2)**[1967] AC 853, per Lord Wilberforce at p. 954) that our courts should afford the same recognition to the order of the Taipei District Court ininsolvency proceedings as it would afford to an order of any other court of competent jurisdiction in similar proceedings. I wouldfound this conclusion on the juridical basis explained by Lord Denning, MR in **In re. James** [1977] 1 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 lawfulsovereign 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 thanexpose them to all the disorders of anarchy. In my judgment, the People's Republic of China, the lawful sovereign here, should betreated as recognising the same necessity for the exercise of a bankruptcy jurisdiction by the courts of Taiwan as it would recognisefor 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, includingour compatriots in Taiwan, to accomplish the great task of reunifying the motherland.”

47. 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 Chinato refuse to recognise the orders in bankruptcy of a court of competent jurisdiction in what the People’s Republic of China regardsas another part, especially since (as I understand) the mainland courts are themselves expected to recognise Taiwanese judgments.

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

Rogers, J.A.:

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

Background

49. The plaintiff, Mr. Ting Lei Miao, was adjudged bankrupt in the Taipei District Court, Taiwan, on 20th October 1990. Mr. Ting hadbeen the President of the Fortune Group in Taiwan. We have been told that this Group had taken deposits from the general public inTaiwan. Apparently, there were more than 100,000 investors who had deposited a total of 48.9 billion NTD with the Group. In July1989, the Group stopped paying principal and interest to the investors. Mr. Ting was held responsible for the liability of the Groupand adjudged bankrupt by the Taiwan Court.

50. The Appellants in this appeal are the four trustees in bankruptcy of Mr. Ting. They were appointed by the Bankruptcy Order of the20th October 1990.

History of these proceedings

51. This Action was commenced by writ on the 2nd August 1991. As originally formulated, the claim is one by Mr. Ting against the Defendantin respect of a total of one and a quarter million shares in Hotel Nikko Hong Kong Limited which the Plaintiff claimed were heldin trust for him by the Defendants. One million shares were claimed from the First Defendant and the remainder from the Second. Itis said that a careful perusal of the Statement of Claim would show that the claim was in fact being made by Mr. Ting’s trusteesin bankruptcy.

52. 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 trusteesin bankruptcy. On the face of it without more, an attorney acts at the direction of, in the interests of and on behalf of his orher principal. A trustee in bankruptcy may have powers of attorney but acts at the direction of the appointing authority (in thiscase the Court in Taiwan) and in the interests of the creditors, particularly where those interests conflict with those of the bankrupt.

53. The claim in the original Statement of Claim, and as the pleadings stand at present, is a claim by Mr Ting for a declaration thatthe 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 thePlaintiff or at his direction or that of his authorised attorneys. As the Statement of Claim stands at present the attorneys arenot parties to the action and there is no suggestion that the attorneys are claiming in their own right still less is there any issuebetween the attorneys and the Plaintiff as to who is entitled to the shares.

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

55. The trustees thereafter took proceedings in the Taipei District Court in their own names against the First Defendant claiming thesame one million shares which had been claimed in these proceedings. Mr. Ting was not a party to those proceedings. Judgment wasobtained in the Taipei District Court on

14th 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 thematter went back before the High Court, the Defendant failed to appear at the hearings either in January or March 1997. Accordinglyon 8th March 1997 the High Court of Taiwan issued a notice to the effect that the Defendant's appeal was regarded as withdrawn. Thisseems to have been akin to a default judgment but the effect of the Taiwan proceedings will be considered later.

56. 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 powersof attorney upon which the trustees relied and sought to take over the conduct of this Action.

57. Consequently, shortly prior to the hearing of the Notice of Motion for summary relief an application was taken out by solicitorsinstructed by the trustees acting in the name of the Plaintiff for leave to amend the writ by adding the trustees as Plaintiffs tothe Action and amending the Statement of Claim.

58. Again that application has not yet been disposed of and upon the Plaintiff being represented by new solicitors, application was madeon behalf of the trustees to intervene in the Action, either in addition to or in substitution for the Plaintiff, in their capacityas trustees in bankruptcy of the Plaintiff and to have conduct of the proceedings as the Plaintiffs in the Action.

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

60. Before turning to the issues themselves, I would comment that the procedure of ordering preliminary issues is one which should beused sparingly. Unless there are clear indications that there will be a saving of proceedings and costs in whichever way the preliminaryissue is decided, it is often to the disadvantage of all concerned to have the issues in a case divided. Furthermore, the difficultyof defining the preliminary issue prior to the full facts emerging can mean that at the preliminary issue stage, the final contentionsof the parties are not fully ventilated.

61. Here the position is even more tenuous. The preliminary issues do not arise on the pleadings at all. As I have pointed out, the issueson the pleadings as they stand at present are between Mr Ting and the 1st Defendant. The issues which are the subject of the preliminaryissues arise, if at all, on the draft amended pleadings, between the trustees, who are not yet parties to the proceedings, and thePlaintiff and were directed to be tried as part of a process of resolving an interlocutory application to determine whether leaveto amend and join parties should be allowed. For my part, I consider that such a procedure should not have been followed. The difficultieshave been exacerbated in this case because the wording of the issues has been imprecise and such that reference to the draft pleadingsis necessary to determine what it is that is sought to be determined by the issues.

The preliminary issues

62. 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 TaipeiDistrict Court dated 20th October 1990 (a copy of which is exhibited as KCC-1 to the affirmation of Ku Chia Chun filed on 11th July1995);

(b) Whether in all the circumstances of this case, this Honourable Court should recognise the said Order of the Taipei District Courtas having effect over the assets of Ting Lei Miao situated in Hong Kong.

63. The Judge below decided both issues in the negative.

Change of circumstances since the judgment

64. 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 considerwhether that would affect the outcome of this case. What is necessary is to consider this case in the light of the sovereignty whichnow exists.

65. Since Hong Kong is now part of the People's Republic of China, the Constitution, i.e. that adopted by the Fifth National People's Congress on 4th December 1982, is applicable in Hong Kong being part of the People'sRepublic. 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.

66. In the Preamble of the Constitution, it is stated :-

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

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

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

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'sRepublic of China but that a state of affairs exists whereby the integrity of the People's Republic has been broken.

67. 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 isHong Kong, namely the People's Republic of China. It is however governed by a government that is not recognised by the People's Republicof China. For the purposes of this appeal, I consider that it should be treated as equivalent to a territory with a rebel government.

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

Proposed questions

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?

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

Preliminary issue (1)

69. I have set out above the wording of the first preliminary issue. I would draw attention to the following points which I considerarise 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 berecognised and given effect to is the order of the Court on 20th October 1990, namely the Order whereby Mr. Ting was adjudged bankrupt.

70. 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 6th October 1995, the new paragraph 4 recites the Order of 20th 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 thedraft 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 purposeof recovering the assets of the bankrupt."

The other major new paragraph in the draft Statement of Claim is paragraph 6 which refers to a further power of attorney. That matteris therefore irrelevant to the present questions.

71. I would observe, at this stage, that the way the draft Statement of Claim has been phrased and the question for determination istherefore not whether certain assets should be regarded as belonging to the trustees but whether the Court Order should be recognisedand 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 proceedingsby the trustees against the 1st Defendant; nor does it purport to base any claim on the effect of the Orders of 14th March 1994 or8th 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 the 8th March 1997 but it was drafted and put forwardafter the Taipei District Court Judgment in March 1994. Paragraph 5 of the draft Statement of Claim pleads the right to bring proceedingsin a Hong Kong Court to recover assets of the bankrupt, not, I would point out, assets the property in which has been transferredto the trustees. What the Court is being asked by the question is whether a right to bring proceedings should be accorded to theTaiwanese trustees in bankruptcy for these purposes. That as, I understand it, is the relevant recognition and effect, which is underconsideration in the first issue.

72. It has to be borne in mind that the trustees in bankruptcy are in the process of administration of an estate in Taiwan. The distributionof any sums recovered will be made under the Taiwan rules relating to distribution of assets. The whole process is being conductedunder the direction of the Taiwan Court. Mr. Chen Chin Lung, a lawyer and one of the trustees in bankruptcy of Mr. Ting's estatemade an affirmation on the 1st December 1995. In paragraph 8 of that affirmation Mr. Chen states that the administration of Mr. Ting'sassets was done under the supervision of Bankruptcy Court in Taiwan. From time to time the trustees reported to the Bankruptcy Courtthe steps taken in recovering Mr. Ting's assets. Not only therefore would the result of such recognition and the giving of effectto 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 administrationof the bankrupt's estate which is being done under the direction of the Court in Taiwan.

73. Mr. Yu S.C. in his admirable argument, relies upon the statements in the various speeches and judgments which draw attention to thepractical difficulties of failing to recognise the existence of a state of affairs in jurisdictions where the government is neitherrecognised as a lawful government nor a government in fact.

74. The start of the submission is a passage in the speech of Lord Wilberforce in the case of **Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2)** [1964] A.C. 853. That case concerned the ownership of trademarks used in respect of products of a business which had become divided because of thedivision of Germany. East Germany was a State set up under Soviet authority but was unrecognised as a State particularly by the UnitedKingdom. Questions of recognition of government acts therefore came into play. The House of Lords reiterated the firmly establishedprinciple that the question whether a foreign state ruler or government is or is not sovereign is one on which the Courts acceptas conclusive the statements provided by the Government. The conclusion in the case was that although the East German Governmentwas not recognised by the Government of the United Kingdom, its acts should be recognised by the English Courts as lawful, not becausethey were acts of a sovereign state, but because they were acts done by a subordinate body which had been set up by the Soviet Republicwhich was recognised by the United Kingdom.

75. The difficulty of not recognising the acts of the East German Government (called the Democratic Republic of Germany) was exemplifiedin the speeches. If, for example, civil marriages were not

recognised, children would be regarded as illegitimate. Furthermore, ifdivorces granted in the German Democratic Republic were not recognised, confusion would be bound to exist, causing considerable complicationsfor those wishing to remarry outside East Germany. Further examples were given that companies incorporated in the German DemocraticRepublic would not be able to sue or be sued in the United Kingdom.

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

"My Lords, if the consequences of non-recognition of the East German 'government' were to bring in question the validity of its legislativeacts, I should wish seriously to consider whether the invalidity so brought about is total, or whether some mitigation of the severityof this result can be found. As Locke said : 'A government without laws is, I suppose, a mystery in politics, inconceivable to humancapacity 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 cannotbe pressed to its ultimate logical limit, and that where private rights, or acts of everyday occurence, or perfunctory acts of administrationare concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interests of justice and commonsense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realitiesfound to exist in the territory in question. These ideas began to take shape on the termination of the Civil War (see *U.S. 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."

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

78. Two points arise from Lord Wilberforce's observations at this part of his speech. In the first place, this was said in the contextof referring to private rights or acts of everyday occurrence and perfunctory acts of administration. That is quite different fromthe Courts recognising and giving effect to an Order of a foreign unrecognised Court particularly if that recognition entails allowinga person appointed a trustee by that Court purporting to act in that capacity and under the direction of that Court in carrying outpresent functions which that Court is supervising. In my view, there is a clear distinction to be drawn between recognising the existenceof 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** case, the existence or otherwise of a body corporate on the one hand and recognising and giving effect to an Order of a Court inthese circumstances on the other. In the second place, the speech of Lord Wilberforce was made in the context of the recognitionor otherwise of foreign governments. In the present case, as I have indicated, the government in question is an unrecognised governmentof another part of the People's Republic of China. Issues of diplomacy and recognition of foreign governments are therefore not inquestion. What is in question is what recognition a sovereign state should give to an unrecognised government of part of its ownterritory.

79. This latter issue was dealt with in part in the case of **In re James (An Insolvent)** [1977] 1 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 colonyof Southern Rhodesia had made a Unilateral Declaration of Independence. In the circumstances that were held to exist, there couldbe no equivocation and the position of the United Kingdom Government was that Rhodesia was still a colony and that the Governmentof Rhodesia was an illegal government. The position of the Courts in Rhodesia was that allegiance was no longer owed to the UnitedKingdom. In the circumstances, therefore, as far as the Courts of the United Kingdom were concerned Rhodesia was a rebel territoryand the Courts of Rhodesia were exercising jurisdiction in a rebel territory. The case arose because the trustees in bankruptcy appointedby the Rhodesian Court were seeking to recover assets of the insolvent in the

Untied Kingdom. The particular provisions under whichthey purported to act related to the High Court in England having jurisdiction in the matter because the order in question was anorder of a British Court.

80. Lord Denning M.R. in a dissenting judgment examined the duties of the citizens of Southern Rhodesia after U.D.I. had been declared.In particular, he examined the duties of those responsible for law and order, for example, the Judges and the police. He pointedout that if the normal tasks were not carried out, murderers would go free, thieves would go unpunished and the civil law would beunenforced. In a passage at p.62 of his judgment, Lord Denning referred to the fundamental duty of the Crown to maintain law andorder in the rebel territory and specifically by authorising the Judges and officers of the Court despite the fact that they mayhave 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. Hugo Grotius himself said as much. When a lawful sovereignis 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 orderwithin 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 isnecessary for the maintenance of law and order rather than expose them to all the disorders of anarchy : see his book on War andPeace (De Jure Belli ac Pacis, Book I, Ch. IV Sect. XV) as translated in 1738."

81. Scarman, L.J. clearly had sympathy with the views expressed. At p. 70, he says that he agreed with much of the thinking which laybehind 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 ajudge 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 anunlawful court or a de facto judge, therefore the court thus recognised is a British court."

82. On that issue, he parted company with the Master of the Rolls and held that the Courts of Rhodesia were not British Courts. GeoffreyLane, L.J. 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 U.D.I. because his appointmentwas ex hypothesi illegal and void. It is true to say that earlier in his judgment the Judge had said that it was unnecessary to decidewhether the Courts of Rhodesia could rightly be described as Courts at all in the eyes of the law of England.

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

84. Two cases were cited for the proposition that foreign trustees in bankruptcy were entitled to sue even though the effect of the bankruptcydid 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** 149 E.R. 1084. Parke B. was there dealing with the right of syndics appointed in France to sue to recover property of the bankrupt in England. Hesaid :-

"The property in the effects of the bankrupt does not appear to be absolutely transferred to these syndics in the way that those ofa bankrupt are in this country; but it should seem that the syndics act as mandatories or agents for the creditors; the whole threeor 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 offoreign assignees or curators, or foreign corporations, appointed or created in a different way from that which the law of this countryrequires."

85. That case was cited and relied upon in the decision of Clauson, J. in **Macaulay v. Guaranty Trust Company 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.

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

Reason for not recognising and giving effect to the Order

87. 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 ofthe sovereign territory where the authority of the sovereign is disputed. This would include recognition of marriages, divorces andthe transfer of property. However, as I have already pointed out that is not the question which arises on the first preliminary issuein this case. The draft Statement of Claim does not rely upon an allegation that any right of property vests in the trustees butrather having referred to the Order of the Taiwan Court on 20th October 1990 the claim is that the trustees have the right and capacityto 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 governmentwhich is not merely an unrecognised government but is exercising power in the Republic of China contrary to the wishes and intentof the Sovereign Government. If the Court were so to act, it seems to me, it would unwittingly become part of the judicial processof Taiwan, namely the process of administration of assets in what is in effect a rebel territory under the control of a Court ofthe rebel government.

88. There are further and other matters which seem to me also to militate against giving effect to the Bankruptcy Order in the mannersought. It is at once apparent from the very fact of this Action that Mr. Ting's financial affairs are not confined to Taiwan. Thereare clearly assets in Hong Kong alleged to belong to Mr. Ting. No inquiry, for example, has been conducted or at least drawn to theattention of this Court as to whether there are creditors of Mr. Ting in Hong Kong. With increasing international trade and businessconducted in more than one jurisdiction, the questions raised by insolvency of those conducting such businesses have raised and arecontinuing to raise considerable problems. As increasing difficulties have been encountered, the United Nations has adopted a draftmodel 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/52/17 Annex 1) (UNCITRAL Year Book, Vol. XXVIII : 1997,Part 3) This draft model law relates to co-operation between Courts in respect of cross-border insolvencies. It is fair to say thatexperience has shown in other jurisdictions that problems have arisen where assets and liabilities of a single debtor exist in morethan one jurisdiction. Each jurisdiction is concerned to see that its own creditors receive a just proportion of the assets. Insofaras it has been possible, the Courts have hitherto resolved difficulties which have arisen in respect of distribution of assets bythe adoption of protocols such as that which was adopted in the case of the Maxwell insolvency in England and New York.

89. For the Court to recognise and give effect to the Bankruptcy Order in the manner sought in this Action it would mean that were creditorsto exist in Hong Kong, the Court would be assisting in the judicial process whereby those creditors would lose the benefit of theassets which were the subject of

the Action or the Court would have in some way to co-operate with the Courts of Taiwan, at leastto the extent of giving effect to a protocol approved by both Courts.

90. 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 entirelyon the Order of 20th October 1990 and that in making the application they were seeking to participate in the Action as officers ofthe Taipei District Court. In effect therefore the Court was being asked to do more than ever to recognise the validity of an orderof 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.

91. What I have said is strictly in the context of the question which has been framed in the context of the draft pleadings that werebefore the Court, the application to rely on which prompted the Court to order the trial of a preliminary issue. As I have made plainthis 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

92. It was submitted on behalf of the Appellant that there is clearly an authority in Taiwan which is capable of exercising effectivecontrol 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] Q.B. 54, it was said that the Courts in Hong Kong should reach their own conclusion as to whether there was a government which should berecognised.

93. 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 referredto 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 dangerof them speaking with different voices should the Court adopt such an approach as has been advocated. Furthermore, the Court shouldnot be involved in assessing the political situation in the territory where there has been an unconstitutional change in power orauthority. The third reason given in the judgment below that different Courts may speak with different voices in respect of the sameforeign government depending on the evidence adduced, again, in my view, is a valid point and one which would militate against adoptionof such an approach.

94. The report of the Chief Justice and President of the P.R.C. Supreme People's Court quoted in the affirmation of Qi Rui Qing and citedin 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 thePRC and damage the public interest of the society, the civil activities of a Taiwan resident in Taiwan and the civil rights obtainedby a Taiwan resident in accordance with the regulations of the Taiwan region can be recognised as having its factual validity. Regardingthe civil judgments made by the Courts of Taiwan region, the question of recognition on the validity can also be resolved in accordancewith the aforesaid principles depending on the different circumstances ….:

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

Second Issue

96. The second issue would only fall to be determined if the first issue were found in favour of the Appellants. Nevertheless, I willalso deal with this briefly. The question turns upon whether the Court should recognise the Order of the Taipei District Court (namelythat of 20th October 1994) as having effect over the assets of Mr. Ting situated in Hong Kong. The basis of the decision below wasthat the

Appellants had failed to discharge the onus of showing that Bankruptcy Order in Taiwan encompassed assets in Hong Kong.

97. On one approach to this issue this matter is important. Rule 169 of Dicey & Morris, The Conflict of Laws, 12th Edition 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 countrywhose courts have jurisdiction over him in accordance with Rule 167(2) is, or operates as, an assignment of the movables of the bankruptsituate in England."

98. 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 certainlimitations :

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

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

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

Proceedings by the trustees against the First Defendant in Taiwan

101. The outcome of proceedings in Taiwan by the Trustees does not assist either. Action was commenced by the trustees against the FirstDefendant in Taiwan claiming transfer of the 1 million shares held by the First Defendant in the Hotel Nikko Hong Kong Limited. Inthe judgment on 14th March 1994, the District Court held that the Bankruptcy Order extended to property of the debtor or bankruptin a foreign country. It was also held that the effect of the Bankruptcy Order was that all property that belonged to the bankruptand his claims on property to be exercised in the future should be vested in the trustees. The matter was appealed to the High Courtof Taiwan which held that the intent of the Taiwan legislation was to protect the interests of the creditors in Taiwan and the BankruptcyOrders made in Taiwan should not be interpreted as having no effect on the property of the bankrupt in foreign countries. The HighCourt acknowledged however that there was a difficulty of enforcement but that since that case was, as I shall refer to below, anaction in personam that difficulty was removed.

102. 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 thebankruptcy order of the Taipei District Court had effect on properties of the bankrupt situated in Hong Kong. As a result, the trialcourt found that the relevant shares belong to the bankruptcy estate. Such findings against the appellant were hasty. The reasonedassertions and complaints made in the appeal that the judgment of the original trial was improper and the judgment should be annulledare not without reason."

103. The matter was therefore remitted for re-trial. As I have already pointed out, it appears that at the re-trial, judgment was givenin 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 couldshow the relevant law of Taiwan.

Trustees Action based on right to bring proceedings

104. The conclusion in respect of the evidence that it was established that the Bankruptcy Order of the 20th October 1990 did not coverassets outside Taiwan is in my view correct and indeed was attempted to be skilfully avoided by Mr. Yu S.C. It was said that thecorrect question was whether under the laws of Taiwan the trustees in bankruptcy have the power to enforce the bankrupt's right ofaction to recover assets situated outside Taiwan. They like the syndics in **Alivon v. Furnival** were acting as mandatories or agents for the creditors and not as assignees.

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

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

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

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

109. As shown by Rule 169 of Dicey & Morris, an assignment of a bankrupt's property under the bankruptcy law of a foreign countryoperates as an assignment if the foreign bankruptcy law provides for extra-territorial effect of the bankruptcy. It is thereforecrucial to show that extra-territorial effect. For that purpose the Hong Kong statute law as to bankruptcy is irrelevant. In respectof the case of **Solomons v. Ross** (1764) 1 H.Bl. 131n to which reference has been made, according to the report of **Folliott v. Ogden** 1 H.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 assignmentfor valuable consideration. In any event Lord Loreburn said of that case in **Galbraith . Grimshaw** [1910] 508@511:

"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 authorityagainst the rule or the principle to which I have adverted."

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

Conclusion

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

Mortimer, V.-P.:

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

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

(Barry Mortimer)

(Gerald Godfrey)

(Anthony Rogers)

Vice-President

Justice of Appeal

Justice of Appeal

Representation:

Mr. Benjamin Yu, S.C. & Mr. Godfrey Lam (M/s. Lau, Chan & Ko) for the Appellants/Applicants

Mr. Ronny K.W. Tong, S.C. & Mr. K.L. Lui (M/s. Philip Pang & Co.) for the 1st Respondent/Plaintiff

Mr. Denis Chang, S.C. & Mr. Erik Shum (M/s. Stevenson Wong & Lai) for the 2nd Respondent/1st Defendant

Mr. Charles P. Chiu (M/s. J. Chan, Yip, So & Partners) for the 3rd Respondent/2nd Defendant

Remarks:
On appeal by the Defendants to the Court of Final Appeal: Appeal dismissed with costs. Please refer to FACV000002/1999.

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