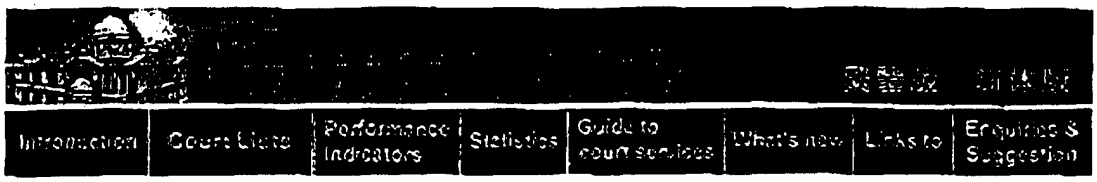

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FACV No. 2 of 1999

FINAL APPEAL NO. 2 OF 1999 (CIVIL)

(ON APPEAL FROM CACV No. 178 OF 1997)

Between :

CHEN LI HUNG alias CHAN CHEN LI HUNG	1st Appellant
and	
CHAN KAI YUNG	2nd Appellant
- and -	
TING LEI MIAO	1st Respondent
KU CHIA CHUN	2nd Respondent
YEH DAH IN	3rd Respondent
CHEN CHIN LUNG	4th Respondent
and	
LIOU CHIH POUNG	5th Respondent

Court:	Chief Justice Li, Mr Justice Litton PJ, Mr Justice Bokhary PJ, Mr Justice Nazareth NPJ and Lord Cooke of Thorndon NPJ
Date of Hearing:	13-16 December 1999
Date of Judgment:	27 January 2000

JUDGMENT

Chief Justice Li:

I agree with the judgments of Mr Justice Bokhary PJ and Lord Cooke of Thorndon NPJ.

Mr Justice Litton PJ:

I agree with the judgments of Mr Justice Bokhary PJ and Lord Cooke of Thorndon NPJ and have nothing to add.

Mr Justice Bokhary PJ:

THE QUESTION OF LAW

To what extent is effect to be given by our courts to orders made by courts sitting in Taiwan which is part of and under the *de jure* sovereignty of the People's Republic of China but is presently under the *de facto* albeit unlawful control of a usurper government? That is the question of law before the Court in this appeal. It arises in the following factual circumstances.

THE FACTUAL CIRCUMSTANCES OF THE CASE

Mr Ting Lei Miao ("Mr Ting") was the President of a group of companies in Taiwan which took deposits from the public there. Over 100,000 Taiwanese investors deposited about NT$48.9 billion with this group. As from July 1989 the group ceased to pay interest and failed to repay principal to its depositors, thus incurring liability to them for the same. On 20 October 1990 a Taiwanese court, namely the Taipei District Court, held Mr Ting responsible for the group's liability, and made an order adjudging him bankrupt and appointing four Taiwanese lawyers his trustees in bankruptcy ("the Trustees").

The bone of contention in the present litigation takes the form of 1.25 million shares in a Hong Kong company, Hotel Nikko Hong Kong Ltd ("Nikko"). At the time when the litigation commenced, Nikko had an issued share capital of 5 million fully paid up shares. Mr Ting was the registered owner of 3.5 million such shares. The Trustees have realised those 3.5 million shares for the benefit of Mr Ting's creditors.

As for the 1.25 million Nikko shares in contention: one million of them are registered in the name of Madam Chen Li Hung ("Madam Chen") by whom Mr Ting has five children; and 250,000 of them are registered in the name of Mr Chan Kai Yung ("Mr Chan").

It is the Trustees' case that these 1.25 million Nikko shares form part of Mr Ting's estate because Madam Chen and Mr Chan hold the Nikko shares registered in their names on trust for Mr Ting. Madam Chen and Mr Chan deny this.

On 2 August 1991 the present action was commenced in the High Court here. Mr Ting is the plaintiff; Madam Chen is the 1st defendant; and Mr Chan is the 2nd defendant. The claim is for the 1.25 million Nikko shares registered in Madam Chen and Mr Chan's names.

Although the action was commenced in Mr Ting's name, instructions to the solicitors for the plaintiff were actually coming from the Trustees.

The Trustees also brought an action against Madam Chen in Taiwan for the one million Nikko shares registered in her name. On 14 March 1994 the Taipei District Court gave judgment in favour of the Trustees. Madam Chen appealed to the Taiwan High Court which, on 6 March 1995, affirmed the Taipei District Court's judgment in favour of the Trustees. She then appealed further to the Supreme Court of Taiwan which, on 14 August 1996, remitted the case to the Taiwan High Court for a rehearing. However Madam Chen failed to appear at that rehearing. As a result, on 25 March 1997, the Taiwan High Court issued a certificate confirming the judgment which the Taipei District Court had given in favour of the Trustees on 14 March 1994, and treating that judgment as having been finalized as of 21 April 1994.

Reverting to the Hong Kong action, I come to what happened in that action after the Taiwan High Court had, on 6 March 1995, first affirmed the Taipei District Court's judgment in favour of the Trustees. It was this. On 11 July 1995 the Trustees took out a motion under Order 14A and 18 for judgment against Madam Chen for the one million Nikko shares registered in her name. They did so by asserting, in reliance on the Taiwanese judgment in their favour, an estoppel *per rem judicatam* against her.

Perhaps such reliance would of itself have eventually led to someone raising the question of law which I have posed at the beginning of this judgment of mine. Be that as it may, what in fact happened was as follows. At about this time, Mr Ting, having served a prison sentence in Taiwan, turned up in Hong Kong. He disputed the authority of the Trustees to give instructions in the present action commenced in his name. And he asserted his own right to give such instructions.

This led to a flurry of procedural steps. I need not rehearse all of them. It suffices to note the following developments. On 11 December 1995 the Trustees took out a summons for leave to intervene and to be joined as plaintiffs either in addition to or in substitution for Mr Ting. When the summons came on before Leonard J on 22 April 1996, he raised the question of whether the Taipei District Court's order of 20 October 1990 ("the Taiwanese Bankruptcy Order") was to be given effect by our courts. And on 5 June 1996 he made an order for the trial of four preliminary issues.

THE PRELIMINARY ISSUES AND HOW THE COURTS BELOW DETERMINED THEM

The first two of these four preliminary issues are now before this Court. As originally framed, they are worded thus:

> "(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 20th October 1990 ...;
>
> (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."

These two preliminary issues were tried before Patrick Chan J (as the present Chief Judge of the High Court then was). By the judgment which he gave on 27 June 1997, he determined both issues in the negative. That was before the People's Republic of China resumed the exercise of sovereignty over Hong Kong at midnight on 30 June

1997. But even before then, Taiwan was in the eyes of Hong Kong law a part of the People's Republic of China. As was stated in the Foreign and Commonwealth Office certificate placed before Patrick Chan J: "Her Majesty's Government does not recognize Taiwan as a state, ... acknowledge[s] the position of the Government of the PRC that Taiwan [is] a province of the PRC and recognize[s] the PRC Government as the sole legal government of China."

The Trustees appealed against Patrick Chan J's judgment. On 2 July 1998 the Court of Appeal (Mortimer VP and Godfrey JA, Rogers JA dissenting) allowed the appeal and answered both issues in the affirmative.

Madam Chen and Mr Chan now appeal to this Court, asking us to determine both issues in the negative. The Trustees are the 2nd to 5th respondents before us. Mr Ting appears to have been an ally of Madam Chen and Mr Chan's in the courts below. When the Trustees appealed to the Court of Appeal seeking determinations in the negative of both issues, Mr Ting was the 1st respondent. He was then represented by leading and junior counsel, and opposed the Trustees' appeal. In Madam Chen and Mr Chan's appeal to this Court, Mr Ting is once again the 1st respondent. But this time he is unrepresented and absent. Plainly his status as a respondent before us is not indicative of his having left Madam Chen and Mr Chan's camp to join the Trustees' camp.

The Trustees fear that if they cannot intervene as they wish, the present action will either not be pursued at all or will become a collusive action between Mr Ting in the guise of plaintiff and Madam Chen and Mr Chan in the guise of defendants. I must of course avoid saying anything which might prejudice the future course of the action. But it is necessary for me at least to decide whether that fear of the Trustees' is well-founded. In my judgment, the events which I have outlined amply establish that such fear is well-founded.

As was indicated to counsel in the course of the hearing before us, the true substance of the two preliminary issues now before the Court for determination would emerge with greater precision if one reversed their order (as Mortimer VP and Godfrey JA did) and thought of them in the following terms:

> (1) Does the Taiwanese Bankruptcy Order extend to Mr Ting's assets situated in Hong Kong?
>
> (2) If so, is that order to be given effect by our courts?

The questions should be approached in that sequence because there would be nothing about the Taiwanese Bankruptcy Order for our courts to give effect to if that order did not extend to assets situated here.

DOES THE TAIWANESE BANKRUPTCY ORDER EXTEND TO MR TING'S ASSETS SITUATED IN HONG KONG?

On the question of whether the Taiwanese Bankruptcy Order extends to Mr Ting's assets in Hong Kong, I have no doubt that the law is as stated by the learned editors of "Dicey and Morris on Conflict of Laws", 12th ed. (1993). Citing a number of cases including *Alivon v. Furnival* (1834) 1 Cr M & R 277 and *Macaulay v. Guaranty Trust Co. of New York* (1927) 44 TLR 99, they say (in Vol. 1 at p.1177) that:

> "It was at one time disputed whether a foreign trustee in bankruptcy could sue in that capacity in England to recover a debt due to the bankrupt. However, on proof that the foreign trustee has, under the law of the country in which he was appointed, a right to

> sue in his own name to recover such debts, an English court will now clearly recognise his right thus to sue in England."

By suing to establish that shares registered in other persons' names are beneficially owned by a bankrupt, his trustees in bankruptcy would be doing nothing materially different from suing to recover debts due to him. And I am satisfied that we should proceed on the footing that under the law in operation where they were appointed, the Trustees have the right to sue in their own names here with a view to getting the disputed 1.25 million Nikko shares into Mr Ting's estate. This is because it is not in dispute that every step taken by the Trustees, including every step which they have taken in Hong Kong, is in conformity with directions obtained by them from the bankruptcy court in Taiwan.

It is contended on Madam Chen and Mr Chan's behalf that its judgment of 14 August 1996 shows that the Supreme Court of Taiwan was of the view that the Taiwanese Bankruptcy Order did not extend to Mr Ting's assets in Hong Kong. I cannot accept this contention. All that appears from its judgment is that the Supreme Court of Taiwan had some doubt as to whether the Hong Kong courts would accord effect to that order given that Taiwan did not accord effect to orders of the Hong Kong courts. If the Supreme Court of Taiwan had really thought that under Taiwanese law the Taiwanese Bankruptcy Order did not extend to Mr Ting's assets in Hong Kong, it is inconceivable that it would have merely remitted the case for rehearing. If it had really thought that, it would surely have reversed the order made in the Trustees' favour and have entered judgment for Madam Chen instead. But it did not do that.

Extends to assets in Hong Kong

For the foregoing reasons, I hold that the Taiwanese Bankruptcy Order extends to Mr Ting's assets situated in Hong Kong.

IS THE TAIWANESE BANKRUPTCY ORDER TO BE GIVEN EFFECT BY OUR COURTS?

I therefore turn now to the question of whether that order is to be given effect by our courts.

Lord Wilberforce's statement

Lying at the heart of this question - and of the general question of the correct attitude in law to be taken to the orders of courts exercising *de facto* power without *de jure* authority - is the passage in Lord Wilberforce's speech in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2)* [1967] AC 853 at p.954 C-E where he famously said:

> "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 *U.S. v. Insurance Companies* 89 US 99 (1875)), and have been developed and reformulated, admittedly as no more than dicta, but dicta by judges of high authority, in later cases."

The decision of the United States Supreme Court there cited by Lord Wilberforce, *US v. Insurance Companies* , is one by which it was held, to quote the headnote, that:

> " 1. All the enactments of the *de facto* Legislatures in the insurrectionary States during the war, which were not hostile to the Union, nor to the authority of the General Government, and which were not in conflict with the Constitution of the United States or of the States, have the same validity as if they had been enactments of legitimate Legislatures.
>
> 2. An insurance company, created by the Legislature of a State, while the State was in armed rebellion against the United States, is a valid corporation and has a legal capacity to sue in the Court of Claims for the proceeds of the sale of property under the Captured and Abandoned Property Act."

It is instructive that Lord Wilberforce's statement, which covers non-recognition situations generally, cites a "rebellion" case like *US v. Insurance Companies* before turning to "non-recognized foreign government" cases like *Sokoloff v. National City Bank of New York* 145 NE 917 (1924) and *Upright v. Mercury Business Machinese Co. Inc.* 213 NY 2d 417 (1961). This supports the view that, with the proper safeguards in place and in appropriate circumstances, there is no reason to be less willing to give effect to the orders of "usurper" courts than to the orders of courts of non-recognized foreign governments.

Grotius's statement

Such view also finds support in Grotius's statement in "*De Jure Belli ac Pacis* ", Book 1, Chapter IV, Section XV that:

> "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."

The Rules of the Supreme People's Court

When it comes to sparing people from utter confusion, it is perfectly natural for a

sovereign to be even more benevolent towards its own people in usurped territory than towards the citizens of non-recognized foreign governments. This truism is, as it seems to me, well illustrated by the Mainland provisions drawn to our attention, namely "The Rules of the Supreme People's Court concerning the recognition by the People's Court of Civil Judgments delivered in Taiwan District" passed on 15 January 1998 and announced on the 22nd of that month. Those Rules apply in the Mainland. They state in Article 1 that they are enacted "to protect the rights and interests of litigants in civil proceedings in Taiwan and other provinces, autonomous regions and municipalities directly under the Central Government". And they go on to make provision for such litigants to apply to the People's Court for recognition of civil judgments delivered in Taiwan. So extending such protection (subject to the safeguards set out in the rest of the Rules) is obviously seen as being consistent with Taiwan's status as a part of the People's Republic of China.

Judicial statements in support of Lord Wilberforce's

No useful purpose would be served by referring to all the cases in which Lord Wilberforce's statement in *Carl Zeiss (No. 2)* has been cited - never with disapproval. But I do consider it worthwhile quoting what Scarman LJ said in *Re James* [1977] Ch. 42 and what Sir John Donaldson MR said in *Gur Corp. v. Trust Bank of Africa Ltd* [1987] 1 QB 599. In *Re James* - a bankruptcy case in the context of Southern Rhodesia's 1965 unilateral declaration of independence - Scarman LJ said this (at p.70G):

> "I do think that in an appropriate case our courts will recognize 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".

In *Gur Corp. v. Trust Bank of Africa Ltd* - which involved the question of whether the Republic of Ciskei had standing to sue or be sued - Sir John Donaldson MR said this (at p.622 D - F):

> "Lord Wilberforce, at p.954, reserved for further consideration whether the non-recognition of a government or, I think, a state, would necessarily lead to the English courts treating all its legislative activities as being a nullity or whether, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, it might not be possible to take cognizance of the actual facts or realities found to exist in the territory in question and he instanced private rights, or acts of everyday occurrence or perfunctory acts of administration. I see great force in this reservation, since it is one thing to treat a state or government as being 'without the law,' but quite another to treat the inhabitants of its territory as 'outlaws' who cannot effectively marry, beget legitimate children, purchase goods on credit or undertake countless day-to-day activities having legal consequences."

All of these statements, including Lord Wilberforce's, are admittedly *obiter*, but they constitute *dicta* of the most carefully considered kind, and I find them wholly persuasive.

Public policy

I am undeterred by the fact that those statements import a limitation by reference to the doctrine of public policy without defining the term "public policy". The reality of the matter is as Kekewich J frankly acknowledged when he said (in *Davies v. Davies* (1887) 36 Ch D 359 at p.364) that: " Public policy does not admit of definition and is not easily explained".

As is well known, the doctrine has its detractors, including Burrough J who said (in *Richardson v. Mellish* (1824) 2 Bing 229 at p.252) that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you". As is equally well known, the doctrine also has its supporters, including Lord Denning MR who answered (in *Enderby Town Football Club v. Football Association* [1971] Ch. 591 at p.606H) that: "With a good man in the saddle, the unruly horse can be kept in control".

Be all of that as it may, the doctrine is a part of the common law. And there is, I think, a good deal of force in the point which Prof. Winfield made (in (1928-29) 42 Harv. L. Rev. 76 at p.94) when he said that the "variability of public policy is a stone in the edifice of the doctrine, and not a missile to be flung at it".

When the doctrine of public policy is raised in the courts, it is usually in regard to whether a contract should be refused effect on public policy grounds. The contractual objects which invalidate contracts on those grounds include (as the learned editors of "Chitty on Contracts", 28th ed. (1999) put it in Vol. 1, p.838, para. 17-005) "objects injurious to good government either in the field of domestic or foreign affairs". This goes to show that Mortimer VP was proceeding in conformity with established principles when he addressed the question of whether "recognition of the rights of the trustees in bankruptcy to sue in Hong Kong [would be] in any way inimical to the interests of the sovereign power". If I may say so, the learned Vice President's terminology expresses very neatly one of the public policy considerations which arise in situations like the present; and I gratefully adopt his terminology.

The answer to the question of law

Turning now to answer the question of law which I posed at the beginning of this judgment, I would answer it thus. In certain circumstances our courts will give effect to the orders of non-recognized courts. By the expression "non-recognized courts" I mean to cover courts sitting in foreign states the governments of which our sovereign does not recognize as well as courts sitting in territory under the *de jure* sovereignty of our sovereign but presently under the *de facto* albeit unlawful control of a usurper government. Our courts will give effect to the orders of non-recognized courts where:

(i) the rights covered by those orders are private rights;

(ii) giving effect to such orders accords with the interests of justice, the dictates of common sense and the needs of law and order; and;

(iii) giving them effect would not be inimical to the sovereign's interests or otherwise contrary to public policy.

That is the principle; and none of it involves recognizing any unrecognised entity. It goes purely and simply to protecting private rights.

To be given effect

In my judgment, the Taiwanese Bankruptcy Order is to be given effect by the Hong Kong courts. The rights thereunder are plainly private. By the general nature and particular circumstances of those rights, giving effect to them accords with the interests of justice, the dictates of common sense and the needs of law and order.

And there is nothing inimical to the sovereign's interests or otherwise contrary to public policy in giving effect to the Taiwanese Bankruptcy Order. The present action is not for the benefit of the usurper regime. It is for the benefit of out-of-pocket depositors. Furthermore it should be clearly understood that giving effect to the Taiwanese Bankruptcy Order does not involve recognizing the usurper regime or courts in Taiwan.

That the Trustees act in accordance with the directions of the Taiwanese bankruptcy court is an unremarkable matter consistent with routine insolvency practice the world over. Patrick Chan J and Rogers JA (whose judgments I have naturally read with respectful care) both appear to think along the following lines: because the Trustees act in accordance with the directions of the Taiwanese bankruptcy court, giving effect to the Taiwanese Bankruptcy Order would be going further than, for example, giving effect to a Taiwanese divorce decree. I am unable to agree. By giving directions to trustees in bankruptcy who then take action, a court is, if anything, actually less directly involved than when it finalises a matter on its own by granting a decree of divorce.

Finally, I should mention the notion floated on Madam Chen and Mr Chan's behalf that the course which the Trustees wish to take would or might somehow be detrimental to the interests of any creditors which Mr Ting may have in Hong Kong. The short answer to this is twofold. To begin with, there is no evidence that Mr Ting has any creditors in Hong Kong. And in any event, it would in truth be in the interests of all of Mr Ting's creditors, including any in Hong Kong, for it to be established, if it can be, that the disputed 1.25 million Nikko shares form part of his estate so that the realized proceeds thereof would be available for distribution among his creditors.

CONCLUSION

Before concluding this judgment, I would like to thank all counsel on both sides for their very considerable assistance. And I trust that neither Mr Benjamin Yu SC's opponents nor his junior would begrudge my singling Mr Yu out for particular thanks for his especially helpful arguments.

In the result, for the reasons which I have given, I agree with the majority in the Court of Appeal that both preliminary issues are to be determined affirmatively in favour of the Trustees. Accordingly I would dismiss this appeal with costs against Madam Chen and Mr Chan in favour of the Trustees.

Mr Justice Nazareth NPJ:

I agree with the judgments of Mr Justice Bokhary PJ and Lord Cooke of Thorndon NPJ.

Lord Cooke of Thorndon NPJ:

I agree fully with the judgment of Mr Justice Bokhary PJ but think it right to add a separate judgment because of the role in this Court of judges from other common law jurisdictions.

By Article 2 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the National People's Congress authorises the Region to enjoy independent judicial power, including that of final adjudication, in accordance with the provisions of the Basic Law. Article 19 elaborates on this, but not in any way material to the present case. By Article 8, the common law shall be maintained except to the extent that it contravenes the Basic Law and subject to any amendment by the legislature of the Region. By Article 11, however, no law enacted by that legislature shall contravene the Basic Law, which includes extensive human rights provisions. Similarly, by Article 159, the power of amendment of the Basic Law, vested in the National People's Congress, does not extend to amendments contravening the established basic policies of the People's Republic of China regarding Hong Kong; and the Preamble to the Basic Law makes it clear that these policies are elaborated by the Chinese Government in the Sino-British Joint Declaration, thus in effect guaranteeing the independence of the courts of the Region. By Article 82 of the Basic Law, the power of final adjudication of the Region is vested in the Court of Final Appeal, which may as required invite judges from other common law jurisdictions to sit on this Court.

Having regard to those provisions and to the purposes of the Basic Law as a whole, I think that it may be inferred that, in appropriate cases, a function of a judge from other common law jurisdictions is to give particular consideration to whether a proposed decision of this Court is in accord with generally accepted principles of the common law.

In the present case I have no hesitation in answering that question affirmatively, together with my colleagues. At international level, the relevant principle goes back at least to the seventeenth century and Grotius. It is sometimes described as the principle of implied mandate, but that is perhaps not a happy description, because the application of the principle does not depend on interpreting anything that the lawful sovereign says or does. Rather, as Lord Wilberforce said in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2)* [1967] A.C. 853, 954, it depends upon justice and common sense, actual facts or realities. I would describe it as Lord Wilberforce's principle, because his outline of it, although leaving the question of its validity open and taking the form of a cautionary reservation in his speech, has been widely regarded as the leading modern expression of the principle in the common law. What he contemplated was recognition of particular acts of governments recognised neither *de jure* nor *de facto* "where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned". Decisions relating to private rights, given by courts established by rebellious or usurping governments (as this Court must see the government of Taiwan), are plainly within this concept.

As Mr Justice Bokhary PJ has noted, Lord Wilberforce's principle has been supported by such other leading common law judges as Lord Scarman and Lord Donaldson M.R. (as they were respectively to become). I would add, too, Lord Denning M.R. In the Rhodesian bankruptcy case *In re James* [1977] Ch. 41 Lord Denning, quoting Grotius, favoured recognising in England an order made by a court of a regime in rebellion in the eyes of United Kingdom law, on the ground that (p.62) -

> "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 ... 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".

In that case it happened to be sufficient for Lord Denning to confine the application of the principle to the enforcement of the law made before the Unilateral Declaration of Independence (see p.63). But the tenor of his reasoning would seem to have gone further. In the following year he undoubtedly went further in *Hesperides Hotels Ltd v. Aegean Turkish Holidays Ltd* [1978] 1 Q.B. 205, a case relating to the seizure of hotels in North Cyprus by the government of the so-called Turkish Federated State of Cyprus. No such government or state was recognised *de jure* or *de facto* by the United Kingdom government. After reviewing various authorities Lord Denning said at p.218 -

> "If it were necessary to make a choice between these two conflicting doctrines, 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."

It is true that, as Mortimer VP said in the leading judgment in the Court of Appeal in the present case, the principle that a limited category of usurper's acts may have legal validity, although recognised in the House of Lords and the Privy Council, has apparently never been applied by either - nor, as far as I am aware, by the Court of Appeal in England. But this appears to be because other doctrines or circumstances have come into play. Thus, in the *Carl Zeiss* case the decisive factor was that the East German Democratic Republic derived authority from the sovereignty in East Germany of the U.S.S.R. *Gur Corp v. Trust Bank of Africa Ltd* [1987] 1 Q.B. 599 was a similar case. In *Madzimbamuto v. Lardner-Burke* [1969] 1 A.C. 645 the principle was excluded by an Order in Council undoubtedly validly authorised by legislation enacted by the Parliament of the lawful sovereign. In *In re James* the majority of the Court of Appeal relied on the ground that the Rhodesian court during the rebel regime was not a *British* court within the meaning of the Bankruptcy Act 1914 of the United Kingdom - a question without any counterpart in the present case. And the action in the *Hesperides Hotel* case had to fail, in the view of the majority of the Court of Appeal, because in substance it was an action for relief against trespass to immovables outside England, and therefore one which the English court had no jurisdiction to entertain.

By contrast, in the present case no other doctrine and no circumstances intrude to supplant Lord Wilberforce's principle. The case impresses me as a good one for the application of the principle. Certainly the principle is subject to the qualification that there must be no consideration of public policy to the contrary; but here there is none. In this context public policy invites particular attention to the interests of sovereign power, the People's Republic of China. This corresponds with Article 9(6) of the Rules of the Supreme People's Court concerning the recognition by the People's Court of civil judgments delivered in Taiwan District. Article 9(6) provides that a Taiwan civil judgment should not be recognised if it violates the basic principles of the national law or is injurious to the public interest of the society. Here the public interest of the society points to the enforceability in Hong Kong of the Taiwan bankruptcy order. The interests to be protected thereby are those of the creditors in the bankruptcy, not those of the Taiwan government. If the Taiwan government were the sole or perhaps the main creditor, the position might be different. As it is, however, the creditors appear to be predominantly residents of Taiwan who have invested in Mr Ting's companies.

As Godfrey JA points out in his judgment in the Court of Appeal, the Preamble to the Constitution of the People's Republic of China declares that Taiwan is a part of the sacred territory of the People's Republic of China and that it is the lofty duty of the entire Chinese people, including the compatriots in Taiwan, to accomplish the great task of reunifying the motherland. I think that reunification will tend to be promoted rather than impeded if people resident in Taiwan, one part of China, are able to enforce in Hong Kong, another part of China, bankruptcy orders made in Taiwan. At one stage during the argument in this case I questioned whether, bearing in mind that the concept of bankruptcy has as yet apparently only a limited presence at best in the laws of mainland China (the evidence about how insolvency is dealt with on the Mainland is not detailed), it can be said to be *necessary* that a Taiwan bankruptcy order be given effect in Hong Kong. I am satisfied, however, that the doubt which I raised is not well founded. Commercially Taiwan and Hong Kong are both relatively highly developed parts of China. It is in the interests of the People's Republic of China, and necessary as a matter of common sense and justice, that bankruptcy orders made in one of these parts should be enforceable in the other.

Viewing the case from a different perspective, the issue is essentially between the Taiwan creditors on the one hand and Mr Ting, Madam Chen and Mr Chan on the other. It is not an issue with which national politics have any natural connection. They should not be allowed to obtrude into or overshadow a question of the private rights and day-to-day affairs of ordinary people. The ordinary principles of private international law should be applied without importing extraneous high-level public controversy.

In all other respects I have nothing to add to what Mr Justice Bokhary PJ has said, but I would expressly associate myself with his reference to the argument presented by Mr Benjamin Yu SC. It ranks with the best I have heard anywhere.

Chief Justice Li:

The Court unanimously dismisses this appeal with costs against the appellants in favour of the 2nd to 5th respondents.

(Andrew Li) Chief Justice	(Henry Litton) Permanent Judge	(Kemal Bokhary) Permanent Judge

(G P Nazareth) Non-Permanent Judge	(Lord Cooke of Thorndon) Non-Permanent Judge

Ms Audrey Eu SC and Mr Kenneth C.L. Chan (instructed by Messrs Hau, Lau, Li & Yeung) for the appellants, Madam Chen Li Hung and Mr Chan Kai Yung

The 1st respondent, Mr Ting Lei Miao, was not represented and did not appear

Mr Benjamin Yu SC and Mr Godfrey Lam (instructed by Messrs Lau, Chan & Ko) for the 2nd to 5th respondents, the trustees in bankruptcy

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