



Neutral Citation Number: [2010] EWCA Civ 9

Case No: A2/2006/2114

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE JACK
[2006] EWHC 2226 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/01/2010

Before :

LORD JUSTICE PILL
LORD JUSTICE LLOYD
and
SIR PAUL KENNEDY

Between :

MELETIOS APOSTOLIDES	<u>Appellant</u>
- and -	
DAVID CHARLES ORAMS & LINDA ELIZABETH ORAMS	<u>Respondents</u>
BRITISH RESIDENTS' SOCIETY	<u>Intervener</u>

**Mr Thomas Beazley QC, Professor Vaughan Lowe QC and Mr Colin West (instructed by
Holman, Fenwick & Willan LLP) for the Appellant**

**Miss Cherie Booth QC, Mr Nicholas Green QC and Dr Angela Ward (instructed by
Herbert Smith LLP) for the Respondents**

Hearing dates : 12 & 13 November 2009

**Judgment Approved by the court
for handing down
(subject to editorial corrections)**

<p>If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.</p>
--

Lord Justice Pill :

1. The proceedings in this jurisdiction arise out of orders made by Master Eyre on 21 October 2005. Master Eyre ordered that judgments dated 9 November 2004 and 19 April 2005 of the Nicosia District Court in the Republic of Cyprus be registered in and be declared enforceable by the Queen’s Bench Division of the High Court of Justice pursuant to Council Regulation (EC) No. 44/2001 (“the Regulation”) of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The order related to land in the village of Lapithos in the district of Kyrenia in Cyprus and required the immediate demolition of the villa, pool and fencing on the property and delivery to Mr Meletios Apostolides (“the appellant”) of the free possession of the property. Orders for damages and costs were also made.
2. The Republic of Cyprus came into being as an independent sovereign state in 1960. However, earlier difficulties between the Greek and the Turkish Cypriot communities on the island persisted. In July 1974, the army of the Turkish Republic invaded the north of the island and set up an administration for that part of the island its forces occupied. The Turkish Republic of Northern Cyprus (“TRNC”) was declared in 1983. It has not been recognised by any state apart from Turkey. Nothing in the present judgment can be taken to indicate an acceptance of or a comment upon the legitimacy of TRNC. The entity has a President, Mr Mehmet Ali Talat. The disputed land is in that part of Cyprus controlled by the Turkish Cypriot administration and not, therefore, within the area over which the Government of the Republic of Cyprus exercises effective control and where Nicosia District Court is situated.
3. The respondents to the judgments, Mr David Orams and Mrs Linda Orams (“the respondents”), appealed against the registration. They had unsuccessfully tried to have the judgments set aside in the Cypriot courts. By order dated 6 September 2006, Jack J allowed the appeal and set aside the registration of the two judgments. He granted permission to appeal to the Court of Appeal. By order dated 26 June 2007, this court referred to the European Court of Justice (“ECJ”), for a ruling on the issues raised, five questions being specified in the schedule to the order. Three of these are now relevant:

“1. In this question,

- the term “the Government-controlled area” refers to the area of the Republic of Cyprus over which the Government of the Republic of Cyprus exercises effective control; and
- the term “the northern area” refers to the area of the Republic of Cyprus over which the Government of the Republic of Cyprus does not exercise effective control.

Does the suspension of the application of the *acquis communautaire* in the northern area by Article 1(1) of Protocol No 10 of the Act of Accession 2003 of Cyprus to the EU preclude a Member State Court from recognising and enforcing a judgment given by a Court of the Republic of Cyprus sitting in the Government-controlled area relating to land in the

northern area, when such recognition and enforcement is sought under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001, L 12, p.1) (“Regulation 44/2001”), which is part of the *acquis communautaire*?

2. Does Article 35(1) of Regulation 44/2001 entitle or bind a Member State court to refuse recognition and enforcement of a judgment given by the Courts of another Member State concerning land in an area of the latter Member State over which the Government of that Member State does not exercise effective control? In particular, does such a judgment conflict with Article 22 of Regulation 44/2001?

3. Can a judgment of a Member State court, sitting in an area of that State over which the Government of that State does exercise effective control, in respect of land in that State in an area over which the Government of that State does not exercise effective control, be denied recognition or enforcement under Article 34(1) of Regulation 44/2001 on the grounds that as a practical matter the judgment cannot be enforced where the land is situated, although the judgment is enforceable in the Government-controlled area of the Member State?”

4. Following oral hearings before the ECJ, Advocate General Kokott delivered an opinion on 18 December 2008 and on 28 April 2009, the Court (Grand Chamber) gave judgment (Case C-420/07). The court ruled on the three questions posed:

“1. The suspension of the application of the *acquis communautaire* in those areas of the Republic of Cyprus in which the Government of that Member State does not exercise effective control, provided for by Article 1(1) of Protocol No. 10 on Cyprus to the Act concerning the conditions of accession [to the European Union of states including the Republic of Cyprus] and the adjustments to the Treaties on which the European Union is founded, does not preclude the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to a judgment which is given by a Cypriot court sitting in the area of the island effectively controlled by the Cypriot Government, but concerns land situated in areas not so controlled.

2. Article 35(1) of Regulation No 44/2001 does not authorise the court of a Member State to refuse recognition or enforcement of a judgment given by the courts of another Member State concerning land situated in an area of the latter State over which its Government does not exercise effective control.

3. The fact that a judgment given by the courts of a Member State, concerning land situated in an area of that State over which its Government does not exercise effective control, cannot, as a practical matter, be enforced where the land is situated does not constitute a ground for refusal of recognition or enforcement under Article 34(1) of Regulation No 44/2001 and it does not mean that such a judgment is unenforceable for the purposes of Article 38(1) of that regulation.”
5. The case returns to this court to decide the appeal from the judgment of Jack J, applying the ECJ’s answers to the questions. The answers to the questions are such that, subject to the further issues raised in this court, the appeal should be allowed and the orders of Master Eyre registering and declaring enforceable the Cypriot judgments reinstated.
6. The respondents have raised two issues for determination:
 - (I) The public policy issue: whether the judgment should be denied enforcement on the basis of public policy or whether further appropriate questions should be referred to the ECJ under article 234EC [Lisbon, article 267]. They rely on article 34(1) of the Regulation:

“A judgment shall not be recognised:

 1. If such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.”
 - (II) The apparent bias issue: whether the ruling of the ECJ is affected by apparent bias of Judge Skouris, President of the Court, and if so whether in the circumstances the question of apparent bias should be referred to the ECJ under article 234EC and/or whether the ECJ should be requested to reconsider the questions posed by the Court of Appeal on 26 June 2007.

Issue I

Public policy

7. On the adoption of the constitution of the Republic of Cyprus, a Treaty of Guarantee, which came into force on 16 August 1960, was made between the Republic of the one part and Greece, Turkey and the United Kingdom of the other part. Article I provided:

“The Republic of Cyprus undertakes to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution.

It undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. It accordingly declares prohibited any activity likely to promote, directly or indirectly, either union with any other State or partition of the Island. ”

8. Article II provided:

“Greece, Turkey and the United Kingdom, taking note of the undertakings of the Republic of Cyprus set out in Article I of the present Treaty, recognise and guarantee the independence, territorial integrity and security of the Republic of Cyprus, and also the state of affairs established by the Basic Articles of its Constitution.

Greece, Turkey and the United Kingdom likewise undertake to prohibit, so far as concerns them, any activity aimed at promoting, directly or indirectly, either union of Cyprus with any other State or partition of the Island.”

9. By a Treaty between the same parties on the same date, arrangements were made for two areas in Cyprus, described as Sovereign Base Areas, to remain under the sovereignty of the United Kingdom. Nothing in this appeal turns on that provision. The Treaty also provided, in article 5, that “the Republic of Cyprus shall secure to everyone within its jurisdiction human rights and fundamental freedoms comparable to those set out in [the European Convention on Human Rights] (“the Convention”).

10. Along with other states, the Republic of Cyprus acceded to the European Union, to which the United Kingdom and Greece already belonged, in May 2004. Protocol No. 10 to the Treaty of Accession made express provision for those areas of the Republic of Cyprus in which its Government does not exercise effective control. It provides:

“1. The application of the *acquis* shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control.

2. The Council, acting unanimously on the basis of a proposal from the Commission, shall decide on the withdrawal of the suspension referred to in paragraph 1.”

11. The ECJ, at paragraph 34, described Protocol 10 as a transitional derogation, based on the exceptional situation prevailing in Cyprus, from the general principle that the provisions of Community law apply *ab initio* and *in toto* to a new Member State. A derogation must be interpreted restrictively and “must be limited to what is absolutely necessary in order to obtain its objective” (paragraph 35).

12. As recorded by the ECJ at paragraphs 18 and following of its judgment, the disputed land belonged to the appellant’s family which had occupied it until the 1974 invasion. As members of the Greek Cypriot community, they were forced to abandon their house and take up residence in the area of the island effectively controlled by the Cypriot Government. The respondents, who are UK citizens, claimed to have purchased the land in 2002 in good faith from a third party who had acquired it from the Turkish Cypriot authorities. They built a villa on the land and frequently occupied it as their holiday home.

13. The first issue, it was submitted, while considered by the Advocate General in her Opinion, was not considered by the ECJ, and advisedly so in the absence of a question directed to the issue. The Advocate General, while making observations in regard to the issue did at the same time underline, at paragraph 105, that it was not the subject-matter of the reference for a preliminary hearing. The issue should now be referred, the respondents submitted.
14. Consideration was given to second references and to the status of opinions of Advocates General in *Regina v Minister of Agriculture, Fisheries and Food ex parte SP Anastasiou (Pissouri) Limited* [2001] UKHL 71. Issues were raised on the marking of citrus fruits imported from outside the Community, some issues arising having already been considered by the ECJ. Further issues arose in the domestic courts. Lord Slynn, with whom Lord Steyn agreed in a constitution of three, stated, at paragraph 34:

“Since we are not agreed on the proper interpretation of item 16.1, and in view of the importance of the issue under items 16.2 - 16.4 to the Minister and to others, it seems to me that, regrettable though a further reference to the European Court is, it is necessary in order for the House to give judgment to decide these questions. Accordingly as the final national Court in respect of these issues the House is bound to refer them to the European Court, pursuant to article 234 of the Treaty.”

The appellant of course highlights the failure of the respondents, if there was merit in the present submission, to request a reference when the case was last before this court.

15. Referring, however, to an issue with which the court did not deal, Lord Slynn stated, at paragraph 23:

“It seems to me that where the national Court finds a closely reasoned opinion of the Advocate-General and does not consider that the opinion is clearly wrong, it should attach considerable weight to it in the absence of an indication by the Court that the Court disagrees.”

Submissions by respondents and interveners

16. In support of their public policy submission, the respondents relied on the first and fifth recitals to Protocol 10. In recital 1, Member States reaffirm “their commitment to a comprehensive settlement of the Cyprus question, consistent with relevant United Nations Security Council Resolutions, and their strong support for the efforts of the United Nations Secretary General to that end”. In recital 5, the parties state their desire “that the accession of Cyprus to the European Union shall benefit all Cypriot citizens and promote civil peace and reconciliation”.
17. For the respondents, Mr Green QC submitted that the public policy issue had been argued in detail before the ECJ but the ECJ had made no ruling on it. The issue is of the utmost importance because it is at the heart of the peace process in Cyprus. Moreover, there are tens of thousands of foreign owners of property in northern Cyprus, who derive the title they claim from the Turkish Cypriot authorities there.

Many British people are affected as demonstrated by the intervention of the British Residents' Society of Cyprus ("BRS") in these proceedings. Many nationals of other Member States of the Union are also affected.

18. Reliance was placed on the statement of the Advocate General at paragraph 109:

"In this case, however, the Commission does not contend that the judgment whose enforcement is sought infringes fundamental rights. In its view, the issue is instead the requirements of international policy regarding the Cyprus problem. Those requirements have to a certain extent acquired legally binding status in so far as they have become established in United Nations Security Council resolutions. That applies, for example, to the obligation on States to refrain from any action which might exacerbate the Cyprus conflict."

19. With the leave of the court, Mr Green submitted a chronology which sets out the Security Council Resolutions on which he relies. These include Resolution 1250 (29 June 1999) which amongst other things expressed the view "that both sides have legitimate concerns that should be addressed through comprehensive negotiations covering all relevant issues" (paragraph 5) and called upon the two [community] leaders "to give their full support to such a comprehensive negotiation, under the auspices of the Secretary General" (paragraph 7).

20. The Security Council by Resolution 1251 of 29 June 1999:

"10. Reaffirms that the status quo is unacceptable and that negotiations on a final political solution to the Cyprus problem have been at an impasse for too long;

11. Reaffirms its position that a Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities as described in the relevant Security Council resolutions, in a bi-communal and bi-zonal federation, and that such a settlement must exclude union in whole or in part with any other country or any form of partition or secession;

13. Reiterates its support for the efforts of the United Nations and others concerned to promote the holding of bi-communal events so as to build cooperation, trust and mutual respect between the two communities, and calls upon the Turkish-Cypriot leadership to resume such activities."

That Resolution was expressly reaffirmed in Resolution 1789 of 14 December 2007 which also "reaffirms that the status quo is unacceptable, that time is not on the side of a settlement, and that negotiations to reunify the Island have been at an impasse for too long".

21. Pursuant to the earlier Resolutions, the Secretary General, Mr Kofi Annan, was instructed to prepare a plan for submission to the parties to the dispute. On 31 March 2004, the final version of the Annan Plan was published. It provided, in article 10, that “the claims of persons who were dispossessed of their properties by events prior to the entry into force of this Agreement shall be resolved in a comprehensive manner in accordance with international law, respect for the individual rights of dispossessed owners and current users, and the principle of bi-zonality”. It proposed detailed arrangements for the exercise of property rights, by way of reinstatement or compensation, and provided that property claims should be received and administered by an independent, impartial Property Board. While the majority of Turkish Cypriots approved the plan it was rejected by the Greek Cypriots, in a separate referendum, 76% voting against.
22. Mr Green relied on the respondents’ submissions to the ECJ in which they asserted (and the general effect of the figures is not for present purposes disputed) that Greek Cypriots claimed title to 78% of the property in the northern area and Turkish Cypriots claimed title to about 21% of the property in the area controlled by the Government. There are said to be almost 10,000 British citizens residing in northern Cyprus. Mr Annan reported, in May 2005:

“On the island, the benefits of the EU membership of Cyprus are becoming manifest. However, in the area of property, it has opened up new fronts of litigation and acrimony. Already, hundreds of Greek Cypriot claims against Turkey for the loss of property rights in the north are pending before the European Court of Human Rights in Strasbourg, France. Additionally, in 2005, Greek Cypriots approached courts in the south for EU arrest warrants against foreigners buying or selling Greek Cypriot property in the north. In this regard, Turkish Cypriot authorities have warned that they will arrest and detain those attempting to serve court summonses. The prospect of an increase of litigation in property cases on either side poses a serious threat to people-to-people relationships and to the reconciliation process. Property rights continue to be an extremely sensitive issue on both sides and it is widely believed that only a comprehensive settlement of the Cyprus problem can bring closure to the property issue.”

Private individuals should not be allowed to use the courts of Member States as a mechanism to further their political objectives, it was submitted.

23. Mr Green also drew attention to and relied on the submissions of the Commission to the ECJ under the heading ‘International Public Policy’:

“However, the recognition of judgments from Courts of the Republic of Cyprus relating to properties lying in the areas where the Government does not exercise effective control may raise another, and very exceptional, ground of international public policy.”

The submissions continued:

“110. Although the present situation does not come under the traditional concept of public policy under Regulation 44/2001, the Commission does not exclude that Article 34(1) could be interpreted as allowing to invoke such a ground of international public policy. Indeed, the words “public policy in the Member State” are open to an interpretation, where grounds of international public policy are invoked that form part of the Member State’s public policy as well. In other words, a public policy ground cannot lose its eligibility under Article 34(1) just because it is shared by all the other EU Member States as well.

. . . .

112. Where the Member States are, however, subject to the same international public policy ground by virtue of their membership in the European Union and the United Nations, the possible conflicts between different public policies in several Member States does not arise. Hence, it would not run contrary to the object and purpose of Article 34(1) to include public policy grounds which are essentially of an international character and shared by all EU Member States. The Commission does therefore not exclude that the courts of a Member State could consider that granting recognition and enforcement to judgments of Cypriot courts with respect to property for which, at the request of the European Court of Human Rights, a mechanism for restitution or compensation has been created might jeopardize the efforts towards restoring civil peace and reconciliation on the island and eventually a comprehensive settlement of the Cyprus problem.
113. It would, in any event, be for the national judge to decide whether, in the light of the facts of the case at hand, recognition and enforcement of a specific judgment given in another Member State would be, in the terms of Article 34(1) of the Regulation, ‘manifestly contrary’ to international public policy.
114. Such a public policy ground would remain very exceptional and would therefore not undermine the general Community interest in the free flow of judgments under Regulation 44/2001. If this Court was to enter into the third question, the public policy ground in this case could be intrinsically linked to the extraordinary *de facto* situation in Cyprus.
115. In sum, the Commission proposes to the Court to respond to the third question as follows:

A judgment of a Cypriot court, in respect of land in that State in an area over which the Government of that State does not exercise effective control, cannot be denied recognition of enforcement under Article 34(1) of the Regulation on the ground that claims cannot be enforced where the land is situated. Judgments relating to such land can, however, be exceptionally refused recognition and enforcement if such recognition is manifestly contrary to international public policy.”

24. While Mr Green relied on paragraph 109 of the Advocate General’s opinion as demonstrating a willingness to introduce the “requirements of international policy” into the assessment, he accepted that the subsequent reasoning of the Advocate General was against him. Having raised the issue, the Advocate General has not grappled with it and has presented a one sided picture, it was submitted. I say at once that I do not accept that the epithets “odd” and “curious” attached by the respondents to the opinion of the Advocate General are apposite.
25. As applied, the judgment of the ECJ created an asymmetrical situation, it was submitted. Persons in the position of the appellant can obtain judgments in their favour from the courts of the Republic of Cyprus whereas Turkish Cypriots claiming title within the area controlled by the Cypriot Government cannot do so. Expert evidence on Cypriot law was not called but reference was made to the decision of the Cyprus Supreme Court in *Ali Kamil & Ors v Ministry of Interior acting as the “Custodian” for Protection of Turkish Cypriot Property*, (Case No.133/2005), 19 January 2007. In that case, a Turkish Cypriot had abandoned land in that part of Cyprus now under the control of the government. The Supreme Court noted that the immovable property in question had been transferred to the administration of a Custodian in accordance with a law of 1991. The Custodian has accepted arrangements for payment of compensation to property owners in the case of compulsory acquisitions but this has been paid into a special account and any payment to claimants is suspended, the court stated, so long as the abnormal situation in the Republic arising from the Turkish occupation continues. The Court concluded:

“But it has also been decided that the Turkish Cypriot property owners and their heirs do not have the right to use their properties under the control of the Custodian. So long as the abnormal situation arising from the Turkish occupation continues, they can be prevented from exercising any kind of right to such properties without permission from the Custodian.”

The alleged lack of symmetry is relied on as revealing the delicate state of relations between the two communities in Cyprus.

26. In *Hesperides Hotels v Aegean Turkish Holidays* [1978] QB 205, the courts in this jurisdiction declined to exercise an original jurisdiction in the northern part of Cyprus. In a judgment with which Scarman LJ agreed, Roskill LJ stated, at page 227A:

“The position in Cyprus, both on the Greek and on the Turkish side, is at the present juncture evolutionary and continues to evolve and develop. Delicate international negotiations have taken place and are about to continue. In those circumstances, for an English court to arrogate to itself the right at this juncture to determine questions of the right to possession of land in Cyprus by entertaining an action for conspiracy to trespass is something which in my view it ought not to do. Even if I am wrong in the view that the *Moçambique* [*British South Africa Co v Companhia de Moçambique* [1893] AC 602] principle applies, and even if I thought that our courts had jurisdiction and therefore a discretion whether or not to grant the injunction sought, in accordance with the principles recently laid down by the House of Lords in *American Cyanamid v Ethicon Ltd.* [1975] A.C. 396, I would not hesitate in the existing circumstances to exercise my discretion against granting the injunctio sought.”

(On appeal to the House of Lords [1979] AC 508, the *Moçambique* principle was upheld).

27. Lord Denning MR put it more broadly. He stated, at page 222F:

“Underlying this case is a divergence of view between two autonomous administrations in Cyprus. The northern administration sets itself up as an administration entitled to pass laws requisitioning this property. The southern administration denies the claim and says that the requisitioning was unlawful. It is not the province of these courts to resolve such a dispute. It is a dispute which should be settled by negotiation between the two administrations, aided, we hope, by intermediaries of goodwill. It is indeed, we hope, being settled at this very moment by negotiations in Vienna. If a settlement is reached it should deal with all questions relating to the taking of property, compensation and so forth. But, whether it is settled or not, it is not for these courts to decide between these conflicting views. The dispute, in my view, is not justiciable here. The action should be struck out as not sustainable. I would allow the appeal accordingly.”

The political sensitivities were fully acknowledged in this court, Mr Green submitted, and, by a parity of reasoning, it will be contrary to public policy in England and Wales to enforce the Cypriot judgment.

28. Mr Green relied on a recent statement from the President of TRNC. Mr Mehmet Ali Talat stressed the need to find a balance between the conflicting interests of the dispossessed owners and the current users and to devise a set of criteria which will satisfy both. The property issue always has been, and continues to be, one of the core issues of the Cyprus problem. It can be tackled satisfactorily only at the negotiating table in the context of a comprehensive settlement, he wrote. The timing of the judgment of the ECJ he considers to be “most unfortunate”. It has ignored the

political problem in Cyprus and the negotiations over many years. “It is essential that all the parties interested in the settlement of the Cyprus problem refrain from taking steps that would cast a shadow over the negotiating table and undermine the process”.

29. To enforce the Cypriot judgment, Mr Green submitted, would be to prejudice peace negotiations and is thereby contrary to public policy in England and Wales which, reflecting UN Security Council Resolutions, does not permit the process to be prejudiced in this way. That is the beginning and end of the case, he submitted. Nothing should be done in this jurisdiction in relation to property disputes in Cyprus which might prejudice the negotiations. Problems arising from the litigation in Cyprus demonstrate the prejudice to the peace process and exacerbation of tension which may result from a recognition of Cypriot judgments in this jurisdiction, it was submitted.
30. The BRS is an association of British nationals who live as residents in northern Cyprus. They have been given permission to intervene, by way of written submissions in this court, and these have been prepared by Professor Stefan Talmon. He made the submission that the relevant Cypriot judgments are in breach of customary international law rules on state jurisdiction. The Regulation does not, by virtue of customary international law, apply to judgments of the courts of the Republic of Cyprus concerning immovable property situated in northern Cyprus. It was submitted that customary international law is a part of EU law and the Regulation must be interpreted, and its scope of application determined, in accordance with principles of customary international law.
31. The Republic of Cyprus, having sovereignty over the whole of Cyprus, does not exercise jurisdiction in the north. Territorial control is not an essential requirement of sovereignty but may be an essential requirement for the exercise of certain rights derived from sovereignty such as jurisdiction, it was submitted. The rule that a sovereign state enjoys prescriptive and enforcement jurisdiction with regard to all matters within its territory does not apply when the state’s territory is under the effective control of a secessionist authority or an occupying power. The TRNC, as *de facto* authority in northern Cyprus, is competent, under customary international law to exercise prescriptive and enforcement jurisdiction in all matters under its effective control, including immovable property situated in northern Cyprus. Decisions of the courts of the Republic of Cyprus purporting to exercise jurisdiction there are not susceptible to enforcement in the United Kingdom.
32. Reliance is placed on Oppenheim’s International Law, 9th Edition:

“Rebels who have been recognised as a *de facto* Government will for that reason be accepted as having powers of government administration in the area under their control . . .”

Judgments of the ECJ and Opinion of the Advocate General

33. When analysing the third question before it, the ECJ considered the effect of article 34(1) of the Regulation. It was recalled, at paragraph 55, that article 34 must be interpreted strictly as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Regulation. The court stated, at paragraph 57, that it was required to review the limits within which the courts of a Member State may have

recourse to the concept of public policy for the purpose of refusing recognition of a judgment. The court of the state in which enforcement is sought cannot review the accuracy of the findings of law or fact made by the court of the state of origin (paragraph 58). I note that recital 16 to the Regulation refers to “mutual trust in the administration of justice in the Community”.

34. The court added, at paragraph 59:

“Recourse to the public-policy clause in Article 34(1) of Regulation No 44/2001 can be envisaged only where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.”

At paragraph 61, the court stated:

“. . . the referring court [that is the Court of Appeal] has not referred to any fundamental principle within the legal order of the United Kingdom which the recognition or enforcement of the judgments in question would be liable to infringe.”

Accordingly, the court concluded, refusal to recognise the judgments would not be justified under article 34(1).

35. In stating those propositions, the court relied on the decision of the ECJ in *Krombach* [2000] ECR I-1935. The case turned on article 27(1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) which is in similar terms to article 34(1) of the Regulation. A national court asked the ECJ how the term “public policy in the state in which recognition is sought” should be interpreted and whether, in relation to the public policy clause, the court of the state in which enforcement is sought can take into account the fact that the court of the state of origin refused to allow a defendant to have his defence presented unless he appeared in person. The court stated, at paragraph 37:

“In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order”.

36. The ECJ in the present case considered article 34(1) in the context of a possible infringement of a fundamental principle of the legal order of the state in which enforcement is sought, in the United Kingdom, that is a manifest breach of a right

recognised as being fundamental within that legal order. The court did not consider the aspect of public policy now invoked by the respondents, an obligation not to prejudice a peace process instituted and encouraged by the international community. The question was raised before the Court. The Advocate General stated, at paragraph 101:

“The respondents submit that the recognition and enforcement of the District Court of Nicosia’s judgment may contravene ‘international public policy’ by undermining the efforts of the international community to find a solution to the Cyprus problem.”

37. That aspect of the case was considered by the Advocate General in her Opinion. I have already cited paragraph 109 where its possible relevance was noted, by reference to submissions of the Commission.
38. The analysis of the issue by the Advocate General is distinctly unfavourable to the respondents’ case. She stated, at paragraph 45:

“It is certainly true that the Security Council has repeatedly called for the preservation of peace in Cyprus and of the country’s territorial integrity. In that context, the international community has also made calls to refrain from any action which might exacerbate the conflict. However, it is not possible to infer from those rather general appeals any obligation to refrain from recognising judgments of Greek Cypriot courts which relate to claims to ownership of land in the Turkish Cypriot area.

46. Moreover, it is by no means clear that, taken overall, the application of the regulation exacerbates the Cyprus conflict. It may equally well have the opposite effect and promote the normalisation of economic relations. It is precisely because the line between the two areas of Cyprus has been opened up for the movement of goods and persons that it is possible to envisage many different legal relationships in which the recognition and enforcement in other Member States of judgments given by courts of the Republic of Cyprus and the application of the rules on jurisdiction in the regulation are also of interest to parties residing in the northern area.”

39. When considering the first question, the Advocate General concluded, at paragraph 48:

“The application of the regulation cannot be made dependent on such complex political assessments. That would be contrary to the principle of legal certainty, respect for which is one of the objects of the regulation.”

40. On the possible requirements of international public policy in relation to national public policy, the Advocate General stated these conclusions:

“110. The preservation of peace and the restoration of the territorial integrity of Cyprus are certainly noble causes. However, whether those goals can be regarded as a ‘rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order’ within the meaning of the *Krombach* case-law is extremely doubtful.

111. As already observed, however, the requirements and appeals contained in the Security Council resolutions on Cyprus are in any case much too general to permit the inference of a specific obligation not to recognise any judgment given by a court of the Republic of Cyprus relating to property rights in land situated in northern Cyprus. Apart from that, it is also by no means clear whether recognition of the judgment in the present context would be beneficial or detrimental to solving the Cyprus problem and whether it is even necessary for the protection of the fundamental rights of Mr Apostolides.

112. The answer to the third question must therefore be that a court of a Member State may not refuse recognition and enforcement of a judgment on the basis of the public policy proviso in Article 34(1) of Regulation No 44/2001 because the judgment, although formally enforceable in the State where it was given, cannot be enforced there for factual reasons.”

41. In relation to the judgment of the ECJ, Mr Green submitted that, because the issue has not been considered by the court itself, a further question or questions should be referred to the court. The Advocate General had noted, at paragraph 102, that the referring court itself did not consider any such ground for refusing recognition and enforcement in the United Kingdom and that, in principle, the court is bound by the subject matter of the reference for a preliminary ruling. That was particularly true, it was submitted, with regard to the interpretation of an article such as article 34(1) of the Regulation because, as the Advocate General stated at paragraph 103, “it is a matter for the Member States to determine according to their own conception what public policy requires”. The ECJ does leave open, at paragraph 62, the possibility of a reference on the basis that this court may identify a “fundamental principle” in the domestic legal order which is infringed by enforcing a judgment of a Cypriot court. This court should now fill the gap by referring the question, Mr Green submitted.
42. In *Loizidou v Turkey* (Application No.15318/89) 18 December 1996, the European Court of Human Rights (“ECtHR”), sitting as a Grand Chamber, considered the position of a Cypriot national displaced from the northern part of Cyprus and claiming to own land there. By a majority of 11 votes to 6, it was held that the denial of access to the applicant’s property and consequent loss of control thereof was imputable to Turkey. By the same majority it was held that there had been a breach by the Turkish Government of article 1 of Protocol 1 to the Convention.
43. The majority of the Grand Chamber stated, at paragraph 46:

“Accordingly, the applicant cannot be deemed to have lost title to her property as a result of Article 159 of the 1985 Constitution of the "TRNC". No other facts entailing loss of title to the applicant’s properties have been advanced by the Turkish Government nor found by the Court. In this context the Court notes that the legitimate Government of Cyprus have consistently asserted their position that Greek Cypriot owners of immovable property in the northern part of Cyprus such as the applicant have retained their title and should be allowed to resume free use of their possessions, whilst the applicant obviously has taken a similar stance.”

44. At paragraph 64, the majority stated:

“Apart from a passing reference to the doctrine of necessity as a justification for the acts of the "TRNC" and to the fact that property rights were the subject of intercommunal talks, the Turkish Government have not sought to make submissions justifying the above interference with the applicant’s property rights which is imputable to Turkey.

It has not, however, been explained how the need to rehouse displaced Turkish Cypriot refugees in the years following the Turkish intervention in the island in 1974 could justify the complete negation of the applicant’s property rights in the form of a total and continuous denial of access and a purported expropriation without compensation.

Nor can the fact that property rights were the subject of intercommunal talks involving both communities in Cyprus provide a justification for this situation under the Convention.

In such circumstances, the Court concludes that there has been and continues to be a breach of Article 1 of Protocol No. 1.”

45. There are many similar applications by Greek Cypriots before the ECtHR. Thus the ECtHR has reaffirmed the title of those dispossessed by the Turkish authorities. That is not a promising context in which to argue that public policy in this jurisdiction requires that the judgments of legitimate courts in the Republic should not be enforced.

Submissions of appellant

46. For the appellant, Mr Beazley QC, first submitted that it would be unacceptable to refer to the ECJ a question that could have been posed but was not suggested at the time of the earlier reference. Further, had the ECJ seen merit in the point, which was fully argued before them, they would have considered it. The ECJ would not have been prepared to permit registration of a judgment which was contrary to international public policy.

47. There is no evidence, Mr Beazley submitted, that the appellant obtained judgments in the Cypriot courts in order to promote or support a political cause. He wanted his land back. I accept that submission.
48. The Republic of Cyprus is a Member State of the European Union, the whole of the Island having acceded. Under article 22 of the Regulation, the courts of the Member State in which immovable property or tenancies of immovable property is situated shall have exclusive jurisdiction. The northern part of the Island is not a separate state for the purposes of the Regulation, or indeed for any other purpose. Under article 35 of the Regulation, the jurisdiction of the court of the Member State of origin may not be reviewed and the test of public policy referred to in article 34(1) may not be applied to the rules relating to jurisdiction. The ECJ held, at paragraph 51:
- “In the case in the main proceedings, it is common ground that the land is situated in the territory of the Republic of Cyprus and that, therefore, the rule of jurisdiction laid down in Article 22(1) of Regulation No 44/2001 has been observed. The fact that the land is situated in the northern area may possibly have an effect on the domestic jurisdiction of the Cypriot courts, but cannot have any effect for the purposes of that regulation.”
49. On the merits of the issue, Mr Beazley submitted that the reasoning of the Advocate General was correct. As the Advocate General stated, it was in any event far from clear that registration of the judgment would exacerbate the situation in Cyprus. To fail to enforce it would be to permit and encourage further sales of land in the north of Cyprus notwithstanding the title there of Greek Cypriots, it was submitted.
50. The independence, territorial integrity and security of the Republic of Cyprus was recognised and indeed guaranteed by the United Kingdom in the Treaty of Guarantee of 1960. Moreover, by a succession of Security Council Resolutions, consistently reaffirmed, all states are called upon “to respect the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus” (Resolution 541 of 18 November 1983).
51. While the ECJ did not deal specifically with the requirements of “international policy” in the context of “public policy in the Member State” its reference, at paragraph 62, to “the absence of a fundamental principle in the legal order of the United Kingdom which the recognition or enforcement of the judgments concerned would be liable to infringe” demonstrates its awareness of the need for respect for such fundamental principles in deciding whether to approve registration and enforcement. To extend such respect to making a decision on enforcement subject to concepts of international public policy, inevitably nebulous in a context such as the present, and their impact on public policy in the United Kingdom would not, in the present context, be acceptable. The application of the rule of law must be predictable and cannot depend on a judicial assessment of the impact upon its relations with other states or the welfare of other states of a decision in a Member State to enforce a judgment, it was submitted.
52. Mr Beazley submitted that reliance on the submissions of the Commission, cited at paragraph 23 of this judgment, to the ECJ is misplaced. Those submissions were not accepted by the Advocate General or by the court. Moreover, they are hedged about

with qualifications. The Commission merely “does not exclude” that article 34(1) could be interpreted as allowing invocation of international public policy. Nor does the Commission “exclude” the possibility that the courts of a Member State could consider the issue. Such a public policy ground would remain “very exceptional” and it would be for the national judge to decide whether recognition would be “manifestly contrary” to international public policy. In relation to the last of those submissions (Commission submissions paragraph 113), I add the comment that article 34(1) would require the judge also to decide whether that international public policy is manifestly contrary to public policy in the Member State.

53. The circumstances in which an English court will not enforce a judgment on the ground that it is contrary to international law are extremely narrow (*Kuwait Airways Corp v Iraqi Airways Co (Nos. 4 & 5)* [2002] 2 AC 883). The claimants sought delivery up of aircraft held by the defendants following a resolution by the Iraq Revolutionary Command Council (“RCC”), during Iraq’s occupation of Kuwait, transferring the property to the defendants.
54. The House of Lords decided that the resolution of the RCC was of a character that involved “flagrant violations of rules of international law of fundamental importance” (paragraph 20). Lord Nicholls of Birkenhead stated, at paragraph 26:

“This is not to say an English court is disabled from ever taking cognisance of international law or from ever considering whether a violation of international law has occurred. In appropriate circumstances it is legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law. Lord Wilberforce himself accepted this in the *Buttes* case, ([1982] AC 888) at page 931D. Nor does the 'non-justiciable' principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain and, indeed, acknowledged. In such a case the adjudication problems confronting the English court in the *Buttes* litigation do not arise. The standard being applied by the court is clear and manageable, and the outcome not in doubt. That is the present case.”

Lord Steyn analysed the situation, at paragraph 114, and attached importance to United Kingdom obligations under Security Council Resolutions. It is not suggested that clear-cut rules of international law require non-recognition in the present case. The submission is that the climate for a political settlement would be impaired by action recognising Cypriot judgments.

55. As to enforcement of judgments of the courts of a Member State, the respondents cannot expect symmetry, it was submitted. The recognition accorded to judgments in the Member State known as the Republic of Cyprus cannot be reciprocated for decisions of the non-recognised entity in the north or in decisions affecting its residents.

Conclusions on Issue I

56. As to the BRS submissions, the acknowledged powers of *de facto* authorities under customary international law in my judgment add nothing in the present context to the submissions made on behalf of the respondents. The ECJ made its ruling in full awareness of the “practical matters” involved in Cyprus. In so far as the submissions challenge the judgment of the ECJ, they are doomed to failure. In so far as they rely on customary international law in a policy context, they add nothing. The objections to enforcement are not enhanced by reliance on customary international law rather than resolutions of the Security Council and actions of the Secretary General. Invoking customary international law notions of powers of *de facto* authorities does not in this context override or impinge either upon the legitimacy of the judgment of the ECJ or the duties of United Kingdom courts in relation to article 34(1) of the Regulation.
57. I return to the respondents’ case. Counsel for the respondents have both described the judgment of the ECJ as “thin”. I do not agree. With respect, it deals clearly and cogently with the questions put to the court. In my judgment, this is far from being a case in which this court can take any of the steps required to make good the respondents’ case and to decline to register the Cypriot judgments.
58. The respondents need to identify a principle of international public policy which courts in the United Kingdom, acting of course judicially, would recognise as requiring a conclusion that the enforcement of the Cypriot judgments would be manifestly contrary to public policy in the United Kingdom. I accept that there is an international consensus that every encouragement should be given to achieving a peaceful settlement of the long standing disputes in Cyprus and that the UN Security Council has strongly supported efforts to achieve a settlement.
59. To proceed from that acceptance to accepting a proposition that United Kingdom courts should treat it as manifestly contrary to public policy in the United Kingdom to enforce the obligation under Community law to register judgments of courts in Cyprus is a very large step. Courts are concerned to uphold the rule of law and to do so consistently and the court would need to assess the issues arising in the Cypriot dispute, the merits of the political issues, both national and international, involved and their impact on public policy in the United Kingdom. Save in exceptional circumstances, that is not a function which courts can or should perform. This is not a case, and is not suggested to be a case, in which plain breaches of international law have been committed by the Republic of Cyprus such that the decisions of its courts ought not to be enforced in the United Kingdom. The notion of international public policy is a much more nebulous one. International support for attempts to achieve a settlement in Cyprus do not convert into an obligation on a United Kingdom court to assess whether a decision of the court does or does not support the peace process.
60. Even if, contrary to my view as to the function of the court, an assessment were to be made, it is far from clear, as the Advocate General recognised in her opinion, whether enforcement of the judgments of a Cypriot court does or does not encourage the peace process. It can cogently be argued that a refusal to recognise the lawfully made judgments of a court in a lawfully constituted state which is a member of the European Union would be to inflame the situation.
61. Further, the court would need to have regard to international obligations of the United Kingdom. Security Council Resolutions, while urging negotiations and settlement

and stressing the importance and delicacy of property issues (as does the government of the United Kingdom), have consistently required respect for the territorial integrity of the Republic of Cyprus under a single sovereignty. That must include respect for the courts as the judicial arm of the sovereign state. Quite apart from Security Council Resolutions, the United Kingdom has an obligation under the Treaty of Guarantee to recognise and guarantee the independence, territorial integrity and security of the Republic of Cyprus. A United Kingdom court assessing international public policy would need to respect these instruments and the obligations they impose on the United Kingdom government.

62. Accordingly, the importance of the peace process in Cyprus would need to be balanced against other international public policy concepts, the requirement for mutual trust in the administration of justice in the community and, perhaps more fundamentally, the subsisting obligation of the United Kingdom, under the Treaty of Guarantee and under successive resolutions of the Security Council which have called upon all states to respect that “sovereignty, independence and territorial integrity”. If domestic courts were forced to make a judgment on what international public policy requires or where the political balance of interest rests, those obligations cannot be ignored and point towards enforcing judgments of the courts of Cyprus.
63. There is no fundamental principle within the legal order of the United Kingdom which the recognition and enforcement of the judgments in question would be liable to infringe. If a further question were to be referred to the ECJ, it is inconceivable that the court would direct the United Kingdom as to what is “manifestly contrary” to its public policy. Nor do I consider it to be a real possibility that the ECJ, as a judicial body, would identify and define, in the present context and for the purposes of article 34(1), a principle or principles of international public policy which national courts would be obliged to consider when deciding whether to recognise judgments of another state of the Union.
64. I respectfully agree with the opinion of the Advocate General on this issue, clearly expressed at paragraphs 45, 46, 48, 110 and 111 (paragraphs 35 to 37 above). Considerable weight should in the circumstances be given to that Opinion. The answer to the respondents’ submission is clear and it fails. I add that the ECJ, having stated at paragraph 37 in *Krombach* in 2000 what approach is to be adopted, I do not find it at all surprising that the court was not, on the earlier occasion, invited to refer the present issue to the ECJ.
65. In his judgment, which I have read in draft, Lloyd LJ has set out the substantive part of a letter of 20 July 2009 from the Minister of State at the Foreign and Commonwealth Office on the issues in Cyprus. I agree with Lloyd LJ’s analysis of the contents of the letter. However, even if the United Kingdom government were to express a view to the court, first, that its policy was to attach absolute priority to not prejudicing negotiations, and, secondly, that enforcing the Cypriot judgments would create such prejudice, the court would be required to follow the procedure considered in the preceding paragraphs of this judgment when making its decision on article 34(1). The government cannot dictate to the court what public policy in the United Kingdom, as that expression is used in an international instrument such as the Regulation, is, and thereby direct the court not to enforce the judgments.

66. Public policy, as contemplated in the Regulation, cannot be determined by the current thinking of the government of the day as to what is an expedient foreign policy. To allow that would itself be a breach of a rule of law essential in the legal order of the United Kingdom (*Krombach*). There is no sign whatever that the government has attempted or would attempt to do that.

Issue II

Apparent Bias

67. The respondents submit that there should be a further reference to the ECJ on the question of bias. It was submitted that the presiding judge in the Grand Chamber which determined the case, Judge V Skouris, who is also President of the Court (“the President”), should have recused himself. It was submitted that the case should be referred and the ECJ invited to answer the question whether its President should have recused himself and whether the earlier questions should be re-determined.
68. The submission is based on contacts which occurred between the President and Cypriot representatives before and during the court’s consideration of the case. The narrative which follows is taken from a chronology submitted by the respondents at a late stage and to the admission of much of which the appellant objected. Without necessarily accepting all the detail, I would for present purposes assume that the narrative is accurate.
69. It is not alleged that the President was biased; the allegation is that the contacts created an appearance of bias such that the President should have recused himself. It is acknowledged that there can be no objection on the basis of the President’s Greek nationality, notwithstanding the close relations which exist between Greece and the Republic of Cyprus.
70. The facts relied on must be considered, it was submitted, in the context of the acute political sensitivity of the issue before the ECJ. Context, submitted Ms Booth QC for the respondents, is everything. In anticipation of the Republic of Cyprus’s accession to the Union, the President, as President of the court, on 15 October 2003, received a Cypriot delegation including the Minister of Foreign Affairs and the Ambassador of the Republic of Cyprus to the Grand Duchy of Luxembourg, on an official visit to Luxembourg. The delegation included judges of the Supreme Court of Cyprus.
71. In early May 2005, the President, together with other ECJ judges, Advocates General and the Registrar visited Cyprus. On 7 May 2005, the President and other members of the court attended a dinner given by the President of Cyprus. At the dinner, the President of Cyprus made a speech in which, according to an agency report, he criticised aspects of the Annan Plan and said that the Hellenic population of Cyprus had rejected it because it did not genuinely seek the reunification of Cyprus.
72. The President made another visit to Cyprus on 1 November 2006. At the Presidential Palace, the President of Cyprus conferred on him the Makarios III Grand Cross. According to the Cyprus news agency report, the award was conferred on the President, “due to his strong and sincere feelings towards Cyprus and its people”. The President of the Republic is said to have praised the President of the court for “his contribution to the protection of international and European law and for his support to

- Cyprus”. Since ultimately it is the appearance that counts, the perception of the intention of the grantor of the award is relevant, it was submitted.
73. Oral submissions in this case were made to the ECJ on 16 September 2008. On 28 February 2009, the President made an official visit to Cyprus, with the Cypriot judge in the Court of First Instance, to attend a conference organised by the University of Cyprus. In the course of the visit, the President met the President of the House of Representatives and a member of the Legal Affairs Committee of the Cypriot Parliament. It was reported that the hosts had informed the President about the workings of Parliament, its legislative authority, and the harmonisation of domestic laws with European laws.
74. On 13 March 2009, a delegation of MPs from the Legal Affairs Committee of the Cypriot Parliament visited the ECJ and met the President and the Cypriot judge. The judgment of the court was delivered on 28 April 2009.
75. It was submitted that a rational, reasonable and objective observer would be convinced that the award to the President created a public connection or affinity between the President and Cyprus. By accepting the honour, the President allowed himself to be associated publicly with the comments made by the President of Cyprus on 1 November 2006. The observer would have concluded that the President’s close ties with the Republic of Cyprus created an insuperable problem. The high status of the judge involved imposed high duties upon him. Political statements made on that occasion, it was submitted, flow into the facts and issues involved in the case.
76. The President should have recused himself from the beginning, it was submitted. The subsequent meetings could have reinforced the apparent connection between the President and the Republic of Cyprus in a way that would be seen to be capable of exerting an influence on his approach to the case. Even if earlier contacts were acceptable, there should have been none between the oral hearings and the delivery of judgment.
77. Ms Booth referred to the Bangalore Principles of Judicial Conduct prepared in November 2002 and endorsed by the UN Human Rights Committee in April 2003. The statement of principles has had an important influence on domestic codes, including that for England and Wales. At paragraph 3.1, it requires judges to ensure that their conduct “is above reproach in the view of a reasonable observer” and, at paragraph 3.2, that justice must not merely be done but must also be seen to be done. Acceptance of an honour by a judge is permitted provided it “might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of bias” (paragraph 4.16).
78. In a commentary on the principles, prepared by an expert group, it is stated at paragraph 38(d):
- “A practice whereby the Minister of Justice awards, or recommends the award, of an honour to a judge for his or her judicial activity, violates the principle of judicial independence. . . . on the other hand, the award to a judge of a civil honour by, or on the recommendation of, a body established as

independent of the government of the day may not be regarded as inappropriate, depending on the circumstances.”

79. That principle has only a very limited application when, in the case of an international court, a judge is honoured by another state. The honour will almost invariably be conferred by the Head of State, as in the present case, and distinctions between executive and judicial honours in a domestic setting have little relevance.
80. The ECJ’s own Code of Conduct, which entered into force on 1 October 2007, provided:

“Article 2

Integrity

Members shall not accept gifts of any kind which might call into question their independence.

Article 3

Impartiality

Members shall avoid any situation which may give rise to a conflict of interest.”

The Statute of the ECJ, dated March 2008, provides, at article 18, that a party may not apply for a change in the composition of the court on the ground of the nationality of a judge.

81. On 23 June 2008, the ECtHR adopted a resolution on judicial ethics which followed the same approach as the Code. Resolution II provides that judges must avoid any “situation that may be reasonably perceived as giving rise to a conflict of interest”.
82. A similar issue arose, in very different circumstances, in joined cases C-341/06P and C-342/06P *Chronopost* [2008] ECR I-4777, 1 July 2008, considered by the Grand Chamber. The court considered proceedings before the Court of First Instance. The court held, at paragraph 47 that if a challenge to impartiality is made, and is not manifestly devoid of merit, “the Court of Justice is obliged to check the correctness of the composition of the formation of the Court of First Instance which delivered the judgment t under appeal”. It must be regarded “as involving a matter of public policy which must be raised by the court of its own motion” (paragraph 48).
83. At paragraph 54, the court stated:

“Second, there are two aspects to the requirement of impartiality: (i) the members of the tribunal themselves must be subjectively impartial, that is, none of its members must show bias or personal prejudice, there being a presumption of personal impartiality in the absence of evidence to the contrary; and (ii) the tribunal must be objectively impartial, that is to say, it must offer guarantees sufficient to exclude any legitimate doubt in this respect.”

84. In a domestic context, the position of the fair-minded and informed observer was considered by Lord Hope of Craighead in *Helow v Secretary of State for the Home Department* [2008] 1WLR 2416, at paragraph 3:

“Then there is the attribute that the observer is ‘informed’. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.”

85. In *Helow*, Lord Mance considered the relevance of the receipt by the judge of controversial information. On the facts of that case, he stated, at paragraph 55, that the recipient “was in no way endorsing or associating herself with statements of the character presently in issue”. The words and conduct were not so extreme that the recipient might be expected to dissociate herself by resignation.
86. Information obtained on behalf of the appellant shows that the previous President of the ECJ, Judge Iglesias, received decorations from a number of states and that, amongst the present membership, the President is not alone in having honours conferred on him by states other than his own, though those awarded have been few in number. Courtesy visits to the ECJ have been made by distinguished delegations from other Member States and non-Member States in recent years including a visit, on 11 April 2005, by a delegation from Turkey, welcomed by the President and Registrar.
87. No question of waiver arose, it was submitted, because the respondents were unaware of the President’s contacts with Cyprus. As soon as they were aware, representations were made and there was no response to them from the court. While the claimed lack of awareness is surprising, given the high profile of the case, I would for present purposes accept, without deciding the point, that there was no waiver.

Conclusions on Issue II

88. I stress that no suggestion is made of actual bias. I accept that members of a court need also to avoid an appearance of bias. In my judgment, there is no appearance of bias in this case. The context is a court created by Member States of the European Union to which their courts can refer questions for elucidation of Union law. Judges are appointed by Member States on the basis of nationality. Mutual trust exists in the administration of justice in the community (recital 16 to the Regulation) and, even when Member States are in dispute, no objection to the presence of a judge can be taken on the ground of nationality (article 18 of the statute).
89. Judges, and the states from which they come, will inevitably have closer links with some Member States than with others. No appearance of bias is created by the presence in the court hearing the case, even as President, of a judge from a state

known to have close relations with the state the decisions of whose courts are the subject of debate.

90. As President of the court, the President can be expected to wish to promote knowledge of the court and its workings in Member States, and in particular new Member States. Making official visits and receiving visiting delegations is a valuable and appropriate part of the office of President. That approach is likely to be reciprocated by Member States, including new Member States. Further, any commendation of the Republic of Cyprus in the presence of the President must be seen in the context of numerous international instruments calling for respect for its territorial integrity and independence. In that context, commendation is of the sovereign entity as a whole.
91. In my judgment, no appearance of bias arises from the visit of the President, together with other judges, to Cyprus in May 2005. It was aptly stated in the ECJ press release that “The Court of Justice maintains continuous relations with the supreme institutions of the Member States and this visit is taking place within that context”. No appearance of bias arises from the political nature of a speech said to have been made by the President of Cyprus during the visit. There is no suggestion that the President adopted or approved the sentiments expressed. The same applies to the President of Cyprus’s speech when the honour was conferred on the President in November 2006. The reasonable informed observer would have no fears that the remarks might influence the President or other judges in their judicial capacity. Nor does the fact that the honour was conferred by a Head of State, rather than by a head of the judiciary, create a fear that the President might be influenced in his judicial capacity. Such honours will normally be conferred by the Head of State and concern based on a distinction between executive and judicial honours (Bangalore 38(d)) has little relevance.
92. The purpose of the President’s visit to Cyprus in February 2009 was to attend a conference organised by the University of Cyprus. Neither his presence, nor the company he kept, creates an appearance of bias in the President of the judicial organ of the Union which is concerned to promote in Member States of the Union understanding of its role. His meeting, in March 2009, with a delegation of Cypriot MPs to discuss the role of the court does not demonstrate an attempt by the delegation to influence the President, still less does it create an appearance that he may be influenced by the delegation. It was the role of the court that was under discussion and not political issues or particular cases.
93. The present case was to be decided, and was decided, by a Grand Chamber according to legal principles. The perception of the reasonable and informed observer would be, as is my perception, that there was no real possibility that the President would be influenced by the honour he received or by his other contacts. The judgment of the court is in no way tarnished by those contacts, considered either individually or cumulatively. The judgment may be applied and no further reference is appropriate.

Result

94. I would allow this appeal and reinstate the Orders of Master Eyre.

Lord Justice Lloyd :

Introduction

95. I agree with Pill LJ that Mr Apostolides’ appeal should be allowed, and Master Eyre’s orders for the registration of the orders made in Cyprus should be reinstated. I do not wish to add anything to what he has said either on the question of apparent bias (except for one incidental point) or in relation to the submissions made on behalf of the British Residents’ Society. I will add some observations of my own on the public policy issue newly raised on behalf of Mr and Mrs Orams.
96. Council Regulation No 44/2001 is at the heart of this case in legal terms. As is often the case, it is useful to bear in mind some of the recitals in the preamble to the Regulation. One theme that emerges from these is the need for rapid and simple procedures for the recognition and enforcement of judgments. Thus recital (2) is as follows:
- “(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.”
97. In turn, recitals (17) and (18) are as follows:
- “(17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.
- (18) However, respect for the rights of the defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected.”
98. Coming to the substantive provisions of the Regulation, Chapter III deals with recognition and enforcement. Article 33.1 is as follows:
- “A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.”
99. Article 34.1, on which the public policy argument raised on behalf of the respondents turns, is as follows:

“A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;”

100. Article 35 precludes any review of the jurisdiction of the court of the member state of origin, subject to irrelevant exceptions. Article 36 prohibits any review of the substance of the foreign judgment, under any circumstances.
101. The procedure for recognition and enforcement, in the first instance, does not involve any participation by the party against whom the judgment was given: see article 41. However, the decision to enforce or recognise, or not, is appealable by either party under article 43. The appeal to Jack J was brought under that provision. Article 44 allows for the judgment on such a first appeal to “be contested only by the appeal referred to in Annex IV”. Annex IV allows, as regards the UK, “a single further appeal on a point of law”. Article 45 provides that the court with which an appeal is lodged under article 43 or article 44 “shall refuse or revoke a declaration of enforceability only on one of the grounds specified in articles 34 and 35. It shall give its decision without delay.”
102. The effect of article 44 is that the present appeal is final. A further appeal to the Supreme Court of the United Kingdom is not permitted. On behalf of Mr and Mrs Orams Mr Green relied on this fact in support of his argument in favour of a second reference to the ECJ. He reminded us that by article 267 of the Treaty on the Functioning of the European Union (the Lisbon Treaty), equivalent to the former article 234, where a question such as the present, concerning the interpretation of the Regulation, “is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court”.
103. The ECJ in its judgment on the reference in the present case, at paragraph 59, emphasised how restricted are the circumstances in which a judgment can properly be denied recognition under article 34.1. The paragraph is set out in the judgment of Pill LJ at paragraph 34.
104. In that passage the court relied in particular on its previous decision in *Krombach v Bamberski* Case C-7/98, under the Brussels Convention, previously in force, in which the court had referred to the purpose of the Convention as being to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure (paragraph 19). It also stressed that the provision which is now article 34.1 “must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention” (paragraph 21) so that recourse is to be had to this provision only in exceptional cases. I do not need to repeat the further relevant passages from that judgment to which Pill LJ has referred in paragraph 35.
105. It follows that, in order to succeed in their argument under consideration, Mr and Mrs Orams must demonstrate that there is a relevant rule of law regarded as essential in the legal order of the United Kingdom or a relevant right recognised as being fundamental within that legal order, and that the recognition and enforcement of the judgments would constitute a manifest breach of that rule of law or that right.

106. In the light of that, it is instructive to consider the course of the present proceedings. Mr and Mrs Orams appealed against Master Eyre’s orders on a number of grounds, but these did not in terms include any reference to article 34.1 of the Regulation. They were successful in their appeal, on two grounds. The first was that the effect of protocol 10 to the Act of Accession, as regards the suspension of the *acquis communautaire* in the northern part of Cyprus, was that the Regulation did not apply at all “in relation to matters which relate to” the northern part of Cyprus, so that Mr Apostolides could not rely on it to secure the recognition of his judgments. The second arose from the circumstances in which service of the original proceedings was effected and the time that was permitted for entry of an appearance to the proceedings.
107. Mr Apostolides appealed to this court. Mr and Mrs Orams put in a Respondent’s Notice in which they sought to rely on two reasons, additional to those upheld by the judge, for dismissing the appeal. Neither of these was expressly based on article 34.1, but the first relied on the proposition that the judgments were unenforceable, and when this was later elaborated, it came to be formulated by reference to article 34.1. The court referred questions to the ECJ, of which Pill LJ has set out the first three, the third having a specific reference to article 34.1.
108. In their respective written submissions both Mr and Mrs Orams and the European Commission mentioned a public policy such as is now alleged. For Mr and Mrs Orams, after a passage describing the supposed policy against recognition of unenforceable orders (paragraphs 5.9 to 5.14), a second ground of public policy was asserted which, it was said, precluded enforcement in the present case, based on the protocol itself, requiring the courts of member states to refrain from becoming embroiled in the Cyprus dispute, and precluding litigants such as Mr Apostolides from using the courts of member States “as a mechanism to further their political objectives”. The Commission, for its part, addressed such a policy in a section of its written submissions (paragraphs 102 to 115) from which Pill LJ has quoted the most material passages in his paragraph 23. As appears from paragraph 112, there cited, the proposition was put forward in a somewhat tentative manner and formulated in rather general terms, to the effect that allowing recognition of the judgment “might jeopardize the efforts towards restoring civil peace and reconciliation on the island and eventually a comprehensive settlement of the Cyprus problem”.
109. Advocate General Kokott referred to the argument for Mr and Mrs Orams at her paragraph 43, and commented that it could not have the effect of disapplying the Regulation whenever a judgment mentions the northern area of Cyprus. At that stage she was addressing the first of the referred questions. When she came to deal with the third question, she noted the absence of any reference to this policy in the questions referred by this court, and the absence of any participation by the UK government in the proceedings, from which the court lacked reliable information, whether from the court or from the government, as to whether the supposed policy is to be regarded as part of the public policy of the UK. In case the court wished to consider the point, despite the absence of a referred question mentioning it, she offered her comments on the point. In doing so she made a reference on which Mr Green relies, at paragraph 109 (quoted by Pill LJ at paragraph 18), to “requirements of international policy regarding the Cyprus problem” having “to a certain extent acquired legally binding status” through UN Security Council resolutions, and to an “obligation on States to

refrain from any action which might exacerbate the Cyprus conflict”. However, in her conclusion on the point, at paragraphs 110-111 (see Pill LJ’s quotation at paragraph 40) she came down firmly against the idea that, even if there is such a policy, it could amount to a sufficient reason not to recognise the judgments in question.

110. The Court did not mention this suggested policy in its judgment.
111. Mr Green’s position on this point was expressed succinctly at the start of his submissions. He argued that there is substantial support for the existence and relevance of such a public policy, and that it can be seen in the written submissions of the Commission and in paragraph 109 of the Advocate General’s opinion. The policy would preclude recognition of the judgment because that would exacerbate the conflict and make it the more difficult to resolve by international and diplomatic negotiation. At any rate, he argued, whether such a policy exists, and if it does what is its effect, is a solid and respectable point, with substantial support. It was argued on the first reference but was not decided by the court. It cannot be said to be *acte clair*, such that there is no question of European law arising. The question therefore needs to be referred and, because of the finality of the appeal to the Court of Appeal, it must be referred.
112. Mr Green also submitted that, to the extent that there has been an indication of the attitude to the UK Government on the question of policy, it supports his contentions. He relied on a letter from Baroness Kinnock, then Minister for Europe at the Foreign and Commonwealth Office, dated 20 July 2009. This appears to have been written in response to a letter to the Prime Minister enclosing a petition on the question of property in Northern Cyprus. Because Mr Green sought to place significant reliance on the letter, whereas Mr Beazley suggested that it provided no support for the existence of the suggested policy, it is convenient to set out the substantive part of the letter in full:

“I appreciate the Turkish Cypriot community’s deep concern regarding the potential implications of the recent European Court of Justice ruling. I understand that many Turkish Cypriots are worried that the case may have a negative impact on both the Turkish Cypriot economy and undermine the wider settlement process. It is not in the UK’s interest to see either of these possibilities realised.

However, whilst this case has potentially wide implications, it is neither appropriate nor possible to prevent individuals seeking legal redress through the courts. Now that the ECJ has ruled on the central points of EC law, the matter reverts to the English Court of Appeal, which must decide how to proceed, including on the question of public policy. It would not be appropriate for Her Majesty’s Government to seek to intervene in these ongoing legal proceedings.

Her Majesty’s Government remains committed to upholding the established UN parameters for a settlement of a bi-zonal, bi-communal federation based on political equality, as defined

