~~GE1 66~~ 3,1956

No. 2 of 1955.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF NEW ZEALAND.

BETWEEN

THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED having its principal place of business in the Dominion of New Zealand at Wellington and carrying on business in the said Dominion and elsewhere as a Life Insurance Office . . . . . *Appellant*

AND

HER MAJESTY'S ATTORNEY-GENERAL FOR THE DOMINION OF NEW ZEALAND . . *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal, pursuant to leave granted by the Supreme Court of New Zealand, from a judgment and order of the Full Court of the said Supreme Court (Fair, Hay and North JJ., Gresson and Stanton JJ. dissenting), dated the 31st May, 1954, and now reported (1954) N.Z.L.R. 754, whereby it was adjudged and ordered in an action brought by the Appellant against the Respondent relating to six parcels of New Zealand 5½ per cent. Inscribed Stock and Bearer Debentures that the Appellant should recover nothing against the Respondent and should pay to the Respondent £750 for costs together with £77 for disbursements. p. 74. pp. 27–72. p. 73.

2. The said parcels of Inscribed Stock and Bearer Debentures were issued by the Respondent as part of £3,002,500 borrowed by the Respondent under the State Advances Act, 1913, in the years 1925 and 1926, and the said parcels were held by the Appellant at their maturity on the 1st February, 1951. Each of the said parcels of Inscribed Stock was issued for a certain number of "pounds" and was to be payable as to interest and repayable as to principal at Melbourne free of exchange. The said Bearer Debentures were expressed each to be for "five hundred pounds Sterling" and to be payable as to interest and repayable as to capital at Melbourne.

3. On the 20th August, 1948, by a decision of the Respondent Government, the official rate of exchange between New Zealand and Australia was altered so that thereafter in substance £A.125 became the equivalent of £N.Z.100. Throughout the period to maturity the Respondent made all payments of interest in respect of the said parcels of Inscribed Stock and Bearer Debentures in Australian currency at the contractual rate, and at maturity the Respondent paid the principal sums in Australian currency at face value, apparently upon the assumption that the obligation was expressed in that currency. In these circumstances the

pp. 1–14. Appellant brought an action against the Respondent in respect of each of the said parcels of Inscribed Stock and Bearer Debentures claiming sums of money (A) for short paid principal and (B) for interest short paid after the 20th August, 1948, together with interest (i) at the rate of $5\frac{1}{2}$ per cent. per annum calculated with half yearly rests from the 1st February, 1951, until judgment on the amount of short paid principal, and (ii) at the rate of $4\frac{1}{2}$ per cent. per annum until judgment by way of damages for non-payment on the due half yearly dates of, first, the short paid interest from and including the payment due on the 1st February, 1949, and, secondly, the half yearly payments of interest on the short paid amount of principal, as claimed in (i) above, from the 1st February, 1951.

4. The principal question for decision in this appeal is whether, as the Appellant contends, the obligations of the Respondent in respect of the principal and interest due under the aforesaid Inscribed Stock and Bearer Debentures are to be measured in New Zealand currency, or, as is contended by the Respondent, in Australian currency. The subsidiary question for decision is whether the Appellant is entitled to recover interest as claimed, or to some and what extent, on the short paid amounts of principal and interest.

5. The hearing of the Appellant's action proceeded on an Agreed

pp. 17–26. Statement of Facts and on the production by consent of the parties (but

pp. 75–137. subject to all just exceptions) of all available documents relating to the raising by the Respondent in 1925 and 1926 of the relevant loans. In the

pp. 138–140. course of the hearing certain other documents relating to the rate and calculation of the interest claimed by the Appellant were put in both by the Appellant and the Respondent, and after the conclusion of the hearing,

pp. 141–143. the Respondent, with the consent of the Appellant, put in two extracts from the New Zealand Year Book for the years 1948 and 1949 showing the National Debt of New Zealand in those years. Further, in the course of the hearing, it was admitted by the Respondent ([1954] N.Z.L.R. at pages 770–771) that the proper law of the contract in respect of each of the parcels of Inscribed Stock and Bearer Debentures was the law of New Zealand.

6. The background to and the circumstances attendant upon the issue of the said parcels of Inscribed Stock and Bearer Debentures as disclosed by the agreed Statement of Facts and the said documents may be summarised as follows. The loans raised by the Respondent in the years

p. 18, ll. 1–32. 1925 and 1926 and relevant to this appeal were raised pursuant to statutory

pp. 75–80. authority namely, the State Advances Act, 1913 (as amended), and Orders-in-Council made thereunder. The sums so raised were charged upon the

p. 18, l. 8. public revenues of New Zealand. The total sum authorised to be raised

in each of the years 1925 and 1926 was the sum of six million five hundred thousand pounds (£6,500,000) but the sum actually raised was £3,002,500. In September, 1925, the Secretary to the Treasury of the Respondent Government entered into negotiations with J. B. Were & Son, stockbrokers of Melbourne, with a view to obtaining by way of loan from investors, either in Australia or in England, the whole or part of the sums authorised to be raised. The said stockbrokers were informed that they were at liberty to obtain offers of money from Australian investors upon and subject to several options as to stock to be issued. These options were set out in a memorandum and an amended memorandum dated the 6th October, 1925. In the event the sum of £3,002,500 was raised wholly from Australian investors as follows :—

p. 18, ll. 24–32. p. 18, l. 36. p. 19, ll. 34–43. p. 19, l. 44. p. 20, l. 1. pp. 83–84. pp. 85–86.

(A) £1,000,000 payable as to interest and repayable as to capital at London, New York or Wellington at option of holders, payment and repayment at New York to be on the basis of 4 dollars 86⅔ cents. to the United Kingdom pound, was subscribed by The Mutual Life and Citizens Assurance Co. Ltd. The greater part of this sum came from London Funds of the subscriber and was made available at Wellington at par of exchange but it appears that some part may have been provided by exchange of other New Zealand stock already held by this subscriber.

p. 18, l. 40; p. 19, l 1. p. 81, ll. 1–8. p. 87. p. 87.

(B) £250,000 payable as to interest and repayable as to principal at London was subscribed by The Colonial Mutual Life Assurance Society Ltd. This sum came from London funds of the subscriber and was made available in Wellington at par of exchange.

p. 18, l. 40; p. 19, l. 8. p. 81, ll. 9–12. p. 87.

(C) £1,644,500 payable as to interest and repayable as to principal at Melbourne or Sydney (as arranged at time of issue), free of exchange, was subscribed by the Appellant, by The Colonial Mutual Life Assurance Society Ltd., by The Mutual Life and Citizens Assurance Co. Ltd. and by one E. J. Crooke. There was no option to change the place of repayment or payment after the date of issue of the relevant Inscribed Stock. The sums subscribed by Colonial Mutual Life Assurance Society Ltd., and by E. J. Crooke came from London funds of these subscribers and were made available in Wellington at par of exchange while the sums provided by the Appellant came from Melbourne funds of the Appellant made available at Wellington at par of exchange with the exception of the sum of £100,000 which was provided from Wellington funds of the Appellant.

p. 19, ll. 4–13. p. 81, ll. 13–31. p. 87. pp. 119–122. p. 23, ll. 34–38. p. 87. p. 20, ll. 14–21. p. 21, l. 45; p. 22, l. 10. p. 22, ll. 37–41. pp. 99–104. p. 21, ll. 1–22.

(D) £108,000 was subscribed by Australian investors and made available at Wellington. In respect of such moneys bearer Debentures were issued providing for payment at Melbourne only. Of the total sum of £108,000, the amount of £70,500 appears to have been provided from London funds of the subscribers.

p. 19, ll. 14–20. p. 121, ll. 22–29. p. 122, ll. 1–3.

7. The Inscribed Stock issued in respect of the borrowings of £1,000,000 and £250,000 referred to above was inscribed on the London Register of the Inscribed Stock Register of the Respondent Government. The Inscribed Stock issued in respect of the borrowings of £1,644,500 was inscribed on the Wellington Register of Inscribed Stock. In the case of

p. 18, ll. 43–45. p. 19, ll. 7–9.

pp. 93–94.
pp. 102–104.
pp. 105–106.

three of the loans subscribed for by the Appellant it was provided in the preliminary documents but not in the Stock Certificates that the loan should be " domiciled " at Wellington.

p. 19, ll. 21–29.

8. The whole of the Inscribed Stock with which this appeal is concerned was issued in respect of the sum of £1,644,500 subscribed as referred to above, and the Bearer Debentures were issued to a holder of £35,000 Inscribed Stock issued in respect of part of the said sum, which holder in the terms of the relevant legislation elected to convert such Inscribed Stock into Bearer Debentures.

9. The Appellant submits that on the true construction of the Inscribed Stock and Bearer Debentures held by the Appellant the currency expressions therein refer to New Zealand currency. The question is one of the substance of the Respondent's obligation upon the true construction of the investments and is governed accordingly by the proper law of the contract. Since it is admitted that the proper law is that of New Zealand, it is submitted that the currency expressions in the Inscribed Stock and Bearer Debentures refer to New Zealand currency. The borrower in this case is the Government of a self-governing country, acting under the authority of statutes of that country, which use terms, including terms fixing the upward limits of the borrowing, which are appropriate to the monetary system of that country and evidence no intention to refer to the currency of any other country; the contractual arrangements made require the money borrowed to be made available to the Government in that country and in the domestic currency; and the borrowings are charged on the public revenues of that country. These circumstances if not in themselves conclusive, as the Appellants would respectfully submit, raise a strong presumption that the currency by which the obligation to be assumed by the Government shall be measured is the domestic currency. It is submitted that the present case discloses no features sufficient to rebut such presumption. The only circumstances which in the Appellant's submission falls to be weighed against the presumption is that Melbourne was fixed as the place of payment of the Inscribed Stock and Bearer Debentures held by the Appellant. The Appellant submits that the mere fact that payment is to be made at a place where a different monetary system (though with the same nomenclature) prevails will seldom, if ever, be sufficient to rebut such a presumption and that in the present case the history of the issue of Inscribed Stock in 1925 and 1926 deprives of any weight the fact that the particular stock held by the Appellant fixed Melbourne as the place of payment. Further, even if any weight could otherwise be attached to the fixing of Melbourne as the place of payment, it is negatived in the present case first by the variation in the places of payment of obligations forming part of the same total borrowings and secondly by the words " free of exchange " in the instant documents. These latter words necessarily connote that an exchange operation was contemplated by the parties, for the cost of which provision was required to be made. Such a state of affairs could only arise on the basis that the Respondent's obligation sounded in New Zealand pounds. If, as the Respondent contends, the obligation undertaken was payment at Melbourne of Australian currency to the nominal amount of principal and interest the words " free of exchange " would

be otiose. The Appellant further submits therefore that the words "free of exchange" of themselves demonstrate that the obligation of the Respondent was to be measured by New Zealand pounds.

10. The Appellant's action was heard before the Full Court of the Supreme Court of New Zealand on the 5th, 6th, 7th and 8th October, 1953, and judgment was delivered on the 31st May, 1954. The majority of the Court (Fair, Hay and North, JJ.) were in favour of the Respondent on the principal question in issue and therefore found it unnecessary to discuss the subsidiary question of interest. Gresson and Stanton JJ. dissented and would have given judgment for the Appellant for the principal and interest short paid, together with simple interest at the rate of 3½ per cent. per annum from the 1st February, 1951, on the amount of principal moneys short paid. p. 27, l. 22. p. 27, l. 23.

11. The leading judgment of the majority of the Court was delivered by Fair J. His general approach to the case is shown by the following passage from his judgment :— pp. 27–41.

> "Where only one place is fixed for repayment of principal and payment of interest, in the absence of very definite indications to the contrary, that seems generally to have been treated as of almost decisive importance. Indeed, in the *Auckland Case* (1937) A.C. 587 it was treated as decisive, and there would appear to be, in the absence of countervailing considerations, logically a strong *prima facie* presumption that in such case the currency designated for the money of payment should also have been intended by the parties to be the currency of obligation or account. That would be the natural assumption in the absence of special grounds for a contrary view, such as (possibly) a recognised discrepancy in the value of the currencies, or an option for payment, provides." p. 37, l. 18.

In Fair, J.'s view the present case fell completely within the *ratio decidendi* of the *Auckland* case and of the *Adelaide* case (1934) A.C. 122 as explained in the *Mount Albert* case (1938) A.C. 224. He regarded the authority of those cases in their application to the present case as unaffected by the decision in *Bonython's* case (1951) A.C. 201, and considered that the criticism of the *Auckland* case in *Bonython's* case was directed merely to the fact that the earlier case had been treated as one in which no option as to the place of payment required to be considered. He set out nine principles which from a consideration of *Bonython's* case and the *National Bank* case (1952) A.C. 493 appeared to him to be firmly settled, and continued :— p. 34, l. 35. p. 40, l. 19. p. 40, l. 38. p. 40, ll. 22–30. pp. 35–36.

> "The principles stated establish, I think, that the place of payment fixed in the contract under consideration, and in the certificates and stock issued as a result of it, is a very strong factor indicating that the currency of obligation was intended to be that of Australia." p. 36, l. 33.

He reinforced this conclusion with considerations drawn from his view of the facts. Thus in discussing the loan of £72,500 made by the Appellant (which he, as did other members of the Court, treated as typical of each of the loans) he found that the contract was made at Melbourne and that p. 32, ll. 35–37. p. 37, ll. 4–5.

p. 36, ll. 37–38. p. 36, ll. 40–42. p. 36, ll. 39–40. p. 36, l. 45 ; p. 37, l. 2. the moneys were provided in and from Australian currency. He regarded these findings as evidence that the parties did not intend New Zealand currency " as that for payment." He laid stress on the fact that all moneys came from foreign investors, and upon the fact that other moneys raised under the same authority were directed to be paid in equivalent of dollars calculated by reference to the £ U.K. He stated that this latter fact was known to the Appellant's agents and relied upon it as negativing any *prima facie* inference that £ N.Z. were meant. He reviewed the arrangements for bearing the cost of transmission of the Appellant's subscription to Wellington and the provision that payment of interest and repayment of capital should be free of exchange. These matters p. 37, ll. 36–39. indicated to him that the Appellant " had in mind the amount of Australian pounds it was providing, and which it intended should be repaid in full." In a later passage he said :—

p. 39, ll. 1–7.

> " It seems, too, more probable and natural for the lender to stipulate where possible, for repayment to him of the exact equivalent in kind as well as in amount of the moneys lent by him ; and if such speculation were admissible, it seems unlikely that an Australian lender would contract for payment in the currency of a smaller country on the assumption or possibility that, in the future, it might be of greater value than that of Australia."

Except as stated above Fair J. derived no assistance from the words p .38, ll. 3–6. " free of exchange." He regarded the phrase as doing no more than avoiding a possible ambiguity, which would be advisable whichever was p. 38, l. 6. the currency intended. He recognised, however, that the phrase was p. 41, ll. 1–5. for the benefit of the Appellant. Accordingly Fair J. came to the conclusion that the stipulation as to one place of payment only, and that place being Australia, seemed, in all the circumstances, definitely to indicate Australian currency as the measure of obligation.

12. The Appellant submits that the reasoning of Fair J. is open to objection in law and in fact. The learned Judge appears to have regarded the principles laid down in *Bonython's* case as applicable only where the lender was given an option as to the place of repayment. It is submitted that the principles laid down in *Bonython's* case are of general application and particularly are applicable where the Government of a self-governing country is the borrower. The presence or absence of an option as to the place of repayment is, it is submitted, merely a factor in construction. It is submitted that Fair J.'s misunderstanding of *Bonython's* case vitiated his approach to the case. He should, it is submitted, have approached the case on the footing that at least there was a presumption in the Appellant's favour and that the nature of the enquiry thereafter to be made was whether there were any features in the case sufficient to rebut that presumption. It is further submitted that Fair J. misunderstood the criticism of the *Auckland* case in *Bonython's* case and was wrong in regarding the *Auckland* case as being any longer of authority. With regard to matters of fact it is submitted that the learned Judge was in error in finding that the contract for the loan of £72,500 was made in Melbourne and in stressing the Australian source of the moneys, when the Appellant's contract required the moneys to be provided at Wellington at par. In respect of the source of the moneys, Fair J. failed to observe

or to give any weight to the fact that the moneys provided by E. J. Crooke and by The Colonial Mutual Life Assurance Society Ltd. in respect of Inscribed Stock repayable at Melbourne came from London funds made available in Wellington in the domestic currency. It is submitted that the learned Judge failed, when considering the weight to be attached to the provision for payment in Melbourne, to attribute any proper weight to the additional facts that J. B. Were & Son were employed by the Respondent to obtain offers of money from Australian investors upon the various options set out in the memoranda of the 6th October, 1925, and that in the case of other loans raised through J. B. Were & Son under the same authorization options as to the place of payment were granted. Finally, it is submitted that the learned Judge erred in failing to attribute their proper significance to the words " free of exchange."

13. Hay J. treated the case as one where the inquiry involved only that aspect of the contracts which related to the mode of performance and one where the contest was between two presumptions of equal weight. His conclusion was that the presumption arising from the fixing of the place of payment had not on the facts been displaced, that the mode of performance of the obligations sounded in Australian currency, and that the Respondent had accordingly discharged the obligations of the contracts. Hay J. found nothing in *Bonython's* case to compel the court to hold that it must govern the decision in the present case, and he regarded *Bonython's* case as being distinguishable in any event on two grounds, first because in *Bonython's* case the lender was given an option as to the place of payment and secondly because in that case nothing was known about the history or facts of the remaining Debentures issued in London, whereas in the present case the details as to the terms and conditions of the remainder of the loan were set out in the statement of agreed facts. Hay J., in marked contrast to Fair J., disregarded the origin of the loan moneys as a factor of any weight. After reviewing the facts he continued :— pp. 58–65. p. 59, ll. 37–38. p. 60, ll. 19–22. p. 65, ll. 27–32. p. 61, ll. 1–27. p. 63, ll. 11–16.

" The whole atmosphere in which this loan was floated suggests to me that at the time of the making of the contracts which are the subject of these proceedings, both parties must be deemed to have had in mind the possibility of a divergence of currencies in the future. In the year 1925, the liability of currencies to depreciate was a matter of common knowledge, demonstrated by the collapse of currencies in different parts of the world. From the point of view of the New Zealand Government, it was inviting subscriptions to its loan wholly from foreign investors, at the same time making it clear that the lenders had the option at the time of issue (within certain prescribed limits) of nominating the place where repayment was to be made. From the point of view of the Plaintiff Company, it was careful in its negotiations through the stockbrokers to stipulate that the terms of the contracts should include provisions for repayment in Melbourne, and that provision appears to me a dominant feature of the contracts, going far beyond the choice of a place of payment merely as a matter of convenience. Such provision was arrived at as the result of bargaining between the parties, and, in my opinion, the course of negotiations is consistent only with the view that the intention in the mind of the Plaintiff Company was p. 63, l. 28.

that in making its investment it should be assured of repayment in Australian currency without taking the risk of possible fluctuations in the currency of New Zealand."

p. 63, l. 48; p. 64, l. 1. In his view therefore there was sufficient evidence to rebut the presumption that the Respondent contracted in its own lawful money. He reasoned
p. 64, ll. 11–20. further that the common measure of obligation found to exist in *Bonython's* case did not exist in the present case, since the facts showed that contracts on varying terms were made with different classes of investors, and he saw no reason why the contracts made with the Appellant should not be construed separately from those made with English investors. Hay J. 10
p. 65, ll. 9–11. then proceeded to discuss the *Auckland* case and came to the conclusion that the validity of neither the decision nor the principles applied had been
p. 65, ll. 14–15. impaired. He regarded the *Auckland* case as authoritative of the decision in the present case, and he referred also to the *Mount Albert* case as supporting his conclusion.

14. It is submitted that Hay J. was wrong in regarding the question as being one only of the mode of performance, and that it is in truth a question of the substance of the Respondent's obligations. It is further submitted that his reluctance to accept the authority of *Bonython's* case and his belief that the authority of the *Auckland* case was unimpaired, 20 led him into the error of thinking that the contest was between two presumptions of equal weight and therefore in effect that the presumption which arises where a sovereign state issues securities in words apt to describe its own currency is nullified if a single place abroad (and presumably one employing the same nomenclature for its own currency) is named for payment. Apart from these considerations, it is submitted that Hay J. paid insufficient regard to the full terms of the contracts and that he took a wrong view of the facts of the case. His view of the facts was coloured by speculations as to the intentions of the parties derived from the pre-contract negotiations. He was in error, it is submitted, in divorcing the 30 loans made by the Appellant from those made by other investors and in his conclusion that the circumstances were such that no common measure of obligation arose.

pp. 65–72. 15. North J. appreciated the fact that at all relevant times the
p. 66, ll. 10–18. currencies of Australia and New Zealand were separate. He considered
p. 66, ll. 18–23. therefore that when the loans were negotiated there was an ambiguity
p. 66, ll. 30–39. as to which of two moneys of account the parties intended, and that the problem was a question of interpreting the contractual intentions of the parties from a consideration of the nature of the transaction and all the
p. 66, l. 42. circumstances of the case. He agreed that the proper law of the contracts 40
p. 66, ll. 43–45. was New Zealand law, but held that this did not mean that New Zealand money was the money of account. North J. considered that various
p. 67, ll. 23–27. matters should be disregarded in deciding the problem. Thus he put on one side the subsequent conduct of the Appellant, the fact that the
p. 67, ll. 36–43. Appellant had in most instances paid its contributions to the loan in Australian pounds, and also the words " free of exchange." He regarded
p. 68, ll. 16–19. these words as equivocal and was not disposed to conclude that they amounted to a recognition that an exchange operation for the conversion of the money of account into the money of payment was involved. In
p. 68, ll. 39–50. discussing the authorities, he said that, until *Bonython's* case, it had been 50

accepted that the *Auckland* case had resolved the doubts which arose when overseas loans began to mature after the New Zealand Government had, as a matter of policy, decided to depreciate the currency. He continued :—

> " If for no other reason, then, than the desirability of maintaining a certain rule of law, it seems to me, if I may say so with respect, that it is very necessary that this Court should not too readily conclude . . . that *Bonython's* case would have been decided in the same way even if only one place of payment had been provided, and that this case should be similarly decided." p. 68, l. 50.

He considered that there were very real points of difference between the facts of the present case and *Bonython's* case, and that *Bonython's* case had expressly left open the consequences of naming only one place for payment. He thought, therefore, that he was bound to regard the *Auckland* case as authoritative where no options as to the place of payment arose. Moreover, he regarded the rule of construction applied in the *Adelaide* and *Auckland* cases as providing a convenient and sensible solution. In any event there were in his opinion three factors which displaced the presumption that the Government of a self-governing country, using the terms appropriate to its own monetary system, must be presumed to refer to that system. The first factor was that Section 5 of the New Zealand Loans Act, 1908, expressly authorised the raising of loans outside New Zealand. From this, North J. concluded that the loans might be raised in whatever currency the Minister might think it advantageous to adopt. North J. thought that the presumption in such circumstances lost much of its weight. The second factor was that New Zealand and Australia were closely associated in financial matters, so that there was nothing incongruous in the idea of the Government of New Zealand undertaking to repay the Australian investors so many " pounds " expressed in Australian currency. Finally, he continued :— p. 70, ll. 50–51. p. 69, ll. 5–12. p. 70, ll. 37–38. p. 71, l. 3. p. 71, ll. 9–13. p. 71, ll. 13–24. p. 71, ll. 40–52.

> " I cannot help thinking that, where a Government deliberately undertakes in the course of negotiations to repay a loan in the country of the lender and uses terms that are apt to describe the legal money of that country, it is more consonant with the probable intentions of the parties to hold that the lender was stipulating for repayment to be made in the currency of his own country without regard to rises and falls in the value of the currency of the borrower." p. 72, l. 2.

16. It is submitted that North J. erred in regarding the *Auckland* case as authoritative of the present case, and in failing to appreciate that decisions prior to *Bonython's* case were given before the real implications of borrowing by a sovereign Government under statutory authority had been determined. It is submitted further that he was wrong in considering that *Bonython's* case so far left open the consequences of naming a single place for payment as to justify a totally different approach to such a case, and that his judgment is vitiated by his failure to approach the problem along the lines laid down in *Bonython's* case. With regard to the three factors which he considered rebutted the presumption that the Government of a self-governing country, using the terms appropriate to its own monetary

system, must be taken to refer to that system, it is submitted, first, that the terms of Section 5 of the New Zealand Loans Act, 1908, in no wise affect the presumption, and that the relevant loans were in any event raised in Wellington ; secondly, that the close financial association between Australia and New Zealand throws no light on the problem ; and that the final matter mentioned by North J. is an unwarranted speculation and far from being a factor rebutting the presumption is in effect a mere denial of the existence of the presumption.

pp. 41–53. 17. In his dissenting judgment, Gresson J. first discussed the Appellant's loan of £72,500 (which he subsequently considered to be typical of the remaining loans). He found that the proper law of the contract was that of New Zealand, since the loan was made by the Government of New Zealand under statutory authority, and secured on the public revenues, and the money was paid to and received by the Respondent as New Zealand pounds. He held, however, that the problem of determining the currency of obligation was not concluded by a decision as to the proper law of the contract, and the problem was to be solved as a question of construction. If the agreement between the parties was sufficiently explicit, that concluded the matter. If the parties had left the matter in doubt two conflicting presumptions had to be weighed. He considered that since *Bonython's* case the principle that as the proper law governed the substance of the contract resort should be had to that law to resolve the doubt, was of at least equal weight with the presumption in favour of the money of the place of payment being the money of account. In the present case he considered that the parties had sufficiently explicitly expressed their intention and in this respect he relied upon the words " payable in Melbourne free of exchange." He regarded the words " free of exchange " as negativing and incompatible with the adoption of Australian currency as the money of account. He proceeded, however, to consider the matter on the basis that he was wrong in attributing decisive effect to the words " free of exchange." He came to the conclusion that on this basis there must be attributed to the parties an intention to make New Zealand money the money of account to govern the substance of the obligation, and the currency of Australia no more than the money of payment to provide the means of discharging the debt. He discussed the *Adelaide* and *Auckland* cases and their present-day authority. In his view both cases were concerned only with the mode of performance, and had proceeded on a vital misconception of fact, namely that the Australian pound and the English pound were the same unit of account. He also discussed the *Mount Albert* case and noted that that case stressed the distinction between obligation and performance, but that the case was not otherwise of assistance since the question of the meaning of the word " pound " was not contested. In Gresson J.'s opinion none of the authorities were inconsistent with his view that even if the parties had not expressly so decided there was an implication that the contract contemplated repayment in New Zealand pounds. The question in the present case was one of the substance of the obligation and not of the mode of performance. It therefore fell to be determined according to the proper law of the contract, which was the law of New Zealand and upon the basis that New Zealand currency was different and distinct from that of Australia. He referred to the *National Bank* case as warning that great care must be exercised in using the place

p. 43, l. 12 ; p. 44, l. 26.

p. 44, ll. 27–41.

p. 46, ll. 5–6.
p. 46, ll. 30–33.

p. 47, ll. 1–16.

p. 49, l. 38 ; p. 50, l. 12.

pp. 47–49.

p. 49, ll. 37–39.

p. 51, ll. 11–13.

p. 51, ll. 24–34.

of payment as a consideration supporting the inference that the substance of the obligation is to be measured in money of the same place. Treating the matter as going to the substance of the obligation he reviewed the facts and found that the New Zealand features of the contract predominated and he concluded that the proper implication arising from all the circumstances of the transaction was that the parties based the transaction on the monetary system of New Zealand, and that the substance of the obligation was to be measured in New Zealand pounds. He would accordingly have given judgment for the Appellant for the amounts of principle and interest short paid, together with interest at the rate of 3½ per cent. per annum from the 1st February, 1951, on the amounts of short paid principal.

p. 52, ll. 4–28.

p. 52, ll. 29–38.

18. Stanton J. also dissented. He immediately discussed the statutory background, to which he attached importance. Approaching the matter apart from authority, his conclusion was that the references in the various New Zealand statutes to " pounds " were references to New Zealand " pounds " and he doubted whether the Respondent could issue securities otherwise than in its own lawful money. Accordingly, he would, apart from authority, have considered that the securities issued under such statutes must be expressed in New Zealand pounds. Stanton J. then reviewed the authorities, on the basis that Australian and New Zealand currencies were separate and distinct and that the proper law of the contract was New Zealand law. In his view the present case was indistinguishable from *Bonython's* case except that in the latter case there were optional places of payment. It was, he said, on that fact alone that the court were asked to come to the opposite conclusion from the one accepted in *Bonython's* case. Stanton J. discussed the *Adelaide* case and came to the conclusion that it did not lay down any general rule that if a particular place is chosen for payment the *lex loci solutionis* must determine the measure of the obligation. He treated the *Auckland* case, in view of the criticism of it in *Bonython's* case, as an isolated decision turning upon its special facts. Dealing with *Bonython's* case, Stanton J. said that although the judgment did not state what the result would have been if there had been only one place named for payment, he nevertheless read it as moving the emphasis from the place of payment to the circumstances of issue, and particularly to the circumstance that the issuing body was the Government of a self-governing country acting under statutory authority and charging its revenues. He referred to the presumption arising from those circumstances and concluded that it must prevail. The conclusion which he reached from a consideration of *Bonython's* case and the *National Bank* case was that the *Auckland* case could no longer be relied on where the facts were different and that the fact of there being only one place of payment was not a countervailing feature sufficient to displace the presumption arising from the special circumstances of issue. He was therefore of opinion that the securities were all to be considered as being expressed in New Zealand currency. Having reached a conclusion favourable to the Appellant, he found it unnecessary to discuss the significance of the words " free of exchange." In his view the Appellant was entitled to recover the amounts of principal and interest short paid, with interest at 3½ per cent. per annum from the 1st February, 1951, on the amounts of short paid principal.

pp. 53–58.

p. 54, l. 20; p. 55, l. 8.

p. 55, ll. 40–44.

p. 55, l. 45; p. 56, l. 9

p. 56, ll. 19–26.

p. 57, ll. 26–50.

p. 57, ll. 6–11.

p. 57, l. 45; p. 58, l. 3

19. The Appellant submits that this Appeal should be allowed with costs and that it should be held that the Appellant is entitled to recover the amounts of short paid principal and interest, together with interest thereon as claimed in the Statement of Claim for the following among other

REASONS

(1) BECAUSE on their true construction the obligation of the Respondent in respect of the Inscribed Stock and Bearer Debentures held by the Appellant is expressed in and to be measured by New Zealand pounds.

(2) BECAUSE the proper law of the said Inscribed Stock and Bearer Debentures is New Zealand law and the currency expressions therein apt to describe and refer to the currency of New Zealand, do refer to such currency.

(3) BECAUSE, alternatively the proper law of the said Inscribed Stock and Bearer Debentures is New Zealand law and the currency expressions therein are apt to describe and refer to the currency of New Zealand, and *prima facie* the same do so refer and no fact or circumstance exists sufficient to rebut that presumption.

(4) BECAUSE the Respondent in issuing the said Inscribed Stock and Bearer Debentures acted under statutory authority and charged the said securities on its public revenues and having used terms apt to describe its own currency must be presumed to have intended that currency as the measure of its obligation and no fact or circumstance exists sufficient to rebut that presumption.

(5) BECAUSE the fact that Melbourne was fixed as the place of payment of interest and repayment of principal under the said Inscribed Stock and Bearer Debentures, if not irrelevant in the circumstances of this case to the construction of the obligation, is at any rate insufficient in the circumstances of this case to displace the presumption which otherwise arises.

(6) BECAUSE the fixing of Melbourne as the place of payment was concerned only with the convenience of the lender in the discharge of the obligation and was not directed to or concerned with measuring the obligations undertaken by the borrowing Government.

(7) BECAUSE the use of the words " free of exchange " show that the parties contemplated an exchange operation incompatible with the measure of the Respondent's obligation sounding in Australian currency.

(8) BECAUSE the amounts claimed by way of interest on the short paid principal and interest are proper and permissible and should be allowed.

(9) BECAUSE the judgments of the majority of the Supreme Court of New Zealand were wrong.

(10) BECAUSE the judgments of Gresson and Stanton JJ. on the question of the measure of the Respondent's obligation were right.

G. E. BARWICK.

R. I. THRELFALL.

No. 2 of 1955.

In the Privy Council.

ON APPEAL

from the Supreme Court of New Zealand.

BETWEEN

THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED *Appellant*

AND

HER MAJESTY'S ATTORNEY-GENERAL FOR THE DOMINION OF NEW ZEALAND *Respondent.*

Case for the Appellant.

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