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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 (Plaintiff) . . . *Appellant*

AND

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

Case for the Respondent

RECORD.

1. This is an Appeal from a judgment of the Supreme Court of New Zealand in an action in which the Appellant was the Plaintiff and the Respondent was the Defendant. p. 73.

2. The facts material to the said action and to this Appeal are not in dispute, and are set out in the Statement of Agreed Facts which was filed in respect of the said action in the said Supreme Court; and are also summarised hereunder. pp. 17–26.

3. The Appellant was on and before the 1st day of February 1951, being the maturity date thereof (hereinafter referred to as "the said maturity date"), the holder of certain parcels of Inscribed Stock and certain Bearer Debentures issued by the New Zealand Government in the years 1925, 1926 and 1927, and having an aggregate nominal or face value of £526,500 (hereinafter collectively referred to as "the said securities"). It was an express stipulation of all the contracts relating to the said securities that payment of both interest and principal should be made at Melbourne and also (except in the case of the Debentures) that such payments of interest and principal at Melbourne should be made there "free of exchange."

4. At the time when the said securities were issued, New Zealand currency was at parity with Australian currency; and, although both currencies were subsequently devalued in relation to English currency and there was for a period some divergence between them, New Zealand and Australian currencies had again been at parity with each other for many years prior to the 20th day of August 1948, when New Zealand currency was restored to parity with English currency with the result that £NZ100 thenceforth became worth £A124.

5. From and after the said 20th day of August 1948 the New Zealand Government continued to pay to the Appellant at Melbourne interest at the rate specified in the said securities on the nominal amount thereof in Australian currency, and, likewise, on the said maturity date repaid to the Appellant at Melbourne the nominal amount of the principal specified in the said securities in Australian currency.

6. The Appellant, in accepting the payments of interest and principal referred to in the preceding paragraph 5 hereof, expressly reserved the right to claim that the obligations of the New Zealand Government were measurable in the money of account of New Zealand, and on the 4th day of August 1953 commenced in the Supreme Court of New Zealand the said action against the Respondent claiming the alleged short payments of principal and interest arising from the difference in the value between the currency of New Zealand and that of Australia which occurred on and after the said 20th day of August 1948.

pp. 1–14.

7. In particular the Appellant's claim in the said action and in this Appeal arises out of and is based on the six separate causes of action which are respectively hereinafter referred to in paragraphs 8 to 13 hereof.

8. The first cause of action relates to certain Inscribed Stock for £61,500, representing the balance, held by the Appellant on the said maturity date, of a parcel of Inscribed Stock for £72,500 originally subscribed for by the Appellant and issued by the New Zealand Government on the 30th day of November 1925.

pp. 1–3; p. 12, l. 45— p. 13, l. 5; p. 14, ll. 22–37.

9. The second cause of action relates to certain Inscribed Stock for £100,000 originally subscribed for by the Appellant and issued by the New Zealand Government on the 2nd day of November 1925.

pp. 3–5; p. 13, ll. 6–12; p. 15, ll. 1–17.

10. The third cause of action relates to certain Inscribed Stock for £56,000, representing the balance, held by the Appellant on the said maturity date, of a parcel of Inscribed Stock for £306,000 originally subscribed for by the Appellant and issued by the New Zealand Government on the 14th day of June 1926.

pp. 5–7; p. 13, ll. 13–19; p. 15, ll. 18–34.

11. The fourth cause of action relates to certain Inscribed Stock for £300,000 originally subscribed for by the Appellant and issued by the New Zealand Government on the 27th day of August 1926.

pp. 7–9; p. 13, ll. 20–26; p. 15, l. 35— p. 16, l. 11.

12. The fifth cause of action relates to certain Inscribed Stock for £7,000, purchased by the Appellant on the 8th day of January 1942 from the estate of the Honourable Edward Jolley Crooke deceased, and representing part of a certain parcel of Inscribed Stock for £32,000 originally subscribed for by the said Edward Jolley Crooke and issued by the New Zealand Government on the 30th day of November 1925. pp. 9–11; p. 13, ll. 27–33; p. 16, ll. 12–27.

13. The sixth cause of action relates to four Bearer Debentures for £500 each issued by the New Zealand Government on the 1st day of August 1927 and purchased by the Appellant in the year 1946. pp. 11–12; p. 13, ll. 34–40; p. 16, ll. 28–43.

14. The said action was heard on the 5th, 6th, 7th and 8th days of October 1953 before The Honourable Mr. Justice Fair, The Honourable Mr. Justice Gresson, The Honourable Mr. Justice Stanton, The Honourable Mr. Justice Hay and The Honourable Mr. Justice North, sitting as a Full Court of the Supreme Court of New Zealand.

15. At the said hearing the following principal submissions were made on behalf of the Respondent as Defendant :—

(A) The fundamental issue in dispute between the parties is what *money of account* is applicable for the purpose of measuring the obligations assumed by the New Zealand Government under the said securities.

(B) This issue is a question of construction.

(C) This question of construction is determinable by the proper law of the contract.

(D) The proper law of the contract is the law of New Zealand.

(E) At all material times New Zealand and Australia have had separate moneys of account.

(F) According to the proper law of the contract, i.e., New Zealand (Municipal) law (which follows English (Municipal) law in this respect) the money of the place of payment and not that of the country of the proper law of the contract is the money of account meant by the parties unless the circumstances indicate a different intention on their part.

(G) The history of the said securities, and the documents in respect thereof, show quite clearly that the place of payment specified by the parties is Melbourne and there are no circumstances which would indicate any intention on their part that the money of account of any other place should be applicable.

(H) It therefore follows that the obligations of the New Zealand Government under the said securities were measurable in the money of account of Australia and that in the circumstances it had fully discharged its indebtedness in respect thereof to the Appellant.

16. By a Majority Judgment (Gresson and Stanton, JJ., dissenting) delivered on the 31st day of May 1954 the contentions of the Respondent as Defendant at the said hearing were upheld by the Supreme Court of pp. 27–73.

New Zealand, and it was adjudged that the Appellant should recover nothing against the Respondent and, by consent, should pay to the Respondent the sum of £750 for costs together with the sum of £77 for disbursements.

17. The following is a summary of the reasons given in the majority judgments in the Supreme Court :—

FAIR J. :

p. 32, l. 30–p. 33, l. 22. (1) When the money was paid by the Plaintiff in Melbourne and the interim receipt was given there was a completed contract of loan.

p. 33, ll. 23–43. (2) At the hearing in the Supreme Court both parties assumed the validity of the " pegging " of the exchange.

p. 35, ll. 18–23. (3) Australian and English currencies have been separate since at least 1900. The same applies equally to English and New Zealand currencies.

p. 35, ll. 24–29. (4) The currency of obligation is to be determined as a question of construction of the documents at the time they were made, though the documents must be looked at as a whole and in the light of the relevant surrounding circumstances.

p. 35, ll. 30–36. (5) It was admitted at the hearing that the proper law of the contract is New Zealand law.

p. 35, ll. 37–42. (6) The place of payment is of little weight where there is an option for payment in different countries, with different currencies in units of the same denomination, or power at will to change the place of registration.

p. 35, l. 49–p. 36, l. 21. (7) Even where the borrower is a Government with a local currency, and the prima facie presumption is that it contracted in units of its own currency, the place of performance may well be a decisive factor displacing the inference to be drawn from that fact, and especially the place of performance is an important factor where only one place is specified.

p. 36, ll. 28–32. (8) The acceptance of payment in one currency over a period of years, or the method of presentation of accounts in the case of currency or denominations of equal value on the day of the making of the contract, cannot be invoked to affect the construction of the contract.

p. 36, l. 33–p. 39, l. 12. (9) The following circumstances strongly indicate that the currency of obligation was intended to be that of Australia :—

(i) That Melbourne was the place specified for payment of interest and repayment of principal ;

(ii) That all the moneys came from foreign investors, and part of them was supplied in and from foreign currency ;

(iii) That the certificates of title were held in the Plaintiff's custody in Australia, though the Plaintiff carries on business in New Zealand and has its principal place of business in New Zealand at the City of Wellington;

(iv) That other moneys similarly raised were directed to be paid in equivalent of dollars calculated by reference to the United Kingdom pound, and that this involves the abandonment of the New Zealand pound as the basis of the contract;

(v) That the expression "free of exchange" meant "free of any deduction for banking costs of transmission" and that the Plaintiff did not at the hearing contend for any wider meaning, such as possible difference in currency;

(vi) That the stipulation as to only one place of payment (Australia), in all the circumstances, seems definitely to indicate Australian currency as that intended as the measure of obligation. p. 41, ll. 1–5.

(10) The cases of *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* [1934] A.C. 122 (as explained in *Mount Albert Borough Council* v. *Australasian T. & G. Society* [1938] A.C. 224 at p. 241) and *Auckland City Council* v. *Alliance Assurance Co. Ltd* [1937] A.C. 587 directly support the submissions for the Respondent, and, in their application to the present case, they contain nothing affected by the decisions in *Bonython* v. *Commonwealth of Australia* [1951] A.C. 201 and *National Bank of Australasia Ltd.* v. *Scottish Union and National Insurance Ltd. and Others* [1952] A.C. 493. p. 39, l. 13–p. 40, l. 50.

(11) He therefore was of opinion that judgment should be for the Defendant. p. 41, ll. 6–7.

HAY J.:

(1) The reasoning of the judgment in the *Bonython* case [1951] A.C. 201 does not lead to the conclusion that any greater weight is to be attached to one as against the other of the two presumptions, namely, that arising from the place for payment and that arising from the fact that the securities were issued by the Government on the authority of New Zealand statutes, and secured on the public revenues of New Zealand. pp. 59–60.

(2) There is nothing in the *Bonython* case to compel the Supreme Court of New Zealand to hold that it must govern the decision in the present case. In the *Bonython* case: (A) Payment in London was only one of four alternative modes of performance, and as the substance of the obligation must be deemed to be in every case the same, the fact that London might be chosen as the place of payment became a factor of little or no weight. (B) No details of the transaction had been given, and the history and fate of the debentures issued in London were not revealed. p. 61, ll. 1–27.

(3) At the time of the making of the contracts in the present case, both parties must be deemed to have had in mind the possibility of a divergence of currencies in the future. The Plaintiff p. 63 ll. 48

Company was careful in its negotiations to stipulate for repayment in Melbourne, and that provision appeared to be a dominant feature of the contracts, going far beyond the choice of a place of payment merely as a matter of convenience, and showing an intention of being assured of repayment in Australian currency, without taking the risk of possible fluctuations in the currency of New Zealand.

p. 64, ll. 11–20. (4) In respect of the same loan, contracts on varying terms were made with different classes of investors. There is no reason in principle why the contracts made with the Plaintiff Company should not be construed separately from those made with English investors.

p. 64, l. 36–p. 65, l. 26. (5) References to the *Auckland* case in the *Bonython* case and the *National Bank* case do not appear to impair the validity of the *Auckland* decision, or of the principles applied by Lord Wright in reaching it.

p. 65, ll. 27–33. (6) The Government has completely discharged its obligations under the various contracts.

NORTH J.:

(1) As to four particular matters discussed during the hearing:

p. 67, ll. 23–36. (A) The subsequent conduct of the Plaintiff Company is of no importance in interpreting the contract, and in any case it was not sufficiently clear and unambiguous to permit the Court to draw any inference that it "understood the debt to be expressed in Australian pounds."

p. 67, ll. 36–43. (B) Nor can there be rightly used against the Plaintiff Company the circumstance that in most instances it paid its contributions to the loan in Australian pounds and began to receive interest from the time that the money was paid into the Bank of New Zealand at Melbourne.

p. 67, l. 44–p. 68, l. 3. (C) The Court should not be influenced by the fact that other parts of the loan contained options to the holder to require payment at London, New York, or Wellington, though the linking of the dollars with English sterling is rather significant.

p. 68, ll. 3–38. (D) In 1925–26 the expression "free of exchange" was not used as referring to the difference, or rate of difference, in values between two currencies. He had understood both Counsel to agree to this. Even if it had been permissible to interpret those words as referring to that difference, the question remained whether "free of" does not mean "independent of the difference in values between the New Zealand pound and the Australian pound."

p. 68, l. 39–p. 69, l. 12. (2) On the main question as to competing presumptions, their Lordships, in the *Bonython* case, appear to have intended to leave open the question of the effect of providing only one place of payment. They said: "It is clear that, if it had been provided that payment would be made in London only, that would have been

an important factor in determining the substance of the obligation, though other features, not present in the *Adelaide* case, could not be ignored."

(3) In the *Bonython* case, unlike the present case, the record did not include any details of the history of the loan, and therefore their Lordships found no countervailing features to displace the presumption that where the legislature of a country uses terms which are apt to describe its own lawful money, it must require the strongest evidence to the contrary to suppose that it intended some other money. p. 70, ll. 15–30.

(4) That presumption is displaced by the following considerations: (A) That section 5 of the New Zealand Loans Act 1908 expressly authorises the Minister to raise loans outside New Zealand and to prescribe the mode, conditions, times, and places of repayment of such loans, and that there is no reference in the section to New Zealand money as such. (B) That in view of the close association between Australia and New Zealand, there is nothing incongruous in the idea of the Government of New Zealand undertaking to repay Australian investors so many " pounds " expressed in Australian currency. (C) Where a Government deliberately undertakes in the course of negotiations to repay a loan in the country of the lender and uses terms 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 or falls in value of the currency of the borrower. p. 71, l. 9–p. 72, l. 15.

(5) It may be open to question whether the Supreme Court is justified in departing from the principles laid down in the *Adelaide* case, adopted three years later in the *Auckland* case, and referred to with approval in the later cases. p. 70, ll. 31–38.

(6) The Plaintiff Company therefore fails in its action. p. 72, ll. 16–17.

18. The following is a summary of the reasons given in the minority judgments in the Supreme Court :—

GRESSON J. :

(1) New Zealand law is the proper law of the contract, because the Government of New Zealand was borrowing under statutory authority, and the loan was secured on the public revenues of New Zealand, and because the obligation of the Plaintiff was to provide the money in New Zealand pounds. p. 41, l. 28–p. 44, l. 26.

(2) Counsel on both sides had conceded that, except that the moneys had an Australian origin and repayment of the principal and payment of interest were to be made in Australia, all the circumstances pointed to the law of New Zealand as the proper law of the contract.

(3) It is only since the decision in the case of *Bonython* v. *Commonwealth of Australia* [1951] A.C. 201 that it has been fully p. 45, ll. 1–29

recognised that the pound in Australia is not the same unit of account as the pound in England. It must be equally true that the pound in Australia and the pound in New Zealand were not identical.

p. 45, l. 40–p. 46, l. 52. (4) The phrase " free of exchange " negatives the adoption of Australian currency as the money of account, for there could be no question of exchange if the debt was a stated number of Australian pounds.

p. 47, ll. 1–16. (5) Even if the words " free of exchange " do not negative the adoption of Australian currency as the money of account, there must be implied from the circumstances of the transaction an intention to make New Zealand money the money of account to govern the substance of the obligation.

p. 47, l. 17–p. 51, l. 28. (6) The earlier cases (the *Adelaide* case and the *Auckland* case), which were greatly relied upon by the Defendant, are distinguishable on the ground (inter alia) that they were based on a misapprehension of fact, namely an assumption that the two currencies involved were not separate and distinct, whereas in fact they were, and have since been recognised as separate and distinct in the *Bonython* and *National Bank* cases.

p. 51, ll. 11–13. (7) The present case must be dealt with on the basis that the currency of New Zealand is different and distinct from that of Australia.

p. 52, l. 46–p. 53, l. 15. (8) These considerations apply not only to the first loan of £72,500, but also to the subsequent loans, though the latter present minor differences.

(9) That the Plaintiff should recover the deficiency claimed in respect of principal, with interest say at 3½ per cent., on all principal short paid as from 1st February 1951, and all interest short paid (but without interest thereon).

STANTON J.:

p. 55, l. 37–p. 57, l. 14. (1) Although their Lordships in the *Bonython* case (where there was an option as to the place of payment) did not say that the result would have been the same if there had been only one place of payment, and that particular case was left open, their judgment should be read as moving the emphasis from the place of payment to the circumstances of issue, and particularly to the fact that the issuing body was the Government of a self-governing country acting under the statutory authority of that country, and charging its revenues; and 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."

p. 57, ll. 20–44. (2) The course of conduct of the parties cannot be looked at to show the intention of the parties.

(3) The Plaintiff should have judgment for the amount claimed and for simple interest in respect of principal sums claimed from 1st February 1951 at 3½ per cent. per annum, with appropriate costs. p. 58, ll. 31-34.

19. The Supreme Court of New Zealand on the said 31st day of May 1954 granted conditional leave, and on the 7th day of October 1954 granted final leave, to the Appellant to appeal to Her Majesty in Council. p. 74.

20. It is humbly submitted on behalf of the Respondent that the said Judgment of the Supreme Court of New Zealand is right, and that the Appeal should be dismissed for the following among other

REASONS

(i) THAT if any ambiguity or doubt arises as to the currency in which a debt is expressed, and especially where the expression used for the denomination thereof connotes the currencies of two or more countries, the parties are presumed to have intended to measure the obligation in the currency of the country in which the debt is payable unless the circumstances indicate a different intention on their part.

(ii) THAT with regard to the said securities there are no circumstances which would indicate that it was the intention of the parties that the obligations of the New Zealand Government thereunder should be measurable otherwise than in Australian money of account and, in fact, the proper inference to be drawn from the contracts relating thereto is that the parties themselves have expressly stipulated that such obligations should be measured in the money of account of Australia.

(iii) THAT the Judgment of the 31st day of May 1954 was right for the reasons and on the grounds stated in the Majority Judgments of the Supreme Court of New Zealand and outlined in the foregoing paragraph 17.

(iv) THAT upon the true construction of the contracts whereunder the money in question was paid the obligation of the New Zealand Government was measurable in the money of account of Australia.

FRANK SOSKICE.

E. J. HAUGHEY.

No. 2 of 1955.

In the Privy Council.

ON APPEAL

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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 (Plaintiff) *Appellant*

AND

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

Case for the Respondent

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