Privy Council Appeal No. 2 *of* 1955

The National Mutual Life Association of Australasia Limited - - - - - - - - - *Appellant*

v.

The Attorney-General for New Zealand - - - - *Respondent*

FROM

THE SUPREME COURT OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH FEBRUARY, 1956

Present at the Hearing:

VISCOUNT SIMONDS
LORD OAKSEY
LORD REID
LORD KEITH OF AVONHOLM
LORD SOMERVELL OF HARROW

[*Delivered by* LORD REID]

This is an appeal from a judgment of the Full Court of the Supreme Court of New Zealand (Fair, Hay and North, JJ., Gresson and Stanton, JJ., dissenting) dated 31st May, 1954, in an action brought by the present appellant against the respondent. The question in dispute is the nature and extent of the obligations of the New Zealand Government in respect of five parcels of New Zealand 5½ per cent. Inscribed Stock and one parcel of bearer debentures all of which matured on 1st February, 1951. Interest was payable on 1st February and 1st August in each year and it is not disputed that interest was duly paid down to and including 1st August, 1948. But the appellant alleges that thereafter the New Zealand Government failed to pay to it the whole of the interest due to it and that on maturity they failed to pay or repay the whole of the principal sum due. It is not disputed that the appellant only accepted under protest the sums paid to it. In this action the appellant sues for the difference between the amounts of interest and principal in fact paid to it and the amounts which it alleges were due to it, and the Supreme Court of New Zealand has adjudged that the appellant do recover nothing against the respondent and do pay to the respondent certain costs.

The Register of Inscribed Stock kept for the New Zealand Government bears with regard to the Stock belonging to the appellant the words "Principal and interest payable at Melbourne free of exchange" and the appellant's certificates of title bear the same words. All the payments made to the appellant in respect of that Stock were made at Melbourne in Australian pounds. The appellant contends that the payments ought to have been made in New Zealand pounds. In 1949 and the subsequent years the New Zealand pound was worth more than the Australian pound and if the appellant's contention is well founded it is entitled to recover the sums sued for in this action. The parties are agreed that the decision of this case ultimately depends on the true construction of the entry in

that Register but they are not in agreement as to what facts ought to be taken into consideration in determining this question. As will appear their Lordships are of opinion that most of the facts the admissibility of which is in dispute would throw no material light on this question and they do not propose to set out more than a summary of these facts. There is before their Lordships an elaborate statement of agreed facts, and there is a full statement of the facts in the leading judgment of Fair, J.

The State Advances Act, 1913, as amended, enabled the Minister of Finance on being authorised by the Governor-General in Council to raise sums of money on the security of and charged upon the public revenues of New Zealand. The Minister of Finance was duly authorised on 23rd March, 1925, to raise by way of loan for certain purposes sums amounting to £6,500,000 for the financial year ending 31st March, 1926, and he was similarly authorised to raise loans for the same purposes to the extent of the same amount for the next financial year. Pursuant to these authorities the Minister duly borrowed £3,002,500. The statement of agreed facts sets out in paragraph 5 the conditions subject to which this sum was borrowed: it was borrowed in three parts. £1,250,000 was subscribed by English investors and made available at Wellington at par of exchange. There is a London Register of Inscribed Stock, and, in respect of this borrowing, there was issued Inscribed Stock inscribed on the London Register, and holders of £1,000,000 of this Stock were specifically given the option of payment of interest and repayment of principal at London, New York or Wellington, such payment and repayment at New York to be on the basis of 4 dollars 86⅔ cents to the United Kingdom pound. The remaining £250,000 and the interest thereon were respectively payable in London only.

The sums with which this case is concerned were part of £1,644,500 subscribed by Australian investors and made available at Wellington at par of exchange. The Inscribed Stock issued in respect of this borrowing was inscribed in the New Zealand Register and the principal and interest moneys were respectively repayable and payable in some cases at Melbourne and in others at Sydney (as arranged at the time of issue) free of exchange. There was no option to change the place of repayment or payment of interest. There was also a sum of £108,000 subscribed by Australian investors in respect of which bearer Debentures were issued which provided for payment at Melbourne with no option to transfer the place of payment.

In September, 1925, there were negotiations between the Secretary to the Treasury and a firm of stockbrokers with a view to obtaining loans: no prospectus was issued, but after some correspondence the appellant through the stockbrokers applied for £72,500 New Zealand 5½ per cent. Inscribed Stock and £72,500 was received from the appellant by the Bank of New Zealand at Melbourne for the credit of the Public Account and was by direction of the Treasury remitted to that Bank at Wellington. The stockbrokers were paid 10s. per cent. by the New Zealand Government and out of that commission they paid the cost of the exchange so that the full sum of £72,500 was provided for the New Zealand Government at Wellington.

The appellant later applied and paid for further large amounts of Inscribed Stock the last application being in August, 1926. It was agreed that on these later occasions the procedure was similar and it is unnecessary to narrate the steps taken on each of these occasions. In due course the appellant received Certificates of Title. In some cases the appellant had sold part of the Stock before receiving the Certificates and, in respect of the first transaction, it received after a considerable time a Certificate which stated that the appellant "is the registered holder of sixty-one thousand five hundred pounds 5½ per cent. New Zealand Inscribed Stock maturing 1st February, 1951, which amount has been duly inscribed in the books of the Treasury under the name and address mentioned above. This Certificate is conclusive evidence of the ownership of the Stock to which it relates and is proof that no Stock Certificate

is outstanding in respect of that Stock". The Certificate bore on its face the words "Principal and interest payable at Melbourne free of exchange".

Section 2 of the New Zealand Inscribed Stock Act, 1917, defines Inscribed Stock as "the claim which any person has against the Public Revenues by virtue of an entry made pursuant to this Act on the Register of Inscribed Stock under the name of such person" and it is therefore essential to see how the entries with regard to the appellant were made. The heading is

> "State Advances Act, 1913 (Advances to Settlers Branch)
>
> Maturing 1st February, 1951. Interest at 5½% payable 1st February 1st August
>
> Principal and Interest Payable at Melbourne Free of Exchange
>
> Warrant to go to General Manager
>
> The National Mutual Life Association of Australasia Ltd., 395 Collins Street, Melbourne, Victoria."

Then there follows a tabular statement. On the right side of the page is the first entry "Oct. 15. 1925 51/2 By cash 72500". Below that are other entries shewing further sums paid. On the left of the page are numerous entries for 1927 and 1930 shewing various amounts of stock sold by the appellant against the words "To Transfer". And in the middle of the page there is a column which apparently shews the amount of stock owned by the appellant after each operation. The first figure in this column is 72,500 and below that is a series of figures which increase to 402,500 by reason of the payments made for stock taken up by the appellant in 1926 and then diminish by reason of the appellant's various sales of stock. The last figure in this column is 117,500 and against it is the entry "Feb. 1. 1951 To Redemption DE 327 117500".

The Statement of Agreed Facts states with regard to the matter which has given rise to this litigation:

> "38. On or about 20th August 1948 the official exchange rates of the Dominion of New Zealand and of the Commonwealth of Australia diverged and thereafter at all material times subject to banking fluctuations £125 Australian currency was the equivalent of £100 New Zealand currency.
>
> "39. Thereafter the New Zealand Government through its agents continued to pay the interest due on 1st February 1949 and all subsequent payments of interest accruing in respect of all the said parcels of Inscribed Stock and of the said Bearer Debentures in Melbourne at the rate of 5½ per cent per annum on the nominal or face value thereof on the basis that the measure of its obligation thereunder was in Australian currency or money of account.
>
> "40. The New Zealand Government through its agents tendered and paid in Melbourne on 1st February 1951 in repayment of the principal moneys due in respect of all the said parcels of Inscribed Stock and of the said Bearer Debentures at the nominal or face value thereof measured in Australian currency or money of account namely the sum of £526,500 in Australian currency or money of account."

The Statement of Agreed Facts then narrated that the appellant accepted all payments after 20th August, 1948, "with a full reservation of its claim that the indebtedness of the New Zealand Government could only be discharged by payment of the nominal or face value of the several obligations in New Zealand currency or its equivalent in Australian currency in Melbourne at the current rate of exchange applicable as at the date of each payment".

The question for decision in this case is difficult but it is narrow in scope. It is admitted that at all relevant times the monetary systems of New Zealand and Australia were different and that even while they were

of the same value the New Zealand pound and the Australian pound were different units. It is further admitted that the proper law of the contracts is the law of New Zealand and that to succeed the respondent must shew that the obligations of the New Zealand Government construed by that law were obligations to pay Australian pounds.

Their Lordships must first notice arguments by the appellant which if correct would lead to the conclusion that it was *ultra vires* of the New Zealand Government to enter into an obligation to pay interest on New Zealand Inscribed Stock or to repay the principal of such Stock in anything but New Zealand money. It was of course not maintained that it would be *ultra vires* to undertake to pay, out of New Zealand, in the currency of the place of payment an amount equivalent at the time of payment to a sum in New Zealand pounds but it was argued that by the law of New Zealand the measure of every obligation in respect of Inscribed Stock must be New Zealand pounds. This argument was based on the relevant New Zealand statutes: it was said that the Governor-General in Council can only authorise borrowing under the State Advances Act, 1913, in New Zealand pounds, and that if the Minister of Finance should undertake an obligation in some other money of obligation or money of account it could not be determined whether such borrowing was within the amount authorised by the Governor-General in Council; if the New Zealand currency should depreciate such an obligation might well require for repayment of the loan the raising from the public revenues of a larger sum than that authorised to be borrowed.

There is reference in the judgments of the Supreme Court to difficulties which might arise if obligations were undertaken to repay loans in foreign currency, but the question whether an obligation to pay foreign currency would be *ultra vires* was not clearly raised or dealt with and it is not raised in the appellant's Reasons in this appeal. Reference has already been made to paragraph 5 of the Statement of Agreed Facts which states that certain subscribers were specifically given the option of payment in New York on the basis of \$4.86⅔ to the United Kingdom pound and it is difficult to see how the giving of that option could be *intra vires* if this argument is well founded. It is true that the rights of those subscribers are not affected by this case but the submission of this statement and the absence of any suggestion of *ultra vires* emphasise the fact that this point has never been properly raised. It is a matter on which it would be of the utmost importance to have the views of the learned judges of the Supreme Court and in view of the far-reaching consequences which a decision of this question might have, their Lordships are not prepared to deal with this new argument in this appeal.

But the appellant is entitled to argue and does argue that there is a strong presumption that a Government will not undertake an obligation to repay money borrowed on the security of its revenues except on the basis that the sum to be repaid is to be measured by its own currency. In *Bonython* v. *Commonwealth of Australia* [1951] A.C. 201 it was said "The Government of a self governing country using the terms appropriate to its own monetary system must be presumed to refer to that system whether or not these terms are apt to refer to another system also. It may be possible to displace that presumption but unless it is displaced it prevails." In their Lordships' judgment the question for decision in the present case is the true construction of the obligation undertaken by the New Zealand Government taking that presumption into account.

The obligation of the Government of New Zealand is contained in the entry in their Register of Inscribed Stock which has already been set out. There is no material difference between it and the terms of the appellant's applications for stock and the terms of the Certificates of Title issued to the appellant, so it is unnecessary to consider what the position would be if there were any material differences between these documents. Arguments were submitted that in construing the entry in the Register other matters should be taken into account such as the facts that the lender resided in Australia and that the money lent came from Australia but their Lordships do not find it necessary to consider

whether as a matter of law any such extrinsic circumstances can be considered because they do not find in the agreed facts anything which could materially affect the construction of the obligation. It is necessary to determine what was the substance of the obligation—whether it was an obligation to pay the face value of the stock in Australian pounds or an obligation to pay the face value in New Zealand pounds or their equivalent at the date of payment. If it is not sufficiently plain from the terms of the entry in the Register that the obligation was an obligation to pay the face value of the stock in Australian pounds then in their Lordships' judgment any inference which could be drawn from the agreed facts would be quite insufficient to overcome the presumption which has to be overcome if the respondent is to succeed. And if the terms of the obligation are sufficiently plain to overcome the presumption then extrinsic evidence is unnecessary. Their Lordships would however draw attention to the fact that this Stock was transferable and that the Stock issued to the appellant was only a part of the £1,644,500 issued to Australian investors subject to the condition that principal and interest should be payable in Australia free of exchange. If extrinsic evidence were admitted to control the meaning of this condition the result might be that, by reason of different circumstances attending investment by different investors, this condition would have one meaning as regards stock issued to one investor and a different meaning as regards stock issued to another investor. So a transferee might have different rights if he bought apparently identical stock from different holders. That would be a strong argument against the admissibility of evidence of the circumstances in which the stock was issued to a particular stockholder.

The arguments for the appellant were based to a large extent on their Lordships' decision in *Bonython* v. *Commonwealth of Australia* [1951] A.C. 201, so it is necessary to examine that case. The holders of inscribed stock of the Commonwealth had an option to be paid the principal sums due on 1st January, 1945, in Brisbane, Sydney, Melbourne or London, and a stockholder exercising his option to be paid in London claimed to be paid the face value of his stock in British currency. His claim failed, and he was held only entitled to receive in British currency the equivalent of the face value of the stock in Australian currency. The Commonwealth Stock had replaced debentures issued by the Queensland Government and it was admitted that it was necessary to determine the rights of the old debenture holders. In their Lordships' judgment it was said "Necessarily the question is a somewhat artificial one; for it is safe to assume that a divergence in the value of the Queensland pound and the English pound was in the contemplation of nobody. But this at least seems clear, that, if no such divergence was thought of, it cannot have been intended that a debenture holder should obtain a different measure of value, or the Queensland Government be placed under a different liability according to the place of payment; in other words it is clear that the same substantial obligation was imposed on the Queensland Government whatever the place chosen for payment, the choice being given to the debenture holder purely as a matter of convenience."

That reason does not apply to the present case where there is no option as to the place of payment but their Lordships did deal with cases where there was no such option. In dealing with *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* [1934] A.C. 122 after criticism of some of the reasoning in the House of Lords it was said: "But the decision itself can be fairly rested on the fact that under the altered articles of the Adelaide Company payment of dividends on its stock was to be made in Australia only. It was therefore easy to conclude that on the true construction of the contract the place of performance determined the substance of the obligation. i.e., the currency by which the obligation was to be measured. (p. 220) . . . In the present case 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" (p. 221).

Their Lordships accept this as recognising that, if there is only one place of payment, that is an important but not a decisive factor in determining whether the currency of the Government which issued the stock or the currency of the place of payment is the measure of the obligation. Nor is the measure of the obligation conclusively determined by finding what is the proper law of the contract. It is possible for parties contracting under the law of New Zealand to make the Australian pound the measure of the obligation.

Their Lordships must also examine *National Bank of Australasia Ltd.* v. *Scottish Union and National Insurance Co. Ltd.* [1952] A.C. 493 although that case is not so directly in point. There were registers of the Bank's stock in Australia and in London and a stockholder could at any time have his stock transferred from one register to the other, and it was held that the measure of the obligation was not the currency of the place where the stock happened to be registered and where therefore payment had to be made, but was the currency of Australia in all cases. Their Lordships quoted with approval from the judgment of Dixon J. (as he then was) in the High Court of Australia: "great care must be exercised in using the place of payment as a consideration supporting an inference that the substance of the obligation is to be measured in the money of the same place". That is undoubtedly true and particularly where there are alternative places of payment.

It was argued for the respondent that the mere fact that the only place of payment is in Australia is sufficient to overcome any inference arising from the fact that the borrower is the Government of another country. That is a question which their Lordships do not find it necessary to decide in this case because the condition attaching to this Stock is not merely that payments shall be made at Melbourne: it is "principal and interest payable at Melbourne free of exchange". It is therefore necessary to find what are the possible meanings of this condition. No doubt the New Zealand Government might happen always to have sufficient funds available in Melbourne but it was at least reasonable to suppose that that Government would or might have to send funds to Melbourne to effect payment there.

The appellant argued first that the obligation was to hand over New Zealand pounds to the stockholder in Melbourne either in the form of New Zealand legal tender or in the form of a cheque or draft on the Government's bank in New Zealand expressed in New Zealand pounds. But that can hardly be reconciled with "free of exchange" because the first thing the recipient in Melbourne would have to do would be to exchange the notes or cheque for Australian currency, and nothing in the nature of exchange would have been done by the Government: it would simply have posted or otherwise sent to its agent in Melbourne or to the stockholder direct the necessary notes or cheque. Their Lordships therefore reject this argument.

Then the appellant argued that the substance of the obligation was to pay New Zealand pounds, that this condition related only to the mode of performance and that it meant that there should be paid in Melbourne such a sum in Australian currency as was at the time of payment of the same value as the New Zealand pounds comprised in the obligation. Free of exchange on this view would mean only that any bankers charges were to be borne by the Government.

The third meaning is that for which the respondent contends; that the obligation was to pay in Australian pounds the face value of the interest or stock and that "free of exchange" was inserted to shew that no question of exchange was to be brought in to the matter. The New Zealand Government was not to be entitled to say that the transmission of funds to Melbourne had cost it a certain sum, or that its currency had depreciated and that by reason of exchange it could not pay in Australian pounds the face value of its obligation.

Their Lordships must choose between the latter two interpretations of this condition. There is no evidence that "free of exchange" had any technical meaning in 1925 nor is there any evidence as to how exchange was operated then or is operated now. There is only the Agreed Fact already quoted that in 1948 the official exchange rates diverged and thereafter subject to banking fluctuations £125 Australian currency has been the equivalent of £100 New Zealand currency.

There is before their Lordships a document which shews that in exchange for an interest warrant for £100 in New Zealand currency there would have been paid in Australian currency by a Bank in Melbourne in 1926 £99 12s. 6d., in 1929 £99 15s. 0d., in 1934 £100 10s. 0d. and in 1938 £100 5s. 0d. These appear to be dates at which the two pounds were equivalent in value and the reasons for these differences are not explained, but it would seem that at a time when the pounds were of equal value a customer presenting to a Bank in Melbourne a sum in New Zealand currency or a draft on New Zealand did not simply get that sum less a charge for the Bank's services but that there had to be taken into account an element of exchange between the two currencies and that the rate of exchange might vary from time to time. And even if this is not a correct interpretation of the facts set out in this document, their Lordships are of opinion that it must be assumed that it was known in 1925 that there could be a rate of exchange other than at par between the two currencies of New Zealand and Australia, even at a time when the two currencies were equivalent in value. Their Lordships have already stated that in their judgment all payments which had to be made in Melbourne must be made in Australian currency ; and in their judgment the stipulation that the payments were to be made there "free of exchange" must have meant from the beginning that the rate of exchange between the two currencies at the time when any payment became due was to be disregarded in determining the amount of Australian currency payable. So a stock holder owning say £1,000 of the 5½ per cent. Inscribed Stock to which this stipulation applied was entitled to be paid in Melbourne as interest in 1926 and each subsequent year £55 in Australian currency, because that is the necessary result if the rate of exchange had to be disregarded.

During the period when the two currencies remained equivalent in value the rate of exchange could not depart far from parity and the effect of the stipulation that payments must be made free of exchange must have been small. But the meaning of the stipulation could not change when the values of the currencies diverged, and it applied to repayment of principal as well as to payment of interest. Their Lordships must therefore hold that the obligation of the New Zealand Government is to repay in Melbourne in Australian currency a number of pounds equal to the face value of the Stock.

It was argued that "free of exchange" is an appropriate expression if the stockholder is being protected against some deduction but is not an appropriate expression to deprive him of an advantage—in the present case the advantage of getting more than the face value of his security by reason of the exchange rate between Australia and New Zealand. But in their Lordships' view "free of" can well mean "independent of". It may be that the primary purpose of this condition was to protect Australian stockholders in the event of the New Zealand pound being worth less in Australia than the Australian pound, but the condition cannot be interpreted so as to be in favour of Australian stockholders in that event and also to be in their favour when the New Zealand pound is worth more than the Australian pound. If they were entitled to be paid in Australian pounds in the one event they could not be entitled to be paid in the equivalent of New Zealand pounds in the other event. In their Lordships' judgment they were entitled in either event to be paid the face value of the obligation in Australian pounds.

Their Lordships must also deal with the view expressed by Gresson J. "The phrase free of exchange negatives the adoption of Australian currency as the money of account for if the debt was a stated number

of Australian pounds there could be no question of exchange. . . . If Australian currency was to be the money of account as well as the money of payment no exchange operation could arise ". Their Lordships recognise that there is force in this argument but are of opinion that the purpose and meaning of the phrase is that no exchange operation is to be performed in determining the number of pounds to be paid and that any payment must be in Australian pounds. Without the words " free of exchange " it might have been said that an exchange operation was necessary if the New Zealand Government was to pay in Australian pounds, but these words indicate that, if the New Zealand Government have to perform an exchange operation in order to make payment at Melbourne, that operation shall not be taken into account in determining the amount of Australian currency which has to be paid.

For the reasons given their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

(39544) Wt. 8064—69 100 3/56 D.L.

In the Privy Council

THE NATIONAL MUTUAL
LIFE ASSOCIATION OF
AUSTRALASIA LIMITED

v.

THE ATTORNEY-GENERAL FOR
NEW ZEALAND

[DELIVERED BY LORD REID]

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