IN THE SUPREME COURT OF NEW ZEALAND SC 83/2009

[2011] NZSC Trans 3

BETWEEN **WESTPAC BANKING CORPORATION**

First Appellant

AND **BANK OF NEW ZEALAND**

Second Appellant

AND **ANZ NATIONAL BANK LIMITED**

Third Appellant

AND **THE COMMISSIONER OF INLAND REVENUE**

Respondent

Hearing:	18 February 2011
Court:	Elias CJ Blanchard J Tipping J McGrath J Anderson J
Appearances:	J S Kós QC, J D Every-Palmer AND M M O'Rourke for the Appellants D J Goddard QC and H L Dempster for the Respondent

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CIVIL APPEAL

MR KÓS QC:

If the Court pleases, I appear with my learned friend, Mr Every-Palmer and Mr O'Rourke for the appellant.

ELIAS CJ:

Thank you Mr Kós, Mr Every-Palmer, Mr O'Rourke.

MR GODDARD QC:

May it please the Court, I appear with my learned friend, Mr Dempster, for the respondent the Commissioner.

ELIAS CJ:

Yes, thank you Mr Goddard, Mr Dempster. Yes, Mr Kós

MR KÓS QC:

Thank you Your Honours. I have prepared the customary short outline of argument today. You'll be pleased to know that my version, as is customary, is mainly pictorial and I'll ask my juniors to provide that to the Court.

ELIAS CJ:

Well, I was really wondering whether to be offended by your photocopy of the cheque, but actually I found it quite useful, so thank you. Another pictorial depiction.

MR KÓS QC:

Well, it may be of limited assistance to Your Honours, but I can tell you it is of assistance to me, as I often find diagrams are. So to comment briefly on what you have before you. I have divided the argument into five, into six parts and I'll deliver the first five and my learned friend, Mr Every-Palmer, will address you on the secondary argument for the banks, which is the meaning of money.

I've summarised the parties' arguments and I'll come back to that summary in a moment –

BLANCHARD J:

Well, just before you go any further, Mr Kós, isn't there a part missing? That's the part in which you tell us why we should depart from a decision of the Privy Council in this case.

MR KÓS QC:

Yes, well, I was going to address that orally, Sir, and it didn't lend itself to a diagram.

BLANCHARD J:

Right. Not an appropriate diagram anyway.

MR KÓS QC:

I can imagine the diagram, but would you like me to address you on that point?

ELIAS CJ:

Well, I think you will need to address us on that point.

MR KÓS QC:

Yes. Well, I think if I might, I could conveniently – I mean of course apprehend, that that's an issue which the Court wishes to grapple with and wishes me to grapple with and so I do propose to come back to it.

ELIAS CJ:

I must say, if the diagram had been as simple as you lead us to believe when you handed it up, we might've been more willing to start with it.

MR KÓS QC:

Well, I'm obliged for that observation. But it reminds me very much of the terms in which the Court of Appeal in *Thomas Cook* began its judgment in the *Thomas Cook* case, and it begins, at paragraph 1, "This appeal involves a novel and difficult issue", and I'm afraid that difficulty is part of the territory in this case, as it was in *Thomas Cook*, so a simple diagram, I think, is probably a bit beyond our capacity. Might I start by just outlining to you in essence what our argument is? The appeal concerns the proper scope of section 4(1)(e) of the Unclaimed Money Act, which provides that money that has been owing for six years from the date it has become payable must be paid to the Commissioner. The banks say, consistent with the Court of Appeal decision in *Thomas Cook,* that that means that money need not be paid unless there is an unconditional liability to pay a liquidated sum. That was the terms in which the Court of Appeal put it in paragraph 63 of its judgment. That is to say that all preconditions for payment have been met and the money should have been paid. To put it another way, the money is overdue for payment by the holder.

Now the banks say that is a matter of law. Neither the foreign currency drafts, which are very similar to the international cheques from *Thomas Cook*, nor bank cheques create an unconditional liability on the banks, as the drawers of those instruments, to pay a liquidated sum until they've been delivered to the payee, presented by the payee, or the payee's endorsement for payment. And furthermore, in the case of

drafts, the drawer's liability is a conditional liability of recourse and for the drawer to be unconditionally liable to the payee or the endorsee, there must also have been dishonour by the drawee and due notice thereof to the drawer. And that is not novel, that is what the Court of Appeal held in *Thomas Cook* in paragraphs 22 and 27.

TIPPING J:

The Privy Council didn't seem particularly attracted to it, Mr Kós.

MR KÓS QC:

No, well, no, the Privy Council decided, contrary to the arguments presented by both parties to it, to launch off in a different direction, based on a, in my submission, misconstruction of the Unclaimed Money Act. And that misconstruction becomes patent when one looks at the legislative history, which is the task I have set as my topic number B. So I will come back to that. But, in my submission, when one looks at both the scheme of the Unclaimed Money Act and the legislative history, it is clear that Parliament intended section 4(1)(e) to have a limited function and that is to say that it applied in the circumstances I've just described, which is where all preconditions of payment had been met and the money should have been paid. That's not the case when one's dealing with an unpresented bank cheque or a foreign currency draft.

Now to touch just briefly on, but not to develop, unless you insist, on the *Couch* point which Your Honour Justice Blanchard tackled me with just after the whistle blew, the banks say that this is a proper case for the Supreme Court to depart from the earlier decision of the Privy Council in *Thomas Cook* because of the circumstances in which we submit the erroneous reasoning in Privy Council arose. That is to say it is an argument introduced by Their Lordships in oral argument, contrary to the parties' position, joint position, in the absence of full argument and particularly on the legislative history of section 4 and based also on a misconception as to the nature of the drawer's liability on a draft. The error has significant commercial implications. Indeed, that's implicit in the granting of leave for this appeal itself. It concerns a matter of statutory interpretation and if the Supreme Court is satisfied that Parliament's intent has been confounded by the Privy Council, then it should rectify that position. And I add also that it involves a recent decision of the Privy Council and there has been no material or irreversible reliance upon it, and that, for instance, in contradistinction to the position perceived in *North Shore City Council v Body Corporate 188529 (Sunset Terraces) & Ors* [2010] NZSC 158 decision of this Court in

December, where of course had the Court decided that *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, [1996] AC 624, [1996] 1 All ER 756, [1996] 2 WLR 367, (1995) 5 NZBLC 104,042, (1996) 78 BLR 78 (PC) was wrongly decided. It then had to grapple with the issue of the fact that, as the Court put it, thousands of people had relied on the *Hamlin* Privy Council's observations about the effect of the Building Act 1991, but that is not the position here.

The bank also advances a secondary argument, which concerns the scope of the word money, and we contend that money contemplated by section 4(1)(e) is limited to money in the nature of a fund held for investment or safekeeping, and that is not an argument that was addressed directly in the *Thomas Cook* decisions.

So if I might turn then to my topic A, which is to start to address the section 4(1)(e). If I might take you to the Act, which is in the large bundle of authorities in the first tab, and to page 3 of that Act, there of course you see set out section 4 and the Court will already have noted that 4(1)(e) is preceded by the other four provisions, which are 4(1)(a) to (d), and those are provisions which deal, in the case of (a) to (c) with depository sums and some cases, fixed term in (a), not in a fixed term basis in (b) and not bearing interest in (c) and in (d) the Act deals with money that is payable and distributable under a life insurance policy but notwithstanding that by the terms of the policy the money is not payable or distributable except on proof of death or some other condition. So we submit that in 4(1)(a) to (d) Parliament has dealt with the four situations in which conditional liabilities give rise to unclaimed money. And that 4(1)(e), which is based on the original definition of unclaimed money in the 1898 Act, the original Act, deals with circumstances where the money is both owing and payable, in contradistinction to (a) to (d) where it is not, and, therefore, excludes additional obligations.

Now I want to take the Court –

TIPPING J:

There are two conceptual steps aren't there? There's the concept of payable, which starts the –

MR KÓS QC:

Starts time running.

TIPPING J:

Starts time running. And then it's got to have been owing –

MR KÓS QC:

That's right.

TIPPING J:

Which presumably means the same as payable?

MR KÓS QC:

It means in our submission, yes, it does. It reinforces that the money should have been paid.

TIPPING J:

Well, it's payable in law.

MR KÓS QC:

Yes, payable in law. That's right. Not a question of practice, not a question of potentially payable, but actually payable. Should have been paid. And that is made quite clear in my submission when one looks at the legislative history and I want to go to that now, and take you to the next tab if I might, which is the 1898 legislation, and to pick immediately up on a point that Justice Tipping has just directed me to. At the top of the right hand page, you see the words, "The definition of unclaimed moneys". Very similar if one strips out the issues of dividends, bonuses, profits and so forth, which are dealt with in other parts of the section 4 of the Unclaimed Money Act now, very similar to section 4(1)(e). What is interesting is how it is different from the predecessor Act to this, which was the 1891 South Australian Unclaimed Monies Act. And that is expressly referred to by the Minister, Mr Walker, in the Parliamentary debate of the legislative council, which is in your, in the authorities, I don't need to take you to it, but it's in the authorities at tab number 21. And this legislation is directly based, it's almost word for word, the South Australian Unclaimed Monies Act, except that if we look at that definition of unclaimed moneys, the following words have been added. In the third line, the words, "owing to any person" and in the fifth line, "after the time when the same has become payable". So in 1898, Parliament saw fit to amend the model legislation from South Australia to add explicitly what we say are the belt and braces requirements, but what is payable must be

unconditionally payable, that is to say that it should have been paid and has been unpaid for six years.

Now, at the time that this legislation was entered into, the focus of Parliament, as we see from the Parliamentary debate or legislative council debate, in tab 21, was the situation of bank accounts and it was thought the principal focus was moneys left in bank accounts, which had not been paid out to the depositors and, as the Court of Appeal in particular, in the judgment of Lord Justice Atkin in the *N Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 (Australia), decision, which is at tab number 18, noted. At this time, or prior to, at least prior to the *Joachimson* decision, the popular perception was that money in a bank account was repayable without demand. And it was only when the *Joachimson* decision was delivered in 1921, the position in the *Clegg* case, *Pott v. Clegg* (1847) 16 M. & W. 321 was refined, and it became clear in Mercantile Law that a bank deposit was repayable only upon demand, otherwise, as the Court of Appeal said in *Joachimson*, the effect would've been that the banker had an immediate obligation on receipt of the deposit to rush out, find the deposit and give the money back to them. So said the Court of Appeal in *Joachimson*, there is an implied term in a banking deposit that the money that is deposited is repayable upon demand and that was not the perception that had preceded the position in 1891 in South Australia, the position in 1898 in New Zealand when the Unclaimed Monies Act in those two jurisdictions were introduced.

So the consequence of that was that, as Justice Chambers observed in his judgment in the *Thomas Cook* case in the High Court, Parliament acted in 1932 to respond *Joachimson* decision and it did so in the legislation that we find at tab number 5. And I want to take you to that for a moment because it is instructed and on the second page –

ELIAS CJ:

Sorry, what is this?

MR KÓS QC:

I'm sorry this – it's the Finance Act 1932 Ma'am.

ELIAS CJ:

Right.

MR KÓS QC:

I'm sorry that becomes clear if we flick through about three pages.

ELIAS CJ:

Yes.

MR KÓS QC:

In fact it's three pages through I want to flick to, to page 100. And it's section 26(1) of the Finance Act 1932, amended the Unclaimed Money Act by, "Providing that the following moneys deposited in any bank shall become unclaimed moneys, within the meaning of the Act at the times hereafter mentioned," and this is the point I rely on, "Whether or not they have at any time theretofore become payable". So when, in 1932, Parliament responded to *Joachimson* and passed –

TIPPING J:

So if you had a dormant balance of six years or more, you had to pay it under the Act.

MR KÓS QC:

Under the Act, yes.

TIPPING J:

Under this legislation?

MR KÓS QC:

Under this legislation, that's right. Whereas of the effect, and this is the point, the effect that Parliament recognised of *Joachimson*, in conjunction with the 1898 Unclaimed Money Act, was that absent demand, it did not have to pay it out, and so (a), (b) and (c) that we see in section 26 and also section 26(2), which is equivalent of now section 4(1)(d), deal with the situation of conditional liabilities where demand, or in the case of section 26(2) for instance, proof of death, were required before the amount was payable, payable at law. So what Parliament did not do in 1932, was to confirm that the 1898 definition of unclaimed money, which is virtually the same as our section 4(1)(e) now, embraced conditional obligations to pay. It did the opposite. It extended the definition by adding (a) to (c), whether or not they were payable, and

so payable confirmed by the 1932 Act, in my submission means, as was understood, a present liability to pay.

And that was then reinforced in the following year in 1933. And that's the next tab, with a further amendment, well that's not actually an amendment it's a separate Act, it's a Reserve, the Reserve Bank of New Zealand Act, and that provided in section 15(6), the bottom right hand corner of page 61, the bank notes, whether issued by the Reserve Bank or any other bank and until 1964, Trading Banks as well as the Reserve Bank in this country, issue their own bank notes. And they are promissory notes, so similar to the legal position of the bank cheques that we're dealing with, provided that those promissory notes were, if not presented for payment within 40 years, were to be treated as if, on the bottom line, as if such amount were unclaimed moneys, flipping on two pages, within the meaning of the Unclaimed Money Act, and should be dealt with as provided therein.

So again there was express provision to incorporate a form of promissory note within the scope of the unclaimed moneys sent, deeming them so to be unclaimed money. Again, reinforcing with section 4(12)(e) as it became, the original definition of unclaimed money did not incorporate conditional liability such as promissory notes, such as bank deposits but for the 1932 amendment. And when then in 1971 the present Act was passed and consolidated, the previous legislation, there was no suggestion in the Parliamentary debate and my friend makes no suggestion in his submissions, that the intent of Parliament in doing so, was to change the sense in which the words, "payable" and "has been owing" in the original legislation were imposed. The sense, which confirmed the actions of Parliament in 1932 and 1933 in my submission, clearly mean that the scope of unclaimed money, except for the specific exceptions, is an unconditional liability to pay a liquidated sum.

TIPPING J:

A present unconditional liability?

MR KÓS QC:

A present unconditional liability, precisely in my submission the position, which the Court of Appeal, without expressly going through the legislative history in the *Thomas Cook* decision, reached. Now, Chambers J, in *Thomas Cook*, did spend a little bit of time looking at the legislative history and it may well be the Court of Appeal relied on that. But we see that at tab number 13 of the authorities and I want to take

the Court to this briefly, and I turn now to the *Thomas Cook* decision. Perhaps just before I do, may I just sum up my argument on section 4, now's a convenient point to do it. And I just want to make four points about it.

The first is that payable has been used consistently by Parliament to refer to a present liability, and that is clear from the 1932 Act if nothing else. Secondly, that (a) to (d) in section 4(1) and the 1932 predecessors were explicitly intended as exceptions to that requirement. Thirdly, that if payable includes conditional liabilities, then there would in fact, and let's just say payable in section 4(1)(e), then there would be no need for sections 4(1)(a) to (d). They would be embraced by 4(1)(e). So the Commissioner's argument, in my submission, results in an internal and quite unnecessary redundancy. And fourthly, if Parliament had intended to clarify that payable included conditional liabilities and the terms of the Finance Act 1932, it would've been quite different. It would have instead amended the definition of "payable" to clarify that point. But instead it continued to use payable to mean a present liability. And the sort of thing it could've done is exemplified, for instance by the American legislation and the Canadian legislation, which is annexed in the authorities that the Court has, and if we turn to tab 11 we see the Michigan Uniform Unclaimed Property Act…

ELIAS CJ:
Sorry, what tab?

MR KÓS QC:
11, Ma'am.

ELIAS CJ:
Thanks.

MR KÓS QC:
And the first thing you see in the definition at (j) on the left-hand side of 567.222, (j), the definition of "intangible property", is a long list of different items, specific items, which you'll see incorporate exactly the sorts of things that the Commissioner asserts should be treated as unclaimed money in this country, under this legislation, very different legislation, that we have, including cheques and drafts, for instance, but also credit balances, security deposits, unpaid wages, unused airline tickets, unidentified remittances, gift certificates and gift cards. Well, this is a modern Act and it's

addressed those things specifically. That's not the provision I want to refer to for the point I'm making about 4(1)(e) though, I want to refer to 567.223 on the next page.

ANDERSON J:

How does a foreign Act in 1995 assist us to interpret a New Zealand Act of 1971?

MR KÓS QC:

It tells us what Parliament could have done if it wanted to incorporate unconditional liabilities. And what it did in that case, in 567.223 at (2), is to say that property is payable and distributable for the purpose of this Act, notwithstanding the owner's failure to make demands or present any instrument. And so that's an express exclusion for all purposes of any demand obligation. So to answer Justice Anderson's point, I'm sure, Sir, that both my friend, he's already given me a copy of the Victorian Act, which is a recent Act, both of us are going to be referring to foreign legislation as context. But can I perhaps just touch on that point now, it's actually pretty interesting, because by no – I mean, my argument, ultimately, when I come to the question of policy, which I'm going to touch on, is that the New Zealand legislation draws lines, and they are lines that have been drawn for some time. For instance, one line it draws, a very obvious line, is that the, apart from some very limited exceptions in section (5), is that only companies, only incorporated bodies that are holding money, have to pay, have to go through this process. So if I have Your Honours' kind loan to me of some money in my early days as a struggling law student, and I've forgotten to repay it, I don't come within the scope of this Act, even it was more than a hundred dollars, which it would have had to have been. So, that's a point to be made, that the Act draws lines.

It also draws lines by confining the scope of what has to be paid to money. So the poor old miner who came rushing in from Gabriel's Gully with a large dusty bag full of nuggets gets no aid under this Act. So the lines are drawn in this Act. Well, they're drawn differently in other countries. So that, for instance, in the legislation I've just put in front of the Court, a much broader scope of property is covered, and it's not confined just to money. Indeed, it's called the Unclaimed Property Act. In England, two years ago, three years ago, with some fanfare, the then Labour government, as one of its later legislative acts, introduced some called the Dormant Bank Accounts and Building Society Accounts Act, which was a voluntary scheme confined only to banks and building society accounts, and which they may or may not have to pay through, but if they do pay it through, then the money can be in those dormant

accounts for the use of a charity. That followed a similar Irish scheme, a much narrower scheme than we have in this country. So I mention that now in case it is suggested that the position being taken by the banks in this case is somehow egregiously greedy, or that they are taking a windfall that they shouldn't have. Other jurisdictions have looked at this issue and have been content that banks, in the situation I'm describing, other than where we are dealing with deposit accounts, may retain the benefit of an unpaid negotiable instrument such as this.

Now, I was embarking on *Thomas Cook*, and had turned to, and turn again to tab number 13, which is Justice Chambers' judgment in the High Court, described in the Court of Appeal as admirably succinct, so it's short.

TIPPING J:

It wasn't quick.

MR KÓS QC:

Yes, it took a year to counter, sometimes – sometimes the shorter they are the longer they take, as we all know.

Now what I want to refer to here is the disc that, if I just touch briefly on 13 and 14, perhaps start at 11. Remember that we're dealing in *Thomas Cook* with instruments, that for a present purpose, I accept, are the same as the foreign currency draft that I am dealing with. There are two distinctions, they're not material. The distinctions for the record are that the, in this case, the drawers are banks as opposed to Thomas Cook which is not a bank and I can't actually remember what the second distinction was, so it's very unmaterial, immaterial – but there we are. They're not, sorry that's right, the Thomas Cook foreign currency drafts or drafts or cheques were not transferable whereas ours our, all of our cheques are transferable.

TIPPING J:

Transferable but not negotiable?

MR KÓS QC:

Some, that's right, that's right. I'll check that point but I think that's right. So at 11, paragraph 11 Justice Chambers noted that both parties had agreed that the money held by Thomas Cook was money and that's why the money argument, which is a secondary argument doesn't really come before you today and then he turns to the

question of unclaimed money and His Honour began by saying, “There’s no draft no doubt, that the draft’s are bills of exchange.” He could also have said, as the Court of Appeal said, that they are also cheques and that is because they are bills drawn on a bank and so they are cheques, and payable on demand so they were cheques. And of course, terminologically, one of the rich ironies we’ve got is that, when we come to the bank cheques that we are also dealing with, bank cheques are not cheques because they are not bills of exchange and to be a cheque you have to be a bill of exchange. And the reason why a bank cheque is not a bill of exchange and therefore not a cheque is that it is not drawn on another, so it is not drawn on another party and so the bank cheques that we’re dealing with are promissory notes. But that didn’t have to trouble Justice Chambers because he was dealing with the drafts only.

TIPPING J:

Nor does it really have to trouble us –

MR KÓS QC:

Well, that’s what Mr Goddard would say because he says, acutely and cleverly, that the consequence of there being a promissory note is that you can deem away the requirement of delivery and you can deem away, there’s no requirement for presentment, which means that you have a present liability, instantaneously, as soon as the promissory note is written. That has the very curious consequence because there is a present liability to pay on a bank cheque then when my friend, Mr O’Rourke arrives in my bank with his suitcase of money from his latest transaction and converts it into a bank cheque, I have to meet him at the revolving door on the way out to present him with the suitcase of money again –

TIPPING J:

Theoretically.

MR KÓS QC:

Theoretically, that's right. So that’s a curious consequence of the argument that these situations should be deemed away and that will be my peroration to the Court this morning before my friend takes over on the money argument.

TIPPING J:

Well I just wanted to flag it, Mr Kós but you obviously have it well in hand.

MR KÓS QC:

Well, I don't know if I have it well in hand Sir, but I have it noted. Now the, going back to paragraphs 13 and 14 of Justice Chambers judgment because this is his useful and helpful. In paragraph 15 His Honour said, "The key is presentment. Until presentment the money is not payable, that is the simple answer to this case, that these drafts have never been presented with the consequence that the money has not become payable by Thomas Cook," and when he says by "Thomas Cook" that's a conflation because, of course, these were drawn on the Bank of New York and so the money on present it was payable by the Bank of New York and Thomas Cook's obligation, as I will – well perhaps I'd better just take the Court to this point right now.

If we flick back please, just for a moment to tab number 4, which is the Bills of Exchange Act, I don't want to spend a lot of time on this unless you want me to but –

TIPPING J:

Well, in the Thomas Cook, it was only a recourse liability.

MR KÓS QC:

That's right, that's right.

TIPPING J:

But that's the nub of it isn't it?

MR KÓS QC:

And that's the point, and if I might just, just make the point where that's found, it's section 55(1)(a) which is page 33 of the Bills of Exchange Act. "The drawer of a bill, by drawing it, engages that on due presentation it shall be accepted and paid according to its tenor and that if it is dishonoured he will compensate the holder or the indorser...provided that the requisite proceedings on dishonour are duly taken." So that's why you have to have delivery to the payee because only if there's been delivery to the payee do you have a valid instrument. The bill is then covered, in effect, unless it's delivered to the payee, which is why my friend spends time trying to

deem that issue away in the case of unpresented notes. Secondly, it has to be presented because section 55(1) requires that the engagement is on due presentation and thirdly, the compensation obligation is dependent on the requisite proceedings on dishonour being taken.

The requisite proceedings on dishonour, just for the record, is simply notice of dishonour and the compensation obligation is then set out just two sections later in section 57, and what's important to note is that the amount of compensation, the amount payable by the drawer of the bill of exchange, so therefore our foreign currency drafts, but not our bank cheques, is not the face value of the cheque but it's under A or B. Under A, in the case of any bill, it's the amount of the bill, interest thereon and the expenses of noting it less any reduction that results from, for instance, a delay in the grant that they're giving of notice of dishonour and we see that in section 48 on page 26. And that is to the extent that notice of dishonour is not given or if it's late, it's not given reasonable time, then the drawer is discharged – this extent of prejudice. So you have to add together section 57(A), its elements and then deduct from section 48 a discount.

TIPPING J:

If any.

MR KÓS QC:

If any, that's right. It's interesting that when one looks through the Bills of Exchange Act, which has become a necessary activity in all counsel engaged in this particular litigation and, eventually, it's illuminating, the – what it provides is a very strict –

ELIAS CJ:

So – really why the Privy Council approach is so appealing –

MR KÓS QC:

Yes.

ELIAS CJ:

– one doesn't need to go there.

MR KÓS QC:

Well, I do, do want to counsel if I may, from my lonely position – such an approach was that, in my submission, is where things went wrong as it was tempting. But the High Court, the Court of Appeal and all parties coming to the Privy Council had thought very carefully about this issue and had reached a joint position in what they presented to the Privy Council and from that the Privy Council wandered – I remember, well my friend – in the High Court, no in the Privy Council's decision they talk about my friend only under the prompting, moving to the position they were advancing. I recall my friend saying very clearly before Justice MacKenzie in the High Court that he did not regard their prompting as at all gentle.

TIPPING J:

But is the nub of the argument that the Privy Council was superficial, that they equated unclaimed with the definitions or the concepts of owing and payable?

MR KÓS QC:

Yes.

TIPPING J:

That seemed to me, I'm not taking sides at this point and I'm simply saying that that seems to me –

MR KÓS QC:

I understand.

TIPPING J:

– to be the nub of what could be the complaint.

MR KÓS QC:

That is exactly it, it – Your Honour terms it, for the purposes of argument, superficial, I describe it as a spontaneous judicial misadventure. That was to say that the, Their Lordships were seized on idea, which is not the subject of argument –

TIPPING J:

I believe it was really one of Their Lordships who was primarily seized of it, not that it really matters; they all subscribed to it.

MR KÓS QC:

Yes that's right. That's right. It seems so from the report, but the report's not very complete.

TIPPING J:

All right.

MR KÓS QC:

What is interesting actually though about the report, is that if one reads the oral argument, which again is eventually illuminating, one sees that little time was spent, certainly in the reporter's report, on this issue and most of it was spent on what they went to argue about which was the service issue, because, of course, in the Privy Council, the Commissioner didn't mind taking the position that it had to be a present liability because the Commissioner's argument was that the liability had become a present one because the bills were stale and *Thomas Cook* had conceded, in that case, that the bills became stale in that case after six months. And so the bills were stale, presentment was dispensed with and, likewise, notice of dishonour, it was not required. And that was the position the Court of Appeal reached and I don't have to argue that point here because our facts are different.

There is no concession in this case, and the Court will see from the affidavit evidence that the general expectation of the banks is that no matter how late foreign currency drafts or the bank cheques are presented, well let's confine ourselves to foreign currency drafts because they're the ones involving corresponded banks, they are paid – less frequently the evidence shows, they are queried and very rarely they are dishonoured. So if one comes to that provision in the Bills of Exchange Act which says, "Does the drawer have reason to believe that the bill when presented will be paid," the answer is yes – in the vast majority of cases no matter how late, but that's an argument for another day. And will require of course, evidence.

So then if I turn then please to where I really wanted to go with Justice Chambers' judgment at page 630, paragraph 19. Justice Chambers there spent a little bit of time on the legislative history which I took this Court to this morning. And at paragraph 19 His Honour notes that – fifth line, "It is true that money held by a bank, in the case of a normal banking relationship, would not normally fall within the section 4(1)(e) definition. That is because bank deposits generally come within (a), (b) or (c). Under those definitions, it's not necessary to establish that the money is 'payable'.

Those definitions are tailor-made for bank deposits", replicate the three definitions in the 1932 Act and I submit, rightly observes at the end of that paragraph, "It is clear that Parliament" – sorry in fact two points. First of all, he notes that the section made clear that those definitions caught the specified bank deposits, whether or not they become payable, a point I took this Court to before, that's the section 26(1), and then the Court, then Justice Chambers says, "It is clear that Parliament, in enacting that provision was reacting to the English Court of Appeal's decision in *Joachimson.* It was making it clear that for the purposes of this legislation, money could be caught as unclaimed money in the specified cases, even if not payable."

In the Court of Appeal in the next tab, tab number 14, as the Court notes at paragraph 20, "It was common ground that money does not become payable for the purpose of section 4(1)(e) unless and until a legal obligation to make payment arises." And the Commissioner raised three arguments in that case as to why it was that the equivalent foreign currency drafts created a legal obligation to make payment from the moment that they were drawn and issued. Now the first of those arguments is replicated in this proceeding and is the basis of the claim for summary judgment which the Commissioner has made. And the argument is that the drawer of the bank of a draft assumes an immediate obligation to pay, that the draft will be paid on presentation and that's sufficient for the Unclaimed Money Act purposes even though the occasion for payment has not arrived, no cause of action has accrued.

So the Commissioner's argument is that it does not have to be payable legally in the sense that it is due for payment or overdue for payment, but simply that there is a obligation, as a result of delivery of the instrument to pay, even if that's at a future point in time.

TIPPING J:

Is this an obligation to pay money or is it an obligation to pay damages?

MR KÓS QC:

Well, that's a very good point. The draw – if one starts with contract which is always a good place to start, the only contractual relationship is between the drawer bank and its correspondent, the drawee bank – they have an arrangement for the drawing of cheques, we don't know what those arrangements are, they're not material for present purposes. As far as the payee is concerned, the person in whose favour the cheque is drawn or indeed the payee's transferee, the endorsee, there is no contract,

so their rights to money, to payment are dependent entirely on the Act and so the question then is what does the Bills of Exchange Act say? And the Bills of Exchange Act, which I took Your Honour to a moment ago, makes provisions for the payment of damages. That incorporates the face value that is part only of what it is and there maybe more or less.

TIPPING J:
But its legal character is damages?

MR KÓS QC:
Yes.

TIPPING J:
In terms of that section 55 is it or one of the 50s?

MR KÓS QC:
Fifty five.

TIPPING J:
Fifty five.

MR KÓS QC:
That's right.

TIPPING J:
It's a recourse of liability to pay damages –

MR KÓS QC:
That's right.

TIPPING J:
– it's not a primary obligation –

MR KÓS QC:
No.

TIPPING J:

– which is that of the correspondent bank?

MR KÓS QC:

That's right. And nor is it in that situation, even if, I mean one could have an argument whether damages or money but for damages to be money would have to be liquidated damages.

ELIAS CJ:

But doesn't that suggest that it starts at the wrong end to start with, the Bills of Exchange Act and that you don't have to start with the Unclaimed Moneys Act and its policy because it's not really a very neat fit if you're looking in terms of moneys?

MR KÓS QC:

Well the – what we know –

ELIAS CJ:

I mean they made the –

MR KÓS QC:

– is that Parliament enacted (a) to (c) –

ELIAS CJ:

Yes.

MR KÓS QC:

– to deal with deposits and those clearly are moneys that are held.

ELIAS CJ:

Yes, I understand that argument because it's based on the text of the Statute that we're principally concerned with but what's the need to go to the Bills of Exchange Act?

MR KÓS QC:

Simply Ma'am to establish that if section 4(1)(e) is concerned with an unconditional obligation to pay money, then whatever the drawer's obligation is under this instrument to the payee – because remember the Commissioner has identified the

payee as the owner and that raises a question, which I'll – I'm so tempted to deal with it now but I'll come back to it. The payee's rights, in terms of the Bills of Exchange Act, to find how much money may be payable to them are in terms of section 55 and they are at large, not liquidated.

Now let me just come back to this question of why is it that the Commissioner identifies, as the owner, and in terms of the Unclaimed Moneys Act, the owner is the person entitled to the unclaimed money. When we are dealing with a draft, which has, at this stage not been presented, which is what we're dealing with, there are a host of people that might be the people seeking or entitled to a payment. The first is a very good reason why it may not have been presented is because it was never delivered in the first place. In other words, the customer went into the bank intending to buy the latest Hilary Mantel novel available only at Barnes and Noble in New York and repented of it because they were lent a copy by their friend over summer and never made the order. So as you will see from the affidavits in the case on appeal, the banks all make provision for the repurchase of drafts they have drawn, so the first person that might come and ask for some money is, in fact, the customer because they've never delivered the instrument to the payee. The second person is likely to be, if it is presented, it will be the payee – the drawee, the correspondent bank and as you'll see again from the evidence, in most cases they don't have to ask for the money because the drawer bank, The Bank of New Zealand, shall we say, has an account at the Bank of New York in, at number 1 Wall Street and the Bank of New York simply accepts the – or pays on the bill and draws the money out of the Bank of New Zealand's account at its New York headquarters.

So it's only in the situation where there is a presentment and then a dishonour that the payee is going to be the owner of a person entitled. And then what they're entitled to is, as I say, damages at large in terms of section 55. So one question that the Commissioner should answer to Your Honours is why of all those people, it is the fate – the person named on the instrument as the payee who is selected as the owner when it could be any one of the other three, other two categories or indeed, could be a transferee from the payee but we don't even need to worry about that.

ELIAS CJ:

Is there any concept of ownership in the Bills of Exchange Act?

MR KÓS QC:

Not per se, but it's understood for instance, that what – a bill of exchange is a negotiable instrument and it's, therefore, an asset or an instrument to value and it is owned then by the person entitled to it.

ELIAS CJ:

The holder?

TIPPING J:

The holder?

MR KÓS QC:

Yes. And then it's discharged when it's accepted by the drawee bank. Section 38 says that the rights, "The relevant rights under the Act are vested in the holder," and that can be a holder in due course. And that is a point that I do rely on because one of the points that we make here is, what is given at the Bank of New Zealand's Wellington office when I go in and get my foreign currency draft is an instrument of value, it's an asset – I can take it away and use it. And if need be, I can come back again in five years time and say, actually, I changed my mind, didn't buy Hilary Mantel's latest novel and –

TIPPING J:

You haven't actually deposited anything with the bank or anything like it, you've bought an asset from the bank?

MR KÓS QC:

That's right. In the same way that I can go down to Monty's Motors and buy a small motor car for the same amount of money. I take away an asset.

So to revert then to the Court of Appeal's analysis in *Thomas Cook* at paragraphs 21 through to 27, the Court deals with the immediate obligation argument and the Court deals there with the same argument that my friend is making in this case. And the point that is made in the middle of page 302, in the middle of paragraph 22 is that, "It is of the essence of payment by cheque," the relevant bill in this case, "That the payee will look to the drawee bank in the first place, the drawer's liability is both practically and legally conditional on presentment and unless presentment is dispensed with." Presentment is dispensed with leaving to staleness and that's the second argument but unless – until the cheque becomes stale it's inherent in the

relationship, that the drawer in pay – that the payee must look first to the drawee bank. At the bottom of the page, at the bottom of the paragraph, "The drawer is not liable on a live cheque until there has been presentment, actual dishonour and due notice," and I respectfully agree with that.

Then the Court deals with some support – well, there are two sources of support that were argued in favour of there being an obligation by the Commissioner in that case. One was that the relationship between the drawer and the drawee was one of agency and so that the drawee bank was really the drawer bank's agent and that was described in paragraph 22 at line 16 as being "problematic" and I submit that it is. There is no direct relationship or privity between the drawer and the payee in almost all cases because in most cases the payee is not the bank's customer. The Bills of Exchange Act creates rights of the payee against the drawer specifically because of a lack of privity, and that's the point I was making before. The drawee bank as agent dishonours, the payee doesn't sue the drawer for breach of the asserted direct and immediate obligation, instead you go through the section 55 process. And if, indeed, the drawee bank, the corresponding bank was the Wellington drawer bank's agent, why is it then that section 48 of the Bills of Exchange Act requires notice of dishonour to be given to the drawer, you wouldn't need to, the drawee bank which dishonoured the cheque was the drawer's agent, then by that act the drawer would be on notice of dishonour. So the scheme of the Bills of Exchange Act is not to treat the drawee as agent and the Court of Appeal was quite right to describe that contention as problematic.

The next source that was relied on in the Court of Appeal and this, and resisted by the Court of Appeal, is set out in paragraphs 23 on and involved a debate about two different editions of the textbook *Byles on Bills of Exchange and Cheques*. And I don't need to go through that in any detail but the point that was made best, most clearly is probably – the middle of page 303 at about line 16, we're quoting from the later addition of *Byles*, the Court adopted the proposition that limitation runs not from the issue or delivery of a cheque but in principal should run, that's to say the – run from the date when following dishonour, notice of dishonour was given or dispensed with, that is to say from the moment that the amount payable under the instrument is required to be paid or the damages, in this case, required to be paid.

So at paragraph 27 of the judgment, the Court said, "That the relationship at law was such that demand by presentment less dispensement was a necessary precondition

and it's impossible to suggest that after a cheque has been issued to the payee, the drawer has a immediate legal obligation to seek out the payee and pay the amount of the cheque by some other means, that would be the logical consequence of adopting the immediate obligation argument." I respectfully agree.

TIPPING J:

Well it's a bit like your – the money coming into the suitcase?

MR KÓS QC:

That's right, the same point. And that's because what the Unclaimed Money Act intends by the use of the word, "payable" as we saw from 1932, was that unless one of the exceptions applied, it was only when the amount was due to be paid that time ran and that was six years under the, under the Unclaimed Money Act, still is. Except in the case of some of the deposits which are exceptions, for which longer periods are provided.

So if the Court pleases, that brings me to page 2 of my handout with the blue blobby diagram. It did at one stage have a hat and scarf around it and I made my friend take the snowman image out but I liked it.

This sets out graphically the process that occurred in *Thomas Cook* and which is now occurring here. The first point is that we submit that, as the Court of Appeal found in *Thomas Cook*, payer will require as a present liability for a specific amount, and we say that's supported by the terms of section 4(1)(e), the fact that it has to have become payable and has been owing, past tense unconditional, the scheme of section 4(1)(e), the legislative history and the High Court and Court of Appeal decisions. Then in *Thomas Cook* for the first time, in oral argument there was the argument made that payable means legally due if demanded, that is to say it would incorporate an obligation, which was still conditional on demand. We say that that is wrong for a start. The Court – the Privy Council didn't consider what that meant in terms of sections 4(1)(a) to (d), or particularly 4(1)(a) to (c). Why would that be necessary when, why would those amendments have been necessary? Have section 4(1)(e) or the previous definition of unclaimed money incorporated. The conditional liability is where they were legally due if demanded. In that case *Joachimson* didn't make any difference and nothing needs to be done in 1932.

We submit that the argument, the approach taken by the Privy Council was not subject to full argument, it was inconsistent with the language of the Unclaimed Money Act and was also, in part, based on a misapprehension of the nature of a drawer's liability on a bill. But that only dealt with dispensing with the condition of demand, what if there are other conditions? In the case of a foreign currency draft, there are three conditions, pre-conditions for payment. That the bill has been delivered, that the bill has been presented and that the bill has been dishonoured. Presentment is the demand element. The Commissioner equivocates, in his submissions before this Court, that in some places the Commissioner says that you disregard all conditions. In other places, the Commissioner says that you disregard the condition that is posited on demand. It appears, overall the Commissioner's argument as was set out in the bottom blob, and that's a quotation from paragraph 1.10, the Commissioner's submissions, "Whether or not a demand has been made by the person, and whether or not that person is in a position to make a demand", ultimately the Commissioner's argument is that all three of those conditions that I have identified in the case of Foreign Currency Draft should be disregarded, and again, we submit that this is wrong. And the consequences of that approach are that it, as I note in diagram, first of all bites merely because the bank has received money in exchange for a valuable instrument and may be liable to someone, at some time, for something. It's inconsistent with the language of the Act, legislative history and, as we submit in our written submissions, it also involves the expropriation of an asset. It's not required by the policy of the Act. At least observed consequences, as all conditional liabilities come within the Unclaimed Moneys Act.

Let us imagine, for instance, a situation where a company borrows from another company a sum of money, and it's simply as a facility and is allowed to continue and it's repayable on demand and demand isn't made because the two companies are happy with the, the loan from one to the other. As I say, it's a facility.

The effect of the Commissioner's argument is if we dispense, even in that simple example, with a condition as to demand, as soon as that loan arrangement hits its sixth anniversary or the end of its sixth year, so I suppose it is the seventh anniversary, the Commiss- the company debtor, the debtor company is bound to go through the Unclaimed Moneys Act process, because that would be an example of money that would be payable, because it, we have reached six years after the arrangement had been made and we disregard the condition of demand.

TIPPING J:

And all companies in New Zealand are, within the definition of holder –

MR KÓS:

That's right.

TIPPING J:

– are they, irrespective of what their business is?

MR KÓS:

That's it. So that touches every single facility arrangement like that and, of course, curiously it doesn't touch the situation if the company lends the money to me as a private individual and that just reinforces the point I made before that the Act draws lines and in a different age or a different circumstances, we might draw the lines differently, but Parliament's drawn the lines and, in my submission, it's clear where it's drawn the lines and if those should be changed, if we should expand the scope of what comes within the Act, that's a job for Parliament.

TIPPING J:

So if a company borrows money from a finance company, secured by debenture and it's essentially payable on demand, a relatively common –

MR KÓS:

Yes.

TIPPING J:

– commercial?

MR KÓS:

That's right, just a trade facility.

TIPPING J:

And it's revolving or whatever else, you'd have to pay something to the Commissioner?

MR KÓS:

Yes, well, you have to go through –

TIPPING J:

You'd have to pay whatever was the balance owing, but what about a fluctuating?

MR KÓS:

Yes.

McGRATH J:

It's highly unlikely, isn't it Mr Kós, that the Privy Council would have contemplated that that type of transaction would have fallen within the purpose of the Unclaimed Money Act?

MR KÓS:

In my submission Sir, but that's the consequence of disregarding the –

McGRATH J:

Well, the Privy Council perhaps wasn't so concerned with the downstream consequences of particular transactions, it was more concerned with the partic- the transaction it had in stating a broad principle and it would presumably have left it to other Courts, and if necessary itself, to work out the limits of the application of the broad principle.

MR KÓS:

In my submission, one couldn't, if you took the simple approach taken by the Privy Council to reach their result, the Privy Council reached in a case involving a foreign currency draft, and a different result from the one Justice Tipping and I are debating.

TIPPING J:

Well, it would seem on the face of it, subject to what Mr Goddard says, that, in principle, they'd be identical. The money would be owing.

MR KÓS:

Yes.

TIPPING J:

Irrespective of the need in law to make demands

MR KÓS:

Yes, it had been owing –

BLANCHARD J:

How much of a problem would it give rise to though?

MR KÓS:

Well, well, what it would require –

BLANCHARD J:

Whereas the values didn't like that, the solutions are pretty obvious and I don't believe in the case of the fluctuating demand that it would actually arise, because it only fluctuates the returns action is going on.

TIPPING J:

You just have different six year periods –

ELLIAS CJ:

Yes.

TIPPING J:

– and it would be quite complicated to administer.

BLANCHARD J:

I just don't see this as creating any difficulty in practice –

MR KÓS:

Well, it's –

BLANCHARD J:

It's a very nice theoretical argument, but no more than that.

MR KÓS:

The answer, in my submission, is that the parties would have to end the existing relationship and re-enter it effectively.

BLANCHARD J:

Well, yes, but it's so easily done.

MR KÓS:

Well, it's easily done but the question is, is that –

BLANCHARD J:

One email would do it.

MR KÓS:

Yes, but that doesn't, that doesn't mean it is a matter of principle, that's the right approach to take to the construction of the Act.

BLANCHARD J:

That may be right, but I'm perhaps jumping ahead and thinking about the question that, maybe the more important one, which is, regardless of whether we think the Privy Council is right or wrong, whether we should interfere, or whether we should simply leave it to Parliament, which hasn't acted so far.

MR KÓS:

Well let me touch, let me touch immediately then on that, that question. I am, and the appellants are conscious of the warnings that final appellant courts have given, including this Court, about reversal of prior authority. But I want to make three points about that. The first is that all final appellant courts and many intermediate appellant courts hold and exercise the power to self reverse, if to do so is necessary to correctly expound the law. The second point is, plainly no issue of deference arises because this Court is co-ordinate with the Privy Council, so we treat the Privy Council for present purposes as this Court.

The third is, in my submission, we have to start with the question of whether the prior decision is wrong and the question then, if it is, is not whether there are compelling

reasons to correct it, but rather whether there are compelling reasons not to correct it and that –

ELLIAS CJ:

Well, it's a point of statutory interpretation, so it's a quest- it's not as, you're not as inhibited as you would be in development of the common law perhaps.

MR KÓS:

Possibly so and that raises, that raises itself two points. The first, the first is that, well, the first thing to deal with is one. It seems to me with respect –

BLANCHARD J:

It's the other way round isn't it, because Parliament can easily correct, whereas with the common law it may not be so easy.

ELLIAS CJ:

Well, we have an obligation of observing Parliament's –

MR KÓS:

Well, that's, thank you, that was the point I –

ELLIAS CJ:

– legislation, is the point I was, yes.

MR KÓS:

– that was the point I was going to make. If this Court took the view that it had or its predecessor had confounded the intention of Parliament, in the construction of the statute, seems to me all the more important that the Court acted to correct it.

TIPPING J:

Subject to reliance issues.

MR KÓS:

Subject to reliance issues, absolutely and that's right.

BLANCHARD J:

But why shouldn't it take the position that it's for Parliament to correct it.

MR KÓS:

Well, that old chestnut's been raised from the bench innumerably and it's been said also innumerably that one cannot rely necessarily on Parliament to respond. If the common law courts have misconstrued statute, then the common law court should correct that construction, without waiting for Parliament to do so.

BLANCHARD J:

Where's your authority for that?

MR KÓS:

Well, I'll find it.

McGRATH J:

Don't you have to, in this respect, Mr Kós, to take some competence advantages of stability in the law –

MR KÓS:

Yes.

McGRATH J:

– a general expectation in the community that once the final court and the jurisdiction has pronounced on how a statute is to be read, that is it and people can proceed on that basis and if the courts get into the practice, particularly when the final court changes, of revisiting whenever it, the matter sort of comes up again, that will detract from the authority of the final court system?

MR KÓS:

That was a view that was, with respect, I think once more popular than it is today. When, in 1966, the House of Lords declared that it would, in sparing circumstances, alter some decisions, the argument that Your Honour advanced appealed to the House of Lords in a case called *Jones v Secretary of State for Social Services* [1972] AC 944, which is the 1972 decision of the House of Lords, but more recently in a case called *Horton v Sadler & Anor* [2006] UKHL 27 (14 June 2006) a different view was expressed and it was expressed by the late Lord Bingham in these terms where the conclusion that the House of Lords had reached was that in a prior and longstanding decision, the, this was a 2006 decision and the decision they were

overturning was a 1979 one, the House of Lords in that case had misconstrued a statute. There had been innumerable occasions since then in which that had been applied involved a limitation question to the disadvantage, the improper disadvantage of plaintiffs and what Lord Bingham said at page 323, paragraph 31, was in these terms, "I would in the result depart from *Walkley* for three reasons taken together. That it unfairly deprives claimants of a right Parliament intended to have. That it has driven the Court of Appeal to draw distinctions which are, in my opinion, correct, which are so fine as to reflect no credit on this area of the law and it subverts the clear intention of Parliament." And, in my submission, if the common law Courts have misconstrued Parliament's intention, then the proper task of the common law Courts, subject to a qualification as to the implications of that in terms of uncertainty, particularly if there has been interim reliance, is to correct that misconstruction. Now in this case we have a 2004 decision of the Privy Council. The decision was challenged –

BLANCHARD J:

Ironically one in which Lord Bingham sat.

MR KÓS QC:

Yes, I noted that. That seems to be one of its best arguments that he doesn't say anything apart from signing off.

ANDERSON J:

The only effect of reliance here was that the accounts between the banks and the Commissioner have changed.

MR KÓS QC:

That's right and the short answer is that this is not a case like *Sunset Terraces* or like *Couch* or *Bottrill* where there might have been an organisation of affairs in response to the extent that there has been any kind of organisation of affairs is usually reversible. If someone's paid the Commissioner and yet they didn't have to, the Commissioner can pay it back.

ANDERSON J:

Could a draft ever become unclaimed money?

MR KÓS QC:

Could a draft become unclaimed money, um –

ANDERSON J:

It would have to be dishonoured for six years wouldn't it?

MR KÓS QC:

Yes, that's right.

ANDERSON J:

It would have to be claimed and been dishonoured for six years to become unclaimed.

MR KÓS QC:

Which, of course, deals with the sheer improbability of it. There would have to have then been a claim on it, which, for some reason or other, failed to be processed. So the probability of that event occurring – so in this case the draft, the Bills of Exchange Act in effect provides its own regulatory system for that recovery. And then of course there's that other issue which we don't have to address in this case which is well –

ELIAS CJ:

It takes a lot out of the scope of the Unclaimed Money Act.

MR KÓS QC:

Well let's – may I turn then to the next, my last page on the handout.

McGRATH J:

Does that conclude what you're wanting to say on this concern about upholding precedent?

MR KÓS QC:

Perhaps I might just, may I just make two more points and then I'll go to that. There are, there is, as I say, no relevant or material reliance so it's not like *Sunset Terraces* where you have an irreversible arrangement of affairs. If in *Sunset* this Court had decided that *Hamlin* was wrong, but you didn't have to worry about that because you decided it was right. This case is unlike *Couch* in two respects and I submit they're not material. One is that there was not, in the prior decision, a split. So one of the

points that was raised in the judgments from *Couch* was that there was a 3:2 decision in the Privy Council in *Bottrill*. That's true, there's no distinction in this particular case but there was distinction of another kind, which was the fact that the Privy Council pressed ahead on, and on the parties an interpretation that neither had contended for and neither had argued for in their written submission. So to that extent there is a similarity. And secondly, it is true that this isn't a matter of wide ranging social policy, and I'm not sure whether a matter of wide ranging social policy is necessarily a point for intervention or against it but in terms of that particular indicia what we do, at least in this case, have is a significant, is to have significant commercial implications particularly if the effect of the Commissioner's argument in the Privy Council's judgment upheld in the Court of Appeal below, is to move, looking at my last diagram, the proper scope of section 4(1)(e) moneys across into conditional liabilities.

What we've done in the diagram is the, the Y axis is the interpretation of money argument and so it's split between, in the lower half, funds, deposits, investments and returns on the same, which is our position. And the upper box is any amount owing but not necessarily one that's in the nature of a fund deposit or investment. And then across the X axis, going across the page from left to right, the first quadrant is present liabilities, which is our position and the position of the Court of Appeal and the High Court in *Thomas Cook*, and then on the right-hand side we have conditional liabilities and so deposits, for instance, which are expressly provided for in 4(1)(a) to (c) are noted there because they are additional and they're in the nature of a fund deposit investment. Life assurance, on the other hand, has both an investment and a non-investment function and may be conditional on demand or may be conditional or more than demand so it sits in the middle.

So then what you see is if the Commissioner's argument is right, then everything within the scope of the diagram comes within section 4(1)(e) and the submission I make is that that involves a policy judgement which Parliament did not make in 1898, did not make in 1932, did not make in 1971 and if it is to be made, should be made by Parliament. That's where Parliament should intervene. If the scope of unclaimed money should be broader than what appears in green in this diagram that's a matter for Parliament to respond to.

So the effect of the Commissioner's argument is, as we see from the diagram, to pick up a raft of conditional and contingent liabilities, where there's no present liability to

pay and no amount overdue, but which the Commissioner's argument would treat as unpaid money once the sixth anniversary of the obligation came around, without payment yet having occurred but also without payment being expected or even necessarily wanted.

TIPPING J:

What did the Privy Council say, if anything, about the contingencies of delivery and dishonour?

MR KÓS QC:

It didn't because it –

TIPPING J:

It saw the only contingency as being demand?

MR KÓS QC:

That's right. And that's the problem, in my submission, in the way in which the Privy Council dealt with it. It disregarded the issue of dishonour, in particular, and I don't recall the issue of delivery being dealt with directly, although I do note that my friend, in his submissions, describes it as having been simply a technical issue. My friend says it was argued but it doesn't appear to me. It doesn't appear in the decision. That's right, he confirms that, thank you.

TIPPING J:

Have the textbooks, well I suppose the banking textbooks are not really concerned with the unclaimed moneys aspect of it so we don't get any assistance on this from any more recent additions of *Byles* or C*halmers* or anything like that?

MR KÓS QC:

No.

TIPPING J:

No.

ELIAS CJ:

Are you coming back to look at the text of the Unclaimed Money Act?

MR KÓS QC:

I didn't necessarily intend to Ma'am but I can do.

ELIAS CJ:

Well, I'm just trying to look at it in its own terms and wondering why it uses the concept of ownership. I mean the two, the twin concepts in this piece of legislation seem to be owners and holders.

MR KÓS QC:

Yes.

ELIAS CJ:

And I wonder really whether owing by a holder applies to any moneys or, of any kind whatsoever where the holder is not the owner within the terms of the Act.

MR KÓS QC:

The – I can't go beyond the definition, I guess, I don't think –

ELIAS CJ:

I mean you'd still say it's not payable, it's really payable that's key I suppose –

MR KÓS QC:

Yes.

ELIAS CJ:

– to your. Well just

TIPPING J:

The ellipsis is that it should, it might say has been owing to an owner by any holder because the concept must be compositely that the holder owes the money to the owner –

MR KÓS QC:

Yes.

TIPPING J:

– one would have thought.

MR KÓS QC:

Yes.

TIPPING J:

And if the owner is a moveable feast as is demonstrably the case here, it's not a very immediately, obvious fit.

MR KÓS QC:

And when one looks at – in answer to the Chief Justice's question first, looking at the definition of "owner", it talks about that being the person entitled to the unclaimed money. So it deals with ownership, or the expression ownership is perhaps a slightly broader expression, and what it deals with appears to be an entitlement but it clearly intends, or the Act clearly intends that there is a person who is entitled, because amongst other things, the – at section 6 of the Act, "Every holder –" and so the banks are holders, " – must keep an alphabetical register in the form prescribed in the schedule," and the schedule requires the name, occupation and last known address of the owner on the books.

TIPPING J:

Well, that could only be – until you knew that it had been delivered, that could only be the person who's bought it from the bank.

MR KÓS QC:

That's – it could be either.

TIPPING J:

Well it might be someone else after delivery –

MR KÓS QC:

Yes.

TIPPING J:

– it might be someone else again after endorsement.

MR KÓS QC:

Yes that's right.

TIPPING J:

It could be all sorts of people.

MR KÓS QC:

And remembering too that my friend may make, may want to make a point in this about the decision of the Court of Appeal in *Yan v Post Office Bank Ltd* [1994] 1 NZLR 154; (1993) ANZ ConvR 581; (1993) 2 New Zealand ConvC 191,695 (CA), which is in my friend's authorities, but that was a very different situation from here because in *Yan's* case the postal note had been given to the customer. The customer had taken the postal note and given it to the payee so there was no issue about delivery in that case, payee actually had it. But because of some fraud on the New Zealand Post, they, the New Zealand Post, dishonoured the postal note before it could ever be presented for them for payment. Now while we're dealing with agency canards, not only is it a canard that the drawee bank is the agent of the drawer, but it cannot be said that the customer who receives the postal note or the bill, in this case the cheque, is the agent of the payee unless it can be established that there is a pre-existing agency relationship to receive the note. In most cases, there won't be an agency relationship because it will be the example I gave before which is the customer goes in, buys the draft to pay Barnes and Noble in New York for the book and it can't possibly be said that in receiving the cheque I am, to pay for my book, I am the agent of Barnes and Noble.

So in answer to Your Honour Justice Tipping's question, the most likely person who is, as far as you are aware, the person entitled would be the customer because you do not know the details of delivery but that might change. It might then become the owner, sorry might then become the payee, might be the payee's endorsee and once the cheque is presented then the person entitled to the money that should flow from you the drawer, the bank that drew the – the cheque would be the drawee bank, the Bank of New York, No. 1 Wall Street.

TIPPING J:

Well, that is who the owner is expected to be ultimately, but isn't necessarily going to be.

MR KÓS QC:

That's right. Which is one of the reasons why we contend that the proper scope of money for the purposes of this is in the nature of funds and deposits where you have an identifiable person. Now I –

ELIAS CJ:

Sorry, no I'm just on the scheme of section 4 – but you can come back to finish what you are developing.

MR KÓS QC:

Well, I will do so Ma'am for me. Of course, a deposit can be transferred so the fact that there is transferability doesn't necessarily mean, I accept that you wouldn't have unclaimed money because even something clearly within 4(1)(a) to (c) can be assigned. I can assign my Post Office Savings Bank account but it does suggest, in my submission, that something, which is as uncertain as an international draft is not within the scope of section 4 – and I'm sorry Ma'am I cut you off.

ELIAS CJ:

Well, no, I want to go back to forgetting all about the Bills of Exchange Act for the moment and looking at the structure of the Unclaimed Money Act and the policy of it and want to suggest to you that section 4(1)(a) to (d) is all concerned with money which is not payable because it's subject to a fixed term or a maturity date or something like that and that, in that context, payable is money that's able to be claimed, particularly as the policy of the Act is about unclaimed moneys. What would be the policy of leaving these sorts of moneys in limbo forever?

MR KÓS QC:

That is the policy, in my submission, is simply that is where Parliament drew the line and it provided –

ELIAS CJ:

Well, it's dealt – sorry – it's dealt specifically with cases where you don't – the money is not payable, it's not able to be claimed in (a) to (d) until a specific time –

MR KÓS QC:

And remember it did that, because it apprehended that the definition of unclaimed money, where there was a conditional payment obligation, didn't cover the

conditional payment obligation, so it needed, in 1932, to amend the Act to add to those particular provisions.

ELIAS CJ:

All right.

MR KÓS QC:

Absolutely no need to do it if it didn't.

ELIAS CJ:

Well, you know the legislative history is one aid to interpretation but under section 5 of the Interpretation Act you start with the text and the structure and the context in its legislative context and it doesn't seem to me, it does seem to me that "payable" may have a specific interpretation in this scheme because otherwise you have an Alsatia, you have an area in which money's able to be claimed, don't come within the Unclaimed Money Act.

MR KÓS QC:

Which would be so, also for instance if the debtor was a private individual. So there are many respects –

ELIAS CJ:

But that's a policy determination –

MR KÓS QC:

That's right.

ELIAS CJ:

– that this regime doesn't attach to private individuals.

MR KÓS QC:

But when Parliament introduced this provision and, focusing simply on the text, it provided in the original definition and ultimately in (e), "That the money had to have been owing by any holder following the date in which the money has become payable." And the "has become payable" in the tense sense there suggests that there has been a change in status to that money, in other words that what might have been payable in one sense –

ELIAS CJ:

Well there maybe a case –

MR KÓS QC:

– has become due and so, and that was the difference between this legislation and its predecessor, the model legislation of South Australia, where those words "has been owing" and "has become payable" were added only in this jurisdiction.

ELIAS CJ:

Well, that covers the eventuality that there may be a date before which it can't be demanded so that would be necessary but it does seem to me that this Act read like, in this way makes total sense.

MR KÓS QC:

And then what sense – one has to then give sense to what is meant by the words "has been owing". I mean if it has been owing and has become payable.

ELIAS CJ:

Well, it's owing because it's not owned by the holder. It is owing in that sense.

MR KÓS QC:

Well, in one sense it is – it's a most unusual sense of the word "owing" to describe an amount that is not yet due.

ELIAS CJ:

But if the holder – it's a bit more like, I don't know – bailment or something perhaps. The holder is not the owner in the scheme of this legislation.

TIPPING J:

The property and the money passes to the bank. The property and the money passes to the bank when the draft is purchased, I mean it's not owing.

MR KÓS QC:

No and that's – indeed that's apparent from the pleadings where the bank sought declarations as to that very point and the Commissioner's defence said well, we don't have to plead for that particular point, we accept that. So all that is, all that is asserted in this case is that the money that is payable to the payee at the end of the chain, not the purchase moneys that was paid to the bank in the first place, is unclear money.

ELIAS CJ:

Well, owner, of course, does have its – is defined in this legislation so it's –

MR KÓS QC:

Mmm, we looked at that a moment ago.

ELIAS CJ:

– a separate, it's a separate bubble or it's capable of being read as a stand-alone regime is what I'm suggesting.

MR KÓS QC:

I accept that the argument can be advanced. This is not a situation in which I say that there is only one conceivable interpretation but I submit that if you look at the text and then look at, and if ultimately what one is trying to do is to ascertain and give effect to Parliament's intention, then the other sources that we're entitled to look at, in particular legislative history, point us, in my submission, clearly in one direction as opposed to the choice. Your Honour offering me one choice and I continue for another.

ELIAS CJ:

Yes, I understand.

McGRATH J:

And more contemporary aspect of context, of course, is the remarks of the Minister introducing the Bill?

MR KÓS QC:

Yes.

McGRATH J:

And I understand Mr Goddard put some reliance on those, particularly the first consideration of policy, if you like, that underlies the Bill.

MR KÓS QC:

Well, the 1971 Act, two points about the 1971 Act, first is that – perhaps three. The first is that it was a consolidating Act, the second is that it, to the extent it amended, its principal effect was, as we see in section 4(2), to actually take out of the scope of unclaimed money, dividends, rebates in the case of mutual associations and pension, superannuation fund benefits and then it enabled in section 5 some specific items for non-incorporated bodies. For instance, in 5(1)(g) an auctioneer we have the – the balance of proceeds of an auction sale. Well, those might have been covered by a holder, if that was an incorporated company but, if the auctioneer was not incorporated, then that comes within. So the effect of section – of the 1971 Act, in my submission, Your Honour was, and there's no indication otherwise in this, not to create a fundamental change to what is meant by unclaimed money in section 4(1)(e) at all but to delve deftly in section 4(2) and section 5(1). And not to reverse the change that was made in 1932 or the recognition in 1932 that the scope of unclaimed money was dependent on their being a present liability for an unconditional, unconditional liability for a liquidated sum.

COURT ADJOURNS: 11.33 AM
COURT RESUMES: 11.52 AM

ELIAS CJ:

Yes, Mr Kós.

MR KÓS QC:

Your Honour might I –

ELIAS CJ:

Just pause a moment, the microphone doesn't seem to be working very well. Thank you.

MR KÓS QC:

Certainly. The first point I want to make is that it is clear on the pleadings that the claim the Commissioner's making is not the money that the bank's received and secondly, we cannot avoid the Bills of Exchange Act on the Commissioner's

pleading. Can I show you how that – tempting as I know it is to avoid the Bills of Exchange Act and I entirely understand why you would want to after a close acquaintance with it, it's – one just can't. So if we could please look at the first volume of the case on appeal. There are two about equal size volumes, this is volume in the seventh, sixth tab, which is the statement of settlement against statement of claim. And if we could turn please to page 46 at the bottom or page 6 at the top. The dispute is identified in paragraphs 27 on and at paragraph 28 the banks plead that the purchase money, that is to say the money that was paid over by the customer is not unclaimed money and –

ELIAS CJ:

Sorry which paragraph are we –

MR KÓS QC:

Twenty eight Ma'am.

ELIAS CJ:

Thank you.

MR KÓS QC:

Tab 6.

TIPPING J:

Forty six at the bottom.

ELIAS CJ:

Tab 6. Twenty eight?

MR KÓS QC:

Twenty eight Ma'am thanks.

ELIAS CJ:

Thank you, yes.

MR KÓS QC:

So purchase money, which is the customer's payment, is no unclaimed money the banks plead. They also plead at 29 that the cover held with the correspondent bank,

the overseas bank is not unclaimed money and that funds paid to an overseas bank at 30 are not unclaimed money and that the bank cheque purchase money 31, which is received from the bank cheque customer is not unclaimed money. And to all of that, I should – no let's carry on. Thirty two, 33, 34 and 35, we plead there that the banks have no liability in 32 and 35 under the – it's the third term, 32 and 34 under the Bills of Exchange Act and to all of that in the next tab the Commissioner pleads at page 50 at the bottom, paragraph 1.1 you will see that the Commissioner pleaded he didn't dispute the banks' position set out in paragraphs 28 to 31 for the second amended statement of claim. So in other words the Commissioner accepts that purchase money cover and funds paid and bank cheque purchase money, none of that is unclaimed money but he, but as we see at 1.3, he does dispute the banks' position set out in paragraphs 32 to 35 and does consider that the amounts payable by the banks pursuant to the unpresented drafts.

ELIAS CJ:

Sorry, I just can't – I haven't found it, where is –

MR KÓS QC:

It's the next tab Ma'am, it's tab 7 –

ELIAS CJ:

Tab 7.

MR KÓS QC:

At page 2 at the top, it's the statement – it's very short statement of defence.

ELIAS CJ:

I see, yes.

MR KÓS QC:

So 1.1 Ma'am, he – the second half of 1.1 doesn't dispute the banks' position about the purchase money and the cover. 1.3 does dispute the allegations about the Bills of Exchange Act and does consider that the amounts payable by the banks pursuant to the unpresented drafts are unclaimed money within the meaning of section 4(1)(e). Accordingly, he seeks declarations that the amounts are payable by the banks pursuant to the unpresented drafts and in (b) pursuant to the bank cheques are unclaimed money within the meaning of the section 4(1)(e). So we can't

avoid the question of what is payable in respect, or pursuant to, the unpresented drafts and the unpresented bank cheques. And that, of course, is the Bills of Exchange Act question.

TIPPING J:

So he's not claiming that any damages that follow on recourse are unclaimed money?

MR KÓS QC:

Well, that –

ELIAS CJ:

He can't.

MR KÓS QC:

He's saying that the amounts payable pursuant to the unpresented drafts.

TIPPING J:

Yes but they're unpresented then so they –

MR KÓS QC:

That's – no, that's true.

TIPPING J:

You haven't got to that point.

MR KÓS QC:

That's a point that I think might have eluded the banks and their advisors to date, but yes that's right.

ELIAS CJ:

Sorry, it's eluding me?

MR KÓS QC:

Well, His Honour's point is that the amounts payable pursuant to the unpresented drafts could not be other than, I understand it, other than the damages but they are not, the damage is not payable in respect of unpresented drafts.

TIPPING J:

Because if – but drafts are unpresented –

MR KÓS QC:

There's no damages.

TIPPING J:

The procedure under the Bills of Exchange Act hasn't –

ELIAS CJ:

Yes.

TIPPING J:

– hasn't started.

MR KÓS QC:

That's right.

ELIAS CJ:

Good reason not to go there.

TIPPING J:

Well –

MR KÓS QC:

But unavoidable, with respect, in terms of –

ELIAS CJ:

Well, you do, it is true, have to just deal with the face value if the Unclaimed Money Act is the controlling scheme.

MR KÓS QC:

Only if that is what is owing and due.

ELIAS CJ:

Or just get into this –

TIPPING J:
The allegation is –

MR KÓS QC:
I don't believe one can avoid that question. Because why would the face value be the relevant amount that's owing and due any more than why is it the payee is identified as the owner?

TIPPING J:
The argument must be on this pleading that as soon as the bank drafts or whatever they are, is – are not issued –

MR KÓS QC:
Delivered.

TIPPING J:
That – no. That as soon as the bank hands to the customer the instrument that some money is payable?

MR KÓS QC:
Yes.

TIPPING J:
Short of presentment?

MR KÓS QC:
That's right. That has always been the Commissioner's argument.

TIPPING J:
So it's –

MR KÓS QC:
This is the immediate obligation argument –

TIPPING J:
It is the unvarnished immediate obligation.

MR KÓS QC:

Yes. The same argument that was before this Court, no not this Court, the Court of Appeal.

BLANCHARD J:

But this would only be for the purposes of the Unclaimed Moneys Act, it doesn't actually have consequences under the Bills of Exchange Act or anywhere else –

MR KÓS QC:

It can't –

BLANCHARD J:

– it's just to fix a point from which time starts to run because otherwise you don't know the end point.

MR KÓS QC:

That's true but what's required to be paid in terms of the Unclaimed Money Act, as we know, is what amount that has been owing after it's become payable and the difficulty, this takes us right back round in a circle again, but the difficulty with that is if that embraces conditional obligations and those conditions could be ones which affect time of payment, they also could be ones that affect the amount of payment, so how does one – if one's trying to deal with conditional obligations under section 4(1)(e), which I say Parliament never intended – how does one fix the amount, when even the amount payable could be the relevant condition? I mean, the amount payable could depend on a number of contingencies. It often does, for instance, in commercial contracts, where depending on certain circumstances, say in a warranty, the amount payable may depend on what has occurred over a period of time.

ELLIAS CJ:

But if it were conditional in that sense, it would not be unclaimed money.

MR KÓS:

Why not?

ELLIAS CJ:

It would not be payable within, even the expanded or contextual sense of, the Unclaimed Money Act.

MR KÓS:

Not under the Commissioner's immediate obligation argument, whether varnished or unvarnished.

ELLIAS CJ:

I'm not sure about that, maybe.

MR KÓS:

Now, I want to –

ELLIAS CJ:

Did, sorry, did you answer that the policy is of not treating this as unclaimed moneys, you know, in the mix, in terms of the other provisions, why shouldn't, if nothing has happened on one of this drafts for six years, why shouldn't it be treated like a deposit that hasn't been activated for six years?

MR KÓS:

For, for two, for two reasons, with three. If we put aside my core argument which is Parliament's drawn the line –

ELLIAS CJ:

Yes.

MR KÓS:

– so let's just put that to one side. The next reason is because what has been purchased in this case is a negotiable instrument, it is an asset, it is an asset of value, so it should be treated differently. The second, the third reason is because, at the end of the day, as has been made perfectly clear in the evidence, the banks remain willing to, and do, pay these instruments when presented.

ELLIAS CJ:

Sorry, at the end of the day the banks remain?

MR KÓS:

The banks honour –

ELLIAS CJ:

Oh, remain liable.

MR KÓS:

The drawee banks honour and –

ELLIAS CJ:

But so do they in terms of deposits?

MR KÓS:

Which are, which are specifically identified, so that's the, I mean, the deposits a different situation, because the deposit is wholly in the control of the bank and the only question –

BLANCHARD J:

But the point we're discussing is willingness to pay.

MR KÓS:

And the only condition in relation to a deposit, is the demand being made by the customer, which of course depends on the customer being aware of the deposit and that's why those provisions are there.

ELLIAS CJ:

Well, in terms of that answer, in terms of the policy, I'm really taking from that it's only that this is a negotiable instrument and should be treated differently.

BLANCHARD J:

I think you had a third reason –

ELLIAS CJ:

Oh, did he.

MR KÓS:

Well, no my third reason, I think the Chief Justice has just attempted to explode.

BLANCHARD J:
Quite successfully really.

MR KÓS:
Well, it remains to be seen. It exploded to the extent I'm not going to pursue that line further, so possibly successfully, but the first two and at the end of the day, I, you understand that my fundamental argument is the textual argument –

ELLIAS CJ:
Oh, yes, I understand that.

MR KÓS:
– based on the history.

ELLIAS CJ:
Yes.

MR KÓS:
With the proposition that if it is to be enlarged and that's a matter for Parliament, not for the Courts. Now, what I would like to do before I handover to Mr Every-Palmer, apart from answering any further questions of the Court might have of me, was just to touch briefly on these other two conditions that we haven't talked about. We've talked about dishonour and we've looked at section 55 of Bills of Exchange Act and the consequential liability that flows for damages, enlarged by interest, enlarged by expenses, but diminished by any prejudice to the drawer from late notification.

The other two conditions, which my friend says can be dispensed with entirely in the case of bank cheques so that bank cheques are misére for him in terms of the Act, are demand and delivery and it's helpful I think, it is always useful I think to look, when you're looking at demand and delivery at the issue of demand or presentment first, because the issue arises normally when one has had, one has a holder in due course who has rights under section 38 for the Bills of Exchange Act who are seeking to enforce those rights.

Now my friend relies in relation to section 88 and it's, I think appropriate, this will only take a minute, but to go please to the Bills of Exchange of Act which is tab 4 and

section 88 which is on page 47. Section 88(1) provides, "Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable, but in any other case, present them for payment is not necessary in order to render the maker reliable." And my friend says that that means that in relation to, and this, these provisions deal with promissory notes, they don't deal with foreign currency drafts, the requirement for presentment is expressed earlier on in the Act in relation to foreign currency drafts.

So my friend says that in relation to that, that means that demand is not necessary in the case of promissory notes to create a liability to pay. But, in my submission, that's a difficult argument to make and I simply note in this context that it is difficult to reconcile that with section 84(1), which provides that a promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay on demand.

So, given that it is, and given that section 89 provides that the maker of a promissory note engages that he'll pay according to its tenor, that should be on the basis that demand is made. The way, there is little author- little discussion of this in the authorities, but if my friend on that point, it ends up with that situation I described before to Your Honour Justice Tipping of the bank, the bag of money being brought in, exchanged for a bank cheque and then being redelivered at the revolving door on the way out again.

So my submission, at best what section 88(1) creates, is a situation of conditional liability for on-demand promissory notes, but clearly not present liability to pay until the demand has been made in accordance with the tenor of the note. In my submission, that's the right approach to take to that issue under the Bills of Exchange Act, which on this particular point we can't avoid because that's, that's the argument my friend makes.

The other provision my friend relies on deals with a question of delivery and this is a curious provision, section 21(4) and as we've already noted, and this provision applies to both bills of exchange and also to promissory notes. 21(1) provides that, "Every contract on a bill, whether it's the drawers, the acceptors or endorsers, is incomplete and revocable until delivery," and delivery we know by definition means to the payee.

So, and then 21(3) provides that, "If the bill is in the hands of the holder in due course, a valid delivery by all parties prior to him, so as to make them liable to him, is conclusively presumed," so it's a conclusive presumption, where a holder in due course has the bill and that, of course, would be the case where one is dealing with the ordinary situation of dishonour because, in that situation, the holder in due course has been disappointed by the drawee and has protested and is seeking payment directly from the drawer under the provisions of section 55. But then 21(4) provides, "Where a bill is no longer in the possession of a party who has signed it as a drawer, acceptor or indorser for valid and unconditional delivery by him is presumed until the contrary is proved." So it is a rebuttable presumption. And all I want to say about this particular provision is that it does not, in my submission, waive the requirement for delivery. Delivery has to be done, as 21(1) provides where, and so that means, in the situation of a bill that has not been presented at all, you don't assume delivery to the payee and that's very sensible, why would you assume delivery to the payee because it may never have been conveyed by the customer to the payee and the customer's unlikely to be the payee's agent. And what this provides instead is simply a rebuttable presumption that can be used in the event that someone other than the holder in due course is seeking to enforce the Bill and that might, for instance, be the drawee.

So it's an evidential provision for the benefit of persons who cannot rely on section 21(3) and that is precisely the way in which Guest AG and Chalmers, *Bills of Exchange, Cheques and Promissory Notes* in their 16th edition, page 123 which is at tab 28 of the authorities handles that particular point. That's in my submission, the answer for that point and I'm sorry to finish on what's rather a miscellaneous point but I had to deal with it before Mr Every-Palmer addressed you.

ELIAS CJ:

Yes.

MR KÓS QC:

Can I assist you further at this point or –

ELIAS CJ:

No, thank you Mr Kós. Yes, Mr Every-Palmer.

MR EVERY-PALMER:

May it please the Court, my submissions relate to the term "money owing" in section 4(1)(e) but there are two questions of Your Honour Justice Tipping's that I might be able to provide some assistance on first. The first is in relation to the negotiability of the instruments, it differs as between the drafts and bank cheques and, to some degree, between the banks as well.

TIPPING J:

I don't think, unless you see it as significant, I need trouble you.

MR EVERY-PALMER:

No, I can give you the reference and the affidavits.

TIPPING J:

No, I don't think, thank you.

MR EVERY-PALMER:

Then secondly, in terms of the question about how the Privy Council dealt with issues such as delivery and dishonour, I'd just draw Your Honours' attention to the first question of Lord Millett in the Privy Council decision, so that's at tab 15, page 723. Where His Lordship says, "The money is in the hands of the creditor –

ELIAS CJ:

Sorry is at tab?

MR EVERY-PALMER:

Tab 15 of the authorities, first page.

ELIAS CJ:

Thank you.

MR EVERY-PALMER:

Lord Millett, and this is really the pivotal question in terms of where the oral argument goes, "The money is in the hands of the creditor who must pay that if demanded," problematic, firstly because it's in the hands of a debtor rather than the hands of a creditor but that's a mistake we can all make. If it's not demanded, the debtor doesn't have to pay, the Act says it must be handed over to the Crown. Now three,

three points in terms of that. The first is the demand is not made of Thomas Cook or the drawer bank, of course, demand is made of the drawee. Secondly, Thomas Cook or the drawer banks don't have to pay on demand, they only pay on dishonour under the Bills of Exchange Act and thirdly, we're not dealing with money in the sense of the purchase moneys handed over. As my friend Mr Kós explained, based on the pleadings we're dealing purely in terms of obligations that are arise under the Bills of Exchange Act. Now it may be that and it's surprising given the evidence of their Lordships, but it maybe that they were led into an inaccurate shorthand in terms of the nature of the instruments and it's reflected –

TIPPING J:

I see His Lordship referred to it as a "debt". That makes a nonsense of the Act, what is unclaimed is not the cheque but the debt.

MR EVERY-PALMER:

Yes.

TIPPING J:

I just don't quite follow that. But you needn't expand.

MR EVERY-PALMER:

No, the only thing I would draw your attention to is where the possible source of the error comes, which is in the statement of facts that were agreed between the parties and recorded in the High Court judgment at paragraph 5 and you don't need to go to it, but I'll just read the end of that paragraph, "Until the draft is presented by the payee to the foreign bank, Thomas Cook does not make payment of money, in respect of the draft from its foreign bank account. When the draft is presented, Thomas Cook pays the money to the payee," so there's the sense of Thomas Cook becoming liable on presentment, which, of course, it isn't under the Bills of Exchange Act, it's only if dishonour occurs. So I just stop at that as perhaps an explanation of where the Privy Council got the sense that these instruments were legally due if demanded, which is reflected in the language of Lord Millett and, of course, in the judgments.

Turning then to the types of liabilities that qualifies money owing under section 4(1)(e) and, in particular, our submission that to counter moneys owing for

that section, it must have an investment or safekeeping quality to it and I'll take you to section 4(1), which is in tab 1. So just starting with the context, 4(1)(a) refers to money deposited with any holder, so there's clearly a, including interest, so there's clearly a, either an investment or safekeeping dimension to (a). Similarly for (b) and (d) which deal with deposits, then (d) deals with money payable or distributable in consequence of the maturity of a policy of life assurance. Now life assurance is a combination of a term investment, usually payable when the policy holder reaches a certain age, were also pay- were also an amount as payable if the policy holder dies during its term. So the point to note there is that life assurance with its investment component comes within (d), but a policy which is only a life insurance policy wouldn't come within (d). So again, an investment component.

Then we get to paragraph (e), "Any other money of any kind whatsoever which has been owing", the Court of Appeal in *Thomas Cook* interpreted this broadly as, "Encompassing any unconditional liability to pay a liquidated sum," at paragraph 63. So the question we respectively raise is whether there is in fact a further qualification so that, in addition to being unconditional in a liquidated sum, whether to be money owing it must also have an investment or safekeeping aspect to it.

ELLIAS CJ:

And where do you get that overlay from on the text?

MR EVERY-PALMER:

From three things. Firstly, from the specific instances of unclaimed money which are referred to in the Act and I've taken you to –

ELLIAS CJ:

Yes.

MR EVERY-PALMER:

– deposits and life assurance, I'll take you to others. Secondly, from the statutory history, where in 1898, in my submission, it was clear that it was only investment safekeeping funds, which were intended to be covered in the absence of any clear Parliamentary intention to go beyond that in any of the amendments since and thirdly, to the consequences of not applying back loss to the section.

So in terms of the first of those, the feat- the specific examples of unclaimed money, which were referred to in the Act were dealt with deposits and life assurance. In section 4, subsection 2, there are, these are types of, these are things which are deemed not to be unclaimed money and, therefore, presumably would be within 4(1)(e) but for section 4, subsection (2) –

BLANCHARD J:

Is this argument taking it any further than Mr Kós' argument? It seems the same argument, dressed up in different words, focussing on a word, "money", but it's inherent in what Mr Kós has told us.

MR EVERY-PALMER:

If you, the easiest way to explain it is with the quadrant diagram in the hand-up, that this is effectively the vertical axis as to what money means.

BLANCHARD J:

But we've been through that.

MR EVERY-PALMER:

My friend's submissions dealt more with the horizontal axis, what the meaning of "payable" is. So, I'm not saying they're unrelated questions, but, conceptually, they're different. One is whether "payable" requires a liability, which is unconditional. This argument goes to whether, in addition, for money owing there has to be a safekeeping or investment element to it. So, in 4(2) we have dividends, which are the return on an equity investment, rebates by mutual association, that's an organisation, which is owned by a group –

BLANCHARD J:

But we've been through all this.

ELIAS CJ:

What's the submission that you're directing this to? Is this to the investment or safekeeping –

MR EVERY-PALMER:

Yes.

ELIAS CJ:

– quality?

MR EVERY-PALMER:

Yes.

ELIAS CJ:

And what do you want to take out of…

MR EVERY-PALMER:

So this is our secondary argument.

ELIAS CJ:

Yes.

MR EVERY-PALMER:

That for money to be owing under 4(1)(e) –

ELIAS CJ:

Yes.

MR EVERY-PALMER:

– not only does there have to be an unconditional liability –

ELIAS CJ:

You have to read down section 4(1)(e).

MR EVERY-PALMER:

It certainly is expressed very broadly on its face.

ELIAS CJ:

Yes.

MR EVERY-PALMER:

So it's saying whether, in the context of the Act as a whole, whether in fact Parliament's attention was directed towards liabilities, which are not merely unconditional but also have this investment safekeeping element to them.

ELIAS CJ:

I understand that, and you said that there are three reasons for that.

MR EVERY-PALMER:

Yes.

ELIAS CJ:

One is the taking it in the context of (1)(e) to (d) –

MR EVERY-PALMER:

Yes.

ELIAS CJ:

– because they're all in that category.

MR EVERY-PALMER:

Yes.

ELIAS CJ:

The second is the legislative history and third is the consequences of –

MR EVERY-PALMER:

Yes.

ELIAS CJ:

– not applying that gloss. Which argument are you addressing us on at the moment?

MR EVERY-PALMER:

So the first one, which is beyond (1)(a) to (d), also 4(2), because dividends –

BLANCHARD J:

This is a simple ejusdem generis argument, isn't it?

MR EVERY-PALMER:

Essentially.

ELIAS CJ:

Yes.

BLANCHARD J:

Well, is there any more to be said?

MR EVERY-PALMER:

Well, let me just point you to the – I don't need to do it in terms of the first limb, I don't need to do much more than point you to the specific instances, which are in the Act. So we've gone through the ones in 4(1), 4(2) have dividends, rebates by mutual association and benefits payable from a pension or superannuation fund. So that's really the first argument.

ELIAS CJ:

Yes.

MR EVERY-PALMER:

Then in terms of the statutory history, if we go over to the next tab, which is tab 2, there are three indicators here that what Parliament had in mind originally was something in the nature of investment fund or money held for safekeeping. The first is the language of the idea of there being a specific owner who's different from the holder, which is a narrower concept than their being a mere creditor. Secondly – these are in the definition of unclaimed moneys at the top of the first page – secondly, the idea of the moneys having to have been in possession of the holder and, thirdly, and most importantly, in section 3, and this is in terms of the register that each company has to compose, "It shall be the duty of every company on the first day of January in each year to enter in an alphabetical register to be kept by such company at its head or principal office in New Zealand in the form set forth in the schedule to this Act and with the particulars therein specified, all unclaimed moneys in the colony in an account, which has not been operated upon for six years."

TIPPING J:

Where are you reading from there?

MR EVERY-PALMER:

Sorry, this is, that's section 3 from the beginning to halfway through the –

TIPPING J:

Section 3.

MR EVERY-PALMER:

Of the 1898 Act, so that's…

TIPPING J:

Oh, the other, sorry.

MR EVERY-PALMER:

Sorry, at tab 2. So, despite the apparently broad wording of "money" whatsoever, despite companies being holders, we have the idea in 1898 that the money has to have been in an account, which has not be operated upon for six years. So we say that for the Commissioner to succeed, to get the kind of liabilities that arise from a bill of exchange to come within the Act, they have to, and I think the Commissioner accepts, also get all trade debts swept up within the Act. But, in my submission, it's clear that that can't have been intended in 1898 because the idea of the unclaimed money being in a, effectively a dormant account, obviously requires it to have been more than an unpaid trade debt.

ELIAS CJ:

Sorry, I'm just not following this. It's almost certainly my fault.

MR EVERY-PALMER:

Yes, yes, well, so there –

TIPPING J:

It's the concept of dormancy, I think, perhaps you're trying to emphasise, is that there must be something in respect of which there's a dormancy.

MR EVERY-PALMER:

Yes. Perhaps I can step back. So the bank's primary argument is about the meaning of "payable", and Mr Kós addressed that. The second relates to a point which wasn't taken in *Thomas Cook,* which is, well, what does "money owing" mean? Does there have to be some kind of fund or does it have to be entrusted for safekeeping, or is it any trade debt or any liability whatsoever, which is really where the Court of Appeal in *Thomas Cook,* that was their finding, it's any unconditional liability for a liquidated sum.

BLANCHARD J:

And you're saying the history of the statute demonstrates that Parliament's always been concerned with a fund?

MR EVERY-PALMER:

Yes, yes. So I've taken you to the ejusdem generis argument –

ELIAS CJ:

Yes.

MR EVERY-PALMER:

– this is now the statutory history, and I won't go through it but the, at tab 21, the Minister responsible, Mr Walker, in his speech mentions banks and bank deposits 13 times, but, and that's really the sense of what it was aimed at. Obviously it extends a little bit beyond that to companies, but not to, we would say, any trade debt whatsoever, which we say is the logical consequence of the Commissioner's argument. So, and there is only one suggestion –

ELIAS CJ:

And that's because you're talking about negotiable instruments, is it?

MR EVERY-PALMER:

Well, it's really, it's not so much about the – well, in terms of the instruments here it's because they're negotiable instruments probably and the money's passed, the customer's left with something valuable, and they result in a, there being potential, a range of potential liabilities on the drawer bank, it can be a contractual liability to the customer, it can be a Bills of Exchange Act liability to the payee, it can be a liability to the drawee, so it's far more complicated than the money deposited in a bank.

So the only suggestion in the legislative history that I can find that there was any broader meaning than the one that restricts it to investments or safekeeping, comes in 1971. In the first reading, the Honourable Robert Muldoon made a statement that we would agree with when he talks about one of the principles being that, "Where money entrusted as an investment or otherwise for safekeeping," which is exactly the concept I'm talking about, "is not claimed, it is proper that, subject to any claims being established by anyone entitled, the Crown should receive the money as custodian in the first instance." So we would agree with that statement, but I should draw your attention to the second reading, which isn't in the materials, but at the end of that very sentence he does say that the same considerations apply to trade debts. So we say, and the readings were almost word for word identical, but he does make that extra statement at the end of that sentence in the second reading. Now that's, I say, although that's against me, that firstly, it was the only reference to trade debts, that we have no way of knowing whether it was a considered statement or a spontaneous utterance, and that there's no attempt to reconcile with his earlier statement that it's about moneys entrusted for safekeeping or investment.

So, in terms of the third limb consequences, I think the Commissioner accepts that if the sort of liabilities under a bill of exchange come within the Act and really it applies to trade debts as well and his argument is that has always applied to trade debts. But if that's true, then I'll give you some examples of the kinds of transactions, which would come within the scope of the Act if A does work and sends an invoice to B. If B doesn't pay and it's a holder, so if it is a limited liability company, then in six years' time, B becomes the holder of unclaimed money, because there's an amount owing, which hasn't been paid. Similarly, if A wins a lottery but doesn't know about it and doesn't claim for money, then the person who ran the lottery, if it was a company, becomes a holder of unclaimed money. Similarly, book vouchers, loyalty programmes, any pre-paid items like bus tickets, if there's a right of refund –

ELLIAS CJ:

Isn't there a sort of a, a monetary –

MR EVERY-PALMER:

There's a $100, but –

ELLIAS CJ:

Yes.

MR EVERY-PALMER:

– in total.

ELLIAS CJ:

Yes.

MR EVERY-PALMER:

So if you issue enough bus tickets you get over it.

TIPPING J:

Cable car.

ELLIAS CJ:

What's the problem with that?

MR EVERY-PALMER:

Well, I think it would be a surprise for a lot of companies to learn that they, those mere transactional trade debts come within the Act and not only that, but –

ELLIAS CJ:

Well, it might be, but in terms of sort of orderly holding of unclaimed funds –

MR EVERY-PALMER:

Yes.

ELLIAS CJ:

– what's the problem really?

MR EVERY-PALMER:

Well, there's, the policy, the policy impulse, which lies behind the Act that if there's money sitting out there, then if no one's claiming it, maybe it should go to the Crown. I accept that that has potentially broad scope, as my friend, Mr Kós, said, a line has got to be drawn somewhere –

ELLIAS CJ:

Yes.

MR EVERY-PALMER:

– for, and that's, so I'm not saying that there's necessary a problem with it –

ELLIAS CJ:

No.

MR EVERY-PALMER:

– apart from the administerability, we just say that's not where the line's been drawn.

ELLIAS CJ:

No.

TIPPING J:

Does this mean that if my plumber sends me a bill for $1000 and I don't pay him –

ELLIAS CJ:

No, you're not caught, you're not a holder.

MR EVERY-PALMER:

You're not a company.

TIPPING J:

No, I'm not a, sorry, but say I'm a company.

MR EVERY-PALMER:

Yes.

TIPPING J:

And the plumber comes and does a job.

MR EVERY-PALMER:

Yes.

TIPPING J:

And I, the company doesn't pay him.

MR EVERY-PALMER:

Yes.

TIPPING J:

I've got to actually remind myself in six years' time –

MR EVERY-PALMER:

Yes.

TIPPING J:

– or six and a half whatever it is –

MR EVERY-PALMER:

You have to keep a register.

TIPPING J:

– I've got to pay Mr Goddard?

MR EVERY-PALMER:

You have to keep a register, you have to fill it in, you've got to try and find the plumber and not only that, you commit an offence, unfortunately, if you don't do it.

TIPPING J:

Oh really?

ANDERSON J:

Maybe, the $100 limit is now grossly out of date, I mean, it's 14 years ago.

MR EVERY-PALMER:

But my point is that, on the position the Commissioner has to get to, he's sweeping up all these other types of obligations, where it would come as a complete surprise and not intended by Parliament that they come within the scope.

ANDERSON J:

The fact that someone is surprised, doesn't mean to say they're not liable.

ELLIAS CJ:

In fact, liability is most surprising to a lot of people.

MR EVERY-PALMER:

It's certainly true, but when it comes to –

TIPPING J:

That should go on the first page of a jurisprudence textbook.

MR EVERY-PALMER:

But we are dealing with legislation, which has been, in one form or another, around since 1898 and if every company, which has a plumbing bill, which hasn't been paid is liable to account and commits an offence if it doesn't keep a register and pay it over to the Commissioner, it is my submission that that wasn't the intention in 1898 and that nothing's changed since then to bring trade debts within the scope of the Act and properly read that it's limited to moneys owing, which have an investment or safekeeping character and that the instruments, the kind of liability that a bank might have on a bill of exchange doesn't come within that and those are our submissions, unless I can assist the Court further. We do have copies of *Horton v Sadler* and also the 1891 South Australian Acts if those would be useful, my friend referred to those earlier?

ELIAS CJ:

Thank you, Mr Every-Palmer. Yes, Mr Goddard.

MR GODDARD QC:

Your Honour. This appeal has as its core an issue of statutory interpretation and the statute that falls to be interpreted is of course the Unclaimed Money Act 1971. As Your Honour Justice Tipping said for the Court in *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 –

TIPPING J:

Oh dear.

MR GODDARD QC:

Very elegantly if I may say so, with respect. The two drivers of interpretation are text and purpose. They are equally important and one must always keep purpose in mind when reading text and, as I listened to my learned friend this morning, I had moments of flashback to that case and to the very refined and sophisticated arguments about the cost of cap – meaning of the term cost of capital put before this Court by Fonterra. In that case, the principle defect of which was that they made absolutely no sense in terms of the policy of the regulations that the Court was interpreting and that's the problem with my learned friend's argument in this case.

The written submissions of the banks nowhere pause to ask what the policy goals of the 1971 Act are and critically, they fail to explain how those goals could justify treating as unclaimed money, the various payment obligations identified explicitly in section 4 of that Act and, as I think my learned friend accepted this morning, instruments such as negotiable certificates of deposit but not the money payable under the instruments with which this appeal is concerned.

And what all of these categories of money have in common, of course, is that if a demand was made, a payment would have to be made that a significant amount of time, depending on the class of obligation, has passed without payment being demanded and, as a result, the legislation requires steps to be taken to bring the entitlement to the attention of the person who could demand payment, giving them an opportunity to do so, and if that opportunity is not taken, which will normally be because they can't be contacted, there's provision for that money to be paid to the Crown as custodian, either for the person entitled to payment if they're later identified, or for use for the benefit of the public in the event that that doesn't occur.

The – at the heart of the Unclaimed Money Act lies the idea that a person, one of the classes of person identified as a holder and I'll come back to that, has an obligation to pay money but has not been called on to do so. And the first principle on which the Act is founded is that money not claimed should not be regarded as potential revenue. I'll go to Hansard in a moment but that's the first principle on which the Minister said the Act is framed. That money not claimed should not be regarded as potential revenue –

ELIAS CJ:

Well, he would say that, wouldn't he, I suppose could be said but yes.

MR GODDARD QC:

It's the Minister introducing uncontroversial legislation into the House and explaining the principles on which it rests.

ELIAS CJ:

Yes.

MR GODDARD QC:

And the first principle identified by the responsible Minister was that money not claimed should not be regarded as potential revenue by the obligor. Contrast that with the banks' argument, which has as its heart a desire to treat these moneys as revenue. To treat them, they say, as the normal unders and overs of commerce. So it's revenue in a sense –

ELIAS CJ:

Yes, yes –

MR GODDARD QC:

– not to the Crown sorry Your Honour.

ELIAS CJ:

I'm sorry, I thought you meant, yes.

MR GODDARD QC:

But revenue to the person with the obligation. The heart of the idea is that you don't say, ho, ho, no one's asked us to pay this, that we can take that to our revenue account, we can keep that. Rather, the idea is that first of all you should be compelled to seek out the person to whom you have the obligation and second, if you fail to find them, you should pay the money over to the Crown as custodian. And that's a policy, which has found legislative expression not only in New Zealand but in the states and territories of Australia, in three of the Canadian provinces, in all 50 of the United States states and the District of Columbia, just to be precise. And the legislation varies considerable in its antiquity. Some are still 19th century statutes but there are many more recent ones, including in the United States, there's a 1995 uniform law, model law preferred by the national conference of commissioners on state laws. There's the 2008 Act in Victoria, in Australia, which has been passed while this litigation has been wending its way through the Courts and there's the

recent Alberta legislation that my learned friend put in his casebook. What one sees consistently in all the modern statutes is explicit provision that when you're asking whether something is payable, you disregard the need for a demand. So, for example, my learned friend went to, I think, the Michigan statute under tab 11 and pointed to section 3(2) which says, "Property is payable or distributable for the purpose of this Act, notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment." And if we look at the Alberta Act, which is under tab 12, what we see in section 4(6) is personal properties "payable or distributable for the purposes of this Act on the day on which the apparent owner could have made a demand or presented an instrument or document required to obtain payment, despite the apparent owner's failure to make a demand or present an instrument or document otherwise required to obtain payment." And there's a similar provision in the –

ELIAS CJ:

But this is a very two-edged sword for you to be wielding.

MR GODDARD QC:

It's – I'm going to come to that.

ELIAS CJ:

Yes.

MR GODDARD QC:

And similarly in the Victorian Act, I won't read it out, but section 3(3) makes similar effects. No account is taken of whether the owner is required to take any action by way of demand. Now my learned friend said, well, if that's what the legislation is to do then it needs to say so. But, in my submission, all this does is tease out something, which is inherent in the scheme and purpose of the legislation; something which the Privy Council rightly identified as inhering in the purpose and scheme of the New Zealand Act. So it reflects not a new departure but rather the modern drafting tendency to spell things out in rather more provisions. And I'll work through the Act and explain why that is so. But that was in essence Their Lordship's criticism of counsel in *Thomas Cook*. They said, well look, you've been beguiled by the delightful intricacies of the Bills of Exchange Act and you've inflicted that on the Court of Appeal of New Zealand and I accept full responsibility –

BLANCHARD J:

Some of them are still recovering.

MR GODDARD QC:

I completely failed to advance before Your Honours in that Court an argument about the purpose –

TIPPING J:

We shouldn't have given you such a splendid accolade, Mr Goddard, should we?

MR GODDARD QC:

– of the 1971 Act. No, Your Honours were much too kind to me. You said nice things about my very technical argument and what Your Honours should have said, and certainly Their Lordships were not slow to say it, was why have you spent all this time on this fine grained argument, Mr Goddard, when there's a simple answer?

ANDERSON J:

Why are you blundering around the trees instead of seeing the wood?

MR GODDARD QC:

I was not, it wasn't even trees Your Honour, it was bushes, shrubs. I was lost in the shrubs and, in fact, there was a simple path right ahead of me that I failed to raise before the Court.

McGRATH J:

It was suggested in the High Court, wasn't it, a little trace of that kind of argument –

MR GODDARD QC:

I didn't appear in the High Court and it's a little hard to follow from the report exactly what was argued there. I think what was argued was actually a variant of my immediate obligation argument. I think, even there, the argument was that payable meant you could sue but that you could sue immediately on a bill of exchanges, it's a little bit difficult to tell. Certainly by the time I was involved before Your Honours in the Court of Appeal, it was accepted for the Commissioner that payable meant that a cause of action had accrued and that the relevant time was the time at which time

began to run for limitation purposes. And I then constructed an elaborate, and in my submission still actually correct, as Your Honours accepted but Their Lordships seemed somewhat more hesitant about, argument about when – can do and that would be argued in this proceeding in the event that this Court was to take a different view from the Privy Council on what payable means under the Unclaimed Money Act. But just picking up my learned friend's point about the time that was spent on the issues in the Privy Council. Although the report of the argument, because it also reports the written arguments of the parties spends, especially in my case, quite a bit of time on the detailed Bills of Exchange Act arguments.

The focus on the day of oral argument was very much on Their Lordships' approach and I think my learned friend Mr Wilson QC for *Thomas Cook* has been on his feet for less than a minute before the questions supervened and it was quite clear that Their Lordships had a little chat just beforehand and had a view and so my learned friend spent most of his time responding to that view, occasionally attempting to advance his argument and then being brought back to what Their Lordships thought the case was about –

TIPPING J:

Sounds rather familiar Mr Goddard.

MR GODDARD QC:

It happens in many final appellate courts actually, Sir. And then after the lunch adjournment I stood up and I adopted Their Lordships' approach to this, as one does –

BLANCHARD J:

Rubbing your hands together.

MR GODDARD QC:

And then against the possibility that the approach that appeared to commute itself to Their Lordships on the day, didn't – or my main concern was that Their Lordships may find that it wasn't open to the Commissioner to argue that, given that it hadn't been put below and that's how it's recorded quite rightly in the report of the arguments and the case isn't open to the Commissioner is the other argument. I

then spent a very short period of time with Lord Bingham saying, "That the Court of Appeal's right, aren't you," and I said, "Yes Sir, but there's a little bit more to it there." "Well do you need to take us through it?" "I'd like to." And then I would say something and His Lordship would say, "Yes." And what it meant was yes move on and so I did and that was quite short.

ELIAS CJ:

Should I be saying this at this stage, Mr Goddard?

MR GODDARD QC:

Yes, Your Honour.

ELIAS CJ:

Yes.

ANDERSON J:

Mr Goddard, could I put to you two sentences to see if I've correctly captured the essence of your basic argument?

MR GODDARD QC:

Sir?

ANDERSON J:

The first proposition is that upon being drawn the drafts and promissory notes create an obligation to pay on the part of the drawer, even though the obligee might not be certain at the time of the drawing?

MR GODDARD QC:

As long as these are propositions about what the Unclaimed Money Act means.

ANDERSON J:

Yes, yes.

MR GODDARD QC:

Not about the Bills of Exchange Act, then yes.

ANDERSON J:

And the next point is, the purpose of the Act is to ensure that obligors do not appropriate for themselves the value of the unclaimed obligation but rather that they account for it to the Crown?

MR GODDARD QC:

Yes, rather that they seek out the person to whom the obligation is owed and if they can't be found account for it to the Crown – to the Crown as custodian. That's the only refinement I'd add to that Your Honour. Yes, that's my argument in a nutshell. Your Honour has brought me back to the relevant point. This case has involved quite a lot of that. So when one looks at the policy of the Act, in my submission, it's just readily apparent that there's no sensible basis for the distinction that the bank is said to draw here and no reason why these unclaimed amounts should be treated as revenue when bank deposits, current accounts, transferrable certificates of deposit, proceeds of life insurance policies are not. There's simply no sensible explanation for that distinction that can be put forward.

TIPPING J:

I can see a clear analogy with a transferrable certificate of deposit because that is a valuable instrument, as is a negotiable instrument. That's probably your best point, I would think. The analogy with the current accounts and so on isn't nearly so strong.

MR GODDARD QC:

In terms of the policy of the legislation, I can't see why one would distinguish.

TIPPING J:

Well, you see you've bought an asset.

MR GODDARD QC:

Your Honour's right. This most striking example to consider is a transferrable –

TIPPING J:

Yes.

MR GODDARD QC:

– certificate of deposit –

TIPPING J:

I would have thought that still.

MR GODDARD QC:

– and it seems to me that first there can be no sensible difference between a deposit that one makes in an account for a bank for a month, clearly one month later when it's payable time starts to run –

TIPPING J:

But that is payable directly by the bank, the bank has a liability to the holder of the certificate –

MR GODDARD QC:

And similarly when we come to a transferrable –

TIPPING J:

No.

MR GODDARD QC:

– certificate of deposit, exactly, so there's a liability to take, but it's a transferrable deposit, negotiable certificate of deposit, so it's payable to whoever a holder is at that time. The bank won't know that, it's no different –

TIPPING J:

Right.

MR GODDARD QC:

– from here and it seems to me, inescapable that that's unclaimed money and, certainly, it's very hard to see any rational policy distinction between an ordinary deposit, transferrable certificate of deposit, or the transferrable certificate of deposit and a bank cheque. It's most odd that if I go into the bank, pay over $10,000 and walk away with a transferrable certificate of deposit, if I don't come back six years and one month later, that's unclaimed money, but if I walk in with that same money, get a bank cheque in my name, intending to open an account with some other bank, but not acting on it, for whatever reason, I'm maybe run over by a bus, which is quite common in Wellington these days, and that that wouldn't be, no sensible policy.

TIPPING J:

I think there's a good point there about bank cheques, but where the bank draws on a correspondent bank in New York say, and the bank has a open account with that correspondent bank, matching let us say, the amounts of the cheques so drawn, could it not be said that the bank has actually paid? That situation, which is –

MR GODDARD QC:

Let, let me deal with that at two levels if I may. The first is to suggest that the way that language, such as money and payable is used in the Unclaimed Money Act is a very broad, commonsense, commercial, if you like, usage of those terms –

TIPPING J:

But it's a bit tough if they have to pay again?

MR GODDARD QC:

– and, sorry, I will take –

TIPPING J:

Sorry.

MR GODDARD QC:

– this a step at a time, and it's not meant to turn on the sort of technical distinctions that the banks seek to draw here, that was something Their Lordships said very forcefully. So, for example, money is payable, there's an owner and a holder, even where it's quite clear that the original money is paid over and becomes the property of the bank, even with an ordinary deposit, these are metaphors –

TIPPING J:

We haven't got to my, we haven't quite to my point yet. I'm a bank. I draw on the Bank of New York, several times a day, but I make sure that I have enough in my account at the Bank of New York to cover the instruments I've drawn on.

BLANCHARD J:

But it's your account.

MR GODDARD QC:

Yes, the state of your account can't possible matter Your Honour, because as long as there's money in there, it's your account and your money and you can use it for whatever you want.

BLANCHARD J:

You've merely put it, the bank has merely put money from one pocket to another.

TIPPING J:

Yes, well –

BLANCHARD J:

But it remains, it's –

TIPPING J:

I accept that, but –

MR GODDARD QC:

Say for example, when I write a cheque

TIPPING J:

I suppose I can get it back.

MR GODDARD QC:

Yes, you can get it back, exactly Your Honour and it shouldn't make any difference whether you've deposited sums there or whether you've got credit arrangements with your correspondent bank, that can't possibly affect whether it's unclaimed money or not. When I write a cheque to the Commissioner of Inland Revenue to pay my provisional tax, that's a payment of my money. It certainly feels that way and that's the commercial reality as well.

TIPPING J:

I think you've satisfied me Mr Goddard, I think it was a hare that was –

MR GODDARD QC:

Yes, also it doesn't matter if I'm in credit or as is –

TIPPING J:

I think it was a hare that was –

MR GODDARD QC:

Not infrequently overdrawn –

BLANCHARD J:

Got flattened in the middle of the road.

TIPPING J:

Got flattened –

ELLIAS CJ:

By a bus.

TIPPING J:

– shortly after its burrow.

ANDERSON J:

Road kill.

TIPPING J:

Road kill, yes. No forgive me, I'm sure your credit must be right.

MR GODDARD QC:

So, at the practical commercial level it seems to me that this is the way in which the language is being used here and it is an Act, which eschews that sort of refinement but also there were some submissions made this morning about the nature of obligations on a bank draft, which are not quite right and I think it's probably worth just getting the fundamental nature of the instrument straight. Now my learned friend said that there's no contract here between the drawer bank and the payee. That's not right. The Bills of Exchange Act codifies the terms of the bundle of contracts embodied in an instrument. That's why, for example, we see in section 21 of the Act the provision in section 21(1), "Every contract on a bill ... is incomplete and revocable until delivery of the instrument." Instruments such as cheques are – Professor Goode puts this rather nicely in his text on commercial law, paragraphs 40 – pages 48 and 480. 48 is not in the bundle I'm afraid but what the professor says,

discussing documentary intangibles is, documentary intangibles are of three kinds: documents of title to payment of money, terms instruments and certain other things. What we're concerned with here is documents of title to payment of money and, as the professor goes on to explain, discussing bills of exchange at page 480, talking about the autonomy of the payment obligation, every instrument of whatever character constitutes an independent contract embodying a payment obligation distinct from that of any other contract or duty relationship by virtue of which the instrument was issued. So it's not an accident that these are called documentary intangibles. They are documents, which embody an obligation to pay and once a bill has been delivered, and I'll come back to that, and the contracts honoured are complete, not incomplete under section 21, there is a contract between, in the case of a cheque, the drawer and the payee and that –

TIPPING J:

Is that what section 55 calls an engagement?

MR GODDARD QC:

Yes, Your Honour. I was going to go to two more things. I was going to go to section 55 and just notice what subsection (1) says. That's under tab 4 of my learned friend's authorities bundle. The drawer of a bill by drawing it (a) engages that on due presentation it shall be accepted and paid, and we're not interested in accepted here, engages that on due presentation it shall be paid according to its tenor and that if it's dishonoured he will compensate the holder, provided the requisite proceedings on dishonour are duly taken.

There are two steps to the promise. The first promise is a promise that it will be paid according to its tenor and, in ordinary commercial commonsense, that's treated as a promise of payment and that's the sense in which documents such as this are documents of title to payment of money. And it's only the secondary obligation, the obligation that arises if the primary engagement is not performed, that is a recourse obligation that involves payment of liquidated damages, and that's why, although my learned friends have focused on the second question of Their Lordships to Mr Wilson in the Privy Council, actually the first one is in some ways more important.

That was seconds into the argument and Lord Scott says, "As to liability arising there are two questions. First, whether money is owing and, secondly, whether there has been breach of an obligation to pay that money. We are only concerned with the first

question." So if there's an obligation to pay, if demand is made, then money is payable for the purposes of the Act. We're not interested in breaches of obligations to pay. That's not what the Unclaimed Money Act is about, as to the treatment of current accounts, for example, neatly illustrates, and it was failure to appreciate that that led counsel in that case astray and that caused counsel to lead, I think, the Court of Appeal down an extraordinarily interesting but probably unnecessary path in those proceedings. For which, once again, I can only apologise. So money is payable when there's an obligation to pay it if it's claimed. If it's unclaimed for the relevant period then it's unclaimed money and the consequences in the legislation tick on.

If we look at the 1971 Hansard, which is in the second respondent's bundle of authorities under tab 8, oh I see the time Your Honour and I'm about to start going through this so I wonder if –

ELIAS CJ:

It was such a relief to get away from the Bills of Exchange Act that I didn't notice the time.

MR GODDARD QC:

I'd love to think this was even better than lunch but I don't think I can claim that Your Honour.

ELIAS CJ:

We'll take the lunch adjournment now, thank you.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.17 PM

ELLIAS CJ:

Yes, Mr Goodard.

MR GODDARD QC:

I was addressing, and the second general point I wanted to cover, which was the policy of the legislation and I was about to take the Court to Hansard for the 1971 Act. The first reading is under tab 8 of the slender volume of authorities. Mr Kós' is the large volume and I'm the little one and the first reading of the Unclaimed Money Bill begins at page 1191, Mr Muldoon, Minister of Finance introduced the Bill, the objective of this Bill provided a code for unclaimed money appropriate to today's conditions, reflecting what it considered to be realistic principles for determining whether money that is not claimed should be accounted for the Crown and this Bill is a consolidation, as well as an amendment.

Now at length he does contain the complete law relating to unclaimed money. In general, the code relates to specific classes of money, which has not been claimed within six years, or in the case of some types of bank accounts, within 25 years, first comprehensive revision in more than 60 years. Before discussing briefly the underlying principles adopted in this Bill, I'd like to stress this is not a taxing statute, although it is administered by the Commissioner on behalf of Treasury. It's a function of the Commissioner, which is quite unrelated to his capacity of collector of taxes imposed by the various Inland Revenue Acts. There's an obvious economy of administration utilising the capacity to receive and refund money already existing in the structure of the department.

Turning now to the underlying principles of the Bill. First, money not claimed should not be regarded as potential revenue, and that's revenue for the obligor Your Honour, not –

ELLIAS CJ:

Yes, I understand your argument.

MR GODDARD QC:

Secondly, where money entrusted is an investment or otherwise for safekeeping is not claimed, it's proper that, subject to any claims being established by anyone entitled, the Crown should receive the money as custodian in the first instance. In the event that such money is never claimed, the Crown should hold it for the benefit of the community as a whole. Conversely, it is proper in a number of instances, such as unclaimed company dividends, of any benefit to be derived, other than by the lawful owner for money not claimed, should accrue to the group within which the money arises. Then it's desirable that those who have on their books unwanted balances, which they would otherwise be unable to dispose of legally, because we're talking about quite a wide range of balances on books at that stage, should be given the means of disposing of those balances to the Crown after a suitable period of time.

Finally, if unpaid money's of a small amount, those holding it should not be put to the trouble and expense of trying to contact the owner after a lapse of several years and of accounting of the money to the Crown. Then a discussion of the main changes in the Bill. No longer necessary for unforfeited company dividends, co-operative society rebates, or superannuation benefits not claimed to be treated as unclaimed money, the normal provisions of the Limitation Act will thus apply in respect of such money.

Small amounts need not be accounted for unless the holder so wishes. As is the case of the present Act, the Bill applies mainly to companies that hold unclaimed money, however, it is desirable to provide a means of disposal of unclaimed balances for certain individuals who are otherwise unable legally to clear their trust accounts. These individuals are money lenders, auctioneers, real estate agents, share brokers, accountants and motor vehicle dealers, prohibited by law or otherwise from diverting client funds to themselves. Those who are engaged in these occupations as corporate bodies are, of course, bound to comply with the Act in respect of all unclaimed money they hold, as is the case with all companies. And then there's some more detailed material.

Now, if I could just provide the Court with the second reading Hansard to which my learned friend, Mr Every-Palmer, referred to earlier. If I could hand that up through Madam Registrar. There's just one difference in the description of the underlying principles, given by the Minister, which is, I think, rather helpful. So at page 2751, there's a remarkably similar first paragraph and then turning now to the underlying principles of the Bill, money not claimed should not be regarded as

potential revenue. "Money entrusted as investment or otherwise for safekeeping's not claimed, it's proper that, subject to any claims being established by anyone entitled, the Crown should receive the money as custodian in the first instance." The same considerations apply to trade debts.

So those broad principles take, as their starting point, an obligation to pay money that hasn't been performed, because the money hasn't been claimed and require that certain classes of holder, oh perhaps a few of the provisions of the Act, that can be expected to meet the record keeping requirements of the Act, make efforts to contact the person entitled to payment and if that doesn't succeed, pay the money over to the Crown as custodian.

It would, as the Privy Council pointed out, be really odd if a good answer to this was, but the obligation wasn't triggered because no claim was ever made for payment, that would be the strangest response one could imagine to a description of money as unclaimed money. It's not unclaimed money because it hasn't yet been claimed and yet that really is what the bank's argument comes down to.

The need to disregard whether or not a demand has been made for payment by the person who could make that demand is at the heart of Their Lordship's interpretation of the terms payable and owing when read in the scheme of, in the context of, the New Zealand Act, having regard to its purpose and, as I mentioned earlier, it's something, which is spelt out in all the modern unclaimed money statutes, because otherwise they wouldn't work, they wouldn't serve their basic purpose.

Perhaps worth nothing at this point, I'll come back to it when I go to the Act, not only would it be a strange policy distinction to draw, but if the bank's argument were right, then there'd be some very simple, but fundamental, avoidance opportunities in respect of this legislation. It's common ground that money deposited on a term deposit with a bank becomes unclaimed money six years after the deposit matures. If the banks were right, then five years and 11 months after it matures, it not having been claimed, a bank could write out a bank cheque, post it to the depositer and, in accordance with ordinary principles, the cheque would be treated as payment of the obligation arising in respect of the deposit and the cheque would, on their approach, never become unclaimed money. So you could turn any obligation that falls within the Act into an obligation that fell outside it by the simple expedient of sending, at any time within six years, a cheque for the obligation to the payee.

BLANCHARD J:

It sounds an unlikely thing for a bank to do though.

MR GODDARD QC:

If it made the difference between paying the Commissioner some millions of dollars every year and not, then I think it's an expedient that might acquire an attraction that commercially would otherwise not exist. I'm not suggesting what happened in the ordinary course of commerce Your Honour, but it seems unlikely that the Act was designed in a way –

TIPPING J:

Is a cheque that's not presented because goes astray, it never reaches the intended payee, deemed to be payment, simply by being dispatched to the payee?

BLANCHARD J:

Cheque's in the mail.

ANDERSON J:

It would have to be accepted wouldn't it?

BLANCHARD J:

There may be a slight flaw in the premise.

MR GODDARD QC:

The normal approach, as I understand it, is that where a cheque is sent in payment to an oblige, then, unless the obligee responds saying, no I don't accept your cheque in payment, that cheque is treated as payment –

TIPPING J:

Not, not if it's not cash.

MR GODDARD QC:

– of the underlying obligation.

TIPPING J:

Not if it's not presented for payment, surely.

MR GODDARD QC:

In terms of when the obligation has been met for various purposes, I think it has been, but I –

TIPPING J:

It would stop interest running for example, no doubt.

ANDERSON J:

It suspends the debt.

MR GODDARD QC:

It suspends the debt.

BLANCHARD J:

Because you're really positing a situation, which the bank is wanting this cheque to disappear into the ether.

MR GODDARD QC:

And what Your Honour is saying quite rightly is, would the Courts really treat that as payment in those circumstances?

BLANCHARD J:

Bizarre and would a bank do it, I don't think so.

MR GODDARD QC:

So perhaps I should abandon that illustration as an unnecessary flourish and move on. What I wanted next to do was to emphasise that the reading adopted by the Privy Council of the terms payable and owing, which focuses on the underlying obligation, not breach of the obligation, which says that money is payable and owing. Once all that is necessary for payment to occur is that demand for payment be made, is certainly a reading consistent with the policy, as explained in Hansard, consistent with unclaimed money regimes in other similar jurisdictions, one which is open on the language of the statute. I'll go through it in a bit more detail shortly, and in those circumstances, it is necessary for the banks to address the issue raised by Your Honour, Blanchard J, where this reading is plainly available, where it's a reasonable reading, consistent with the policy of the legislation, why should this

Court now depart from the reading preferred and approved authoritatively by the Privy Council?

In my submission, this is not one of those cases that falls within the principles discussed by this Court in *Couch (No 2)* governing the circumstances in which the Court will depart from an earlier decision of its own or of the Privy Council and, for example, if one puts that in the terms of Your Honour, Blanchard J's paragraph 51, "The Court should not do so unless it's satisfied the Privy Council decision was not only an error, but also inappropriate for the proper development of New Zealand law and New Zealand conditions." Difficult to see how that test would be met, or in the language of Your Honour, Tipping J at 105, "Touchstone should be caution, often considerable caution, when it comes to suggestions the Court should depart from one of its own decisions or a decision of the Privy Council. It must usually be evident that the previous decision was, or has become clearly wrong, rather than simply representing a preferred choice with which the current bench does not agree."

And just dealing briefly with the suggestion made by my learned friend that those principles should be watered down in some way when it comes to the interpretation of legislation, in my submission, the position is quite the reverse, as long as – it would be artificial to suggest that legislation has only one right interpretation and that reasonable different views are never open on the construction of particular provisions of a statute, especially when it comes to interpreting in the light of both text and purpose and, in my submission, precisely the same principles apply where the Privy Council has read a particular provision in a way, which is reasonably open, and it would be a bold argument to suggest that that had not occurred.

TIPPING J:

Mr Goddard, I think there are cases, if my memory serves me right, where debts are treated as present debts, even though demand might be necessary. In other words, it's a debt that's owing here and now, even though its actual fulfilment or satisfaction, if you like, necessarily will occur in the future, pursuant to a demand.

MR GODDARD QC:

Yes.

TIPPING J:

Now, that might – I don't want to over complicate this – but that might be consistent with what you're saying is the proper meaning of "payable and owing" here.

MR GODDARD QC:

Absolutely, Your Honour. In my submission, those are quite flexible words, rather like "money", and Your Honour discussed that in *Thomas Cook*. "Money" is also a word of broad meaning. Similarly, "payable", my learned friend points to dictionary definitions, "must be paid" is one, "due" is another. An amount is payable even if a demand needs to be made for it in ordinary English, in my submission. If you borrow money from the bank for a mortgage, you owe that to the bank, even if you don't have to pay it today.

TIPPING J:

Most people would say, "I owe the bank."

MR GODDARD QC:

I owe the bank money, and yet I really hope that when I get back to my chambers there won't be a demand for it, who knows, after this argument when vengeance will be wreaked. But it seems to me that to say something is owing doesn't mean that I have a positive obligation now to seek out my creditor and pay them this very instant. And really that's the difficulty with my learned friend's, that suitcase of money and the revolving door example, is that it's important to distinguish between the sense in which the words "payable and owing" are used in this legislation, and the question of what the precise legal obligations of the parties to a debt transaction are.

TIPPING J:

I think the fundamental point which perhaps we were led astray on in the Court of Appeal was the equation with payable, with a cause of action.

MR GODDARD QC:

Yes.

TIPPING J:

This is really your argument.

MR GODDARD QC:

That's exactly my argument, Your Honour, that it was a much too narrow and, indeed, in this context, inappropriate reading of "payable" and, as Their Lordships pointed out, I said, "Well, lots of other categories of money are treated as unclaimed money, even though no cause of action has ever arisen," current account, for example. There's no necessary link in this legislation between the existence of a cause of action and the treatment of money as unclaimed money. Similarly, in relation to life insurance policies, it will often be the case that no cause of action will accrue until death has been proved or age has been proved, and often life insurance policies will also require surrender of a policy in exchange for receipt of payment. But what the Act makes very clear is that money due under a life insurance policy will be treated as unclaimed money in certain circumstances, even though those requirements can't be met and therefore no cause of action has accrued. The time frames for money to become unclaimed money are not linked to limitation periods in all cases. Six years is a common limitation period, but the time bar on a speciality, as Their Lordships pointed out, is 12 years. That won't stop the money becoming unclaimed after six, there's no limitation period of 25 years, that's the period used for current accounts in the Act. So there's no necessary connection between the concept of payable, as used in this legislation, and the accrual of a cause of action, that is the point on which the Court of Appeal was misled. It was a common assumption, which was just wrong.

TIPPING J:

We decided it on the premise that there needed to be.

MR GODDARD QC:

Yes. So, starting from that, there was then an elaborate argument as to why a cause of action had accrued. I effectively identified a hurdle and then spent some hours attempting to leap over it. In fact, the hurdle wasn't there.

TIPPING J:

It would have been a much easier judgment to write.

MR GODDARD QC:

My learned friend asked me how much more apologising I was going to do. I could do lots more really, because it's a bit mortifying, but –

TIPPING J:

No, no, I'm not blaming anyone, I'm just saying, this has the advantage of simplicity, this particular…

MR GODDARD QC:

Yes, it does. And coming back to the point about departure, it would be a bold submission to suggest this wasn't a reasonable reading of the legislation in those circumstances, even if this Court were to consider that it might have landed somewhere else on balance. Reading it, that would not be sufficient reason to depart from the decision, especially in circumstances where it's a decision that was delivered some seven years ago now and Parliament has not seen fit to intervene and change the law to depart from what the Privy Council said it understood the legislation to mean. So, the hurdle in *Couch (No 2)* really is there, unlike some other hurdles, and, in my submission, hasn't been cleared.

What I would like to do is just go to the Act now and point to a few features, which really reinforce that reading of the legislation, that's in tab 1 of my learned friend's large bundle of authorities and it's convenient, I think, to look at the reprint under tab 1.

In the definition is the term "holder" and that is necessarily a metaphor, where money is deposited with a bank, it doesn't hold it physically separate somewhere. It's quite clear, as we read on, that that includes an obligor in respect of a payment obligation. Coming on down to "owner" in relation to any unclaimed money means "the person entitled to the unclaimed money" and includes any other person claiming under or on behalf of that person. So, the definition expressly contemplates the possibility of transfer or succession in respect of unclaimed money. And we'll look a little later on at the register obligation and how that should be read in the light of that. Unclaimed money defined so clearly is unclaimed money within the meaning of section 4. Section 3, "Payable to the Crown or money, which becomes unclaimed money after commencement of this Act," subject to special provisions, then 4, unclaimed money. Subject to the section, "Unclaimed money shall consist of, (a), money, including interest thereon, deposited with any holder, so as to bear interest for a fixed term, which has been in the possession of the holder for the period of six years immediately following the date of expiry of the term." Now, it's immediately apparent I think, again, that terms are not being used in a narrow, technical way here, because when one deposits money with a bank, it passes, title to the money passes to the bank, the bank owes a debt to the deposit, to speak of possession is necessarily

metaphorical. So, a lack of concern with technical niceties leaps out from the very first paragraph.

Second, money, including interest, deposited with any holder, so it's to bear interest, either without limitation of time or where the fixed term rolls over, where, in either case, there's been no operation on the account for a period of 25 years, whether by deposit or withdrawal or instruction in writing. Just pausing there, my learned friend's example of a facility made available to a company, it seems to me that where you have a facility, revolving credit facility, on which interest is payable by a company, then – and if it's not by a company you haven't got a holder – then that obligation falls to be dealt under (b), and the reason that you don't suddenly have to pay it all back after six years is that if transactions are taking place on the facility, then the 25 years period won't start running, and it's a very long period anyway. If one had a facility that had not been operated, where the creditor had not had any contact with the debtor for 25 years, then it doesn't seem to me especially onerous for legislation to impose an obligation to make inquiry of him.

Then there's money deposited upon current account or otherwise not bearing interest. There's a distinction there between accounts with savings banks and other cases. The timeframe is different, 25 years or six years. And then (d), (d) is important as Court of Appeal said in *Thomas Cook* because of the light it sheds on what's meant by money. "Money payable or distributable on or in consequence of the maturity of a policy of life insurance, being money, which has been in the possession of any holder for the period of six years immediately succeeding the date on which the policy matured otherwise than by death or the holder first had reason to suppose the policy has matured by death, whether such death has been legally proved or date, whichever date is the earlier, notwithstanding that by the terms of the policy the money is not payable or distributable except on proof of death or on proof of age or any other collateral matter."

And there's a lot of helpful indications in this. First, an amount payable in consequence of a maturity of a policy of life insurance is money, even though there's no question of a fund for safekeeping here. One could have been putting into a life insurance policy for the first year, paid one year's worth of premium. In the event of maturity by death, there's an obligation to make a payment which bears no relationship at all to any fund that's been deposited. It's simply the face value of the policy. Second, the trigger of the holder first supposing the policy had matured by

death, whether or not it had been legally proved, shows the disassociation between the concept of unclaimed money and the accrual of a course of action, as does the reference further down to, "or distributable except on proof of death or on proof of age or any other collateral matter."

It's also interesting to note what's not in there. As I mentioned earlier, it's not uncommon for life insurance policies, which are capable of assignment or being delivered by way of security, to require, as a condition of payment, that the policy be surrendered, but that's not identified here. Why isn't it identified here? Because it's in the nature of a demand for the money. And it's just implicit in the whole of the scheme of this legislation that the need for a demand is disregarded when speaking of money being payable because that's what's missing. That's the problem to which the legislation is addressed and if one asks how an insurer would fare if they had reason to suppose a policy had matured by death, six years had passed and they didn't account and they said, "But the policy hasn't been surrendered to us and it's required as a condition," the Court's would have no time for such an argument. That's because the demand is not necessary because it's the absence of it that's the whole point.

And then we have in (e), language, which could hardly be broader, language, which tracks directly to the Minister's reference to trade debts, "Any other money of any kind whatsoever." Some effort has been put into being general here. "Of any kind whatsoever which has been owing by any holder for the period of six years immediately following the date on which the money has become payable by the holder." The reason for reference to the date on which it's become payable, as Their Lordships noted in the – this is exactly the reason given by Your Honour, the Chief Justice earlier today, that money may be payable at some future date and you don't start counting, until that date has arrived.

And then there are some carve-outs in terms of the $100 amount. The exclusions in subsection (2) are also illuminating because they shed light on what Parliament thought would otherwise have been captured by subsection (1) and, in particular, paragraph (e), the general provision. "Unpaid money shall not include any dividends, not being dividends payable by a mutual association in relation to money deposited, but payable by a company to any of its shareholders." Your Honours will remember that that's one of the points made by the Minister, one of the changes made here was that dividends were being excluded. The express exclusion is necessary because

otherwise dividends would be money of any kind whatsoever owing by a holder. Secondly, rebates payable by a mutual association to any of its members in relation to the trading transactions of the member. Again, not being rebates payable in relation to money deposited. So that's the very common mutual association concept defined, in fact, in subsection (4), "A body or association of persons, which enters into transactions of a mutual character with its members whether or not it also enters into transaction with other persons."

So New Zealand has, through its history, fertiliser co-operatives, grocery co-operatives, many other co-operatives. Members enter into transactions and, rather than their being shares and shareholders, what then happens is that the members of the co-operative receive rebates, which are often proportional to the volume of their trading activity. That's a well-known feature of the New Zealand commercial scene, a little less important today than it was in the 1970s, but still significant.

Rebates payable to members in relation to trading transactions are simply debts provided for in the agreement establishing the association, nothing to do with the fund, nothing to do with investment, it's simply a particular amount of money payable pursuant to a calculation to members.

BLANCHARD J:

Why do you think they were excluded?

MR GODDARD QC:

The rationale that was given by the Minister was that certain amounts arising within a particular group should be retained within that group, so it's the same as a co-operative keeps its money, the company keeps its money. So the fact that some shareholders or some members haven't claimed the money, doesn't mean it should go to the public at large but rather that that group, which has generated the wealth, should keep it.

McGRATH J:

But that must really mean that the Minister in Parliament regarded it as appointment to treat this as potential revenue. It had been, if you like the revenue had been earned and it was quite happy for this element of profit or payment by agreement, not to be paid out.

MR GODDARD QC:

Yes.

McGRATH J:

The revenue before that was appropriately kept.

MR GODDARD QC:

That's right. It was already the members' money.

McGRATH J:

Yes.

MR GODDARD QC:

The company had earned it for the benefit of its members, the co-operative had earned it for the benefit of its members. Some of it wasn't paid out to particular members, that didn't mean that the remaining members should give it away. Yes, Your Honour is exactly right.

The need to carve those outs is indicative of the breadth of paragraph (e). The –

ELIAS CJ:

Pensions.

MR GODDARD QC:

Sorry, Your Honour?

ELIAS CJ:

Pensions.

MR GODDARD QC:

Pensions, also. So, for example, it seems very clear that unpaid wages would fall within 4(1)(e). If an employer held wages on their books that an employee had not received, then efforts should be made to find the person entitled and, if they are not found, the money is paid to the Crown as custodian. That person can claim it at any time without being subject to the limitation defences or otherwise it's used for the benefit of the public. Trade debts likewise. And in situations where that – the range

of situations that could occur where, through illness or an accident, a payment is not received in the days when wages were paid in cash, someone doesn't come to collect them, when someone moves or, of course, where it transpires that wages have been underpaid as, for example, the recent Court of Appeal decision has suggested in relation to certain carers so there are now – there'll be wage balances on certain employers books.

BLANCHARD J:

I doubt the Unclaimed Money Act will be applied there.

MR GODDARD QC:

I don't think we'll ever reach that, Sir, one way or another.

ELIAS CJ:

The rationale for excluding benefits payable from pensions or superannuation funds is the same as in terms of mutual associations and companies.

McGRATH J:

Yes.

MR GODDARD QC:

Yes, Your Honour. Turning to (5), holders is very broadly defined. It's not just banks, it's any company incorporated in New Zealand, any company incorporated outside New Zealand carrying on business here, building societies, any person, firm, body or institution carrying on the business of borrowing or lending money, in respect of money borrowed. And then certain persons, auctioneers, real estate agents, conveyancers, share brokers, chartered accountants and motor vehicle traders, whether or not companies. And then subsection (2), any person, firm, body or institution may elect to be the holder in respect of money and that's the facility that the Minister referred to, of clearing small balances off your books, so you can elect, even if you're an individual not otherwise caught to treat yourself as a holder and pay it across. The difference between people who are holders and those who are not, are those who are under a positive obligation to turn their mind to their obligations under the Act to keep the register and pay money over. In fact, though, the scope of the Act, in terms of the facilities it provides, are potentially broader.

Six, register to be kept. "Holders required on the first day of June in each year to enter in a register in the form prescribed, particulars of unclaimed money arising on or after the first day of June in the preceding year, that's open to inspection on payment of a fee not exceeding 50 cents." Some of these numbers do perhaps require contemporary attention here. And there's provision for deposit of registers in the custody of the Registrar of the District Court in an exclusion in respect of unclaimed money, where special provisions are made under any other Act.

So a register is kept of unclaimed money and that's to be kept in the form prescribed in the schedule and if one turns to the schedule, which is on page 15 of the Act, "Name, occupation, last known address of owner on books, total amount due, description, date of posting notice to owner and then whether it's been paid," and it's quite clear, in my submission, that there could be no criticism of a holder for simply including the last known owner, even though the definition of owner includes people claiming under or through the owner, that that obligation would be met.

In relation to bank cheques and drafts of this kind, the owner who should be recorded is the person who is expected to, person to whom there is a contractual obligation to pay, maybe the payee.

In the case of a transferrable certificate of deposit, it would be the name of the first holder, even though by its nature one would expect that there was a real possibility that someone else would turn up and make the claim, and that's to a perfect-

TIPPING J:

And would the owner of a draft, drawn on a foreign bank, be the foreign bank?

MR GODDARD QC:

No, Your Honour, it would be the payee, because that's the person to whom the drawer bank promises that the foreign bank will make payment, out of their account. So the obligee is the payee. That's the contract on the Bill.

TIPPING J:

Yes, I know.

MR GODDARD QC:

So the contract, the promise to procure payment, is made by, by the drawer to the payee –

ANDERSON J:

Why not the customer?

MR GODDARD QC:

The customer is only a party to the bill if the customer is the payee. Now there are some situations where that will be the case and, also, the banks' argument rather glides over this. The cases where, as a result of that, delivery will, in fact, have occurred, in terms of section 21, where the customer who is the payee purchases the draft. All those conditions will, in fact, have been met there. The banks don't separately record and account to the Commissioner for those. But the person to whom the bank promises payment is the payee.

TIPPING J:

Even though the bank will not necessarily pay the payee?

MR GODDARD QC:

Yes. It's not an accident though that if one, someone other than a payee, such as a customer, wants to return a bank draft, an indemnity may be sought by the bank before that is done. But yes, the pay- the obligee, in terms of the contract that's formed on delivery, is the payee and they are naturally the person who is the owner, in terms of the scheme of this legislation. So –

McGRATH J:

If the customer was paying, it would be a separate transaction?

MR GODDARD QC:

The customer pays for the draft, but –

McGRATH J:

Yes, but if the customer was to redeem it or buy it –

MR GODDARD QC:

Yes.

McGRATH J:

– back or whatever you wanted to call it, but it would be a separate transaction –

MR GODDARD QC:

Exactly Your Honour –

McGRATH J:

– from the Bill transaction?

MR GODDARD QC:

– that's a separate transaction, it's actually not performance of the contract embodied in the bill, Your Honour, that's a very nice way of putting it, Sir. It's not a performance of the contract embodied in the bill, it's a separate transaction by which the bank agrees to pay some money to its customer, in exchange for surrender of an instrument on which it would otherwise be liable. That's the third argument I tried to run in *Thomas Cook* about the implied term in the contract with Thomas Cook's customer, which got short shrift and I accept deservedly short shrift, in the Court of Appeal.

Just returning to the body of the Unclaimed Money Act, one sees the obligation in section 7 to notify the Commissioner and owners of entries in the register if, and then section 8 is again worth noticing. "What unclaimed money comprising in a year, ending with the 31st of May, which has not, before the next succeeding 30 September, been paid by a holder to the owner thereof, and in respect of which no person has before that thirtieth day established a valid claim, shall be paid by the whole to the Commissioner." So, it's paid over only if it hasn't been paid out and no one's established a valid claim. All you need to do is make contact, say it's mine and have the holder say yes, we acknowledge it's yours and no payment is needed.

There's provision in section 9 for special arrangements to be made, modifying the operating of some of the earlier provisions. Then provision for investigation, section 11 provides for the Commissioner to make payment to claimants, "Where unclaimed money's been paid to the Commissioner, or paid into the current bank account under former enactments, the Commissioner on being satisfied the claimant is the owner of the money demanded by him shall cause payment to be made by him, paid out of the Crown Bank account without further appropriation and no right to interest." So,

there's an enduring right to receive payment which is not defeated by the affluxtion of a limitation period, as against the holder.

The, when one reads this Act and asks oneself the right question, its policy seems reasonably clear and the fact that language, such as payee and possession and holder and owner, are all used in very broad, non-technical ways is irresistible. That was always so.

If we turn over to the next tab, to the 1898 Act, we see and my learned friend took the Court to this, the definition of unclaimed moneys, which is again very broad, "All principal and interest money, all unforfeited dividends, bonuses, profits and sums of money whatsoever owing to any person." So there again, for a start, it's quite clear we're not talking about just investment funds. There's dividends, there's profits and sums of money whatsoever owing to any person, anytime in the possession of a company for a period of six years or upwards and owner means the person entitled to any unclaimed moneys.

Section 3 my learned friend, Mr Every-Palmer, referred to –

TIPPING J:
Just before you go on, Mr Goddard, this may help you. Just, "And in respect of which whereof no claim has been made, and respect of which no demand has been made." In other words that could be thought to signal the very point –

MR GODDARD QC:
Yes.

TIPPING J:
– that you're –

MR GODDARD QC:
Your Honour's right.

TIPPING J:
– arguing?

MR GODDARD QC:

That's exactly right.

TIPPING J:

Because a claim and a demand are –

MR GODDARD QC:

The same thing.

TIPPING J:

– equivalent concept.

MR GODDARD QC:

And that, and this is an Act about unclaimed money, this, yes, spells out and no claim has been paid.

TIPPING J:

Which that part of it has, actually hasn't been carried into (e) has it?

MR GODDARD QC:

No, because, in my submission, it was just seen as –

TIPPING J:

It's implicit.

MR GODDARD QC:

– implicit in the whole scheme.

TIPPING J:

Yes, but if it had been carried into (e) –

MR GODDARD QC:

It would be a further support.

TIPPING J:

– it would be rather more vivid perhaps?

MR GODDARD QC:

Yes, but it does, the submission I was proposing to make about that was, the complete unimportance to this, even this early Act, of whether or not a cause of action had accrued and that, Your Honour is right, certainly underscores that one of the things to be disregarded is the making of a claim, the making of a demand.

Section 3 says, "The duty of every company at the 1st of January, to enter an alphabetical register, all unclaimed moneys in an account which has not been operated on for six years," and, when one bears in mind that unclaimed moneys include dividends and bonuses and profits, the word "account" clearly means no more than an entry in a book of accounts or financial statement. It doesn't mean a bank account or anything like that, otherwise section 3 simply wouldn't match to the breadth of the concept of unclaimed moneys as expressly spelt out in section 2, never mind the generic words that are used. And – there's then provision for publication of the register and payment of unclaimed moneys to the Colonial Treasurer. As my learned friends emphasised, bank accounts were at the forefront of the original policy underpinning this and that is apparent from the schedule, the sample schedule for a register of money unclaimed on the last page of the 1898 Bill. The Court will see that the examples given are a Christopher Thomas Ashman owed £350, being a first dividend on 600 shares in the Electric Light Company. So, and the second example given is a Mr George Robert Field owed the, princely then, sum of £10,000 being a deposit or balance of account in the Bank of New Zealand or such other particulars as may be a sufficient description of the money. So the intention that this apply to dividends and deposits and bank accounts and balances of current accounts, very apparent on the face of the legislation, very apparent from Hansard and, although my learned friend is right to say that there was an assumption that bank accounts were payable immediately and that limit in time ran in the event of non-operation and expired six years later so banks didn't have to pay, in my submission, it would be better to say that that was seen as a matter of complete irrelevance, a matter of unimportance rather than it being integral to the scheme of the Act. The point was here that – the concern was about unclaimed money of a wide range of kinds and that was to be recorded in a register, publicised and, if not claimed, paid over. The same schedule occurred in the 1908 Act with some additional literary flourishes. Mr Ashman has become a carpenter of Masterton and Mr Field has become a station owner in Southland, perhaps explaining the differences in the sums that they had regarded as de minimis and not claimed.

The 1932 legislation, on which my learned friend puts so much emphasis, appears under tab 5, the Finance Act and the particular provision is section 26 of that Finance Act, which is on page 100 of the Statute. My learned friend's right that this follows the decision of the English Court of Appeal in *Joachimson* and what it did, in my submission, was to underscore the irrelevance of whether or not a cause of action had arisen and the application of the Act to certain moneys that had not been demanded, had not been claimed, regardless of whether or not a cause of action had arisen in respect of those sums. So the following moneys shall become unclaimed moneys at the times here and after mentioned, whether or not they have at any time, theretofore become payable, that's an irrelevance namely. Firstly, moneys deposited so as to bear interest for a fixed term had the expression of six years from the date when such fixed term expired. That actually would have become payable on any sense, a cause of action would have accrued, but it doesn't matter, they're saying, this is the relevant period – deposits so as to bear interest without limitation of time, had the expression of 25 years from when the account was last operated, deposit on current account and not bearing interest, the expression of six years from when it was operated or 25 years for a Post Office Savings Bank. And then subsection 2, provision in relation to the proceeds of a life insurance policy.

Now, sorry Your Honour – sorry I thought Your Honour might have a question. So the irrelevance of a cause of action having accrued is what's underscored by this provision and although, and the term "payable" is used there in a sense, which is a little difficult to pin down but which doesn't really matter given that the reference is whether or not the money meets that description. But taking my learned friend's argument at its high point, which is that this reflects an interpretation of payable as meaning a cause of action has accrued, then, in my submission, it would be wrong to read this deaming provision introduced out of an abundance of caution in 1932 as limiting the breadth of the existing Statute. As the Court of Appeal observed in this case, it is sometimes the case that Parliament passes an amendment Act, operating under a misapprehension about the meaning of the earlier principal Act and one does not, as a result of such a misapprehension, read down the earlier Act. And the example given by the Court of Appeal and that judgment in this case was *R v Henderson* [1990] 3 NZLR 174; (1990) 6 CRNZ 137 (CA) the case about the Crimes Act and amendments made to it in 1977 in the context of the Contraception, Sterilisation and Abortion Legislation. The Court held, a five Judge Court, that that didn't, despite a misconception about the meaning of section 182 of that Act, alter the meaning of section 182.

Certainly, in my submission, this is a very slender support for an argument that payable in the 1971 Act should be read in a sense that it plainly wasn't understood as having in 1898 or 1908 and that, consistent with the policy of the Act, it should not have in 1971 and today.

I'll turn next, and I'm almost done I think, to the decision of the Privy Council and there's just a few aspects of that I'd like to emphasise that's in my learned friend's authorities under tab 15. I've already drawn Your Honours' attention to the first question from Lord Scott, which really goes to the heart of the issue. Words like "obligation", words like "payable", words like "owing" are ambiguous. They can mean that an obligation exists or they can mean that the obligation's been breached. And what this Act is concerned with is that the – the question of whether the obligation exists. The intervention of Lord Millett, which emphasises that the focus on what "payable" means in the context of this Act, circumstances where the bank has the money, it hasn't had to pay it yet out of its account with the drawee bank, because demand hasn't been made and just how peculiar it would be if that was an answer to a claim that this was unclaimed money. Because the questions of delivery and what that means – if the obligation were raised should perhaps draw attention to – on the next page, Mr Harley's argument beginning at line 26, "The Court of Appeal elided a critical question where Thomas Cook's customer is a different person from the payee. The threshold question is whether the drafts were ever issued to a holder. That is a question of delivery, which is fundamental in terms of section 2 of the 1908 Act. Without delivery being established the payee has no right to payment". Reference to section 21, reference to the schedule to the Act contemplating the holder knows the identity of the owner of the money and is able to give prescribed particulars. So all these matters were argued before Their Lordships. The reason there's no detailed discussion of them is that there was a single sentence saying all these technicalities under the Bills of Exchange Act are irrelevant once you understand the Unclaimed Money Act.

Turning then to the judgment of Their Lordships, delivered by Lord Brown, after introducing the case in paragraphs 1 to 3, His Lordship said at 4, "At the heart of the appeal lies section 4(1)(e)", sets it out, "what is the meaning of payable within that section? More particularly, in the case of a cheque or other instrument payable on demand. If it's meant to be payable and thus six years later are unclaimed money for the purpose of the 1971 Act, must payment actually been demanded or a cause of

action otherwise have arisen, so as to set time running under the Limitation Act. That ultimately is the issue for the Board's determination on this appeal." Unfortunately not addressed below. "Proceedings hitherto have outgrown the assumption that money only becomes payable once an action to payment could have been brought. Such, indeed, the continuing assumption underlying both parties' written cases. Earning response to His Lordship's promptings. The Commission finally submitted payable means no more than legally due if demanded, it being quite unnecessary that any demand should actually have been made, or any cause of action should in fact have accrued. Since for reasons, which will appear, Their Lordships are satisfied that this is the correct view, it becomes unnecessary to say much about the various arguments advanced below, many of them turning on abstruse points of law arising under the Bills of Exchange Act 1908." That's what happened to the delivery argument. There's a certain resonance Your Honour, of the Chief Justice's questions earlier today.

The agreed facts, which were set out, expressly recorded at the top of the next page, paragraph 6 of the extract from the Court of Appeal's decision, that a customer who requested Thomas Cook to issue a draft and provides payment for it, may not necessarily be the payee, so there was no confusion about that at all before Their Lordships, and it's slightly surprising to suggest, with respect to my learned friends, that Their Lordships misunderstood the nature of the instruments that were being discussed before them. It was not a lack of understanding. They weren't misled by an agreed statement of facts in errors about how cheques worked, rather they just considered all of that to be supremely irrelevant.

TIPPING J:

You've really based your argument to a certain extent on this judgment haven't you, in relation to what you've already said?

MR GODDARD QC:

Yes. I'm simply picking up and running with –

TIPPING J:

Your simply picking up particular points?

MR GODDARD QC:

Yes. What Their Lordships said. So all I think I need expressly draw the Court's attention to after, is in paragraph 11 at line 34, Their Lordships turn to the central issue now arising, the viewpoint raised for this type of point, must a cause of action have arisen in respect of money before it's described as payable? Their Lordships say in 12, "Instructed to consider the other categories of unclaimed moneys specified by section 4", Their Lordships go through those. Thirteen, "Two points immediately thought to be made in respect of these other categories of unclaimed moneys. First, they contain no suggestion a cause of action must already have arisen in respect of the relevant money before time starts to run out in the 1971 Act. On the contrary – on the contrary, *Joachimson* long ago established no cause of action arises in respect of money standing on current account till the customer demands payment.

Secondly, the periods of time required to elapse before moneys become unclaimed are not, in all cases, coincident with periods of time applying under the Limitation Act. Fourteen, it is, moreover, planned from the scheme of the 1971 Act because they hold it is essentially unconcerned with the Limitation Act considerations. And that's explained. Various questions are posed.

TIPPING J:

If it was linked directly with the Limitation Act consideration, then it wouldn't be payable after the expiry of the very time that made it unclaimed money.

MR GODDARD QC:

Exactly Your Honour, there'd be no obligation at the very time –

TIPPING J:

No.

MR GODDARD QC:

– when suddenly you had to pay it over. So there's a profound disconnect between the Limitation Act considerations and the policy of this Act, which clearly overrides the Limitation Act. That explains why the Minister, Mr Muldoon, said in relation to the categories of money that were being carved out of the unclaimed money regime 1971, the Limitation Act 1950 will apply to these categories of money.

Reference to paragraph 16 to the proposing Minister making plain in Parliament what the policy of the Act is. I point the word "payable" used, to mean simply that, as

between the company and its shareholders, the moneys due entitled to it, whether it's been demanded or not. Whether, indeed, the company or mutual associate can trace them. The money may, of course, be payable only at some specified future date, that's why section 4(1)(e) speaks not merely of money owing, but of money owing for six years after it has become payable. But that's not to say that under this legislation it only becomes payable on demand and thus is not payable until claimed. That surely would be the greatest nonsense of all, to say that money can only become unclaimed money once it has, in fact, been claimed.

That really is the long and the short of this case. Moneys unclaimed under these Thomas Cook drafts were, for the purposes of the 1971 Act, owing and payable from their date of issue. It matters not whether the drafts could ever have been sued on without a demand being made, whether before or after they become stale. Then after a final swipe at counsel, and consequential costs ordered, no costs awarded Your Honour, despite the Commissioner's success.

BLANCHARD J::

Quite right.

MR GODDARD QC:

The matter came to an end. Rarely, might I say, have counsel been less buoyed by an obvious victory on the day, but nonetheless –

TIPPING J:

I'm sure you felt better than your opponent.

MR GODDARD QC:

Yes, I think that's probably true, Sir. As I say in my submissions that really deals with the case. The purpose of the interpretation of the Unclaimed Money Act means that one just does not need to get into all the fine issues of the Bills of Exchange Act that my learned friend addressed. I have, in my written submissions, dealt in detail with those against the possibility that the Court considers that it is necessary to analyse in detail what is meant by "money" and by "payable" and "owing". And the expropriation argument, which essentially is an argument that commercial entity should be permitted to treat unclaimed money as revenue, and that's its expropriation to pay it over to the Crown as custodian, which is directly inconsistent with the policy of the legislation and essentially saying, "Well, we accept that we'd have no defence if the

person entitled, asked us for this money. So it is a windfall if we get to keep it, but nonetheless we'd like to keep it." I don't think it's an especially compelling application of that principle.

And finally, in section 12 of my written submissions, I explain why, even if my learned friend were right, that "payable" means a cause of action has accrued, nonetheless, that condition is satisfied in respect of bank cheques, though not bank drafts, because it's very well established since, I think, probably before *Norton and Ellam* in the 19th Century, that time begins to run on a promissory note from the date on which it's made. So I anticipate, given the time, that it would not be welcome if I were to trudge through all that detailed material, unless the Court has any specific questions, or there is anything you particularly know Your Honour.

ELIAS CJ:

No, thank you, Mr Goddard. Thank you, thank you, Mr Goddard. Mr Kós?

MR KÓS QC:

The Court pleases in reply four points. The first of these is the question of, the central question of what does "payable" mean in terms of the Act. And the Court by now is well familiar with our argument, which is that the New Zealand Parliament elected in 1898, and confirmed in 1932 and 1933 and 1971, a scheme that is of a constrained scope, with a limited place for a conditional executory obligations, that limited place being sub-paragraphs (a) through to (d). My friend's arguments in sum comes down to saying, "Well 1932, where those four sub-paragraphs were introduced to the Act, which dealt with conditional obligations, whether or not payable, as section 26 put it, comes to an abundance of caution." Or to put it another way, "That that is an internal redundancy within section 4 because you don't need 4(1)(a) to (d) because it's all covered by 4(1)(e)." The Court knows our argument in relation to that and it is that section 32 has the affect of extending the scope of the Act to executory conditional obligations in (a) to (d) only; that (e) deals with the original purpose, confirmed at 32, which is that conditional obligations stand outside. And that is all the more so in relation to bills of exchange, which are complex conditional instruments.

Now, my friends both embrace and eschew reliance on the Bills of Exchange Act and a very good example of that is my friend's answer to Your Honour, Anderson J's question before about why the owner isn't the customer and the answer to that was,

well because, in terms of the Bills of Exchange Act the party entitled is the payee, the holder. Well, that's an example of my friends relying squarely on the Bills of Exchange Act to justify their selection of owner.

We say, in the submission in response, that in terms of the Unclaimed Money Act, there are a range of choices and if you look at the matter from a distance, many potential owners, If the Bill has not been delivered then the person entitled would and could never be other than the customer, who has never delivered the Bill to the, to the payee. So there is no holder in due course in that situation. The rights of the customer are determined by the contract and you may recall in the affidavit evidence that there are sample contracts between the bank and the customer, in relation to the issue of a, of foreign current drafts, which provide for return and refund. So in that situation and, of course, we don't know because we don't have presentments and we don't have the holder in due course, but in that situation the owner is most likely to be, in terms of the person entitled, the customer, in terms of that contractual right.

The second point I want to make in response is to my friend's analysis of section 55 of the Bills of Exchange Act and the Court will remember that my friend described that as being a two part obligation. The first was the engagement element. Engages that it will accepted and paid according to its tender, and secondly that if it's dishonoured, he will compensate the holder.

In my submission, the obligation is, in terms of the relationship between the drawer and the payee, or the holder in due course, is properly stated in *Byles*, which is in the bundle at tab number 25 and if, I might just take you to that for a moment and it's about three pages into the, into tab 25. The Court, this is under paragraph 17.11, under the heading, "The Drawer," *Byles* says there, in terms of section 55 that, "The liability of the drawer can be described as both secondary and conditional. By the terms of section 55(1)(a) the drawer does not, himself, undertake to pay the bill, but merely engages that the bill will be accepted and paid, and undertakes, in the event of dishonour, to pay compensation. The liability," it says at the end of the paragraph, "That the drawer is conditional since it is dependent on the holder taking the requisite steps upon dishonour."

The same point is made on the next page in relation to cheques. "The right of recourse arises if and only if the cheque is dishonoured for non-payment." And precisely the same point is made by the other leading authority, the other leading text

on bills of exchange, which is *Chalmers and Guest* at tab 28 and the very last page of tab 28, the middle, middle, the paragraph 7.023, "The liability, in contrast for the liability of the acceptor or that of the drawer, is conditional. It does not arise unless or until the bill is dishonoured, either by non-acceptance or by non-payment. It is also conditional of requisite proceedings on dishonour being duly taken", that's to say the giving of notice of dishonour. So, in my submission, that is the proper analysis and it is properly set out in those paragraphs. There is no direct or immediate obligation as between the drawer of the bill and the holder in due course, or the payee. That's the obligation. It's a recourse obligation, not a director obligation and if it were otherwise, then section 47(2) of the Bills of Exchange, which is the provision that provides that there is an immediate right of recourse vested in the holder in the event of dishonour, simply wouldn't be necessary. You wouldn't need to sue on the dishonour. You'd simply sue on the disappointed expectation of the non, non-payment by the drawee.

So that's what I want to say about the immediate two part obligation that my friend advances. In my submission, it is and remains as the Court of Appeal correctly identified in *Thomas Cook*, a one part conditional recourse obligation.

Third point in response relates to transferrable certificates of deposit and that was the subject of a short discussion, too short. I want to expand it just a little bit if you please. The first point to make about transitional, sorry, transferrable certificates of deposit is that they are covered within section 4(1)(a) to (d). They are deposits so you don't get into – and they are therefore within the extended definition of unclaimed money, so payability doesn't arise as an issue in relation to those provisions. And secondly, of course, they are a direct liability of the bank. One's not dealing there with a right of recourse, as we've just seen in relation to bills of exchange.

And the last point I want to make, might be the most important one, is this. The decision of the Privy Council in *Thomas Cook*, even if upheld, stands only for dispensing with the condition of demand. It doesn't dispense with the condition of dishonour, of which liability of the drawer depends, as we have seen, and we don't assume, and shouldn't assume, that instruments will be dishonoured. Indeed, the evidence suggests, in the affidavits that you have before you, that it is most unlikely that they will be.

ELLIAS CJ:

If they turn up.

MR KÓS:

If they are presented, yes. That's right.

ANDERSON J:

And therefore they won't be unclaimed because by turning up you're claiming?

ELLIAS CJ:

But, but that is, for those that turn up and are claimed, really we're concerned about funds that aren't.

MR KÓS:

No, you're, yes, I understand that, but you're concerned here with whether the banks that have received customer purchase moneys for these instruments, should pay over those or some relationship to that amount, to the Commissioner, having alternatively sought out either the customer, notified them that they might be the owner, or else sort out the payee and notify to them that they might be the owner, which is my friend's preferred analysis of the position. The point I simply make in relation to that is whether the bank is ever liable to pay anyone at all depends upon the presentment of that document and it's being dishonoured by the drawee. Or –

BLANCHARD J:

Are you –

MR KÓS:

– it been returned, been returned by the customer.

BLANCHARD J:

Is it your argument that the Privy Council overlooked the dishonour requirement?

MR KÓS:

Didn't deal with it at all.

BLANCHARD J:

But it wouldn't have overlooked it.

MR KÓS:

Well, it didn't deal with it.

BLANCHARD J:

Heavens above, with people of this quality sitting on the Board, I can't believe they would have simply not seen that point. After all, Lord Millett is an expert in this area.

MR KÓS:

Well, Lord Millett was the, was the and I don't mean this impertinently to His Lordship, particularly when we have the terror of transcripts, but Lord Millett was the one who was question, who confused the relationship of debtor and creditor.

BLANCHARD J:

Well, he used the wrong word, but we do that sort of thing all the time –

MR KÓS:

I know, and I do not mean that impertinently, but –

BLANCHARD J:

– and I don't need to remind you of Lord Hoffman's explanation of how people understand incorrect language.

MR KÓS:

Well, my point remains that, in that situation, unless you coalesce the conditions of both demand and dishonour, you have to do that in order to sustain the Privy Council's position.

TIPPING J:

Logically, if you're dispensing with demand, aren't you dispensing with all down, matters downstream of demand?

MR KÓS:

That would be the necessary completion and if that were the approach taken, then one can sustain –

TIPPING J:

Well, I think that has –

MR KÓS:

– logically.

TIPPING J:

– logically to be the position, Mr Kós, doesn't it? Either you dispense with demand and all the baggage that follows that, or you don't. So you're in or out, so to speak. That would be my provisional response to your proposition.

MR KÓS:

Well, I understand that to be the best response to the, to the argument. But then we go back then to what, again, the bank's fundamental position before this Court is, and it is simply that the affect of the legislation, when one looks at its text and when one looks at its legislative history, was to provide for the payment to the Commissioner only where there was a present liability. It does, in my submission, when the words payable are used, does require such present liability and the examples that my friend used as departures from that all fell, in fact, within (a) through to (d).

TIPPING J:

You mean a present liability –

MR KÓS:

A present liability.

TIPPING J:

– in the sense of an existing cause –

MR KÓS:

That's right..

TIPPING J:

– of action –

MR KÓS:

Yes, no, Your Honour's.

TIPPING J:

– rather than a present liability as distinguished from a future discharge of that liability?

MR KÓS:

That's right, in other words, a present liability on an obligation that has, that has fallen due and Your Honour described that before as a situation in which you have been, you might have been led astray. Well, with respect, I do not think, I don't like to submit that you were not led astray in the, in the conclusion you reached in the Court of Appeal in *Thomas Cook*, because that is the correct way to give effect to the legislation, in particular, in light of the 1932 amendment. Otherwise what one is doing is treating (a) to (d) as redundant to the provisionally, and so payable does require there to be a present liability and that is coordinate with there being a right of action. That was the conclusion reached in *Thomas Cook* in the Court of Appeal and I –

TIPPING J:

But what if the right of action evaporates on the expiry of the limitation period, which is exactly, I think –

MR KÓS:

No, well, it doesn't.

TIPPING J:

It doesn't you say?

MR KÓS:

Well, it doesn't. It certainly doesn't in this situation.

TIPPING J:

Why, why doesn't it? I'm, you've almost, you're right Mr Kós, but –

MR KÓS:

No, because the right of action doesn't expire until those three conditions are met, including dishonour. So, so it would only expire if those steps have been taken and as we discussed this morning, for some strange reason having, having presented and the Bill having been dishonoured, then nothing happened for a period of six years at which point the limitation point could be taken.

BLANCHARD J:

So it was payable for one purpose but not for another, if the Privy Council is correct?

MR KÓS:

Yes. That sounds rather Craddockian.

BLANCHARD J:

Craddockian. It did have an echo.

MR KÓS:

Well, that's, those are our submissions, if the Court pleases, I'm not sure if there's –

ELLIAS CJ:

Yes, thank you, Mr Kós, any questions?

MR KÓS:

– more I can assist you with? Otherwise I will take my leave, thank you.

ELLIAS CJ:

Thank you. All right, thank you very much counsel for your assistance in this.