

No. 52 of 1981 and No. 53 of 1981

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF THE SUPREME COURT OF  
NEW SOUTH WALES

IN PROCEEDINGS 415 OF 1979 AND 416 OF 1979

B E T W E E N :

GENERAL ACCIDENT FIRE AND LIFE  
ASSURANCE CORPORATION LIMITED Appellant

10 - and -

THE COMMISSIONER OF PAY-ROLL TAX Respondent

- and -

SENTRY LIFE ASSURANCE LIMITED Appellant

- and -

THE COMMISSIONER OF PAY-ROLL TAX Respondent

CASE FOR THE APPELLANTS

Record

THE SUBJECT MATTER OF THE APPEALS

20 1. The proceedings the subject of these appeals, 481-482  
which have been heard and determined together in  
the Courts below, were commenced in the  
Administrative Law Division of the Supreme Court  
of New South Wales as appeals against assessments  
made under the Pay-roll Tax Act 1971 (as amended)  
of New South Wales. The plaintiffs, the present  
appellants, carry on insurance business in New  
South Wales; one a general insurance business, 306-307  
the other a life insurance business. As well as  
paying wages to their employees the plaintiffs, in  
the ordinary course of business, pay commissions,  
30 to various persons firms and companies who are  
described as "agents". It was common ground that  
those "agents" were not employees of the  
plaintiffs, but the respondent Commissioner

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contended that payments made to them fell within an extended definition of "wages" in the Act, the terms of which are set out below. These proceedings were brought as test cases to challenge that contention.

2. The parties agreed on most of the relevant facts, and put before Sheppard, J., at first instance, a series of different cases each of which involved the same ultimate question but which were, at least in theory, capable of different resolution. At the hearing the Commissioner conceded that certain cases relating to the appeal of General Accident Fire & Life Assurance Corporation Limited (being Cases 1, 2 and 3) gave rise to no liability to tax. The plaintiffs accepted that concession without for their part conceding that there was any legally relevant distinction between those cases and the cases in dispute. Sheppard, J. decided all disputed cases in favour of the plaintiffs, and the Commissioner appealed to the Court of Appeal. 10
- 189-258
3. The Court of Appeal, by majority, allowed the Commissioner's appeal. Glass, J.A. with whom Mahoney, J.A. agreed, expressed a general view on the relevant question of statutory construction. The parties thereafter agreed between themselves on the financial consequences of that view in relation to the disputed assessments, and judgment was entered for the Commissioner in the appropriate amounts. Reynolds, J.A. dissenting, reached the same conclusion as had Sheppard, J. at first instance, that is to say, that the taxpayers' challenges to the assessments should have been upheld in their entirety. 20
- 271-288
4. No judge in the Courts below decided in favour of some intermediate position although some such position may be open. For example, a very substantial part of the disputed payments claimed to be "wages" (as defined) were paid to corporations some of which in turn paid wages to employees of their own. The appellants contended below that such payments fall outside the definition of "wages" even if payments to individuals do not. However the two judges below who found in favour of the appellants did so on wider grounds that made it unnecessary to deal with the case of payments to corporations. The two judges who found against the appellants did not mention the matter. 30
- 318 line 1  
342 line 22  
349 line 20  
556 line 20  
586 line 26  
600 line 20  
604 line 23
5. These appeals are brought, pursuant to conditional leave granted on 3 March 1981 and final leave granted on 13 July 1981 from the 40 50

decision of the Court of Appeal of New South  
Wales.

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THE STATUTE

10 6. Pay-roll tax was introduced in Australia as  
a federal tax by the Pay-roll Tax Assessment Act  
1941. The genesis of that legislation was  
explained by Barwick, C.J. in Victoria v. The  
Commonwealth 122 C.L.R. 353 at 362. It was a tax  
on employers levied to finance a particular form  
of benefit. For reasons related to Commonwealth-  
State financial arrangements the tax later became  
a State tax. The State legislation closely  
followed the form of the earlier Commonwealth  
legislation.

20 7. Pay-roll tax is defined in s.3 of the Pay-  
roll Tax Act 1971 (of New South Wales), to mean  
the tax chargeable under s.7. That tax is levied,  
by virtue of s.7, on "all taxable wages". The tax  
is to be paid by the employer by whom the taxable  
wages are paid or payable. Employers are required  
to compile and furnish monthly returns of wages.  
Assessments are made on the basis of those returns.

8. The expression "wages" is defined in s.3 of  
the Act as follows:

30 "'wages' means any wages, salary, commission,  
bonuses or allowances paid or payable  
(whether at piece work rates or otherwise  
and whether paid or payable in cash or in  
kind) to an employee as such, and, without  
limiting the generality of the foregoing,  
includes -

- 40 (a) any payments made by way of remuneration  
to a person holding office under the  
Crown in right of the State of New  
South Wales or in the service of the  
Crown in right of the State of New  
South Wales;
- (b) any payment made under any prescribed  
classes of contracts to the extent to  
which that payment is attributable to  
labour;
- (c) any payment made by a company by way of  
remuneration to a director or member of  
the governing body of that company;
- (d) any payment made by way of commission  
to an insurance or time-payment  
canvasser or collector; and

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(e) the provision by the employer of meals or sustenance or the use of premises or quarters as consideration or part consideration for the employee's services."

9. The question in issue in the appeals is whether all or any of the payments described in the Agreed Statements of Facts fall within the above definition of "wages", having regard, in particular, to the terms of paragraph (d) in the definition.

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THE FACTS

193-229

10. The facts were not the subject of any significant dispute, and were in large part agreed. They are summarised in the judgment of Sheppard, J.

11. The following aspects of the facts are, it is submitted, common to both appellants:

(a) The "agents" are not employees of the Insurer.

e.g. 308-309, 564, 571, 578

(b) Whether the agent is an individual, firm or corporation is a matter of indifference to the Insurer. Taxation considerations frequently govern the matter.

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e.g. 454, 504 line 25

(c) The degree of control and supervision exercised over the way in which the agents carry on their activities is slight.

e.g. 454, 501 line 23

(d) The agents are not required to devote the whole, or any specified portion, of their time to the insurance business.

e.g. 317 line 11, 501 line 10

(e) The agents normally operate from their own premises.

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(f) None of the agents in question are persons who fall within the vocational description "insurance canvasser and/or collector" as that description, which had a well understood meaning in the insurance industry in relation to industrial insurance, was, according to the evidence and the historical material before the Court, understood both in 1941 and 1971.

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614

12. The persons, firms and companies to whom the appellant General Accident Fire & Life Assurance Corporation Limited made payments in question covered a very wide range, including individuals who actively and in a business-like way

solicited insurance business for the appellant, Record  
persons such as:

- (a) storekeepers, 512
- (b) tax agents, or 501
- (c) real estate agents, 517

10 who in the course of some other business came into  
contact with people who required insurance and  
introduced or directed the business of those people  
to the appellant or to some other insurance  
company, and "insurance brokers" who undertook to  
advise clients as to which insurer should be  
offered their business. Entitlement to  
commissions arose from the introduction of  
insurance business by the agent to the appellant.  
The relevant forms of agency agreement imposed on  
the agent no contractual obligation to solicit  
business or collect premiums, and payment of  
commission was not dependent upon such  
solicitation or collection having occurred. Some  
20 of the agents acted as such for more than one  
insurance company. Commissions earned by the  
agents in some cases formed a very small part of  
their total income. e.g. 586,  
597  
620-666  
e.g. 580,  
591  
e.g. 501,  
517, 527

13. The persons, firms and companies to whom the  
appellant Sentry Life Assurance Limited made  
payments in question were somewhat less disparate,  
and the usual form of agency agreement was more  
specific as to the obligations of the agent. In  
particular the agent in most cases was said to be  
30 engaged for the purposes of soliciting new  
business. However the agent was plainly  
recognized as an independent business man (or  
business entity) (c.f. A.M.P. Society v. Allen 52  
A.L.J.R. 407). One of the agents in question was  
a company which was a member of the Sentry Life  
Group and whose relevant activities involved  
occupying space in premises owned by a chain of  
Sydney department stores and selling insurance to  
customers of those stores in co-operation with the  
owner of the stores. That company was also itself  
40 an underwriter and commissions received by it  
constituted a minute portion of its total income.  
Yet another agent was also a member of the Sentry  
Life Group which itself employed 6 or 7 "field  
staff supervisors" and engaged between 10 and 20  
"agents" of its own. Its relevant activities arose  
out of an association with a friendly society from  
whose members it obtained business. Some of the  
agents appoint sub-agents and pay commissions to  
50 or share commissions with such sub-agents. e.g. 374  
line 12  
341-348  
349-356  
e.g. 349

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EVIDENCE AND HISTORICAL MATERIAL AS TO THE  
EXPRESSION "INSURANCE CANVASSER OR COLLECTOR"

14. There was a substantial body of information before the Court, in the form of:
- 178-181 (a) affidavit evidence,
- 241 (b) material from books of reference, and
- 670-735 (c) industrial awards relating to persons employed in the insurance industry,
- which demonstrated that the expression "insurance canvasser and collector" had and has a well understood meaning in the insurance industry. It relates to a class of persons who were engaged in relation to what was originally termed "industrial" life insurance, and is now sometimes termed "collector" life insurance. (See Halsbury's Laws of England 3rd Ed., Vol. 21, pp.70-71). Whether such persons, who were usually remunerated by way of commission, were strictly speaking employees seems to have been a matter of doubt. The existence of the doubt may explain why they are dealt with specifically in the definition of "wages" in the Act. However they have at all relevant times been the subject of industrial awards. Other cases the subject of the sub-paragraphs in the definition of wages may also have been thought to be borderline cases. The way insurance canvassers and collectors operate is described in the affidavit of Mr. Gray, which was rejected as inadmissible by Sheppard, J. but admitted by the Court of Appeal. It can also be inferred from the terms of the industrial Awards in evidence, and the judgments relating to those Awards. (e.g. Federated Clerks Union of Australia & Ors. v. The Industrial Life Assurance Agents Association 46 C.A.R. 578).
- 180-181
- 236-238
- 285-286
15. The majority in the Court of Appeal accepted that the expression had the meaning referred to above in the context of industrial insurance, but refused to treat the expression in the Act as having the same meaning because the Act used the term "insurance" without restricting it to industrial insurance. Submissions as to the meaning which the majority gave the term will be made below, but at this point it is respectfully submitted that their reasoning involves a significant error. If a term used in relation to the insurance industry has a meaning that is well known but that relates to one type of insurance only it can be given a perfectly proper and intelligible application to "insurance" by being given its normal meaning. To use the word "industrial" in the definition would

have been otiose. The absence of the word "industrial" should not be allowed to convert a simple, clear vocational description into a designation of extreme uncertainty.

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THE REASONING OF THE MAJORITY IN THE COURT OF APPEAL

16. Glass, J.A., with whom Mahoney, J.A. agreed, did not appear to accept the definition of the relevant words contended for by the Commissioner. Rather, His Honour said the words "insurance canvasser" and "insurance collector" are ordinary English words and they mean respectively "a person who solicits insurance business" and "a person who collects premiums due under an insurance policy".

285 line 15

17. This, it is submitted, involves the fallacy of ascertaining the meaning of a composite vocational description by taking the dictionary definition of the individual words making up that description. The expression "waterside worker" has a well understood meaning in Australian industrial law and practice, and it does not include beach inspectors.

18. Furthermore, the definition raises at least as many problems as it solves. The nature of those problems can be seen from the elaborate qualifications attached (and, on this approach, necessarily attached) by the Commissioner to his definition of the term. Is it, for example, only payments that are for insurance business which the payee actually solicited that fall within the definition of "wages"?

279-282

19. The appellant respectfully submits that the reasoning of Reynolds, J.A. and Sheppard, J. in the Courts below is to be preferred to that of Glass and Mahoney, JJ.A.

THE COMMISSIONER'S ARGUMENT

20. In the Courts below the Commissioner propounded an elaborate definition of the expression in question, which is set out in the judgment of Reynolds J.A.

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21. The very complexity of the factual enquiries raised by the Commissioner's definition of itself makes it suspect, especially when it is borne in mind that the tax is based on returns filed by the employer within 7 days of the close of the month to which the return relates. The scheme of the Act reflects an assumption that the facts relevant to liability to tax are known to or are readily ascertainable by the taxpayer. The Act

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imposes penalties for incorrect self-assessment by a taxpayer.

22. A detailed examination of the Commissioner's definition shows that it is replete with fine distinctions, uncertainties, and questions of fact and degree which it is unreasonable to expect the insurance company to resolve.

SUBMISSIONS OF THE APPELLANTS

23. (a) The expression "insurance canvasser or collector" is to be understood in the context of industrial life insurance where it has a well-known and reasonably plain meaning. 10

(b) The expression is used in a context where it denotes a form of occupation or vocation pursued by an individual rather than an activity in which persons firms or companies may engage in a wide variety of circumstances.

(c) Even if one does not restrict the terms to its original context of industrial life insurance, it is not enough to make a person an insurance canvasser that he from time to time solicits insurance business. For him to be identified as an "insurance canvasser" the activity of canvassing, which is thus treated as definitive of his occupation, must be essential to it. He must be engaged and obliged to canvas. 20 30

24. Even if one does not restrict the relevant definition to people who are employees as such, the context in which the definition appears militates strongly against applying it to persons of the kind to whom the payments in the present case were made, especially when it can be given a perfectly sensible application to people who are on the borderline between employee and independent contractor and who are covered by industrial awards. 40

25. Further the context is strongly against applying the definition to firms and companies, to employers of other people or even to individuals who could, if they choose, elect to have their activities performed by persons or companies. The operation of the corresponding definition in the Income Tax Assessment Act 1936 (as amended (Commonwealth) which is in pari materia, supports this consideration.



26. The words "canvas" and "solicit" are not synonymous. Solicitation can take many forms, some subtle and unobtrusive, whereas canvassing involves an element of systematic physical and peripatetic activity.

10 27. The appellants further submit that, having regard to the terms of the definition of wages, and to the scheme of the Act, and in particular the terms of section 6 of the Act, it is only payments to an "employee as such" which attract the tax in question. The purpose of the specific subparagraphs of the definition is directed not so much to the categories of payees as to the type of payment. This submission was put to and rejected by the judges below, but it is respectfully maintained by the appellants.

28. The appellants submit that the appeal should be allowed with costs for the following amongst other

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R E A S O N S

- (1) BECAUSE none, or alternatively, not all, of the payments in dispute in the proceedings were "wages" as defined in the relevant legislation.
- (2) BECAUSE the persons firms and companies to whom the payments were made were not insurance canvassers or collectors.
- (3) BECAUSE such persons firms and companies were not employees of the respective appellants.
- 30 (4) BECAUSE the Court of Appeal of New South Wales erred in reversing the decision of Mr. Justice Sheppard.

A.M. GLEESON

D.G. HILL

No. 52 of 1981 and No. 53 of 1981

IN THE PRIVY COUNCIL

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O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH  
WALES, COURT OF APPEAL

IN PROCEEDINGS 415 OF 1979 AND  
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B E T W E E N :

GENERAL ACCIDENT FIRE AND LIFE  
ASSURANCE CORPORATION LIMITED

Appellant

- and -

THE COMMISSIONER OF PAY-ROLL  
TAX

Respondent

- and -

B E T W E E N :

SENTRY LIFE ASSURANCE  
LIMITED

Appellant

- and -

THE COMMISSIONER OF PAY-ROLL  
TAX

Respondent

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CASE FOR THE APPELLANTS

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