
O N A P P E A L

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

B E T W E E N

SENTRY LIFE ASSURANCE LIMITED

Appellant

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- and -

THE COMMISSIONER OF PAY-ROLL TAX

Respondent

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
CORPORATION LIMITED

Appellant

- and -

THE COMMISSIONER OF PAY-ROLL TAX

Respondent

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CASE FOR THE RESPONDENT

1. These are appeals brought from orders of the Court of Appeal of the Supreme Court of New South Wales which by majority (Glass and Mahoney JJA; Reynolds JA dissenting) set aside the judgment of Sheppard J at first instance. In the matter of Sentry Life Assurance Limited, the Court of Appeal by such majority disallowed the objections of that Company and ordered it to pay

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the Commissioner's costs. In the matter of General Accident Fire and Life Assurance Corporation Limited, the Court of Appeal by such majority ordered that the objections of that company be allowed to the extent of part only of the assessment of the above Commissioner, and otherwise disallowed those objections and ordered that that objector pay the Commissioner's costs.

2. In each matter the issue was as to whether the present Appellants were liable to pay Pay-roll Tax in respect of commissions paid by them respectively to certain persons connected with the effecting with such respective companies of policies of insurance. 10

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3. Under the Pay-roll Tax Act 1971 s.3(1), an employer means any person who pays wages or is liable to pay wages (as defined) and includes the Crown in right of the State of New South Wales. By virtue of ss. 6, 7 and 8 of the Act, if the commissions here in question be "wages" such are taxable wages in respect of which the person by whom they are paid is liable to pay tax. 20

4. The sole contest is whether the aforesaid commissions are "wages" as defined as being:

"(d) any amount paid by way of commission to an insurance canvasser or collector" (s.3(1)).

5. The contention of the Appellant Companies, put briefly, was that at the time when such words first appeared in Australian legislation (namely in the (Commonwealth) Income Tax Assessment (Amendment) Act No. 2, 1940 - which inserted s.221A(1) of the Income Tax Assessment Act, 1936 as amended - and in the (Commonwealth) Pay-roll Tax Assessment Act, 1941, s.3(1)) there was a group of persons well known in the insurance business who engaged to canvass for life insurance policies and collected the premiums therefor. 30 40

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The canvassing was done on foot from door to door in some area allotted by supervisors for the insurance company, and the collecting was done from door to door at short intervals - weekly or fortnightly or monthly - as the premiums were payable at such intervals. Both canvassing and collecting were done under supervision and commissions were paid on new policies obtained

and on premiums collected. This type of engagement and this type of canvassing and collecting occurred only in relation to life insurance, and it was known as industrial life insurance business or industrial insurance business, though later also referred to as collector life insurance business and collector insurance business.

10 The Appellants' contention was that the definition in the Pay-roll Tax Act, 1971, s.2(1) "wages (d)" is restricted to commission paid or payable to persons who canvass for, or collect premiums on, industrial or collector life policies, or at least to persons whose conditions of work are similar, in that they are bound by contract to canvass or collect and to do so systematically; who do so full time and by face to face approach in a defined area allotted to them by the insurance company; and
20 who promote one insurance company only; and whose work is supervised or in respect of whose work there is right to supervise.

6. The contention of the Respondent Commissioner is that the said paragraph (d) in the definition of "wages" in s.3 of the (New South Wales) Pay-roll Tax Act, 1971, is not so restricted but embraces any person (see later submission that it includes companies and firms) who, whether or not contractually
30 bound, for example, to canvass for the taking out of policies, does so with the express or implied concurrence of one or more insurance companies, (whether life companies or otherwise) and with express or implied agreement that, if policies are placed through him with any such company, he will be remunerated by commission, and who so canvasses by physical presence, by telephone, by letter or otherwise provided that the canvassing occurs from time to time as
40 circumstances suggest the likelihood of gain and his other activities (business or otherwise) permit, and is such that it can properly be said that it plays a regular part of his activities in the insurance field. However, he will not be an insurance canvasser if his canvassing is done only as an ancillary part of another distinct

Record occupation - e.g. as a solicitor advising his client purchaser to insure the purchased property and recommending a company from which he (the solicitor) will get a commission.

7. The evidence consisting of awards, (the Commonwealth) Life Insurance Act, 1945, s.4(1), the (New South Wales) Stamp Duties Act, s.102(3), the judgment of Piper C. J. in the case of Federated Clerks Union of Australia and Ors. v. The Industrial Life Assurance Agents Association (1942) C.A.R. 578, the book written by Mr. Gray, "Life Insurance in Australia" and Mr. Gray's affidavit all establishes that there was for many years prior to 1941, and since, a type of insurance business known as industrial life insurance or assurance, or industrial insurance or assurance - later known also as collector insurance or assurance - in which persons worked broadly in the manner described in paragraph 5 above. 10

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8. If relevant, the affidavit of Mr. Gray also establishes that, in the insurance world, the words "canvasser" and "collector" would, in both 1941 and 1971, have been understood as applying solely to persons concerned primarily with industrial life insurance and, while so concerned, working in the manner above described. 20

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9. The Respondent Commissioner submits that the words in paragraph (d) of the definition of "wages" - "insurance canvasser or collector" - are ordinary English words, with no indication in the words themselves or their context of their being used in a technical or trade sense. The word "insurance" is merely descriptive of the thing being offered or promoted by the canvasser or (though perhaps elliptical) of the nature of the sums (insurance premiums) to be obtained by the collector. In neither case is the word "insurance" descriptive of the nature of the conditions subject to which the canvasser or collector is working. The Commissioner draws attention to the fact that neither in the (Commonwealth) Pay-roll Tax Assessment Act, 1941, nor in the (New South Wales) Pay-roll Tax Act, 1971, is there any reference to "industrial" or "collector" insurance and to the similar absence of any such words from the (Commonwealth) 30 40

Income Tax Assessment Act, 1936, as amended, s.221A(1) (inserted by the Amendment Act No. 2, 1940) and likewise to the absence from the Pay-roll Tax Acts of any other word qualifying the nature of the insurance.

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10 10. If the words "insurance canvasser" be ordinary English words, their connotation is a matter for the Court, with assistance if needed from dictionaries and the like; and evidence that in the insurance world they would be understood in some particular and restricted way is not admissible (see Marquis Camden v. I.R.C. (1914) 1 K.B. 641, 647-8; Australian Gas Light Company v. V.G. (1940) 40 S.R. (N.S.W.) 126, 137; Hardwick Game Farm v. Suffolk Agricultural Poultry Producers' Association (1966) 1 W.L.R. 287 at 311, 324, in the Court of Appeal - nothing to the contrary was said in the House of Lords at (1969) 2 A.C. 31).

20 11. Even if contrary to the Commissioner's submissions, the words were capable of being read either in a popular sense or as words of art, it is for the appellants to establish that they should be construed as words of art, and in the context of paragraph (d) of the definition of wages there is, it is submitted, no reason to adopt such an approach.

30 12. It is of critical importance, the Commissioner submits, in relation to his submission in paragraph 11, to observe that if the only persons intended to be included by the reference to insurance canvassers or collectors were as submitted by the Appellants, then such words would not have been necessary since the persons described in the awards and in Mr. Gray's affidavit were clearly employees under the general law and payments made to them would have been payments to "employees as such". They had contracted to perform the work of canvassing and collecting and they performed those contracted functions subject to a high degree of supervision and direction by superintendents, and in clearly defined areas allocated to them by the insurance company.

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13. It is additionally significant, the Commissioner submits, that the lettered paragraphs in the definition of wages are "included" in "wages" as defined and the normal effect of that word is to bring into the word defined, but for the purposes of the Act only, things which would not normally be regarded as falling within it; and this is reinforced by the use in paragraphs (a), (b), (c) and (d) of the words "any amount". If, therefore, an amount in question satisfies (a), (b), (c) or (d) it matters not that the payment is not within the opening words "wages, salary, commission to an employee as such". 10

14. Expanding on this last submission, the opening words of the definition relate only to wages and employees as understood at common law.

But paragraph (a) brings into the definition payments some of which would not be, as understood at common law, wages paid to an employee as such. A person holding office under the Crown or in service of the Crown is not an employee or not always an employee (I.R.C. v. Hambrook (1956) 2 Q.B. 641 at 652 - middle p.665; Halsbury's Laws of England (4th Ed.) Vol. 16, para 507; A.G. v. Perpetual Trustee Co. (1955) A.C. 457 at 482, 484 and 488; Commissioner for Railways (N.S.W.) v. Scott (1959) 102 C.L.R. 392 at 418, per Kitto J. and at 441 per Windeyer J. 20

A person holding office under the Crown would not, at least in the case of higher offices - e.g. governor of a state or judges - be subject to any direction as to how or when he is to perform the expected functions of his office. 30

Paragraph (b) manifestly was intended to permit, by prescription of classes of contract, the bringing to tax of payments in or partly in respect of labour which payments either -

- (i) were not wholly describable as wages etc. e.g. where the payment is for labour and materials unallocated, and/or 40
- (ii) were made where the payee was not an employee but an independent contractor.

10 Paragraph (c) brings in payments which are not made to an employee. A Director (at least by the time of the passing of the (N.S.W.) Pay-roll Tax Act, 1971) has accepted a statutory obligation to use "reasonable diligence in the discharge of the duties of his office"(Companies Act, 1961, s.124(1)) but he has not bound himself to devote any particular amount of time to his office or, except for his statutory obligation to attend board meetings, even though absence without leave, continued for some time (under Table A of the relevant New South Wales Act, for six months), would cause him to vacate his office.

20 Critically, no-one can give directions to a director as to how he is to perform his duties. The Board cannot do so. Nor can a general meeting instruct a director as to how he is to perform his duties. Unless the articles were in an unusual form, even a majority of the members could not overrule a decision of the Board or otherwise instruct it as to how it should exercise its powers and discretions (see Pennington's Company Law (4th Ed.) p.525.2; Ford's Principles of Company Law (2nd Ed.) paras. 1407-1409, inclusive; Gower's Modern Company Law (4th Ed.) p.146. In particular, see Automatic Self-Cleaning Filter Syndicate Company Ltd. v. Cuninghame (1906) 2 Ch. 34 at 44-5; Gramophone & Typewriter Ltd. v. Stanley (1908) 2 K.B. 89 at 105, quoted with approval in Salmon v. Quinn & Axtens Ltd. (1909) 1 Ch. 311 at 319; affirmed (1909) A.C. 442. It is, with respect, submitted that there is no foundation whatever for saying of a director of a company that he is in a position "akin" to one in the strict service of the company or "akin" to an employee as was said by Reynolds J.A. in the Court of Appeal at p.283 line 12 and at first instance by Sheppard J. at p.250 line 22.

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40 Paragraph (e) brings in to the definition of "wages" an attributable value of meals or sustenance or use of premises where otherwise the provision of meals or sustenance or use of premises could not fall within the opening words of the definition. The opening words would cover a case of, say, a salary of \$200 per week satisfied as to \$5 by provision of meals; but only paragraph (e) aided by sub-section (2)

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would deal completely with the case of a salary of \$200 per week plus provision of meals or quarters.

15. Since, then, each of the lettered paragraphs (a), (b), (c) and (e) brings into the definition of wages sums which would certainly not be payments to employees as such, as understood at common law, there is no reason, as a matter of construction, for saying that the words in (d) - "insurance canvasser or collector" - should be treated as words of art and thus given a meaning restricting their application to persons who would be employees at common law. This submission that the lettered paragraphs bring in payments by and to persons not being in the relationship of employer and employee by common law principles accords with the view expressed (although obiter) by Gibbs J., as he then was, in relation to the Pay-roll Tax Act, 1971-77 of Victoria (in relevantly similar form). See Murdoch v. Commissioner of Pay-roll Tax 54 A.L.J.R. 502 at 503 (outer column).

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16. It is said that the draftsman in 1941 included in the (Commonwealth) Pay-roll Tax Assessment Act, as paragraph (c), the counterpart of paragraph (d) in the definition of wages in the New South Wales Act of 1971, because there had been no decision by Piper C.J. in Federated Clerks Union of Australia and Ors. v. The Industrial Life Assurance Agents Association (1942) C.A.R. 578, and there could therefore be uncertainty as to whether the persons dealt with by Piper C.J., whose contracts purported to give them independence from control and supervision, were employees at common law. If this were so the consequence would be that the draftsman proposed legislation which would be unnecessary if such persons were held to be employees but which, if they were not employees because of such independence, would nevertheless make their commissions "wages". The draftsman, that is to say, had in mind not that the Act should cover only employees at common law but that it should cover "insurance canvassers or collectors" whether or not they were employees at common law.

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Alternatively, if the draftsman had in mind not persons who had clauses in their contracts suggesting independence, but persons whose conditions of work were as Mr. Gray describes and as Piper C. J. found to be the facts - i.e. having no independence - these would beyond any argument have been employees at common law.

10 17. What is an insurance canvasser? One who, with the express or implied concurrence of one or more than one Insurance Company, pursues for financial gain, and with a sufficient degree of repetition to justify the description, the activity of soliciting the making of insurance contracts where he:-

- (a) so canvasses as his sole means of livelihood.
- 20 (b) so canvasses as part of his livelihood derived from activities in the insurance world.
- (c) so canvasses to an extent sufficient, bearing in mind his other activities, to permit it to be said that he has two distinct means of livelihood, e.g. as a service station proprietor and as a canvasser,

and in each of the above volume is not in itself decisive where he:-

- 30 (i) makes the necessary arrangements so as to establish some relationship between himself and an insurance company, including arrangements as to commission;
- (ii) proceeds to act so as to earn commission;
- (iii) from time to time, as circumstances suggest the likelihood of gain and his other activities, business and otherwise, permit, repeats such acts

but

- 40 (d) where his canvassing is normally as a subordinate and ancillary part of another distinct business carried on, then he will not carry on the vocation or business of an insurance canvasser.

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A. Lewis and Company (Westminster) Limited v. Bell Property Trust Limited
(1940) Ch. 345.

Followed in Labone v. Litherland U.D.C.
(1969) 1 W.L.R. 522.

Followed in Rother v. Colchester Corporation
(1969) 1 W.L.R. 721 at 728, foot of page
to end.

And see Stuart v. Diplock (1889) 43 Ch.D.
343.

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It may be, as to some vocations distinct from the insurance field, a normal and natural part of them that persons be advised or urged to take out insurance but, if so, the person so advising or urging is not an insurance canvasser. He has not approached the other person with that as his object.

In such cases the urging to insure is merely a natural and incidental part of the distinct vocational purpose (e.g. solicitor and client) for which the parties have come together.

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18. An insurance canvasser is someone who solicits insurance business and this of necessity involves approaching in person, by telephone or by correspondence, persons thought possibly, or likely to be, willing to take out insurance. See the following definitions in the Oxford English Dictionary:

Canvass:

(intransitive) to solicit especially to solicit votes or support previously to an election; also to solicit support, contributions, orders for goods, etc.

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(transitive) (b) to sue or solicit (persons, a district) for votes subscriptions, custom, orders, etc.; especially to solicit the support of a constituency by going through and interviewing the individual electors to ascertain by this means the number of ones supporters.

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To import into the ordinary meaning of "canvasser" the concept that he must solicit business in a particular way (namely, by door to door approach in person) is to import wholly irrelevant factors.

10 See Parker's Conduct of Parliamentary Elections (1st Ed. by Mr. H. W. Wollaston, being the 7th Ed. of Parker's original work) at p.62. See also In re Baker's Election; ex parte Clemente (1965) Tas. S.R. 152 at 171.

For example, he is still a canvasser if he solicits insurance business whether or not;

- (a) he does so from his own premises or from the insurance company's,
- (b) the names of likely persons are obtained from the insurance company or from his own records or contracts,
- 20 (c) he solicits only on behalf of one Insurance Company or solicits on behalf of more than one,
- (d) he has contracted to solicit, or merely does so with the express or implied consent of the payer of the commission.

19. Can a Company or Partnership be an insurance canvasser or collector?

30 Yes, since it is not necessary that the canvasser or collector be an employee. Note as to Companies or Partnerships being employees, A.M.P. v. Chaplin (1978) 18 A.L.R. 385 at p.391 line 10 and at p.392 line 6 (Sub nomine A.M.P. v. Allen 52 A.L.J.R. 407 at p. 410, outer column F and G and at p.410, inner column F and G).

Note that under (c) a company can be a director (Companies Act, 1961 s. 114(2) and s. 134(2)(b)).

The Commissioner cannot say this point was argued in 10 C.T.B.R. Case 152 but nothing there said would deny his answer.

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20. It is no answer, the Commissioner submits, to his submissions to say that double tax may be payable - once by the Insurance Company on commissions payable to the company or firm and again on any commission paid by that company or firm to an employee canvassing. Such is not double tax. There are two sets of "wages" and the same would apply under the opening words of the definition of wages where X was an individual employee with a right to employ others to assist him or to perform the task on his behalf.

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21. If a person is an insurance canvasser all payments of commission to him pursuant to a standing contract (express or implied) for commission are within the definition because it was the existence of such a contract which led to the canvassing notwithstanding that as to a particular proposal he may not have solicited it.

"Any amount paid" etc.

Attention is drawn to the width of the phrase and to the fact that the sub-clause is not "any amount paid or payable by way of commission for canvassing".

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This is not merely the meaning of the words used, but to treat them as bringing to tax only commissions on business in respect of which an insurance canvasser in fact canvassed would involve the payer (insurance company) in investigating the circumstances surrounding the making of each proposal accepted and possibly the Commissioner doing likewise. This would be a much more burdensome enquiry than the enquiry whether a person does frequently canvass.

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Alternatively, but not the Commissioner's preferred approach, would be to say that whether one is speaking of a person who canvasses as in Paragraph 17(a), (b) or (c) above, the insurance company must in each case of a new policy make the above enquiry and pay or not pay tax accordingly.

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Whether the Commissioner's first choice were preferred or his second choice, in all cases payments to the canvasser would include all commissions on renewals since these it is submitted are merely continuing reward for the policy which has been brought about by an insurance canvasser.

10 22. The Appellants' insistence upon a persons' having bound himself to canvass before he will be within paragraph (d) of the definition of "wages" is not logical, it is submitted, unless the Appellants can establish the proposition that "insurance canvasser or collector" means only "industrial insurance canvasser or collector". If that proposition cannot be established there is no justification for insistence upon a contract to canvass if only because it would have the unjustified consequence that a person not bound to canvass who elected to endeavour
20 to earn commissions by a full time door to door approach would not be a canvasser.

"Insurance Canvasser" is a phrase descriptive of what a person does, not of what he has contracted to do.

30 23. No distinction can be drawn unfavourable to the Commissioner's submissions from the fact that individual life insurance canvassers or collectors do so for one insurer only, whereas the Commissioner's definition comprehends - though not exclusively - cases where the person canvassing has the necessary arrangement with say, two companies, and canvasses the taking out of policies with one or other of them - the final choice depending, for example, upon the suitability of the respective policies the needs of the person canvassed or the choice of that person or of the canvasser.

40 Under both the Appellants' definition and the Commissioner's definition the canvassing is a means to an end, namely the persuasion of the person canvassed to take out a policy, the effecting of which through the canvasser will produce reward to him.

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24. The Respondent submits, in summary, that the words "insurance canvasser" are not restricted to individuals nor to those who:-

- (a) have contracted to canvass;
- (b) canvass throughout normal working hours;
- (c) canvass on foot;
- (d) canvass under supervision.

The Respondent therefore humbly submits that the Orders of the Court of Appeal were correct and that Your Lordships will advise Her Majesty that these appeals should be dismissed with costs.

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James Offler Q C

A. Tolhurst