

37/83

IN THE PRIVY COUNCIL

No. 38 of 1982

ON APPEAL

FROM THE SUPREME COURT OF

NEW SOUTH WALES

ADMINISTRATIVE LAW DIVISION

IN CAUSE NO. 605 of 1978

BETWEEN: NARICH PTY. LIMITED

Plaintiff (Appellant)

AND: THE COMMISSIONER OF PAY-ROLL TAX

Defendant (Respondent)

CASE FOR THE APPELLANT

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CASE FOR THE APPELLANT

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ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES ADMINISTRATIVE
LAW DIVISION IN PROCEEDINGS NO. 605 of 1978

BETWEEN :

NARICH PTY. LIMITED

Appellant

and

COMMISSIONER OF PAY-ROLL TAX

Respondent

CASE FOR THE APPELLANT

RECORD

- | | | | |
|----|---|---------------|----|
| 1. | This is an appeal pursuant to leave granted by the Supreme Court of New South Wales on 4th March 1982 to appeal from the Judgment and Order of that Court whereby proceedings brought by the Appellant in that Court objecting to the assessment of further tax under the Pay-Roll Tax Act 1971 were dismissed. | p. 272 | 10 |
| | | p.198-
271 | |
| 2. | By Notice dated 26th June 1978 the Commissioner of Pay-Roll Tax assessed the | p. 50 | |

Appellant as liable to pay further tax and additional taxes totalling \$80,703.00 in respect of moneys alleged to have been paid by the Appellant as wages during the period 1st November 1973 to 30th June 1977.

3. By Notice of Objection dated 24th August 1978 the Appellant objected to the said assessment on the ground that :

(a) The moneys alleged to have been paid by it were not wages, salary, commission, bonuses or allowance paid or payable to an employee or alternatively to an employee as such.

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(b) The moneys were not :

(i) Wages within the meaning of the Pay-Roll Tax Act.

(ii) Wages liable to Pay-Roll tax under the said Act.

(iii) Taxable wages within the meaning of the said Act.

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(c) Alternatively, if the said sums or any part of them were wages or wages liable to Pay-Roll tax or taxable wages within the meaning of the said Act neither they nor any part of

them were paid or payable by the Appellant
as the employer.

p. 52-53

4. By Summons filed in the Supreme Court of New South Wales on 5th October 1978 the Appellant sought an Order that its objection to the said assessment be allowed.

p. 1-2

5. The proceedings came on for hearing before His Honour Mr. Justice Woodward and on 6th November 1981 His Honour ordered that the Appellant's Notice of Objection be disallowed and that the Summons be dismissed with costs.

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p. 271

6. The Appellant carries on business in New South Wales, and elsewhere throughout Australia, under the registered business name of "Weight Watchers". At all material times it held a franchise from Weight Watchers International Inc., a United States corporation.

p. 198

7. The franchise enables the Appellant to conduct classes in which people (called Members) are taught to change their eating habits and thereby reduce their weight. The programme taught in such classes was developed by Weight Watchers International Inc. and licensed exclusively to

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the Appellant in New South Wales. Trade secrets and techniques relating to the operation of such classes have been disclosed in confidence to the Appellant. The franchise granted was limited to the operation of Weight Watchers classes.

pp. 199-
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8. Under the franchise agreement the Appellant agreed to comply with a number of conditions including :

A. To help people lose and control weight by using only the programme and techniques developed by Weight Watchers International Inc. at classes presented by the Appellant. p. 201

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B. The presentation of such programme and techniques is to be made strictly in accordance with the Licences, Rules and Regulations promulgated from time to time by Weight Watchers International Inc. p. 201

9. During the period November 1973 to June 1977 ("the relevant period") the Appellant conducted its Weight Watchers programme pursuant to its franchise by engaging lecturers who conducted meetings attended by persons who were

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overweight. Lecturers were recruited from persons who had themselves attended Weight Watchers classes and who had received additional training according to the method developed by Weight Watchers International Inc. and contained in the training book given by the Appellant to all lecturers.

pp.207-
208

10. The Appellant's business during the relevant period was conducted by various area managers responsible to the General Manager. In addition supervisors and clerical staff were employed by the Appellant in its business. It is not disputed that such persons are employees. p.207 10
11. The lecturers were mainly female. Most of the meetings were conducted during the evening, by lecturers who either engaged in full-time employment (not being employment by or with the Appellant) or attended to domestic duties during the rest of the day. p. 209
12. During the relevant period the number of meetings held each week throughout New South Wales varied. In the last week of the period there 20

were 200 meetings conducted by approximately 89 lecturers and slightly more than 8,400 members participated in the programme and attended those meetings. The number of persons attending each meeting varied but usually ranged from approximately 15 to 50.

p.210

13. During the period November 1973 until some time in 1977, lecturers were engaged by the Appellant under agreements in similar form. pp.9, 215
That form of agreement is reproduced in the Record. Agreements in that form remained in use until 1977. During April 1977 the Appellant reviewed the form of lecturers' agreement and adopted a new form of agreement which varied somewhat from that previously in use. This latter form is reproduced in the Record. pp.26-32 10 p. 41-48

14. The first lecturers' agreement provided inter alia :

"4. The Lecturer is not an employee of the (Appellant) and shall perform her duties free from the direction and control of the (Appellant) providing she follows the Weight Watchers Lecturers Handbook distributed by Weight Watchers of New York and she will attend without payment one Saturday meeting of lecturers per month at which she will inter alia be weighed."

p. 28

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15. The second agreement provided inter alia :

"3. The lecturer is not an employee of the (Appellant) but is an independent contractor and shall perform her duties free from the direction and control of the (Appellant) and she will attend without payment one Saturday meeting of lecturers per month at which she will inter alia be weighed."

p. 44

16. Members paid weekly subscriptions which were collected at the meetings by the lecturer. The meeting was conducted by the lecturer with the help of a weigher and a recorder. Weighers and recorders were usually recruited from members; and their selection was the responsibility of the lecturer.

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p. 210

17. The first (Clause 5(f)) and the second (Clause 4 (e)) lecturers' agreements required the lecturer to account to the Appellant for subscriptions received from members of each class and to deposit the net receipts to the credit of the Appellant's bank account.

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pp. 29,44

18. Lecturers did not receive any payments from the Appellant, but deducted any honoraria and commission payable to them in respect of their Weight Watchers meeting from the membership

subscriptions received at the meetings conducted by them. The agreements referred to in paragraph 13 above provided for certain sums to be paid to lecturers in respect of each meeting conducted. The sum payable varied according to the lecturer's experience and the number of members attending the meeting.

p. 14

pp. 28, 43

19. The 1973 agreement was introduced because certain trades unions in N.S.W. had attempted to induce the lecturers to become members and had insisted upon addressing a meeting of lecturers upon one occasion. The lecturers had rejected that approach. The Chairman of the Appellant then investigated what provision other franchisors (including the English Weight Watchers) made in relation to the status of lecturers; the English format was virtually copied. (With some exceptions not relevant here, only employees can belong to unions in N.S.W.) Another reason for the change was that the Appellant's organisation was growing and spreading to country areas; and administrative problems developed. In particular it was found that payments to lecturers were considerably delayed if the

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pp. 141, 238

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money had to be sent to them after collections had been forwarded to the Head Office. The change in the form of agreement was not made because of any desire to avoid Pay-Roll Tax.

pp. 237,
238,
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20. The Appellant relies upon the following findings of fact made by Woodward J. :

(a) The agreement was not a sham.

The lecturers were not parties to a sham. p.236

(b) The method of conducting the meetings was described in documents prepared by the American franchisor and issued to the Appellant pursuant to the franchise agreement and distributed to lecturers at the training workshops.

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p.210

(c) There is nothing to suggest that the lecturers were required to conduct a meeting in a particular fashion.

p.212

(d) There was nothing to suggest that the Appellant sought to interfere from time to time by the issue of directives with the method in which the lecturers conducted meetings.

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p.232

(e) The provisions of the lecturers' agreements which stipulate that the lecturer is not an employee of the Appellant reflect the common intention of the

parties that the lecturer should not be an employee of the Appellant.

pp. 235,
236

(f) It appeared from the evidence of the Chairman of the Appellant that lecturers were in a position somewhat different from an employee. The instructions that were given to them would be accepted by reasonable persons in the position of the lecturers as common sense advice as to how to make a success of what they were doing.

pp. 241-
242

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(g) The relationship that must exist between payer and payee of the moneys sought to be brought to tax is that of employer and employee, or master and servant, and the existence of that relationship must be found in accordance with the principles of common law.

p. 255

ISSUES IN THE APPEAL

21. The issues in the appeal are :

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(a) Whether the amounts assessed by the Respondent as wages for the period 1st November 1973 to 30th June 1977 were

received by persons who were employees of the Appellant.

- (b) Alternatively, even if such persons were employees whether the payments received by them were wages as defined by the Pay-Roll Tax Act 1971.
- (c) Alternatively, if they were wages as defined by the Act, whether they were paid or payable by the Appellant.

THE LEGISLATION

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22. The Pay-Roll Tax Act 1971 (N.S.W.) follows closely the form of the Pay-Roll Tax Assessment Act 1941 of the Commonwealth which was repealed in 1971 pursuant to an agreement between the Commonwealth and New South Wales and the other States of Australia.

23. By Section 7 of the Pay-Roll Tax Act pay-roll tax is imposed on all taxable wages. The tax is payable by the employer by whom the taxable wage is paid or payable :

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Section 8. Taxable wages are specified in Section 6.

24. "Employer" is defined in Section 3(1) as "any person who pays or is liable to pay any wages ..."
- "Employee" is not defined.
- "Wages" are then defined as "any wages, salary commission, bonuses or allowances paid or payable ... to an employee as such and without limiting the generality of the foregoing, includes ... payments to persons in positions analogous to employees."

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25. The N.S.W. Court of Appeal in Commissioner of Pay-Roll Tax v. Sentry Life Assurance Corporation Limited (1980) 2 NSWLR 898 held that the words in the definition of "wages" following the general introductory words are words of extension and, at least in the case of insurance agents in paragraph (d), apply to persons working under a contract as well as employees strictly so called. See Reynolds JA. at 900 para. 6,7; Glass JA. at 905, para. 22 and Mahoney JA. at 906. (On appeal to the Privy Council, (1982) 42 ALR 365, this question was not adverted to).

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SUBMISSIONS ON THE FIRST ISSUE

26. Notwithstanding the importance of the power of

control, there is no magic touchstone for distinguishing between a contract of service and a contract of services. The Court looks at a number of indicia and answers them pro and con: See AMP Society v. Allen (1977) 16 SASR 237 at 247 and on appeal to the Privy Council, sub nom, AMP Society v. Chaplin (1978) 18 ALR 385 at 387.

27. It is not legitimate to use as an aid in the construction of a contract anything which the parties said or did after it was made, although it may have been amended or varied by subsequent action : see Whitworth Street Estates Ltd. v. Miller (1970) AC 583 at 603 E; Wickman Tools v. Schuler A.G. (1974) AC 235 and AMP Society v. Chaplin (supra) at 392. 10
28. It was not submitted below, nor did His Honour find, that either of the lecturers' agreements had been amended or varied by subsequent actions.
29. Where the relationship between parties to a contract is capable of being either one of service or for services, the parties are entitled to determine by their contract what it will be : 20

Massey v. Crown Life Insurance Co. [1978] 1
WLR 676; AMP Society v. Chaplin (supra) at
389-390.

30. It is submitted that if a person makes his intention not to be an employee sufficiently clear, the implications that would normally arise from implied terms do not override the prime object of the bargain. See the minority judgment of Lawton LJ. in Ferguson v. John Dawson & Partners (Contractors) Ltd. [1976] 1
WLR 1213 at 1224 etc., particularly at 1225
B-D and 1226 H- 1227 A.

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31. The relevant facts disclosed :

(1) Implicitly that the Appellant did not
make PAYE deductions for income tax.

pp. 145,
226

(Such deductions are required in the case of
employees : see Section 221 C Income Tax
Assessment Act 1936 (Cth)).

(2) A lecturer, Mrs. Santea, called on behalf of the Appellant, said that she did not receive any fee for preparation before the lectures she gave, nor was she paid for any setting up period before the lecture.

p. 224

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It is submitted that her evidence can be regarded as applicable to lecturers generally.

32. The extent to which an alleged employer has the right to control the manner in which work is carried out is always an important consideration in determining whether a contractual relationship is that of master and servant. But control is present in some degree in most contracts for the performance of work; and generally the court must examine the relationship between the parties as a whole in order to determine whether a contract of service exists. AMP Society v. Chaplin (1978) 18 ALR 385 at 387; Market Investigations Ltd. v. Minister of Social Security [1969] 2 Q.B. 173 at 183D-185B. Thus while an agreement may reserve to one party very considerable powers of direction, the extent to which that power is in fact exercised or other factors apart from control may reveal that the substance of the relationship is that the parties are independent, i.e. are not in a master and servant relationship : see, e.g. Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance [1968] 2 Q.B. 497 at 515F-516B,

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516G-518B; Queensland Stations Pty. Ltd. v. Federal Commissioner of Tax (1945) 70 C.L.R. 539 at 552 per Dixon J.

33. In the present case Woodward J. laid great stress on the explanatory materials and directions contained in the Weight Watchers Lecturers' Handbooks as indicating that the Appellant retained a high degree of control over the lecturers. But the special character of the business which the Appellant was franchised to operate and the work undertaken by the lecturers in relation to that business raise distinctive problems which the control test does not, by itself, satisfactorily resolve. pp.262, 268

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34. The methods developed by Weight Watchers International Inc. to assist members to lose and control weight include an elaborate system for checking a member's progress towards a 'goal weight' and reinforcing that member's efforts to reach his or her individual goal. Those methods are described in the Lecturers' Handbook; and a lecturer would learn how to apply them partly from experience as a Weight Watchers member or lecturer and partly from p. 204

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the Lecturers' Handbook and other information supplied by the franchisor through the Appellant. The main role of a lecturer is to guide and help motivate members by using the methods so learned. The Handbooks and the other materials in which they are described are not so much a medium of control as a source of proven techniques on which the lecturers drew in order to make a success of what they were doing. See Commissioner of Pay-Roll Tax v. Mary Kay Cosmetics Pty. Ltd. [1982] V.R. 871 at 880.

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pp.241-
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35. The position of the lecturer engaged by the Appellant is thus markedly different from, for example, that of the interviewers in Market Investigations Ltd. v. Minister of Social Security (supra) or the land salesmen in Federal Commissioner of Taxation v. Barrett (1973) 129 C.L.R. 395; 2 A.L.R. 65. The tasks which the interviewers in the former case were required to carry out involved no special knowledge and the directions given to them in respect of the conduct of interviews were couched in imperative terms. See [1964] 2 Q.B. at

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185E-186B. In Barrett's case the salesmen were in the exclusive service of the employer firm and were subject to close and regular supervision. See 129 C.L.R. at 406-407. Although the salesmen may have enjoyed a certain latitude to deploy individual sales techniques, they did not apply any other special skill and otherwise were under a direct form of control that has no parallel in the present case.

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36. It is submitted that the proviso in Clause 4 of the first form of lecturers' agreement (reproduced in paragraph 14 above)
- (1) does not qualify the express stipulation in the first part of that clause that the lecturer is not an employee of the Appellant, and
 - (2) does not purport to impose a requirement that the Lecturers' Handbook be followed strictly.

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And, in any case, the proviso did not form part of any subsequent lecturers' agreements.

37. It is further submitted that the power of

termination without notice contained in clause 1(b) of the lecturers' agreements is entirely consistent with the relationship of principal and independent contractor. Moreover nothing in the evidence suggested that in practice this power was used as a means to enforce compliance with the methods set out in the Handbooks; or that the Appellant otherwise sought through the issue of directions or the intervention of its supervisors to enforce such compliance.

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Mr. Jamieson (Chairman of the Appellant) made a practice of attending meetings conducted by lecturers; but he did not interfere with a lecturer's conduct, even when mistakes were made; and he did not try to insist on observance of the recommendations in the Handbook.

pp.231-240

p. 239-240

38. Questions relating to control must be weighed along with other factors and, in particular, with the question whether the alleged employee has a substantial responsibility for management and an opportunity of profiting from sound management in the performance of his tasks. See Montreal v. Montreal Locomotive Works Ltd. [1947] 1 D.L.R. 161 at 170, P.C., and Market Investigations Ltd. v. Minister of Social Security supra

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184H-185B. The evidence of Mrs. Santea, a lecturer called on behalf of the Appellant, showed that lecturers undertook substantial responsibilities for arranging the venue of meetings; for preparing lectures and setting up premises which were used for meetings; and for choosing and supervising weighers and recorders who assisted them at such meetings. For these tasks, for time spent in preparation for lectures, and for attendance at lecturers' meetings and training sessions, lecturers received no remuneration. Payment instead depended on the lecturer's experience and the number of members above 40 (or, under the later form of agreement, 35) who attended each meeting. It is submitted that these facts indicate that lecturer's remuneration depended to a significant degree on individual management and initiative; and that such facts are fully consistent with the existence of a contract for services.

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pp. 80-83,
208-209,
224-228

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39. The relationship between the lecturers and the Appellant is not one which finds any close factual parallel in the reported cases on the present subject. If it is regarded as a

relationship which is not easily or readily categorised, the designation attached to the relationship by the parties in their contract carries considerable weight. See B.S.M. (1257) Ltd. v. Secretary of State for Social Services (1978) I.C.R. 894; Massey v. Crown Life Insurance Ltd. [1978] 1 W.L.R. 676 at 579 per Lord Denning M.R.;, AMP v. Chaplin supra at 389-390.

40. In the present case the evidence disclosed nothing which suggested that the expressed intention of the parties was solely a device to gain any tax advantages: cf. Ferguson v. Dawson (Contractors) Ltd. [1976] 1 W.L.R. 1213 at 1222, 1230. On the contrary, the evidence showed that the forms of lecturers' agreements were adopted for bona fide commercial reasons. pp.237-239 10
41. It is submitted that the relationship between the Appellant and the lecturers was clearly not the relationship of master and servants. The lecturers' agreements, placed in their factual context and properly interpreted, do not create a contract of service. 20

SUBMISSIONS ON THE SECOND ISSUE

42. The moneys received by the lecturers are not

"wages" as defined by Section 3(1) of the Pay-Roll Tax Act because lecturers are required to account to the Appellant for the net money received from members attending the classes after payment of the lecturers' remuneration and other expenses. See Doggett v. Waterloo Taxi Cabs Ltd. (1910) 2 KB 336 at 340 per Cozens Hardy MR. Also Queensland Stations 547 per Latham CJ.

43. The obligation of the lecturers to so account 10
arises directly from the terms of the lecturers' agreement, or alternatively by variation of those agreements arising out of the actions of the parties.

SUBMISSIONS ON THE THIRD ISSUE

44. It is submitted that in imposing tax upon the employer "by whom the taxable wage is paid or payable" Section 8 of the Act only taxes payments made or payable directly by the employer.
45. It is submitted that the moneys in respect of 20
which tax has been imposed in the present case are not made or payable directly by the employer.