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 RESPONDENT

Solicitors for the
(Plaintiff)Appellant

Baker & McKenzie,
50 Bridge Street,
Sydney. N.S.W. Australia

Tel.231.5488

Solicitor for the
(Defendant)Respondent

H. K. Roberts,
Crown Solicitor,
Goodsell Building,
8-12 Chifley Square,
Sydney. N.S.W. Australia

Tel. 238.0555

London Agents for the
Respondents:
Lovell, White & King,
21, Holborn Viaduct,
London, EC1A 2DY.

Tel: 236 6011

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	RECORD	
1. This is an appeal from an order made on 6th November 1981 at first instance by the Administrative Law Division of the Supreme Court of New South Wales constituted by Mr. Justice Woodward.	Vol. 1 p.271	
Final leave to appeal was granted by Supreme Court on 23rd February,1982 Appeal lies as of right having regard to the amount in issue. There has been no intermediate appeal.	Vol. 1 p.272	10

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2. The appellant carried on business under the name "Weight Watchers" pursuant to a franchise agreement with Weight Watchers International Inc. of New York. The franchise agreement and amending agreements are Exhibit A. The appellant conducted a Weight Watchers programme by engaging the Lecturers to conduct meetings attended by persons who were over-weight (called members). The remuneration of the Lecturers gave rise to this litigation.

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3. By a Notice dated 26th June 1978 a delegate of the Commissioner of Pay-roll Tax notified the appellant that the appellant was liable to pay further pay-roll tax of $26,901.00 together with additional tax (in the nature of a penalty) under Section 18(5). The further pay-roll tax was calculated by reference to remuneration of lecturers who conducted Weight Watchers meetings. The sums so paid to lecturers were $94,352.32 in the period 1st November 1973 to 31st August 1974 and $453,102.94 in the period 1st September 1974 to 30th June 1977.

Vol 1 p. 50

4. The appellant made an objection in writing to the respondent on 24th August 1978. The respondent disallowed the objection and the appellant appealed to the Administrative Law Division by Summons dated 5th October 1978 and claimed an order that its objection be allowed.

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5. The hearing occupied five days, 17th, 18th and 19th November 1980 and 6th and 7th October 1981. The appellant tendered affidavit and oral evidence of Richard Bruce Jamieson its Chairman of Directors and of Beatrice Santea one of the Lecturers. No issue arose as to any matter of accounting or calculation. Mr. Justice Woodward published his reserved judgment on 6th November 1981, and made the order under appeal the consequence of which is that the appellant's liability to pay-roll tax was confirmed.

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6. Pay-roll tax was levied in Australia by Commonwealth legislation from 1941 until 1971, when each State Parliament legislated for pay-roll tax. The State legislation generally follows the scheme of the Commonwealth legislation and there are numerous parallels among the enactments of the States. The legislation relevant to this appeal is the Pay-roll Tax Act, 1971 of New South Wales, as amended from time to time.

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7. By section 7 of the Pay-roll Tax Act, 1971, pay-roll tax is imposed on all taxable wages. Section 8 provides that it shall be paid by the employer by whom the taxable wages are paid or payable. What are taxable wages is specified in section 6. "Employer", "Wages", and "taxable wages" are defined expressions: section 3(1).

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8. Before Mr. Justice Woodward the appellant contended that the issues were:- first, whether the persons who received the moneys assessed by the respondent as taxable wages, they being the Lecturers, were employees of the appellant; secondly, if they were, whether the moneys which they received were "wages" as defined by the Pay-roll Tax Act, 1971; thirdly, even if both the preceding issues were found in favour of the respondent, whether the moneys were paid or payable by the appellant within the meaning of that Act. Mr. Justice Woodward determined in favour of the respondent:

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- on the first issue, — Vol 1 p. 264
- and on the second and third issues. — Vol 1 p. 270

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9. The respondent accepted that those questions were in issue and also contended (the fourth issue):-

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that the existence of a relationship of employer and employee at common law is not essential and that moneys may be "wages" as defined even though there is no such relationship. Mr. Justice Woodward rejected this contention. Vol 1 p. 255
The submissions on this issue are set out at 33 infra.

10. Lecturers engaged by the appellant were required to sign agreements prepared by the appellant. These agreements were in the form Annexure A to Mr. Jamieson's affidavit (Vol 1 p. 26) from 1st November 1973 until some time in 1977 when Annexure C was adopted (Vol 1 p. 41). (Annexure B was used without the appellant's authority in a few cases). These forms make declarations to the effect that the Lecturer is not an employee - clause 4 of Annexure A (Vol 1 p. 28). and also in the later document that the lecturer is an independent contractor.
- Clause 3 of Annexure C (Vol 1 p. 44). The respondent contends that these attempts to fix labels to the relationship do not correctly describe the relationship, and are not effective. See <u>Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance [1968] 2 Q.B. 497 at 512-13</u>.

11. On the facts found, the relationship is not ambiguous and the use of the label is ineffective to resolve any doubt as to the nature of the relationship. Mr. Justice Woodward found that there was no ambiguity or uncertainty as to the true relationship. It is unnecessary (Vol 1 p. 262) for the determination of this appeal to establish whether it is relevant that the appellant used the "label" that the propositus was "not an

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employee of the company" though there may be some difference in emphasis between English tests and Australian tests on the value of such a label (cf. Massey v. Crown Life Insurance Co. [1978] 1 W.L.R. 676 and A.M.P. Society v. Allan (1978) 52 A.L.J.R. 407) on the one hand with cases such as R. v. Foster; Ex Parte The Commonwealth Life (Amalgamated) Assurances Ltd (1952) 85 C.L.R. 138, 151; Ex parte Robert John Pty. Ltd; Re Fostars Shoes Pty. Ltd (1963) S.R. (N.S.W.) 260, 267-9 and cf. Gurfinkel v. Bentley Pty. Ltd. (1966) 116 C.L.R. 98 at 114 and Price v. Grant Industries Pty. Ltd. (1978) 21 A.L.R. 388, 393.

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12. The parties' declaration of the character of their relationship is a statement of law, or about the application of legal tests to their contractual relationship. As a statement about the law the declaration cannot bind the Court; it is inherently incapable of answering the question which it purports to answer: it can assist the Court to see the answer but not because the Court applies the parties' declaration.

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13. Apart from the declarations that the Lecturer is not an employee, and that the Lecturer is an independent contractor, the appellant's forms of agreement contain practically nothing which prescribes what the relationship is to be by stating expressly what control the appellant is to have over the manner in which the Lecturer performs her work; or what exemption from control the Lecturer is to be entitled to have. Those things were left unstated by the parties and were left by them to be determined from their conduct: the only possible source alternate to treating their agreement as ineffective because it

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does not state them.

14. In the instant case we are not faced with the problem as to what evidence outside the written agreement is admissible (cf Wickman Machine Tool Sales Ltd. v. L. Schuler A-G [1974] A.C. 235) because -

(a) We are here concerned not with construing a contract but with what the terms of the contract really were.

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(b) The appellant called and relied on evidence showing what the relationship was in operation and both parties relied on that material.

(c) The issue was what was the actual relation between the parties during the period to which the assessment relates; and

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(d) The written documentation was obviously incomplete on its face so that it was necessary to fill in with reference to conduct. See e.g. Liverpool C.C. v. Irwin [1977] A.C. 239 at 253-4 and Ferguson v. Dawson & Partners [1976] 1 W.L.R. 1213 at 1221E.

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15. Accordingly, the Court looks at the nature of the relationship by looking at the whole of the writings, actions and positions taken by the parties to the relationship relative to each other in the exercise of control and in conforming with control in carrying out the activity or in managing the organization and in participating in the organised activities.

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16. If the matter raised by the preceding paragraph is correctly

determined by the terms of the parties' document, the whole of what is to happen according to the document should be regarded and in the present case when those things are regarded there is no ambiguity and the labels are either incorrect or have no significance.

17. The respondent contends that in this case the true effect of an attempt to affix a label or title to the relationship is to arouse misgivings and stimulate inquiry as to what legal complexion the relationship truly wears. See R. v. Foster ex parte The Commonwealth Life (Amalgamated) Assurances Ltd (1952) 85 C.L.R. 138, 151. 10

18. The effect of a label as between the parties to an agreement which adopted the label is different to its effect where the rights of the Revenue or of some other person is affected by the character of their relationship. The parties to a document may be estopped from contradicting the terms of their document in litigation between themselves, or they may be restricted by their agreement to the conventional view of the nature of their relationship. Having regard to the control which in fact is exercised, the compliance which is achieved and the company's need to ensure compliance with the terms of its franchise, the label used is an incorrect statement about the relationship between the parties. 20 30

19. The question in this case is the proper relationship between the appellant and its lecturers. The proper characterisation of that relationship is a matter of law once the relevant provisions of the contract and the relevant conduct 40

RECORD

of the parties under the contract are ascertained. Price v. Grant Industries Pty. Ltd. (1978) 21 A.L.R. 388, 393; Australian Timber Workers Union v. Monaro Sawmills Pty. Ltd. (1980) 29 A.L.R. 322, 324.

20. Although, of course, the power of the Board to review the decision below is unlimited, the Board should not review the Judge's decision on the question of "contract of service or no" unless 10

(a) there was no evidence upon which he could reach his conclusion, or

(b) it contains a false proposition of law ex facie. cf. Global Plant Ltd. v. Secretary of State for Social Services [1972] 1 Q.B. 139 at pp. 152-5. 20

21. Mr. Justice Woodward's decision on the facts was reached upon extensive consideration of the evidence in a reserved judgment after a hearing of five days in which the plaintiff's evidence was presented fully and cross-examination was lengthy. Mr. Justice Woodward found the following to be facts.

(a) Continuance of the franchise from Weight Watchers International Inc. depends on observance of its terms, and the obligation to observe its terms must in some way be imposed on the lecturers. 30 — Vol 1 pp. 198,199

(b) The plaintiff conducted the training of its lecturers according to a method communicated by Weight Watchers International Inc. to the plaintiff and set out in the training handbook given by the plaintiff to its lecturers. 40 — Vol 1 pp. 206, 207

RECORD

(c) Trainee lecturers received instructions on how to conduct meetings of classes from training managers, the area manager or a supervisor; they were taught the technique of conducting Weight Watchers meetings and they were also taught the Weight Watchers system of weight reduction and control and the programme to be followed by members. The trainees were instructed in the use to be made of various publications and literature supplied by the plaintiff. — Vol 1 p. 208

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(d) From time to time the plaintiff held re-training workshops, their purpose being to communicate new information and techniques. Each month except December the plaintiff conducted a Lecturers' Meeting; most but not all lecturers attended; they were weighed and if they were over their goal weight by 2 pounds they were not permitted to conduct meetings until they reduced their weight to their goal weight. — Vol 1 p. 209

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(e) The method of conducting the meetings was provided for in documents issued to the plaintiff pursuant to the franchise agreement and distributed to lecturers at the training workshops, and also from time to time by direct supply. — Vol 1 p. 210

(f) The conduct of each meeting followed a pattern no doubt set by the plaintiff; generally the lecturer was left to conduct the meeting in accordance with a scheme propounded to the lecturer by the plaintiff; if a lecturer failed to conduct

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a meeting in accordance with the standards set by the plaintiff a report from the supervisor might well have resulted in the lecturer ceasing to occupy the position; the very scheme of the Weight Watchers programme was such that it must be adhered to and the lecturers would be required to adhere to it for the conduct of the meetings. 10

Vol 1 pp. 212, 213

(g) Although the lecturer prepared a theme for discussion at the meeting that theme was in accordance with the directions of the plaintiff.

Vol 1 p. 213

(h) In the preparation of visual aids and in the presentation of the material at each lecture the lecturer was confined to and was acting in accordance with instructions from which there was no right of deviation. 20

Vol 1 p. 231

(i) If the lecturers in following the instructions given to them in their training had success it must be because they had complied with the directions because they had realised from the results that the outlines and instructions given to them were capable of producing the required results. The plaintiff had the right or power to direct lecturers how to conduct their classes. 30

Vol 1 p. 232

(j) It may be said that the lecturers were employees because having been directed to hold a module class followed in the next week by a feedback class with the procedure repeated for six weeks at the end of which it was 40

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followed by a link-up class they had, in following that procedure, accepted the situation that they were bound to observe the directions of the plaintiff. — Vol 1 p. 233

(k) That the procedure was both logical and sensible because amongst other things it enabled a person doing the programme to be sure of continuity if moving about the State, or indeed Australia, was not the only reason why the lecturer adhered to it. Perhaps the lecturer felt he or she had little alternative but to do so. — Vol 1 p. 233

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(l) The lack of supervision at the meetings rather indicated an assurance on the part of the plaintiff that it needed only to tell the lecturers what they should do in order to secure adherence to the directions. — Vol 1 pp. 233, 234

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(m) What the plaintiff sought to do was, by a series of instructions and supply of information, to ensure that its operation which had then proved to be successful, would continue to be so, that its popularity would increase, that it would have considerable goodwill and support in the area in which, to it, such support would be profitable and that its object be achieved by encouraging its lecturers upon whom such success depended to behave in a fashion which would do nothing to diminish the likelihood of such success. — Vol 1 p. 236

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(n) The lecturer must carry out her duties or obligations as a lecturer in a proper manner

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and cannot fail to do so without control and without the risk. of her engagement being terminated. Her weight must not be excessive. Vol 1 p. 261

(o) The statement that the lecturer shall perform her duties free from the direction and control of the company is subject to a proviso which renders the statement of such freedom valueless. The price of such freedom is that she follows the Weight Watchers Lecturers Handbook distributed by the American company and will attend without payment once per month at a Saturday meeting of the lecturers at which she will be weighed. Vol 1 p. 262

(p) If one were to apply the organization test there could be no doubt that in this case the relationship of employer and employee is established. However it does not require the application of that test to establish such. Vol 1 p. 263

(q) It is inherent in the arrangement that the lecturer would be required to be available for regular meetings for the purpose of maintaining control over the attendance and activities of the members of particular classes. Vol 1 p. 264

(r) The lecturer cannot be said to be a person who is performing services in business on her own account. Vol 1 p. 264

(s) The plaintiff is an employer of each lecturer within the meaning of the Act. Vol 1 p. 264

(t) While the lecturers are given scope for individual initiative they remain very much a part of

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the plaintiff's organization, they are subject to control in respect of the matters referred to. — Vol 1 p. 264

(u) While there is little evidence of detailed supervision, its absence is not so much an indication of lack of the right to control as of an efficiently organized business. — Vol 1 pp. 264, 265 — 10

(v) With the right to terminate, such as it was, the plaintiff was clearly able to control not only the task allotted to the lecturer but the manner in which the task was performed. — Vol 1 p. 268

22. On the First Issue Mr. Justice Woodward held on the facts which he found that the persons concerned were employees. It is submitted by the respondent that this finding was clearly open to His Honour and that no appealable fault can be found in it. — Vol 1 pp. 255 to 269 — 20

23. Mr. Justice Woodward looked at the various tests for master and servant and virtually held that whether he applied what is popularly known as the control test or ultimate control test or the test as to whether the propositus was an integral part of the appellant's organization, there was such ability to direct the propositus' actions by the appellant that the propositus was an employee. — 30

24. It is accordingly unnecessary in this appeal to consider whether there is any difference as a matter of law as to which test is nowadays the appropriate one for deciding whether a person is an employee. The learned Judge considered all the possible tests and factors and indeed was referred in argument to the — 40

RECORD

various factors which courts have traditionally looked at as guidance as to whether there is an employer/ employee relationship as set out for instance in Atiyah Vicarious Liability In the Law of Torts Chapters 5 and 6. See also Federal Commissioner of Taxation v. Barrett (1973) 129 C.L.R. 395; Fall v. Hitchen [1973] 1 W.L.R. 286 and Humberstone v. Northern Timber Mills (1949) 79 C.L.R. 389. 10

25. His Honour's decision on the facts was unexceptionable. In particular the following factors indicate that there was no other decision possible:- Vol II p. 275

(a) The franchise agreement, Exhibit A, the agreement with the lecturer, Exhibit B, the lecturer's handbook, Exhibit U all indicate that the lecturer has virtually no freedom about the way she conducts herself. 20

(b) The lecturers in fact obeyed the rules. Mrs. Santea Vol 1 p. 99, 117 Jamieson Vol 1 p. 151 to p. 152

(c) There was an organization to police the rules in that there was an area manager supervisor and trainers, lecturer weighers and tally clerks. There were regular meetings of lecturers and supervisors visited meetings of members regularly. Vol 1 p. 95 to p. 96 30

(d) The lecturers were required to keep a close identity of the order of presentation and the material presented because of movement of members from class to class. Materials are provided without charge to lecturers, Ex. Q - this includes ballpoint pens, carbon paper etc. and the Vol 1 p. 102 to p. 103 40

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lecturer is even reimbursed for phone calls. As to the significance of this case see Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance [1968] 2 Q.B. 497, 523A.

(e) Supervisors in fact "encourage" and "discipline". They attended meetings to do this and the Managing Director also attended meetings. — Vol. 1 pp.169 to 172; 185, 188, 189

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(f) Dress, deportment and weight are controlled, e.g. the lecturer is not allowed to sit or smoke , weight is controlled (Ex. B) and as to dress, Mr. Jamieson said it was controlled, although Mrs. Santea denied this, but for the reason that she dresses well in any event. — Vol 1 p.170 to p. 171; Vol 1 p. 155 Vol 1 p. 194 to p. 195 Vol 1 p. 83

(g) There is in fact control. Compliance is achieved. The methods of "encouragement" show that the tenets and discipline do have effect and are observed by lecturers. Note what happened to the "religious lady". — Vol 1 p. 136, 151, 152, 154, 155, 156, 157, 158, 159 Vol 1 p.150 to 154, 189, 190, 191, 192, 194

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(h) The money paid to lecturers is more than an ex gratia payment. Indeed, the tally sheets, Ex. O and the members' agreements, Ex. L and W show the moneys clearly belong to the appellant and that the lecturer is entitled to her fee. Ex. B. See also Mrs. Santea and Mr. Jamieson Vol 1 p. 174, 175 Cf. Hobbs v. Royal Arsenal Co-operative Society Ltd (1930) 23 B.W.C.C. 254 — Vol 1 p. 87, p. 174 175 Vol 1 p. 132, 133, 134

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(i) The job of the lecturers is to present the appellant's material not just to get the result. As to the significance

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of this, see the Humberstone Case (1949) 79 C.L.R. 389, 396 the Ready Mix Case [1968] 2 Q.B. 497, 524E and Commissioner of Payroll Tax v. Mary Kay Cosmetics Pty. Ltd. [1982] V.R. 871.

(j) The lecturer is limited to the company's literature; after the module meeting there is always a feedback meeting: lecturers have to live the module and instructions and there is to be no variation. — Vol 1 pp. 98,99,100; Vol 1 pp. 104, 105; Vol 1 p. 115, 124, 125; Vol 1 p. 136

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(k) The company must ensure control and achieve compliance if it is to meet the conditions of its own franchise Ex. A.

26. If one goes through Atiyah's list of significant factors all 14 of them in Chapter 6 of his Vicarious Liability one can see that the majority of the tests show that this is employment in the instant case and see also the case nearest the present in point of fact, Market Investigations Ltd v. Minister of Social Security [1969] 2 Q.B. 173 applied in Fall v. Hitchen [1973] 1 W.L.R. 286.

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27. It is also significant that the lecturers were not persons in business on their own account, see Market Investigations Ltd. v. Minister of Social Security [1969] 2 Q.B. 173 at p. 184, W.H.P.T. Housing Assn. Ltd v. Secretary of State for Social Services [1981] I.C.R. 737 at p. 744.

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28. The appellant strongly relied on the right of substitution of lecturers and the fact that the lecturer paid her weighers. As to substitution the evidence was really unclear as — Vol 1 p. 16

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to who arranged it, see Jamieson's affidavit, para. 37. Mrs. Santea Mr. Jamieson's evidence. In any event, a right to substitute is not necessarily conclusive and was not so in this case, see Deputy Commissioner of Taxation v. Bolwell (1967) 1 A.T.R. 862, 869-70; Neale v. Atlas Products (Vic) Pty. Ltd (1954) 94 C.L.R. 419 and Atiyah op. cit. p. 59. It was also most significant that on permanent vacancies the appellant selected the replacement.

Vol 1 p. 116, 117
Vol 1 p. 195

Vol 1 p. 178, 179   10

29. The fact that the lecturer paid the weighers was no more significant in this case than a removalist who calls at a local hotel under instructions to get a mate to help him unload. Really the lecturer is no more than the agent of the appellant to hire the weigher on their behalf and to pay him out of moneys of the appellant available to her. See e.g. Bobbey v. W.M. Crosbie & Co. Ltd (1915) 114 L.T. 244 and Atiyah op. cit. p. 60 and cf. member of a butty-gang. Atiyah at p. 60 the cases noted in footnote 5 and McHale v. Park Royal Woodworkers Ltd (1947) 40 B.W.C.C. 14.

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30. Other relevant factors are -

(a) There is a settled permanent relationship between the parties, see e.g. the case of Valma McDonald Lecturer No. 13 (even though she does not believe in the module system. As to the significance of this, see Barrett's Case at 407.

Vol 1 p. 187, 188
Vol 1 p. 173, 174

(b) The lecturers also receive a commission on the sale of cookbooks etc. which they are obviously selling on account of the appellant, See Ex. O.

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31.

(a) The appellant is not assisted by the fact that each lecture may be differently presented because of the lecturer's skill or personality. In Zuijs v. Wirth Bros. Pty. Ltd (1955) 93 C.L.R. 561, 571 this is said to be a false criterion, see also Barrett's Case at 404.

(b) Schoolteachers are usually employees notwithstanding that all will present the material differently and there is a great difference in personality and skill. See e.g. Ryan v. Fildes [1938] 3 All E.R. 517, Zuijs' Case (supra) at 570 and Ramsay v. Larsen (1964) 111 C.L.R. 16.

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32. Accordingly on the principle of the Global Plant Case [1972] 1 Q.B. 139 at 152-5, the appeal on this point fails.

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33. Even if there was no employment in the strict common law sense, there may even still be employment under the Pay-Roll Tax Act because "employer" is defined in s.3(1) as a person who pays or is liable to pay any wages including the Crown and the definition of "wages" in the same sub-section shows that the category is wider than common law master and servant, see Commissioner of Pay-Roll Tax v. General Accident Fire and Life Assurance Corp. Ltd and Sentry Life Assurance Ltd [1980] 2 N.S.W.L.R. 898 esp. 900, 905.
(A matter not dealt with in the judgment of the Privy Council (1982) 56 A.L.J.R. 775).

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34. As to the Second Issue, the concept of wages under the Pay-Roll Tax Act is a very wide one indeed.

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See Murdoch v. Commissioner of Pay-Roll Tax (Vic.) (1980) 143 C.L.R. 629, 635 and Passim.

35. The definition of "wages" in s.3(1) is so wide that it encompasses all payments made to persons who are employees, see Federal Commissioner of Taxation v. J. Walter Thompson (Aust.) Pty. Ltd (1944) 69 C.L.R. 227, 234 and Murdoch's Case at 636, 639, 644. 10

36. The Judge was clearly correct in his holding that the payment was wages.

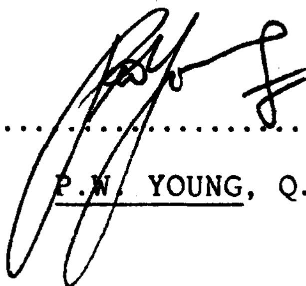
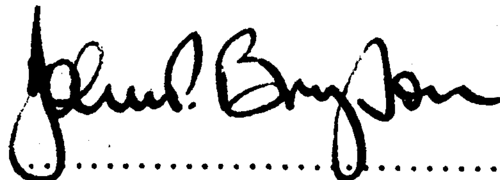
37. As to the Third Issue it is clear from the evidence that the appellant has the money in its power and that it is the appellant which owes the obligation to the lecturer and not vice versa.

Santea Vol 1 p.66,87
Jamieson Vol 1 p.21,22
174
Ex. B. cl.5(f)
Ex. D. cl.4(e) 20
Tally sheets, Ex.
Q.

38. "Students" are members of Weight Watchers, i.e. associates of the company. They do not have a personal relationship with the lecturer.

Vol 1 p. 8

39. For the above reasons this appeal ought to be dismissed.

P.W. YOUNG, Q.C. JOHN P. BRYSON

Counsel for the Respondent

D. West, Government Printer, New South Wales—1983