Privy Council Appeal No. 38 of 1982

Narich Pty. Limited *Appellant*

v.

The Commissioner of Pay-roll Tax *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH DECEMBER 1983

Present at the Hearing:

LORD KEITH OF KINKEL
LORD ELWYN-JONES
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN

*[Delivered by **Lord Brandon of Oakbrook**]*

The appellant in this case, Narich Pty. Limited ("Narich"), are franchisees throughout Australia of Weight Watchers International Inc., a New York corporation. The business of Weight Watchers, and of its various franchisees in different countries, including Narich in Australia, is to help people to lose excess weight, and, having done so, not to put it on again. The method of operation by which that business is carried on is by the conducting of classes, known as Weight Watchers classes. These classes are attended by persons desirous of losing weight, who are known as members of Weight Watchers and who pay fees in respect of their attendance at such classes. The immediate conduct of the classes is in the hands of lecturers, who impart to the attending members mainly oral instruction and advice in accordance with a detailed programme prescribed by Weight Watchers. So far as the business of Narich in Australia is concerned, the lecturers are persons, mainly women, chosen and trained by Narich, and receiving payments from Narich, in a manner to be described later, as remuneration for each lecture given by them.

[37] By a Notice dated 26th June 1978 a delegate of the Commissioner of Pay-roll Tax for New South Wales notified Narich that it was liable to pay further

pay-roll tax of $26,901.00 together with additional tax of $53,802.00 in the nature of a penalty. The further pay-roll tax concerned was calculated by reference to the remuneration of lecturers who took part in Weight Watchers classes of the kind described above. The amounts of remuneration so paid (which were not in dispute on this appeal) 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.

Narich, as it was entitled to do, made an objection in writing dated 24th August 1978 to this assessment of further pay-roll tax, on grounds to which reference will be made later. A summons dated 5th October 1978 raising the objection was later issued by Narich as plaintiff against the Commissioner of Pay-roll Tax ("the Commissioner") as defendant in the Administrative Law Division of the Supreme Court of New South Wales. The summons was heard by Woodward J. sitting as a judge of first instance.

A large body of evidence, both in affidavit form and oral, was put before the Court on behalf of Narich, with the consequence that the hearing lasted no fewer than five days. Subsequently, by an order dated 6th November 1981, Woodward J. disallowed the Notice of Objection to the assessment given by Narich, dismissed Narich's summons, and ordered Narich to pay the Commissioner's costs. By a further order of the same Court made on 23rd February 1982 final leave to appeal to Her Majesty in Council from the decision of Woodward J. was granted to Narich.

Liability for payment of pay-roll tax is imposed by the New South Wales Pay-roll Tax Act, 1971 ("the Act"). Section 1(2) of the Act provides that it shall be deemed to commence on 1st September 1971. Section 3(1) provides that certain expressions used in the Act shall, except in so far as the context otherwise indicates or requires, have certain specified meanings. The meanings so specified include:-

> "'Employer' - any person who pays or is liable to pay any wages;
>
> 'Taxable wages' - wages that, under section 6, are liable to pay-roll tax;
>
> 'Wages' - 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....."

Section 6(1)(a) of the Act provides, *inter alia* and subject to an exception which is not material, that wages liable to pay-roll tax are wages payable in New South Wales after the month of August 1971.

Section 7, which has been subsequently amended, deals with the charging, levying, collection and payment of pay-roll tax. Nothing in this appeal turns upon the precise provisions of that section, or of the subsequent amendments to it.

Section 8 provides that pay-roll tax shall be payable by the employer by whom the taxable wages are paid or payable.

The grounds of objection relied on by Narich in its Notice of Objection dated 24th August 1978 were these:-

(1) Neither the sums of $94,352.32 or $453,102.94 nor any part of them were wages, salary, commission, bonuses or allowances paid or payable to an employee or alternatively to an employee as such.

(2) Neither the said sums nor any part of them were:
(a) wages within the meaning of the Pay-roll Tax Act, 1971;
(b) wages liable to pay-roll tax under the said Act;
(c) taxable wages within the meaning of the said Act.

(3) 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 (which is denied), neither they nor any part of them were paid or payable by Narich as the employer.

It was common ground that the main question falling to be determined on this appeal was whether the nature of the contracts between Narich and its lecturers was that of contracts of service, under which the lecturers were employees of Narich, or that of contracts for services, under which the lecturers were independent contractors of Narich.

Subject to two subsidiary contentions put forward by Narich, to which reference will be made after the main question stated above has been resolved, it was conceded by Narich that, if the nature of the contracts between Narich and its lecturers was that of contracts of service, under which the lecturers were employees of Narich, then Narich was liable to pay pay-roll tax in respect of the payments made to them. By contrast it was asserted by Narich, but not conceded by the Commissioner, that, if the nature of such contracts was that of contracts for services, under which the lecturers were independent contractors of Narich, then Narich was not so liable.

In support of the view that the lecturers were not employees of Narich but independent contractors,

Narich relied strongly, as they might well have been expected to do, on a clause in the contracts concerned which purported by its express terms to establish the status of the lecturers as that of independent contractors and not employees. Despite this clause, however, Woodward J. held that, on the true construction of the contracts concerned as a whole, the status of the lecturers was that of employees and not independent contractors. The main task for their Lordships on this appeal is to decide whether he was right in so holding or not.

The question whether, in any particular case, a person, who does work for and receives remuneration in respect of such work from another person, is an employee or an independent contractor, is far from being a novel one, and there is a large number of authorities, both in Australia and England, concerning it. In their Lordships' view however, the principles of law relating to the determination of such a question are well settled, and no useful purpose is to be served by examining a congeries of reported cases, whether Australian or English, in which courts have, on the particular facts of the particular case before them, reached a result one way or the other by the application of those well settled principles.

The only authority to which their Lordships consider it desirable to refer in order to explain clearly the principles of law which are relevant is *Australian Mutual Provident Society v. Chaplin and Another* (1978) 18 A.L.R. 385 ("the A.M.P. case"). The issue in that case was whether the relationship between the appellant and the respondent was that of employer and employee on the one hand, or that of principal and agent on the other. There is, however, no difference between the principles of law applicable to a case of that kind and those applicable to a case of the kind concerned in this appeal.

The judgment of the Judicial Committee in the A.M.P. case was delivered by Lord Fraser of Tullybelton and is authority for three principles of law applicable to a case of the present kind. The first principle is that, subject to one exception, where there is a written contract between the parties whose relationship is in issue, a court is confined, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in the light of the circumstances surrounding the making of it; and it is not entitled to consider also the manner in which the parties subsequently acted in pursuance of such contract. The one exception to that rule is that, where the subsequent conduct of the parties can be shown to have amounted to an agreed addition to, or modification of, the original written contract, such conduct may be considered and taken into account by the court (see the A.M.P. case at pages 392-3).

The second principle is that, while all relevant terms of the contract must be regarded, the most important, and in most cases the decisive, criterion for determining the relationship between the parties is the extent to which the person, whose status as employee or independent contractor is in issue, is under the direction and control of the other party to the contract with regard to the manner in which he does his work under it (see the A.M.P. case at page 387).

The third principle relates to cases where the parties have, as in the present case, included in their written contract an express provision purporting to define the status of the party engaged under it, either as that of employee on the one hand, or as that of independent contractor on the other. With regard to a clause of this kind Lord Fraser of Tullybelton said in the A.M.P. case at pages 389-90:-

> "Clearly cl 3, which, if it stood alone, would be conclusive in favour of the Society, cannot receive effect according to its terms if they contradict the effect of the agreement as a whole. Nevertheless, their Lordships attach importance to cl 3, and they consider that the following statement by Lord Denning MR in *Massey v. Crown Life Insurance Co.* [1978] 1 W.L.R. 676 correctly states the way in which it can properly be used: 'The law, as I see it, is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it..... On the other hand, if their relationship is ambiguous and is capable of being one or the other [i.e. either service or agency], then the parties can remove that ambiguity, by the very agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true legal relationship between them.'
>
> In the present case, where there is no reason to think that the clause is a sham, or that it is not a genuine statement of the parties' intentions, it must be given its proper weight in relation to other clauses in the agreement."

These being the governing principles, their Lordships now turn to examine the particular facts of the present case and to apply those principles to them.

During the period to which the disputed assessment relates there were in use two forms of written contract between Narich and its lecturers, one form which was in use from 1973 to April 1977, and another revised form which was in use from April 1977 onwards. It was conceded by counsel for Narich that, if he could not succeed in showing that the status of

the lecturers was that of independent contractors rather than that of employees under the later form of contract, he certainly could not succeed in doing so under the earlier form. In view of that concession, which their Lordships consider was properly made, it is sufficient, in the first place at any rate, to examine the later contract rather than the earlier one.

The later contract, like the earlier one, was made by Narich for the purpose of performing its obligations as franchisees of Weight Watchers. The franchise held by Narich was governed by an original written contract between it and Weight Watchers dated 1st June 1969 ("the Franchise Agreement"), together with a series of amending contracts made at various later dates. The Franchise Agreement forms a part, and in their Lordships' view an important and significant part, of the circumstances surrounding the making of both the earlier and the later contracts between Narich and its lecturers, and its terms are therefore relevant in interpreting the latter.

The essential features of the Franchise Agreement for present purposes can be summarised in this way. Weight Watchers is an organisation which, by the use of the franchise system, operates in a number of different countries or territories. Weight Watchers have developed and perfected over many years what they claim to be unique methods for enabling persons who are over-weight to lose weight, and, having lost it, not to put it on again. These unique methods are applied by the use of a detailed programme, fixed in principle but open to amendment by Weight Watchers only from time to time, carried out in Weight Watchers classes. That programme, which lies at the heart of the business carried on by Weight Watchers, is set out in manuals, including in particular lecturers' manuals, published and disseminated to their franchisees from time to time. The programme so set out is to be adhered to rigidly, in substance at any rate, in every Weight Watchers class wherever conducted. Any departure from that fixed and detailed programme would, it is said, have an adverse effect on the reputation of Weight Watchers with its public in all the various countries and territories in which Weight Watchers or their franchisees operate, and cannot therefore be tolerated in any circumstances.

Further, all individuals coming into contact with members attending Weight Watchers classes, including in particular lecturers, must themselves attain and keep their proper weight (known as their "goal weight"), as laid down in the relevant manual, within two pounds, failing which they are to be automatically disqualified from continuing in the position previously occupied by them.

It is against the background of these essential features of the Franchise Agreement that the later form of contract between Narich and its lecturers falls to be interpreted. This form of contract ("the Lecturers' Contract") provides:-

"THIS AGREEMENT made the day of 197 BETWEEN Narich Pty. Limited, a company having its Registered Office at 13th Floor, 309 Pitt Street, Sydney, N.S.W, and trading under the registered business name of "WEIGHT WATCHERS" of the one part AND (hereinafter called "the Lecturer") of the other part.

WHEREAS:

(A) the company has as the result of its own operations and through its associations with overseas companies acquired skill and information in relation to the techniques, systems, methods, principles, programs and lecture courses devised by its Doctors, Psychologists and Nutritionists, concerned with weight reduction of individuals and the business techniques promotion publicity and administrative procedures connected therewith and the group therapy techniques and the controlled eating plans developed used and propagated in relation thereto (which are collectively referred to hereafter as "weight control skills"); and

(B) the Lecturer has agreed to act as a Lecturer at Weight Watchers classes and the Company has agreed to hire to her the "Weight Watchers Lecturers' Handbook" containing material for guidance only including the Program Food Plan for use as a Weight Watchers Lecturer and which the Lecturer agrees contains information which is and remains the property of the Company and forms part of the weight control skills; and

(C) the Lecturer agrees that the weight control skills include confidential information and matters of confidence the disclosure of which and the use of which outside the business of the Company would cause substantial loss and damage to the Company.

NOW THIS AGREEMENT WITNESSETH

1.(a) The Lecturer will herself or by a substitute approved by the Company lecture one or more Weight Watchers classes as may from time to time be agreed between the parties to be held at such times and places as the Company may arrange. The Lecturer shall ensure that any such substitute carries out all the obligations which this Agreement imposes on the Lecturer and shall be responsible for arranging payment of the substitute from the fees and dues received from the members of the class.

(b) If the Lecturer fails or refuses to carry out her duties or obligations as a Lecturer in a proper manner or if the weight of the Lecturer exceeds her goal weight the Company may terminate her engagement without notice or, with the Company's permission, she may arrange a

substitute Lecturer until these deficiencies have been corrected.

2. The Company will pay the Lecturer a fee for each lecture and agreed ancillary tasks calculated as follows or such other fees as may from time to time be agreed between the parties:-

[There follows a detailed scale of fees based on two factors: first, the number of years of experience which the Lecturer has had, and, secondly, the number of members attending the class. A further payment is also prescribed in respect of any members of the Lecturer's class who reaches the status of Lifetime Membership.]

3. The Lecturer is not an employee of the Company but is an independent contractor and shall perform her duties free from the direction and control of the Company and she will attend without payment one Saturday Meeting of Lecturers per month at which she will inter alia be weighed.

4. The Lecturer shall to the best of her ability:-

(a) deliver the lectures and teach the Programme and Plateau and Maintenance Plans;
(b) select and train sufficient recorders and weighers to properly conduct the lectures;
(c) ensure that the classes are properly organised and controlled;
(d) report to the Company upon the functioning of each class;
(e) account to the Company for fees and dues received from the members of each class at which she lectures and in this regard the Lecturer shall be the Company's agent for collection and shall as soon as possible thereafter deposit the nett receipts to the credit of the Company's account at the National Bank of Australasia Limited, 249 Pitt Street, Sydney;
(f) conduct the class so as to advance the welfare of the members according to the principles of Weight Watchers International Inc.;
(g) contact by phone or call on members who have been absent from meetings.

5. The Lecturer shall be responsible for paying her recorders and weighers and the rental for the Hall for each class.

6. The Company agrees to rent to the Lecturer for the period of her engagement hereunder the "Weight Watchers Lecturers' Handbook" for a rental of $5.00. The Lecturer undertakes that forthwith on the termination of her engagement hereunder for whatever reason she will immediately return to the Company her "Weight Watchers Lecturers' Handbook" and all other documents supplied to her in connection with such engagement and any copies thereof. When the said Handbook is returned in good condition, the Company will refund to the Lecturer the said rental of $5.00."

There follow further clauses numbered 7-11, containing mainly obligations imposed on the lecturer with regard to the confidentiality of the lecturing material supplied to her by Narich, and prohibitions against her engaging in competition with Narich either during the continuance of the contract or for a period of one year after its termination. It was not suggested by counsel on either side that these further clauses were material to any of the issues on the appeal, and no further reference will therefore be made to them.

Reference was made earlier to the large volume of evidence, both affidavit and oral, adduced in the court below. A great deal of this evidence concerned how the lecturers' contracts had in practice been performed, and to what extent the lecturers were in practice supervised, directed or controlled by Narich during the performance of their work. In relation to this kind of evidence the first principle stated in the A.M.P. case, as set out earlier, applies, with the consequence that a great deal of such evidence is irrelevant and should be disregarded. Some of the evidence, however, is relevant in that it establishes that the parties did, by their conduct subsequent to the making of the written contracts between them, impliedly add to, or modify, the terms of those contracts. That addition or modification related to the manner in which the lecturers were to be paid by Narich the fees in respect of Weight Watchers classes prescribed by clause 3 of the earlier contract and clause 2 of the later contract. What was further agreed by conduct in that respect was that the lecturers, at the conclusion of a class, should deduct their fees from the moneys paid by the members before remitting the balance to Narich's bank in Sydney. This deduction was in addition to the three deductions already expressly authorised by the written contracts in respect of fees paid by the lecturers to weighers and recorders designated by them to act as such at classes, and in respect of the rental of lecture halls, if any.

In determining the true nature of the relationship between Narich and the lecturers under the later contract, the following terms, apart from clause 3 itself, require particular consideration. First, the elaborate description in part (A) of the recitals of the "weight control skills" possessed by Narich. Secondly, the arrangement referred to in part (B) of the recitals for the hire by Narich to the lecturer of the Weight Watchers lecturers' handbook, described as being "for guidance only", but the use of which, for reasons which will appear, cannot sensibly be limited in the way that these words would suggest. Thirdly, clause 1(a), which provides (i) that any substitute lecturer must be approved by Narich, and (ii) that classes are to be held at such times and places as Narich may arrange. Fourthly, clause 4(a),

which requires the lecturer, in delivering her lectures, to teach what is described as "the Programme and Plateau and Maintenance Plans". Fifthly, clause 4(f), which requires the lecturer so to conduct her classes as to advance the principles of Weight Watchers. And, sixthly, clause 1(b), which entitles Narich to terminate the engagement of the lecturer, immediately and without notice, either (i) if she fails to carry out her duties and obligations as a lecturer in a proper manner or (ii) if her weight exceeds her goal weight.

The reference in clause 4(a) to "the Programme and Plateau and Maintenance Plans" is a clear reference to the contents of the Weight Watchers lecturers' handbook stated to be hired to the lecturer in part (B) of the recitals. Two Weight Watchers lecturers' handbooks were in use at different times: an earlier version until 1976 and a later revised version from 1976 onwards. It is, therefore, the later handbook which is referred to expressly in part (B) of the recitals in the contract, and by necessary implication in clause 4(a) of it.

The contents of the later revised handbook are set out in a "Table of Contents" at the beginning of it. The subjects there listed, which are arranged both in the Table and in the body of the handbook in alphabetical order, are these: award presentations; card calling; charting; commitments; clerk's responsibilities; cue cards; feedback week; fill-ins; food diaries; goal weight conferences; greeting; group involvement; inspiration and motivation; lead-in; lecturer's job responsibilities; link-up classes; module presentation; modules, rationales and quizes (sic); names; nutrition, weight control and you (sic) booklet; recruitment; room arrangements; special purpose modules; staff meetings; summaries; time allocation in class; visual aids; and weighing. "Module" is an expression which is used in this instance to describe an "Eating Management Technique".

The body of the handbook contains lengthy, detailed and specific instructions as to how each of the twenty-eight subjects set out above is to be taught or handled by a Weight Watchers lecturer. It is impossible for a lecturer, who is required to teach and act, at or in connection with Weight Watchers classes, in accordance with this handbook, to use it "for guidance only". She either teaches and acts in the way prescribed in all its elaborate detail, or she does not. If on the one hand she does teach and act in the manner prescribed, not only the nature and scope of her work, but also the precise manner in which she does it, is closely controlled and directed by Narich through the medium of the handbook. Such close direction and control is clearly essential if Narich is to comply with its own obligations to

Weight Watchers under the Franchise Agreement. It is, accordingly, not surprising to find such a close degree of direction and control provided for in a lecturer's contract: it would, on the contrary, be surprising not to find it. If on the other hand a lecturer fails or neglects to teach and act in the manner prescribed in the handbook, she is liable to have her engagement terminated, immediately and without notice, by Narich. She is liable to suffer the same fate if periodical weighing, which she is obliged to undergo, reveals that her weight exceeds her goal weight.

The earlier handbook, while it differs in form and arrangement from the later handbook, prescribes equally clear and rigid instructions for a lecturer to follow in conducting a Weight Watchers class.

It was argued by counsel for Narich that the mere fact that a contract, under which one person is engaged to do work for another, prescribes in great detail not only the nature and scope of the work to be done, but also, in equal or even greater detail, the way in which it is to be done, does not of itself mean that the former person is under such control and direction by the latter as to create a relationship of employer and employee between them. On the contrary, it was submitted that, the greater the detail in which the way in which the person engaged is to do his work is prescribed by the contract concerned, the less scope there is for direction and control of the way in which the work is done during and in the course of its performance.

In their Lordships' view this argument has a paradoxical quality about it. It matters not by what means the engagor is contractually entitled to direct and control the manner in which the engagee does his work. What matters is that, by one means or another, the engagor is, as a matter of law arising from the terms of the contract concerned, entitled to do so.

Woodward J. summarised the effect of the lecturer's contract in this way:-

> "There was imposed upon every lecturer a number of obligations as to the manner in which the lecture was to be conducted, the information to be imparted to the members and an obligation not to exceed a specified weight. 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."

Their Lordships find themselves in complete agreement with that summary and are content to adopt it as an accurate analysis of the effect of the contract in issue.

Having regard to the statement of principle by Lord Fraser of Tullybelton in the A.M.P. case, it is impossible for clause 3 of the later contract to receive effect according to its terms if they contradict the effect of the agreement as a whole. In their Lordships' view, for the reasons which have been given, the effect of the contract as a whole does contradict clause 3, and effect cannot therefore be given to that clause according to its terms. The effect of the contract as a whole is to create between Narich and the lecturer the relationship of employer and employee, and, in so far as clause 3 purports to provide otherwise, it must be treated as failing in its purpose. This is so, even though there has never been any suggestion either that clause 3 was a sham, or that the parties did not include it in the contract in good faith and with the desire that it should be effective.

The plain situation in law is that a lecturer is tied hand and foot by the contract with regard to the manner in which she performs her work under it. In these circumstances it is not possible to hold that she is, in relation to Narich, an independent contractor. On the contrary, the only possible conclusion is that she is an employee.

Reference was made earlier to two subsidiary contentions put forward by Narich. These contentions both proceed on the assumption that the true nature of the relationship between Narich and each of its lecturers is that of employer and employee, as their Lordships have held it to be. The first contention is that the fees received by the lecturers are nevertheless not "wages" within the meaning of the Act, because the lecturers take them, together with their expenses, out of the moneys collected from members, and therefore there is nothing more than an accounting situation between them and Narich, without any actual payment being made to them at all. The second contention, which appears, in part at least, to overlap the first, is that the fees received by the lecturers are not "taxable wages" within the meaning of the Act, because the manner in which they are paid is indirect rather than direct. In their Lordships' view the substance of the matter is that the lecturers have their fees paid to them out of moneys belonging to Narich, and must therefore, as a matter of common sense, be regarded as being paid by Narich. There is, accordingly, no merit in either of these subsidiary contentions.

For the reasons which have been given their Lordships will humbly advise Her Majesty that this appeal should be dismissed. Narich must pay the Commissioner's costs of the appeal.