HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S27/2021

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **ZG OPERATIONS AUSTRALIA PTY LTD (ACN 060 142 501)**
First Appellant

ZG LIGHTING AUSTRALIA PTY LTD (ACN 002 281 601)
Second Appellant

- and -

MARTIN JAMSEK
First Respondent

DANIEL CIVTANOVIC as trustee for
the bankrupt estate of **ROBERT WILLIAM WHITBY**
Second Respondent

STEPHEN HUNDY as trustee for
the bankrupt estate of **ROBERT WILLIAM WHITBY**
Third Respondent

Appellants' Submission

Part I: Publication on the internet

1. This submission is in a form suitable for publication on the internet.

Part II: Concise statement of the issues

2. Were the First Respondent (**Mr Jamsek**) and Robert Whitby (**Mr Whitby**) employees?

3. Is there a dichotomy between performing work in one's own business and performing that work as an employee in another person's business?

Part III: No notice under s 78B of the *Judiciary Act 1903* is required

4. ZG considers that no notice under s 78B of the *Judiciary Act 1903* is required.

Part IV: Citation of the judgments below

5. The primary judgment is reported as *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 (**TJ**). The Full Court's judgment on appeal (from which this appeal is brought) is reported as *Jamsek v ZG Operations Australia Pty Ltd* (2020) 297 IR 210 (**AJ**).

Part V: Relevant facts

Summary

6. Mr Jamsek and Mr Whitby (**Drivers**) are truck owner-drivers who, from 1986 to 2017, provided delivery services to the Appellants (collectively, **ZG**), and the various corporate predecessors that owned ZG's business during this period. It is convenient to refer to the corporate entity operating the business at any given point in time simply as the **Company**. The Second and Third Respondents are Mr Whitby's trustees in bankruptcy appointed after the trial (**Trustees**).

7. For almost all of this 30-year period, each Driver operated a partnership business structure with his wife (**Partnerships**).[1] Each Partnership owned a truck. The Partnerships were engaged to provide delivery services to the Company using the Partnership's truck under a series of contracts that designated the Partnerships as contractors.

8. The Partnerships "conducted their affairs as one would expect of a business".[2] Among other things, they paid all truck-related costs, replaced the trucks from time to time without seeking Company approval, rendered tax invoices, claimed tax deductions and input tax credits, declared revenues earned from their delivery services as partnership income, and split that income between the partners.

9. In 2017, the Company terminated the engagement of the Partnerships to reduce costs.[3] The Drivers then brought the proceeding below, alleging that they had been employees of the Company throughout the relevant period and seeking employee entitlements under the *Fair Work Act 2009*, the *Road Transport and Distribution Award 2010* and the *Long Service Leave Act 1955* (NSW). These entitlements included various types of paid leave, overtime, and superannuation. The Drivers also alleged sham contracting contraventions. They sought declarations, compensation and penalties.

10. With one exception, the Drivers' claims turned on whether they were employees or contractors. The exception was that their superannuation claim was also put on an alternative basis that the Drivers, even if not employees in the common law sense, fell

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1 The Whitby Partnership was dissolved in 2012 and from then on Mr Whitby started invoicing the Company using his own ABN. Otherwise, the relationship between Mr Whitby and the Company remained unchanged: AJ [88] (Core Appeal Book (**CAB**) 94), [123] (CAB 99).

2 TJ [145] (CAB 36); AJ [189]–[190] (CAB 117–8).

3 AJ [95] (CAB 95).

within the extended meaning of "employee" in s 12(3) of the *Superannuation Guarantee (Administration) Act 1992*.

11. The primary judge (Thawley J) dismissed the proceeding, finding that the Drivers were not employees and did not fall within the extended meaning of employee in s 12(3).

12. Mr Jamsek and the Trustees then appealed out of time. The Full Court (Perram, Wigney and Anderson JJ) allowed the appeal. The Full Court found that the Drivers were employees, made declarations to that effect, and remitted the balance of the proceeding to the primary judge.

More detailed review of the facts

10 The establishment and engagement of the Partnerships

13. The Drivers were employed by the Company in the late 1970s and by about 1980 were employed as truck drivers. In late 1985, the Company offered the Drivers (and three other employee truck drivers) an opportunity to "become contractors". The drivers were told: "If you don't agree to become contractors, we can't guarantee you a job going forward".[4] All five drivers agreed to take up the proposal. They were paid out their accrued employment entitlements, such as annual leave.[5]

14. Shortly afterwards, the Drivers obtained accounting advice and, on the basis of that advice, established the Partnerships.[6] In early 1986, each Partnership purchased a truck from the Company and executed a written contract with the Company to provide delivery
20 services as a contractor. No copy of the original 1986 contract could be located but its terms were similar to the subsequent 1993 contract.[7] Several later contracts accommodated changes to the Company entity and increased the payment rates, as negotiated by the Partnerships from time to time, but otherwise did not materially depart from the terms of the 1993 contract.[8] It is convenient to refer to this series of contracts simply as the **Contract**.[9] The relevant terms of the Contract are extracted below.

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4 AJ [31]–[32], [38]–[40] (CAB 82–3).

5 TJ [130] (CAB 33).

6 AJ [35]–[36] (CAB 82).

7 AJ [40], [43] (CAB 83–4). See fn 18 below as to one difference between the 1986 and later contracts.

8 AJ [40] (CAB 83), [62]–[63] and [65]–[66] (CAB 89), [209] (CAB 124).

9 All clause references are to the 1993 contract extracted at AJ [57] (CAB 85–8).

The Partnerships' services

15. Under the Contract, the Partnerships were required to "[u]ndertake carriage of goods as reasonably directed" and in compliance with relevant legislation.[10] And they did so, performing deliveries of goods from the Company's warehouses.

16. The Contract also provided that, wherever possible, the Company will offer extra work to the Partnerships at a mutually agreed rate for each job.[11] And the Drivers did in fact perform additional work for the Company for additional fees:

    a. From time to time, the Drivers picked up empty pallets from customers and returned them to the Company for an additional fee.[12]

    b. In 2009, the Drivers successfully proposed to the Company to quote for non-metropolitan deliveries. Subsequently, the Company would from time to time approach the Drivers to see if they were interested in a non-metropolitan delivery and, if so, to quote for the job.[13]

The trucks

17. Each Partnership bought its first truck from the Company in 1986. Subsequently, the Partnerships replaced the trucks from time to time, without seeking Company approval.[14]

18. In 2010, the Whitby Partnership added a second vehicle — a Rodeo ute — to its fleet and successfully proposed to the Company to use the ute to carry out inner-city deliveries previously given to couriers.[15] From then on, the Whitby Partnership would generally decide which of the two vehicles to use for particular deliveries so as to maximise profitability (it was more profitable to use the ute, but some items only fit on the truck).[16]

19. From the early 1990s, the trucks were covered with a tarp displaying the Company logo. The Whitby Partnership removed the tarp in 2010 and subsequently its truck did not display the logo. The Whitby Partnership's ute never displayed the Company logo.[17]

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10 Clauses 2(1)(a) and (b) of the Contract extracted at AJ [57] (CAB 86).
11 Clause 9(a) of the Contract extracted at AJ [57] (CAB 88).
12 TJ [100] (CAB 28), [148] (CAB 37), [208] (CAB 51).
13 AJ [80] (CAB 93).
14 AJ [50]–[51] (CAB 85), [61] (CAB 88–9).
15 AJ [81]–[82] (CAB 93–4).
16 AJ [84] (CAB 94).
17 AJ [82]–[83] (CAB 94), [219] (CAB 128).

Financial arrangements

20. The Contract prescribed a fee structure for the delivery services based on "running" and "standby" hourly rates. The rates were expressly stated to incorporate "an allowance" for the absence of annual leave, sick leave and public holiday pay under the Contract.[18] From time to time, the Partnerships negotiated rate increases with the Company, in one case by announcing that they "must increase [their] rates by 7.2%".[19]

21. The Contract required that the Partnerships invoice for their work,[20] and they did so, charging GST after its introduction.[21]

22. On the expense side of the ledger, the Partnerships took on all costs associated with the trucks, including finance, fuel, maintenance and insurance. The Partnerships' other business expenses included rent and "casual labour".[22]

23. The Partnerships took full advantage of the tax benefits of their business structure and the contractor relationship that the Contract sought to create, splitting the revenue of the Partnership between the two partners (Driver and his wife) and claiming tax deductions and input tax credits.[23]

Insurance

24. As required by the Contract, the Partnerships maintained their own public liability and motor vehicle insurance, at their own expense.[24]

Using substitute drivers

25. The Contract permitted the Partnerships to use a substitute driver with prior consent and continuing approval of the Company.[25] The Jamsek Partnership used a substitute driver for a period of 6 or 7 weeks, invoicing the Company in the usual way for the delivery

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18 Clause 7(a) of the Contract extracted at AJ [57] (CAB 87). The hourly rates were introduced sometime between 1990 and 1993, with the original 1986 contract providing for "carton" rates: AJ [40] (CAB 83), [52] (CAB 85).

19 AJ [62]–[63] and [65] (CAB 89), [77]–[78] (CAB 92–3).

20 Clause 1(c) of the Contract extracted at AJ [57] (CAB 85).

21 AJ [67] (CAB 90), [118] and [122] (CAB 99), [188] (CAB 117).

22 AJ [46] (CAB 84), [110]–[124] (CAB 97–100). See also cl 2(1)(c) of the Contract extracted at AJ [57] (CAB 86).

23 AJ [35] (CAB 82), [110]–[124] (CAB 97–100), [189]–[190] (CAB 117–8).

24 Clauses 2(1)(h) and (i) of the Contract extracted at AJ [57] (CAB 86); AJ [117] (CAB 99); TJ [147] and [149] (CAB 37).

25 Clause 2(1)(g) of the Contract extracted at AJ [57] (CAB 86).

services performed by the substitute driver on behalf of the Partnership. The Partnership in turn paid the substitute driver for his work.[26]

Exclusivity of service

26. The Contract expressly permitted the Partnerships to service other clients, provided that such work was not detrimental to the Company or its customers.[27] But the Partnerships did not in fact take advantage of that right.

27. The Full Court drew an inference that, in practice, the Partnerships could not service other clients because the Drivers did not have time to do so as they spent 9 hours per day on weekdays performing deliveries for the Company, and also because the trucks displayed the Company logo.[28] If necessary, ZG challenges this inference below.

Uniforms

28. The Drivers were given Company-branded clothing but were not instructed to wear a full uniform and in fact wore a mix of personal and branded clothing.[29]

Other elements of control

29. The Contract prescribed a "standard working day" of 9 hours commencing at 6am and finishing at 3pm, but expressly provided that "both parties accept[ed] that the actual hours may vary due to work load fluctuations".[30]

30. In reality, the prescribed times were regularly not observed. That is, at various times during the relationship, the Drivers regularly arrived at the Company's warehouse significantly later than 6am and/or concluded deliveries before 3pm.[31]

31. As one would expect with a delivery service, the Company determined what goods the Partnerships were to deliver and where they were to be delivered. But the Drivers determined the order of the deliveries for their own convenience and frequently did not return to the warehouse after the last delivery but drove directly home.[32] The Drivers

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26 AJ [97] (CAB 95–6).
27 Clause 1(b) of the Contract extracted at AJ [57] (CAB 85).
28 AJ [10] (CAB 76–7), [17] (CAB 78), [225] (CAB 131), [237] (CAB 134–5).
29 AJ [109] (CAB 97), [221]–[224] (CAB 129–31).
30 Clause 7(b) of the Contract extracted at AJ [57] (CAB 87).
31 AJ [100]–[103] (CAB 96).
32 AJ [68] and [72] (CAB 90), [100] (CAB 96).

also agreed their respective delivery areas between themselves.[33]

32. Under the Contract, the Partnerships were "responsible for the vehicle equipment and gear, the safe loading of the vehicle and the securing and weather protection of the load".[34] Consistently with this provision, the Drivers decided the order in which items were loaded onto their trucks and then how they were arranged within their trucks.[35]

33. The primary judge found that the Company "did not purport to exercise control in any way" over the Partnerships' decisions to purchase trucks or maintain them and "had no real control over the way in which the [Drivers] managed and operated their trucks".[36]

The Partnerships' businesses

34. The Partnerships "purchased assets, claimed deductions, made decisions about expenditure which affected profitability and conducted their affairs as one would expect of a business". The Partnerships also conducted their "taxation affairs … in a business-like manner and as one would expect of couples conducting a small business in which one member of each couple performs the majority of the services".[37]

35. The Partnerships' profitability "turned in large measure on the costs associated with operating the vehicles purchased by the [P]artnerships, including the costs associated with the substantial purchase price of the vehicles".[38] Their business expenses represented a substantial proportion of revenue. For example, business expenses represented 37.9% of the Jamsek Partnership's revenue in FY2007 and 40.3% of revenue in FY2006.[39]

36. On the revenue side, the Partnerships' profitability turned on the contractual rates (which the Partnerships negotiated to increase from time to time) and on generating additional delivery work (with the Partnerships charging extra fees to return pallets and successfully pitching for non-metropolitan delivery work).

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33 AJ [69] (CAB 90). Clause 9(c) of the Contract extracted at AJ [57] (CAB 88) required the Drivers to arrange between themselves for one truck to go to a particular warehouse in the morning.

34 Clause 2(1)(d) of the Contract extracted at AJ [57] (CAB 86).

35 TJ [194] (CAB 48); AJ [74]–[75] (CAB 91).

36 TJ [189] (CAB 47); AJ [215(c)], [216] (CAB 126–7).

37 TJ [145] (CAB 36). The Full Court did not disturb these findings: AJ [189]–[190] (CAB 117–8).

38 TJ [147] (CAB 37).

39 AJ [110]–[124] (CAB 97–100). It is convenient to refer to the Jamsek Partnership's figures for FY2006 and FY2007 as an example because the Jamsek Partnership's P&L for FY2006 and FY2007 is the only P&L that is extracted in full in the AJ at [114] (CAB 98) (the FY2007 and FY2006 figures are found in the first and second columns respectively).

37. The *Partnership Act 1892* (NSW) at all material times defined a "partnership" as a relation between persons "carrying on a business in common with a view of profit".[40] At trial and on appeal, the Drivers did not dispute that their Partnerships were bona fide. On the contrary, in cross-examination each Driver agreed that his respective Partnership was conducting a business.[41]

38. The primary judge found that the Partnerships (and after the dissolution of the Whitby Partnership, Mr Whitby as an individual) "were running businesses of their own".[42] The Full Court did not overturn that finding but agreed with it.[43]

Goodwill

10 39. The Contract provided that the Partnerships must not offer their vehicles for sale with any guarantee of either continuity of work for the Company or implied acceptance of the purchase by the Company.[44] The primary judge held that this provision "did not prohibit the sale of a business" and "if anything … suggest[ed] the parties contemplated that the relationship was not one of employment and that [the Drivers] might have something over and above the truck to sell".[45] His Honour found that the Partnerships "could have sold their businesses if they had wished and such a sale may have included goodwill".[46]

40. The Full Court disagreed, concluding that its finding that the Partnerships were, in practice, unable to service other clients meant that they were unable to generate any goodwill in their businesses.[47] If necessary, ZG challenges this conclusion below.

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40 Section 1(1).

41 Trial Transcript 35 (lines 19–30), 44 (lines 4–7), 108 (lines 31–37) (Appellants' Book of Further Materials).

42 TJ [213] (CAB 51–2).

43 Perram J posited the proposition that "an affirmative answer to the question of whether one is working in one's own business does not necessarily entail that one is not working in another's business or that one cannot be an employee", expressly stated that he did not "deny that the [Drivers] were conducting their own businesses" and then repeatedly referred to the Drivers' "businesses": AJ [7]–[12] (CAB 76–77). Wigney J agreed with Perram J. Anderson J agreed with Perram J that there is no "perfect dichotomy" between running one's own business and being an employee in the business of another and then agreed with the primary judge's observation that the Partnerships "conducted their affairs as one would expect of a business": AJ [181] (CAB 115), [189]–[190] (CAB 117–8).

44 Clause 2(1)(k) extracted at AJ [57] (CAB 86).

45 TJ [152] (CAB 38).

46 TJ [151] (CAB 38).

47 AJ [9]–[12] (CAB 76–7), [236]–[237] (CAB 134–5).

Part VI: ZG's argument

41. The Full Court observed, correctly, that whether the Drivers were employees or contractors depended on the "totality of the relationship between the parties".[48] It then examined a multitude of relevant factors and concluded that the Drivers were employees. In coming to that conclusion, the Full Court erred.

The Full Court erred by accepting the No Dichotomy Proposition

42. The Full Court held that "an affirmative answer to the question of whether one is working in one's own business does not necessarily entail that one is not working in another's business or that one cannot be an employee". The Court considered that there is no "perfect dichotomy" between these two scenarios. Rather, that a person operates their own business is merely a *factor* to be considered in determining whether they are a contractor (**No Dichotomy Proposition**).[49]

43. The No Dichotomy Proposition is wrong for at least five reasons.

44. First, it is contrary to longstanding authority of this Court. In *Marshall v Whittaker's Building Supply Co*,[50] Windeyer J held that the "distinction between a servant and an independent contractor … is rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own".[51] In *Vabu*, the joint judgment endorsed this proposition.[52] And in *Sweeney v Boylan Nominees Pty Ltd*,[53] the joint judgment treated employment and conducting one's own business as being mutually exclusive.[54]

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48 AJ [6] (CAB 75), [179] (CAB 114), citing *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 (***Vabu***).

49 AJ [6]–[8] (CAB 75–6), [181] (CAB 115).

50 (1963) 109 CLR 210.

51 Ibid 217.

52 *Vabu* (2001) 207 CLR 21 [40] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

53 (2006) 226 CLR 161.

54 "The mechanic was not an employee of the respondent. He conducted his own business": ibid [31] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). And he performed the work "not as an employee of the respondent but as a principal pursuing his own business or as an employee of his own company pursuing its business": ibid [33] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, where the Privy Council held that the "fundamental test" for determining whether a person is an employee or a contractor is the question: "'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a

45. *Secondly*, the No Dichotomy Proposition is intuitively unsound and internally incoherent. How can a person be performing the same item of work[55] as a representative of their own business and at the same time also as an employee in another person's business? Would it mean that their remuneration is simultaneously salary/wages and business revenue? And if, as here, the person's own business is operated by a partnership, how are the person's duties as an employee in someone else's business to be reconciled with their duties as a partner in their own business?

46. *Thirdly*, the origin of the No Dichotomy Proposition in the decision below can be traced back to an earlier Full Court's misreading of a different Full Court's infelicitous paraphrasing of a passage from *Vabu*:

a. In *Vabu*, the joint judgment stated that "the circumstance that the business enterprise of a party said to be an employer is benefited by the activities of the person in question cannot be a sufficient indication that this person is an employee".[56] (This is because both "employees and independent contractors perform work for the benefit of their employers and principals respectively".[57])

b. In *ACE Insurance Ltd v Trifunovski*,[58] Buchanan J quoted this passage and paraphrased the principle as being "[w]orking in the business of another is not inconsistent with working in a business of one's own".[59] While this paraphrase was shorter, its language was unfortunately ambiguous and capable of being misunderstood. The paraphrase being based on the *Vabu* passage above, the words "[w]orking in the business of another" were clearly intended to refer to *performing work that benefits the business of another* (what *Vabu* called "the circumstance that

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contract of service": at 382, quoting *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173.

55 The reference to the "same item of work" is important. Obviously, just because a person has a business and works in that business does not mean that they cannot also perform some other work as an employee in another business. For example, a barrister runs their own business but could also cameo as an employee barista in a café outside their chambers. Indeed, a person can perform the same *type* of work both as an employee and in their own business — eg a motor mechanic could be working as an employee in someone else's workshop during the week and running their own workshop on weekends. ZG's point, however, is that in relation to *any particular item of work*, a person must be performing it either in their own business or as an employee in the business of another, but not both.

56 *Vabu* (2001) 207 CLR 21 [40] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

57 Ibid.

58 (2013) 209 FCR 146 (***ACE Insurance***).

59 Ibid [128].

the business enterprise of [another] is benefited by the activities of the person in question"). Buchanan J was simply re-expressing the *Vabu* point that this was not incompatible with working in one's own business *and being a contractor*. Understood in that way, his Honour's paraphrase is entirely uncontroversial. Unfortunately, the words "[w]orking in the business of another" can be misunderstood as meaning *being employed in the business of another*, giving the paraphrase a totally different meaning.

c. This is exactly what happened in the subsequent Full Federal Court decision in *Tattsbet Ltd v Morrow*,[60] where Buchanan J's shorthand paraphrase was used as an authority for the No Dichotomy Proposition.[61]

d. In *Tattsbet*, the No Dichotomy Proposition was used to posit that a person can still be a contractor even if they are *not* running their own business. But in the judgment below, the Full Court took the No Dichotomy Proposition from *Tattsbet* and deployed it in the other direction, positing that a person can be running their own business and still be an employee of another business in relation to the same work. In coming to this conclusion, Perram J (with whom the other judges relevantly agreed) misread the findings in *ACE Insurance*, stating that "*ACE Insurance* was a case where insurance sales agents were working in their own businesses and in the business of ACE Insurance *and* were employees" (original emphasis).[62] In fact, the sales agents in *ACE Insurance* were held *not* to be conducting their own businesses.[63]

e. Thus, what started as an infelicitously-worded shorthand paraphrase of a completely innocuous passage in *Vabu* took on a life of its own and gave rise to the No Dichotomy Proposition.

47. <u>*Fourthly*</u>, the rejection of the No Dichotomy Proposition is fully consistent with the well-established multi-factorial test for determining whether someone is an employee or a contractor. The question of whether a person is performing work in their own business is not a *substitute* for the multi-factorial test. Rather, as Wilson and Dawson JJ explained

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60 (2015) 233 FCR 46 (***Tattsbet***).

61 Ibid [61] (Jessup J). Allsop CJ expressly refused to decide this question, finding that, in any event, the service provider in that case was conducting her own business: at [3]. White J agreed with both Jessup J and Allsop CJ.

62 AJ [7] (CAB 76).

63 See, eg, *ACE Insurance* (2013) 209 FCR 146 [15] (Lander J), [129], [149] (Buchanan J, Lander and Robertson JJ agreeing).

in *Stevens v Brodribb Sawmilling Company Pty Ltd*,[64] it is simply a "different way" of "posing the ultimate question".[65] In other words, to ask whether someone is performing work in their own business is an alternative but equivalent way of asking whether the person is performing work as an independent contractor. Expressed in either way, the question falls to be answered by applying the multi-factorial test. And the application of the multi-factorial test will then yield one of two conclusions — either the person does not have their own business and is performing work as an employee in the business of another, or the person has their own business and is performing work as a contractor.

48. *Fifthly*, the No Dichotomy Proposition makes the multi-factorial test — which is already notoriously difficult[66] — even more uncertain and indeterminate. The multi-factorial test requires the decision-maker to consider numerous factors. But knowing what factors are relevant does not, of itself, take matters very far because different factors can, and often do, point in opposite directions. How are these factors to be weighed against each other? If the notion of a contractor is de-coupled from running one's own business, it becomes largely devoid of content. The question "What is a contractor?" can then only be answered as: "Someone who is not an employee". This means that a decision-maker applying the multi-factorial test has little guidance as to what it is they are trying to find when looking at the relevant factors.

49. In contrast, the acceptance of the proposition that performing work in one's own business and performing work as an independent contractor are equivalent concepts, gives tangible content to the notion of a "contractor". Running one's own business is a familiar and well-understood concept. Armed with that concept as a guide, the multi-factorial test can be applied in a much more consistent and determinate manner.

50. For these reasons, the No Dichotomy Proposition should be rejected.

51. Here, the primary judge and the Full Court found that the Drivers were conducting their own businesses.[67] The Respondents' Notice of Contention does not challenge this finding. It follows that the Drivers were not employees of the Company but independent contractors.

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64 (1986) 160 CLR 16.

65 Ibid 35.

66 Ibid 28 (Mason J), 35 (Wilson and Dawson JJ).

67 See [38] above as to the findings of the primary judge and the Full Court.

On the facts of this case, the Drivers were contractors running their own businesses

52. If this Court finds it necessary to go beyond the finding below that the Drivers were running their own businesses and proceeds to re-assess the question of whether the Drivers were employees or contractors on the facts, ZG submits that the proper application of the multi-factorial test leads to the conclusion that the Drivers were contractors running their own businesses, for the following ten reasons.

53. *First*, the Partnerships brought a substantial business asset to their engagement by the Company — the trucks. This is a key factor pointing to a contractor relationship.

54. In *Vabu*, in finding that the couriers in that case were employees, the joint judgment placed considerable reliance on the fact that the cost of the bicycles was "relatively small" and that they were "not tools that are inherently capable of use only for courier work but provide a means of personal transport or even a means of recreation out of work time".[68] It expressly stated that "[a] different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training were required to operate it".[69] And it specifically distinguished bicycle couriers from motor vehicle or motorbike couriers.[70]

55. Here, a truck is an asset that is vastly more substantial — and requires much greater skill to operate — than a bicycle. Indeed, it is a much more substantial asset than the motor vehicles and motorbikes that the joint judgment distinguished from bicycles in *Vabu*. This is reflected in the fact that the costs associated with the trucks constituted a substantial proportion of the revenue of the Partnerships. For example, even ignoring the capital outlay, just the running costs of the trucks represented 29.3% of the Jamsek Partnership's revenue in FY2007 and 31.9% of revenue in FY2006.[71] Further, unlike a bicycle, a truck *is* inherently a tool that is capable of use only for delivery work and not as a means of personal transport or recreation.

56. Consistently with this analysis, several decisions of this Court have considered the status of truck owner-drivers and each of them has concluded that the owner-driver was a

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68 *Vabu* (2001) 207 CLR 21 [56] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

69 Ibid [47].

70 Ibid [22].

71 AJ [114] (CAB 98) (the percentages above were calculated by adding "M/V commercial - Fuel & oil", "M/V commercial - Reg/Insurance" and "M/V commercial - Repairs" and dividing by "Gross Receipts").

contractor.[72] Of course, each case turns on its own facts. But as the NSW Court of Appeal explained in *Australian Air Express Pty Ltd v Langford*,[73] and as the Court below accepted, "[t]here is a consistent line of High Court authority supporting the 'conventional view' that owners of expensive equipment such as [a] truck … are independent contractors".[74]

57. *Secondly*, the fact that the Contract was with the Partnerships and not the Drivers individually[75] is also an important factor pointing to a contractor relationship. As the Privy Council explained in *Australian Mutual Provident Society v Chaplin*,[76] "[i]t may not be absolutely inconsistent with a relationship of master and servant that the alleged servant should be a partnership, but it would certainly be unusual".[77]

58. Importantly, the use of the partnership structure was not a fiction or contrivance, nor was it a device imposed by the Company on the Drivers in order to make the relationship look less like an employment relationship. Rather, the partnership structure reflected the reality of how the Drivers in fact conducted their financial affairs — the Partnerships rendered the invoices, received and declared the revenue, owned the trucks, incurred the expenses, and took advantage of the tax benefits of the structure by income-splitting between partners.[78] And it was the Drivers themselves who decided to adopt that structure after receiving their own accounting advice.[79]

59. *Thirdly*, the Company's control over the way in which the Partnerships provided services to the Company was quite limited:

    a. After initially purchasing their first truck from the Company, the Partnerships replaced their trucks from time to time without seeking Company approval.[80] The

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72 *Humberstone v Northern Timber Mills* (1949) 79 CLR 389; *Wright v Attorney-General (Tas)* (1954) 94 CLR 409; *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

73 (2005) 147 IR 240.

74 Ibid [44] (McColl JA, Ipp and Tobias JJA agreeing). The Full Court below expressly accepted this proposition: AJ [205] (CAB 123).

75 The Drivers argued that the Contract should be construed as being with them individually and not with the Partnerships, but the argument was rejected by both the primary judge and the Full Court: TJ [173] (CAB 44); AJ [211] (CAB 124).

76 (1978) 18 ALR 385.

77 Ibid 391.

78 But see fn 1 above regarding the dissolution of the Whitby Partnership in 2012.

79 AJ [35]–[36] (CAB 82); TJ [145] (CAB 36).

80 AJ [50]–[51] (CAB 85), [61] (CAB 88–9).

Whitby Partnership, of its own initiative, added a second vehicle to its fleet and then started making its own decisions as to which vehicle to use for particular deliveries to maximise profit.[81] The primary judge found that the Company "did not purport to exercise control in any way in respect of the decisions to purchase trucks or maintain them".[82]

b. The Drivers also controlled how the trucks were operated. Of course, the Company determined what goods were to be delivered and to whom — this is inherent in the nature of a delivery service. But the Drivers allocated delivery areas between themselves and decided on the order of deliveries.[83] They also determined the order in which items were loaded onto their trucks and then how they were arranged within their trucks.[84] The primary judge found that the Company had "no real control over the way in which [the Drivers] managed and operated their trucks".[85]

c. Instead of simply directing the Drivers to return empty pallets back to the warehouse, the Company agreed to pay the Partnerships additional fees for bringing back empty pallets.[86] And when the Partnerships, of their own initiative, pitched to the Company for non-metropolitan work, the Company offered them to quote for additional delivery jobs, leaving it up to them whether to accept or reject these deliveries.[87]

60. *Fourthly*, as the trial judge found, the Partnerships "conducted their affairs as one would expect of a business".[88] Among other things:

a. The Partnerships successfully pitched for additional business from the Company.[89]

b. The Partnerships "made decisions about expenditure which affected profitability".[90] This included replacing the trucks, using a second vehicle,[91] and engaging

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81 AJ [81]–[84] (CAB 93–4).
82 TJ [189] (CAB 47).
83 AJ [68]–[69] and [74]–[75] (CAB 90–2).
84 TJ [194] (CAB 48); AJ [74]–[75] (CAB 91–2).
85 TJ [189] (CAB 47).
86 TJ [100] (CAB 28), [148] (CAB 37), [208] (CAB 51).
87 See [16] above.
88 TJ [145] (CAB 36); AJ [189]–[190] (CAB 117–8).
89 See [16] above.
90 TJ [145] (CAB 36); AJ [189]–[190] (CAB 117–8).
91 See [18] above.

employees.[92] The Partnerships' business expenses represented a substantial proportion of revenue.[93]

c. The use of a partnership structure inherently required that the partners be conducting a business.[94]

d. The Drivers themselves believed that the Partnerships were running businesses.[95]

e. The Partnerships conducted their "taxation affairs … in a business-like manner",[96] claiming tax deductions and input tax credits and splitting income between partners.

61. *Fifthly*, "[t]he power to delegate is an important factor in deciding whether a worker is a servant or an independent contractor".[97] Here, the Contract permitted the Partnerships to use a substitute driver with the Company's approval. And the Jamsek Partnership did in fact take advantage of this for 6 or 7 weeks, with the Company continuing to pay the Partnership and the Partnership making its own arrangements to remunerate the driver.[98]

62. *Sixthly*, the Contract expressly permitted the Partnerships to service other clients. And the Full Court was wrong to draw an inference[99] that they could not do so in practice. It was for the Drivers, as applicants at trial who carried the onus of proof, to prove that it was impractical for the Partnerships to exercise their contractual right to service other clients. They did not discharge that onus:

a. Even if the Drivers personally had no time to perform other work, there was nothing stopping the Partnerships from engaging employees to drive the trucks when they were not delivering goods for the Company.[100] Indeed, the Jamsek Partnership actually had one or more employees in the late 1990s.[101]

b. There was no evidence that the Company logo on the trucks reduced the pool of potential additional clients to *nil*. It seems inherently unlikely that the logo would

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92 The Jamsek Partnership's expenses included "casual labour": AJ [111]–[113] (CAB 98).
93 See [35] above.
94 See [37] above.
95 See fn 41 above.
96 TJ [145] (CAB 36); AJ [189]–[190] (CAB 117–8).
97 *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16, 26 (Mason J).
98 AJ [97] (CAB 95–6).
99 As to the relevant principles, see *Fox v Percy* (2003) 214 CLR 118 [25].
100 TJ [185] (CAB 46–7).
101 See fn 92 above.

have been a deal-breaker for a variety of potential jobs, for example, work for non-business clients and non-customer-facing deliveries for business clients. And the Drivers did not adduce any evidence that no such work was available. In any event, there was nothing stopping the Partnerships from acquiring other vehicles. One of them did in fact expand its fleet to a second vehicle and also removed the tarp with the Company logo from the primary truck.

63. *Seventhly*, the Full Court was wrong to find that the Partnerships could not generate goodwill in their businesses, and that this was the "most important element" in analysing the relationship between the Partnerships and the Company:[102]

a. For the reasons set out above, the Partnerships could have serviced other clients,[103] generating goodwill through that work.

b. Even if the Partnerships could not service other clients, they could still generate goodwill through their work for the Company. Although they could not sell their business with a *right* to continue providing delivery services to the Company (in other words, they could not novate the Contract), they could still introduce the purchaser to the Company. And "introduction to old customers" is an established source of goodwill.[104] The value of such an introduction would presumably depend on the strength of the Partnerships' relationships with the Company. If the Drivers wished to argue that such an introduction would have been worthless throughout the 30-year relationship between the parties, that was for them to prove. They did not do so.

c. In any event, a variety of businesses — even large businesses with many employees of their own — have little, if any, goodwill. For example, in the recent decision of this Court in *Placer Dome*, a multi-billion-dollar multinational mining company with approximately 13,000 employees[105] was held not to possess any material legal goodwill at all.[106] Further examples include businesses supplying commodity goods to a single distributor (such as farms), manufacturers of specialised equipment for a single customer, service providers with only one client, and commercial landlords

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102 AJ [9] (CAB 76).

103 See [62] above.

104 *Commissioner of State Revenue (WA) v Placer Dome Inc* (***Placer Dome***) (2018) 265 CLR 585 [69] (Kiefel CJ, Bell, Nettle and Gordon JJ).

105 Ibid [28] (Kiefel CJ, Bell, Nettle and Gordon JJ).

106 Ibid [12], [143] (Kiefel CJ, Bell, Nettle and Gordon JJ).

with a single tenant.[107] Further, many businesses start with a single client and no goodwill before expanding. Hence, if the Partnerships could not generate goodwill, this was a relevant factor but hardly "the most important element" of the analysis.

64. *Eighthly*, that the Drivers faced a possible redundancy if they did not take up the offer to become contractors[108] was of marginal, if any, significance. The risk of redundancy was no doubt a powerful *motive* for the Drivers to accept the offer. But absent a recognised vitiating factor (of which there was no suggestion here), strong commercial imperative to enter into a particular type of transaction does not make the transaction legally ineffective. It may be that the Drivers would have preferred to stay as employees had they been given an unconstrained choice. But that is neither here nor there. Whatever their *motives*, they did in fact agree to become contractors and from that point onwards conducted themselves on the basis that the Contract was effective in creating a contractor relationship. For example, they replaced trucks without seeking Company approval, charged for returning empty pallets, and took full advantage of the tax benefits of a contractor relationship.

65. *Ninthly*, the handful of other factors pointing towards an employment relationship — such as the Company logo on the trucks during most of the relevant period and the fact that the Drivers wore a mix of personal and branded clothing — cannot overcome the combined strength of the other factors, outlined above, indicating that the Partnerships were contractors.

66. *Tenthly*, the Full Court's conclusion that the Drivers were employees is at odds with the decision of the New Zealand Court of Appeal in *TNT Worldwide Express (NZ) Ltd v Cunningham*[109] — a decision that the joint judgment in *Vabu* discussed and distinguished without expressing disapproval or doubting the correctness of the result.[110]

67. In *Cunningham*:[111]

    a. The company controlled the "type and colour scheme" of the driver's vehicle.

    b. The driver was required to wear a uniform.

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107 A commercial landlord with a single property and a single tenant, when selling its business, would have nothing to sell over and above the land and the attendant lease.

108 AJ [39] (CAB 83); TJ [132] (CAB 33–4).

109 [1993] 3 NZLR 681 (***Cunningham***).

110 *Vabu* (2001) 207 CLR 21 [58] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

111 See *Cunningham* [1993] 3 NZLR 681, 689–92 extracting the contract.

c. The driver had to source insurance from a company-approved insurer on company-approved terms.

d. The driver was expressly prohibited from carrying any goods or persons that had not been approved by the company or otherwise providing deliveries or passenger transport to any other client.

e. In certain circumstances, the driver was required, on request, to provide the company with details of his operating expenses and other financial information.

f. The driver could use a relief driver — that had to be satisfactory to the company — only in the event that the driver was temporarily unable to perform his duties.

10 68. It is immediately apparent that the case for an employment relationship was far stronger in *Cunningham* than in this case. If the Drivers in this case are employees, then not only was *Cunningham* wrong, but it was manifestly and obviously wrong and it is puzzling why the joint judgment in *Vabu* went to the trouble of distinguishing it.

Conclusion

69. For these reasons, the Full Court was wrong to find that the Drivers were employees. They were not employees of the Company at any point after the Drivers and the Company transitioned to a contractor relationship in 1986. Subject to the Notice of Contention,[112] the orders of the Full Court should be set aside.

Part VII: Orders sought by ZG

20 70. ZG seeks orders that:

a. the appeal be allowed; and

b. the orders made by the Full Court on 16 July 2020 be set aside and substituted with an order that the appeal to that Court be dismissed.

Part VIII: Estimate of time required for oral argument

71. ZG estimates that it will require 2 hours to present its oral argument.

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[112] CAB 164. ZG will address the Notice of Contention in its reply submission after having the benefit of the Respondents' submission on the Notice.

Friday, 16 April 2021

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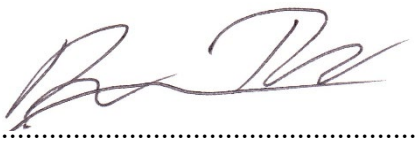
Stuart Wood AM QC
Tel: (03) 9225 6719
Fax: (03) 9225 7967
swood@vicbar.com.au



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Dimitri Ternovski
Tel: (03) 9225 8958
Fax: (03) 9225 8395
d@ternovski.com

Annexure — Relevant Statutory Provisions

1. *Partnership Act 1892* (NSW):

   a. Compilation No 12, dated 28 May 2012.

   b. Section 1(1).

2. *Superannuation Guarantee (Administration) Act 1992* (Cth):

   a. Compilation No 66, dated 1 January 2017.

   b. Section 12.