HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S27 OF 2021

BETWEEN: ZG OPERATIONS AUSTRALIA & ANOR
Appellants

MARTIN JAMSEK & ORS
Respondents

RESPONDENTS' SUBMISSIONS

PART I: CERTIFICATION

1. The respondents certify that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The appeal raises three issues:

   (a) *first,* a question of principle as to whether there is a dichotomy between, on the one hand, being employed and, on the other, conducting one's owns business;[1]

   (b) *secondly,* a question of fact as to whether the Full Court of the Federal Court of Australia (**Full Court**) was correct to conclude in all the circumstances that Mr Jamsek and Mr Whitby:

      (i) were "employees"[2] of the appellants within the meaning of section 335 and item 1 in table at section 342(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) and for the purposes of section 12(1)[3] of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGA Act**); and

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[1] See Full Court judgement (**FC**) at 7 per Perram J; Core Appeal Book (**CAB**) 75.

[2] This leads into the definition in section 13 of the FW Act which provides "A national system employee is an individual so far as he or she is employed, or usually employed, as described in the definition of national system employer in section 14, by a national system employer, except on a vocational placement."

[3] "(1) Subject to this section, in this Act, employee and employer have their ordinary meaning. However, for the purposes of this Act, subsections (2) to (11):

(a) expand the meaning of those terms; and

(b) make particular provision to avoid doubt as to the status of certain persons."

(ii) were "workers" for the purpose of section 3 of the *Long Service Leave Act 1995* (NSW);[4] and

(c) *thirdly,* if those questions are answered in favour of the appellants, a further question of fact as to whether Mr Jamsek and Mr Whitby worked under contracts that were wholly or principally for their labour within the meaning of section 12(3) of the SGA Act.

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV: STATEMENT OF MATERIAL FACTS WHICH ARE CONTESTED

4. It is not correct that Mr Jamsek and Mr Whitby could service other clients (AS [27][5]). Rather, given the working conditions and the fact they never did so, the reality was that they could not do so (FC [10], [17], [237], CAB 76, 78, 134).

5. For similar reasons, it is not correct that Mr Jamsek and Mr Whitby could generate goodwill in their businesses (noting Mr Whitby ceased to be in a partnership in 2012) (AS [40]). This is discussed in more detail at paragraphs [45] to [46] below.

6. The "Whitby Partnership" did not add a second vehicle to its "fleet" (AS [18]). Rather, as recorded by the primary judge, Mr Whitby purchased a utility vehicle "initially for private use, but which was later used for making deliveries" (PJ[6] [69], CAB 23). Mr Whitby could not recall if the partnership had initially purchased the ute as he was separated from his wife at that time and in the process of dissolving the partnership.[7]

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[4] **"Worker"** means person employed, whether on salary or wages or piecework rates, or as a member of a buttygang, and the fact that a person is working under a contract for labour only, or substantially for labour only, or as lessee of any tools or other implements of production, or as an outworker, or is working as a salesman, canvasser, collector, commercial traveller, insurance agent, or in any other capacity in which the person is paid wholly or partly by commission shall not in itself prevent such person being held to be a worker but does not include a person who is a worker within the meaning of the *Long Service Leave (Metalliferous Mining Industry) Act 1963* .

[5] Appellant's submissions filed on 16 April 2021.

[6] Primary judge.

[7] Respondents' Further Materials (**RFM**) at 104 line 19 to 105 line 16.

7. Mr Whitby did not "remove" the tarpaulin with the company logo from his truck in 2010 (AS [19]). Rather, Mr Whitby changed his truck to a "flatbed", which meant that the company logo could no longer be affixed with a tarpaulin (FC [219], CAB 128).[8]

8. The "Whitby Partnership" was not a continuous business; rather it was dissolved with effect from 30 June 2012 (FC at [88], CAB 94). For the next 5 years, until his termination 20 January 2017 (FC at [95], CAB 95), Mr Whitby did not conduct the business of a partnership.

9. It is not correct that Mr Jamsek's and Mr Whitby's work times were not regularly observed (AS [30]). The Full Court found that "during the entirety of their long working relationship, [Mr Jamsek and Mr Whitby] worked more or less regular hours with a relatively constant set of work arrangements'" (FC [217], CAB 127). The Full Court also held that, "in light of the long relationship between [Mr Jamsek and Mr Whitby] and the company, and given [Mr Jamsek and Mr Whitby] were expected to work nine hours a day for the company for nearly 40 years, this flexibility should not be viewed as materially indicative of [Mr Jamsek and Mr Whitby] undertaking an independent business." (FC [218], CAB 127).

10. It is not correct to imply that the appellants' control over Mr Jamsek and Mr Whitby's day-to-day work was "quite limited" (AS [59]). Rather, the Full Court's finding (not challenged on this appeal) was that the control exercised by the appellants over Mr Jamsek and Mr Whitby was important and to similar that in *Hollis v Vabu* (2001) 2017 CLR 21 (FC [213] – [225], CAB 125ff). In addition, the unchallenged evidence was that Mr Whitby and Mr Jamsek's freedom to make discretionary decisions about matters such as the order in which they made the deliveries, remained the same as it had been when Mr Jamsek and Mr Whitby were employees (RFM 52 [12], 53 [22], 55 [32], 66 [12], 156).

PART V: ARGUMENT

Background

11. The factual background is set out by Anderson J in some detail at [21] – [23], [26] – [124] and analysed at [188] – [214] (CAB 80, 81, 117).

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[8] RFM at 106 line 45 to 107 line 7.

12. In summary, Mr Jamsek left high school at 14 years old; Mr Whitby left at 15 years old. Neither has any other formal education or qualifications. Both had only ever worked in basic jobs requiring their manual labour (FC [30], CAB 82).

13. In 1977, Mr Jamsek and Mr Whitby each commenced working in a lighting manufacture and distribution business carried on at that time by Associated Lighting Industries Pty Limited (**ALI**) (being the business later transferred to the second and then the first appellant). Mr Jamsek was then about 22 years old and Mr Whitby was about 17 years old. By 1980 both men were full-time delivery drivers for ALI (FC [31] - [34], CAB 82).

14. Notably, the work of a delivery driver was not complex, did not need to be closely supervised and, by 1985, the men had been doing such work for ALI for at least 5 years.

15. In 1985, ALI apparently implemented a plan to reduce its overheads and risks, purporting to convert its employed drivers, including Mr Whitby and Mr Jamsek, into "independent contractors" and requiring them to purchase the trucks then owned by the business and undertake the same work as they had prior to these arrangements. Such conduct by employers is now prohibited by section 358 of the FW Act, but it was not unlawful in 1985.

16. Relevantly, the drivers were told just before Christmas in 1985: "*If you don't agree to become contractors, we can't guarantee you a job going forward.*" (FC [40], CAB 83). Faced with that ultimatum, Mr Jamsek and Mr Whitby signed the new contracts and bought the trucks as required by the company and at the prices demanded by the company (FC [40], [43] – [46], [200], [201], [206][9], CAB 83, 84, 121 - 123).

17. The Full Court concluded that the circumstances in which Mr Jamsek and Mr Whitby entered their new life as "business" owners was as follows (at [201], CAB 122):

> "… [Mr Jamsek and Mr Whitby] were faced with the likely, if not certain, prospect of redundancy should they not enter into the 1986 Contract. There was no opportunity for negotiation and [Mr Jamsek and Mr Whitby], unless they wished to seek alternative work, were compelled to accept the terms of the 1986 Contract. This was not a case where, for instance, [Mr Jamsek and Mr Whitby] sought professional advice and subsequently initiated discussions with the company about restructuring the terms of the working relationship. In

[9] The prices demanded by the company are the unchallenged: see RFM at 53 (affidavit of Mr Jamsek at [19] to [21]) and noting Mr Whity's evidence is extracted at FC [200] CAB 121 and is at RFM 65.

truth, the company wanted the change, and [Mr Jamsek and Mr Whitby] had to accept the change or leave. These circumstances diminish any suggestion that there was a clear mutual intention to alter the nature and structure of the relationship between the parties."

18. The single document entitled "Contract Carriers' Arrangement" was executed by Mr Jamsek, Mr Whitby and the other drivers as a "group"[10] without any negotiation in 1986, 1993, 1998 and 2001 (FC [40], [57], [63], [66], CAB 83, 85, 89) and:[11]

(a) entitled the drivers to four weeks leave *without* pay, but with an expectation that they would take at least two of those weeks in January and that any leave period of more than two weeks required permission from the company (cl 3(a));

(b) provided that if the company decided to close the NSW Branch for a longer period than two weeks, then (cl 3(a)):

(i) for notice given in November, the drivers would be paid an hourly rate for a 9 hour day and they had to be "on call"; and

(ii) for no notice given before December 19th, then the drivers would be paid their "usual weekly rate" and had to attend the sites and "work as directed";

(c) required the drivers to work a "standard nine hour working day with a usual starting time of 6am" (cl 7(b));

(d) required each driver to be paid an hourly rate (cl 7(b));

(e) stipulated that "sick day or unable to work days" had to be notified by the drivers (identified in the contract as "he") by no later than 6am (cl 8);

(f) contained a promise on the part of the drivers that each not offer "his" vehicle for sale "with any guarantee of either the continuity of work for [the company] or [the] implied acceptance [by the company]… of the purchaser" (cl 2(1)(k));

(g) did not permit any other person to drive the drivers' trucks without the company's permission (cl 2(1)(g));

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[10] RFM page 84 line 46.

[11] The contracts are reproduced in RFM at 12, 21, and 28.

(h) permitted termination of the contract where the drivers did not first obtain the company's permission before selling their vehicle for any purpose other than replacement (cl 5(e)); and

(i) recognised that while the "Contractors" were "working under the same arrangement" they were fully independent from each other (cl 5(a)) but would co-ordinate with each other (cl 5(b), cl 9(c)) including as to matters of pay (cl 5(f)).

19. In 2001, Mr Jamsek and Mr Whitby were also required by the appellants to complete a "manifest run sheet" each day. The purposes of the run sheet included outlining deliveries to be completed that day and enabling the appellants' warehouse manager or other company managers to identify where the drivers would be at certain times (FC [71] – [72], CAB 90).

20. During their 30 years as so-called "independent contractors", Mr Jamsek and Mr Whitby "were ostensibly required, or at least expected" (FC [224], CAB 131) to:

(a) permit the appellants to affix to their trucks tarpaulins adorned with the company's (large) name and logo (FC [51], [61], [73], [79],[219] – [220], CAB 85, 88, 91, 93, 128); and

(b) wear company-branded clothing, including jackets and shirts (FC [58], [108], [222], CAB 88, 97, 130).

21. Mr Jamsek and Mr Whitby did not, at any time after 1986, have a practice of trying to increase their income or business opportunities by seeking further sources of work. In working for one business only, Mr Jamsek and Mr Whitby did not enter into transactions on a continuous and repetitive basis in the pursuit of profit: on the contrary, Mr Jamsek and Mr Whitby entered into, in effect, only *one* transaction of substance being solely their work for the appellants.

22. Mr Jamsek and Mr Whitby were thus not entrepreneurial or profit-motivated. They were men of limited education and ambition who ended up in partnership structures and owning delivery trucks *not* because they were striving for greater income or personal autonomy, but because as young men in their 20s with no significant skills, they were faced with the loss of their jobs.

Argument

23. In concluding that Mr Jamsek and Mr Whitby were employees and workers, the Full Court engaged in an orthodox application of the well-established multi-factorial test

for determining the "totality of the relationship" and whether or not there exists an employment relationship: *Stephens v Brodribb* (1986) 160 CLR 16; *Hollis v Vabu* (supra).[12]

24. Perram J (with whom Wigney and Anderson JJ agreed on this point) rejected the proposition that the question of employment could be resolved by reference to a binary distinction, or dichotomy, between working in one's own business and working in the business of another.[13]

25. It is this aspect of the Full Court's judgment that raises the issue of principle.

"No Dichotomy Principle"

10 26. Underlying this question from the appellants' perspective is, perhaps, an unstated assumption that the "work" being referred to as performed by the putative employee for their employer and in their own business is exactly the same.

27. Whether or not that is the appellants' assumption, the question of principle can be resolved relatively quickly:

(a) *first,* the Full Court's consideration is consistent with High Court authority as the bicycle couriers in *Hollis v Vabu* (supra) also had their own businesses to some extent as they could contract with Vabu Pty Ltd through partnerships and companies and that did not prevent the High Court's conclusion that they were employees (at [19] – [22] per Gleeson CJ, Gaudron, Gummow, Kirby and
20 Hayne JJ; cf Buchanan J in *ACE Insurance v Trifunovski* (2003) 209 FCR 146 at [121], [128]);

(b) *secondly,* it is well established that partners may hold other offices and employment outside the partnership and be liable to account to the partnership for their salaries and income earned in those roles: Roderick I'Anson Banks, *Lindley & Banks on Partnership* (Sweet & Maxwell, 20th Edition, 2017) at [10-56] in 'Usual Clauses Found in a Partnership Agreement'; see also *Collins v Jackson* (1862) 31 Beav 645 and 54 ER 1289 and *Calryon-Britton v Lumb*

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[12] FC [3], [6], [14], [179] – [184], [186], CAB 74, 75, 78, 114.

[13] FC [6] – [8], [14], [181], CAB 75, 78, 115.

(1922) 38 TLR 298. In other words, the partners have simultaneously their own business and are employed by others; and

(c) *thirdly*, when a partnership business involves one of the partners being employed by others, there is a coherent, non-dichotomous relationship between the work of the employee and the business he or she is also conducting. The potential for this type of non-dichotomous relationship to exist was recognised by the primary judge at [150] (CAB 37) and was explained by Perram J at first instance in *ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532 at [95].

28. In the appellants' written submissions, they identify five reasons why the Full Court purported erred in this regard (AS [44] – [49]). Dealing with each in turn.

29. *First*, as set out at [27] above, the Full Court's observation was not "contrary to longstanding authority of this Court" (AS [44]). In *Hollis v Vabu* (supra), the fact that the bicycle couriers could contract with Vabu Pty Ltd through their own partnerships and companies was no barrier to the conclusion that they were also employees. There was no suggestion that those entities would be a sham. Rather, the majority stated that "viewed as a practical matter the bicycle couriers were not running their own business or enterprise", and then immediately added that "nor did they have independence in the conduct of their operations" (at [47] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). The majority then examined all the circumstances of the relationship between the parties and explained that "their engagement by [the respondent] left the couriers with limited scope for the pursuit of any real business enterprise on their own account" (at [55]). That is, in effect, the same observation made by the Full Court in this case (FC [10] per Perram J (CAB 76), [17] per Wigney J (CAB 78) and [244] per Anderson J (CAB 137)).

30. In this context, the passage from *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217 relied upon by the appellants (AS [44]) is not a statement of principle from which a Court must commence the multi-factorial analysis to determine the reality of the relationship. Rather, it is a statement of the ultimate conclusion that the Court will reach on the binary question before it, and does not foreclose the possibility that the person may also be conducting a business. Applied to the conclusion in case, it is reconciled by understanding that the partnership business was the ownership of the trucks (as the wives could rationally be partners in that activity) and the labour undertaken by Mr Jamsek and Mr Whitby was serving the business of

the appellants. The fact that the income from that work was accounted for to the partnership does not, as a matter of principle, change that analysis.

31. *Secondly,* there is no incoherence as matter of principle. Partnerships frequently and successfully manage potential conflicts. Further, partners having outside appointments and employment are not uncommon. In this case, there is no obvious conflict between the role of the drivers as employees and their roles as partners in owning the trucks.

32. *Thirdly,* the appellants purported tracing of the "No Dichotomy Proposition" is not correct and, in any event, irrelevant. Buchanan J in *ACE Insurance* (supra) at [128] (second sentence) was not purporting to summarise *Hollis v Vabu.* Rather, his Honour was stating a matter of general principle which his Honour then identified was not contrary to *Hollis v Vabu*. This was made plain at [121] of his Honour's reasons.

33. *Fourthly*, the appellants in their fourth argument appear to accept that the dichotomy referred to in from *Marshall v Whittaker's Building Supply Co* (supra) is the ultimate conclusion of the multi-factorial analysis. The point of difference between the parties is the respondents' contention that while a person may have a business entity and conduct some business, this does not compel the conclusion that, in reality, the relevant work they are performing is in that business.

34. *Fifthly,* if the outcome of the multi-factorial test turned upon the requirement that a person could not be "running their own business" in any form (AS [48] – [49]), then employees who erroneously understood themselves to be contractors and who had set up companies and partnerships would always be excluded because they have established a business entity and made various arrangements on that basis. As Buchanan J (Lander and Robertson JJ agreeing) observed about taxation and other arrangements in *ACE Insurance* (supra) at [37]):

> "It is also difficult, in my view, to give much independent weight to arrangements about taxation, or even matters such as insurance cover or superannuation. These are reflections of a view by one party (or both) that the relationship is, or is not, one of employment. For that reason, in my view, those matters are in the same category as declarations by the parties in their contract (from which they often proceed). They may be taken into account but are not conclusive. These matters are less important than the adoption by the parties (where this occurs) of rights and obligations which are fundamentally inconsistent with basic requirements of a contract of employment, such as the ability to delegate the discharge of obligations under a contract to another person, or where there is a lack of control over how work is done."

35. On this basis, the appellants' fifth argument is ultimately nothing more than a rejection of the well-established multi-factorial test and a desire to replace it with a simplified (and employer friendly) question as to whether the putative employee has "a business of any kind". However, the correct approach to the question of employment under the relevant legislation in this case is to ask whether, in all the circumstances, the personal labour being provided by the putative employee is for the employer or for his or her own business.

Appellants' factual challenge to the Full Court's conclusions

36. The appellants then challenge the factual findings made by the Full Court that Mr Jamsek and Mr Whitby were "employees" and "workers" for the purpose of the various statutes.

37. That challenge is, with respect, flawed having regard to the "10" reasons given by the appellants for the reasons that follow and taking each point in turn.

38. *First,* it is not strictly correct that the respondents brought a "substantial business asset" to their engagement by the appellants[14]. Rather, the trucks (but not the ute which was initially bought for personal use by Mr Whitby) represented a "substantial outlay in capital" by the partnerships (FC [205], CAB 123). Further, as the Full Court observed:

(a) the respondents were compelled by the appellants' predecessors to arrange for the purchase the trucks as part of the employment ultimatum given in 1985 and, for the majority of the time, the trucks were adorned with the appellants logo (FC [206], CAB 123). In other words, the purchase of the trucks was not

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[14] The accounting records for the Jamsek partnership in evidence before the primary judge demonstrated that its truck had minimal value to the partnership from at least 1999 and ceased to be recorded as an asset all together in 2010 – see table below.

Year	Depreciation	Value	RFM Ref
1997	$2,145	$9,532	254, 256
1998	$1,662	$7,387	263, 264
1999	$1,288	$5,725	269, 274
2007	$14,672 (accumulated)	$746.18	279, 285
2008	$14,853 (accumulated)	$565.18	295, 301
2009	$14,989 (accumulated)	$429.18	313, 317
2010	n/a	$0	329, 334

indicative of any self-generated entrepreneurial initiative by Mr Jamsek and Mr Whitby;

(b) the respondents did not exercise any significant additional skills in driving the trucks (and certainly not the ute) (FC [207], CAB 123);

(c) while a different conclusion might be appropriate in other cases (*Hollis v Vabu* at [47]), the conclusion that a quasi-owner driver might also be an employee, was consistent with earlier authority in *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179 at [185] (FC [208], CAB 124). That the application of broad principle to any case is fact-dependent is not unusual.

10 39. This Court's decisions in *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* (supra) and *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 are not all cases concerned simply with "truck owner-drivers" and are not all cases where that factor is determinative (AS [56]).

40. On the contrary:

(a) *Humberstone* was decided in 1949 at a time when even owning a car was not common and where Mr Humberstone had purchased his truck and run a business, with his business name on the truck, since 1924. The Court (Latham CJ, Rich and Dixon JJ) decided that case on the basis of the "control" test;

20 (b) *Wright* concerned a "four to five ton" tip truck which had been hired to carry gravel, sand and petrol in in connection with the construction of a road. The driver of the truck was not its owner; rather he had been engaged by the owner who had been engaged by the government (at 416.7 per Fullagar J);

(c) *Marshall* concerned a timber feller, Mr Marshall, who was obliged by his oral contract with the respondent to not only supply his own felling equipment and a truck with a power winch, but also a "swamper" (being another specialised labourer). Mr Marshall was engaged an activity which involved "a very considerable degree of skill and knowledge" (at 213.8 per Kitto, Taylor, Menzies and Owen JJ) where the contract required not only his labour but for
30 him to hire other labour as well (at 215.2); and

(d) *Stevens* concerned the admitted negligence of Mr Gray who was a "snigger" and who was operating his bulldozer and the injuries to Mr Stevens who was

operating his truck. Mr Stevens claimed, among other things, that Mr Gray was an employee of Brodribb and that he was also an employee of Brodribb. The ownership of the truck and bulldozer were not the determinative factor in the Court's conclusion that they were not employees: at 25.8 per Mason J, 36.4 per Wilson and Dawson JJ, 47 per Brennan J (agreeing with Mason J) and 49.7 per Deane J (agreeing with Mason J in relation to employment).

41. *Secondly*, whether or not the contracts were with Mr Jamsek and Mr Whitby's partnerships (noting this was plainly not so in relation to Mr Whitby after 30 June 2012), that does not preclude a conclusion as to the employment of Mr Jamsek and Mr Whitby by the appellants (FC [192] – [201] ff; *Hollis v Vabu* at [19 – [22]). Further, as set out earlier, it is not usual for partnerships to make provision to require partners to bring to account their income from employment outside the partnership. And subject to one exception which proved the otherwise invariable rule (discussed further below), in their 30 years of work, the appellants (and their predecessors) required that Mr Jamsek and Mr Whitby themselves perform the contracts.

42. *Thirdly*, the appellants exercised effectively the same control over the drivers as they had prior to the independent contractor ultimatum in 1985. Like the bicycle couriers in *Hollis v Vabu* (supra), the drivers had relatively little control over the manner of performing their very basic work given that, among other things, the appellants dictated (among other things) their hours of work, their leave conditions and their livery (FC [213] – [225], CAB 125ff).

43. *Fourthly,* even though each partnership conducted its affairs as a business (which is essentially based upon the fact that each partnership owned the trucks and did no more than properly meet the accounting and taxation requirements of a partnership), in addition to the other arguments set out earlier, that ignores that Mr Jamsek and Mr Whitby did not and could not generate goodwill in their businesses by also serving other companies and engaging in entrepreneurial activity. And they were prohibited by cl 2(1)(k) of their contracts from generating goodwill in their sole relationship with the appellants (see FC [9]-[12] and [234]-[237], CAB 76, 134).

44. *Fifthly,* the fact that on only one occasion in the course of 30 years a friend drove Mr Jamsek's truck for 6 weeks (when Mr Jamsek, after about 23 years of working for the company, took a longer holiday), does not support a finding that the drivers' work was readily delegated. Mr Jamsek's evidence was that he had called upon a friend who

worked for another company and was on leave and they agreed a one-off amount of payment.[15] The reality was that Mr Jamsek's request to arrange a friend to drive his truck *only once* in over 30 years of work is an indictment of the appellants having not afforded their drivers fair working conditions since late 1985. For his part, Mr Whitby never sought, in 30 years, to engage another driver so that he could take longer than his contractually stipulated unpaid 4 weeks annual leave.

45. *The sixth and seventh* arguments challenge the Full Court's findings with respect to Mr Jamsek and Mr Whitby's ability to service other clients and the Full Court's findings in relation to goodwill. The proposition Mr Jamsek and Mr Whitby should have personally worked more than 40-45 per week driving their trucks had obvious problems and is no longer pressed by the appellants. The new proposition, that Mr Jamsek and Mr Whitby could have hired other drivers or purchased more trucks to be driven by others, was never put to Mr Jamsek or Mr Whitby by the appellant's former counsel. The fact is they never did so in 30 years and, by inference, never would have done so. If the appellants wished to displace that clear inference, it was for them to adduce that evidence. In particular, the appellants adduced no evidence that Mr Jamsek or Mr Whitby could have afforded to purchase more trucks for the purpose of effectively creating a new business[16], or could logistically or profitably have sub-leased their trucks to other drivers at night time or on the weekends. This new suggestion is, in substance, a contention that Mr Jamsek and Mr Whitby should have created different businesses.

46. In so far as the appellants now also assert for the first time that Mr Jamsek or Mr Whitby could have captured goodwill had they introduced a potential purchaser to the appellants (AS [63](b)), this was a matter on which the appellants could have called evidence and which related to issues in their knowledge alone *Blatch v Archer* (1774), 1 Cowp. 63; (1774) 98 ER 969. Further, and in any event, the partnerships did not have "old customers" in the sense discussed in *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 cited with approval in *Commissioner of State Revenue v Placer Dome Inc* (2018) 265 CLR 585 at [69] per Kiefel CJ, Bell, Nettle and Gordon

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[15] RFM 153 at line 15 ff.

[16] Mr Whitby's purchase of the extra ute only created flexibility for him to use either the ute or the truck depending on whether he was being required to make deliveries in the CBD or deliver large items: FC [81] – [84], CAB 93ff.

JJ. Rather, they had a wholly unique business with no objective value as the relationship with the appellants was based in the long term trust developed with each of the individual men who drove the trucks.

47. *Finally*, on any view, the fact that some large businesses may have no goodwill (AS [63](c)) does not render the question of goodwill irrelevant to the multifactorial analysis: see *Stevens v Brodribb* (supra) at 37 per Wilson and Dawson JJ and discussion by the Full Court at [234] per Anderson J (CAB 134). In this case, it was strong indicator that Mr Jamsek and Mr Whitby were working in the appellants' businesses.

48. The *eighth* point in substance cavils with the Full Court giving less weight than the primary judge to the parties intentions in entering into the new contracts in 1985 (FC [192] – [201]). The appellants, seemingly inconsistently, contend that the parties motives could not render the "transaction… legally ineffective", thus suggesting that the contract itself was determinative of the legal relationship, and the multi-factorial test did not apply. In reaching a different to conclusion to the primary judge, the Full Court undertook a detailed analysis of *Autoclenz Ltd v Elecher* [2011] UKSC 41; [2011] 4 All ER 745; [2011] ICR 1157. *Autoclenz* was recently considered by the Supreme Court of the United Kingdom in *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5.

49. In *Uber BV*, Lord Leggatt (with whom Lord Reed, Lord Hodge, Lady Arden, Lord Sales and Lord Hamblen agreed and noting Lord Kitchin became ill), upheld the employment tribunal decision that Uber's drivers were employees for the purpose of relevant UK legislation. Uber argued on the appeal that (at [44]):

> "… the approach adopted by the employment tribunal, the Employment Appeal Tribunal and the majority of the Court of Appeal was wrong in law because it involved disregarding, without any legal justification, the clear and unambiguous terms of the written agreements."

50. The UK Supreme Court then set out the principles as to why employment contracts were treated differently to other contractual relationship and the need to focus on the "reality" of the relationship at [59] to [64]. Lord Leggatt also explained the rationale for this approach, also applicable to this case, being that (at [69] to [70]):

> "Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, *Autoclenz* had agreed that the claimants should be paid at least the national minimum wage or receive paid annual

> leave. It was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation."

51. In this case, the fact that Mr Jamsek and Mr Whitby had no entrepreneurial motivation in purporting to become independent contractors and had instead been motivated by the desire to avoid redundancy, was a relevant matter in determining the reality of the relationship and a proper basis for the Full Court to depart from the primary judge's emphasis on their contractual intentions in 1985 (PJ [177]).

52. The final and *tenth* point concerns the alleged applicability of the judgement of the High Court of New Zealand in *TNT Worldwide Express (NZ) Limited v Cunningham* [1993] NZLR 681. In that case, the relevant law in New Zealand was the since repealed *Employment Contracts Act 1991* (NZ) and the main inquiry to determine whether the drivers were employees or independent contractors was the correct construction of the written contract between the drivers and the company (at 686.42 per Cooke P, 695.39 per Casey J and 698.28 per Hardie boys J). That is not the position in Australia where the multi-factorial test to determine the totality of the relationship is well accepted.

53. Further, in 2000, the *Employment Contracts Act 1991* (NZ) was replaced by the *Employment Relations Act 2000* (NZ). Section 6(2) of that Act now requires the Court, when deciding whether a person is employed, to "determine the real nature of the relationship" between the parties. And section 6(3)(b) directs that the Court "is not to treat as a determining matter any statement by the persons that describes the nature of their relationship".

54. Finally, another significant difference in *Cunningham* is that the drivers were paid on a per-unit delivered basis (at 692.45 and Schedule A to the contract). Accordingly, the drivers in that case could increase their profits depending on the number of items they delivered whereas Mr Jamsek and Mr Whitby were paid per hour for their labour. On any view, *Cunningham* has little relevance to this case.

Notice of Contention

55. The Notice Contention is to the effect that section 12(3) of SGA Act applied to Mr Jamsek and Mr Whitby. The Full Court, having found that Mr Jamsek and Mr Whitby "employees" and "workers", did not need to consider this question (FC [255], CAB 140).

56. To find that a person is an employee under the extended definition in section 12(3) of the SGA Act requires:

(a) there should be a 'contract';

(b) that the contract is wholly or principally 'for' the labour of a person; and

(c) that the person must 'work' under that contract.

See *Dental Corporation Pty Ltd v Moffet* [2020] FCAFC 118; 278 FCR 502 at [82], [111] and [117]).

57. The primary judge found that there was no relevant contract because the "contract" (whether express or implied) was between the relevant partnerships and the appellants (PJ [219], CAB 52). However the plain language of section 12(3) does not require the contract to be with made with the putative employee. Rather, section 12(3) requires that "a person works under a contract…". In this case, both Mr Jamsek and Mr Whitby worked "under" the relevant contracts which expressly regulated their working activities (including times of work, leave and the like: see [18] above) and paid them for their labour on a per hour basis.

58. The primary judge also found that the contracts "were not principally" for the labour of Mr Jamsek and Mr Whitby because the contracts also provided for the equipment (delivery vehicles) (PJ [220], CAB 52).

59. However, section 12(3) is intended to apply even where a contract may have multiple purposes and the Court's role is to determine in such cases whether the contract, viewed from the perspective of the putative employer, is "principally" for the labour of the person working under that contract (*Dental Corporation* at [83]-[85]).

60. "Principally" ordinarily means chiefly or mainly: *Commissioner of Taxation v Commonwealth Aluminium Corporation Limited* (1979 – 1980) 143 CLR 646 at 658.8 per Stephen, Mason and Wilson JJ; *Gray v Mercantile Mutual Insurance (Australia) Limited* (1994) SASR 154 at 159 per Olsson J (with whom Mohr J agreed) citing Lockhart J in *Parker Pen (Australia) Pty Ltd v Export Development Grants Board* (1983) 67 FLR 234 at 240 – 241; see also *Cascade Brewery Co Pty Ltd v Commissioner of Taxation* (2006) 153 FCR 11 at [25] per Sundberg J.

61. The determination cannot simply be that there are two purposes and to assume each is equal; cf *Gray v Mercantile Mutual Insurance (Australia) Limited* (supra) at 160. Some analysis of the substantive facts must be undertaken to determine whether the

purpose of "labour" is the main or chief purpose from the perspective of the putative employer.

62. In this case, the primary judge had earlier recorded that prior to entry into the contract in 1986, Mr Whitby had been earning as an employee "$410 a week" (PJ [28], CAB 13). Entry into the contract in 1986 "provided a minimum of $600 per week" and this amount built up over time. Mr Whitby understood this increase was to cover the fact he was now providing a truck at his expense as well as his labour (PJ [29], CAB 13). The correct conclusion, with respect, was that the labour provided under the contract by former employees who could be trusted to do their job well was, from the perspective of value to the putative employer, the main or chief component of the value of the contract measured by the metric of money. That this more or less remained the case was, in part, corroborated by the evidence of Mr Jamsek's partnership accounts which demonstrated that "less than 50 percent of the applicants' gross income was used to pay their expenses" (PJ [220], CAB 52).

63. Accordingly, section 12(3) of the SGA Act applied to Mr Jamsek and Mr Whitby.

PART VI: ESTIMATED TIME FOR ORAL ARGUMENT

64. The respondents estimate that they will require 1 ½ hours for oral argument.

Dated: 28 May 2021

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IN THE HIGH COURT OF AUSTRALIA S27/2021

SYDNEY REGISTRY

BETWEEN:

ZG OPERATIONS AUSTRALIA PTY LTD & ANOR

Appellants

and

MARTIN JOSEPH JAMSEK & ORS

Respondents

Annexure to Respondents' Submissions (Practice Note 1 of 2019)

1. *Fair Work Act 2009* (Cth):

   (a) All compilations between the Compilation dated 29 July 2011 and Compilation No. 29 dated 17 November 2016.

   (b) Sections 13, 335 and 342(1).

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

   (a) The Compilation published on 31 January 1993, Compilation No. 66 dated 1 January 2017 and all intervening Compilations.

   (b) Section 12(3).

3. *Long Service Leave Act 1955* (NSW):

   (a) The version published on 5 July 2000, the version published on 8 December 2016 and all intervening versions.

   (b) Section 3.