



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S27/2021
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Important Information

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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

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

- and -

MARTIN JAMSEK
 First Respondent

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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' Chronology

Part I: Publication on the internet

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

Part II: Principal events

- 30 This chronology adopts the defined terms from ZG's submission dated 16 April 2020.

Date	Event
1977	Mr Jamsek and Mr Whitby commence employment with Associated Lighting Industries Pty Ltd (ALI). ¹

¹ AJ [31]-[32] (CAB 82).

Date	Event
By 1980	Mr Jamsek and Mr Whitby start driving trucks for ALI as employee truck drivers. ²
Late 1985	ALI offers its five employee truck drivers the opportunity to “become contractors”. The drivers are told: “If you don’t agree to become contractors, we can’t guarantee you a job going forward”. All five drivers agree to become contractors. ³
Late 1985 to early 1986	<p>ALI and the Drivers transition to new arrangements giving effect to the Drivers’ agreement to the proposal to become contractors:</p> <ul style="list-style-type: none"> – Mr Jamsek and Mr Whitby are paid out their accrued employment entitlements, such as annual leave.⁴ – Mr Jamsek and Mr Whitby each obtain accounting advice and, based on that advice, establish the Partnerships.⁵ – The Whitby Partnership and the Jamsek Partnership execute a written contract with ALI agreeing to provide delivery services as contractors. (A copy of that contract could not be located but its terms were similar to the subsequent contracts, except that the 1986 contract provided for delivery fees to be calculated on a “per carton” basis whereas the subsequent contracts provided for hourly rates).⁶ – The Partnerships purchase delivery trucks from the Company, borrowing funds to finance the acquisition.⁷ – From that point on, the Partnerships:⁸ <ul style="list-style-type: none"> ▪ render invoices for their services; ▪ receive payments from the Company and declare them as partnership income; ▪ split partnership income between the partners; ▪ take on all truck-related costs; and ▪ claim tax deductions for these costs and other business expenses. <p>(But see below regarding the dissolution of the Whitby Partnership in 2012.)</p> <p>From then on, the Drivers wear a mix of personal and Company-branded clothing.⁹</p>

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² Ibid.

³ AJ [39]–[40] (CAB 83).

Date	Event
Early 1986	ALI transfers its business to Thorn EMI Pty Ltd. ¹⁰
1989	The Whitby Partnership acquires a new truck, using finance to fund it. ¹¹
1990	The Jamsek Partnership acquires a new truck, using finance to fund it. ¹² A tarp with the Company logo is installed on the truck and is replaced from time to time. ¹³
Sometime between 1990 and 1993	The Partnerships begin invoicing based on hourly rates, rather than on a “per carton” basis. ¹⁴
17 May 1993	Thorn Lighting Pty Ltd (the First Appellant under its former name) is incorporated. ¹⁵
Around 1 July 1993	The Partnerships enter into a new contract with “Thorn Lighting”, described as being a division of Thorn EMI (1993 Contract). ¹⁶
25 August 1993	Thorn EMI transfers its business to Thorn Lighting. ¹⁷
1993	The Whitby Partnership trades in its truck and leases another truck. ¹⁸ A tarp with the Company logo is installed on the truck and is replaced from time to time. ¹⁹

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4 TJ [130] (CAB 33).
5 AJ [35]–[36] (CAB 82).
6 AJ [40] (CAB 83).
7 AJ [43]–[45] (CAB 84).
8 AJ [35]–[36] (CAB 82), [46] (CAB 84), [110]–[124] (CAB 97–100), [188] (CAB 117).
9 AJ [109] (CAB 97), [221]–[224] (CAB 129–31).
10 AJ [47] (CAB 84).
11 AJ [50] (CAB 85).
12 AJ [51] (CAB 85).
13 AJ [219] (CAB 128).
14 AJ [52] (CAB 85).
15 AJ [53] (CAB 85).
16 AJ [55] (CAB 85).
17 AJ [60] (CAB 88).
18 AJ [61] (CAB 88–9).
19 AJ [219] (CAB 128).

Date	Event
19 August 1996	Thorn EMI changes its name to Thorn Australia Pty Ltd. ²⁰
1 October 1998	The Partnerships enter into a new contract with Thorn Lighting. The contract provides for increased rates but otherwise does not materially differ from the 1993 Contract. ²¹
2000	<p>For a 6- or 7-week period, the Jamsek Partnership uses a substitute driver. The Partnership continues to invoice the Company for its services and makes its own arrangements to remunerate the substitute driver.²²</p> <p>Upon the introduction of GST, the Partnerships register for GST, start charging GST, rendering tax invoices, and claiming input tax credits.²³</p>
2001	The Partnerships enter into a new contract with Thorn Lighting. The contract provides for increased rates but otherwise does not materially differ from the 1993 Contract. ²⁴
Around 2007	Thorn Lighting and Zumtobel Lighting Pty Ltd (the Second Appellant under its former name) merge their warehousing and manufacturing divisions, maintaining separate sales divisions. Thorn Lighting undertakes all distribution, transport and delivery of products for both sales divisions. ²⁵
2009	The Partnerships approach the Company proposing to quote for non-metropolitan deliveries. The Company agrees. From that point, the Company approaches the Drivers from time to time to see if they are interested in quoting for a particular non-metropolitan delivery job. ²⁶

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²⁰ AJ [27] (CAB 81).

²¹ AJ [63] (CAB 89).

²² AJ [97] (CAB 95–6).

²³ AJ [67] (CAB 90), [118] and [122] (CAB 99); TJ [136] (CAB 34).

²⁴ AJ [65]–[66] (CAB 89).

²⁵ AJ [76] (CAB 92), [89] (CAB 94).

²⁶ AJ [80] (CAB 93).

Date	Event
2010	<p>Mr Whitby purchases a Rodeo ute, initially for private use. He approaches the Company offering to use the ute to perform inner-city deliveries that were previously given to couriers. From that point, Mr Whitby generally decides which vehicle to use for particular deliveries so as to maximise profitability (it is more profitable to use the ute, but some items only fit on the truck). The ute does not display the Company logo.²⁷</p> <p>Mr Whitby disassembles the gates and removes the tarp from the Whitby Partnership truck so that it becomes a “flatbed”. From that point onwards, the truck does not display the Company logo.²⁸</p>
30 June 2012	The Whitby Partnership is dissolved. From that point onwards, Mr Whitby invoices the company using his own ABN. ²⁹
About 2014	Mr Whitby replaces the Rodeo ute with another ute and continues to use it as the Partnership’s second vehicle to perform deliveries for the Company. The new ute does not display the Company logo. ³⁰
28 September 2015	Thorn Lighting changes its name to ZG Operations Australia Pty Ltd. Zumtobel Lighting Pty Ltd changes its name to ZG Lighting Australia Pty Ltd. ZG Operations and ZG Lighting undergo a restructure, with ZG Lighting becoming solely responsible for sales and ZG Operations becoming responsible for the balance of the business functions. ³¹
14 November 2016	Mr Whitby and Mr Jamsek receive a letter from the Company terminating the Contract with effect from 20 January 2017. The letter states that the Contract is being terminated due to financial conditions and the need to reduce costs. ³²
15 November 2017	The Drivers commence the proceeding below. ³³

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²⁷ AJ [81]–[82], [84] (CAB 93–4).

²⁸ AJ [83] (CAB 94).

²⁹ AJ [88] (CAB 94), [123] (CAB 99).

³⁰ AJ [82] (CAB 94).

³¹ AJ [89]–[90] (CAB 94–5).

³² AJ [95] (CAB 95).

³³ TJ [1] (CAB 8).

Date	Event
30 November 2018	The primary judge (Thawley J) dismisses the Drivers' proceeding. ³⁴
16 July 2020	The Full Court (Perram, Wigney and Anderson JJ) allows the appeal, finds that the Drivers were employees and remits the balance of the proceeding to the primary judge. ³⁵
12 February 2021	This Court grants special leave to appeal against the Full Court's judgment. ³⁶

Friday, 16 April 2021



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³⁴ CAB 57.

³⁵ CAB 143-4.

³⁶ CAB 157.