



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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BETWEEN:

ZG OPERATIONS AUSTRALIA PTY LTD & ANOR
Appellants**MARTIN JAMSEK & ORS**
Respondents

Appellants' Outline of Oral Submissions¹

10 Part I: Publication on the internet

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

Part II: Outline of oral submissions

1. There is a dichotomy between running one's own business and being an employee

1.1. Key cases:

1.1.1. *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, 217.

1.1.2. *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 35.

1.1.3. *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 [40].

1.2. Requires examination of the totality of the relationship.

1.3. Not a substitute for the multi-factorial test but a different way of expressing the ultimate question.

1.4. Organising principle that helps guide the application of the multi-factorial test.

1.5. Full Court rejected this dichotomy: AJ [6]–[8] (CAB 75–6), [181] (CAB 115).

2. The Drivers were running their own businesses and were contractors

2.1. Courts below found that the Partnerships were running their own businesses:

2.1.1. Primary judge: TJ [213] (CAB 51–2).

2.1.2. Full Court: AJ [7]–[12] (CAB 75–77), [189]–[190] (CAB 117–8).

2.2. Key facts in favour of a contractor relationship:

2.2.1. Partnerships owned, operated, maintained, insured, repaired and replaced their trucks: AS [17]–[18], [24], [33], [53]–[56].

¹ This outline adopts the defined terms in ZG's written submissions and reply.

2.2.2. Use of the partnership structure:

2.2.2.1 Drivers set up the Partnerships at their own initiative and on advice: AS [14], [58].

2.2.2.1.1. Contract was with the Partnerships: AS [57].

2.2.2.1.2. Clear mutual intention to create a contractor relationship; commercial pressure irrelevant: AS [64].

2.2.2.2 Drivers operated the Partnerships for about three decades.

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2.2.2.3 All revenue from the use of the trucks (including additional revenue streams from return of pallets and non-metropolitan deliveries) treated as partnership income: AS [16], [58], [59(c)]; Reply [5].

2.2.2.4 Partnerships rendered tax invoices, charged GST and claimed input tax credits: AS [21], [23], [60(e)].

2.2.2.5 Partnerships incurred all truck-related expenses (including insurance, fuel, maintenance, finance costs, rent of business premises, repairs, tolls, fines, telephone costs, casual labour and depreciation on trucks, office equipment, truck port, truck canopy, truck radio and even driveway improvements): AS [22], [55], [60(b)].

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2.2.2.6 Partnerships split income between partners for tax advantage: AS [23], [58], [60(e)].

2.2.3. Partnerships had a right to delegate work and did so: AS [25], [61].

2.2.4. Partnerships had a right to service other clients and could have done so: AS [26]–[27], [62].

2.2.5. Partnerships had capacity to generate goodwill: AS [39]–[40], [63].

2.2.6. Drivers controlled delivery areas, order of deliveries, loading of trucks: AS [31]–[33], [59(b)].

2.3. Facts put against a contractor relationship:

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2.3.1. Drivers were provided with branded clothing, though not required to wear a full uniform: AS [28], [65].

2.3.2. For part of the period, the trucks displayed a Company logo: AS [19], [65].

2.3.3. 9-hour working day, though regularly departed from: AS [29]–[30].

2.4. Classifying the Drivers as contractors is consistent with the “‘conventional view’ that owners of expensive equipment such as [a] truck ... are independent contractors”: *Australian Air Express Pty Ltd v Langford* (2005) 147 IR 240 [44].

3. Submissions of the amicus curiae

3.1. Amicus makes three submissions (concerning long service leave, annual leave and coherence of the law), all based on a determination made by the NSW Industrial Relations Commission under the *Industrial Relations Act 1996* (NSW) (**IR Act**).

3.2. None of these were raised before the primary judge or the Full Court by any party.

10 3.3. Two submissions concern issues that do not arise in this appeal but fall within the Full Court’s remitter to the primary judge (long service leave and annual leave).

3.4. Coherence of the law submission fails because the IR Act is specific to NSW: *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 [23].

4. The *Superannuation Guarantee (Administration) Act 1992* issue should be remitted

4.1. No objection to extension of time for the cross-appeal.

4.2. The question of whether the Drivers were “employees” within the meaning of s 12(3) of the *Superannuation Guarantee (Administration) Act 1992* should be remitted to the Full Court:

20 4.2.1. Raises important legal questions: Reply [17]–[18].

4.2.2. Court below did not decide the issue: Reply [19].

4.2.3. Commissioner of Taxation is not joined: Reply [19].

31 August 2021

Stuart Wood
Dimitri Ternovski