HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

ZG OPERATIONS AUSTRALIA PTY LTD & ANOR APPELLANTS

AND

MARTIN JAMSEK & ORS RESPONDENTS

ZG Operations Australia Pty Ltd v Jamsek
[2022] HCA 2
Date of Hearing: 1 September 2021
Date of Judgment: 9 February 2022
S27/2021

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 16 July 2020.*

3. *The issues raised by the notice of cross-appeal be remitted to the Full Court of the Federal Court of Australia for determination, and the Full Court to otherwise make orders in accordance with the reasons of this Court.*

On appeal from the Federal Court of Australia

Representation

S J Wood QC and D Ternovski for the appellants (instructed by Agnew Legal)

N C Hutley SC and R S Francois with A D Crossland for the respondents (instructed by Watson Law)

New South Wales Business Chamber Limited appearing as amicus curiae, limited to its written submissions

CATCHWORDS

ZG Operations Australia Pty Ltd v Jamsek

Industrial law (Cth) – Nature of employment relationship – Employee or independent contractor – Where respondents previously employed by company as truck drivers – Where respondents agreed to "become contractors" and purchase own trucks – Where each respondent set up partnership with spouse – Where partnerships executed contract with company for provision of delivery services – Where contract provided partnerships to purchase trucks – Where contract provided partnerships be paid by company for delivery services – Whether respondents employees of company.

Words and phrases – "contractual rights and obligations", "control", "disparity in bargaining power", "employee", "goodwill", "independent contractor", "partnership", "provision of services", "sham", "substance and reality", "totality of the relationship", "worker", "written contract".

Fair Work Act 2009 (Cth), ss 13, 14.

1 KIEFEL CJ, KEANE AND EDELMAN JJ. Between 1977 and 2017, Mr Jamsek and Mr Whitby[1] ("the respondents") were engaged as truck drivers by the second appellant's predecessors in business and subsequently by the second appellant itself. That business has undergone several changes of ownership during the period of the respondents' engagements. From the respondents' commencement in 1977 until 1986, the business was owned by Associated Lighting Industries Pty Ltd. The business was transferred in 1986 to Thorn EMI Pty Ltd and again in 1993 to the first appellant, which was then named Thorn Lighting Pty Ltd. Finally, in 2015, there was a corporate restructure by which Thorn Lighting Pty Ltd was renamed ZG Operations Australia Pty Ltd ("ZG Operations") and responsibility for the sales division of the business, which included the arrangements with the respondents' partnerships, was transferred to the second appellant, ZG Lighting Pty Ltd ("ZG Lighting"). ZG Lighting engaged the partnerships until the date of their termination on 20 January 2017[2]. For convenience, the various entities which engaged the respondents and their partnerships will be referred to in these reasons compendiously as "the company".

2 The respondents were initially engaged as employees of the company and drove trucks provided by the company. However, in late 1985 or early 1986, the company insisted that it would no longer employ the respondents, and would continue to use their services only if they purchased their trucks and entered into contracts to carry goods for the company. The respondents agreed to the new arrangement and each of Mr Jamsek and Mr Whitby set up a partnership with his wife. Those partnerships purchased trucks from the company and executed a written agreement with the company for the provision of delivery services. Thereafter, the respondents made deliveries as requested by the company. Each partnership invoiced the company for the delivery services provided, and was paid by it for those services. Part of the revenue earned was used to meet the partnerships' costs of operating the trucks. The net revenue earned was declared as partnership income and split between husband and wife for the purposes of income tax.

3 The agreement between the partnerships and the company was terminated in 2017. The respondents then commenced proceedings in the Federal Court of Australia seeking declarations in respect of statutory entitlements alleged to be owed to them as employees of the company pursuant to the *Fair Work Act*

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1 Mr Whitby having been declared bankrupt, the second and third respondents in the appeal to this Court were the trustees of Mr Whitby's estate in bankruptcy. It is convenient, however, in these reasons to refer to Mr Whitby personally.

2 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 121 [27], 131 [89]-[91], 132 [95].

2009 (Cth) ("the *FW Act*"), the *Superannuation Guarantee (Administration) Act 1992* (Cth) ("the *SGA Act*") and the *Long Service Leave Act 1955* (NSW) ("the *LSL Act*"). In the proceedings, a question arose as to whether the respondents were "employees" for the purposes of the *FW Act* and the *SGA Act* and/or "workers" for the purposes of the *LSL Act*.

4 The *FW Act* variously deploys the terms "employee" and "national system employee", depending on the context. Similarly, the *SGA Act* applies to an "employee". The *LSL Act* relevantly applies to a "worker", a term which is itself defined by reference to whether the person is "employed". Subject to one exception, it was not suggested by any party that the meaning of "employee" or "worker" differed in any material respect across the three statutory contexts or that they reflected a departure from the ordinary meaning of employment at common law[3]. The exception is s 12(2)-(11) of the *SGA Act*, which gives an expanded meaning to the terms "employee" and "employer" for the purposes of that Act. The sub-section relevant to the present appeal is s 12(3), to which reference will be made later in these reasons when considering the respondents' notice of cross-appeal.

5 The primary judge (Thawley J) concluded that the respondents were not employees of the company, and instead were independent contractors[4]. The Full Court of the Federal Court of Australia (Perram, Wigney and Anderson JJ) allowed the respondents' appeal, holding that the respondents were employees of the company[5].

6 The reasons of the Full Court suffered from two errors of approach. The first was the significant attention devoted by that Court (and indeed the primary judge) to the manner in which the parties actually conducted themselves over the decades of their relationship. That was thought to be necessary because those courts took the view that a proper characterisation of the totality of the relationship required a consideration of how the parties' contract played out in practice. The second was the Full Court's reasoning that the disparity in bargaining power between the parties affected the contract pursuant to which the partnerships were

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3 See ss 11-13, 15, 30C, 30E of the *FW Act*; s 12(1) of the *SGA Act*; s 3(1) of the *LSL Act*.

4 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934.

5 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114.

engaged, so that the "reality" of the relationship between the company and each respondent was one of employment.

7 The reasoning of the Full Court cannot be sustained. The respondents were not employed by the company. They were members of partnerships which carried on the business of providing delivery services to the company. The appeal to this Court must be allowed.

8 This appeal was heard together with the appeal in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*[6] ("*CFMMEU v Personnel Contracting*"). In the present case, as in *CFMMEU v Personnel Contracting*, there was no suggestion that the contract between the parties was a sham or had been varied or otherwise displaced by conduct of the parties. There was no claim by the respondents to set aside the contract either under statute or pursuant to equitable doctrines such as those relating to unconscionable conduct. In these circumstances, and for the reasons given in *CFMMEU v Personnel Contracting*, the character of the relationship between the parties in this case was to be determined by reference to the rights and duties created by the written agreement which comprehensively regulated that relationship. The circumstance that entry into the contract between the company and the partnerships may have been brought about by the exercise of superior bargaining power by the company did not alter the meaning and effect of the contract.

9 In addition, as a practical matter of the due administration of justice, the task of raking over the day-to-day workings of a relationship spanning several decades is an exercise not to be undertaken without good reason having regard to the expense to the parties and drain on judicial time involved in such an exercise. The claims made by the respondents in this case did not give rise to an occasion for such an exercise, those claims involving no suggestion that any aspect of the day-to-day performance of the contract superseded the rights and duties established by the contract. That having been said, however, in order to aid an understanding of the reasons of the courts below and of the arguments in this Court, it is desirable to summarise the salient aspects of the history of the dealings between the parties.

The factual background

10 Mr Jamsek and Mr Whitby left high school at 14 and 15 years of age respectively. Neither has any formal qualifications, and both have only ever

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6 [2022] HCA 1.

worked in jobs requiring manual labour. Both Mr Jamsek and Mr Whitby began working for the company in 1977 and became delivery drivers in 1980. There is no dispute that, at least until late 1985 or early 1986, they were employees of the company[7]. During this time, they drove trucks that were provided by the company[8].

The 1986 contract

11 In late 1985, aware that the company was planning to move locations, Mr Jamsek and another truck driver approached the company to request a pay rise to compensate them for the additional travel time. The request was rejected. A few weeks later, the company informed all five of its drivers, including Mr Jamsek and Mr Whitby, that it would not offer a pay rise but instead would offer the opportunity for the drivers to "become contractors", which would involve the drivers purchasing their own trucks. The drivers were told: "If you don't agree to become contractors, we can't guarantee you a job going forward"[9].

12 Each of the company's five drivers accepted the offer[10]. Each of Mr Jamsek and Mr Whitby, on the advice of his accountant, set up a partnership with his wife (referred to in these reasons as "the Jamsek partnership" and "the Whitby partnership" respectively)[11]. To give effect to the new arrangements, Mr Jamsek and Mr Whitby executed a written contract with the company ("the 1986 contract"). A copy of the 1986 contract could not be located when the proceedings commenced, and it was not in evidence at trial. Nevertheless, the primary judge inferred that, consistently with later contracts, each respondent entered into the 1986 contract on behalf of his partnership[12].

13 Pursuant to the 1986 contract, the drivers were paid a minimum "carton rate" of $120 per day (or $600 per week). Before the 1986 contract, Mr Whitby

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7 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 121-122 [30]-[32], [34].

8 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 153 [202].

9 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 122 [38]-[39].

10 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 122 [40].

11 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 122 [35]-[36].

12 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [22].

was earning approximately $410 per week[13]. Mr Whitby was also paid out his accrued annual leave balance at the time of entering into the 1986 contract[14].

The partnerships purchase trucks

14 Consistently with the proposal that led to the 1986 contract, Mr Jamsek and Mr Whitby each purchased a four-tonne delivery truck from the company for sums of $15,000 and $21,000 respectively. Each borrowed money to finance the purchase[15]. The primary judge inferred that these trucks, like the trucks that were purchased subsequently, had been purchased by each respondent on behalf of his partnership[16]. The partnerships paid all expenses associated with the trucks, including registration, maintenance, and interest on the funds borrowed to finance their purchase[17].

15 New trucks were acquired by the Whitby partnership in 1989 (for $70,000)[18], by the Jamsek partnership in 1990 (for between $70,000 and $80,000)[19], and by the Whitby partnership in 1993 (on lease)[20]. Other than the truck leased by the Whitby partnership, in each instance the relevant partnership obtained finance to fund the purchase of the new truck. In the case of the Jamsek partnership, the finance for the acquisition in 1990 was paid back over a period of

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13 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 122-123 [39]-[41].

14 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 123 [42].

15 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 123 [43]-[45].

16 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [23].

17 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 123 [46].

18 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 123-124 [50].

19 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 124 [51].

20 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 127 [61].

10 years[21]. The respondents did not negotiate with the company as to the type or model of truck purchased[22].

16 In 2010, Mr Whitby purchased a utility vehicle. This vehicle was initially purchased for private use, but Mr Whitby later notified the company that he had purchased the ute and offered to use it to make smaller deliveries for the company in metropolitan areas where it was difficult to manoeuvre a large truck. He began using the ute for small deliveries that the company had previously engaged external couriers to perform[23]. From 2010, Mr Whitby made deliveries using his ute, rather than his truck, most of the time. It was largely left to Mr Whitby to decide which vehicle to use for deliveries[24]. After owning the first ute for approximately four years, Mr Whitby purchased a second ute, which was also used to make deliveries[25].

The 1993 contract and subsequent rate reviews

17 In 1993, Mr Whitby (for himself and on behalf of Mr Jamsek) and several other drivers approached the company and negotiated a new arrangement under which the partnerships would invoice the company on an hourly rate on the basis of a nine-hour working day, although it was understood, and the contract provided, that actual hours worked might vary. The partnerships executed a written "Contract Carriers Arrangement" with the company in July 1993 ("the 1993 contract")[26].

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21 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 123-124 [50]-[51].

22 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 124 [50], 127 [61].

23 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 130 [81].

24 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 131 [84].

25 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 130 [82].

26 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 124 [52], [54]-[56].

18 The 1993 contract included the following terms:

"**1. The Contractors so named are:**

a) Separate legal entities both from each other and THORN LIGHTING.

b) Able to work for other parties, providing that such work is not detrimental to either THORN LIGHTING or THORN LIGHTING customers.

c) To present an invoice for work carried out in the preceding week.

2. THORN LIGHTING and the Contractors have agreed:

1. The Contractors will:

a) Undertake carriage of goods as reasonably directed

b) Comply with all Acts, Ordinances, Regulations and By-laws relating to the registration, third party insurance and general operation of the vehicle within New South Wales.

c) Pay all legal costs, such as tax and duty, payable in respect of the vehicle and keep the vehicle in a mechanically sound, road worthy and clean condition.

d) Be responsible for the vehicle equipment and gear, the safe loading of the vehicle and the securing and weather protection of the load.

e) Exercise all reasonable care and diligence in the carriage and safe keeping of the goods in their charge. Account for all goods by use of run sheets and return of signed delivery dockets or similar documents.

f) Hold at all times and on request produce for inspection, a current driver's licence issued in respect of a vehicle of the class of the vehicle in use and immediately notify THORN LIGHTING if the licence is suspended or cancelled.

g) Not engage or use the services of a driver for the vehicle without prior and continuing approval by THORN LIGHTING. Such driver is to be correctly licensed, suitably

dressed, and in all other respects entirely to the satisfaction of THORN LIGHTING.

h) Obtain and maintain a public liability insurance policy for an amount of $2,000,000 or greater in respect of any liability incurred by the Contractor in performance of work for THORN LIGHTING.

i) Obtain and maintain a comprehensive motor insurance policy over the vehicle including cover for amount of $5,000,000 or greater for third party property damage in respect of one accident.

Ensure that such policies include an indemnity of THORN LIGHTING for any action of the Contractor to which the policy applies.

Produce on request a current receipted copy of such policies.

j) Immediately report any accident to the person in charge of the NSW Branch Warehouse and to attend to any legal requirements at the scene or subsequent to the accident.

k) Not offer his vehicle for sale with any guarantee of either continuity of work for THORN LIGHTING, or implied acceptance by THORN LIGHTING of the purchaser."

19 The 1993 contract also provided for four weeks annual leave without pay and noted that allowances for annual leave, public holidays and sick days had already been made in the hourly rate[27].

20 Further contracts were executed between the partnerships and the company in 1998 and 2001. Each new contract was prompted by a request on behalf of the drivers for an increase in the hourly rate of pay, which was motivated on each occasion by concerns about increased costs, including for fuel, registration and insurance. Besides the changes to the hourly rate, for present purposes there were

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27 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 125 [57].

no other material changes to the contracts[28]. A further rate increase was approved in 2008, prompted by similar concerns from the drivers about rising costs[29].

Making deliveries

21 Initially, the company gave the drivers delivery dockets, which were to be signed by customers upon each delivery. From around 2001, the drivers were also required to fill out "manifest run sheets", which outlined the deliveries to be completed that day and allowed company managers to identify where the drivers would be at certain times. Each run sheet would record the driver's arrival at the warehouse in the morning, would be signed by each customer upon delivery, and would record the time the driver had completed deliveries for the day. The drivers were to return the run sheets to the warehouse at the end of the day, or the next morning if the driver went straight home after his last delivery. Apart from the run sheets, the drivers were not required to fill out any other document akin to a timesheet[30].

22 Although the drivers were told what to deliver, they were left largely to agree amongst themselves on their respective delivery areas. Each driver structured his own delivery route. By around 2001, Mr Whitby, who lived about 160 kilometres from the company's warehouse, would relatively frequently drive home after making his last delivery, rather than return to the warehouse. He would structure his route such that he made his deliveries closest to the warehouse first and made his deliveries furthest away from the warehouse last[31]. In some years, the Whitby partnership rented a property near the warehouse, to save the costs of Mr Whitby travelling between the warehouse and his home[32].

23 The company's warehouse staff were responsible for picking and packing orders for delivery. Items for delivery would then be moved on pallets to the

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28 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 127 [62]-[63], [65]-[66].

29 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 129-130 [77]-[78].

30 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 128 [71]-[72].

31 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 127-128 [68]-[69].

32 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 135 [120].

despatch area at the warehouse and sorted into runs, initially by warehouse staff. During this time, the drivers were instructed to wait in the canteen. From around 2006, a company manager told Mr Whitby that he was to start sorting his own run by himself. After six months, Mr Whitby was told that he was not to sort his run inside the warehouse, and should do so outside the warehouse. Warehouse staff would then load the sorted items onto the truck. Mr Whitby would sometimes shift the items around inside the truck to ensure safe transit of the goods, using a pallet jack if required[33].

24 In 2009, the drivers approached the company and proposed that they perform non-metropolitan deliveries. The company agreed to "give it a go" if it would be cheaper for the company than paying others to make those deliveries. From time to time thereafter, the company would approach a driver to see if he was interested in a non-metropolitan delivery and, if the driver was interested, he would quote for that job and complete it, if approved[34].

Financial arrangements

25 The income from the work performed by Mr Jamsek and Mr Whitby for the company was declared as income of each partnership and split, generally evenly, between husband and wife[35]. Generally, each partnership paid for running costs and other expenses associated with the trucks, including public liability insurance and motor vehicle insurance. These were claimed as deductions for tax purposes[36]. In the case of Mr Whitby, the Whitby partnership also claimed deductions in respect of the rental property used to minimise Mr Whitby's travelling costs between the warehouse and home[37].

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33 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 122 [33], 128-129 [74]-[75].

34 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 130 [80].

35 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 133 [110], 135 [119].

36 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 133-134 [111]-[117], 135 [120]-[121].

37 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 135 [120].

26 As required by cl 1(c) of the contract, the partnerships invoiced the company for their work[38]. After the introduction of GST in 2000, each partnership charged GST to the company in relation to the services it supplied, and provided the company with tax invoices[39].

27 In 2012, the Whitby partnership was dissolved. Mr Whitby continued supplying his services, now as a sole trader using his own ABN. In his subsequent tax returns, Mr Whitby declared that he was carrying on a business in respect of a "transport operation" or a "courier service". He continued to claim deductions in respect of depreciation and expenses associated with the trucks[40].

Working hours and leave

28 Mr Jamsek and Mr Whitby worked more or less regular hours, usually arriving at the warehouse between 6.00 am and 7.00 am and finishing deliveries around 3.00 pm[41].

29 In 2000, Mr Jamsek took six or seven weeks of leave. During this period, a friend of Mr Jamsek drove his truck and the Jamsek partnership paid the friend for his work. The company paid the Jamsek partnership as usual[42].

30 In 2010, Mr Jamsek took five or six weeks of leave. During this period, he handed his run to other drivers at the company or, if those drivers could not take on his deliveries, the deliveries were done by external couriers[43].

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38 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 149 [188].

39 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 134 [118], 135 [122].

40 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 135 [123]-[124].

41 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 132 [100]-[103], 163 [233].

42 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 132 [97].

43 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 132 [98].

31 Mr Jamsek took leave on several other occasions, and took two weeks annual leave over Christmas each year[44].

Logos, uniforms and livery

32 At various times throughout their engagements, the respondents were asked by the company to install tarpaulins bearing the company logo on the trucks. On some occasions, the respondents installed the tarpaulins themselves; on other occasions, the company installed the tarpaulins, or contributed towards the costs of installation[45]. In 2010, Mr Whitby converted his truck to become a "flatbed", and from that time onwards his truck did not bear a company logo[46].

33 At various times throughout their engagements, the respondents were supplied with uniforms bearing the company logo, including on occasions following a transfer of the business to a new entity[47]. The primary judge found that the respondents wore a mix of personal and branded clothing[48]. They were not instructed by the company to wear a uniform, although from 2014 they were required to wear high-visibility vests inside the warehouse[49].

Other work besides deliveries

34 The respondents were occasionally asked to perform tasks beyond their core delivery duties.

35 Around 2012, Mr Jamsek and Mr Whitby were told by warehouse management that they were to start scanning the manifest run sheets to give to warehouse staff. When Mr Jamsek told the warehouse foreman that it was not part

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44 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 132 [98]-[99].

45 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 124 [51], 127 [61], [64], 128 [73], 130 [79].

46 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 131 [83].

47 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 126 [58], 133 [108]-[109].

48 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [188].

49 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 133 [108], 138 [137].

of his job, he was told that he had to do the clerical work. The respondents performed this task daily for the remainder of their engagements. Mr Whitby estimated that the task took 15 minutes per day to complete[50].

36 The respondents were occasionally asked by company warehouse staff to assist in cleaning up behind the warehouse while a stocktake was being undertaken. Neither assisted in the actual stocktake[51]. Both respondents also occasionally used their trucks to assist in relocations of the factory or warehouse, for which they were paid their usual rate[52]. From time to time, the respondents would also collect and return empty pallets to the warehouse, for which they would charge the company. There was no evidence that the respondents were directed to do so.

The primary judge

37 The primary judge concluded that, having regard to the totality of the parties' relationship, Mr Jamsek and Mr Whitby were not "employees" of the company for the purposes of the *FW Act* and the *SGA Act*, nor were they "workers" for the purpose of the *LSL Act*[53]. Rather, in his Honour's view, the case was "an example of partnerships (and from 1 July 2012, Mr Whitby) running businesses of their own"[54].

38 The primary judge considered that the events in 1986, including the formation of the partnerships, the payment of Mr Whitby's annual leave, and the purchase by the respondents of trucks, demonstrated a mutual intention that significant aspects of the existing relationship would change from the employment relationship subsisting to that time[55]. In the primary judge's view, this mutual

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50 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 131 [85]-[87].

51 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 132-133 [104]-[106].

52 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 133 [107].

53 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [212], [218], [224].

54 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [213].

55 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [133].

intention to alter the structure of the relationship was reflected in the written contract[56].

39 The primary judge considered that the provision of trucks (and, in Mr Whitby's case, utes) was a significant factor – especially given the substantial value of those vehicles – which favoured a characterisation of the respondents as independent contractors[57]. The provision of services through the vehicle of a partnership (and, in Mr Whitby's case, later as a sole trader) also weighed in favour of a conclusion that the respondents were independent contractors. In this regard, the primary judge described the partnerships as having "conducted their affairs as one would expect of a business"[58], in that the partnerships bore the costs associated with purchasing and operating the trucks, and so bore the risk that the provision of services to the company would not be a profitable venture. In the primary judge's view, these were significantly higher risks than the risks Mr Jamsek and Mr Whitby would have faced as employees[59].

40 The company had submitted that the respondents' work did not involve the development of goodwill, on the basis that cl 2.1(k) of the contract restrained the respondents from selling their trucks with any guarantee of continuing work for the company. His Honour rejected this submission, noting that the clause did not prohibit the sale of a business and, if anything, suggested that the parties contemplated that the respondents might otherwise have something over and above the value of the trucks to sell. In the upshot, his Honour regarded this factor as insignificant[60].

41 The primary judge concluded that the company's right of control was less extensive than was typical of an employer-employee relationship. In this regard, the primary judge emphasised the absence of control over the manner in which the respondents conducted their deliveries or their decisions to purchase the trucks[61];

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56 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [177].

57 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [156], [166].

58 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [145].

59 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [145]-[147], [149]-[150]. See also [184].

60 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [151]-[152].

61 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [189].

the absence of any direction to wear a uniform[62]; the flexibility around choosing the delivery area, delivery route and whether to return home after completing deliveries[63]; and the circumstance that Mr Jamsek paid for someone else to carry out his deliveries while he was on leave in 2000[64]. In the primary judge's view, the circumstance that the company told the respondents what to deliver was not significant; such instructions would be equally given to an external courier[65].

42 Against these factors, the primary judge regarded each respondent's length of service, regularity of working hours and consistency of working arrangements as characteristics typical of an employment relationship[66]. The primary judge noted that while the respondents did not serve other customers besides the company, there was no restriction preventing the respondents from serving other customers, either by driving their trucks outside the hours which they contracted to work for the company or by engaging others to drive their trucks on the weekends[67].

43 Finally, the primary judge observed that the circumstance that the respondents were asked to assist in cleaning the warehouse during stocktakes was not a strong indicator of an employment relationship, but rather was consistent with the "give-and-take" one might expect of such a long-standing relationship[68].

The Full Court

44 The Full Court allowed the appeal. Anderson J wrote the leading judgment, with which Perram J and Wigney J agreed, each adding some further remarks as to the factors their Honours considered most significant in the overall balancing of relevant factors.

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62 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [188].

63 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [187], [205].

64 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [211].

65 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [190], [199].

66 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [183].

67 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [185].

68 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [209].

45 The Full Court emphasised that the ultimate question – whether either respondent was an employee – was to be answered by reference to the "substance and reality" of the relationship[69]. The Full Court emphasised that this was not the same question as asking whether either respondent was conducting his own business, noting that the distinction between a person serving his or her employer's business and a contractor conducting a business of his or her own "may not represent a perfect dichotomy"[70].

46 The task of ascertaining the "substance and reality" of the relationship was approached by the Full Court explicitly as a "matter of impression"[71] by reference to the history of the parties' dealings with each other over many decades. The Full Court proceeded on the footing that it was necessary to embark on such an exercise having regard to the need to consider "the totality of the relationship" between the parties beyond the terms of their written contracts[72]. It was said that at the heart of this conclusion was[73]:

> "a preference for the substance of the relationship ... over certain aspects of the contractual obligations governing the relationship, and the legal structures through which the [respondents] contracted."

47 The Full Court went on to say[74]:

> "[T]he essence of the legal framework between the parties involved the [respondents], for large part through their Partnerships, contracting with the company, with the Partnerships [supplying] the vehicles for the [respondents'] work. These are, on their face, indications that the [respondents] were operating an independent business. But ... they are

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69 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 147 [182].

70 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 147 [181]. See also 118 [8], 119 [14].

71 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 165 [242].

72 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 165 [242].

73 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 165 [243].

74 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 165 [243].

outweighed by the particular, and perhaps peculiar, attributes of the long relationship between the parties."

48 Speaking broadly, this approach is erroneous in point of principle for the reasons given in *CFMMEU v Personnel Contracting*[75]. In relation to the particular matters identified by the Full Court as leading to a conclusion as to the character of the relationship that was contrary to the indications "on the face" of the parties' agreements, a consideration of those matters helps to illustrate why the conclusion reached by the Full Court was not soundly based in principle.

49 The first point made by the Full Court in this regard was that there was limited evidence that the respondents' wives contributed to work that generated income for the partnerships. On that basis, it was concluded that the respondents and their wives were "partners in name only"[76]. It is necessary to recall here that it was no part of the respondents' case that the partnerships were shams. And, in any event, partnerships in which one partner does not contribute his or her service to the partnership business are commonplace. There is no reason to view these partnerships differently.

50 As to the circumstances surrounding the making of the 1986 contract and the alteration thereby effected to the nature of the parties' relationship, the Full Court held that the parties' intentions in entering into the 1986 contract "must be characterised in light of the reality of the respective bargaining positions of each party"[77]. In the Full Court's opinion, because "the reality" was that there was little or no room for negotiation and the respondents were faced with "an effective ultimatum" of either redundancy or the restructured arrangement, the significance of entry into the 1986 contract was diminished[78]. It was also said that the significance of the respondents' investment in and deployment of their vehicles was lessened by the circumstances that the respondents were effectively compelled to purchase the trucks as part of entering into the 1986 contract; that the trucks were subsequently adorned with the company's logo for most of the duration of the

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75 [2022] HCA 1 at [40]-[62].

76 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 149 [191].

77 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 151 [196].

78 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 149-152 [192]-[201], 165 [245].

engagements; and that driving the trucks did not require an exceptional level of skill[79].

51 It is necessary to note in these observations of the Full Court the expansive approach taken to determining the "substance and reality" of the relationship between the parties, and especially the significance attached to the disparity in bargaining power as itself affecting the meaning or effect of what the parties had agreed. This expansive approach accords with that which has been taken in the United Kingdom[80]. For the reasons stated in *WorkPac Pty Ltd v Rossato*[81] and in *CFMMEU v Personnel Contracting*[82], this expansive approach involves an unjustified departure from orthodox contractual analysis.

52 Next, the Full Court considered that the circumstance that the company "ostensibly required, or at least expected"[83] the respondents to adorn their trucks and themselves with the company logo deserved greater emphasis than was apparent from the decision of the primary judge. It was reasoned that, although there may not have been a prescriptive policy or any express directions regarding clothing, the evidence "support[ed] the inference of an expectation" that the respondents would ordinarily wear company-branded clothing[84]. It was noted further that this expectation would lead stakeholders to identify the respondents as part of the company's staff, which may have limited the opportunity for the respondents to obtain work from others[85].

53 The "expectations" referred to by the Full Court did not alter the contractual rights and obligations which characterised the relationship between the

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79 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 153-154 [205]-[207].

80 *Autoclenz Ltd v Belcher* [2011] 4 All ER 745.

81 (2021) 95 ALJR 681 at 694-695 [62]-[64]; 392 ALR 39 at 53-54.

82 [2022] HCA 1 at [40]-[62].

83 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 160 [224].

84 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 160 [224].

85 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 160-161 [225]. See also 120 [17]-[18].

partnerships and the company[86]. Moreover, the willingness of the respondents to display the company's branding on their trucks is quite consistent with a sensible, self-interested response of an independent contractor to legitimate commercial pressure from its best customer.

54 Next, the Full Court found that, apart from the incident in 2000 when a friend of Mr Jamsek drove his truck on his behalf for several weeks, the respondents "devoted" their working lives and the vehicles owned by their partnerships to the company. Although the Full Court accepted that the respondents were entitled under the contract to work for third parties, it was concluded that, in light of the "expectation" that the respondents would work nine hours a day, five days a week for the company, there was "in practice" minimal time for them to undertake work for others[87].

55 To say these things is to say little more than that the demand by the company for the services rendered by the partnerships was such that the partnerships had no further capacity to serve the needs of other customers. Such a state of affairs is not inconsistent with the independent status of the partnerships. And in any event, "expectations" of the kind referred to by the Full Court are not apt to alter, and indeed were not alleged to have altered, the rights and duties which characterised the relationship between the partnerships and the company. Clause 2.1(g) did not exclude the possibility of engaging alternative drivers with the company's approval, the company's right to grant or withhold approval recognising its interest in the safe transport of its goods.

56 The same may be said of the observation by the Full Court that the respondents did not engage in "entrepreneurial or profit motivated activity", which was "a hallmark of an independent business"[88]. In this regard, the Full Court noted the length of their service, that work from the company was their sole source of

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86 cf *WorkPac Pty Ltd v Rossato* (2021) 95 ALJR 681 at 694-695 [62]-[64]; 392 ALR 39 at 53-54.

87 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 162-163 [229]-[233].

88 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 165 [244], citing *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation [No 3]* (2011) 214 FCR 82 at 142 [291]; *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346 at 390 [181].

income, and that they did not drive for any other entity[89]. The "lengthy and devoted" nature of the working relationship, in the Full Court's view, "colour[ed]" the manner in which the relevant circumstances of the relationship were to be assessed for the purposes of the multifactorial test[90]. None of these considerations is a basis for disregarding the effect of the agreement between the partnerships and the company.

57 Finally, the Full Court considered that the partnerships generated no goodwill. Clause 2.1(k) denied any guarantee of continuity of work from the company were the vehicles to be sold. That being so, there was said to be "nothing for the [respondents] to sell over and above their vehicles"[91]. Perram J highlighted the absence of any goodwill in the respondents' businesses as the "most important element" in his reasoning to the conclusion that the respondents were employees of the company[92].

58 The circumstance that the contract did not entitle the partnerships to sell their businesses accompanied by a right to continue providing delivery services to the company did not prevent the generation of goodwill. Each partnership was at liberty to introduce a purchaser of its business to the company as an established customer. Whether a purchaser would see sufficient value in such an introduction to pay a substantial sum for it would depend upon the circumstances of the market. More importantly, many businesses – such as manufacturers of products for a single customer – do not generate goodwill. That is a feature of the niche in the market occupied by those businesses; it is not a circumstance which denies the independence of such businesses from their customers.

59 It will be apparent from this review that the reasons of the Full Court cannot sustain the decision to reverse the primary judge's decision. One may now turn to consider the arguments agitated by the parties in this Court.

The parties' contentions in this Court

60 The appellants emphasised the finding of the primary judge that the respondents, as members of their partnerships, were engaged in the conduct of their

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89 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 165 [244].

90 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 166 [247].

91 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 164 [237].

92 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 118 [9].

own businesses[93]. That finding was clearly correct. Given that there is no basis for holding that the respondents were otherwise associated with the company, there is no basis for concluding that the respondents were employed by the company. The only relationship between the respondents and the company was that the respondents were members of partnerships that had agreed to make deliveries for the company.

61 On the orthodox approach to the interpretation of contracts, regard may be had to the circumstances surrounding the making of a contract[94]. The 1986 contract between the partnerships and the company came to be made because of the company's insistence that the only ongoing relationship between the respondents and the company would be that established by the 1986 contract and that the partnerships would own and operate the trucks which would transport the company's deliveries. Given that the genesis of the contract was the company's refusal to continue to employ the respondents as drivers, and the respondents' evident acceptance of that refusal, it is difficult to see how there could be any doubt that the respondents were thereafter no longer employees of the company.

62 The circumstance that this state of affairs was brought about by the exercise of superior bargaining power by the company weighed heavily with the Full Court; but that circumstance has no bearing on the meaning and effect of the bargains that were struck between the partnerships and the company. To say this is not to suggest that disparities in bargaining power may not give rise to injustices that call for a legal remedy. The law in Australia does provide remedies for such injustices under both the general law and statute. Those remedies were not invoked in this case. As has been noted earlier, the respondents did not claim that the contracts with the partnerships were shams. Nor did they seek to make a claim under statute or otherwise to challenge the validity of the contracts that were made by the partnerships. In Australia, claims of sham cannot be made by stealth under the obscurantist guise of a search for the "reality" of the situation[95].

63 Even if this disguised submission of sham were to be countenanced, the reality of the situation is that the partnerships, and not the respondents individually, owned and operated the trucks. The partnerships contracted with the company and

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93 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [213]; *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 119 [11], 149 [190].

94 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352; *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597 at 601.

95 See *WorkPac Pty Ltd v Rossato* (2021) 95 ALJR 681 at 694-695 [62]-[64]; 392 ALR 39 at 53-54; cf *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at 752-757 [20]-[35].

invoiced the company for delivery services provided by the operation of the trucks. The partnerships earned income from the company, incurred expenses associated with the ownership and operation of the trucks, and took advantage of tax benefits of the structure. It is not possible to square the contention that the respondents were not conducting a business of their own as partners with the circumstance that, for many years, they enjoyed the advantages of splitting the income generated by the business conducted by the partnerships with their fellow partners.

64 The respondents submitted that the contract between the company and the partnerships could be reconciled with the contention that the respondents were employees by recognising that, while the business of the partnerships was the ownership of the trucks, the labour involved in driving those trucks was undertaken by Mr Jamsek and Mr Whitby individually, in the service of the business of the company. In the respondents' submission, there was no inherent incoherence in this state of affairs because partners may, and commonly do, hold other offices or employment outside their partnership.

65 In support of these contentions, counsel for the respondents advanced a strained interpretation of the 1993 contract. It was said that the contract contemplated that certain of the obligations contained therein (such as the supply of the trucks) were obligations of the partnerships, while other obligations (such as the obligation to hold a current driver's licence) could only sensibly be seen as applying to Mr Jamsek and Mr Whitby as individuals. This interpretation was said to be open on the loose drafting of the 1993 contract, including the oscillating use of the expressions "his" or "the Contractor" to describe the relevant obligor. In essence, though the 1993 contract comprised but the one document, in reality the document contained a "multiplicity" of contracts. Once that premise was accepted, the respondents submitted, the obligation in cl 2.1(a) of the 1993 contract to undertake carriage as reasonably directed – an obligation attaching to the respondents as individuals – manifested a right of control over the work of the respondents that was so comprehensive as to establish that they were employees.

66 As the appellants rightly submitted, the contract between the partnerships and the company did not divorce the obligations concerning provision of the trucks from the obligations concerning provision of the labour of Mr Jamsek and Mr Whitby. Both aspects were bound up in the services provided by the partnerships. As both sides to the contract plainly knew, the ownership of the trucks alone was of no use to anyone unless they were operated by drivers with the skills of the respondents. The two elements had to be deployed together to provide the services to earn the fees charged by the partnerships to the company.

67 The 1993 contract (and the subsequent contracts) expressly contemplated that the partnerships stood on one side of the bargain and the company stood on the other, and that the partnerships were to provide carriage services by trucks

driven by the active member of the partnerships in return for payment to the partnerships. And insofar as some provisions of the 1993 contract contained obligations which related to an individual, it is not open to doubt that those obligations applied to the active member of the partnership, for whom the partnership was responsible.

68 However poorly drafted the 1993 contract may be, and while the complex arrangement propounded by the respondents may be theoretically possible, such an arrangement cannot reasonably be discerned from the text of the contract. It is an interpretation that has no appeal as a reasonable commercial arrangement.

69 As to cl 2.1(a) of the contract, the obligation to undertake carriage "as reasonably directed" was not, as counsel for the respondents submitted, akin to a power of the company to "micromanage" the conduct of the deliveries. That clause is to be understood in the context of provisions that highlight that it was the partnerships which had responsibility for the conduct of the deliveries. With that context, the better view of the clause, as a matter of the ordinary meaning of the text, is that it created an obligation as to what carriage was to be undertaken rather than how it was to be carried out. In this sense, as the primary judge observed[96], such an obligation would be at the core of any engagement of an external courier to deliver goods. The qualification of the obligation to undertake carriage "as reasonably directed" served to ensure that the company could not over-stretch the partnerships' capacity by requiring them to deliver goods in such volumes as might put them in breach of their obligations.

70 The respondents' submissions must be rejected. The services provided by the partnerships involved, compendiously, the truck-driving skills of the respondents and the use of the trucks owned by the partnerships. The provision of such services has consistently been held, both in Australia and in England, to have been characteristic of independent contractors, not employees[97]. In the present case, there is no reason to reach a different conclusion.

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96 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [190], [199].

97 *Humberstone v Northern Timber Mills* (1949) 79 CLR 389; *Barro Group Pty Ltd v Fraser* [1985] VR 577; *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.

The proposed cross-appeal: expanded definition of "employee" under s 12(3) of the *SGA Act*

71 The respondents filed a notice of cross-appeal in which they contended that Mr Jamsek and Mr Whitby fell within the expanded definition of "employee" pursuant to s 12(3) of the *SGA Act*. That sub-section provides:

> "If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract."

72 The primary judge rejected the contention that the respondents fell within s 12(3) for two reasons. First, the relevant contracts were between the company and the partnerships, and not the respondents as individuals. Secondly, the contracts were not "principally for the labour of the person", but rather "were plainly for the provision of substantial equipment" as well as labour[98].

73 The Full Court, having concluded that the respondents were employees according to the ordinary meaning of that term, considered that it was unnecessary to deal with s 12(3) in order to dispose of the appeal[99]. As a consequence, this Court does not have the benefit of the Full Court's reasoned resolution of the issue sought to be raised by the proposed cross-appeal. Ordinarily, that circumstance would warrant the refusal of special leave to bring the cross-appeal. That would be unfair in this case, given that the Full Court did not consider the respondents' submissions in relation to s 12(3) because their claim could be sustained on another basis.

74 The respondents submitted that the primary judge's first reason for rejecting the applicability of s 12(3) was erroneous. In the respondents' submission, all s 12(3) required was that the person work "under" a contract, not that the person was himself or herself a party to the contract. As for the primary judge's second reason, the respondents submitted that although one of the purposes of the contract was the provision of equipment, the contract remained one that was "principally" for the labour of the drivers.

75 The arguments advanced by the respondents are not insubstantial. They cannot be dismissed out of hand. Acceptance of these arguments would have substantial consequences for the revenue. It would be inappropriate for this Court to determine these issues in circumstances where the Commissioner of Taxation

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98 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [218]-[220].

99 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 168 [255].

was not a party to the proceedings, and where the Full Court did not address these questions.

76 So far as the proposed cross-appeal by the respondents is concerned, the justice of the case would be met by an order that the issues raised by the notice of cross-appeal be remitted to the Full Court to enable that matter to be determined following the joinder of the Commissioner of Taxation.

Orders

77 The appeal should be allowed, and the orders made by the Full Court on 16 July 2020 be set aside. The issues raised by the notice of cross-appeal should be remitted to the Full Court for determination, and the Full Court should otherwise make orders in accordance with these reasons.

78 GAGELER AND GLEESON JJ. In contrast to the companion appeal in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* ("*CFMMEU*")[100], which concerns a labour hire arrangement of a kind that has come to prominence with the disaggregation of business structures in the late 20th and early 21st centuries, the controversy underlying this appeal arises out of a scenario well known in an earlier industrial age.

79 A company with an established workforce of employees wants to change the structure of its business to turn them into independent contractors. To achieve that change, the company proffers written contracts which its workers sign. The conduct of the business of the company goes on with little change in practice. Later, an issue arises in a taxation or superannuation or workplace compensation or workplace entitlement context about whether the company achieved its aim. A worker claims that the written contract cannot obscure the reality that the true nature of his or her relationship with the company did not change at all.

80 Faced with claims of that type, to the extent necessary to adjudicate the issues in dispute, courts and tribunals applying common law principles have been astute to ascertain what the real relationship between the company and the worker was following the signing of the contract and to characterise that relationship in its totality. They have not always been astute to distinguish contractual variation from contractual performance. That has been unsurprising given that contractual performance and any contractual variation will have occurred within the same matrix of fact. The distinction, moreover, has not always been seen to have mattered, since the terms of the contract as varied and the manner of its performance have both been understood to have borne on the ultimate question of characterisation. That has been so whether the ultimate question of characterisation has been framed more in terms of whether the worker was supplying subordinated labour under the control of the company or more in terms of whether the worker was carrying on his or her own business.

81 *Yellow Cabs of Australia Ltd v Colgan*[101] provides an early instructive example. There a taxi company was found by a majority of the New South Wales Industrial Commission (Street and Cantor JJ, Piddington J dissenting) to have been successful in turning its previously employed workforce of taxi drivers into independent contractors by getting them to enter into "leases" in relation to its

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100 [2022] HCA 1.

101 [1930] AR (NSW) 137.

taxis, which they then drove according to the company's rules. Street and Cantor JJ said[102]:

> "[I]n all arrangements where the parties occupy a relationship in the nature of that of joint adventurers, there is necessarily involved a certain degree of direction and control arising out of the nature of the relationship created by the agreement itself. But this does not necessarily create the relationship of employer and employee, that question, all the surrounding circumstances having been taken into consideration, being *mainly determined by the degree and extent of the detailed control vested in one party over the acts of the other party in the actual execution of the work contemplated in the joint venture*."

After referring to the terms of the "leases" and associated contractual documents, and to the work practices in place prior to the "lease" arrangements, their Honours continued[103]:

> "Under the new system the drivers kept the cab at the company's garage or not, according to their own convenience, and they worked whatever days or hours they liked without control by the company. They were not bound to start from or finish at the company's garage, nor were they required to record their time on the bundy clock. They were not compelled to furnish any record of their hours, nor to work from any specified rank or under any orders as to the place or direction in which they should cruise for work. They paid for their own petrol and they were liable to repay to the company the cost of repairing any damage to the cab or its equipment."

In concluding that the previous relationship of employment had not been maintained under the new system, their Honours said[104]:

> "Such a system does not appear to establish that the drivers were subject to the commands of the company as to the manner in which they shall do their work, but were independent in that, though they embarked upon the carrying out of a joint enterprise, each driver was substantially in the position of an independent contractor 'who undertakes to produce a given result, but so that in the actual execution of the work he is not under

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102 [1930] AR (NSW) 137 at 163 (emphasis added).

103 [1930] AR (NSW) 137 at 165.

104 [1930] AR (NSW) 137 at 169, quoting *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762 at 768.

> the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand.'"

82 In *Cam and Sons Pty Ltd v Sargent*[105], Evatt J referred to *Yellow Cabs* as containing a discussion of the principles applicable to determining the issue in that case, which was whether a shipping company had succeeded by entering into a written agreement in turning the master and crew of one of its ships into a partnership chartering the ship. Proceeding on the understanding that "the relationship between the parties [was] to be determined by a careful consideration of the terms of the agreement made between them and their conduct whilst it was in force"[106], Judge Markell had determined at first instance that the relationship between the shipping company and the master and crew during the period in which the written agreement was in force was "in fact" that of employer and employee. The Full Court of this Court (Rich, Dixon, Evatt and McTiernan JJ) unanimously upheld that result in ex tempore reasons for judgment delivered seriatim. In the language of Dixon J, "the learned judge was perfectly right in treating the substance of the relation of master and servant as subsisting between the parties". His Honour explained[107]:

> "In a matter of this sort we are to look at the substance of the transaction and not to treat a written agreement, which is designed to disguise its real nature, as succeeding in doing so if it amounts merely to a cloud of words and, without really altering the substantial relations between the parties, describes them by elaborate provisions expressed in terms appropriate to some other relation."

83 The approach in *Yellow Cabs* was later reflected, and *Yellow Cabs* was cited, in the reasoning in *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd*[108] sufficiently set out in *CFMMEU*[109]. There, as noted in *CFMMEU*, application of that reasoning led to the result that an insurance

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105 (1940) 14 ALJ 162; High Court of Australia file (proceeding No 7 of 1940).

106 *Sargent v Cam & Sons Pty Ltd* (unreported, District Court of the Metropolitan District Holden at Sydney, 20 March 1940).

107 Oral reasons of Dixon J, High Court of Australia file (proceeding No 7 of 1940).

108 (1952) 85 CLR 138.

109 [2022] HCA 1 at [134].

company was not shown on the evidence to have been successful in making its insurance salesmen independent contractors.

84 Here, the primary judge (Thawley J) and the Full Court of the Federal Court (Perram, Wigney and Anderson JJ) took essentially the same approach to the resolution of the ultimate question of whether Mr Jamsek and Mr Whitby remained employees of the company after each signed the 1986 contract. They were correct to do so.

85 Subject to one qualification, we see nothing wrong with the Full Court's identification of the applicable common law principles. The one qualification concerns the Full Court's apparent preparedness to contemplate that two persons who have contracted with each other might simultaneously be an employer and an employee and a hirer and an independent contractor[110]. If the contemplation was no more than that a contract under which a relationship of employment is established and maintained need not be a contract that deals solely with the subject-matter of employment or that admits of performance solely through the establishment and maintenance of a relationship of employment, the contemplation would have been wholly orthodox. If the contemplation was that a single relationship established and maintained under a contract could be simultaneously a relationship of employer and employee and of hirer and independent contractor, the contemplation would have been heterodox. For the purposes of determining who is an "employee" at common law, the distinction between an employee and an independent contractor is and has always been a true dichotomy.

86 Our disagreement is with the evaluative conclusion reached by the Full Court. Against the background of the facts set out by Kiefel CJ, Keane and Edelman JJ, and without repetition of the principles we have referred to in *CFMMEU*, our reasons for disagreement can be expressed briefly and sufficiently with reference to the relationship between Mr Jamsek and the company during the period of the 1993 contract. Implicit in our earlier identification of the ultimate question is that we adopt the abbreviations of Kiefel CJ, Keane and Edelman JJ.

87 Leaving more equivocal indications to one side, two features of the relationship that existed in fact between Mr Jamsek and the company point inexorably to it having been a relationship within which Mr and Mrs Jamsek in partnership provided carriage services to the company using their own truck as

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110 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 117-118 [6]-[8], 147 [181].

distinct from a relationship within which Mr Jamsek provided personal service to the company as a truck driver.

88 The first is that Mr and Mrs Jamsek were obliged to, and did, maintain the truck which was used to perform the 1993 contract. A relationship of employment is a relationship of personal service. Personal service is not inherently inconsistent with the individual who provides service being responsible for the physical means by which his or her service is provided[111]. Bicycle couriers were found to be employees in *Hollis v Vabu Pty Ltd*[112] despite having used their own bicycles, just as Mr McCourt has been found to be an employee in *CFMMEU* despite having purchased and presumably used his own hard hat. But acceptance by the plurality in *Hollis*[113] that motor vehicle couriers and motorbike couriers in contractual arrangements similar to the bicycle couriers might not have been employees shows that questions of scale can be important and even decisive[114]. Where work contracted for, actually performed by an individual, and paid for, involves use of a substantial item of mechanical equipment for which the provider of the work is wholly responsible, the personal is overshadowed by the mechanical. That was recognised by this Court in *Humberstone v Northern Timber Mills*[115] and again in *Wright v Attorney-General for the State of Tasmania*[116]. Those cases were cited as authorities for that proposition in *Neale v Atlas Products (Vic) Pty Ltd*[117]; they support what has become the "conventional view" that "owners of expensive equipment, such as [a truck], are independent contractors"[118].

89 The second important feature of the relationship is that it was Mr and Mrs Jamsek in partnership who contracted for the doing of the work involving the use of the truck, and who were therefore jointly and severally liable to the company for the performance of the 1993 contract and jointly and severally entitled to be

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111 *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419 at 425.

112 (2001) 207 CLR 21 at 41-42 [47], 44 [56].

113 (2001) 207 CLR 21 at 31-32 [22], distinguishing *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537.

114 *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146 at 171 [95].

115 (1949) 79 CLR 389.

116 (1954) 94 CLR 409.

117 (1955) 94 CLR 419 at 426.

118 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 153 [205].

paid by the company when performance in fact occurred. They together invoiced the company as partners and were together paid by the company as partners.

90 No doubt in recognition of those difficulties, the argument for Mr Jamsek on the appeal involved an attempt to deconstruct and reconstruct the relationship under the 1993 contract, portraying it both as one within which Mr and Mrs Jamsek *in partnership* were obliged to and did provide the truck and were responsible for invoicing and receiving payment and as one within which Mr Jamsek *alone* was obliged to and did do the driving. Whilst there is no reason in principle why their relationships could not have been structured and performed that way, that is not what was contracted for and that is not what happened in practice. Mr Jamsek usually drove the truck, but he was not contractually obliged to do so, and on occasions he did not. Mr Jamsek did no substantial work in the performance of the contract other than to load, unload and drive the truck for the purpose of carrying the company's goods. When he did that work in the performance of the contract, the partnership invoiced and was paid for the carriage of goods he provided using the truck. What was contracted for, provided, and paid for, under the contract was the carriage of goods by means of a truck, not the truck and separately Mr Jamsek as an individual to drive it.

91 We agree with the orders proposed by Kiefel CJ, Keane and Edelman JJ, including the order remitting the issues raised by the notice of cross-appeal to the Full Court for determination.

92 GORDON AND STEWARD JJ. The central question is whether Mr Jamsek and Mr Whitby were "employed, or usually employed" by a "national system employer" so as to be "national system employee[s]" for the purposes of ss 13 and 14 of the *Fair Work Act 2009* (Cth). The answer to this question is determinative of claims brought by Mr Jamsek and Mr Whitby for contraventions by one of the appellants or their predecessors ("ZG") of ss 44, 45 and 357 of the *Fair Work Act*[119].

93 Other questions were raised in this appeal, namely: (2) for the purposes of the definition of "[w]orker" in s 3(1) of the *Long Service Leave Act 1955* (NSW), whether Mr Jamsek and Mr Whitby were "employed, whether on salary or wages or piecework rates" by ZG (so as to enliven an entitlement to long service leave and payment for untaken long service leave[120]); and (3) for the purposes of s 12(1) and (3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth), whether Mr Jamsek and Mr Whitby were employees of ZG, including on the basis that they worked under a contract that was wholly or principally for their labour (so as to create the possibility of a superannuation guarantee shortfall[121]).

94 It was common ground that the second question was resolved by the answer to the central question. One aspect of the third question was in a different category. The parties accepted that even if Mr Jamsek and Mr Whitby were not employees of ZG (and they were not), the separate question of whether for the purposes of s 12(3) of the *Superannuation Guarantee (Administration) Act* they worked under a contract that was wholly or principally for their labour should be remitted to be determined according to law. It is a separate question about, and requires separate characterisation of, the contracts.

95 The principles we consider should be applied and the approach to be adopted in deciding whether the totality of a relationship between two parties is one of employer and employee are set out in Gordon J's reasons for judgment in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*[122] ("*CFMMEU*").

96 The claims made by Mr Jamsek and Mr Whitby related to periods when the identity of the putative employer – the company that owned the business – changed. No party submitted that this affected the answer to the question whether

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119 *Fair Work Act*, ss 42, 335, 339(a)-(b).

120 *Long Service Leave Act*, s 4(1) and (5).

121 *Superannuation Guarantee (Administration) Act*, ss 19(1), 33, 46.

122 [2022] HCA 1.

the relationships between Mr Jamsek and Mr Whitby and ZG were relationships of employer and employee. It is therefore not necessary to differentiate between the two appellants or to differentiate between the two appellants and their predecessors. It is for this reason that the putative employer is referred to as "ZG". And, further, no party suggested that the various contracts which were in place during the claim period resulted in a different characterisation of the totality of the parties' relationships. It is therefore sufficient to primarily refer to two of the contracts – the 1986 Contract and the 1993 Contract.

97 The relevant facts may be stated simply. Mr Jamsek and Mr Whitby were each employed by ZG from 1977 until late 1985 or early 1986. For the latter part of that period, each was employed to drive ZG's trucks. In late 1985, ZG told Mr Jamsek and Mr Whitby (and the other drivers employed by ZG) that if they did not agree to become contractors and provide their own trucks, ZG could not guarantee them a job going forward. Mr Jamsek and Mr Whitby (and the other drivers) accepted ZG's offer. In 1986, the Jamsek Partnership (comprised of Mr Jamsek and his wife, established in late 1985 or early 1986) and the Whitby Partnership (comprised of Mr Whitby and his wife, established in late 1985 or early 1986) each entered into a written contract with ZG ("the 1986 Contract"). Under the 1986 Contract, each partnership provided a truck and contracted to deliver goods for ZG for which the partnership was entitled to be paid a minimum "per carton" rate of $120 per day or $600 per week. A copy of the 1986 Contract could not be located and was not in evidence.

98 In July 1993, each partnership and ZG executed a written "Contract Carriers Arrangement" ("the 1993 Contract"). The parties to the 1993 Contract again included each of the partnerships, identified as "Contractors", and ZG. Senior counsel for Mr Jamsek and Mr Whitby submitted that each contract, or "instrument", constituted a multiplicity of contracts, including contracts "between [ZG] and several partnerships", contracts "between the partnerships" and contracts "involv[ing] rights which [were] particular to the male members of those partnerships". But then junior counsel for Mr Jamsek and Mr Whitby submitted that "a partnership is not a separate legal entity" and so the contract was directly with Mr Jamsek and Mr Whitby.

99 The identity of the contracting parties was not in dispute. The 1993 Contract was a contract between the partnerships and the other drivers (referred to as "Contractors") and ZG. The nature of the contracting parties[123] and the context

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123 *CFMMEU* [2022] HCA 1 at [174], citing *Australian Mutual Provident Society v Chaplin* (1978) 52 ALJR 407 at 410; 18 ALR 385 at 391 and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 48-49 [68].

in which the contract was entered into assists to identify the purpose or object of the contract[124]. As we have seen, the partnerships were established in late 1985 or early 1986, contemporaneously with Mr Jamsek and Mr Whitby being offered, on a take it or leave it basis, the opportunity to "become contractors" with ZG and to "[u]ndertake carriage of goods as reasonably directed"[125] by ZG, and that offer being taken up. A partnership, being the relation which exists between persons carrying on their own business with a view of profit[126], cannot, with respect to the activities of the partnership, be contracted to work in another's business or enterprise.

100 The relationships created by the 1993 Contract between each partnership and ZG were not ones of employer and employee. Under the 1993 Contract, the partnerships were required to supply a vehicle of a particular kind if the partnership was to "[u]ndertake carriage of goods as reasonably directed"[127] under that contract[128]. The pay rates under the 1993 Contract were set by reference to the partnerships supplying vehicles of a particular kind – "trucks over one year old with a carrying capacity of not less than 5 tonnes but less than 8 tonnes"[129].

101 Under the 1993 Contract, each partnership's obligations in relation to the truck it supplied included:

(1) to pay all legal costs, such as tax and duty, in relation to the vehicle and keep the vehicle mechanically sound, road worthy and clean (cl 2.1(c));

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124 *CFMMEU* [2022] HCA 1 at [175], citing, among other cases, *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 350, 352 and *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 117 [50].

125 1993 Contract, cl 2.1(a).

126 *Partnership Act 1892* (NSW), s 1(1); *Partnership Act 1958* (Vic), s 5(1); *Partnership Act 1891* (SA), s 1(1); *Partnership Act 1891* (Qld), s 5(1); *Partnership Act 1895* (WA), s 7(1); *Partnership Act 1891* (Tas), s 6(1); *Partnership Act 1997* (NT), s 5(1); *Partnership Act 1963* (ACT), s 6(1).

127 1993 Contract, cl 2.1(a).

128 1993 Contract, cll 2.1(c), 2.1(i), 7(a).

129 1993 Contract, cl 7(a).

(2) to obtain and maintain a public liability insurance policy for an amount of $2,000,000 or greater in respect of any liability incurred by the partnership in performing work for ZG (cl 2.1(h)); and

(3) to obtain and maintain a comprehensive motor insurance policy over the vehicle for an amount of $5,000,000 or greater for third party property damage in respect of one accident (cl 2.1(i)).

102 Consistent with those contractual obligations, each partnership also agreed "[n]ot [to] offer [its] vehicle for sale with any guarantee of either continuity of work for [ZG], or implied acceptance by [ZG] of the purchaser"[130]. The significance of the supply of the vehicle by each partnership under the contract was reinforced by cl 5(e), which provided that sale of "the vehicle" for any reason other than replacement "automatically terminate[d] [the 1993 Contract] ... unless specifically, and in writing, agreed otherwise with the NSW Branch Manager".

103 Next, cl 1(b) provided that the partnerships were "[a]ble to work for other parties, providing that such work [was] not detrimental to either [ZG] or [ZG's] customers" and cl 2.1(g) provided that the partnerships agreed to "[n]ot engage or use the services of a driver for the vehicle without prior and continuing approval by [ZG]". This made explicit that the partnerships were not tied to ZG and that performance of the contractual obligations was not personal to Mr Jamsek and Mr Whitby[131].

104 The work – carriage of goods – and the payment for that work do not suggest relationships of employer and employee. Under cl 1(c) of the 1993 Contract, the partnerships were to invoice ZG for the work carried out in the preceding week. Under the 1993 Contract, the pay rates changed. Under cl 7(a), the partnerships were entitled to invoice ZG on an hourly rate, rather than on a "per carton" basis.

105 The work the partnerships were contracted to carry out under the contract – carriage of goods – was as reasonably directed by ZG[132]. Much was made of this clause by senior counsel for Mr Jamsek and Mr Whitby, who suggested that it was "the most complete example of control one can conceive of". While cl 2.1(a) did confer control on ZG, it was control of a particular kind: a power to give directions to make deliveries rather than to direct how that should be done. Put in different

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130 1993 Contract, cl 2.1(k).

131 See *CFMMEU* [2022] HCA 1 at [198], citing *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24, 36-37.

132 1993 Contract, cl 2.1(a).

terms, ZG engaged the partnerships to carry its goods to its customers; not to carry goods absent a specified destination.

106 There are clauses in the 1993 Contract that may suggest relationships of employer and employee. For example, cl 7(b) provided that the parties had "agreed to a standard nine hour working day with a usual starting time of 6 am, both parties accepting that the actual hours may vary due to work load fluctuations". While this may tend slightly in favour of relationships of employer and employee, it should be viewed in the context of cl 9(a), which provided that "[ZG] [would] where ever possible, offer any extra work to the [partnerships] at a mutually agreed rate for each job". This suggests that while the parties agreed on a nine-hour working day as a starting point, there was flexibility built into the contract for the remuneration to increase as extra work was undertaken[133].

107 Assessing the totality of the relationships between the partnerships and ZG as set out in the 1993 Contract, Mr Jamsek and Mr Whitby were not employed by ZG. The partnerships, not Mr Jamsek and Mr Whitby, were the contracting parties. The partnerships each contracted to provide, to operate and to maintain a truck to carry ZG's goods to its customers. The partnerships were entitled to invoice ZG for carrying the goods that they carried. It is true that the 1993 Contract between the partnerships and ZG addressed the obligations of the partnerships providing drivers. But that is to be expected. A truck could not in 1986 or 1993 carry and deliver goods without a driver.

108 In 2012, the Whitby Partnership was dissolved after the dissolution of Mr Whitby's marriage. The evidence at trial was that Mr Whitby alone continued to provide, to operate and to maintain a truck to carry ZG's goods to its customers and, in return, Mr Whitby for himself (not on behalf of the Whitby Partnership) invoiced ZG for carrying the goods that he carried. That evidence was admissible to establish discharge of what had by that time become the contract terms pursuant to the "Contract Carriers Agreement Rate Review – 23rd May 2008" ("the 2008 Contract")[134] and the making of a new contract between Mr Whitby alone and ZG on terms identical to the 2008 Contract. The totality of that relationship was not that of employer and employee.

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133 *CFMMEU* [2022] HCA 1 at [174], citing *Stevens* (1986) 160 CLR 16 at 24.

134 It was common ground that, but for the substitution of Mr Whitby for the Whitby Partnership and the change of pay rates, there were no material changes between the 1993 Contract, the 1998 Contract, the 2001 Contract and the 2008 Contract.

109 Consistent with the principles set out in *CFMMEU*[135], it was both relevant and admissible to adduce evidence to establish, in the case of the Whitby Partnership and Mr Whitby, that the 2008 Contract was discharged, that a new contract was formed and what the terms of that contract were. By contrast, however, how the parties exercised their rights, performed their duties or unilaterally conducted themselves, whether at the time of a change in ownership of the business, the time of the dissolution of the Whitby Partnership or any other time during the period of the claim, was not relevant[136].

110 Throughout the claim period, there were changes to the pay rates which were agreed between ZG and the partnerships. It was both relevant and admissible to adduce evidence to establish that an increase in pay rates was agreed and the terms of that agreement[137]. So, for example, evidence was adduced that in 1998 Mr Whitby approached the New South Wales State Manager of ZG to seek an increase in the pay rates from those set out in the 1993 Contract and that an increase was agreed which was then set out in the 1998 Contract. Evidence was adduced that similar requests were made in 2001 and 2008 and increased rates were agreed.

111 We agree with the orders proposed by Kiefel CJ, Keane and Edelman JJ.

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135 See *CFMMEU* [2022] HCA 1 at [177], [183], [188], citing, among other cases, *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93 at 112-113, *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 442, *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at 163-164 [25], *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2012) 245 CLR 338 at 350-351 [31]-[32] and *Chitty on Contracts*, 33rd ed (2018), vol 1 at 1087 [13-124].

136 *CFMMEU* [2022] HCA 1 at [176], citing *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 582 [35], *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603 and *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 446.

137 *CFMMEU* [2022] HCA 1 at [177], [183], [188], citing *Phillips v Ellinson Brothers Pty Ltd* (1941) 65 CLR 221 at 243-244, *Tallerman* (1957) 98 CLR 93 at 112-113 and *Chaplin* (1978) 52 ALJR 407 at 411; 18 ALR 385 at 392-393.