



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: P48/2021
File Title: Hill v. Zuda Pty Ltd as trustee for THE HOLLY SUPERANNUATION FUND
Registry: Perth
Document filed: Form 27F - Outline of oral argument
Filing party: Appellant
Date filed: 05 Apr 2022

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

CLAIRE ELIZABETH HILL
Appellant

and

ZUDA PTY LTD
(A.C.N. 008 968 232)

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As trustee for THE HOLLY SUPERANNUATION FUND
First Respondent

and

JENNIFER PATRICIA MURRAY
As executor of the estate of ALEC SODHY
Second Respondent

and

JENNIFER PATRICIA MURRAY
Third Respondent

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Outline of the Appellant's Oral Argument

Sub-regulations 6.17A(4) to (7) Apply to SMSFs

2. Sub-reg 6.17A(4) to (7) of the *SIS Regs* will not apply to a SMSF if, and only if, they are solely applicable to s.59(1A) of the *SIS Act*. That is, to the exclusion of s.31.
3. Sub-reg (1) was always a part of reg 6.17A and is complete and unambiguous on its face. Sub-reg (1) expressly applies sub-reg (4) as an operating standard under s.31: **A[33]; Rep[5]-[6]**. Meaning must be given to sub-reg (1): **A[29]-[31]**.
- 10 4. The Explanatory Memorandum Sch 1 Item 2 **JBA/E tab 29** states sub-reg (1) prescribes the standard in sub-reg (4) as an operating standard for s.31: **Rep[8]**.
5. The heading to reg 6.17A, with its reference to s.59(1A), does not alter or limit the express words of sub-r 6.17A(1): **R[45]; Rep[9]**.
6. The Respondents' analysis **R[34]** assumes reg 6.17A does not apply to a SMSF. As to the Respondents' analysis of reg 6.17A **R[43]-[53]**:
 - (a) Assumes it was made solely for s.59(1A) **R[44]**;
 - (b) Asserts the reference to s.59(1A) in sub-reg (2) is determinative **R[45]**;
 - (c) Is wrong in assigning the condition in sub-reg (2) and (3) as a condition that must also be imposed on SMSFs for reg 6.17A to apply for s.31 **R[47]-[48]**;
 - 20 (d) The language of sub-reg (4) does reflect s.59(1A) **R[49]; Rep[10]**;
 - (e) The reliance upon s.34(1) is misplaced **R[50]; Rep[13]**;
 - (f) The existence of sub-reg (1) does not conflict with the *SIS Act* **R[51]**;
 - (g) It does not engage with the express words of sub-reg (1) **R[51]-[53]**; and
 - (h) It does not engage with any of the reasoning in *Retail Employees v Pain: JBA/D tab 23 at [499]-[510]; A[32]-[41].*
7. S.59(1A) refers to a trustee complying with any conditions prescribed by regulation. Those conditions are in sub-reg (2) and (3): **A[25], [34], [35]; Rep[11]-[12]**.
8. The reference in s.59(1A) to the rules permitting a member to give a notice "in accordance with the regulations" does not require that they be regulations made solely for the purpose of s.59(1A). It is appropriately a reference to the regulations prescribing operating standards made under s.31, namely sub-reg 6.17A(1), (4) - (7).
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9. As reasoned in *Retail Employees v Pain JBA/D tab 23*:
- (a) The text, context and purpose of reg 6.17A favours sub-reg (1), (4) – (7) being made for s.31 [498];
 - (b) Sub-reg (2) & (3) are made for s.59(1A), sub-reg (1) & (4) are made for s.31 [499];
 - (c) Sub-reg (4) is apposite to an operating standard as to how things are to be done, as opposed to a condition for exemption from s.59(1) [500]-[501];
 - (d) S.59(1A) whilst speaking of conditions to be complied with by the trustee, this section does not also support a regulation (sub-r (7)) providing for a notice to expire, which would be supported by s.31 [502]-[504];
- 10 (e) The single contra-indication was s.59(1A) contemplating regulations specifying the form of the notice from members [506].
10. However, the regulations governing the notice to be given can be regulations under s.31.
11. Further, the reference in sub-reg (4) back to sub-reg (2) cannot result in the exclusion of the express words in sub-reg (1) applying sub-reg (4) for the purposes of s.31.
12. The reference in sub-reg (4) to sub-reg (2) does not condition the clear words of sub-reg (1). The direction in sub-reg (1) results in the language of sub-reg (4) being construed to conform with the direction in sub-reg 6.17A(1): **Rep[6], [10]**.
13. In *Re Narumon JBA/D tab 22* the applicant accepted sub-reg 6.17A did not apply to the SMSF adopting *Munro A[67]*, and argued the express terms incorporated an equivalent obligation **A[67]**. Reg 6.17A was still considered **A[68]-[78]**, however:
- 20 (a) The inconsistency of reg 6.17A not being an operating standard under s.31 and s.55A having no work to do;
- (b) The express words of sub-reg 6.17A(1); and
- (c) The analysis in *Retail Employees v Pain*,
Were not brought to account in the conclusion reached despite the tension created by reg 6.17A(1) being recognised: **A[76], [80]**.
14. If contrary to the Appellant’s primary position, sub-reg (4) is made under s.59(1A) this does not exclude the operation of sub-reg(1): **A[42]**. Regulations can be made applicable to multiple provisions: **A[26]**.
- 30 15. The contents of sub-reg (4) to (7) are equally applicable to an SMSF as any other regulated superannuation fund. There is no inconsistency that arises with anything associated with an SMSF if those regulations are applicable to an SMSF.

16. S.55A, added in 2007 A[18], would have no work to do if sub-regs (4), (5), (6) and (7) do not apply under s.31 as there would be no relevant operating standard prescribed, reg 6.22 defining a class of eligible recipients only, as recognised in *Re Narumon: JBA/D tab 22 [41]; A[71]; Rep[24]*.
 17. If the 2011 Amending Deed is not a “notice given to the trustee by a member” there is non-compliance with sub-reg (4), and accordingly s.31. Clause 5 would therefore be inconsistent with s.55A: R[9]-[13], [54]-[56]; Rep[14], [15], [17].
 18. The member signatures are not required to amend the deed. The 2011 Amending Deed is a notice by the members: Rep[16].
 - 10 19. To find that terms can be incorporated into SMSF deeds that do not constitute a “notice”, thus avoiding reg 6.17A, would result in significant consequences: Rep[21].
 20. S.34(3) cannot save the 2011 Amending Deed in the face of s 55A: R[27], [57]; Rep[15].
 21. If the deed binds the trustee outside of sub-reg (4) it is contrary to s.52B(2)(e): Rep[19].
- Comity Between Intermediate Courts of Appeal*
22. *Cantor* merely accepted *Munro* and did not recognise the omission or engage itself with ss.31 and 55A or sub-r 6.17A(1): A[59]-[61]; R[75]-[77], [82]-[84], [86].
 23. *Cantor* itself was not based upon reg 6.17A but whether the requirements for notice in accordance with the deed had been satisfied A[62] – [63]. There was no engagement with *Retail Employees v Pain*: A[64].
 - 20 24. There is dicta of several different types and qualities, the strength or application of which varies with the circumstances A[88]-[89], including where a point has been conceded or assumed, the incorporated in the reasoning without argument or examination in the judgment A[90], or given without reference to a relevant statutory provision: A[91].
 25. The dicta is not “seriously considered” and reasoning without analysis of statutory provisions is “plainly wrong”: A[49], [61], [66], [81]-[92]; R[61]-[74], [77], [80].
 26. The Court of Appeal was obliged to determine the proper position including with reference to sub-reg 6.17A(1) and ss.31 & 55A: A[92]-[95], [99]-[101]; R[78],[82]-[83]; Rep[23]. This it did not do.

Dated: 4 April 2022

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