



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF WESTERN AUSTRALIA

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

## **APPELLANT'S REPLY**

### **20 Part I: Certification**

1. These submissions are in a form suitable for publication on the internet.

### **Part II: Concise Reply to Respondents' Argument**

2. The Appellant does not contest the additional facts set out by the Respondents in paragraph 8 of the Respondents' Submissions<sup>1</sup> or paragraph 6.

#### **Ground 1**

3. The Appellant's submission<sup>2</sup> that clause 5 of the **2011 Amending Deed** is prohibited and invalidated by section 55A of the *SIS Act* was relied upon below.<sup>3</sup>

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<sup>1</sup> See Appellant's Submissions, paragraphs [8], [9] and [22].

<sup>2</sup> Appellant's Submissions, paragraph [44(b)].

<sup>3</sup> See CA [10], [27] (CAB 29, 34 - 35).

4. The Respondents commence their analysis from section 59 of the *SIS Act*, which skews that analysis. The Appellant<sup>4</sup> accepts section 59 has no application to an SMSF.
5. Sub-reg 6.17A(1) was part of reg 6.17A from its original enactment.<sup>5</sup> Statutory interpretation must begin with a consideration of the text itself.<sup>6</sup> Sub-reg 6.17A(1) is complete and unambiguous on its face. The Respondents fail to engage with the express words of sub-reg 6.17A(1) or provide a basis for it to be given any meaning. Sub-regulation 6.17A(1) cannot be ignored, as if obliterated from the statute books.
6. The terms of sub-reg 6.17A(1), make sub-reg (4) applicable to section 31. It is the language of sub-reg (4) that is to be construed where necessary to fit application as a payment standard under section 31 of the *SIS Act* as required by sub-reg 6.17A(1) opposed to excluding section 31 in favour of application only under section 59.
7. The Respondents' submission<sup>7</sup> that clause 5 of the **2011 Amending Deed** "*are in accordance with standards prescribed for the purposes of s31*" moves from sub-reg 6.17(1) and (2) to Division 6.3 and then reg 6.22, omitting reg 6.17A.<sup>8</sup> This assumes sub-reg 6.17A is solely referable to section 59 of the *SIS Act* and has no existence as a standard under section 31.
8. The Explanatory Statement<sup>9</sup> is consistent with and supports sub-reg 6.17A(4) of the *SIS Regulations* as a standard prescribed by sub-reg 6.17A(1) and that only sub-regs (2) and (3) are compliance conditions required by section 59(1A) of the *SIS Act* for the giving of a notice following the receipt of sufficient information to enable an informed decision (being a matter relevant to a non-SMSF).<sup>10</sup>
9. As confirmed by *R v A2*,<sup>11</sup> headings are not always reliable. Headings cannot result in sub-reg 6.17A(1) being ignored.<sup>12</sup> Sub-reg 6.17A(1) should not be constrained by

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<sup>4</sup> Appellant's Submissions, paragraph [21]. Acknowledged in Respondents' Submissions, paragraph [42].

<sup>5</sup> Item 2 of Schedule 1 to the *Superannuation Industry (Supervision) Amendment Regulations 1999 (No 3)* (Statutory Rules 115 of 1999) made on 9 June 1999.

<sup>6</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47].

<sup>7</sup> Respondents' Submissions, paragraph [34].

<sup>8</sup> Without recognising that regulation 6.22 of the *SIS Regulations* is not an operating standard: *Asgard Capital Management Ltd v Maher* (2003) 131 FCR 196 at 199 – 202 [6] – [13]; *Re Narumon* [2019] 2 Qd R 247, 259 – 260 [41].

<sup>9</sup> Explanatory Statement, *Superannuation Industry (Supervision) Regulations (Amendment) 1999 (No 3)* (Statutory Rules No 115 of 1999) (Cth), Schedule 1 Item 2.

<sup>10</sup> See Appellant's Submissions, paragraphs [34] – [35].

<sup>11</sup> (2019) 269 CLR 507 at 523 [40]; [2019] HCA 35.

<sup>12</sup> *Ragless v Prospect District Council* [1922] SASR 299 at 311; D Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9<sup>th</sup> ed, 2019) 194 – 196 [4.65] – [4.67].

the text of the heading,<sup>13</sup> particularly where sub-reg 6.17A(1) was a part of the regulation from inception. Meaning must be given to sub-reg 6.17A(1).

10. Sub-reg 6.17A(4) refers back to sub-reg (2), which is a condition not applicable to a **SMSF**. As a condition not relevant to a SMSF, confronted with the choice between ignoring the existence of sub-reg 6.17A(1) or reconciling the construction of sub-reg 6.17A(4) the latter should prevail. Compliance with sub-reg (2) is required by section 59(1A) and imposes an obligation on the trustee to provide information. Sub-reg 6.17A(4) does not reflect the terms of section 59(1A) of the **SIS Act**.
11. While section 59(1A) of the **SIS Act** contemplates a notice being given in accordance with a fund's rules, the relevant regulation must relate to "a trustee of the entity complying with any condition contained in the regulations". Section 59(1A) imposes this upon the effectiveness of any rules allowing a notice that otherwise controls the trustee's discretion and is a condition to be satisfied before any notice is given. That condition is contained in sub-regs 6.17A(2) and (3).<sup>14</sup>
12. Section 59(1A) does not otherwise speak of regulations governing the form or content of the notice given by a member, the steps to be taken by the member in giving a notice or the duration for which it is effective. Such matters are operating standards prescribed under section 31 of the **SIS Act**. As such they do not conflict with the **SIS Act** and reg 6.17A does not exceed the legislative power to make regulations.<sup>15</sup>
- 20 13. Section 34(1) of the **SIS Act** does not make the distinction contended by the Respondents.<sup>16</sup> The section speaks of the applicable operating standards by reference to the distinction made in sections 31, 32 and 33 of the **SIS Act** between the 3 forms of fund comprising the definition of "superannuation entity".<sup>17</sup>
14. The Respondents' new argument<sup>18</sup> is contrary to the Respondent's position below<sup>19</sup> and is incorrect as set out below in any event.

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<sup>13</sup> *Silk Bros Pty Ltd v State Electricity Commission (Victoria)* (1943) 67 CLR 1 at 16; *Hornsby Building Information Centre Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 225; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 323 - 324.

<sup>14</sup> Namely the rules of a non-SMSF may allow a **BDBN** "if the trustee gives to the member information" to allow the member to make a fully informed decision.

<sup>15</sup> Contrary to the Respondents' Submissions, paragraph [51].

<sup>16</sup> Respondents' Submissions, paragraph [50].

<sup>17</sup> Section 10 of the **SIS Act** as regulated superannuation funds, approved deposit funds and pooled superannuation trusts.

<sup>18</sup> Respondents' Submissions, paragraph [10].

<sup>19</sup> See Respondents' Court of Appeal Submissions, paragraph [13]: "Clause 1.5 of the Amending Deed constitutes a binding death benefit nomination whereby the Deceased directs Zuda as trustee of the HS Fund, upon his death, 'must' pay any benefit he is entitled to under the HS Fund to Ms Murray."

15. Section 55A of the *SIS Act* prohibits the cashing of a deceased member's benefits otherwise than in accordance with the standards prescribed for section 31.
16. Sub-reg 6.17A(4) of the *SIS Regulations* requires the giving of a notice to the trustee by the member. The power to amend the terms of the Holly Superannuation Fund Deed rests with the trustee.<sup>20</sup> The members' signatures on the **2011 Amending Deed**, their inclusion as parties to the deed and the "wish" expressed in the recital constitutes the **2011 Amending Deed** as "a notice given" within the regulation.
17. If clause 5 of the **2011 Amending Deed** is not "a notice given" by the member, with the effect that clause 5 does not fall within sub-reg 6.17A(4),<sup>21</sup> then it is not in accordance with the standards prescribed for section 31 and is invalid to the extent of that inconsistency by operation of section 55A(2) of the *SIS Act*.
18. A superannuation fund trustee has a discretion in exercising the power to pay a deceased member's benefits.<sup>22</sup>
19. If clause 5 of the **2011 Amending Deed** does not fall within sub-reg 6.17A(4) then it constitutes a "*contract or the doing of anything else, that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the trustee's functions and powers*"<sup>23</sup> contrary to section 52B(2)(e) of the *SIS Act*.
20. Section 59(1A) of the *SIS Act* provides a limited exception allowing a fetter on a trustee's discretion with respect to the payment of a deceased member's benefits by allowing the rules, subject to the provision of relevant information in accordance with reg 6.17A(2) and (3), to permit a member to require the trustee to pay a person mentioned in the notice.
21. To find sub-reg 6.17A(4) of the *SIS Regulations* only applies where there is a requirement imposed by the notice given by a since deceased member in the manner contended<sup>24</sup> would result in a superannuation fund being able to incorporate terms prohibiting payments upon death to the deceased member's estate or to a second

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<sup>20</sup> Clause 10 of the **2011 Amending Deed** (Appellant's Book of Further Materials, page 20), clause 10.1 being in the same terms as clause 10 of the original deed save for the addition of the words "or written resolution".

<sup>21</sup> See Respondents' Submissions, paragraphs [10] – [13].

<sup>22</sup> Pursuant to regulation 6.22 of the *SIS Regulations* to one or more of the deceased's estate or a dependant (which includes a spouse or a child).

<sup>23</sup> Namely: (a) the exercise of the discretion without reference to all objects of the power: *Gartside v Inland Revenue Commissioners* [1968] AC 553, 575 A, 617 G; *Elovalis v Elovalis* [2008] WASCA 141, [50]; or (b) the fettering of the exercise of the discretion: *National Trustees, Executors and Agency Company of Australasia Ltd v Federal Commissioner of Taxation* (1923) 33 CLR 491, 504; *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566, 600 [121]; [2001] FCA 1628.

<sup>24</sup> Respondents' Submissions, paragraphs [10] – [13], [43], [55].

spouse, to stepchildren or children of a first marriage.<sup>25</sup> This effectively creates a permanent exclusion of all but the selected beneficiary and circumvents sub-regs 6.17A(5) - (7).

22. To say,<sup>26</sup> *first* regulation 6.17A(4) is an obligation not a prohibition and *second* the validity of any payment is saved by section 34(3) of the *SIS Act* does not take account of section 55A of the *SIS Act*, which invalidates clause 5<sup>27</sup> and prohibits payment other than as permitted by sub-reg 6.17A. If this argument had been run below questions would have arisen as to whether or not the trustee has cashed the Deceased’s member benefits or whether they remain held by the trustee (i.e. no transaction has occurred).<sup>28</sup>

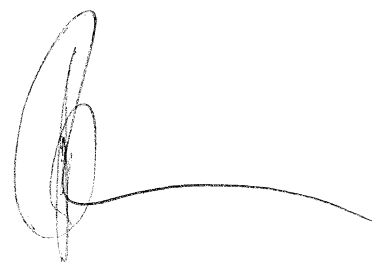
10 **Grounds 2 and 3**

23. Review of the reasons of the Full Court in *Cantor Management*<sup>29</sup> is necessary and appropriate.<sup>30</sup> *First* in assessing the type and quality of the dicta and *second* to assess whether relevant statutory provisions had been properly considered, both matters being relevant to whether the operation of the principle of comity is enlivened.

24. Reg 6.22 of the *SIS Regulations* is not an operating standard under section 31 of the *SIS Act*.<sup>31</sup> If reg 6.17A is not an operating standard for the purposes of section 31, then there are no operating standards regarding the payment of a member’s benefits after death for the purposes of section 31 and section 55A of the *SIS Act* has no work to do.

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Dated: 25 February 2022



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<sup>25</sup> See the definition of “child” in section 10 of the *SIS Act*.

<sup>26</sup> As the Respondents’ now do, see Respondents’ Submissions, paragraphs [54] – [57].

<sup>27</sup> Clause 5 being contrary to regulation 6.17A of the *SIS Regulations* as an applicable standard prescribed under section 31 of the *SIS Act* and section 55A having the effect of not only invalidating clause 5 but providing that the governing rules do not permit payment otherwise than in accordance with regulation 6.17A.

<sup>28</sup> Further, section 34(3) of the *SIS Act* does not exclude an action against the trustee for any transaction that constitutes a breach of the trust.

<sup>29</sup> *Cantor Management Services Pty Ltd v Booth* (2017) 16 ASTLR 489; [2017] SASFC 122.

<sup>30</sup> Contrary to the Respondents’ Submissions, paragraphs [82] – [83].

<sup>31</sup> *Asgard Capital Management Ltd v Maher* (2003) 131 FCR 196 at 199 – 202 [6] – [13]; *Re Narumon* [2019] 2 Qd R 247, 259 - 260 [41].