

HIGH COURT OF AUSTRALIA

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

CLAIRE ELIZABETH HILL

APPELLANT

AND

ZUDA PTY LTD AS TRUSTEE FOR THE HOLLY
SUPERANNUATION FUND & ORS

RESPONDENTS

Hill v Zuda Pty Ltd
[2022] HCA 21
Date of Hearing: 5 April 2022
Date of Judgment: 15 June 2022
P48/2021

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation

B W Ashdown for the appellant (instructed by Eastwood Law)

M D Cuerden SC with A P Hershowitz for the respondents (instructed by
Lawton Gillon)

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formal revision prior to publication in the Commonwealth Law
Reports.

CATCHWORDS

Hill v Zuda Pty Ltd

Superannuation – Self managed superannuation fund – Binding death benefit nomination – Where reg 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) prescribed standards for, relevantly, regulated superannuation funds for payment of member's superannuation benefits to nominated person on or after member's death – Where trust deed for self managed superannuation fund amended to insert "binding death benefit nomination" clause directing trustee as to payment of member's benefits upon member's death – Where appellant challenged validity of binding death benefit nomination clause on basis it did not comply with requirements of reg 6.17A – Whether reg 6.17A applied to self managed superannuation funds.

Precedent – Intermediate appellate courts – Obiter dicta of intermediate appellate courts – Decision-making principles in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

Words and phrases – "binding death benefit nomination", "compelling reason", "intermediate appellate court", "obiter dicta", "plainly wrong", "regulated superannuation fund", "self managed superannuation fund", "seriously considered dicta", "SMSF", "superannuation".

Superannuation Industry (Supervision) Act 1993 (Cth), ss 31(1), 32(1), 34, 55A, 59, 353.

Superannuation Industry (Supervision) Regulations 1994 (Cth), regs 6.17, 6.17A, 6.21, 6.22.

1 KIEFEL CJ, GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND
GLEESON JJ. This appeal is from a judgment of the Court of Appeal of the
Supreme Court of Western Australia (Buss P, Murphy and Mitchell JJA)¹ on
appeal from a decision of a Master of that Court (Sanderson M)². It concerns the
scope of the operation of a provision of the *Superannuation Industry (Supervision)*
Regulations 1994 (Cth) ("the Regulations") made under the *Superannuation*
Industry (Supervision) Act 1993 (Cth) ("the Act").

2 The substantive question on which the appeal turns is whether the Court of
Appeal was correct to conclude that reg 6.17A of the Regulations has no
application to a superannuation fund referred to in the Act as a "self managed
superannuation fund" ("an SMSF"). The question is one of statutory construction.

3 The Court of Appeal reached that conclusion by adopting the construction
of reg 6.17A previously expressed in the Full Court of the Supreme Court of South
Australia in what the Court of Appeal characterised as at least "seriously
considered dicta". The Court of Appeal adopted the construction on the basis that
it did not consider the construction to have been "plainly wrong". There is
accordingly a question which has been aired in the appeal about the
appropriateness of the method by which the Court of Appeal reached the
conclusion.

4 Although the Court of Appeal ought to have reached the conclusion
construing the regulation for itself, the Court of Appeal was correct to conclude
that reg 6.17A has no application to an SMSF. The appeal must therefore be
dismissed.

The Act

5 The main object of the Act is to make provision for the prudent management
and supervision of certain superannuation funds, approved deposit funds and
pooled superannuation trusts³. One of the bases for supervision is that those funds

1 *Hill v Zuda Pty Ltd* [2021] WASCA 59.

2 *Hill v Zuda Pty Ltd* [2020] WASC 89.

3 Section 3(1) of the Act.

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and trusts are structured so as to be subject to regulation in the exercise of the legislative power of the Commonwealth Parliament with respect to "trading or financial corporations"⁴ in return for which they may become eligible for concessional taxation treatment⁵.

6 Within the meaning of the Act a superannuation fund is a "regulated superannuation fund" if it has a trustee which is a trading or financial corporation⁶ and if that trustee has by written notice elected that the Act applies in relation to the fund⁷. A superannuation fund that is a regulated superannuation fund is also an SMSF within the meaning of the Act if it has fewer than five members, each of which is a director of the trustee, and if certain other conditions are fulfilled⁸.

7 Part 3 of the Act makes provision for a system of prescribed standards applicable to the operation of regulated superannuation funds, approved deposit funds and pooled superannuation trusts⁹. Each is encompassed within the description in the Act of a "superannuation entity"¹⁰.

8 Within Pt 3, ss 31 and 32 provide for standards to be prescribed by regulations made under s 353 of the Act. Section 31(1) provides for the regulations to prescribe standards applicable to the operation of regulated superannuation funds. Section 32(1) provides for the regulations to prescribe standards applicable to the operation of approved deposit funds. By force of s 34, each trustee of a

4 Section 51(xx) of the *Constitution*.

5 Section 3(2) of the Act.

6 Section 10(1) (definition of "constitutional corporation") of the Act.

7 Section 19 of the Act.

8 Section 17A of the Act.

9 Section 30 of the Act.

10 Section 10(1) (definition of "superannuation entity") of the Act.

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superannuation entity is obliged to ensure that the prescribed standards applicable to the operation of that entity are complied with at all times.

9 Part 6 of the Act sets out rules about the content of the "governing rules of superannuation entities"¹¹, including such governing rules as may be contained in trust instruments¹². Within Pt 6 are relevantly ss 55A and 59.

10 Section 55A provides:

- "(1) The governing rules of a regulated superannuation fund must not permit a fund member's benefits to be cashed after the member's death otherwise than in accordance with standards prescribed for the purposes of section 31.
- (2) If the governing rules of a fund are inconsistent with subsection (1):
 - (a) subsection (1) prevails; and
 - (b) the governing rules are invalid, to the extent of the inconsistency."

11 Section 59 provides:

- "(1) Subject to subsection (1A), the governing rules of a superannuation entity other than a self managed superannuation fund must not permit a discretion under those rules that is exercisable by a person other than a trustee of the entity to be exercised unless:
 - (a) those rules require the consent of the trustee, or the trustees, of the entity to the exercise of that discretion; or
 - (b) if the entity is an employer-sponsored fund:
 - (i) the exercise of the discretion relates to the contributions that an employer-sponsor will, after the

11 Section 51 of the Act.

12 Section 10(1) (definition of "governing rules") of the Act.

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discretion is exercised, be required or permitted to pay to the fund; or

- (ii) the exercise of the discretion relates solely to a decision to terminate the fund; or
- (iii) the circumstances in which the discretion was exercised are covered by regulations made for the purposes of this subparagraph.

(1A) Despite subsection (1), the governing rules of a superannuation entity may, subject to a trustee of the entity complying with any conditions contained in the regulations, permit a member of the entity, by notice given to a trustee of the entity in accordance with the regulations, to require a trustee of the entity to provide any benefits in respect of the member on or after the member's death to a person or persons mentioned in the notice, being the legal personal representative or a dependant or dependants of the member.

(2) If the governing rules of a superannuation entity are inconsistent with subsection (1), that subsection prevails, and the governing rules are, to the extent of the inconsistency, invalid."

12 Unsurprisingly, given that s 59(1) is expressed to have no application to a superannuation entity that is an SMSF and that s 59(1A) operates as an exception to s 59(1), there is no dispute that regulations made under s 353 for the purpose of s 59(1A) can have no application to an SMSF.

The Regulations

13 Part 6 of the Regulations is headed "Payment standards". Division 6.2 is headed "Payment of benefits" and relevantly contains regs 6.17 and 6.17A.

14 Regulation 6.17(1) relevantly provides that, for the purposes of ss 31(1) and 32(1) of the Act, the standards set out in reg 6.17(2) are applicable to the operation of regulated superannuation funds and approved deposit funds. The standard set out in reg 6.17(2)(a)(i) permits a member's benefits in a fund to be paid by being "cashed" in accordance with Div 6.3 of the Regulations. That division, headed "Cashing of benefits", relevantly contains regs 6.21 and 6.22. Regulation 6.21(1) relevantly provides that "a member's benefits in a regulated superannuation fund must be cashed as soon as practicable after the member dies". Regulation 6.22

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<i>Gleeson</i>	<i>J</i>

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limits the circumstances in which a member's benefits in a regulated superannuation fund can be cashed in favour of a person other than the member or the member's legal personal representative. There is no dispute that regs 6.21 and 6.22 apply to a regulated superannuation fund that is an SMSF.

15 Regulation 6.17A relevantly provides:

- "(1) For subsections 31(1) and 32(1) of the Act, the standard set out in subregulation (4) is applicable to the operation of regulated superannuation funds and approved deposit funds.
- (2) For subsection 59(1A) of the Act, the governing rules of a fund may permit a member of the fund to require the trustee to provide any benefits in respect of the member, on or after the death of the member, to the legal personal representative or a dependant of the member if the trustee gives to the member information under subregulation (3).
- (3) The trustee must give to the member information that the trustee reasonably believes the member reasonably needs for the purpose of understanding the right of that member to require the trustee to provide the benefits.
- (4) Subject to subregulation (4A), ... if the governing rules of a fund permit a member of the fund to require the trustee to provide any benefits in accordance with subregulation (2), the trustee must pay a benefit in respect of the member, on or after the death of the member, to the person or persons mentioned in a notice given to the trustee by the member if:
 - (a) the person, or each of the persons, mentioned in the notice is the legal personal representative or a dependant of the member; and
 - (b) the proportion of the benefit that will be paid to that person, or to each of those persons, is certain or readily ascertainable from the notice; and
 - (c) the notice is in accordance with subregulation (6); and
 - (d) the notice is in effect.

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(4A) ...

(5) ...

(6) For paragraph[] (4)(c) ..., the notice:

- (a) must be in writing; and
- (b) must be signed, and dated, by the member in the presence of 2 witnesses, being persons:
 - (i) each of whom has turned 18; and
 - (ii) neither of whom is a person mentioned in the notice; and
- (c) must contain a declaration signed, and dated, by the witnesses stating that the notice was signed by the member in their presence.

(7) Unless sooner revoked by the member, a notice under subregulation (4) ceases to have effect:

- (a) at the end of the period of 3 years after the day it was first signed, or last confirmed or amended, by the member; or
- (b) if the governing rules of the fund fix a shorter period – at the end of that period."

16 The heading to reg 6.17A is "Payment of benefit on or after death of member (Act, s 59(1A))". There is no dispute that reg 6.17A(2) is referable solely to s 59(1A) and that neither reg 6.17A(2) nor reg 6.17A(3) has application to an SMSF.

The facts and procedural history

17 Zuda Pty Ltd ("Zuda") is the trustee of an SMSF known as the Holly Superannuation Fund ("the Fund") which was created by a deed dated 14 June 2000 ("the Trust Deed"). Mr Alec Kumar Sodhy and his de facto partner Ms Jennifer Patricia Murray were each a member of the Fund and a director of Zuda. Ms Claire Elizabeth Hill is the only child of Mr Sodhy.

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18 On 13 December 2011, the Trust Deed was amended to insert a clause described as a "binding death benefit nomination" ("BDBN") according to which, if either Mr Sodhy or Ms Murray died, Zuda was required to distribute the whole of the deceased member's balance in the Fund to the surviving member. Mr Sodhy died on 22 November 2016.

19 Ms Hill subsequently commenced a proceeding in the Supreme Court of Western Australia seeking declaratory and injunctive relief against Zuda and Ms Murray. Ms Hill sought that relief on the basis that the BDBN was of no force and effect by reason of the BDBN having been a notice given to Zuda by each of Mr Sodhy and Ms Murray for the purpose of reg 6.17A(4) which failed to comply with either reg 6.17A(6)(b) or (c) (as to its form) or reg 6.17A(7)(a) (as to its timing).

20 That the BDBN was a notice given to Zuda by each of Mr Sodhy and Ms Murray was undisputed before the Master and the Court of Appeal, and (notwithstanding an attempt by Zuda and Ms Murray to resile from what had been common ground manifested in an application for revocation of special leave to appeal, which is refused) remains undisputed on the appeal. That the notice was not in accordance with reg 6.17A(6)(b) or (c) or reg 6.17A(7)(a) was, and remains, similarly undisputed.

21 The sole issue before the Master and the Court of Appeal was, and the sole substantive issue on the appeal remains, whether reg 6.17A applied to the Fund as an SMSF.

22 Holding that reg 6.17A had no application to an SMSF, the Master summarily dismissed the proceeding¹³. The Court of Appeal concluded that there was no error in that holding and so dismissed an appeal from that order for summary dismissal.

23 In reasoning to that conclusion, the Court of Appeal acknowledged¹⁴ that the view that reg 6.17A had no application to an SMSF had first been expressed

13 *Hill v Zuda Pty Ltd* [2020] WASC 89 at [22].

14 *Hill v Zuda Pty Ltd* [2021] WASCA 59 at [28].

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by a single judge of the Supreme Court of Queensland¹⁵. The Court of Appeal noted that, despite a tentative expression of opinion in the interim by a single judge of Supreme Court of South Australia which it interpreted as having been to the contrary¹⁶, the view that reg 6.17A had no application to an SMSF had subsequently been accepted sequentially in an observation in the Full Court of the Supreme Court of South Australia¹⁷ and by another single judge of the Supreme Court of Queensland¹⁸.

24

Noting that there "may be some debate" as to whether the observation in the Full Court of the Supreme Court of South Australia was "ratio" or "dicta", the Court of Appeal proceeded on the basis that the observation was at least "seriously considered dicta" which the Court of Appeal was required by the reasoning of this Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*¹⁹ to follow unless convinced that it was "plainly wrong"²⁰, which it was not²¹. On that basis the Court of Appeal considered itself "bound" to construe reg 6.17A as having no application to an SMSF²².

15 *Munro v Munro* (2015) 306 FLR 93 at 100 [36].

16 *Retail Employees Superannuation Pty Ltd v Pain* (2016) 115 ACSR 1 at 89-93 [495]-[511].

17 *Cantor Management Services Pty Ltd v Booth* (2017) 16 ASTLR 489 at 495-496 [29]-[31].

18 *Re Narumon Pty Ltd* [2019] 2 Qd R 247 at 258 [35]-[36].

19 (2007) 230 CLR 89.

20 *Hill v Zuda Pty Ltd* [2021] WASCA 59 at [39]-[41], [50].

21 *Hill v Zuda Pty Ltd* [2021] WASCA 59 at [48].

22 *Hill v Zuda Pty Ltd* [2021] WASCA 59 at [50].

The methodological question

25 *Farah Constructions* identified two decision-making principles. The first is that an intermediate appellate court should not depart from seriously considered dicta of a majority of this Court²³. The second is that neither an intermediate appellate court nor a trial judge should depart from a decision of another intermediate appellate court on the interpretation of Commonwealth legislation, uniform national legislation or the common law of Australia unless convinced that the interpretation is plainly wrong²⁴ or, to use a different expression, unless there is a compelling reason to do so²⁵.

26 Although both principles are directed to ensuring coherence in the law, the principles are distinct. The first concerns the relationship between an intermediate appellate court and this Court. The second concerns the relationships between intermediate appellate courts and between intermediate appellate courts and trial judges. In that latter context, intermediate appellate courts and trial judges are not bound to follow obiter dicta of other intermediate appellate courts, although they would ordinarily be expected to give great weight to them.

The substantive question

27 Turning now to the substantive question left unaddressed by the Court of Appeal, reg 6.17A can be seen from its terms to have been made for two distinct and complementary purposes. Regulation 6.17A(2) and (3) can be seen to have been made for the purposes of s 59(1A) of the Act. Regulation 6.17A(4)-(7) can also be seen to have been made for the purposes of ss 31(1) and 32(1) of the Act.

28 To the extent that reg 6.17A has been made for the purposes of ss 31(1) and 32(1), the trustee of every regulated superannuation fund to which it applies must comply with it. That is required by s 34 of the Act.

23 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151 [134].

24 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-152 [135].

25 *RJE v Secretary to the Department of Justice* (2008) 21 VR 526 at 554 [104].

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29 To the extent that reg 6.17A has been made for the purposes of s 59(1A) of the Act, it has the additional consequence that a rule of a regulated superannuation fund to which it applies is invalid if that rule purports to confer a discretion on a member that does not comply with the conditions of reg 6.17A or with those of s 59(1). That is the result of s 59(2) of the Act.

30 Ms Hill submits that reg 6.17A(1) makes the standard set out in reg 6.17A(4) applicable to the operation of all regulated superannuation funds. The alternative, and preferable, interpretation of reg 6.17A(1) is that it simply makes the standard set out in reg 6.17A(4) applicable to the operation of those regulated superannuation funds to which reg 6.17A(4) is in its terms applicable. The standard set out in reg 6.17A(4) in its terms applies only "if the governing rules of a fund permit a member of the fund to require the trustee to provide any benefits in accordance with [reg 6.17A(2)]". Since reg 6.17A(2) has no application to an SMSF, neither does reg 6.17A(4). And since reg 6.17A(4) has no application to an SMSF, neither does reg 6.17A(1). This is consistent with the heading to reg 6.17A referring expressly to s 59(1A) of the Act, which does not apply to an SMSF. It is also consistent with the extrinsic materials and the purposes of reg 6.17A.

31 As explained in the Explanatory Statement for the amendment to the Regulations which introduced reg 6.17A in its original form²⁶, following the insertion of s 59(1A) into the Act in 1999²⁷, reg 6.17A(1) "prescribes the standard set out in [reg] 6.17A(4) as an operating standard for the purposes of the [Act]". Regulation 6.17A(1) is designed to have, and has, no wider operation.

32 That the requirements of reg 6.17A(4) concerning the giving of notice by a member of a regulated superannuation fund to the trustee of that fund do not apply to an SMSF is not surprising given that an SMSF is, by definition, a superannuation fund in which members of the fund are also directors of the corporate trustee of the fund. In the context of an SMSF, giving notice of the kind envisaged by reg 6.17A(4) as expounded in reg 6.17A(6) and (7) would be at best an exercise in formality and at worst redundant. The two purposes of reg 6.17A – enabling members to compel trustees to distribute death benefits in accordance with their

26 *Superannuation Industry (Supervision) Regulations (Amendment) 1999 (No 3)* (Cth), Explanatory Statement.

27 *Superannuation Legislation Amendment Act 1999* (Cth).

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wishes and ensuring that members have sufficient information – are inapt to administration of an SMSF.

33 Contrary to another submission of Ms Hill, the conclusion that reg 6.17A(1) does not apply to an SMSF does not deprive s 55A of operation in relation to an SMSF. The operation of s 55A to a superannuation fund, including an SMSF, is not through the application of reg 6.17A but relevantly through the application of reg 6.17 in conjunction with regs 6.21 and 6.22.

Disposition

34 The appeal must be dismissed with costs.