HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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)
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 SUBMISSIONS

Part I: Certification

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

Part II: Statement of Issues

2. Are sub-regulations 6.17A(4), (6) and (7) of the ***SIS Regulations*** applicable to all regulated superannuation funds (including **SMSFs**) pursuant to sections 31 and 55A of the ***SIS Act*** and sub-regulation 6.17A(1) of the ***SIS Regulations***? (Ground 1)

3. Where an intermediate appellate court:

(a) adopts a lower court's decision, which decision did not consider a relevant aspect of the applicable legislation;

(b) did not itself consider that relevant aspect of the applicable legislation; and

(c) the adoption of the lower court's decision forms part of the *obiter dictum* of the intermediate appellate court,

is a subsequent intermediate appellate court under a duty to apply that earlier intermediate appellate court's decision without determining for itself the question of statutory interpretation, including the additional aspects of the applicable legislation? (Grounds 2 and 3)

Part III: Notice under 78B Judiciary Act 1903 (Cth)

4. The appellant considers that no notice under section 78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: Citation

5. The judgment of the Primary Court is unreported and has the medium neutral citation of *Hill v Zuda Pty Ltd* [2020] WASC 89 (**PJ**). The judgment of the Western Australian Court of Appeal is unreported and has the medium neutral citation of *Hill v Zuda Pty Ltd* [2021] WASCA 59 (**CA**).

Part V: Relevant Facts

6. The Appellant is the only child of the late Alec Sodhy (**Deceased**) (**CA** [4] **CAB 27**; **PJ** [4] **CAB 7**).

7. The Appellant is a dependant of the Deceased within the meaning of that term in section 10 of the ***SIS Act***.

8. The Deceased established a **SMSF** that was a regulated superannuation fund known as the Holly Superannuation Fund (**CA** [5] **CAB 28**).

9. The original trust deed was amended by a deed dated 13 December 2011 (**2011 Amending Deed**). Clauses 5 and 6 of the **2011 Amending Deed** inserted a purported binding death benefit nomination (**BDBN**) in the following terms (**CA** [6] **CAB 28**):

> 5. Despite anything else in the trust deed or Rules, if either Alec Kumar Sodhy or Jennifer Patricia Murray dies, then the Trustee must distribute the whole of the deceased Member's Account Balance to the other Member and may pay any part of the benefit as a lump sum or as a pension as the Trustee considers appropriate.
>
> 6. Clause 5 is a Binding Death Benefit Nomination for the purpose of the Rules.

10. Clauses 5 and 6 of the **2011 Amending Deed** (see **CA** [6] **CAB 28**) do not satisfy the requirements of sub-regulations 6.17A(6)(b) & (c) and 6.17A(7)(a) of the ***SIS Regulations*** so as to constitute a binding death benefit nomination (**BDBN**).

11. The Deceased died on 22 November 2016 and a Grant of Probate was made in favour of the Second Respondent on 3 February 2017 (**PJ** [4] **CAB 7**; **CA** [4] **CAB 27**).

Part VI: Appellant's Argument

Introduction: Legislative History

12. Sections 31 and 59 (save for sub-section 59(1A)) were contained in the ***SIS Act*** as originally enacted (Act No 78 of 1993 assented to on 30 November 1993).

13. Section 59 of the ***SIS Act*** as originally enacted applied to "a superannuation entity" which included a "regulated superannuation fund" but by its terms section 59 did not apply to an "excluded fund", defined in section 10 to include an "excluded

superannuation fund" (being a fund with less than 5 members) thereby effectively including **SMSFs**.

14. Subsection 59(1A) of the ***SIS Act*** was inserted by item 5 of Part 1 to Schedule 2 of the *Superannuation Legislation Amendment Act 1999* (Cth) (Act No 38 of 1999) and commenced on assent on 31 May 1999.

15. Regulation 6.17A was inserted by item 2 of Schedule 1 to the *Superannuation Industry (Supervision) Amendment Regulations 1999 (No 3)* (Statutory Rules No 115 of 1999) made on 9 June 1999 and which provision commenced upon gazettal.

16. **SMSFs** were expressly incorporated into the ***SIS Act*** through the *Superannuation Legislation Amendment Act (No 3) 1999* (Cth) (Act No 121 of 1999 assented to on 8 October 1999).

17. The amendments made (Part 1 to Schedule 1) included, *inter alia*:

(a) the repeal of the definition of "excluded fund" (items 15 and 16);

(b) inserting the definition of "self managed superannuation fund" in sections 10(1) and 17A (items 20 and 22); and

(c) substituting "a self managed superannuation fund" for "an excluded fund" in section 59 (item 40).

18. Section 55A of the ***SIS Act*** was inserted by item 361 of Part 2 to Schedule 1 of the *Superannuation Legislation Amendment (Simplification) Act 2007* (Cth) (Act No 15 of 2007) which commenced on 15 March 2007 (section 2(1)).

19. The only amendments to sections 31, 55A and 59 of the ***SIS Act*** and regulation 6.17A of the ***SIS Regulations*** since their respective original enactment are:

(a) Section 31(1): insertion at the end of the sub-section "and to trustees and RSE licensees of those funds";

(b) Section 31(2): insertion of paragraphs (da), (db), (dc), (ea), (eb), (ma), (pa), (sa), (sb);

(c) Section 31(2)(l): insertion at the end of the paragraph "and the management of the investment";

(d) Section 31(2)(q) and (r): replacement of "Commissioner" with "Regulator";

(e) Section 55A: no amendments have been made to this section;

(f) Section 59(1): substitution of "self managed superannuation fund" for "an excluded fund";

(g) Section 59(1A): references to "the trustee" amended to read "the trustee of the entity";

(h) Regulation 6.17A(4): the insertion of additional cross-references at the commencement of the sub-regulation as follows "Subject to subregulation (4A), and regulations 6.17B, 7A.17 and 7A.18, if …"; and

(i) Insertion of sub-regulation 6.17A(4A).

10 **20.** Those amendments have not made any changes relevant to the construction of any of the applicable provisions with respect to a **BDBN**.

Ground 1

21. Section 59 of the ***SIS Act*** does not apply to a **SMSF**.

22. Sections 31 and 55A of the ***SIS Act*** apply to all regulated superannuation funds (including **SMSFs**) and therefore apply to the Holly Superannuation Fund.

23. Regulation 6.17A of the ***SIS Regulations*** contains express reference to both sections 31 and 59 of the ***SIS Act***.

24. Sub-regulation 6.17A(1) provides:

> *"For subsections 31(1) and 32(1) of the Act, the standard set out in*
20 *subregulation (4) is applicable to the operation of regulated superannuation funds and approved deposit funds."*

25. Sub-regulations 6.17A(2) and (3) of the ***SIS Regulations*** are referrable to section 59(1A) of the ***SIS Act***. Sub-regulations (2) and (3) do not themselves make reference to the balance of regulation 6.17A. The extent of any ambiguity or inconsistency with sub-regulation 6.17A(1) arises from sub-regulation (4) including a reference back to sub-regulation (2).

26. A regulation can be supported, and therefore made applicable, by multiple provisions within a single Act: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 391 [94]; *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at
30 760.

27. Therefore the question is whether regulation 6.17A of the ***SIS Regulations*** in its entirety is referrable solely to section 59(1A) of the ***SIS Act*** and sub-regulation (1) with its reference to section 31 of the ***SIS Act*** (including in the context provided by section 55A of the ***SIS Act***) is irrelevant and to be ignored? That is, is the entirety of sub-regulation 6.17A(1) an error?

28. The answer is "no".

29. A court construing a statutory provision must strive to give meaning to every word of the provision, such that no word shall prove superfluous, void or insignificant if by any other construction they may all be made useful and pertinent: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71]; D Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) [2.43] 67 – 68, Annexure 443 – 444.

30. A construction of sub-regulations 6.17A(1) and (4) of the ***SIS Regulations*** that sub-regulations 6.17A(4), (6) and (7) are regulations that prescribe an operating standard under section 31 of the ***SIS Act*** does not require the provisions in sub-regulation 6.17A(1) to be ignored.

31. Such a construction does not require section 59(1A) of the ***SIS Act*** or sub-regulations 6.17A(2) and (3) of the ***SIS Regulations*** to be ignored or rendered otiose.

Retail Employees v Pain

32. Considered *dicta* supporting the appellant's construction is found in *Retail Employees Superannuation Pty Ltd v Pain* [2016] SASC 121 at [495] – [511]; (2016) 115 ACSR 1 at 89 – 93 (***Retail Employees v Pain***).

33. Sub-regulation 6.17A(1) of the ***SIS Regulations*** identifies sub-regulation 6.17A(4), and thereby sub-regulations 6.17A(4) to (7), as applicable operating standards pursuant to section 31 of the ***SIS Act*** (***Retail Employees v Pain*** at [495]).

34. Sub-regulations 6.17A(2) and (3) are expressed to be made under section 59(1A) of the ***SIS Act***. They require the giving of information by a trustee to a member about the right to give a binding death benefit nomination where the governing rules of a large fund controlled by a "registrable superannuation entity" permit the giving of a binding death benefit nomination (***Retail Employees v Pain*** at [495] – [496]).

35. This is understandable. In such a fund the member is not a trustee or director of the corporate trustee, as is the case with a **SMSF**. Therefore, the member is not in a position of management and does not have access to such information, unlike the situation of an **SMSF** member who by section 17A of the ***SIS Act*** must be a trustee or a director of the corporate trustee. The **SMSF** member therefore already has access to such information.

36. In ***Retail Employees v Pain*** (at [497]) the construction advanced by APRA was that sub-regulations 6.17A(4) to (7) are not only operating standards under section 31 of the ***SIS Act*** but also requirements for the validity and efficacy of a notice under section 59(1A) of the ***SIS Act***.

10 **37.** The other parties contended that only sub-regulations 6.17A(2) and (3) were applicable under section 59(1A) of the ***SIS Act*** and sub-regulations 6.17A(4) to (7) were operating standards under section 31 (at [496]).

38. The effect of either of these positions would be that a **BDBN** in relation to any superannuation entity other than an **SMSF** would be required to comply with sub-regulations 6.17A(4) to (7), as both sections 31 and 59 apply to superannuation entities other than an **SMSF**. It is only regulations applicable by section 31 of the ***SIS Act*** that apply in respect of an **SMSF**.

39. Blue J (at [498]) favoured the construction of sub-regulations 6.17A(4) to (7) as being operating standards under section 31 of the ***SIS Act*** as proposed by the parties other
20 than APRA.

40. Blue J (at [499] – [510]) then considered a series of factors as to whether sub-regulations 6.17A(4) to (7) are not made under or applicable to section 59(1A) of the ***SIS Act***.

41. The reasoning in ***Retail Employees v Pain*** that sub-regulations 6.17A(1) and (4) to (7) are operating standards applicable under section 31 of the ***SIS Act*** and therefore apply to **SMSFs** should be accepted.

42. Whether sub-regulations 6.17A(4) to (7) of the ***SIS Regulations*** are operating standards under section 31 of the ***SIS Act*** only or are applicable under both sections 31 and 59(1A) of the ***SIS Act***, they would still apply to **SMSFs**.

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Conclusion

43. Upon a proper construction of regulation 6.17A, sub-regulations 6.17A(1) and (4) to (7) of the ***SIS Regulations*** apply to all regulated superannuation funds, including a **SMSF**, as operating standards under section 31 of the ***SIS Act***.

44. Clauses 5 and 6 of the **2011 Amending Deed** for the Holly Superannuation Fund (**CA [6] CAB 28**):

(a) do not amount to a valid and effective binding death benefit nomination pursuant to section 31 of the ***SIS Act*** and sub-regulations 6.17A(6)(b) & (c) and 6.17A(7)(a) of the ***SIS Regulations***; and

(b) are invalid pursuant to section 55A(2) of the ***SIS Act***.

Grounds 2 and 3

Three Contrary Existing Authorities

45. Three decisions relevant to the applicability of regulation 6.17A of the ***SIS Regulations*** to **SMSFs** (finding that it has no application) are wrongly decided.[1]

46. Those 3 decisions are:

(a) *Munro v Munro* [2015] QSC 61; (2015) 306 FLR 93 (***Munro***) decided 25 March 2015;

(b) *Cantor Management Services Pty Ltd v Booth* [2017] SASCFC 122; (2017) 16 ASTLR 489; (2017) 106 ATR 615 (***Cantor Management***) decided 22 September 2017; and

(c) *Re Narumon Pty Ltd* [2018] QSC 185; [2019] 2 Qd R 247 (***Re Narumon***) decided 24 August 2018.

47. Each of ***Munro*** and ***Cantor Management*** fail to consider and apply sections 31 and 55A of the ***SIS Act*** and sub-regulation 6.17A(1) of the ***SIS Regulations***.

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[1] The position is to be distinguished from that arising in *Donovan v Donovan* [2009] QSC 26 (***Donovan***) where the proper construction of the defined term used in the **SMSF** trust deed ("Statutory Requirements") meant that the requirements of regulation 6.17A(4) to (7) of the ***SIS Regulations*** were incorporated into the terms of the trust deed.

48. ***Re Narumon*** fails to properly apply principles of statutory interpretation in the construction of regulation 6.17A arrived at and is therefore wrong in its conclusion that regulation 6.17A of the ***SIS Regulations*** is not applicable to **SMSFs**.

Munro

49. In ***Munro*** (at [27]) both sections 31 and 55A(1) of the ***SIS Act*** are identified, but only in connection with regulation 6.22 of the ***SIS Regulations***.

50. As identified in ***Munro*** (at [30]) the issue was stated as being whether the binding death benefit nomination had to comply with regulation 6.17A of the ***SIS Regulations***. However, (at [28]) it is stated that regulation 6.17A is for the purposes of only section 59(1A).

51. In ***Munro*** (at [32]) the applicant's argument was based on the inapplicability of section 59(1A) to **SMSFs** and that the requirements of regulation 6.17A were not imported by the definition of "Relevant Requirements" in the trust deed (see at [4], [6]).

52. The Respondent's argument (at [33]) was that the trust deed definition of "Relevant Requirements" imported the requirements of regulation 6.17A as was the case in ***Donovan***.

53. It appears from the reasons for decision that neither party argued that regulation 6.17A of the ***SIS Regulations*** had of its own force direct application **SMSFs**.

54. Mullins J (at [36]) held that section 59(1) of the ***SIS Act*** in expressly not applying to **SMSFs** (and with section 59(1A) of the ***SIS Act*** therefore also not applicable) results in regulation 6.17A being inapplicable to **SMSFs**. As a result, there was no restriction other than what may be contained in the terms of the trust deed under which the **SMSF** is constituted governing the form in which a binding nomination may be given.

55. In considering the incorporation of the requirements of regulation 6.17A by the terms of the definitions used in the **SMSF** trust deed Mullins J (at [37] – [39]) also distinguished ***Donovan*** due to the difference in wording of the definitions used in the respective trust deeds ("Relevant Requirements" as opposed to "Statutory Requirements") and held that the trust deed did not incorporate the requirements of regulation 6.17A in that case.

56. The basis of the decision in ***Munro*** was that compliance with regulation 6.17A of the ***SIS Regulations*** only arises as a condition for the purpose of section 59(1A) of the ***SIS Act*** (at [36]).

Cantor Management

57. The Full Court of South Australia in ***Cantor Management*** (at [29] – [31]) stated that regulation 6.17A of the ***SIS Regulations*** did not apply to a **SMSF** because section 59 of the ***SIS Act*** did not apply to a **SMSF**.

58. It is accepted that section 59 of the ***SIS Act*** does not apply to a **SMSF**. However, regulation 6.17A of the ***SIS Regulations*** is not solely attributable to section 59.

59. ***Cantor Management*** did **not** consider the position arising from:

(a) Sections 31 and 55A of the ***SIS Act***; or

(b) Sub-regulation 6.17A(1) of the ***SIS Regulations***.

60. The entirety of the reasoning in ***Cantor Management*** with respect to the applicability of regulation 6.17A of the ***SIS Regulations*** to a **SMSF** is to be found at [29] – [31] (and is set out in full in **CA** [37] **CAB 37**).

61. The South Australian Full Court in ***Cantor Management*** (at [29] - [30]) referred to the decision in ***Munro*** but only to briefly mention the conclusion that section 59(1) of the ***SIS Act*** and regulation 6.17A of the ***SIS Regulations*** (which prescribe the form of death benefit nomination) do not apply to a **SMSF**. No reference was made to sections 31 and 55A of the ***SIS Act*** or to sub-regulation 6.17A(1).

62. Kourakis CJ (with whom Peek and Nicholson JJ agreed) said at [31]:

> *"Be that as it may, the appellant does not rely on any non-compliance with the SIS Regulations other than with respect to the requirement to give notice of the DBBNF to the trustee of the Superannuation Fund which is, in any event, a requirement under the Fund Deed."*

63. As confirmed (at [31]) the appellant in ***Cantor Management*** did not rely on any non-compliance with the ***SIS Regulations***, the appeal was based solely on whether the binding death benefit nomination was "given" to the trustee in accordance with the terms of the relevant **SMSF** trust deed.

64. The Full Court of South Australia in ***Cantor Management*** did not refer to and therefore did not engage with the line of reasoning expressed by Blue J in ***Retail Employees v Pain*** at [495] – [511]. It is not known whether this decision was cited to the Full Court of South Australia in ***Cantor Management*** nor whether the point was the subject of any argument.

65. As such the only reasoning by which the outcome in ***Cantor Management*** as to the non-application of regulation 6.17A can be judged, and which is relevant to whether the principles of comity were applicable to make ***Cantor Management*** determinative of the appeal, is in substance that of ***Munro*** with which the court expressed agreement (at [30]).

66. Both ***Munro*** and ***Cantor Management*** did **not** consider sections 31 and 55A(1) of the ***SIS Act*** or whether they, along with sub-regulation 6.17A(1), upon a proper construction provided that sub-regulations 6.17A(4), (6) and (7) applied to a **SMSF**.

Re Narumon

67. In ***Re Narumon*** (at [34]) the applicant trustee originally submitted that regulation 6.17A applied, however based upon ***Munro*** and its determination that section 59(1A) of the ***SIS Act*** does not apply to **SMSFs**. The applicant trustee's position changed to regulation 6.17A not being applicable based upon an acceptance of ***Munro***. The applicant then based its case on the position that the express terms of the superannuation fund deed imported the requirements of regulation 6.17A.

68. It does not appear from the reasons in ***Re Narumon*** that there was any argument as to the proper construction of regulation 6.17A of the ***SIS Regulations*** or their application to SMSFs by reason of the applicant trustee's change of position and the material filed and written submissions of the applicant trustee. The only other party represented at the hearing did not oppose the relief sought (see ***Re Narumon*** at [10]) and orders were made essentially in terms of the originating application (see ***Re Narumon*** at [93]).

69. Bowskill J (at [35]) agreed with Mullins J in ***Munro*** (at [35] – [36]) that section 59(1A) of the ***SIS Act*** does not apply to a **SMSF**.

70. From [36] Bowskill J continued to consider whether regulation 6.17A applied in any event but concluded that the regulation does not apply. Section 59 of the ***SIS Act*** is considered at [37] – [39].

71. Bowskill J identifies the existence of sections 31 and 55A of the ***SIS Act*** (at [40]) and that whilst regulation 6.22 "*defines the category of persons to whom benefits can be paid after death, it imposes no operating standard in terms of how that is to occur*" (at [41]).[2]

72. Bowskill J does not engage with the inconsistency between:

(a) this correct view of regulation 6.22, which results in only regulation 6.17A(1) and (4) to (7) being an operating standard capable of application after a member's death; and

(b) the effect of her Honour's conclusion that regulation 6.17A is only applicable under section 59 of the ***SIS Act***, which results in there being no relevant operating standard after a member's death applicable to all regulated superannuation funds for the purposes of section 55A of the ***SIS Act*** (as opposed to registrable funds separately under section 59).

73. Bowskill J identifies (at [43]) the duality in regulation 6.17A, including that sub-regulation 6.17A(1) and therefore sub-regulations 6.17A(4) to (7) are expressed to be made under section 31 of the ***SIS Act*** as an operating standard applicable to a **SMSF** and sub-regulations 6.17A(2) and (3) are expressed to be made under section 59(1A) of the ***SIS Act***.

74. Bowskill J referenced (at [43] footnote 35) ***Retail Employees v Pain*** at [494] – [515] regarding the discussion of the ambiguities and uncertainties created by the drafting of regulation 6.17A. It was noted that in ***Retail Employees v Pain*** regulation 6.17A and section 59 applied as the superannuation fund was a "registrable superannuation entity" (see ***Retail Employees v Pain*** at [16]) and not a **SMSF**.

75. Bowskill J in ***Re Narumon*** does not engage with the analysis of Blue J in ***Retail Employees v Pain*** at [479] – [510] (particularly the analysis at [495] – [510]).

76. However, having identified the existence of a question as to the proper construction of regulation 6.17A of the ***SIS Regulations***, Bowskill J determined (at [44]) that despite the tension arising from the express words of sub-regulation 6.17A(1) and the potential ambiguity "*[o]n balance … the better construction of reg 6.17A is that it applies only*

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[2] See also *Asgard Capital Management Ltd v Maher* (2003) 131 FCR 196 at 199 – 202 [6] – [13] as to regulation 6.22 not being an operating standard, as cited by Bowskill J at fn 32.

to the payment of benefits on or after death under the governing rules of a fund to which s 59 applies. It does not, therefore, apply to a self-managed superannuation fund."

77. Therefore, consistent with ***Cantor Management*** (at [30]), it was held in ***Re Narumon*** that only the terms of the trust deed which contains the governing rules of a **SMSF** will govern the form in which a binding death benefit nomination may be given.

78. The balance of the decision in ***Re Narumon*** (from [45]) considers whether the trust deed definition of "Superannuation Law"[3] imports the requirements of regulation 6.17A by its terms, given the finding that they have no direct statutory application.

Error in Re Narumon

10 **79.** The construction arrived at in ***Re Narumon*** (at [36], [40], [43] and [44]) was that the inclusion of a reference in sub-regulation 6.17A(4) to sub-regulation (2) (a sub-regulation "For section 59(1A)" of the ***SIS Act***) meant that the express reference in sub-regulation 6.17A(1) to the standard set out in sub-regulation (4) as being applicable to regulated superannuation funds for the purposes of sub-section 31(1) of the ***SIS Act*** was to be ignored and treated as erroneous.

80. Bowskill J did not engage with the inconsistencies, issues and difficulties that arose from the determination that regulation 6.17A of the ***SIS Regulations*** is only applicable pursuant to section 59(1A) of the ***SIS Act*** and does not apply to SMSFs, or the *dicta* of Blue J in ***Retail Employees v Pain.***

20 ***Was the Court of Appeal Obliged to Apply Cantor Management as A Matter of Comity?***

81. Consistency in the interpretation and application of Commonwealth legislation, the common law and uniform national legislation (which does not contain a material distinction in language) is an important consideration which underlies the duty of a court not to depart from seriously considered *dicta* on such subjects of a court higher in the Australian judicial hierarchy or of co-ordinate level courts, including intermediate appellate courts, unless it is plainly wrong: *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at 411 – 413 [48] - [51]; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151 – 152 [135]; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR

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[3] As was done with respect to the term "Relevant Requirements" in ***Munro*** and "Statutory Requirements" in ***Donovan***.

485 at 492; *Mustac v Medical Board of Western Australia* [2007] WASCA 128 at [46(c)].

82. In *Gett v Tabet* (2009) 254 ALR 504 at 565 – 566 [294] – [295] the New South Wales Court of Appeal set out three attributes which may give rise to a decision being "plainly wrong". As to the **first** attribute, the fact of error being immediately apparent was considered to be "highly subjective" and should not be required. The **second** attribute was the strong conviction that the earlier judgment was erroneous and not merely the choice of an approach which was open, but no longer preferred (see also *Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 ALR 74 at 96 [117] as to the degree of conviction with which error is perceived). The **third** attribute was that the nature of the error can be demonstrated with a degree of clarity by the application of correct legal analysis.

83. Each of the second and third attributes are found in this case.

84. A later court is not restricted to a preliminary examination to form a view as to whether a previous decision is "plainly" or "clearly" wrong. The question does not involve speed or obviousness as to the appreciation of error at a preliminary examination: *Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 ALR 74 at 96 [117].

85. The words "plainly" or "clearly" distinguish the position from one where minds might differ or there is mere disagreement between various reasonably open constructions: *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 at 560 [29]; *SCCASP Holdings Pty Ltd v Federal Commissioner of Taxation* (2013) 211 FCR 332 at 342 [79]; *Director of Public Prosecutions v Patrick Stevedores Holdings Pty Ltd* (2012) 41 VR 81 at 106 [113]; *SZEEU v Minister for Immigration and Multicultural Affairs* (2006) 150 FCR 214 at 251 [149]. The statement in *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234 at 253 – 254 [86] that "[t]*here is a distinction between concluding a decision is wrongly decided and a conclusion that an earlier authority is 'plainly wrong'*" should not be interpreted as increasing the burden of persuasion beyond that where minds might differ in the selection of one of two reasonably open constructions.

86. In *SZEEU v Minister for Immigration and Multicultural Affairs* (2006) 150 FCR 214 at 250 [148] Weinberg J said that the error must be "*manifest or, if it does not rise to*

that level, at least capable of being easily demonstrated. In a sense, the error must be so clear as to enable a later court to say that the point is not reasonably arguable." Weinberg J then (at 250 [149]), in reference to *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 at 729, gave as an example of a plain error an earlier judgment given *per incuriam*.

87. The adoption of the word "easily" by Weinberg J should not be seen as imposing a requirement of speed, obviousness or mere preliminary examination contrary to the decision of the New South Wales Court of Appeal in *Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 ALR 74 at 96 [117] (per Allsop P, Spigelman CJ agreeing at 76 [1], Macfarlan JA agreeing at 126 [305]). See also *Gett v Tabet* (2009) 254 ALR 504 at 565 – 566 [294] – [295].

88. There are *dicta* of several different types and qualities: *Federated Saw Mill, Timber Yard, and General Woodworkers Employees' Association of Australasia v James Moore and Sons Pty Ltd* (1909) 8 CLR 465 at 485; *Richard West and Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424 at 431 – 432; *Brunner v Greenslade* [1971] Ch 993 at 1002 – 1003.

89. Judicial comity is a flexible concept the strength or application of which varies with the circumstances of the particular case under consideration: *Ying v Song* [2009] NSWSC 1344 at [19], [29]; *Mitchforce Pty Ltd v Starkey (No 2)* (2003) 130 IR 378 at 386 [19]; [2003] NSWIRComm 458; *Sharah v Headley* [1982] 2 NSWLR 223 at 227; *Mustac v Medical Board of Western Australia* [2007] WASCA 128 at [46(a)]; *Undershaft (No 1) Ltd v Federal Commissioner of Taxation* (2009) 175 FCR 150 at 166 [74], [77].

90. A court is not bound to follow another decision in which a principle has been conceded, assumed or incorporated into the reasoning of a particular court (even if it forms part of the *ratio decidendi*) without the principle being the subject of argument or reasoned examination in the judgment, even if it forms a necessary part of the judgment: *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 – 12 [13] – [15]; *Traderight Pty Ltd v Bank of Queensland* (2010) 266 ALR 503 at 518 – 520, 521 - 522 [67] – [70], [72] – [76], [82] - [86]; *Ying v Song* [2009] NSWSC 1344 at [23]; *Taylor v Rudaks* (2007) 166 FCR 451 at 462 – 463 [39]; *Markisic v Commonwealth* (2007) 69 NSWLR 737 at 748 [56]; *Brunner v Greenslade* [1971] Ch 993 at 1002 – 1003.

91. Further, an earlier decision given without reference to a relevant statutory provision or rule of law and which the court did not have in mind in delivering its decision is given *per incuriam*: *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 at 729; Cf *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54 at 58; Phillips v Robab Pty Ltd (2014) 110 IPR 184 at 193 [59]; [2014] NSWSC 1520.

92. The fact that a court was not informed of, or did not consider the effect of, a relevant statutory provision or previous case authority is sufficient to oblige a subsequent court to determine the proper position giving effect to that statutory provision. If taking into account the further statutory provision alters the outcome then the principle of comity does not oblige a second court to apply the former decision in conflict with the correct position: *Re Linc Energy Ltd (in liquidation)* [2017] 2 Qd R 720 at 744 [140]; *Phillips v Robab Pty Ltd* [2014] NSWSC 1520; (2014) 110 IPR 184 at 193 [59]; *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234 at 253 [83]; *Huddersfield Police Authority v Watson* [1947] KB 842 at 847; *Morelle Ltd v Wakeling* [1955] 2 QB 379 at 406 – 407; *Duncan v Queensland* (1916) 22 CLR 556 at 582.

93. Accordingly, decisions involving principles conceded, assumed or incorporated without argument, and those given without reference to a relevant statutory provision or rule of law and which the court did not have in mind in delivering its decision, give rise to a manifest omission or error, or alternatively form a distinct category of decisions. The duty of a co-ordinate court based upon the principle of comity in such circumstances does not require the application of the earlier decision without reconsideration of the issues and determination of the true position so as to ensure the correct application of the law as found.

94. The decision in ***Cantor Management***:

(a) Rests solely on the adoption of the decision in ***Munro***;

(b) Does not itself contain "seriously considered *dicta*" for the purposes of an application of the principle of comity;

(c) Does not involve long established authority or rest upon a principle carefully worked out in a significant succession of cases;[4]

(d) Has not itself been followed by any other intermediate appellate court, other than in the present case the subject of this appeal;[5]

(e) Fails to consider sections 31 and 55A(1) of the ***SIS Act*** and sub-regulation 6.17A(1) of the ***SIS Regulations*** as a basis for the application of sub-regulations 6.17A(4), (6) and (7) to a **SMSF**;

(f) Is wrong in a significant respect in failing to give meaning and operation to regulation 6.17A(1) of the ***SIS Regulations*** and sections 31 and 55A of the ***SIS Act***: *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 440; and

(g) Does not engage with the inconsistencies, issues and difficulties that arise from regulation 6.17A of the ***SIS Regulations*** only being applicable pursuant to section 59(1A) of the ***SIS Act*** and thereby not applying to SMSFs.[6]

95. The fact of error in ***Cantor Management*** is immediately apparent, and the nature of the error is demonstrated with a degree of clarity by the application of correct legal analysis: *Gett v Tabet* (2009) 254 ALR 504 at 565 – 566 [294] – [295]; [2009] NSWCA76.

96. The fact that commercial arrangements have been entered into on the basis of a construction adopted in previous decisions is insufficient to preclude a later court from overruling such previous decisions and the particular construction adopted: *Cargill International SA v Peabody Australia Mining Ltd* (2010) 78 NSWLR 533 at 564 - 565 [102] – [104].

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[4] being the first of the four matters applicable in the analogous situation of justifying the ability of a full court to review and depart from its own previous decisions: *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56 (Gibbs CJ), *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438; *Gett v Tabet* [2009] NSWCA76; (2009) 254 ALR 504 at 566 [297].

[5] Cf *Neutral Bay Pty Ltd v Deputy Commissioner of Taxation* (2007) 68 ATR 886 at 907 [73]; [2007] QCA 312.

[6] *David Grant & Co Pty Ltd v Westpac Banking Corporation* [1995] 2 VR 495 at 503.

97. The subsequent addition of the reasoning in ***Re Narumon*** does not add to the evaluation of ***Cantor Management*** for the purposes of determining its application as a matter of comity or the contents of its reasoning as "seriously considered dicta".

98. The reasoning of ***Re Naruman*** itself is not to be accorded application as a matter of comity. Its reasoning is relevant to be considered as part of the evaluation of the correct construction to be placed on the ***SIS Act*** and ***SIS Regulations*** that should have occurred in the Court of Appeal. As set out above ***Re Narumon*** is incorrect in its construction of the ***SIS Act*** and ***SIS Regulations*** and should not be followed.

Conclusion

99. The omission of sections 31 and 55A of the ***SIS Act*** and sub-regulation 6.17A(1) of the ***SIS Regulations*** from the reasoning in ***Cantor Management*** (and ***Munro***) means that the principle of comity should not be applicable so as to be determinative of the question of construction raised before the Court of Appeal.

100. The Court of Appeal was required to engage with and evaluate the competing constructions to be placed on the ***SIS Act*** and ***SIS Regulations*** which it identified (**CA** [24] – [28]; **CAB 34-35**) and the further relevant legislative provisions identified: *Undershaft (No 1) Ltd v Federal Commissioner of Taxation* (2009) 175 FCR 150 at 166 [70]; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at 740 [582] *Ying v Song* [2009] NSWSC 1344 at [26] – [29]; *Appleton Papers Inc v Tomasetti Paper Pty Ltd* [1983] 3 NSWLR 208 at 218; *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851 at 864.

101. The Court of Appeal was required to determine for itself whether on a proper construction sub-regulations 6.17A(4), (6) and (7) were applicable to **SMSFs** pursuant to sections 31 and 55A(1) of the ***SIS Act*** and sub-regulation 6.17A(1) of the ***SIS Regulations***.

102. Had the Court of Appeal engaged in determining the question of the proper construction for itself it would pursuant to sub-regulation 6.17A(1) of the ***SIS Regulations*** (in conjunction with sections 31 and 55A of the ***SIS Act***) have found that sub-regulations 6.17A(4), (6) and (7) were applicable to **SMSFs**, as set out with respect to ground 1 of this appeal.

Part VII: Orders Sought

103. The appeal be allowed.

104. The orders of the Court of Appeal of Western Australia made 23 April 2021 be set aside and in place thereof it be ordered that:

(a) The appeal to the Court of Appeal of Western Australia be allowed;

(b) The orders of the Supreme Court of Western Australia made 7 April 2020 be set aside and in lieu thereof it be ordered that:

(i) the First, Second and Third Respondents' application for summary judgment dated 24 October 2019 be dismissed; and

(ii) the costs of the application for summary judgment be costs in the cause;

(c) The Respondents pay the Appellant's costs of the appeal to the Court of Appeal of Western Australia, including reserved costs, to be taxed;

(d) The action otherwise be remitted for determination by the Supreme Court of Western Australia.

105. The Respondents pay the Appellant's costs of this appeal.

106. The Respondents do repay to the Appellant the sum of $28,231.44 together with interest at the rate prescribed pursuant to section 8 of the *Civil Judgments Enforcement Act 2004* (WA):

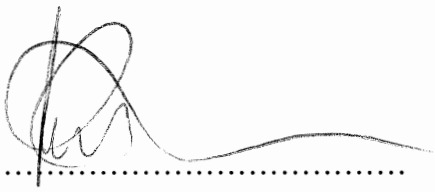
(a) On the sum of $8,771.44 from 15 December 2020 until payment;

(b) On the sum of $19,460.00 from 19 September 2021 until payment.

Part VIII: Time Estimate for Oral Argument

107. It is estimated the presentation of the appellant's oral argument will require 1 hour.

Dated: 7 January 2022



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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)
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

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the Appellant sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the Appellant's submissions.

The date relevant to this case is 22 November 2016
(being the date of death of the late Alec Sodhy (Deceased)).

No	Legislation	Provision(s)	Version
Constitutional Provisions			
1.	Nil		
Legislation			
Commonwealth			
2.	*Superannuation Industry (Supervision) Act 1993* (Cth)	ss 31, 55A, 59	Compilation 91 1 October 2016
3.	*Superannuation Legislation Amendment Act 1999* (Cth)	Item 5, Part 1, Schedule 2	As enacted 9 June 1999
4.	*Superannuation Legislation Amendment Act (No 3) 1999* (Cth)	Items 15, 16, 20, 22 and 40, Part 1, Schedule 1	As enacted 8 October 1999
5.	*Superannuation Legislation Amendment (Simplification) Act 2007* (Cth)	Item 361, Part 2, Schedule 1; section 2(1)	As enacted 15 March 2007
State			
6.	*Civil Judgments Enforcement Act 2004* (WA)	s 8	Current 3 November 2018
Statutory Instruments			
Commonwealth			
7.	*Superannuation Industry (Supervision) Regulations 1994* (Cth)	r 6.17A	Compilation 102 29 October 2016

8.	*Superannuation Industry (Superannuation) Amendment Regulations 1999 (No 3)* (Cth)	Item 2, Schedule 1	9 June 1999
State			
9.	Nil		