HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

P48/2021

BETWEEN:

CLAIRE ELIZABETH HILL
Appellant

10

and

ZUDA PTY LTD atf the HOLLY SUPERANNUATION FUND
First Respondent

and

JENNIFER PATRICIA MURRAY
as EXECUTOR of the ESTATE of ALEC SODHY (deceased)
Second Respondent

20

and

JENNIFER PATRICIA MURRAY
Third Respondent

RESPONDENTS' SUBMISSIONS

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. Should the Court revoke the grant of special leave to appeal?

3. Do sub-regs 6.17A(4), (6) and (7) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (***SIS Regulations***) made under the *Superannuation Industry (Supervision) Act 1993* (Cth) (***SIS Act***) apply to a self managed superannuation fund (**SMSF**) within the meaning of the *SIS Act*? (Ground 1)

4. Should the Court of Appeal have declined to follow the decision of the Full Court of the Supreme Court of South Australia in ***Cantor Management Services Pty Ltd v***

Booth [2017] SASCFC 122; (2016) 16 ASTLR 489 and determined the issue the subject of ground 1 for itself? (Grounds 2 and 3).

PART III: SECTION 78B NOTICES

5. The respondents consider that notices are not required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: STATEMENT OF CONTESTED MATERIAL FACTS

6. The respondents do not contest any of the material facts set out in the appellant's narrative of facts save for the statement in par 8 that 'the Deceased established' the Holly Superannuation Fund **(the HS Fund)**, which is not based on any finding below
10 and would be irrelevant in any event.

7. The respondents do not contest any of the material facts set out in the appellant's chronology.

8. To the appellant's statement of facts should be added the following:

   (a) The third respondent was the de facto partner of the late Alec Kumar Sodhy **(the Deceased)** for a period of approximately 33 years prior to his death on 22 November 2016,[1] and so was a dependent of the Deceased within the meaning of that term as defined in s10(1) of the *SIS Act*.[2]

   (b) The Holly Superannuation Fund **(the HS Fund)** is a regulated superannuation fund and a SMSF within the meaning of the *SIS Act*.[3]

20 (c) The governing rules of the HS Fund are the 2011 Amending Deed.[4]

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[1] Core Appeal Book **(CAB)** p7 par [4]; p27 par [4].
[2] See also CAB p29 par [9].
[3] CAB p28 par [5].
[4] Appellant's book of further materials, pp4ff.

PART V: ARGUMENT

A. Special leave should be revoked

9. The implicit premise to the appellant's appeal is that the validity of clause 5 of the 2011 Amending Deed turns on the answer to the question whether sub-reg 6.17A(4)[5] applies to a SMSF.

10. That is not so. Even assuming that sub-reg 6.17A(4) *does* apply to a SMSF, sub-reg 6.17A(4) applies only to the provision of benefits the subject of a requirement imposed on the trustee by the (since) deceased member of the fund as permitted by its governing rules.[6] The terms of sub-reg 6.17A(4) specifically contemplate the deceased member having given a 'notice' to the trustee in respect of the benefit.

11. The benefit in question was not payable to the third respondent because the Deceased 'required' the first respondent as trustee of the HS Fund to pay it to the third respondent pursuant to 'permission' granted to the Deceased by the governing rules (ie the 2011 Amending Deed) within the meaning of sub-reg 6.17A(4). Rather, the first respondent as trustee of the HS Fund was required to pay the benefit to the third respondent by clause 5 of the governing rules themselves. The fact that the Deceased was a director of the first respondent and signed the 2011 Amending Deed in that capacity and in his capacity as a member does not alter this conclusion.

12. The distinction between a requirement imposed on the trustee *by the deceased* during his or her lifetime *as permitted by* the governing rules, and a requirement imposed on the trustee *by the terms of the governing rules themselves*, is a real one. In any event, the language of sub-reg 6.17A(4) in this respect is clear, and there is no scope for reading it as applying to a requirement imposed on the trustee by the terms of the governing rules themselves.[7]

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[5] As the Court of Appeal observed (with respect, correctly), sub-regs 6.17A(6) and (7) merely expand upon the operation of sub-reg 6.17A(4), and have no independent operation: CAB p40 par [46].

[6] Defined to mean, relevantly, any rules contained in a trust instrument, other document or legislation, or combination of them: *SIS Act* s10(1) ('governing rules').

[7] See ***Taylor v Owners – Strata Plan No 11564*** (2014) 253 CLR 531; [2014] HCA 9 at [38]-[40], [65]; ***Minogue v Victoria*** (2018) 264 CLR 252; [2018] HCA 27 at [43].

13. For these reasons, even if the appellant's argument as to the application of sub-reg 6.17A(4) to a SMSF was correct, it would not change the result in this case, as sub-reg 6.17A(4) did not apply to the first respondent's obligation to pay the benefit to the third respondent under clause 5 of the 2011 Amending Deed.

14. Accordingly, it is respectfully submitted that this case is not a suitable vehicle for consideration of the question whether sub-reg 6.17A(4) applies to a SMSF.

15. In these circumstances, the Court is respectfully invited to consider revoking the grant of special leave.

B. Ground 1

10 16. Reg 6.17A necessarily falls to be considered in the context of the *SIS Act*, under which it was made.

17. The appellant relies on ss31 and 55A of the *SIS Act*, but these too must be considered in the context of the *SIS Act* as a whole.

Requirements of a SMSF

18. A SMSF has the meaning given by ss17A and 17B.[8]

19. Relevantly, a superannuation fund, other than a fund with only one member, is a SMSF if and only if it satisfies the conditions in subs 17A(1). Those conditions are to the effect that the fund has no more than 6 members; if the trustees of the fund are individuals, each individual trustee is a member of the fund; if the trustee of the fund is
20 a body corporate, each director of the body corporate is member of the fund; each member of the fund is a trustee of the fund or (if the trustee is a body corporate) a director of the body corporate; no member of the fund is an employee of another member of the fund (unless they are relatives); and no trustee of the fund (and, if the trustee is a body corporate, no director thereof) receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund.

[8] See s10(1) ('self managed superannuation fund').

20. Subs 17A(2) prescribes the conditions for a SMSF with only one member. Subs 17A(3) to (10), and s17B, are of no relevance for present purposes.

Section 31

21. Section 31 forms part of Div 2 of Part 3 of the *SIS Act*. As the heading to Part 3 makes clear, it is concerned with 'operating standards', its object being to provide for a system of prescribed standards applicable to (a) the operation of regulated superannuation funds,[9] approved deposit funds and pooled superannuation trusts; and (b) the trustees and RSE licensees of those funds and trusts.[10]

22. Subs 31(1) provides that the regulations may prescribe standards applicable to the operation of regulated superannuation funds and to trustees and RSE licensees of those funds. Subs 31(2) identifies, non-exhaustively, the matters to which standards that may be prescribed under subs 31(2) may relate.[11]

23. That is, s31 does not itself prescribe applicable standards, but authorises standards to be prescribed by regulation.

24. A standard applicable to the operation of a superannuation entity[12] may be prescribed that elaborates, supplements or otherwise deals with any aspect of (relevantly) a matter relating to the operation of the entity to which a provision of the *SIS Act* or another provision of the regulations relates,[13] but a standard applicable to the operation of a superannuation entity is of no effect to the extent that it conflicts with the *SIS Act*.[14]

[9] Defined in s19 of the *SIS Act*, and which includes a SMSF in respect of which subsections (2) to (4) thereof have been complied with.
[10] *SIS Act* s30.
[11] Sections 32 and 33 contain broadly equivalent provisions with respect to approved deposit funds and pooled superannuation trusts respectively.
[12] Defined to include a regulated superannuation fund, which as said above (footnote 9) includes a SMSF in respect of which subsections (2) to (4) thereof have been complied with.
[13] *SIS Act* s33A(1).
[14] *SIS Act* s33A(2).

Section 34

25. Subs 34(1) provides that each trustee of a superannuation entity must ensure that the prescribed standards applicable to the operation of the entity are complied with at all times.

26. A person who intentionally or recklessly fails to do so commits an offence,[15] and in the case of a SMSF, a trustee or director of a corporate trustee who fails to do so is liable to an administrative penalty.[16]

27. However, a contravention of subs 34(1) does not affect the validity of a transaction.[17]

Section 55A

10 28. The appellant relies on s55A, which forms part of Part 6 of the *SIS Act*, headed 'Provisions relating to governing rules of superannuation entities'. The object of Part 6 is to set out rules about the content of the governing rules of superannuation entities.[18]

29. Section 55A(1) provides that 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 s31. If the governing rules of a fund are inconsistent with subs 55A(1), subs 55A(1) prevails and the governing rules are invalid to the extent of the inconsistency.[19]

30. Neither the term 'cashed' nor its grammatical derivatives are defined in either the *SIS Act* or the *SIS Regulations*. However, to 'cash' a member's benefit means to pay it.[20]

20 31. The terms of appeal ground 1, and par 2 of the appellant's submissions, both, with respect, misapprehend the effect of s55A insofar as they contend that sub-regs 6.17A(4), (6) and (7) apply to a SMSF 'pursuant to' s55A.

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[15] *SIS Act* s34(2).
[16] *SIS Act* s166.
[17] *SIS Act* s34(3).
[18] *SIS Act* s51.
[19] *SIS Act* s55A(2).
[20] See ***Asgard Capital Management Ltd v Maher*** (2003) 131 FCR 196; [2003] FCAFC 156 at [8].

32. Section 55A is not a source of power to prescribe standards. Section 31 is the source of that power. The effect of s55A is to prohibit and invalidate governing rules of a regulated superannuation fund which permit a fund member's benefit to be cashed after the member's death to the extent they are not in accordance with a standard prescribed for the purposes of s31. It cannot be said that sub-regs 6.17A(4), (6) and (7) apply to a SMSF 'pursuant to' s55A, as that is not the way s55A operates.

33. The appellant did not contend below that clause 5 of the 2011 Amending Deed is prohibited and invalidated by s55A. A submission is now put to that effect in par 44(b) of the appellant's submissions, but it is outside the terms of the grounds of appeal to
10 this Court and the grant of special leave.

34. In any event, for completeness and the avoidance of doubt, the governing rules of the HS Fund, ie the 2011 Amending Deed including cl 5 thereof, *are* in accordance with standards prescribed for the purposes of s31. That is so for the following reasons:

(a) Part 6 of the *SIS Regulations* is concerned with 'Payment standards'. Reg 6.17 forms part of Div 6.2, being part of Part 6. Sub-reg 6.17(1) provides that for the purposes of subs 31(1) and 32(1) of the *SIS Act*, the standards set out in (relevantly) sub-reg 6.17(2) are applicable to the operation of (relevantly) regulated superannuation funds. Sub-reg 6.17(2)(a)(i) provides that a member's benefits in a fund may be paid (amongst others) by being cashed in accordance
20 with Div 6.3.

(b) Div 6.3, headed 'Cashing of benefits', also forms part of Part 6 of the *SIS Regulations*. Subdiv 6.3.1 thereof is concerned with regulated superannuation funds. In particular, reg 6.22 is concerned with cashing of a fund member's benefit after the member's death.

(c) Sub-reg 6.22(1) provides, relevantly, that a member's benefits in a regulated superannuation fund must not be cashed in favour of a person other than the member or the member's legal personal representative unless the member has died and the conditions of sub-regs 6.22(2) or (3) are satisfied. Sub-reg 6.22(2) provides that those conditions are satisfied if the benefits are cashed in favour of
30 either or both the member's legal personal representative or one or more of the member's dependants.

(d) 'Dependant' includes a person's spouse,[21] which in turn includes a relationship of the type between the third respondent and the Deceased.[22]

(e) Accordingly, the governing rules of the HS Fund accord with reg 6.22 and therefore do not permit the Deceased's benefit to be cashed after his death otherwise than in accordance with standards prescribed for the purposes of s31, within the meaning of s55A(1).

35. Further, the appellant's reliance on s55A stands no higher than her argument that sub-reg 6.17A(4) applies to a SMSF by virtue of sub-reg 6.17A(1). The appellant's reference to s55A is, with respect, an irrelevant distraction.

10 ***Section 59***

36. Subs 59(1) provides that subject to subs 59(1A), the governing rules of a superannuation entity other than a SMSF 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 (relevantly) those rules require the consent of the trustee, or the trustees, of the entity to the exercise of that discretion. If the governing rules of a superannuation entity are inconsistent with subs 59(1), subs 59(1) prevails, and the governing rules are, to the extent of the inconsistency, invalid.[23]

37. It is unnecessary to consider whether the governing rules in this case would satisfy the requirement that they require the consent of the trustee to the exercise of that discretion,

20 because the prohibition in subs 59(1) expressly does not apply to a SMSF in any event.

38. Subs 59(1A) was introduced to the *SIS Act* in 1999, and commenced on 31 May 1999.[24] It provides that 'despite' subs 59(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

[21] *SIS Act* s10(1) ('dependant').
[22] *SIS Act* s10(1) ('spouse').
[23] *SIS Act* s59(2).
[24] *Superannuation Legislation Amendment Act 1999* (Cth) (Act No 38 of 1999), s3, Schedule 2, Part 1, Item 5.

mentioned in the notice, being the legal personal representative or a dependant or dependants of the member.

39. At the same time as subs 59(1A) was introduced, subs 59(1) was amended to add the words 'Subject to subsection (1A),'.[25]

40. Although subs 59(1A) refers to the governing rules of a 'superannuation entity' (which as said above includes a SMSF that is a regulated superannuation fund), the introductory words 'despite subsection (1)' in subs 59(1A) make clear that subs 59(1A) operates as an exception to the prohibition in subs 59(1) so as to conditionally permit (ie subject to compliance with conditions prescribed for this purpose) a member of a superannuation entity other than a SMSF (to which the prohibition under subs 59(1) does not apply in the first place) to give the trustee notice in accordance with regulations requiring the trustee to provide benefits as specified in subs 59(1A).

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41. Accordingly, the South Australian Full Court in ***Cantor Management***[26] was, with respect, correct in saying that the proviso in subs 59(1A) does not apply as a general rule governing the way in which a binding nomination may be given by a member of a SMSF, because in respect of a SMSF the position is governed by the governing rules not subs 59(1A).

42. The appellant expressly accepts that s59 of the *SIS Act* does not apply to a SMSF.[27] This is nevertheless confirmed, if necessary, both by the relevant legislative history[28] (ie the words 'Subject to subsection (1A),' being introduced into subs 59(1) when subs 59(1A) was introduced), and also by the relevant explanatory memorandum with respect to those amendments.[29]

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[25] *Superannuation Legislation Amendment Act 1999* (Cth) (Act No 38 of 1999), s3, Schedule 2, Part 1, Item 4.
[26] (Supra) at [30] per Kourakis CJ, with whom Peek and Nicholson JJ agreed.
[27] See appellant's submissions, par 21.
[28] As to the relevance of which, see ***Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd*** [2021] HCA 39 at [87], [117].
[29] Explanatory Memorandum, Superannuation Legislation Amendment Bill 1998, Schedule 2, Part 1, Items 4 and 5, pars 18, 19.

Regulation 6.17A

43. Having regard to the relevant provisions of the *SIS Act* in the context of which reg 6.17A falls to be construed, and the textual and contextual matters referred to below, on its proper interpretation reg 6.17A (including sub-reg 6.17A(4)) is confined in its operation to a death benefit nomination by a member of a superannuation entity within s59 of the *SIS Act*; that is, a superannuation entity *other than* a SMSF fund.

44. First, reg 6.17A was introduced simultaneously with the introduction of subs 59(1A) (and the addition of the opening words to subs 59(1).[30] The relevant explanatory statement makes clear that the purpose of reg 6.17A was to prescribe conditions in relation to the acceptance of binding death benefit notices for the purposes of subs 59(1A) of the *SIS Act*, ie in respect of superannuation entities other than SMSFs.

45. Secondly, there is express reference within the heading to reg 6.17A itself to 's59(1A)', ie subs 59(1A) of the *SIS Act*. That is a clear indication that the whole of reg 6.17A is directed to prescribing conditions for the purpose of subs 59(1A), ie in respect of superannuation entities other than SMSFs.[31]

46. Thirdly, the standard prescribed in sub-reg 6.17A(4) by sub-reg 6.17A(1) applies (per sub-reg 6.17A(4)) '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), ...', and sub-reg 6.17A(2) in turn expressly provides for the circumstances in which '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 dependent of the member', namely if the trustee gives to the member information under sub-reg 6.17A(3). Again, given that (as said above) s59 does not apply to a SMSF, the standard prescribed in sub-reg 6.17A(4) is necessarily not applicable to the operation of a superannuation entity which is a SMSF.

[30] Reg 6.17A was introduced 9 days later, on 9 June 1999: *Superannuation Industry (Supervision) Amendment Regulations 1999 (No 3) (Statutory Rules No 115 of 1999)*, Schedule 1, Item 2.

[31] The heading to the regulation is properly taken into account in its interpretation: *Acts Interpretation Act 1901* (Cth) s13(1) (which applies to regulations as if they were an Act: *Acts Interpretation Act* s2(1); *Legislation Act 2003* (Cth) s13). See also ***R v A2*** (2019) 269 CLR 507; [2019] HCA 35 at [40]; *Acts Interpretation Act* s15AB(2)(a).

47. Fourthly, sub-reg 6.17A(4) not only refers back to sub-reg 6.17A(2) with its reference to subs 59(1A) as just mentioned, but sub-reg 6.17A(2) in turn expressly conditions the permission granted therein (and, therefore, the operation of sub-reg 6.17A(4)) on the trustee giving to the member information under sub-reg 6.17A(3). The information which the trustee must give to the member under sub-reg 6.17A(3) is 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.

48. That requirement that the trustee give such information to the member makes no sense in the context of a SMSF where the members of the fund and the trustees (or the directors of a corporate trustee as the case may be) are the same people. The concept of a person giving information to himself or herself, based on what he or she reasonably believes that he or she needs for the purpose of understanding a right – let alone as a condition of the validity of a death benefit nomination that he or she subsequently makes – is, with respect, nonsensical.

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49. Fifthly, the language of sub-regs 6.17A(2) and (4) reflect the language of subs 59(1A).

50. Sixthly, the obligation on a trustee of a superannuation entity under subs 34(1) of the *SIS Act* is to ensure that the prescribed standards *applicable to the operation of the entity* are complied with at all times. That is, the *SIS Act* expressly contemplates that not all prescribed standards will apply to the operation of all superannuation entities.

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51. Seventhly, given the terms of s59 and the legislative intent disclosed therein, namely that relevant conditions would be prescribed with respect to a superannuation entity *other than* a SMSF, to the extent sub-reg 6.17A(1) might otherwise be thought to be intended to apply the requirements of sub-reg 6.17A(4) to a SMSF at all, its provisions would conflict with the *SIS Act* and would be of no effect to that extent.[32] Reg 6.17A should be interpreted so as not to exceed the legislative power to make it.[33] However, it is unnecessary to resort to such considerations because, properly understood, reg 6.17A does not reveal an intention in the first place to prescribe a standard applicable to a SMSF.

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[32] *SIS Act* s33A(2).

[33] *Legislation Act 2003* (Cth) s13(2).

52. For these reasons, the standard prescribed in sub-reg 6.17A(4) does not apply to a SMSF.

53. Properly construed, reg 6.17A involves no internal inconsistency or tension to be resolved such as the appellant submits. The conclusion that sub-reg 6.17A(4) does not apply to a SMSF does not require sub-reg 6.17A(1) to be read down to exclude a SMSF from the scope of the standard prescribed in sub-reg 6.17A(4). Rather, it is inherent in sub-reg 6.17A(4), properly construed as set out above, that it does not apply to a SMSF in the first place. However, to the extent it was thought necessary to read down sub-reg 6.17A(1) in order to exclude a SMSF from the scope of the standard prescribed in sub-
10 reg 6.17A(4), the contextual matters referred to above, with respect, warrant doing so.

54. Even if the appellant's contended construction of reg 6.17A was otherwise correct, it would still not support the contention, which the appellant makes,[34] that clauses 5 and 6 of the 2011 Amending Deed do not amount to a valid and effective binding death benefit nomination pursuant to s31 and sub-regs 6.17A(4), (6) and (7).

55. This is so for two reasons. First, the standard prescribed in sub-reg 6.17A(4) is an *obligation* on a trustee *to pay* a benefit in accordance with a notice given by a since-deceased member if the relevant requirements *are* met. It is not a *prohibition* on a trustee paying a benefit if those requirements are *not* met. There is no reason to interpret sub-reg 6.17A(4) other than according to its plain terms in this respect,
20 particularly given that a failure to comply renders a trustee liable to criminal conviction.

56. That does not mean there is no prohibition on a trustee of a superannuation entity other than a SMSF providing benefits in accordance with a notice given by a member before his or her death which does not satisfy the requirements of sub-reg 6.17A(4); there is, but that prohibition comes from subs 59(2) (by invalidating the governing rules to the extent they would otherwise permit the payment beyond that permitted by subs 59(1A)), not from sub-reg 6.17A(4).

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[34] Appellant's submissions, par 44(a).

57. Secondly, as said above a failure by the trustee to comply with applicable standards prescribed under s31 does not affect the validity of a transaction.[35]

58. For these reasons, ground 1 of the appeal should be dismissed.

C. Grounds 2 and 3

59. Ground 3 is parasitic on, and therefore stands no higher than, ground 2.

60. Further, the appeal turns on the success or otherwise of ground 1. Ground 2 (and, therefore, ground 3), even if established, is incapable of affecting the result of the appeal if ground 1 fails.

61. This Court has 'emphasised on several occasions'[36] that Australian intermediate appellate courts are bound to follow the decisions of other Australian intermediate appellate courts in both matters of statutory interpretation and matters of common law unless persuaded that those decisions are plainly wrong.[37]

62. The appellant submits that the conclusion in ***Cantor Management*** as to the proper interpretation of reg 6.17A was obiter, not part of the ratio of the decision. The principle enunciated by this Court does not turn on any such distinction. So much is clear from this Court's decision in ***Australian Securities Commission v Marlborough Gold Mines Ltd***.[38]

63. In that case, this Court expressly described the conclusion of the earlier Full Court of the Federal Court placing an interpretation on a provision of uniform national legislation (the *Corporations Law*) as obiter, but said that the Full Court of the Supreme Court of Western Australia should not have departed from that earlier decision unless convinced that that interpretation was plainly wrong.

64. What required the subsequent court to follow the earlier conclusion was that the previous court had 'placed' an interpretation on the legislation in question, being

[35] *SIS Act* s34(3).
[36] ***R v Falzon*** (2018) 264 CLR 361; [2018] HCA 29 at [49].
[37] ***Australian Securities Commission v Marlborough Gold Mines Ltd*** (1993) 177 CLR 485 at 492; ***Farah Constructions Pty Ltd v Say-Dee Pty Ltd*** (2007) 230 CLR 89; [2007] HCA 22 at [135]; ***CAL No 14 Pty Ltd v Motor Accidents Insurance Board*** (2009) 239 CLR 390; [2009] HCA 47 at [49]; ***Hili v The Queen*** (2010) 242 CLR 520; [2010] HCA 45 at [57].
[38] (Supra) at 492.

uniform national legislation, not a characterisation of that conclusion as part of the ratio rather than obiter.

65. The principle stated by the Court in ***Australian Securities Commission v Marlborough Gold Mines Ltd*** applies with no less force in respect of a decision of an earlier intermediate appellate court placing an interpretation on Commonwealth legislation, as opposed to uniform national legislation. This is apparent from the context of the Court's reasons in that case, and what was expressly said by the plurality in ***Farah Constructions Pty Ltd v Say-Dee Pty Ltd***.[39]

66. Nothing in subsequent decisions of this Court detracts from the application of the principle stated in ***Australian Securities Commission v Marlborough Gold Mines Ltd*** to an earlier conclusion of an intermediate appellate court which is obiter dictum. (At the very least, the Court of Appeal in this case was bound to apply the principle stated in ***Australian Securities Commission v Marlborough Gold Mines Ltd*** to an earlier conclusion of that nature unless and until this Court was to say otherwise).

67. In ***Farah Constructions Pty Ltd v Say-Dee Pty Ltd***,[40] the plurality referred, at par [134], to the 'seriously considered' dicta of members of this Court in ***Consul Development Pty Ltd v DPC Estates Pty Ltd***.[41] The plurality did so in two respects: first, in the context of rejecting the reasoning of the intermediate appellate court below that the statements made by members of this Court in ***Consul Development Pty Ltd v DPC Estates Pty Ltd*** bore only 'indirectly' on the matter; and secondly, as a reason for rejecting as inappropriate the recognition by the court below of a new and additional avenue of relief which tended to render the existing law otiose, a step which the plurality said the court below should not have taken in the face of long-established authority and seriously considered dicta of a majority of this Court.

68. The plurality, in the next paragraph of their judgment,[42] stated the principle that intermediate appellate courts and trial judges should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth or uniform national legislation unless they are convinced that the

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[39] (2007) 230 CLR 89; [2007] HCA 22 at [135].
[40] (Supra).
[41] (1975) 132 CLR 373.
[42] (Supra) at [135].

interpretation is plainly wrong, in terms which did not refer to the nature of the earlier decision. However, the authority cited was ***Australian Securities Commission v Marlborough Gold Mines Ltd***,[43] which, as just said, was a case concerning a conclusion by way of obiter of an earlier intermediate appellate court.

69. Accordingly, nothing in ***Farah Constructions Pty Ltd v Say-Dee Pty Ltd*** detracts from the duty of an intermediate appellate court to follow an obiter conclusion of an earlier intermediate appellate court placing an interpretation on Commonwealth or uniform national legislation. As said above, the plurality's references to 'seriously considered dicta' of this Court were made in a different, albeit related context.

10 70. However, in applying this principle it is appropriate to recognise that a statement by way of obiter may range from a passing remark or statement or assumption on some matter without the benefit of argument, to a considered judgment on a point argued by the parties which, for one reason or another, does not technically form part of the ratio of the case.[44]

71. Given the underlying rationale of the principle stated in ***Australian Securities Commission v Marlborough Gold Mines Ltd***, namely promoting uniformity of decision in the interpretation of Commonwealth or uniform national legislation,[45] as well as supporting the authority of the courts and confidence in the law by the value it places upon consistency in judicial decision-making,[46] and fostering the virtues of
20 stability and predictability in the law and the administration of justice,[47] it is understandable that the principle should not turn on a technical – and sometimes difficult if not arid – debate as to whether the earlier conclusion is properly characterised as part of the ratio of the decision.

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[43] (Supra) at 492.
[44] See ***Brunner v Greenslade*** [1971] Ch 993 at 1002-1003; ***Price v Spoor*** [2021] HCA 20 at [18].
[45] ***Australian Securities Commission v Marlborough Gold Mines Ltd*** (supra) at 492. See also ***Gett v Tabet*** (2009) 254 ALR 504; [2009] NSWCA 76 at [281], [286].
[46] ***Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs*** (2003) 133 FCR 190; [2003] FCA 1263 at [52]; and see ***Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19*** [2021] FCAFC 153 at [14], [104].
[47] ***Gett v Tabet*** (supra) at [286]; and see ***Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19*** (supra) at [18], [20], [104].

72. However, it is another thing to suggest that the principle applies to everything said by the earlier court in the course of its reasons for decision. It cannot be supposed that this Court's decision in ***Australian Securities Commission v Marlborough Gold Mines Ltd*** contemplated that an intermediate appellate court should be required to follow every earlier obiter statement, no matter how fleeting or inconsequential it might have been. While this might also be a matter which goes to the ease with which the subsequent appellate court might consider the earlier decision to have been 'plainly wrong', the principle as enunciated by this Court contemplates that the earlier court have expressed a concluded view on the relevant subject, whether or not it is part of the ratio of the 10 decision.

73. Indeed, as said above, the principle as stated in ***Australian Securities Commission v Marlborough Gold Mines Ltd*** expressly contemplated that the earlier court had 'placed' an interpretation on the relevant legislation, which of itself suggests an expression of a concluded view on the relevant subject.

74. Given the context in which the plurality in ***Farah Constructions Pty Ltd v Say-Dee Pty Ltd*** used the expression 'seriously considered dicta', it cannot necessarily be transplanted to this, different context, although it may involve no error to use it (as the Court of Appeal effectively did here) to describe an obiter conclusion of an earlier intermediate appellate court being sufficiently definite or conclusive to attract the 20 operation of the principle in ***Australian Securities Commission v Marlborough Gold Mines Ltd***.

The decision in *Cantor Management* attracted the operation of the principle in *Australian Securities Commission v Marlborough Gold Mines Ltd*

75. In ***Cantor Management***, Kourakis CJ, with whom Peek and Nicholson JJ agreed, expressly adopted the conclusion of Mullins J in ***Munro v Munro***.[48] In context, the Full Court in ***Cantor Management*** agreed with and adopted Mullins J's reasons for that conclusion.

[48] [2015] QSC 61. See ***Cantor Management*** at [30].

76. Mullins J's reasons were concise, and focused on the essential propositions that reg 6.17A refers to subs 59(1A), and that subs 59(1A) (and subs 59(1)) do not apply to a SMSF.[49]

77. Although their reasons were brief, the Full Court in ***Cantor Management*** 'seriously considered' the issue, and expressed the considered, unqualified and apparently final view that Mullins J's conclusion in ***Munro v Munro*** was correct.

78. The Court of Appeal said, in effect, that while the decision in ***Cantor Management*** on the point might form part of the ratio of the case,[50] it took the pragmatic view that it did not matter because if not part of the ratio it was nevertheless 'seriously considered dicta
10 to which considerable weight must be given'. The Court of Appeal subsequently described the Full Court's expression of opinion as 'its (at least seriously considered) opinion as to whether reg 6.17A applies to SMSFs'.[51] Both these forms of expression (and the Court of Appeal's further observations at par [49][52] as to the confusion and uncertainty which would be produced by two potentially conflicting decisions), conveyed the concept that the Full Court's decision was expressed in sufficiently definite or conclusive terms as to attract the operation of the principle in ***Australian Securities Commission v Marlborough Gold Mines Ltd***.

79. That was sufficient to attract the operation of the principle in ***Australian Securities Commission v Marlborough Gold Mines Ltd*** unless the Court of Appeal was
20 convinced that Mullins J's conclusion was plainly wrong. The Court of Appeal was correct to follow the decision in ***Cantor Management*** unless convinced it was plainly wrong.

The decision in *Cantor Management* was not 'plainly wrong'

80. The reference to a 'decision' being plainly wrong in this context is a reference to the conclusion reached, not the reasons for the conclusion. As this Court said in ***Australian Securities Commission v Marlborough Gold Mines Ltd***,[53] the subsequent court is required to follow the interpretation placed on the relevant legislation by the earlier

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[49] ***Munro v Munro*** (supra) at [36].
[50] CAB p38 par [41].
[51] CAB p40 par [49].
[52] CAB pp40-41.
[53] (Supra) at 492.

court unless convinced that *'that interpretation'* (not the reasoning process) is plainly wrong. Departure from an earlier decision of a court of coordinate jurisdiction requires 'necessity for conviction *as to error*'.[54] Seriously defective reasoning (not to suggest that was the case here) might assist a court to more readily conclude that the decision in the earlier case was plainly wrong, but the relevant focus is on the conclusion reached not the reasoning.

81. The courts have emphasised the caution which a court should exercise before concluding that an earlier decision was 'plainly wrong'.[55] That is particularly so where the issue is one of statutory interpretation, in respect of which minds may reasonably
10 differ.[56]

82. The appellant says that the Full Court in ***Cantor Management*** failed to consider ss31 and 55A of the *SIS Act*, and sub-reg 6.17A(1) of the *SIS Regulations*.

83. This is an attack on the correctness of the Full Court's reasons, not the conclusion it reached.

84. In any event, as said above the Full Court in ***Cantor Management*** implicitly adopted Mullins J's reasons. Mullins J expressly referred to both ss31 and 55A.[57] Section 31 is the statutory source of the power to prescribe standards by regulations, and as said above in respect of ground 1 the fact that the standard in sub-reg 6.17A(4) was prescribed by sub-reg 6.17A(1) under subs 31(1) is irrelevant to the matter in issue,
20 namely whether it applies to a SMSF, as the true issue is the scope and content of the standard prescribed in sub-reg 6.17A(4).

85. Further, for the reasons above in respect of ground 1, s55A is completely irrelevant to the proper interpretation of reg 6.17A.

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[54] ***Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19*** (supra) at [7], [104].

[55] The relevant authorities were collected and discussed by Allsop CJ in the recent decision of ***Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19*** (supra) at [1]-[20], with whom Kerr and Mortimer JJ agreed (at [104]).

[56] ***Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs*** (supra) at [52]; ***Gett v Tabet*** (supra) at [283]; ***Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19*** (supra) at [14], [18], [104].

[57] ***Munro v Munro*** (supra) at [27].

86. Mullins J did not refer to sub-reg 6.17A(1) specifically, but she referred to reg 6.17A.

87. The Court of Appeal concluded that the appellant's contended construction was reasonably open, but so was the construction adopted in ***Cantor Management***, and that the construction adopted in ***Cantor Management*** was not plainly wrong.[58]

88. For the reasons submitted above in respect of ground 1, the conclusion reached in ***Cantor Management*** as to the proper interpretation of reg 6.17A was not only *not* 'plainly wrong', but was *correct*. At the very least, even if this Court upheld ground 1 it could not be said that the construction adopted in ***Cantor Management*** for which the respondents contend was 'plainly wrong' or that the Court of Appeal erred in failing to
10 so conclude.

D. Costs

89. The appellant should pay the respondents' costs of this appeal.

E. Orders

90. The appeal ought to be dismissed with costs.

91. If the appeal is allowed, the respondents agree the appellant's proposed orders are appropriate.[59]

92. In particular, it is appropriate (with respect) that if the appeal is allowed the action be remitted to the Supreme Court (for determination in accordance with the reasons of this Court). Other issues will arise as to the appellant's claim to substantive relief (some of
20 which have been referred to herein) beyond the issue of interpretation raised by the appeal. As the action has not proceeded beyond the point of summary judgment, the respondents have not yet filed a defence and the occasion to consider these other issues has not yet arisen.

PART VI: ESTIMATE OF TIME

93. The respondents estimate they will require a total of one hour for the presentation of oral argument.

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[58] CAB p40 pars [44]-[49].
[59] See appellant's submissions, pars 103-106.

Date: 4 February 2022

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ANNEXURE

Acts Interpretation Act 1901 (Cth) (as at 20 December 2018): ss 2(1), 13(1), 15AB(2)(a)

Explanatory Memorandum, Superannuation Legislation Amendment Bill 1998 (Cth): Schedule 2, Part 1, Items 4 and 5, pars 18, 19

Legislation Act 2003 (Cth) (as at 24 February 2019) s 13(2)

10 Explanatory Statement, *Superannuation Industry (Supervision) Regulations (Amendment) 1999 (No 3) (Statutory Rules No 115 of 1999)* (Cth): Schedule 1, Item 2

Superannuation Industry (Supervision) Regulations 1994 (Cth) (as at 18 December 2021): sub-regs 6.17(1), 6.17(2), 6.17A, 6.17A(4), 6.17A(6), 6.17A(7), 6.22

Superannuation Industry (Supervision) Act 1993 (Cth) (as at 1 March 2017): ss 10(1), 17A, 17B, 19, 30, 31, 32, 33, 34, 55A, 59

Superannuation Legislation Amendment Act 1999 (Cth) (act No 38 of 1999) (as at 31 May 20 1999): s 3, Schedule 2, Part 1, Item 5