

The trust deed is king

Hill v Zuda Pty Ltd as trustee for The Holly Superannuation Fund & Ors [2022] HCA 16

By Winsome Hall

The High Court of Australia, in *Hill v Zuda Pty Ltd as trustee for The Holly Superannuation Fund & Ors* [2022] HCA 16 determined that a self-managed superannuation fund's trust deed can make a binding death benefit nomination that extends beyond three years, and in doing so maintained the primacy of the terms of a trust deed.

The court also confirmed that intermediate appellate courts are ordinarily expected to give 'great weight' to the dicta of other intermediate appellate courts.

The case concerned a question of statutory construction, namely reg 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (Regulations) made under the *Superannuation Industry (Supervision) Act 1993* (Cth) (the SIS Act).

The High Court unanimously upheld the decision of the Court of Appeal of the Supreme Court of Western Australia that reg 6.17A had no application to a self-managed superannuation fund (SMSF).

This is a timely reminder that it is the terms of the trust deed which are key. Even though the SIS Act and Regulations significantly regulate this space, superannuation trusts are, crucially, trusts. The decision brings clarity to the issue of whether SMSFs which incorporate binding death benefit nominations (BDBNs) must comply with the requirements of reg 6.17A. Since 2008, the ATO has stated that reg 6.17A does not apply to SMSFs (meaning it was possible for an SMSF's trust deed to be drafted to enable an BDBN to not expire at the end of three years).¹ That position has now been confirmed by the High Court.

Factual background

The circumstances of the case were as follows.

Zuda Pty Ltd was the trustee of an SMSF known as the Holly Superannuation Fund (the Fund). Mr Sodhy and Ms Murray were both members of the Fund and directors of Zuda Pty Ltd. Ms Hill was the only child of Mr Sodhy (now deceased). Mr Sodhy, before his death, was in a de facto relationship with Ms Murray.

On 31 December 2011, the trust deed of the Fund was amended to insert a clause described as a 'binding death benefit nomination' clause. This BDBN was in favour of Ms Murray; it required that if either member of the Fund died, Zuda Pty Ltd 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. Ms Hill brought an action contending that the nomination was signed more than



three years prior to Mr Sodhy's death and, as such, had ceased to have effect under reg 6.17A(7)(a) of the Regulations. This provision holds that a notice, constituting the BDBN, ceases to have effect three years after the day it was signed. Ms Hill contended that the superannuation should go to the estate of Mr Sodhy, of which she was a beneficiary.

The sole issue before the court was whether reg 6.17A applied to the Fund as an SMSF.

Procedural history

The Supreme Court of Western Australia summarily dismissed the proceeding on the basis that reg 6.17A did not apply as the Fund was an SMSF. Ms Hill appealed.

The Court of Appeal concluded that reg 6.17A did not apply to an SMSF on the basis that the Full Court of the Supreme Court of South Australia had so concluded in 'seriously considered dicta,' which the Court of Appeal did not consider to be 'plainly wrong' on a *Farah Constructions* basis.

Findings of the High Court

The High Court addressed two questions in this case: the substantive question regarding reg 6.17A and a methodological question regarding the precedent status of decisions of other intermediate appellate courts.

Reg 6.17A and SMSFs

Regarding the substantive question, the High Court held that reg 6.17A, properly construed, did not apply to an SMSF. As reg 6.17A did not apply to SMSFs, the wording of the Fund's trust deed determined the distribution of the superannuation. Practically speaking, this means that a BDBN which is part of the terms of the

trust deed can last more than three years.

The High Court's findings confirm that the validity of BDBNs is governed by the trust deed in the context of SMSFs. This aligns with the purposes of reg 6.17A. The regulation is designed to operate in the context of regulated superannuation funds where the trustee is unknown to the members. In SMSFs, however, members are also the directors of a corporate trustee of the SMSF (or trustee in their own right). As the High Court noted:

the two purposes of reg 6.17A — enabling members to compel trustees to distribute death benefits in accordance with their wishes and ensuring that members have sufficient information — are inapt to administration of an SMSF.²

Principles in *Farah Constructions*

The High Court reaffirmed two principles arising from *Farah Constructions*. First, that an intermediate appellate court should not depart from seriously considered dicta of a majority of the High Court. Secondly, that neither an intermediate appellate court nor a judge at first instance should depart from a decision of another intermediate appellate court unless the decision is plainly wrong (or there is a compelling reason to do so).

In this case, the High Court stated that although the Court of Appeal came to the correct conclusion regarding reg 6.17A, it ought to have reached that conclusion by construing the regulation itself rather than reasoning that the seriously considered dicta of the Full Court of the Supreme Court of South Australia was binding. The High Court noted, however, that intermediate appellate courts are ordinarily expected to give 'great weight' to the dicta of other intermediate appellate courts.³

Key takeaway

The most important lesson from this case is a reminder of the primacy of the trust deed. The High Court confirmed that an SMSF could incorporate into its trust deed a binding death benefit nomination that supersedes the requirements of the Regulations. It is the terms of the trust deed that must be carefully worded to ensure the validity of such an amendment. **BN**

ENDNOTES

- 1 Australian Taxation Office, *Self-Managed Superannuation Funds: is there any restriction in the Superannuation Industry (Supervision) legislation on a self-managed superannuation fund trustee accepting from a member a binding nomination of the recipients of any benefits payable in the event of the member's death?* (SMSFD 2008/3, 17 December 2008) [14]-[16].
- 2 *Hill v Zuda* [2022] HCA 21, [32].
- 3 *Hill v Zuda* [2022] HCA 21, [26].