**Faull v Superannuation Complaints Tribunal [1999] NSWSC 1137 (26 November 1999)**

Last Updated: 29 November 1999

NEW SOUTH WALES SUPREME COURT

CITATION: Faull v Superannuation Complaints Tribunal [1999] NSWSC 1137

CURRENT JURISDICTION: Equity Division

Commercial List

FILE NUMBER(S): 50091/99

HEARING DATE{S): 29/10/99

JUDGMENT DATE: 26/11/1999

PARTIES:

Maxwell John Faull - Plaintiff

Superannuation Complaints Tribunal - Defendant

JUDGMENT OF: Rolfe J

LOWER COURT JURISDICTION:

LOWER COURT FILE NUMBER(S): 97-C0832\1

LOWER COURT JUDICIAL OFFICER: Mr N. Wilkinson, Mr R. Putnam, Mr B. Sharpe

COUNSEL:

SOLICITORS:

Mr S.P. Wilde of Cowley Hearne - Plaintiff

Australian Government Solicitor - Defendant

CATCHWORDS:

ACTS CITED:

[Commercial Arbitration Act 1984](http://www.austlii.edu.au/au/legis/nsw/repealed_act/caa1984219/) (NSW)

[Succession Act 1981](http://www.austlii.edu.au/au/legis/qld/consol_act/sa1981138/) (Qld)

Supervision Act

DECISION:

1. Summons for leave to appeal filed on 23 July 1999 dismissed

2. No order as to costs.

JUDGMENT:

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THE SUPREME COURT

OF NEW SOUTH WALES

EQUITY DIVISION

COMMERCIAL LIST

ROLFE J

FRIDAY, 26 NOVEMBER 1999

**50091/1999 - FAULL v SUPERANNUATION COMPLAINTS TRIBUNAL**

**JUDGMENT**

HIS HONOUR:

**Introduction**

1 The plaintiff, Mr Maxwell John Faull, filed a Summons for leave to appeal against an Arbitral Award of the Superannuation Complaints Tribunal, ("the Tribunal"), dated 22 June 1999, pursuant to s.38 of the [**Commercial Arbitration Act**](http://www.austlii.edu.au/au/legis/nsw/repealed_act/caa1984219/) 1984 (NSW), ("the Act").

2 On 10 August 1999 the Tribunal filed an appearance and, on 17 August 1999, it filed a submitting appearance, submitting to such order as the Court may make, save in relation to costs.

3 It is necessary to state the facts in a little detail to understand how the proceedings arise. The plaintiff was married to Ms Alison Faull. They ceased to cohabit, initially, in about 1985 or 1987 and, finally, in about 1990, after which they were divorced. There was one child of the marriage, Mr Llewellyn John Faull, ("the deceased"), who was born on 27 February 1976 and died, as a result of injuries sustained in the course of his employment, on 16 April 1995. From the time when Mr and Ms Faull ceased to live together, the deceased lived with Ms Faull until his death. The deceased had no issue, had not married, and died intestate.

4 The deceased had contributed to a superannuation fund and, at the time of his death, the approximate value of the death benefit from that fund was $235,114.73. Ms Faull applied to Retail Employees Superannuation Trust, ("REST"), which administers the superannuation fund, for a payment out to her of the superannuation death benefit and, on 1 May 1997, the Trustee wrote to Mr Faull advising that it proposed to distribute the superannuation benefit wholly to Ms Faull, and stating that if he agreed with that proposal he need take no further action.

5 The letter continued:-

**"The benefit will be paid in accordance with this proposal unless REST receives advice from you, or any other person, claiming to have an interest in the distribution of this benefit, that you do not agree with this proposal. Your advice must be in writing and REST must receive it within 28 days of this letter, that is, before 30/5/1997. Unless REST receives details of your objection before this date, you will subsequently be unable to complain about the payment to the Superannuation Complaints Tribunal."**

6 Solicitors acting for Mr Faull disputed the Trustee's determination and, by letter dated 28 August 1997, the Trustee affirmed its previous decision and advised that if any further complaint was to be made it should be to the Tribunal. In due course Mr Faull complained to the Tribunal, which issued its Award.

7 The Award stated, under the heading "Procedural Matters", that the Tribunal approached the determination of the matter thus:-

**"The Parties to the Arbitration (the Parties) have requested the Superannuation Complaints Tribunal (the Tribunal) to arbitrate the dispute in accordance with the terms and conditions of the executed Deed of Agreement (the Agreement) which is retained on the Tribunal files.**

**The matter was originally scheduled for a Review Meeting of the Tribunal on 10 February 1998. Submissions were invited and received from all Parties and responses to those submissions. The handing down of the Decision of the Full Federal Court prevented the Review Meeting from taking place.**

**The Tribunal conducted the Arbitration on the papers and had before it all the documents submitted by the Parties. The Trustee and the Complainant chose to make additional submissions to the Arbitration Meeting and these submissions were distributed to the other Parties. The Complainant and the Trustee responded in writing to these submissions. All documents are retained on the Tribunal file for record purposes and all documents other than the response submissions had been copied and distributed to the Parties before the Arbitration Meeting."**

8 The Parties were stated to be Mr Faull, the trustee, and Ms Faull. In the present proceedings Ms Faull did not appear, although I was informed that she had been made aware of the proceedings and did not wish to be heard in relation to them.

**The Arbitration Award And The Reasons**

9 The reasons for the Award, after setting forth most of the matters to which I have referred, turned to a consideration of the Trust Deed, Rule 9.1 of which provided:-

**"If the Member dies the Trustee shall pay or apply the benefits payable in accordance with this Deed and the Rules to or for the benefit or (sic) such one or more Dependants of the deceased Member and the Legal Personal Representative of the deceased Member and in such shares and proportions and in such manner as the Trustee in its discretion determines and without limiting the generality of the foregoing the Trustee may utilise the whole or part of the benefit payable to provide for payment of an annuity (to any one or more of the Dependants of the deceased Member) of such nature as the Trustee in its discretion determines."**

10 The reasons then set forth the definition of "Dependant" in Rule 1, namely:-

**"(a) a spouse of the Member ..**

**(b) a child of the Member; or**

**(c) any person who in the opinion of the Trustee is at the relevant date (or in the case of a deceased Member was at the date of death of that deceased Member) wholly or partially dependent financially on that member; or**

**(d) any person who in the opinion of the Trustee has or had at the relevant date a legally enforceable right to look to that Member for financial support."**

11 The reasons stated that the Tribunal did not consider that any part of the definition, other than sub-clause (c), was relevant, and that Rule 1 defined "Legal Personal Representative" as "the Executor or Administrator of the deceased Member's estate".

12 The reasons then considered whether there was "a Dependant". It was stated that Mr Faull did not claim any financial dependence upon the deceased, and that the Trustee had submitted that Ms Faull was a dependant in that, in a statutory declaration she had made on 13 June 1996, she stated she was partially dependent upon the deceased at the date of his death. That partial dependency stemmed from the fact that the deceased paid her board of $30 per week. To this Mr Faull had responded that Ms Faull's stated annual salary was $39,411, being $757.90 per week, that the deceased's contribution was $30 per week, and that:-

**"I fail to see what significant effect this would of (sic) had on my ex-wife's standard of living and any suggestion of dependency is ludicrous. In consequence I cannot accept that (Mother) was either dependent or reliant on this contribution if it indeed existed and if so was any proof presented to the trustee to support such i.e. receipts or taxation declarations." (My emphasis.)**

13 The reasons noted that the Trustee responded that the payment of $30 per week was enough to make Ms Faull partially financially dependent on the deceased immediately prior to his death, reliance being placed on the fact that it was only necessary for there to be partial financial dependency. The Trustee's submission was recorded as being that the level of dependency was only relevant where there was more than one person dependent on the deceased and:-

**"In these circumstances the level of dependency will be used to determine in what proportions the benefit should be distributed. However, where only one person falls within the definition of `dependant', the level of dependency is irrelevant - the entire benefit must** **be paid to him/her." (My emphasis.)**

14 Subsequently in the reasons, the Tribunal considered the relative needs of Mr and Ms Faull. It stated:-

**"The Tribunal is in no doubt that the financial circumstances of the Mother are superior to those of the Father. Whereas the Father was unemployed and existed on a Disability Support Pension, the Mother had regular employment, an income of about $39,000 for the year, and was in receipt of a Worker's Compensation Death Benefit of over $10,000. The Father described his position to be in `poor health' and diagnosed with cancer of the vocal cords. He states that he was `part blind had emphysema and also suffering from a nervous disorder'.**

**If the Tribunal's task was to allocate the Death Benefit according to need, then the Trustee's decision should be overthrown and replaced with a decision that allocated a significant proportion of the benefit to the Complainant. However, that is not the task of the Tribunal. It is merely one consideration among a number of considerations which the Tribunal considers to be more important in this particular case."**

15 I have taken this passage out of context from the reasons to show the gross discrepancy between the financial positions of Mr Faull and Ms Faull, lest it should be found that that is relevant.

16 In the reasons, after setting forth the payments made by the deceased to Ms Faull of $30 per week to which I have referred, the Tribunal stated that partial financial dependence was not defined, and that the Tribunal had been aware for a long time that the superannuation industry tended to interpret the term somewhat generously to facilitate the payment of death benefits. The reasons continued:-

**"The Tribunal in past decisions has tended to follow industry practice in this regard providing the dependency is real and sufficient to make a real difference to the person's living standard. The Tribunal recognises that though the Mother had a reasonable income and a degree of financial security, the regular income of $30 per week, probably offset by outgoings for food, does provide the basis for the provision of more adequate and comfortable accommodation than may have been accessed by a person living alone. The Tribunal therefore accepts that at the point of death the Mother can be properly described in the terms of the Trust Deed as a person who was `partially dependent financially on that Member'. As such, the Member's Mother is entitled, under the Trust Deed, to the status of `dependant'. There is no evidence of the existence of any other `dependant' or of a person who had a legally enforceable right to look to the Member for financial support." (My emphasis.)**

17 The reasons then turn to a consideration as to whether there was a legal personal representative, and observed that on 23 December 1997 the Trustee argued that the deceased died intestate and no Letters of Administration had been granted in respect of his estate and, accordingly, there is no legal personal representative to whom any benefit can be paid. The reasons considered this aspect of the matter and, in particular, a submission put on behalf of Mr Faull that the estate was vested in the Public Trustee until Letters of Administration were issued. To this the Trustee responded that if the Public Trustee was in fact the legal personal representative pursuant to the [**Succession Act**](http://www.austlii.edu.au/au/legis/qld/consol_act/sa1981138/) 1981 (Qld), and that as such a provision existed in all States, Mr Faull's argument would lead to the conclusion that there would always be a legal personal representative, which would lead to an interpretation contrary to Regulation 6.22 of the **Supervision Act**:-

**"Which `clearly contemplates the payment of benefits on death to non-dependants, where there are no dependants nor a legal personal representative'."**

It was further argued by the Trustee that the Public Trustee had not consented "at this point of time" to act as Trustee.

18 In these circumstances the Tribunal concluded that the Trustee was correct that there was no legal personal representative of the deceased's estate, but it did not put aside the prospect that the Public Trustee may be appointed and:-

**"Thus the Tribunal, under the provisions of the Trust Deed, is required to resolve the dispute by awarding the death benefit to the Mother, as `dependant', and/or to the Legal Personal Representative `in such shares and proportions and in such manner' as in its discretion it determines."**

19 The reasons then considered matters for the exercise of the Trustee's discretion, the first of which was the deceased's wishes. He had made an application for membership less than two months before his death in which he had nominated Ms Faull as the Preferred Beneficiary to be paid one hundred per cent of the benefit in the event of death. The Tribunal was satisfied that though the deceased was only nineteen years old, he was of sufficient age and maturity to consciously and definitely make such a decision.

20 The Tribunal referred to the fact that the deceased had applied for the maximum level of insurance and that:-

**"It would be surprising that a young man without a spouse and without children dependent upon him would take such an option unless he had some person clearly in mind at the time."**

The Tribunal was of the view that the nomination of Ms Faull indicated she was that person.

21 The reasons then made reference to certain assertions by Ms Faull that it was the deceased's intention that she should receive the benefit, and concluded:-

**"Though the Tribunal cannot verify the accuracy of the latter references, the Tribunal believes there is a degree of consistency with the information that is clearly documented on the application for Membership. All this information is in marked contrast to the situation with respect to the Complainant, as there is absolutely no evidence that the Member wished him to share in any Insured benefit."**

22 Nextly the Tribunal considered the relationship with the deceased, and came to the view that there was basically no communication between him and Mr Faull after the final separation in 1990. The Tribunal was of the view that the relationship between Mr Faull and the deceased "had completely broken down by the last years of" the deceased's life, but, on the other hand, the relationship between Ms Faull and the deceased was established as one of mutual support by the time of his death.

23 Nextly the Tribunal dealt with the relative needs of Mr and Ms Faull, to which I have referred, and concluded:-

**"The Tribunal believes the wishes of the Member were clearly expressed close to the time of his death and that he was of sufficient maturity to make a sound and independent judgment. Those wishes should therefore be given great weight.**

**The Tribunal concludes that, though there was considerable evidence provided at the genuine responsibility and good intentions of the Father to care for his Son in earlier years, for various reasons the relationship established had come to nought in the final years of the Member's life. He chose to keep at a distance from his Father and to consciously support his Mother with whom he had a sound and ongoing relationship.**

**The Mother was a `dependant' under the terms of the Trust Deed and therefore entitled to be considered as a beneficiary with respect to the death benefit. The Father was not entitled to be considered a beneficiary in his own right, though the Tribunal could have allocated some or all of the benefit to a Legal Personal Representative who would have emerged to deal with the benefit.**

**The Tribunal concluded that though the Father demonstrated greater economic need than the Mother, the death benefit allocation entirely to the Mother constituted a decision of the Trustee that was fair and reasonable in all the circumstances."**

In the result the Tribunal upheld the Trustee's determination.

**The Grounds Of Appeal**

24 It was accepted by Mr Faull that he must establish the requirements of s.38(5), the principal and relevant one being that there is a manifest error of law on the face of the Award, or that there was strong evidence that the Tribunal made an error of law and that the determination of the question may add, or be likely to add, substantially to the certainty of commercial law.

25 The questions of law raised were:-

(a) Whether the mother was a dependant or a partial dependant as a matter of law or as a matter of fact;

(b) Whether the Trustee was correct in concluding that there was no legal personal representative to whom the moneys would be paid;

(c) Whether the Tribunal was correct in having regard to the industry practice;

(d) Whether the Tribunal was correct in finding that it was required to resolve the dispute by awarding the death benefit to Ms Faull and/or the legal personal representative;

(e) Whether in accordance with the [Succession Act](http://www.austlii.edu.au/au/legis/qld/consol_act/sa1981138/) the Trustee was required to give consideration to and failed to give consideration to the fact that the Public Trustee was vested with full authority and power in respect of the estate;

(f) Whether the Trustee was required to confer with or communicate with the Public Trustee in respect of his acceptance or otherwise of being a legal representative for the estate;

(g) Whether the Trustee failed to give full consideration to whether or not $30 a week board was a partial dependency;

(h) Whether Ms Faull was not a dependant by definition, so that no payment could be ordered to her;

(i) The effect of the dramatic change on the parties' financial position because, if there was a legal representative the amount would be distributed according to the law of intestacy; and

(j) "That the error of law of the Arbitrator in respect to the rules of intestacy and the rights of the legal representatives is communicably significant".

26 An order was also sought pursuant to [s.42](http://www.austlii.edu.au/au/legis/qld/consol_act/sa1981138/s42.html), although, as I understand it, no submissions in relation to this were ultimately made.

**The Questions Of Law Said To Be Raised**

27 Whilst there are a number of grounds of appeal I consider that there are three basic matters to which attention must be directed. Firstly, the proceedings are brought against the Arbitral Award and, in my opinion, Mr Faull is not entitled to attack the findings of the Trustee. If Mr Faull is to succeed, it must be on the basis that the Award manifests the necessary error of law. Secondly, a principal question is whether Ms Faull was a partial dependant. Thirdly, the question is whether the position of the Public Trustee should be taken into account, so that there is, on Mr Faull's submission, a legal personal representative, to whom regard should have been paid when the Trustee was exercising its discretion.

**Was Ms Faull A Partial Dependant**

28 In my opinion the Tribunal's decision that Ms Faull was a partial dependant cannot be attacked pursuant to [s.38(5).](http://www.austlii.edu.au/au/legis/qld/consol_act/sa1981138/s38.html) The Tribunal accepted that she was being paid $30 per week by way of board, i.e. that she was being paid $30 per week for providing lodging and, perhaps, food, for the deceased and that this provided the basis for the provision of more adequate and comfortable accommodation than may otherwise have been available to her. The short answer to the various submissions made on behalf of Mr Faull in relation to this aspect of the matter, is that irrespective of what other moneys Ms Faull was receiving, she was receiving $30 per week for this service she provided to the deceased. The payment of that amount augmented her other income and, to that extent, she was dependent upon the deceased for the receipt of some of her income. Accordingly, she was "partially dependent" upon the payments made by the deceased.

29 It may be argued that the word "dependant" means that the recipient must have a necessity for the money received from the payer in order to live to qualify as a dependant. In my opinion this is giving too narrow a meaning to the word "dependant", as defined in sub-paragraph (c). That is particularly so when the word, within the definition, encompasses partial dependency. The definition provides that a spouse or child is a "Dependant", without any need to show financial dependency. Of course, the degree of financial dependency may be a very real question in deciding how the discretion should be exercised. This gives colour to the words in sub-paragraph (c).

30 The obvious purpose of the provision was to provide a category of persons among whom the Trustee may, in the exercise of the Trustee's discretion, divide or to whom the Trustee, in the exercise of its discretion, may pay the death benefit. The determinant for that, relevantly for present purposes, was a partial dependency, which must mean a partial financial dependency. The receipt by Ms Faull of $30 per week from the deceased, in return for the provisions she made for him, constituted such a dependency, in the Tribunal's opinion. In my opinion, on the facts and the provisions of the definition, this conclusion could not be said to be an error of law, let alone a manifest one. It was one of either fact or mixed fact and law, and it was not governed by regard to industry practice. The Tribunal clearly considered the facts of this case. Questions of fact or mixed fact and law are not ones to which the Court can have regard in considering applications for leave to appeal: **Promenade Investments Pty Limited v The State of New South Wales** [(1992) 26 NSWLR 203](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281992%29%2026%20NSWLR%20203) and **Natoli v Walker** (Court of Appeal (New South Wales) - 26 May 1994 - unreported).

31 These grounds of appeal must, accordingly, be dismissed.

**The Personal Representative Point**

32 [Section 45(1)](http://www.austlii.edu.au/au/legis/qld/consol_act/sa1981138/s45.html) of the [**Succession Act**](http://www.austlii.edu.au/au/legis/qld/consol_act/sa1981138/) 1981 provides that the property of a deceased person shall, on his or her death and notwithstanding any testamentary disposition;

**"... devolve to and vest in his or her executor and if more than one as joint tenants, or, if there is no executor or no executor able and willing to act, the public trustee."**

Sub-section (2) provides that upon the grant of probate or letters of administration the property vested in the persons referred to in sub-s.(1) shall devolve to and vest in the person to whom the grant is made, and sub-s.(4) provides:-

**"The title of any administrator appointed under this Act to any property which devolves to and vests in the administrator shall relate back to and be deemed to have arisen upon the death of the deceased as if there had been no interval of time between the death and the appointment."**

33 Sub-section (6) provides:-

**"While the property of a deceased person is vested in the public trustee under this section, the public trustee shall not be required to act in the administration of the estate of the deceased person or in any trusts created by the will of the deceased person, or exercise any discretions, powers, or authorities of a personal representative, trustee or devisee, merely because of the provisions of this section."**

34 In my opinion [s.45](http://www.austlii.edu.au/au/legis/qld/consol_act/sa1981138/s45.html) does not make the Public Trustee a legal personal representative, but rather the repository of the property in the stated circumstances, sub-s.(4) making it clear that from the appointment of an administrator, who may be the Public Trustee, there is a relation back to the date of death, as if there had been no interval, and sub-s.(6) making it clear that the Public Trustee is not required to act in the administration of the estate by virtue of the devolution of property in him or her.

35 The [**Succession Act**](http://www.austlii.edu.au/au/legis/qld/consol_act/sa1981138/) does not, in the particular circumstances of this case, constitute the Public Trustee either the executor or administrator of the deceased's estate. Accordingly, in finding the Trustee was correct in its assertion that there is no legal personal representative, the Tribunal was correct and there is no manifest error of law on the face of the Award. I consider that the Tribunal's finding was one of law, but that there was no relevant error of law.

**Other Matters**

36 Even if the views to which I have come are not correct, there was no obligation on the Tribunal to order that the whole or any part of the fund be paid to the legal personal representative, that being a matter within the discretion of the Trustee and, I assume, the Tribunal. In these circumstances, even if I were of the opinion that there was a manifest error of law, I would not be disposed to exercise the discretion to grant leave: **Natoli v Walker**.

37 The Tribunal clearly gave the most careful, detailed and compassionate consideration to the demands of Mr Faull, but came to the conclusion that the Trustee's decision was the proper decision in all the circumstances.

38 As with the Tribunal, I sympathise with Mr Faull in the position in which he finds himself. However, I do not consider that he has established any basis on which his application can succeed, based as it is on the provisions of [s.38(5).](http://www.austlii.edu.au/au/legis/qld/consol_act/sa1981138/s38.html) As I have said, no further points were argued in respect of [s.42.](http://www.austlii.edu.au/au/legis/qld/consol_act/sa1981138/s42.html)

39 In the particular circumstances of this case I am of the opinion that the proper exercise of discretion, in relation to costs, is that there be no order as to costs. The Tribunal filed a submitting appearance and Ms Faull did not appear. Accordingly, neither, on the evidence before me, has suffered any significant cost burden.

**Orders**

40 (1) I order that the Summons for leave to appeal filed on 23 July 1999

be dismissed.

(2) I make no order as to costs.

**\*\*\*\*\*\*\*\*\*\***

**LAST UPDATED: 29/11/1999**