HIGH COURT OF AUSTRALIA

Travers William Duncan

Vs.

Independent Commission Against Corruption

[2015] HCA 32

(French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.)

09.09.2015

ORDER

French Cj, Kiefel, Bell and Keane JJ.

1. In proceedings pending in the Court of Appeal of the Supreme Court of New South Wales, the applicant seeks a declaration that certain findings contained in a report entitled "Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others" dated July 2013 ("the Report") were made in excess of the jurisdiction of the respondent, the Independent Commission Against Corruption (ICAC).

2. In the Report, the respondent found that the applicant had engaged in conduct which adversely affected, or could have adversely affected, the efficacy of the performance of functions by officials of the executive government of the State of New South Wales. The respondent proceeded to conclude that this conduct was "corrupt conduct" within the meaning of s 8(2) of the Independent Commission Against Corruption Act 1988 (NSW) ("the ICAC Act").

3. The applicant commenced proceedings in the Supreme Court of New South Wales challenging the validity of the findings against him in the Report. His claim was dismissed by the primary judge (McDougall J) . He then applied for leave to appeal to the Court of Appeal of New South Wales. Before that application could be determined, this Court on 15 April 2015 delivered its judgment in Independent Commission Against Corruption v Cunneen , holding that "corrupt conduct" within the respondent's investigative jurisdiction under the ICAC Act did not encompass conduct which did not compromise the probity of public administration. Given that the Report did not suggest that the applicant's conduct had adversely affected the probity of the exercise of any official function, the applicant then added to the grounds of his claim the contention that the respondent lacked jurisdiction to make findings of corrupt conduct against him.

4. On 6 May 2015, while the application for leave to appeal to the Court of Appeal was still pending, the New South Wales Parliament enacted the Independent Commission Against Corruption Amendment (Validation) Act 2015 (NSW) ("the Validation Act"). The Validation Act added Pt 13 of Sched 4 to the ICAC Act ("Pt 13") to ensure the validity of the respondent's activities before 15 April 2015 (including the compilation of the Report), notwithstanding this Court's decision in Cunneen.

5. The applicant thereupon added to his claims in the Court of Appeal a claim for a declaration that Pt 13 is invalid. Further, the applicant sought, in the alternative, a declaration that s 79(1) of the Judiciary Act 1903 (Cth) ("the Judiciary Act") does not validly apply Pt 13 as surrogate federal law in the proceedings.

6. On 25 May 2015, Gageler J ordered the removal into this Court of so much of the proceedings pending in the Court of Appeal as related to the applicant's challenge to the validity of Pt 13.

7. In this Court, it was common ground that, given this Court's decision in Cunneen, the respondent's findings in the Report that the applicant had engaged in corrupt conduct were based upon a misconstruction of s 8(2) of the ICAC Act so that the Report was, at the time of its original publication, affected by jurisdictional error.

Part 13

8. Given the contention advanced by the applicant, it is desirable to set out the full text of the material terms of Pt 13. It will be readily apparent that Pt 13 is concerned to address only one problem. That problem was that, on the interpretation in Cunneen of "corrupt conduct" in s 8(2) of the ICAC Act, the findings of the respondent, in the Report, were beyond power to the extent that they concerned the applicant. Part 13 purports to deal comprehensively with this problem by addressing the validity of the respondent's activities prior to this Court's decision in Cunneen on 15 April 2015. In considering the terms of Pt 13, it is to be borne in mind that it was the applicant's contention that the brief but comprehensive provisions missed the only target at which they were directed.

> "Part 13 Validation relating to decision on 15 April 2015 in Independent Commission Against Corruption v Cunneen [2015] HCA 14
> 34 Interpretation
> (1) In this Part:
> relevant conduct means conduct that would be corrupt conduct for the purposes of this Act if the reference in section 8(2) to conduct that adversely affects, or could adversely affect, the exercise of official functions included conduct that adversely affects, or could adversely affect, the efficacy (but not the probity) of the exercise of official functions.
> (2) A reference in this Part to anything done or purporting to have been done by the Commission includes a reference to:

(a) anything done or purporting to have been done by an officer of the Commission, and
(b) any investigation, examination, inquiry, hearing, finding, referral, recommendation or report conducted or made by the Commission or an officer of the Commission, and Validation

(1)Anything done or purporting to have been done by the Commission before 15 April 2015 that would have been validly done if corrupt conduct for the purposes of this Act included relevant conduct is taken to have been, and always to have been, validly done.

(2) The validation under subclause (1) extends to the validation of:

(a) things done or purporting to have been done by any person or body, and
(b) legal proceedings and matters arising in or as a result of those proceedings,
if their validity relies on the validity of a thing done or purporting to have been done by the Commission.
(3) The validation under subclause (1) extends to the validation of things on and from the date they were done or purported to have been done.

(4) The Commission is authorised (and is taken always to have been authorised) to exercise functions under this Act on or after 15 April 2015 to refer matters for investigation or other action to other persons or bodies, or to communicate or provide evidence given to the Commission to other persons or bodies, even if the matter arose or the evidence was given to the Commission before 15 April 2015 and its validity relies on the validation under subclause (1).
(5) Subclause (4) applies even if any finding of corrupt conduct that relates to the matter or evidence is declared a nullity or otherwise set aside by a court.
..."

The applicant's challenge to Pt 13

9. Underpinning the applicant's principal challenge to the validity of Pt 13 was the submission that, properly construed, cll 34 and 35 do not deem the conduct of the applicant referred to in the Report to be "corrupt conduct". The applicant submitted that Pt 13 does not validate invalid acts of the respondent; rather, so it was said, it directs courts to treat as valid acts that were, and remain, invalid. It was argued that this case is distinguishable on this basis from others in which this Court upheld the validity of laws which effect the retrospective validity of invalid acts . It was submitted that, in directing the courts to treat as valid that which Pt 13 has left invalid, Pt 13 contravenes the principle in Kable v Director of Public Prosecutions (NSW) by undermining the institutional integrity of the Supreme Court of New South Wales. It was also said that Pt 13 offends the principle stated by this Court in Kirk v Industrial Court (NSW) that "[l]egislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power".

The operation of Pt 13

10. The applicant's construction of Pt 13 is distinctly implausible given the purpose of its enactment. It is not sustainable on a fair reading of cll 34 and 35.

11. As a matter of the ordinary use of language, cll 34 and 35 deem to be valid acts done by the respondent before 15 April 2015 to the extent that they would have been valid if corrupt conduct as defined in s 8(2) of the ICAC Act encompassed conduct which adversely affected the efficacy, but not the probity, of the exercise of official functions.

12. In this way, cll 34 and 35 operate to amend s 8(2) of the ICAC Act in its application to acts done by the respondent prior to 15 April 2015. Parliament thereby changed the meaning of "corrupt conduct", as a matter of substantive law, from the meaning given to that expression in Cunneen in respect of acts occurring before 15 April 2015. It is not to the point that cl 35 does not expressly purport to "amend" s 8(2): it is well settled that a statute which effects an alteration of the provisions of an earlier statute amends that earlier statute even though it may not expressly describe itself as "an amending statute".

13. The applicant's argument that Pt 13 does not validate the respondent's invalid findings in the Report, and so cannot require a court to attribute the legal consequences of valid findings to the respondent's invalid findings, involved the elusive suggestion that the invalid findings in the Report had no legal consequences. It might be said that the adverse effect of the Report upon the applicant's reputation would have been one relevant legal consequence of the Report, and indeed a consequence which was relevant to his standing to bring the present proceedings . However that may be, the applicant's argument strains too hard against the ordinary meaning of cll 34 and 35. In truth, they declare the legal position of the respondent, and of persons affected by things "done or purporting to have been done" by the respondent, prior to 15 April 2015.

14. Clause 35 operates so that the legal position so declared is the same as if the respondent had been authorised by the ICAC Act to investigate and report on conduct that included "relevant conduct" as defined in cl 34; and cl 35 also attaches to the respondent's findings, "as acts in the law, consequences which it declares them to have always had" . The Report becomes, by virtue of cll 34 and 35, cognisable as a matter of law as a report into "corrupt conduct" made under the ICAC Act . Even if it were the case that the respondent's activities in investigating the applicant and making findings about the conduct of the applicant and his associates initially had no legal consequences at the time the activities occurred, that circumstance would no longer be fatal to the validity of the Report: it is well settled that it is open to the legislature to select the fact that these activities occurred as the ground for attaching such legal consequences as it may choose .

15. Because cll 34 and 35 widened the scope of the expression "corrupt conduct", and thereby widened the jurisdiction of the respondent in relation to its investigation, the principal ground

of the applicant's challenge to the validity of Pt 13 is not made out. On behalf of the applicant, it was acknowledged that if Pt 13, properly construed, does no more than attribute the consequences of legal validity to things done by the respondent, then his challenge must fail. This concession was rightly made. Some brief reference to earlier decisions of this Court will suffice to explain why that is so.

Kable

16. As this Court recently noted in Attorney-General (NT) v Emmerson , the Kable principle stands for the proposition that, in the case of a State court capable of being invested with the judicial power of the Commonwealth:

> "State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid." (footnote omitted)

17. As was explained in H A Bachrach Pty Ltd v Queensland , Kable takes as its starting point:

> "the principles applicable to courts created by the Parliament under s 71 [of the Constitution] and to the exercise by them of the judicial power of the Commonwealth under Ch III. If the law in question here had been a law of the Commonwealth and it would not have offended those principles, then an occasion for the application of Kable does not arise."

18. Decisions of this Court establish that a law of the Commonwealth to the effect of Pt 13 would not be inconsistent with Ch III of the Constitution.

19. In Nelungaloo Pty Ltd v The Commonwealth , this Court rejected a challenge to the validity of the Wheat Industry Stabilization Act (No 2) 1946 (Cth) on the ground that it validated an order for the acquisition of wheat the validity of which was in issue in judicial proceedings pending when the statute was enacted. Nelungaloo was concerned with s 11 of the Wheat Industry Stabilization Act (No 2), which purported to deem an executive order made under a regulation "to be, and at all times to have been, fully authorized by that regulation" and to have and have had "full force and effect according to its tenor". In rejecting the contention that s 11 amounted to a usurpation of the judicial power of the Commonwealth in contravention of Ch III of the Constitution, Dixon J said that there could be no objection to the validity of the statute, which was :

> "simply a retrospective validation of an administrative act and should be treated in the same way as if it said that the rights and duties [of the parties to the litigation] should be the same as they would be, if the order was valid."

20. In R v Humby; Ex parte Rooney , this Court was concerned with a challenge to the validity of legislation passed to validate decisions under the Matrimonial Causes Act 1959

(Cth) made in excess of jurisdiction. Section 5 of the Matrimonial Causes Act 1971 (Cth) deemed the rights, liabilities and obligations of people affected by certain decrees issued by non-judicial officers of the Supreme Court of South Australia to be the same as if those decrees had been made by the Supreme Court constituted by a single judge. Section 5 was held not to involve an interference with the judicial process contrary to Ch III of the Constitution. Mason J said :
"Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action."

21. This observation by Mason J was adopted by Gummow, Hayne and Bell JJ in Australian Education Union v General Manager of Fair Work Australia , with whom French CJ, Crennan and Kiefel JJ agreed in this respect .

22. In AEU, this Court considered the validity of s 26A of the Fair Work (Registered Organisations) Act 2009 (Cth), which provided that, where the registration of an association under the Workplace Relations Act 1996 (Cth) prior to the commencement of s 26A was invalid only because that organisation's rules did not provide for the termination of membership or preclusion from membership of particular persons, that registration would be taken to be valid and to have always been valid. All members of this Court rejected the contention that s 26A was an impermissible interference with judicial power.

French CJ, Crennan and Kiefel JJ said :

23. "If a court exercising federal jurisdiction makes a decision which involves the formulation of a common law principle or the construction of a statute, the Parliament of the Commonwealth can, if the subject matter be within its constitutional competence, pass an enactment which changes the law as declared by the court. Moreover, such an enactment may be expressed so as to make a change in the law with deemed operation from a date prior to the date of its enactment. Section 26A was such a law."

24 . To similar effect, Gummow, Hayne and Bell JJ referred with approval to the following passage in Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs :

> "It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates." (emphasis added)

25. The retrospective conferral upon the respondent by cl 35 of the jurisdiction which was held lacking in Cunneen is a grant of jurisdiction within the first category of cases identified

in that passage. No relevant distinction is discernible between s 26A of the Act considered in AEU and cll 34 and 35: both sets of provisions attach new legal consequences and a new legal status to things done which otherwise would not have had such legal consequences or status.

26. It is now well settled that a statute which alters substantive rights does not involve an interference with judicial power contrary to Ch III of the Constitution even if those rights are in issue in pending litigation. This Court's decision in Bachrach affords an example of a case involving a piece of State legislation which was said to contravene the Kable principle. That case was concerned with a section of the Local Government (Morayfield Shopping Centre Zoning) Act 1996 (Q) that provided that the purposes for which certain land could be used without the consent of the local council were "taken to include" a particular proposed shopping centre development. This Court held that the impugned legislation did not constitute an impermissible interference with judicial power, notwithstanding that it was directed at the specific parcel of land which was the subject of pending proceedings in court .

27. It is also to be noted that cl 35 does not purport to confer any power or function upon a court. Importantly, it does not purport to give a direction to a court to treat as valid that which the legislature has left invalid. The present case is, therefore, readily distinguishable from this Court's decision in International Finance Trust Co Ltd v New South Wales Crime Commission , on which the applicant relied.

28. In International Finance, this Court held that s 10 of the Criminal Assets Recovery Act 1990 (NSW), which required the court to hear applications for restraining orders in respect of specific interests in property on an ex parte basis, was an impermissible direction to the judicature . In contrast, Pt 13 is a retrospective alteration of the substantive law which is to be applied by the courts in accordance with their ordinary processes. While s 10 of the Criminal Assets Recovery Act required the court to hear certain applications on an ex parte basis, Pt 13 does not affect the processes applied by the Supreme Court; indeed it neither confers a function on the Supreme Court nor deprives it of one.
Kirk

29. This Court's decision in Kirk was concerned with legislative intrusion upon the supervisory jurisdiction of the Supreme Courts of the States over administrative agencies and inferior courts ; but it did not deny the competence of State legislatures to alter the substantive law to be applied by those agencies and courts. As has been explained, Pt 13, properly understood, effects an alteration in the substantive law as to what constitutes corrupt conduct; it does not withdraw any jurisdiction from the Supreme Court. The Court of Appeal remains seized of the proceedings pending before it. Accordingly, Pt 13 does not contravene the Kirk principle. Federal jurisdiction

30. The applicant advanced an alternative contention to the effect that Pt 13 is incompatible with Ch III of the Constitution and therefore cannot apply in the proceedings in the Court of Appeal, which had engaged that Court's federal jurisdiction. It was said that federal

jurisdiction was engaged because the proceedings in the Court of Appeal involved a question arising under s 184(1) of the Corporations Act 2001 (Cth). Accordingly, so said the applicant, Pt 13 could only apply to the proceedings via s 79(1) of the Judiciary Act, thereby directly engaging Ch III of the Constitution.

31. Insofar as the applicant's alternative claim is based on the contention that the proceedings pending in the Court of Appeal have engaged federal jurisdiction, it must fail. As the earlier decisions of this Court in Nelungaloo, Humby and AEU show, even if Pt 13 were a law of the Commonwealth it would not be inconsistent with Ch III of the Constitution. Part 13 does not operate as an impermissible direction to the judicature: it is not concerned with the functions or jurisdiction of courts; it does not refer to court proceedings either specifically or generally; and it does not direct the courts as to the giving of relief. It is not necessary, therefore, to have regard to the applicant's submissions about the interaction between s 79 of the Judiciary Act and Pt 13.

Conclusion

32. The applicant's challenge to the validity of Pt 13 fails.

33. So much of proceeding number 2014/239426 as was pending in the Court of Appeal of the Supreme Court of New South Wales as concerns grounds 1A, 1B and 1D and prayers 1, 2 and 4 of the Further Amended Draft Notice of Appeal should be dismissed.

34. The applicant must pay the costs of the proceedings in this Court.

35. GAGELER J. "It is, of course", as Dixon J pointed out in R v Hickman; Ex parte Fox and Clinton , "quite impossible" for the Commonwealth Parliament "to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the … body by prohibition." It is equally impossible for a State Parliament to impose limits upon the administrative or judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive the Supreme Court of that State of authority to declare and enforce the limits it has set. That is the consequence of the holding in Kirk v Industrial Court (NSW) that "[l]egislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power".

36. The constitutional argument of the applicant in this case is that, in enacting the Validation Act to insert Pt 13 into Sched 4 of the ICAC Act, the Parliament of New South Wales attempted the impossible. Instead of retrospectively expanding the administrative authority of ICAC with the intention of saving from invalidity a category of things done by ICAC in the past that were revealed by the majority decision in Independent Commission Against Corruption v Cunneen to have been done in excess of the authority which had been granted to ICAC – something which the Parliament undoubtedly has power to do – the Parliament chose to leave the previous jurisdictional limits of ICAC unaltered and to attempt to prevent the Supreme Court from declaring and enforcing those limits.

37. The constitutional argument teeters on a narrow proposition of statutory construction. The proposition is that cl 35 operates to attach new legal consequences to an invalid act of ICAC while accepting that the act remains invalid.
38. The difficulty for the applicant is that that is not what cl 35 says. And, as his counsel frankly conceded, if that is not what it says, the applicant loses.

39. Part 13 engages two relevant principles of statutory construction. One is a statutory principle which has a common law analogue . It is that, in the interpretation of a statutory provision, "a construction that would promote the purpose or object underlying the [statute] ... shall be preferred to a construction that would not promote that purpose or object" . The other is a common law principle which has a statutory analogue . It is that "[i]f the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open" . Those principles of statutory construction confirm what emerges in any event from a plain reading of the statutory text.

40. In referring to "[a]nything done or purporting to have been done by the Commission before 15 April 2015 that would have been validly done if corrupt conduct for the purposes of this Act included relevant conduct", cl 35(1) refers to nothing more than historical acts of ICAC. The historical acts of ICAC so identified are limited to acts which would have been in excess of the power conferred on ICAC for the reason stated by the majority decision in Cunneen were it not for the enactment of the Validation Act.

41. In going on to provide that those historical acts of ICAC are "taken to have been, and always to have been, validly done", cl 35(1) does no more than to provide that the authority conferred on ICAC extends by force of cl 35(1) itself to include authority to have done those historical acts. An historical act of ICAC which would have been in excess of the power conferred on ICAC for the reason stated by the majority decision in Cunneen were it not for the enactment of the Validation Act is brought within the power conferred on ICAC through the operation of cl 35(1) itself. That which was "invalid" (in excess of the authority granted to ICAC by the Parliament) is thereby made "valid" (within the authority granted to ICAC by the Parliament). Sub-clauses (2) and (3) of cl 35 respectively spell out the consequential and retrospective effects of that "validation".

42. There is no novelty in the proposition that "in general, a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence" . There is even less novelty in the legislative selection of the historical fact of a previously unauthorised administrative act as the trigger for the retrospective conferral of legislative authority on the administrator concerned to have done that act : a legal consequence fairly described as validation . That is all that has happened here.

43. For these reasons, I agree with the orders proposed by French CJ, Kiefel, Bell and Keane JJ.

44. NETTLE AND GORDON JJ. We have had the considerable advantage of reading in draft the reasons of French CJ, Kiefel, Bell and Keane JJ.
45. We agree with the reasons advanced by their Honours for concluding that Pt 13 (cll 34 and 35) of Sched 4 to the Independent Commission Against Corruption Act 1988 (NSW) ("the ICAC Act") deems to be valid acts done by the respondent before 15 April 2015 to the extent that they would have been valid if corrupt conduct as defined in s 8(2) of the ICAC Act encompassed conduct which adversely affected the efficacy, but not the probity, of the exercise of official functions.

46. We would prefer to put it upon the basis that in their legal operation cll 34 and 35 do not amend s 8(2) of the ICAC Act in its application to acts done by the respondent prior to 15 April 2015. Clauses 34 and 35 do operate to effect a change in the law. They create a new or different legal regime in which, for a prescribed period of time, the concept of corrupt conduct (as defined in s 8(2) of the ICAC Act) is taken to be expanded to encompass conduct which adversely affected, or could adversely affect, the efficacy, but not the probity, of the exercise of official functions. Clauses 34 and 35 then validate acts done during that time according to the new or different legal regime.

47. We agree with the orders proposed in the judgment of French CJ, Kiefel, Bell and Keane JJ.