



Judgment Summary
Supreme Court
New South Wales

10 November 2014

Cunneen v Independent Commission Against Corruption
[2014] NSWSC 1571

Hoeben CJ at CL

Today the Supreme Court dismissed a summons brought by Margaret Cunneen, Stephen Wyllie and Sophia Tilley against the Independent Commission Against Corruption (ICAC).

The proceedings arose out of a decision by the ICAC to conduct a public inquiry. The inquiry concerned allegations that on 31 May 2014, Ms Cunneen and Mr Wyllie, with the intention of perverting the course of justice, counselled Ms Tilley to pretend to have chest pains to prevent police from obtaining her blood alcohol level at the scene of an accident.

In response to summonses from the ICAC to attend and give evidence at a public inquiry, the plaintiffs commenced these proceedings. They sought various orders on grounds that the ICAC was acting beyond its jurisdiction in investigating the allegations, that it took into account an irrelevant consideration, namely that Ms Cunneen held the office of a Crown Prosecutor, and the ICAC had exceeded its power by deciding to conduct a public inquiry.

The Court initially considered a preliminary matter in which the plaintiffs sought production by the ICAC of copies of its decisions to investigate and to hold a public inquiry, as well as statements of reasons for both the decisions. They sought production under a provision of the Uniform Civil Procedure Rules 2005 (rule 59.9). The Court declined to make the order sought by the plaintiffs. It did so because the matter was specifically dealt with by the *Independent Commission Against Corruption Act 1988* (ICAC Act), which provides that a defined person is not required to produce documents or divulge information in court (s 111). The Court, in exercising its discretion, has to take into account matters including that such an order would be ineffective because the ICAC would not be obliged to comply with it.

The Court then addressed the substantive issues in the proceedings. In relation to whether the ICAC went beyond its jurisdiction in deciding to investigate the allegations, his Honour rejected the plaintiffs' initial submission that the ICAC was required to provide reasons at every point in the investigation. His Honour also rejected the construction put forward by the plaintiffs in relation to what may constitute 'corrupt conduct' under the ICAC Act. He held that while the ICAC Act infringes fundamental rights, provisions such as that defining corrupt conduct should not be unnecessarily read down. In this case, the allegations could be used to satisfy both limbs of the definition of corrupt conduct in the ICAC Act.

The plaintiffs also submitted that the ICAC had mistaken its own jurisdiction by taking into account the fact that Ms Cunneen was a Crown Prosecutor. That was said to be irrelevant

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as there was no suggestion that the allegations involved her conduct as a Prosecutor. His Honour rejected this submission. Given the purposes of the ICAC Act, it was appropriate for the ICAC to have regard to a person's status as a public official in deciding whether to exercise its powers. This is particularly the case where Ms Cunneen holds senior office with the Director of Public Prosecutions, being an important role in the administration of justice, and where the allegations relate to possibly acting with intent to pervert the course of justice. The ICAC Act provides no distinction in relation to personal or private conduct.

His Honour also rejected the submission that the conduct alleged against the plaintiffs could not satisfy the test of 'corrupt conduct' under the ICAC Act because it could not constitute either perverting the course of justice (s 8(2)(g)) or a conspiracy or attempt to pervert the course of justice (s 8(2)(y)). It was said the allegations went no higher than an interference with a police investigation. However, relying on previous decisions, his Honour held that interference with an investigation with the intention to deflect criminal or disciplinary action can amount to perverting the course of justice or an attempt to pervert the course of justice.

The plaintiffs submitted that in exercising its power to conduct a public inquiry, the ICAC had exceeded its jurisdiction because certain facts that had to be taken into account were not satisfied. These included risk of undue prejudice to a person's reputation and whether the public interest in exposing the matter is outweighed by the interest in preserving the privacy of those concerned. His Honour held that the plaintiffs had to establish there was no basis for the ICAC's satisfaction about those matters. In this case, where allegations relating to interference with the course of justice are raised against persons, one of whom holds senior public office in the administration of justice, it cannot be said that no rational or reasonable decision maker could reach the view that no public hearing should be held.

The Court dismissed the plaintiffs' summons and reserved the issue of costs.