Replacing the applicant under s. 66B – Barkandji claim

Lawson v Minister for Land and Water Conservation (NSW) [2002] FCA 1517

Stone J, 9 December 2002

Issues

The issues for determination in this case were whether the authorisation of those named as the applicant in the Barkandji (Paakantyi) people's claimant application had been revoked and under what circumstances the Federal Court will permit the replacement of the applicant pursuant to s. 66B of the *Native Title Act* 1993 (Cwlth) (NTA).

Background

Dorothy Lawson and Philip Lawson (the Lawsons) made a claimant application on behalf of the Barkandji (Paakantyi) people by on 8 October 1997. The application relates to a large area of west and south-west New South Wales. On 29 August 1999, a delegate of the Native Title Registrar accepted the application for registration, thereby accepting that the Lawsons were authorised to bring the application in accordance with the traditional decision-making processes of the claim group.

An earlier application to replace the Lawsons was unsuccessful: see *Johnson, in the matter of Lawson v Lawson* [2001] FCA 894. In those proceedings, Justice Stone accepted that the Lawsons had lost the confidence of some very important members of the claim group. However, there was insufficient evidence to show that their authority had been revoked or that the relevant members of the claim group had been authorised, in accordance with the traditional process of decision making, to replace them, as required under s. 66B.

The claim was referred to the National Native Title Tribunal for mediation under s. 86B of the NTA, for the limited purpose of attempting to resolve the dispute about the Lawsons' authority to proceed as representatives of the claim group. As a result of the mediation, the Tribunal recommended that the court order that the New South Wales Native Title Services Ltd (NTS) convene an authorisation meeting. NTS is a corporate body funded to perform the functions of an Aboriginal/Torres Strait Islander representative body and a party to the proceedings. The meeting was convened by NTS at Broken Hill on 5 July 2002. Affidavit evidence was given of the steps taken to give interested parties notice of the meeting, which included:

> [E]xtensive advertising of the meetings that included a map of the claim area, an agenda for the meeting and contact details for further information, along with notice that limited travel and accommodation assistance to attend the meeting was available; information sessions convened by NTS; sending letters advising of the meeting to 130 people and to

> Local Aboriginal Land Councils within the claim area and letters to the Lawsons and their legal representative.

Detailed minutes of the meeting were taken. One hundred and forty people attended. This was said to be an unusually large number for a claimant meeting. The absence of the Lawsons was noted in the minutes with regret. The meeting was chaired by NTS and Smiley Johnson, a Barkandji man and Chief Executive Officer of the Indigenous Land Corporation. According to the minutes, after discussion, a vote was taken by a show of hands to revoke the authority of the Lawsons to act as the applicant. The minutes recorded that the vote to remove the Lawsons was 'unanimous' and that eight persons were approved to replace the Lawsons by applause, rather than a formal vote.

Authorisation under the NTA

Subsection 61(1) of the NTA provides a claimant application may be made under the NTA only by those persons authorised by:

> All the persons (the native title claim group) who, according to their traditional laws and 20 customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title group.

Subsection 61(2) provides that, where more than one person is named as being authorised to bring the application, the people named are jointly 'the applicant'. The concept of authorisation is dealt with in s. 251B.

Five of the eight persons named in the minutes of the meeting (the proposed applicant) made an application to the court seeking to have their names substituted as the applicant, in place of the Lawsons, pursuant to s. 66B of the NTA, on the basis that the Lawsons' authority had been revoked. Stone J referred to s. 251B of the NTA and agreed with Mansfield J in *Ward v Northern Territory* [2002] FCA 1477 that the section applies implicitly to the revocation of authority by a native title claim group. Her Honour also cited with approval the approach taken by French J in *Daniel v Western Australia* [2002] FCA 1147—see *Native Title Hot Spots* Issue 2.

The Lawsons conceded that the persons named in the s. 66B application were all members of the native title claim group, as required. All the parties accepted that the Lawsons' original authorisation was conferred by a traditional decision-making process that existed at the time. That being the case, the Lawsons submitted that the alternative decision-making process referred to in s. 251B(b) could not apply and, therefore, that the meeting at Broken Hill was not sufficient to remove them and replace them with the proposed applicant.

The proposed applicant said that there is no challenge to the traditional decision-making process that appointed the Lawsons in the first place. However, the traditional system was unable to cope with the decisions now required in respect of a native title application. Therefore, the group had to resort to the more direct

approach and have the claim group directly vote on the issues relevant to the application.

Her Honour was satisfied that 'there is no relevant traditional decision-making process capable of dealing with the decisions that need to be made to progress this matter and resolve the problem of who is to represent the Claim Group'. In light of this, it was found that reference should to be made to s. 251B(b)—at [21].

After stating that she was satisfied that all reasonable steps had been taken to advise members of the claim group, her Honour found that 'non-attendance of the Lawsons [was not] sufficient to invalidate the decision-making process adopted by the meeting' i.e. the acceptance of voting by show of hands and a unanimous vote— at [22].

Stone J then addressed whether this new form of decision making resulted in authorisation of the applicants and found that it is not a requirement, that all the persons in the claim group must be in agreement—at [24]ff.

Section 251B specifies what is required to establish that 'all persons in a native title claim ...authorise a person or persons to make a native title determination application'. Her Honour took the view the word 'all' has a limited meaning in this context, noting that the word 'all' is not repeated in s. 251B(b), which comes into operation if there is no traditional process of decision-making 'in relation to authorising the things of that kind'. Stone J was of the opinion that the subsection does not require 'all' members of the relevant claim group to be involved in making the decision. Nor does it require the unanimous vote of every member. According to her Honour, such an approach would allow individual members to veto any decision and it would be 'difficult if not impossible for a claimant group to progress a claim'. The court concluded that 'it is sufficient if a decision is made once the claim group are given every reasonable opportunity to participate in the decision-making process'—at [25].

Her Honour was satisfied that all reasonable steps were taken to advise the members of the Claim Group. In the absence of any evidence to the contrary, it was accepted that those who did not participate in the meeting chose not to be involved in the decision making of the claim group—at [17].

This conclusion should be read in the light of the facts of this case i.e. there was no evidence of that members of the claim group, other than the Lawsons, did not attend the meeting—see at [22].

Further, the meeting was well attended, appropriately advertised and there was no dissent from any of the resolutions that were passed. Therefore, it was safe to assume that the resolutions approved by the meeting were approved by the claim group, including the resolution to revoke the Lawsons authority and replace them—at [27].

As an incidental point, the Lawsons asserted that some of the members at the meeting who voted were not members of the claim group. Her Honour considered that this did not invalidate the vote. The NTA did not require that decisions of native title claim groups be:

> [S]crutinised in an overly technical or pedantic way. Unless a practical approach is adopted to such questions the ability of indigenous groups to pursue their entitlements under the Act will be severely compromised—at [28]

Further, in finding that the Lawsons' authorisation had been revoked, there was no necessity to reach a conclusion or express any opinion as to their prior conduct of the claim or whether or not they have been fairly or unfairly treated by the claim group—at [29].

That said, it does not appear that this case could be relied upon where there was a challenge to the process through which authority was purportedly given pursuant to s. 251B(b).

Decision

Her Honour was satisfied that the requirements of s. 66B had been met and ordered the proposed applicant replace the Lawsons.