

JEMENA GAS NETWORKS (NSW) LIMITED v MINE SUBSIDENCE BOARD (S312/2010)

Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 146

Date of judgment: 28 June 2010

Date of grant of special leave: 10 December 2010

The Appellant owns and operates the Moomba to Sydney gas pipeline ("the Pipeline"). That pipeline traverses Mallaty Creek, an area the subject of an underground coal-mining lease. In December 2004 that coal-mining lease encompassed a block of parallel, adjacent panels of coal that had been approved for longwall mining known as Longwalls 29 to 33.

The Appellant did not anticipate that the mining of Longwalls 29 to 31 would cause any subsidence or damage to the Pipeline. It did however anticipate that the mining of coal from Longwall 32 would.

In October 2006 the Appellant commenced work designed to prevent any subsidence-related damage to the Pipeline from the anticipated mining of Longwall 32. In July 2007 it made a claim for compensation pursuant to the *Mine Subsidence Compensation Act* 1961 (NSW) ("the Act") with respect to such. On 23 July 2008 the Respondent rejected that claim. The Appellant then appealed to the Land and Environment Court.

On 30 June 2009 Justice Sheahan rejected the Appellant's claim. This was because the subject works were incurred in anticipation of future subsidence, not with respect to existing subsidence. In doing so, his Honour applied the decision of *Mine Subsidence Board v Wambo Coal Pty Ltd* ("Wambo").

Upon appeal the Appellant submitted that *Wambo* was distinguishable on the basis that some "initial subsidence" had already occurred. In the alternative it submitted that *Wambo* was wrongly decided.

On 28 June 2010 the New South Wales Court of Appeal (Spigelman CJ, Allsop P, Giles, Basten & Macfarlan JJA) dismissed the Appellant's appeal. Their Honours unanimously held that as *Wambo* could not be regarded as "plainly" or "clearly" wrong, the Court was bound to follow it. Chief Justice Spigelman, President Allsop, Justice Giles and Justice Macfarlan also found that Justice Sheehan had correctly treated the mining of each longwall as a separate course of conduct with respect to the "extraction of coal". The subsidence caused by the mining of Longwall 32 was not therefore a "further subsidence" and *Wambo* could not be distinguished on that basis.

Chief Justice Spigelman, President Allsop and Justice Giles further held that *Wambo* interpreted s 12A(1)(b) of the Act as authorising claims for expenditure that had been incurred to prevent or mitigate damage from subsidence that has already taken place, not that which was anticipated.

The grounds of appeal include:

- The Court of Appeal erred in construing s 12A(1)(b) of the Act so as to limit the right of an improvement owner to compensation for preventative or mitigatory works only to those cases in which the subsidence reasonably anticipated to give rise to the damage has already taken place at the time the expense is incurred or proposed.
- The Court of Appeal erred in addressing the causal connection between subsidence and damage under s 12A(1)(b) of the Act by treating the mining of each longwall of a longwall mining operation as a separate extraction of coal for the purposes of the Act with separate causal consequences.