



HIGH COURT OF AUSTRALIA

1 June 2011

JEMENA GAS NETWORKS (NSW) LIMITED v MINE SUBSIDENCE BOARD
[2011] HCA 19

Today the High Court allowed an appeal from the Court of Appeal of the Supreme Court of New South Wales regarding the construction of s 12A(1)(b) of the *Mine Subsidence Compensation Act* 1961 (NSW). By majority, the High Court held that the appellant is entitled, under s 12A(1)(b) of the Act, to an amount from the Mine Subsidence Compensation Fund ("the Fund") to meet the proper and necessary expense of preventing or mitigating cumulative subsidence from approved longwall mining at Mallaty Creek that the appellant reasonably anticipated, based on expert advice, would likely cause damage to its pipeline.

The appellant owns and operates a gas pipeline which runs from Moomba to Sydney. The gas pipeline is the main source of natural gas for the Sydney and Newcastle metropolitan areas. The gas pipeline runs underground at the point where it crosses Mallaty Creek and traverses an area of land which is subject to a mining lease held by a subsidiary of BHP Billiton Limited relating to the West Cliff Colliery. The pipeline runs above a series of "panels" (designated areas) proposed, and used, for underground longwall mining. Longwall mining has been taking place in them for some years. Expert consultants predicted in December 2003 that there would be subsidence where the pipeline crosses Mallaty Creek when a certain panel was mined and that the subsidence would increase as subsequent longwall panels were mined. Other expert consultants advised in February 2004 that mitigating works would be needed as a result of future extraction from subsequent longwall panels. Between December 2005 and January 2007, the appellant undertook excavation work to prevent the pipeline being damaged by the predicted subsidence. The cumulative subsidence that eventuated after those works were undertaken broadly corresponded with the predictions of the expert consultants.

The Fund, to which colliery proprietors make compulsory contributions pursuant to the Act, is administered by the respondent, the Mine Subsidence Board ("the Board"). Under s 12A(1)(b), owners of improvements on land may make claims for payment from the Fund for proper and necessary expenditure incurred in preventing or mitigating damage to those improvements that, in the opinion of the Board, "the owner could reasonably have anticipated would otherwise have arisen, or could reasonably anticipate would otherwise arise, from a subsidence that has taken place". On 17 July 2007, pursuant to s 12A(1)(b), the appellant made a claim against the Fund for the costs of preventative and mitigatory works performed between December 2005 and January 2007 on the pipeline.

The Board considered that the appellant could not make a claim under s 12A(1)(b) of the Act. The Board held that a claim could only be made under that provision if the whole of the subsidence had occurred before the expense of preventative works was incurred.

The appellant instituted proceedings in the Land and Environment Court of New South Wales against the Board. That Court held that, assuming that the appellant could establish that the expenses were "proper and necessary", the appellant was not entitled to an amount under s 12A(1)(b) because the Court of Appeal had held in a previous case that no claim could be made unless the whole of the subsidence had occurred before the expense of preventative works was incurred. The appellant appealed to the Court of Appeal, however, the appeal was unanimously dismissed. The appellant appealed to the High Court.

By majority, the High Court held that claims under s 12A(1)(b) are not confined to expenditure incurred only once a subsidence has in fact occurred. Rather, claims under s 12A(1)(b) extend to expenditure that, in the opinion of the Board, the owner could reasonably have anticipated would otherwise have arisen, or could reasonably anticipate would otherwise arise, from a subsidence that has taken place prior to that damage arising, even though at the time when the expense is incurred or proposed there has not yet been either subsidence or damage.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*