HIGH COURT OF AUSTRALIA

GUMMOW, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

ALINTA LGA LIMITED (FORMERLY
THE AUSTRALIAN GAS LIGHT COMPANY)
& ANOR APPELLANTS

AND

MINE SUBSIDENCE BOARD RESPONDENT

Alinta LGA Limited (Formerly The Australian Gas Light Company) v Mine Subsidence Board
[2008] HCA 17
24 April 2008
S520/2007

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

J T Gleeson SC with J R Williams for the appellants (instructed by Freehills)

M J Leeming SC with S J Free for the respondent (instructed by Crown Solicitor (NSW))

CATCHWORDS

Alinta LGA Limited (Formerly The Australian Gas Light Company) v Mine Subsidence Board

Statutes – Interpretation – *Mine Subsidence Compensation Act* 1961 (NSW) ("the Subsidence Act") – Appellants claimed compensation from statutory fund for cost of works to prevent damage to pipeline from subsidence – Pursuant to s 15(5)(b) "no claim shall be entertained or payment made" where improvement erected without approval unless certificate is issued – Respondent Board found pipeline erected without approval and refused to issue certificate or entertain claim – Section 12B(b) conferred right of appeal to Land and Environment Court against "the decision of the Board as to the amount of the payment from the Fund" – Whether refusal of Board to entertain claim in absence of jurisdictional facts appealable under s 12B(b) or subject only to judicial review in Supreme Court.

Courts and judicial system – Jurisdiction – Land and Environment Court – Appeals – Class 3 – Sections 16 and 19(fl) of the *Land and Environment Court Act* 1979 (NSW) conferred jurisdiction to hear and determine appeals under s 12B of the Subsidence Act – Whether jurisdiction to hear and determine appellants' appeal against Board's decision – Relevance of breadth of powers under s 39(3) to conduct *de novo* rehearing.

Words and phrases – "amount", "appeal", "jurisdictional facts", "no claim shall be entertained or payment made".

Land and Environment Court Act 1979 (NSW), ss 16, 19(fl), 39.
Mine Subsidence Compensation Act 1961 (NSW), ss 12B, 15(5)(b).

1 GUMMOW, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. The Appin Mine Subsidence District was proclaimed under s 15(1) of the *Mine Subsidence Compensation Act* 1961 (NSW) ("the Subsidence Act") on 20 March 1968[1]. Located within that district are the Appin and West Cliff Collieries. Between May 1998 and July 2003, coal was extracted by a third party from longwalls in these collieries. AGL Gas Networks Limited owned the Wilton to Horsley Park natural gas pipeline ("the Pipeline") at that time. It had acquired the Pipeline in 1985 from The Australian Gas Light Company. The Pipeline was built in or around 1975 and passes through the Appin Mine Subsidence District.

2 The Australian Gas Light Company is now styled Alinta LGA Limited (the first appellant) and AGL Gas Networks Limited is now styled Alinta AGN Limited (the second appellant). It is convenient to refer to the appellants collectively as Alinta. Alinta alleges that the extractions between May 1998 and July 2003 caused subsidence to occur in the vicinity of the Pipeline and that it undertook preventative and mitigatory works to prevent damage to the Pipeline as a result of that subsidence. Alinta claims that the works cost $2,392,229.29.

3 Section 10(1) of the Subsidence Act establishes a Mine Subsidence Compensation Fund ("the Fund"). The Fund is under the direction and control of the respondent, the Mine Subsidence Board ("the Board") (s 10(4)). Sections 12 and 12A establish a scheme for the payment from the Fund of compensation for damage to improvements caused by subsidence, of amounts to meet the expense of preventing or mitigating such damage and of compensation for damage caused by the Board carrying out certain works. "Improvement" is defined by s 4 to include any building or work erected or constructed on land and, relevantly to this appeal, any pipeline.

4 The litigation which has reached this Court stems from the treatment by the Board of a claim made by Alinta on 28 September 2004. Alinta made a claim for compensation from the Fund in the sum of $2,392,229.29. By letter dated 14 October 2005, the Board informed Alinta that the claim could not be entertained by reason of s 15(5)(b) of the Subsidence Act. This states that "no claim shall be entertained or payment made under [the Subsidence Act]" in the circumstances there described. It will be necessary to set out the text of s 15(5)(b) in full later in these reasons. It is sufficient now to note that the

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1 In their submissions the appellants identified the source of the proclamation in legislation which in fact had been repealed in 1961 by s 2 of the Subsidence Act.

consequence of the Board's refusal to entertain Alinta's claim was that no payment of compensation from the Fund was made.

5 Alinta filed an application in the Land and Environment Court of New South Wales ("the LEC") on 10 February 2006. The application was identified as an "[a]ppeal under s 12B of [the Subsidence Act] against the decision of [the Board] as to non-payment from the Fund". Section 12B of the Subsidence Act states:

> "A person claiming compensation under section 12 or 12A may appeal to [the LEC] against the decision of the Board:
>
> (a) as to whether damage has arisen from subsidence or could reasonably have been anticipated, or
>
> (b) as to the amount of the payment from the Fund."

6 The Board sought to defend the application by contending that the LEC did not have jurisdiction to hear and determine the application for two reasons. The first was that the impugned decision was not a decision refusing a claim under s 12 or s 12A. The second was that, in any event, the Board had not made any decision as to the matters specified in pars (a) and (b) of s 12B. The primary judge (Biscoe J) identified as a preliminary question[2]:

> "whether [the LEC] has jurisdiction to hear and determine the application filed by [Alinta] on 10 February 2006".

His Honour directed that the preliminary question be determined separately and subsequently ordered that it be answered "yes".

7 At issue in this appeal from the Court of Appeal of the Supreme Court of New South Wales (Tobias JA and Handley AJA, Hodgson JA dissenting)[3] is whether that answer to the preliminary question was correct. On appeal by the Board, a majority of the Court of Appeal reached the opposite conclusion and ordered that the preliminary question be answered "no". Alinta seeks the reinstatement by this Court of the affirmative answer given by Biscoe J. For the reasons which follow the appeal to this Court by Alinta should be dismissed.

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2 *Australian Gas Light Co v Mine Subsidence Board* (2006) 147 LGERA 433 at 436.

3 *Mine Subsidence Board v Australian Gas Light Company* (2007) 152 LGERA 73.

8 No question arises in this appeal as to the merits of Alinta's claim to compensation or the correctness of the Board's decision. The preliminary question concerns the construction of s 12B of the Subsidence Act and the jurisdiction of the LEC to hear and dispose of appeals under that provision. The starting point in this regard is the *Land and Environment Court Act* 1979 (NSW) ("the LEC Act").

The LEC Act

9 The LEC is constituted by s 5 of the LEC Act. It is a superior court but of limited jurisdiction. Section 16 of the LEC Act provides:

> "(1) [The LEC] shall have the jurisdiction vested in it by or under this or any other Act.
>
> (1A) [The LEC] also has jurisdiction to hear and dispose of any matter not falling within its jurisdiction under any other provision of this Act or under any other Act, being a matter that is ancillary to a matter that falls within its jurisdiction under any other provision of this Act or under any other Act.
>
> (2) For the purposes of this Act, the jurisdiction of [the LEC] is divided into 7 classes, as provided in this Division."

10 Of the seven classes of jurisdiction referred to in s 16(2), it is the third class that is relevant to this appeal. Class 3 of the LEC's jurisdiction is titled "land tenure, valuation, rating and compensation matters" (s 19). Pursuant to s 19(fl), the matters within Class 3 of the LEC's jurisdiction include jurisdiction to hear and dispose of "appeals under section 12B of [the Subsidence Act]".

11 The powers of the LEC when hearing and disposing of appeals in Class 3 of its jurisdiction are described by s 39. They include the following. First, in accordance with s 39(3), the "appeal" is conducted by way of a *de novo* rehearing; fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision under appeal may be received. Secondly, for the purposes of hearing and disposing of the "appeal", the LEC has all the functions and discretions which the person or body whose decision is under appeal had in respect of "the matter the subject of the appeal" (s 39(2)). Thirdly, the decision of the LEC on the "appeal" is deemed, where appropriate, to be the final decision of the relevant person or body and shall be given effect accordingly (s 39(5)). Proceedings in Class 3 of the LEC's jurisdiction are

conducted with as little formality and technicality as possible (s 38(1)). The LEC is not bound by the rules of evidence (s 38(2)) and may obtain the assistance of other persons (s 38(3)), such as an assessor.

12 Alinta relies on the breadth of the LEC's powers under s 39 of the LEC Act to hear and dispose of appeals under s 12B of the Subsidence Act by way of a *de novo* rehearing. It submits that such a proceeding is an appeal in name only, and that the proceeding is in truth an original proceeding for a determination of the claimant's entitlement to payment from the Fund where the LEC is given by s 39(2) of the LEC Act all the functions and discretions of the Board.

13 While s 39 grants the LEC powers and discretions that provide, in effect, for a full merits review[4], those powers and discretions are only conferred in respect of an "appeal" as defined by the section[5]. Section 39(1) defines "appeal" when used in s 39 to mean:

> "an appeal, objection, reference or other matter *which may be disposed of by the Court in proceedings in Class 1, 2 or 3 of its jurisdiction*". (emphasis added)

Whether Alinta's application may be so characterised turns on the construction and application of s 12B of the Subsidence Act as no other matter arising under the Subsidence Act is included in Class 1, 2 or 3 of the jurisdiction of the LEC. This requires an understanding at the outset of the legislative scheme in which s 12B is located and the jurisdiction of the Board to make "decisions" of the kind referred to in s 12B.

14 An examination of the provisions of the Subsidence Act discloses an accommodation, on particular terms, between the interests of colliery proprietors and the owners of damaged improvements. The nature of that accommodation appears only from analysis of complex provisions of the statute. It is necessary to undertake that analysis for an appreciation of the issues on this appeal.

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4 cf *Administrative Appeals Tribunal Act* 1975 (Cth), s 43(1); *Australian Securities and Investments Commission v Donald* (2003) 136 FCR 7 at 13-14.

5 See *Dwyer v Calco Timbers Pty Ltd* [2008] HCA 13 at [2].

The Board and the Fund

15 Section 5(1) constitutes the Board. It is a body corporate capable of suing and being sued in its corporate name (s 6(1)). Its functions and duties include directing and controlling the Fund (s 10), collecting the contributions of colliery proprietors (s 11), investigating and determining claims for compensation (ss 12 and 12A), purchasing damaged improvements and effecting remedial works (s 13), carrying out preventative or mitigatory works (s 13A) and determining approvals and certifications (ss 15 and 15B).

16 The Board consists of the Director-General of the Department of Primary Industries or a member of staff of that Department as chairperson (s 5(2)(a)), the Chief Inspector of Coal Mines (s 5(2)(b))[6] and four persons appointed by the Governor (s 5(2)(c)). The persons appointed by the Governor must include a representative of the colliery proprietors (s 5(2)(c)(i)) and a person nominated by the Minister to represent improvement owners within mine subsidence districts (s 5(2)(c)(iii)). The composition of the Board is illustrative of the balance the Subsidence Act seeks to strike between the interests of the colliery proprietors and the owners of improvements within a mine subsidence district.

17 The Fund consists of the contributions of colliery proprietors (s 10(2)(b)) and certain other sums (s 10(2)(a), (c) and (d)), such as interest accruing from the investment of moneys in the Fund (s 10(2)(c)). Colliery proprietors are obliged to make contributions to the Fund in accordance with s 11(1A), (1B) and (1C) and the amount so calculated is deemed a debt due to the Crown and recoverable by the Board (s 11(8)).

18 The statutory *quid pro quo* for the contributions of colliery proprietors to the Fund lies in s 14(1) of the Subsidence Act. Provided the proprietor of a colliery holding is not in arrears with contributions (s 14(1)(a)) and observes operational covenants of the kind described by s 14(1)(b), the proprietor "shall not be liable for any damage to improvements or household or other effects occasioned by subsidence" (s 14(1)). This statutory immunity is stated not to extend to relieve the liability of a proprietor for damage caused by subsidence due to negligence (s 14(2)). Alinta submitted that s 14(1) would displace the

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6 By force of amendments to s 5(2)(b) commencing after the filing of Alinta's application in the LEC, now a person nominated by the Minister who has appropriate expertise in coal mine operations.

liability of a proprietor under the tort of nuisance; it is unnecessary to determine whether that is so.

Claims for payment from the Fund

19 Compensation is paid out of the Fund (s 10(3)(a)). There are two species of claim on the Fund, one in respect of damage (s 12) and the other for preventative or mitigatory works (s 12A). These will now be considered in turn.

20 Section 12(1) provides for the making of claims for payment from the Fund of compensation for damage caused by subsidence. The key provision is par (a) of that sub-section. This states that claims may be made for payment from the Fund of:

> "compensation for any damage to improvements that arises from subsidence, except where the subsidence is due to operations carried on by the owner of the improvements".

Claims may also be made for payment from the Fund of an amount to meet the expenses incurred in undertaking certain works (s 12(1)(b)) and an amount equivalent to lost rent where premises are untenantable or "such sum in lieu of rent as the Board deems just" where all or part of any building or work is occupied (s 12(1)(c)). "Household or other effects" are defined by s 4 and compensation for damage to such effects that arises from subsidence may also be claimed, save where subsidence is due to the owner's operations (s 12(1)(d)).

21 The procedure for making claims for payment from the Fund under s 12(1) is laid out in par (a) of s 12(2): the owner of an improvement, household or other effect damaged by subsidence may notify the Board of the details of such damage, the location of the improvement damaged, the description of the effect damaged, the amount claimed from the Fund, and such other particulars as may be prescribed; that notification is then treated as a claim for payment from the Fund; the notification must be in a form approved by the Board and within the time limit prescribed by the regulations[7].

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7 At the time of Alinta's claim, reg 6 of the Mine Subsidence Compensation Regulation 2002 (NSW) imposed a 12 month time limit (subject to extension by the Board in certain circumstances) by reference to the day on which the owner knew, or the Board determined the owner should have known, that damage was caused by subsidence. Regulation 6 of the Mine Subsidence Compensation Regulation 2007 (NSW), now in force, is to the same effect.

22 The obligations of the Board to investigate, report and make a decision on the claim are specified in par (b) of s 12(2). The notification:

> "shall be recorded and investigated by the Board, an officer of the Board or some other officer in the Public Service acting for the Board and on receipt of a report of such investigation the matter shall be placed before a meeting of the Board for a decision as to the payment, if any, to be allowed in respect of the damage to which such notification relates".

23 This is an important provision in the statutory scheme and must be read with s 8. For the purpose of exercising and discharging its powers, authorities, functions and duties under the Subsidence Act, s 8 grants the Board and the chairperson of the Board the powers, authorities, protections and immunities conferred on Royal Commissioners and the chairperson of a Royal Commission respectively by Div 1 of Pt 2 of the *Royal Commissions Act* 1923 (NSW). These powers include, for example, the power to summon persons to give evidence on oath or affirmation and produce any document or other thing[8]. The powers afforded to individual members of the Board by s 16 include the power to make inspection, examination and inquiry as may be necessary to ascertain the nature and extent of any damage to property and to ascertain whether the provisions of the Subsidence Act have been complied with (s 16(1)). Section 16(1A) confers a power of entry upon any land, subject to the conditions respecting entry into dwelling houses (s 16(1B)) and the giving of notice to occupiers of land (s 16(1C)).

24 We turn to the second species of compensation claim. The right to claim compensation for certain preventative or mitigatory works derives from par (b) of s 12A(1) of the Subsidence Act. This provides:

> "(1) Subject to this section, claims may be made under this Act for payment from the Fund of:
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> ...
>
> (b) an amount to meet the proper and necessary expense incurred or proposed by or on behalf of the owner of improvements or household or other effects in preventing or mitigating damage to those improvements or household or

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8 *Royal Commissions Act* 1923 (NSW), ss 8 and 9.

> other effects 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, other than a subsidence due to operations carried on by the owner."

Compensation to recover damage incurred as a result of the Board exercising its powers to undertake preventative or mitigatory works may also be claimed under par (a) of s 12A(1). Pursuant to s 13A, the Board may carry out "such works as, in its opinion, would reduce the total prospective liability of the Fund by preventing or mitigating damage" of the kind described in the section.

25 Claims made under s 12A(1) must specify the particulars required by s 12A(2)(c) and (d) and be made within the time limit prescribed by s 12A(2)(a) and (b). Once such a claim is made, s 12A(3) relevantly provides that:

> "The provisions of section 12(2)(b) … shall, mutatis mutandis, apply to and in respect of claims and payments under this section in the same manner as they apply to and in respect of notifications and payments under section 12."

It follows that, in dealing with a claim made under s 12A(1) of the Subsidence Act, the Board has the same functions and duties earlier described and is charged with the function of dealing with the claim in accordance with par (b) of s 12(2), to which reference has been made above.

Necessary approvals and certification

26 The statute also imposes obligations upon the owners of improvements and those effecting improvements. Observance of those obligations assists the interests of the colliery proprietors. That observance is encouraged by provisions denying the competency of claims to compensation from the Fund to which the colliery proprietors are required to contribute.

27 It is an offence for a person to do or cause to be done any work in connection with the erection or alteration of an improvement within a subsidence district without the Board's approval or in disconformity with such approval as is given (s 15(7)). It is also an offence for a person to subdivide or cause to be subdivided any land within a subsidence district without approval of the Board (s 15(8)). It is the former offence (s 15(7)) that is relevant to this appeal.

28 Three possible consequences flow from a contravention of s 15(7) of the Subsidence Act. First, there may be a prosecution under s 17, provided proceedings to prosecute are brought within 12 months of commission of the offence (s 15(10)). The maximum penalty is 20 penalty units. Secondly, where any improvement has been erected or altered in contravention of the section, a purchaser may cancel a contract for sale and recover any deposit paid together with reasonable costs and expenses (s 15(5)(a)). The reason why a purchaser might wish to do so becomes apparent when one has regard to the third possible consequence of a contravention. This is provided by s 15(5)(b). Read together with s 15(7), s 15(5)(b) relevantly provides that where an improvement has been altered or erected without the approval of the Board, "no claim shall be entertained or payment made under [the Subsidence Act] in respect of damage caused by subsidence" unless a certificate is issued under s 15B(3A). Such certificates take their place in the scheme of the Subsidence Act as follows.

29 A contravention of s 15(7) of the Subsidence Act may be avoided by a person applying to the Board for its approval to alter or erect improvements in the form required by s 15(2A). The Board may grant its approval conditionally or unconditionally (s 15(3)) and certificates of compliance in respect of that approval may be obtained under s 15B. A certificate of compliance is deemed to be conclusive evidence that the requirements of the Subsidence Act relating to an improvement have been complied with up to the date of the certificate (s 15B(4)). The rationale of the certification regime was explained by the then Minister for Minerals and Energy in the second reading speech upon the Bill for what became the *Mine Subsidence Compensation (Amendment) Act* 1989 (NSW) ("the 1989 Act"). The Minister said[9]:

> "The community is protected by certificates issued by the [B]oard … I am aware … of recent cases where members of the community have suffered financial loss because of the action of previous owners in failing to obtain the [B]oard's approval for erection or alteration of improvements ..."

30 So far as material, the Subsidence Act provides for the issue of compliance certificates in two circumstances. The first is found in s 15B(3): where the Board is satisfied that an improvement was erected in accordance with the Board's approval and an application for certification is made in the form required by s 15B(2), the Board shall issue a certificate in respect of the relevant

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9 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 19 September 1989 at 10127-10128.

improvement. Secondly, if the Board is satisfied that an improvement would have met the requirements of s 15B(3) had the Board's approval been obtained (s 15B(3A)(a)), and it is appropriate having regard to the circumstances of the case to do so (s 15B(3A)(b)), the Board "may" issue a certificate under s 15B(3A).

31 Section 15B(3A) was inserted into the Subsidence Act by the 1989 Act[10]. Read together with s 15(5)(b), the effect of an exercise by the Board of its discretion to issue a s 15B(3A) certificate is to enable the Board to entertain a claim in respect of damage caused by subsidence notwithstanding that an improvement was constructed or altered without its approval and in contravention of s 15(7). The objective of the insertion of s 15B(3A) is explained in the Explanatory Note to the Bill for the 1989 Act. The note gives as an aim of the Bill:

> "(d) to extend the compensation provisions to improvements ... that have met all requirements except prior approval".

32 It is now appropriate, with the statutory scheme in mind, to return to the facts and circumstances of this appeal.

The application for a s 15B(3A) certificate

33 Alinta applied for a "[c]ertificate under s 15B" in relation to the Pipeline in a letter to the Board dated 23 April 2003. No distinction was drawn in that letter between the two limbs of s 15B on which such a certificate might issue. Alinta asserted as the basis for its application that the Pipeline was constructed in compliance with the *Pipelines Act* 1967 (NSW) ("the Pipelines Act") and that Alinta had been granted a licence by the Governor and had the consent of the Minister for Mines to operate. At that time, the Minister for Mines was also responsible for administering the Subsidence Act.

34 No point has been taken at any stage in these proceedings as to the interaction (if any) between the Pipelines Act and the Subsidence Act or the statutory relationship (if any) between any licence granted to Alinta under the Pipelines Act and the requirement for approval under s 15 of the Subsidence Act. Nor has either party referred at any stage to any relevant Commonwealth legislation.

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10 Schedule 1, Item 9.

35 In further correspondence to the Board dated 24 March 2004, Alinta asked the Board to treat "this letter, and our previous correspondence, as an application" for a "section 15B(3A) certificate" for that part of the Pipeline which traversed the Appin Mine Subsidence District. The letter asserted, as the basis for the application:

> "It is clear … that [the Board] would have given the requisite approval to [Alinta] (assuming for these purposes only, because of the lack of records both within [Alinta] and [the Board], that no such approval was in fact sought or given at the time)."

36 The Board informed Alinta of its refusal to issue a certificate under s 15B(3A) by letter of the Secretary dated 29 July 2005. The Secretary stated with reference to s 15B(3A)(b) that the Board was not satisfied that it was appropriate to issue a certificate in the circumstances. The reasons given for the Board's lack of satisfaction included Alinta's "failure to obtain approval" at the time of construction of the Pipeline, delay in applying for certification, and the Board's belief that:

> "Issue of a certificate under s 15B(3A) will mean the entertainment and payment of a compensation claim from [Alinta] under [the Subsidence Act] is not precluded by operation of s 15(5)(b)".

37 Alinta took issue with that interpretation by further letter to the Board dated 28 September 2005. Alinta asserted that:

> "[S]ection 15(5)(b) of the Act refers only to payments in respect of 'damage caused by subsidence'. This wording is the same as the wording used in section 12 of the Act and clearly differs from the wording used in section 12A of the Act. That latter section refers to 'damage … that … the owner could have reasonably anticipated would otherwise have arisen'. On this basis, section 15(5)(b) of the Act:
>
> (A) precludes payments under section 12 of the Act unless a section 15B(3A) Certificate has been issued; but
>
> (B) does not preclude payments under section 12A of the Act if no such certificate has been issued."

38 Alinta's letter of 28 September 2005 also pressed the Board to reconsider its decision to refuse to grant a s 15B(3A) certificate. The Board responded to

these matters when dealing with Alinta's claim for compensation on 14 October 2005.

The application for compensation

39 Alinta applied to the Board for compensation from the Fund on 28 September 2004, before the Board's decision to refuse its application for certification. The amount of the claim was specified as $2,392,229.29, being the costs of the mitigatory works that Alinta allegedly undertook to prevent damage to the Pipeline that would otherwise have arisen because of subsidence. Although the initial claim drew no distinction between ss 12 and 12A of the Subsidence Act, it was later particularised by reference to both those provisions.

40 By the letter of 14 October 2005, under the hand of the Secretary, the Board informed Alinta of its decision to refuse to entertain Alinta's claim to compensation. The letter stated that the Board did not propose to reconsider its refusal to issue a s 15B(3A) certificate and that:

> "Given the Board's decision to refuse to issue a certificate, [Alinta's] claims under ss 12(1) and 12A(1)(b) of [the Subsidence Act] cannot be entertained, by reason of s 15(5)(b)."

The letter then set out the following additional observations:

> "Your comments on the application of s 15(5)(b) to s 12A(1)(b) in your letter of 28 September 2005 are noted. However, the Board respectfully disagrees with your interpretation of s 15(5)(b).
>
> …
>
> Insofar as [Alinta] claims compensation from the [F]und with respect to expenses incurred to prevent damage that might otherwise have arisen had *anticipated subsidence* occurred, I draw the following matters to your attention. The key provisions of the Act regarding compensation for damage arising from subsidence (s 12) and the recovery of expenses incurred in preventing or mitigating damage that would otherwise arise from subsidence (s 12A) apply only in respect of *subsidence that has taken place*. Those sections do not provide for the owner of an improvement to recover expenses incurred in preventing or limiting the damage that might be caused by *anticipated subsidence* … It is the Board's view that the only way in which a claim may be made with respect to expenses for works to prevent damage that might otherwise

have arisen had anticipated subsidence taken place is through the operation of s 13A." (original emphasis)

41 It was that additional commentary which founded the primary judge's affirmative answer to the preliminary question. Biscoe J accepted that, by expressing the "view" that ss 12 and 12A did not provide for the recovery of expenses incurred in connection with "anticipated subsidence", the Board had made a decision "as to whether damage has arisen from subsidence or could reasonably have been anticipated" within the meaning of s 12B(a) of the Subsidence Act. It followed that his Honour found that the LEC had jurisdiction to hear and dispose of an appeal against that decision (s 16(1) of the LEC Act) and matters ancillary to it (s 16(1A) of that statute). The matters his Honour considered to be within the ancillary jurisdiction included the Board's decisions to refuse to issue a s 15B(3A) certificate and to refuse to entertain Alinta's claim to compensation.

The appeal to this Court

42 It is no longer contended by Alinta that the Board's "view" as to "anticipated subsidence" as expressed in the letter of 14 October 2005 was a decision "as to whether damage … could reasonably have been anticipated" within s 12B(a) of the Subsidence Act. Each of the members of the Court of Appeal concluded that the primary judge erred in so finding[11]. No complaint is made by Alinta as to their Honours' conclusion in that respect. Nor does Alinta now contend that the refusal of the Board to issue Alinta with a s 15B(3A) certificate involved a decision as to the matters specified in s 12B(a) or (b) of the Subsidence Act.

43 At issue in this Court is whether the Board's refusal to entertain Alinta's claim to compensation was a decision against which an appeal lay to the LEC under s 12B(b) of the Subsidence Act. The majority in the Court of Appeal concluded that a decision as to "the amount of the payment from the Fund" under s 12B(b) is a decision that determines the quantum of compensation to be paid from the Fund and that the Board's refusal to entertain Alinta's claim by reference to s 15(5)(b) could not be so characterised.

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11 (2007) 152 LGERA 73 at 78 per Hodgson JA, 97 per Tobias JA and 99 per Handley AJA.

44 Alinta's fundamental contention before this Court is that *any* decision of the Board which has the legal effect that there be no payment from the Fund engages the right of appeal in s 12B(b), and that this is so however that decision is reached. That proposition was adopted by Hodgson JA in his dissenting reasons. His Honour considered there were 10 issues which might arise for determination on a claim for payment from the Fund and stated that he could see no reason why the legislature would permit an appeal in respect of some (but not other) issues "if that decision results in a nil award"[12].

45 The contention advanced by Alinta should be rejected as contrary to the text and scheme of the Subsidence Act.

"No claim shall be entertained"

46 The Subsidence Act adopts the expression "no claim shall be entertained or payment made under [the Subsidence Act]" in two provisions. The first is the penultimate paragraph of s 12(1), which refers to the earlier legislation, the *Mine Subsidence Act* 1928 (NSW) ("the 1928 Act"), and provides[13]:

> "No claim shall be entertained or payment made under this Act in respect of any improvement which was the subject of a conditional right to insure granted under section 16 of [the 1928 Act] unless the conditions of such conditional right have been, and are at the date of making such claim, complied with, or, where such conditions have not been or are not being so complied with, unless the Board is satisfied that any departure from or contravention of such conditions is such that it need not be rectified."

47 The second provision is s 15(5)(b), summarised earlier in these reasons. Section 15(5) states:

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12 (2007) 152 LGERA 73 at 76.

13 The 1928 Act established a different scheme whereby owners of improvements paid a premium for certificates of insurance against damage caused by subsidence (ss 4(1) and 5(2)) and the Board determined claims against that insurance (s 10(1)). Section 16(1) of the 1928 Act forbad owners of land within a subsidence district to alienate any portion of their land in subdivision unless an application for insurance in respect of improvements had first been made to the Board, which insurance could be granted unconditionally or conditionally (s 16(3)).

"Where any improvement has been erected or altered or subdivision has been made in contravention of this section:

(a) …

(b) no claim shall be entertained or payment made under this Act in respect of damage caused by subsidence to any such improvement or to any improvement upon land within any such subdivision, unless a certificate is issued under section 15B(3A) in respect of the improvement or land."

48 The language of "entertain" and "payment" is also found in s 12(1A) of the Subsidence Act. Section 12(1A) relevantly provides that the Board "may refuse to entertain a claim, or make a payment" where improvements or household or other effects were used in extractive industries or operations and the Board is satisfied that the relevant subsidence was caused by the carrying on of that industry or operation. Alinta submitted that the use of "may" in s 12(1A) is akin to that discussed in *Leach v The Queen*[14] and confers no discretion on the Board as to whether it should refuse to entertain a claim or make a payment in such circumstances. It may be assumed, without deciding, that this analysis is correct.

49 Alinta characterises the Board's refusal to entertain its claim to compensation as a "decision" made under s 12(2)(b) that "no payment be made from the Fund in the absence of a s 15B(3A) certificate". That decision of "no payment" is said to be a decision "as to the amount of the payment from the Fund" for the purposes of s 12B(b) of the Subsidence Act.

50 However, in this characterisation there is implicit a misunderstanding of the decision-making process mandated by the provisions just described and by s 15(5)(b) in particular. Section 15 manifests a policy that the alteration or erection of improvements within a mine subsidence district should only take place with the Board's approval. One of the means of giving effect to that policy is to place persons who contravene s 15 in a position where they are unable to recover compensation from the Fund in respect of damage caused by subsidence by force of s 15(5)(b), unless a certificate is issued under s 15B(3A).

51 This object might readily have been achieved by stating "no payment shall be made under this Act", but the disjunctive phrase "*no claim shall be*

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14 (2007) 230 CLR 1 at 17-18 [38]; [2007] HCA 3.

entertained or payment made under this Act" is adopted in s 15(5)(b) (emphasis added). This provides a powerful textual indication that s 15(5)(b) curtails not just a claimant's entitlement to payment from the Fund, but also the Board's jurisdiction to investigate, report and make a decision as to the payment, if any, to be allowed under s 12(2)(b). In this regard, both Alinta and the Board accept that the words "under this Act" in s 15(5)(b) should be read as providing "no claim shall be entertained [under this Act] or payment made under this Act".

52 The Board submits that s 15(5)(b) requires the Board to satisfy itself that the approval regime prescribed by s 15 has been complied with before exercising its extensive powers to investigate, report and determine claims for payment from the Fund under s 12(2)(b). This construction is explained by the statutory context. Expenses incurred by the Board in administering the Subsidence Act, including expenses incurred in investigating notifications of damage and claims for payment, are paid out of the Fund (s 10(3)(b)). Determining the cause and extent of damage in a claim for payment from the Fund may be complex and difficult, especially where (as here) the improvement concerned is a major underground infrastructure. However, where the Board finds that an improvement was altered or erected in a mine subsidence district without the Board's approval and no certificate has issued under s 15B(3A), the words "no claim shall be entertained" take effect. They relieve the Board from incurring unnecessary costs investigating and determining whether damage has been caused by subsidence and the extent and quantum of such damage when, in any event, no payment could be made because there has been a contravention of s 15.

53 Subject to one additional matter, the Board's construction of s 15(5)(b) should be accepted. So construed, s 15(5)(b) presents jurisdictional facts upon which the exercise of the Board's powers under s 12(2)(b) to investigate and determine claims for compensation are conditioned[15]. In this case, the Board found that requisite facts presented by s 15(5)(b) (approval under s 15 or the issue of a certificate under s 15B(3A)) were not established.

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15 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430, 432; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 650-654 [127]-[137]; [1999] HCA 21; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 609 [183]; [2002] HCA 54.

54 Alinta has never conceded in this litigation that the Pipeline was erected without the Board's approval. Relevantly in this regard, Hodgson JA observed in the Court of Appeal that[16]:

> "If the Board erroneously decides that an improvement was erected otherwise than in accordance with an approval of the Board, and for that reason does not entertain an application, then presumably, unless s 12B applies, the claimant could seek an order in the nature of mandamus in the Supreme Court."

In this Court, the Board did not seek to resist that suggestion. To the contrary, it accepted that no specific time limit applies to an application for orders in the nature of mandamus in the New South Wales Supreme Court[17] and referred the Court to s 65 of the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act"). Section 65 confers powers on the Supreme Court to "order any person to fulfil any duty" (s 65(1)) and is a simplified procedure unencumbered by the technicalities which attend the issue of the writ of mandamus at common law[18].

55 The additional matter concerns Alinta's submission that s 15(5)(b) applies only to claims for payment made under s 12(1) and has no application to s 12A. That contention was summarised in Alinta's letter to the Board of 28 September 2005. This is reproduced in part earlier in these reasons. Alinta's claim was particularised there by reference to both ss 12 and 12A.

56 However, it is unnecessary to determine whether s 15(5)(b) precludes the Board from entertaining claims made under s 12A in addition to its operation on claims made under s 12(1). That question might arise in proceedings for an order in the nature of mandamus, but does not arise here. The Board decided that it could not entertain Alinta's claim by reason of s 15(5)(b). Whether that decision was right or wrong, it will be seen that no decision was made as to the subject

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16 (2007) 152 LGERA 73 at 77.

17 cf r 25.07.2 of the High Court Rules 2004 (Cth). As to the discretionary considerations that would apply at common law, see *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 667 [40]-[42]; [2007] HCA 14.

18 *Dickinson v Perrignon* [1973] 1 NSWLR 72 at 82-83; *McBeatty v Gorman* [1976] 2 NSWLR 560 at 564.

matter referred to in s 12B and there arose no right of appeal to the LEC. We turn now to s 12B.

Section 12B

57 Section 12B is set out earlier in these reasons and repeated for convenience. The section provides:

> "A person claiming compensation under section 12 or 12A may appeal to [the LEC] against the decision of the Board:
>
> (a) as to whether damage has arisen from subsidence or could reasonably have been anticipated, or
>
> (b) as to the amount of the payment from the Fund."

58 Three observations may be made about the text of s 12B. First, there must be a decision of the Board on a claim under ss 12 or 12A for the right of appeal provided by s 12B to be enlivened. The Board's decision on an application for approval under s 15 or certification under s 15B will not meet the statutory description called for by the section. It may thus be observed at the outset that not every decision of the Board will be the subject of an appeal to the LEC.

59 The second observation is that the Board's decision on the claim must be a decision "as to" one of two classes of subject matter (identified in pars (a) and (b) of s 12B) for the right of appeal to be enlivened.

60 The third observation is that the subject matter prescribed in pars (a) and (b) is identified and delimited by the language of ss 12 and 12A. This proposition is elucidated by a textual comparison. The disjunctive expression "arisen from subsidence or could reasonably have been anticipated" in par (a) corresponds to the language used to prescribe causal elements of claims under ss 12 and 12A respectively. Under s 12(1), compensation may be claimed for damage which "*arises from subsidence*" (s 12(1)(a) and (d)) (emphasis added). That language is adopted by the first limb of s 12B(a) which refers to a decision "as to whether damage *has arisen from subsidence*" (emphasis added). By way of example, the Board may decide on a claim under s 12(1)(a) that there is no damage or less damage than is claimed or that the relevant damage pre-existed the alleged subsidence or has some other cause. Those decisions would be decisions as to the subject matter identified by s 12B(a). Similarly, a claim may be brought under s 12A(1)(b) in respect of an amount to meet the expense of preventing or mitigating damage 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 (emphasis added). This language is reflected by the second limb of s 12B(a). This provides a right of appeal against a decision "as to whether damage … *could reasonably have been anticipated*". Pursuant to s 12B(a), an appeal lies to the LEC against the Board's decision as to that subject matter on a claim under s 12A.

61 As to par (b) of s 12B, claimants under ss 12(1) or 12A(1) must specify the "*amount* claimed" from the Fund in their application (ss 12(2)(a) and 12A(2)(c)) (emphasis added). Sections 12(1)(b) and 12A(1)(b) confer the right to make a claim for an "*amount* to meet the proper and necessary expense" of undertaking certain works (s 12(1)(b)) or preventing or mitigating damage (s 12A(1)(b)) and s 12(1)(c) confers the right to make a claim for an "*amount* equivalent to the rent which would have been payable" (emphasis added). The Board may also reduce "the *amount* of compensation" where the damage caused by subsidence is greater because of the negligent or improper manner in which an improvement is constructed or maintained (s 12(1), ultimate paragraph) (emphasis added). The Board's decision as to the quantum of payment from the Fund pursuant to these provisions would be a decision "as to the amount of the payment from the Fund" within s 12B(b) of the Subsidence Act.

62 The Board submits that, if a broader construction of s 12B(b) be accepted, s 12B(a) would be rendered redundant. This would be because any adverse decision by the Board on the question of causation which leads to the refusal of a claim and hence "no payment" or a reduced payment is appealable under s 12B(b). Hodgson JA recognised the force of this submission but observed that[19]:

> "It seems to me unlikely that the legislature intended that the availability of an appeal, and the availability or need to approach the Supreme Court, should depend upon capricious distinctions … so although there is force in the contention that a broad construction of s 12B(b) would render s 12B(a) otiose, I think the broad construction of s 12B(b) is preferable."

63 However, there may be a number of reasons for the distinction drawn by the text of s 12B. One is that s 12B reflects an intention to limit the liability of

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19 (2007) 152 LGERA 73 at 77.

the Fund under s 10(3)(b) to the costs of a rehearing in the LEC on any decision of the Board that goes on appeal. Another is that the legislature left to the Board the determination of jurisdictional facts, subject to scrutiny only on judicial review in the Supreme Court. That state of affairs is more readily understood where, as here, the jurisdictional impediment was in the alleged absence of approval and the absence of a certificate respecting Alinta's improvement. On the other hand, the legislation left for determination by the LEC *de novo* such questions as the determination of causation and quantum of compensation in claims competently made against the Fund.

64 The right of appeal to the LEC is restricted to appeals against decisions of the Board as to the subject matter identified in s 12B(a) and (b). The outcome of "no payment" in this case followed not from a decision as to either of those subject matters, but from the Board's application of the statutory requirement that no claim be entertained in the circumstances prescribed by s 15(5)(b). In these circumstances, there was no decision of the Board "as to the amount of the payment from the Fund" under s 12B(b) against which an appeal would lie to the LEC. The jurisdiction to hear and dispose of an appeal under s 12B of the Subsidence Act is not enlivened by Alinta's application.

65 One final point may be noted. This concerns Alinta's reliance on the legislative history of the right of appeal under the Subsidence Act. Alinta referred the Court to the 1928 Act and the Subsidence Act as it stood before amendment to include s 12B. It is unnecessary to set out that history here. The submission raised essentially the same question as to construction and takes Alinta's case no further.

Orders

66 It follows that the answer to the preliminary question is "no". The appeal should be dismissed with costs.