HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

JEMENA GAS NETWORKS (NSW) LIMITED APPELLANT

AND

MINE SUBSIDENCE BOARD RESPONDENT

Jemena Gas Networks (NSW) Limited v Mine Subsidence Board
[2011] HCA 19
1 June 2011
S312/2010

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 28 June 2010 and in their place order:*

   (a) *That the appeal to that Court be allowed.*

   (b) *Set aside the orders of the Land and Environment Court of New South Wales made on 17 July 2009 and in their place order that the preliminary question of law identified by Sheahan J of the Land and Environment Court of New South Wales, namely:*

   > *Whether the Applicant is entitled to an amount under section 12A(1)(b) of the* Mine Subsidence Compensation Act 1961 *(NSW) in respect of expenses that it incurred in performing work on the Sydney to Moomba Gas Pipeline in circumstances where subsidence occurred at or near Mallaty Creek near Campbelltown in or about October 2005, on the assumption that the Applicant can establish that, for the purposes of that section, the expenses incurred by it were "proper and necessary",*

   be answered:

   > *It being agreed that the applicant reasonably anticipated, based on expert advice, that cumulative subsidence at Mallaty*

Creek from approved longwall mining of Longwalls 30-32 was likely to cause damage to its pipeline, the applicant was entitled under s 12A(1)(b) of the Mine Subsidence Compensation Act *1961 (NSW) to an amount from the Mine Subsidence Compensation Fund to meet the proper and necessary expense of preventing or mitigating that damage.*

(c) The Board to pay the appellant's costs of the hearing of the preliminary question before the Land and Environment Court and of the appeal to the Court of Appeal.

3. The Board to pay the costs of the appellant of the appeal to this Court.

On appeal from the Supreme Court of New South Wales

Representation

R J Ellicott QC with J R Williams for the appellant (instructed by Freehills)

S B Lloyd SC with S J Free for the respondent (instructed by Crown Solicitor (NSW))

CATCHWORDS

Jemena Gas Networks (NSW) Limited v Mine Subsidence Board

Mining – Compensation – Section 12A(1)(b) of *Mine Subsidence Compensation Act* 1961 (NSW) allowed claims by owners of improvements for payment from Mine Subsidence Compensation Fund ("Fund") for proper and necessary expense incurred or proposed in preventing or mitigating damage that, in opinion of Mine Subsidence Board, owner "could reasonably have anticipated would otherwise have arisen, or could reasonably anticipate would otherwise arise, from a subsidence that has taken place" – Appellant made claim for costs of preventative and mitigatory works performed on pipeline after receiving expert advice that such works would be necessary as result of certain underground longwall mining – Whether appellant entitled to compensation from Fund under s 12A(1)(b) – Whether entitled to compensation only if subsidence occurred before expense incurred in preventing or mitigating damage – Whether "from a subsidence that has taken place" in s 12A(1)(b) refers to actual past occurrence or hypothetical future occurrence of subsidence.

Words and phrases – "from a subsidence that has taken place".

Mine Subsidence Compensation Act 1961 (NSW), ss 11, 12A(1)(b), 13A, 14.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. This appeal relates to the *Mine Subsidence Compensation Act* 1961 (NSW) ("the Act"). Section 10 of the Act provides for the creation of a Mine Subsidence Compensation Fund ("the Fund"). The Fund is administered by the respondent, the Mine Subsidence Board ("the Board"). By s 8 of the Act, the Board has the wide powers of a commission under the *Royal Commissions Act* 1923 (NSW), Pt 2 Div 1. Colliery proprietors make compulsory contributions to the Fund (s 11). Claims may be made by the owners of improvements for payment from the Fund of expenditures in relation to subsidence-caused damage to those improvements (ss 12 and 12A).

2 The appeal concerns the construction of s 12A(1)(b) of the Act. Section 12A(1)(b) provides for compensation to be paid out of the Fund by the Board to the owners of improvements on land for expense incurred in preventing or mitigating damage from subsidence caused by mining[1]. It is a difficult provision, which has occasioned considerable controversy in the courts of New South Wales.

The factual background

3 The appellant owns and operates a gas pipeline which runs from Moomba to Sydney. It is licensed to do so under Pt 3 of the *Pipelines Act* 1967 (NSW), and hence it is a "licensee" for the purposes of that Act. The gas pipeline is the main source of natural gas for the large populations who live in the Sydney and Newcastle metropolitan areas. For the most part the gas pipeline runs underground, and it does so at a point where it crosses Mallaty Creek. The pipeline traverses an area of land which is subject to a mining lease relating to the West Cliff Colliery. That mining lease is held by a subsidiary of BHP Billiton Limited.

4 The pipeline runs above a series of parallel panels numbered 29-36. Those panels have been proposed for longwall mining. Longwall mining has been taking place in them for some years. On 14 April 2003, longwall mining in Longwall 29 began. In December 2003, expert consultants predicted that there would be subsidence at the point where the pipeline crosses Mallaty Creek when Longwall 30 was mined. They also predicted that the subsidence would increase as subsequent longwall panels were mined. In February 2004, other expert

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1 See below at [6].

consultants advised that no works were needed to mitigate the cumulative effects of subsidence arising from extraction from Longwall 30 and Longwall 31. But they advised that mitigation works would be needed as a result of extraction from Longwall 30, Longwall 31 and Longwall 32.

5 The mining of Longwall 30 was completed on 4 June 2005, and of Longwall 31 on 11 December 2006. Between December 2005 and January 2007, work was done to excavate the pipeline and the three other pipelines which pass along the same easement, to decouple the four pipelines from the soil, and to carry out associated filling. On 20 December 2006, the cumulative subsidence was 42.3mm. In February 2007, the mining of Longwall 32 commenced. By 30 April 2007, the cumulative subsidence had risen to 140.4mm. By 28 August 2007, the cumulative subsidence had risen to 274.7mm. This broadly corresponded with the predictions of the expert consultants.

6 Meanwhile, on 17 July 2007 the appellant made a claim for $2,770,664 against the Board under the Act for the costs of preventative and mitigatory works performed on the pipeline on the northern side of Mallaty Creek. Section 12A(1)(b) provides:

> "(1) Subject to this section, claims may be made under this Act for payment from the Fund of:
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> …
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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 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."[2]

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2 Section 12A(1)(b), introduced in 1969, may be compared with s 12(1)(a) and (b), which provide:

> "(1) Claims may be made under this Act for payment from the Fund of:

(Footnote continues on next page)

7 On 28 July 2008, the Board sent a letter to the appellant. It appeared to say that in the Board's view no claim could be made unless the whole of the subsidence occurred before the expense of preventative works was incurred. It relied on the reasoning in *Mine Subsidence Board v Wambo Coal Pty Ltd* ("the *Wambo* case")[3].

The proceedings

8 On 19 September 2008, the appellant instituted class 3 proceedings in the Land and Environment Court of New South Wales against the Board. Section 19(f1) of the *Land and Environment Court Act* 1979 (NSW) provides that the matters within class 3 of the Land and Environment Court's jurisdiction include jurisdiction to hear and dispose of "appeals under section 12B of [the Act]"[4]. The Court (Sheahan J) dealt with the following separate question[5]:

(a) 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,

(b) an amount to meet the proper and necessary expense incurred or to be incurred as a result of such damage in [listed respects]".

Section 13 provides that in lieu of making payments in respect of claims under s 12, the Board has power to purchase the damaged land or restore it.

3 (2007) 154 LGERA 60.

4 Section 12B of the Act provides:

"A person claiming compensation under section 12 or 12A may appeal to the Land and Environment Court 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."

5 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2009) 167 LGERA 308 at 310 [2].

> "Whether the [appellant] is entitled to an amount under section 12A(1)(b) of the *Mine Subsidence Compensation Act 1961* (NSW) in respect of expenses that it incurred in performing work on the Sydney to Moomba Gas Pipeline in circumstances where subsidence occurred at or near Mallaty Creek near Campbelltown in or about October 2005, on the assumption that the [appellant] can establish that, for the purposes of that section, the expenses incurred by it were 'proper and necessary'."

He answered that question: "No"[6]. He correctly regarded himself as bound to do so in view of the reversal of a decision of Lloyd J in the Land and Environment Court by the Court of Appeal of the Supreme Court of New South Wales in the *Wambo* case.

9 The appellant appealed to the Court of Appeal of the Supreme Court of New South Wales. It unanimously dismissed the appeal, but there were internal divisions of reasoning. Since the appellant invited the Court to overrule its own earlier decision in the *Wambo* case, five judges sat. Spigelman CJ (Allsop P and Giles JA concurring) considered that the *Wambo* case was correct and should be followed. Basten JA (with whom Macfarlan JA agreed in a short judgment) held that the *Wambo* case was wrong, but that since it was not "clearly or plainly wrong"[7] it should not be overruled[8].

10 In this Court the appellant maintains its challenge to the correctness of the *Wambo* case.

The position of the judges and the appellant

11 It was common ground that the pipeline was an improvement, that the appellant was its owner, and that damage would be caused by subsidence unless some preventative or mitigatory works were undertaken. The dispute turns on

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6 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2009) 167 LGERA 308 at 319 [56].

7 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 47 [168].

8 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 48 [172].

the significance of the words "from a subsidence that has taken place" in s 12A(1)(b).

12 The majority of the Court of Appeal, in adopting the construction of s 12A(1)(b) stated in the *Wambo* case, held that the words "from a subsidence that has taken place" meant that there could be no claim unless the subsidence had already taken place by the time that the "expense" had been "incurred or proposed"[9]. On that construction, the subsidence liable to cause damage to the appellant's improvements which began in February 2007 had not taken place before the expense had been incurred from December 2005 to January 2007, and hence the Board was correct in rejecting the appellant's claim.

13 The minority in the Court of Appeal thought that that construction was wrong. In its view, s 12A(1)(b) required only that the "subsidence" had taken place before the Board formed its opinion[10]. On that construction, since subsidence liable to cause damage to the appellant's pipeline had taken place from February 2007, when mining of Longwall 32 began, which was before the Board communicated its rejection of the claim on 28 July 2008, it was wrong for the Board to reject the claim.

14 The appellant relied on the minority construction as sufficient to bring it victory in this appeal. But that was not its preferred approach. The appellant advocated another construction as its preferred approach. It does not appear to have been advanced until the Court of Appeal hearing in the present case. On that construction, the words "from a subsidence that has taken place" do not require that subsidence actually occur before a valid claim can be made or decided. The appellant submitted that the words "damage … from a subsidence that has taken place" merely describe the character of the possible damage to the prevention or mitigation of which the expense is directed and to which the inquiry about the owner's reasonable anticipation is to be directed.

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9 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 24-25 [28], 27-28 [42]-[44], 32 [71] and 35 [95].

10 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 35-50 [99]-[186]. This view seems to have been that adopted by Lloyd J, the primary judge in the *Wambo* case, whose decision was reversed by the Court of Appeal: see *Wambo Coal Pty Ltd v Mine Subsidence Board* (2006) 147 LGERA 457.

The appellant's submission

15 The appellant's construction focuses attention on the requirement that the Board form an opinion about what damage the owner could reasonably have anticipated as arising from a subsidence unless preventative or mitigatory works were undertaken. Among the assessments to be made by the Board is an assessment of what the owner could reasonably have anticipated in relation to a future event – the future occurrence of damage to the owner's improvement. If, in the opinion of the Board, the owner could reasonably have anticipated or anticipate that, without preventative or mitigatory work, damage would have arisen in the future from subsidence in the future, a claim may be made. The words "from *a* subsidence that has taken place" refer not to some specific subsidence that has happened, but to *a* subsidence which may not have happened but which is anticipated to take place in the future, causing damage. The Board has to consider what the owner could reasonably have anticipated at a time after the time of anticipation, but the Board's assessment of that question may take place at points in time before the future events which could reasonably have been anticipated – subsidence and damage – have taken place. The provision creates a condition that "subsidence … has taken place", but the point of time at which the condition must be satisfied is the time at which the damage would otherwise arise if preventative or mitigatory works have not been undertaken. On the hypothesis that future damage could reasonably have been anticipated from a subsidence, the subsidence will necessarily have preceded or accompanied the damage and will necessarily have caused that damage. At the point in time at which the anticipated damage occurs, it can correctly be said that damage has arisen from a subsidence *that has taken place*.

16 In short, s 12A(1)(b) requires the Board to ask of an owner who has incurred or proposed an expense to prevent or mitigate damage: "Could the owner reasonably have anticipated that subsidence-caused damage would have arisen but for the preventative or mitigatory expense?" or "Could the owner reasonably have anticipated that subsidence-caused damage would otherwise arise but for the preventative or mitigatory expense?" The difference between the two questions is that the first directs itself to a reasonable anticipation that but for the preventative or mitigatory expense subsidence-caused damage will already have arisen, before the time when the Board is forming its opinion. The second question directs itself to a reasonable anticipation that but for the preventative or mitigatory expense, subsidence-caused damage would arise after the time when the Board is forming its opinion.

17 Section 12A(1)(b) thus permits a claim to be made for payment from the Fund of an amount to meet expense incurred by the owner of improvements in 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 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.

18 The appellant's preferred construction is correct. In giving the reasons for that view, it is desirable to start by examining the reasoning of the Court of Appeal majority.

The reasoning of the Court of Appeal majority

19 The Court of Appeal majority rejected the appellant's construction for the following reasons. It summarised the appellant's submission thus[11]:

> "the words 'subsidence that has taken place' encapsulate a hypothesis. The very purpose of the clause … is to permit the owner to incur expenses to prevent or mitigate damage which has not yet occurred. The reference to 'subsidence that has taken place' should be understood as a component part of the hypothesis, being the damage which the owner of the improvements is seeking to prevent or mitigate. The 'subsidence' to which the subsection refers is not actual subsidence but a hypothetical subsidence.
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> The characterisation of the reference to 'a subsidence that has taken place' as a 'hypothesis' … carries with it the implication that no subsidence needs to take place. On this basis the reference remains hypothetical throughout although, of course, in the usual case there will be subsidence, the effects of which have been avoided by the work carried out by the owner."

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11 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 31 [63]-[64].

The Court of Appeal majority said that this was contrary to the *Wambo* case: that is true, but the correctness of the construction propounded in that case is the very question in issue. The Court of Appeal majority continued[12]:

> "It is clear that the purpose of the section under consideration is to prevent or mitigate damage and, in that sense, there is a hypothetical element in s 12A(1)(b). There is no reason, however, to conclude that any other element in the section is similarly hypothetical. Specifically the words 'that has taken place' are … intractable. They refer in their natural and ordinary meaning to an actual, past event."

But, it will be suggested below[13], it is not only the "damage" which is hypothetical. The "subsidence" may also be hypothetical, since it is part of the compound expression "damage … from a subsidence that has taken place". The Court of Appeal majority then said[14]:

> "The interpretation of s 12A(1)(b) adopted in [the *Wambo* case] is reinforced by the immediate textual context.
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> First, the use of the article 'from *a* subsidence that has taken place' cannot be set aside as irrelevant. The phrase cannot be read as if it said 'from subsidence' (c/f s 12(1)) or 'by reason of subsidence' (c/f s 13A).
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> … there are numerous other references to 'subsidence' in the Act, some unadorned by any preposition or article and others preceded by prepositions such as 'by' or 'from'. Section 12A(1)(b) is, however, the only example in which an article is used. Together with the past tense of the phrase 'has taken place', the formulation suggests an *actual*, not a hypothetical occurrence.
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> This conclusion is reinforced by the fact that the article appears twice in immediate successive clauses in s 12A(1)(b), namely: 'from a

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12 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 31 [66].

13 At [48].

14 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 31-32 [67]-[70].

> subsidence that has taken place, other than a subsidence due to operations carried on by the owner'. The identification of a specific subsidence caused by the 'operations' of the owner is a further indication that what is involved is an actual, rather than a hypothetical, occurrence." (emphasis in original)

These considerations do not take account of the need to concentrate on the fact that the Board is to form an opinion about the reasonable anticipation of future events, one of which is "a" subsidence. The indefinite article is used to describe something of which nothing specific is known, but which is merely generic and hypothetical.

20 The Court of Appeal majority referred to nine reasons given in the *Wambo* case for the conclusion there reached, and in addition gave a tenth reason of its own. Although the reasons in the *Wambo* case were directed in terms to a rejection of Lloyd J's view in that case, which was also the view of the Court of Appeal minority in this case, the Board relied on them to refute the construction propounded by the appellant as well. The Court of Appeal minority exposed those reasons to considerable criticism, which, so far as it is consistent with the appellant's construction, is sound[15]. Many of the reasons in the *Wambo* case do no more than set out the problem, or assume the correctness of a particular answer to it (for example, the first three and the fifth)[16]. Others are neutral – for example, the fourth and sixth[17]. Others are not determinative – for example, the seventh and eighth[18]. The ninth reason was that the *Wambo* construction was not irrational[19]; that may be accepted but is not to the point. Section 12A(1)(b) is, as

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15 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 43-46 [145]-[161].

16 *Mine Subsidence Board v Wambo Coal Pty Ltd* (2007) 154 LGERA 60 at 67 [28]-[30] and 68-69 [33]-[38].

17 *Mine Subsidence Board v Wambo Coal Pty Ltd* (2007) 154 LGERA 60 at 67-68 [31]-[32] and 69-70 [39]-[43].

18 *Mine Subsidence Board v Wambo Coal Pty Ltd* (2007) 154 LGERA 60 at 70 [44]-[45].

19 *Mine Subsidence Board v Wambo Coal Pty Ltd* (2007) 154 LGERA 60 at 70-71 [46].

already remarked, a difficult provision, and the issue is which of the proffered constructions is to be accepted over the others, none of which manifests such an absence of reason as to be irrational. The tenth reason – that since the indefinite article was used before "subsidence" the language pointed to a "specific, past subsidence"[20] – has already been dealt with.

21 Overall the reasoning in the *Wambo* case is flawed by its inattention to the significance of the words "in the opinion of the Board" in s 12A(1)(b).

The Board's primary argument

22 The parties engaged in numerous peripheral or indecisive battles.

23 Thus the Board relied on the contrast drawn in the *Wambo* case between the words "subsidence that has taken place" in s 12A(1)(b) and "by reason of subsidence" in s 13A: it was said that the latter words relate to anticipated subsidence but the former do not[21]. The Court of Appeal minority rejected that inference from the contrast[22]: "Undoubtedly the wording [in s 13A] is different from that in s 12A(1)(b), but so is the principal purpose of the provision, focussing on the comparative cost to the Fund of different courses of action." In addition, it is not possible to find consistency in the numerous references to "subsidence" in the Act. If that type of analysis were to be employed, one inference from the contrast between the words "actual subsidence" in the definition of "subsidence" in s 4 and the absence of the word "actual" in the phrase "subsidence that has taken place" in s 12A(1)(b) is that s 12A(1)(b) does not require actual subsidence.

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20 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 28 [44].

21 *Mine Subsidence Board v Wambo Coal Pty Ltd* (2007) 154 LGERA 60 at 67-68 [32].

22 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 44 [148].

24 Both parties took the Court to the Second Reading Speech, but it casts no useful light on the controversy[23].

25 The Board argued that even if the appellant was not able to recover under s 12A(1)(b) of the Act, it could recover under s 265(1) of the *Mining Act* 1992 (NSW). Assuming, which is controversial, that the appellant could recover under s 265(1), the argument casts no light on the question whether the appellant is able to recover under s 12A(1)(b).

26 Both parties also advanced many other arguments that need not be considered in detail because they are not central. All that need be considered is the decisive collision between the Board's claim that the appellant's construction would create unacceptable linguistic incongruity and the appellant's claim that the Board's construction was irrational.

27 The Board submitted that the mischief attacked by s 12A(1)(b) was that before it was enacted, by reason of the narrowness of s 12(1), there was no method by which owners of improvements carrying out preventative or mitigatory works in advance of damage could recover from the Fund. It submitted that the enactment of s 12A(1)(b) met that mischief, subject to a condition. The condition was that a subsidence must have occurred before the expense was incurred or proposed, even though that subsidence had not yet led to damage. It accepted that the words "would otherwise have arisen" and "would otherwise arise" indicated that the provision called for hypothetical reasoning, but contended that the weak link in the appellant's construction was to require the hypothesis to extend to subsidence. That extension, according to the Board, was precluded by the words "subsidence that has taken place".

28 The Board submitted that the appellant's construction might have been sound if the provision had omitted the words "that has taken place". It might have been sound if the provision had said "anticipated subsidence" or "expected subsidence". It might have been sound if the provision had read "a subsidence, if that were to take place", as was suggested by the Court of Appeal minority[24].

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23 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 2 October 1969 at 1550-1551.

24 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 37 [111].

The Board's submissions placed considerable weight on these linguistic incongruities as a flaw in the appellant's preferred construction.

29 It may be that the words "or could reasonably anticipate would otherwise arise" were inserted at a late stage, without any corresponding modification to the words "that has taken place". The words "or could reasonably anticipate would otherwise arise" look to the future, and do not fit well with the words "from a subsidence that has taken place" if that expression is construed as looking exclusively to the past. The Board conceded that its construction would be more acceptable if the provision had said "from a subsidence that had or has taken place", but submitted that the words "has taken place" were sufficiently "flexible" to deal with all temporal possibilities.

30 There are linguistic difficulties in the appellant's construction. But there are linguistic difficulties in all possible constructions. The construction in the *Wambo* case, preferred by the Board, involves inserting the word "already" or "beforehand" after "that has taken place". And, as the Court of Appeal minority said, if the words "in the opinion of the Board" are to be downplayed or ignored, the words "subsidence that has taken place" should read "subsidence 'that *had then* taken place'"[25]. In these circumstances it is necessary to look for the least irrational construction.

Section 12A as a quid pro quo for s 14

31 One fundamental support for the appellant's construction stems from s 14 of the Act, which provides:

> "(1) The proprietor of a colliery holding who:
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> (a) is not in arrears with the contributions payable by the proprietor to the Fund under this Act, and
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> (b) observes or performs every covenant or stipulation relating to the method or extent of the extraction of coal or shale contained in any instrument through which the proprietor derives title to mine such coal or shale,

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25 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 47 [166] (emphasis in original).

shall not be liable for any damage to improvements or household or other effects occasioned by subsidence.

(2) Nothing in this section shall relieve a proprietor of a colliery holding from liability for damage caused by subsidence where the subsidence is due to the negligence of the proprietor of the colliery holding or the proprietor's servants."

32 If the Act had not been enacted, and if no provision corresponding to s 14 existed, at common law the proprietor of a colliery holding, although not liable for a mere withdrawal of support, and not liable merely for subsidence caused by that withdrawal of support, would be liable in nuisance for a withdrawal of support creating subsidence which caused actual damage[26]. This is because the owner of land has a right to the support of that land in its natural state from the adjacent and subjacent land of neighbouring owners (including lessees). The right is a natural incident of the ownership. There is no natural right of support for structures (as distinct from the natural right of support for land in its natural state) but damages for injury to a structure flowing from subsidence caused by a withdrawal of support (as distinct from the additional weight of structures on the land) are recoverable[27]. The depreciation in the market value of the property attributable to the risk of future subsidence cannot be taken into account[28]. But each successive subsidence causing damage creates a fresh cause of action, even though there has been no new excavation[29].

33 Although the remedy of damages at law is not available until the subsidence has caused injury to a landowner's property[30], in equity the landowner may apply for a negative injunction (interlocutory or final) against conduct causing subsidence in future, whether or not there has been any subsidence,

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26 *Bonomi v Backhouse* (1859) El Bl & El 646 [120 ER 652]; *Backhouse v Bonomi* (1861) 9 HLC 503 [11 ER 825]; *Dalton v Angus* (1881) 6 App Cas 740 at 808.

27 *Brown v Robins* (1859) 4 H & N 186 [157 ER 809]; *Stroyan v Knowles* (1861) 6 H & N 454 [158 ER 186]; *Pantalone v Alaouie* (1989) 18 NSWLR 119 at 129.

28 *West Leigh Colliery Co Ltd v Tunnicliffe & Hampson Ltd* [1908] AC 27.

29 *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127.

30 *Midland Bank plc v Bardgrove Property Services Ltd* [1992] 2 EGLR 168 at 172.

whether or not there has been any injury caused by subsidence, and indeed whether or not mining has begun[31]. And the landowner may apply for a mandatory injunction (interlocutory or final) of a quia timet kind, compelling the defendant to take positive steps to prevent subsidence-causing injury[32]. It is not necessary to explore the details of the hurdles in the landowner's path in taking those courses: depending on the circumstances, they may be significant but they are not insurmountable.

34 In addition, under s 9 of the *Equity Act* 1901 (NSW), the equivalent of Lord Cairns's Act, which is now s 68 of the *Supreme Court Act* 1970 (NSW), the court had jurisdiction to award damages in addition to or in lieu of an injunction in the case of an injury which was threatened but had not yet occurred[33].

35 Section 14 is thus an extremely important provision. In its absence, the proprietors of colliery holdings would be exposed to the risk of repeated actions for damages and applications for negative and mandatory injunctions. This is particularly so where, as is the case in parts of New South Wales, the operations of mining for the vital resource of coal are conducted in districts with many buildings used by a large population, or through which pipes of various kinds pass, or both. The legislature struck a compromise in s 14. On the one hand, s 14(2) left the proprietors of colliery holdings liable for damage caused by subsidence where the subsidence resulted from their negligence or that of their employees. On the other hand, s 14(1) gave the proprietors an immunity from action where there was no negligence. In return for that immunity, the proprietors were obliged to contribute to the Fund under s 11, and those who otherwise could have sued for damages or injunctive relief were given a right to claim against the Fund. It was for reasons of this kind that in *Alinta LGA Ltd v Mine Subsidence Board*[34] this Court described s 14 as the "statutory quid pro quo for the contributions of colliery proprietors to the Fund". There is a close

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31 *Redland Bricks Ltd v Morris* [1970] AC 652 at 664.

32 *Redland Bricks Ltd v Morris* [1970] AC 652; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 31 [33]; [1998] HCA 30.

33 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851.

34 (2008) 82 ALJR 826 at 830 [18] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; 244 ALR 276 at 280; [2008] HCA 17.

relationship between what the colliery proprietors gained under s 14 and what they lost under s 11. It is for that reason that the *Alinta* case referred to the Act as disclosing "an accommodation, on particular terms, between the interests of colliery proprietors and the owners of damaged improvements."[35]

36 Section 14 thus takes away the legal rights of those who could otherwise prevent damage to themselves by obtaining negative or mandatory injunctions, or who could get compensation for any damage caused. Those were rights which were of considerable utility to those who had them, but which posed considerable risks for those who owed the corresponding duties.

37 Legislation is commonly construed not to expropriate or extinguish rights unless just terms are provided in their place. That is because there is a common law rule of statutory interpretation requiring that "clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation."[36] The Act does provide substitutes for the rights taken away. Before 1969, the substitutes were found in ss 12 and 13[37]. In 1969, further substitutes were added – ss 12A, 13A and 13B. Section 51(xxxi) of the Constitution, providing for just terms when property is acquired pursuant to Commonwealth legislation, is to be construed with liberality[38]. Similarly, non-constitutional legislation which, in accommodating conflicting public and private interests, provides substitutes for what private interests must lose, is to be construed amply. The need for it to be construed amply is reinforced by reflection on the damage to the coal industry which would be caused if s 14 did not exist and colliery proprietors had to fight continual outbreaks of litigation in conducting their businesses. That amplitude of approach applies as much to provisions enacted in 1969, eight years after s 14 was originally enacted, like s 12A, as it does to those enacted contemporaneously with s 14. A purposive construction of ss 10, 12 and 12A is that they give to the

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35 (2008) 82 ALJR 826 at 829 [14] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; 244 ALR 276 at 280.

36 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 111 per Deane and Gaudron JJ; [1992] HCA 23.

37 See above at [6] n 2.

38 *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 212-213 [185]-[186]; [2009] HCA 51.

owners of improvements advantages broadly commensurate with what they lost by reason of s 14. Broadly speaking, it may be said that the scheme of the Act is to convert all relevant rights to sue for damages or seek injunctions into money claims against the Fund. For colliery proprietors, s 14 is a very beneficial provision. For owners of improvements, s 12A is thus properly to be seen as a beneficial provision, not to be restricted by a close and technical reading. To do so would arbitrarily restrict rights of compensation offered in substitution for the rights destroyed by s 14. And it is questionable whether a construction of s 12A which gives compensation to owners of improvements for some of their losses but not all is sound. On the Board's preferred construction of the Act, the owners of improvements would have had all their common law and equitable rights in relation to non-negligent nuisance removed, but with no corresponding right against the Fund in relation to some of those rights.

38 The Board submitted that "there is no common law equivalent to the entitlement to payment which the appellant says now arises from s 12A(1)(b)." The submission fastens on the appellant's contention that it can claim an amount to meet the expense of preventative or mitigatory measures even before mining has begun, or subsidence has taken place. If by "common law equivalent" the submission means "general law equivalent apart from the Act", that is not so. Under Lord Cairns's Act damages may be awarded in addition to or in lieu of an injunction, and an injunction may be obtained quia timet, whether or not any mining or subsidence or damage has yet taken place.

39 Those conclusions are not affected by the fact that the Act replaced the *Mine Subsidence Act* 1928 (NSW), which also curtailed common law rights. The previous existence of those rights would have affected the construction of the 1928 Act, and it is equally relevant to the construction of its replacement[39]. Nor is there any incongruity in the fact that the rights given affected owners in 1961 were less extensive than those additionally conferred in 1969, which included the right conferred by s 12A.

Section 12A as a means of minimising damage

40 A second fundamental point is that one function of the Act is to minimise damage. That function is not limited to providing means by which maximum

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39 Cf *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 33 [83].

damage can be caused by the activities of colliery owners, so long as the Fund pays for it after it has been caused. The Act operates rather to prevent or reduce damage before it is caused. Prevention may be cheaper than cure, and more efficient than cure. The appellant advanced a telling example from the facts of the *Wambo* case. In that case the improvement owner predicted that planned underground longwall mining would cause subsidence of the land on which its surface drift coal conveyor was located and inevitably damage the conveyor. The owner was faced with two possible courses of action. The first, which it took, was the prudent and sensible course of dismantling and relocating the conveyor before the predicted subsidence occurred, which in due course it did. The second was to wait until the predicted subsidence occurred and then, if the conveyor was not already damaged, to seek to dismantle and relocate it before damage resulted. The former course was likely to be much more inexpensive than the latter, for the latter might have left the conveyor extensively damaged by the subsidence. A construction which would deny the owner's claim when it took the former, sensible, option rather than the latter, riskier, one is a construction having irrational effects. On those grounds it ought to be rejected. In short, as the appellant correctly submitted, having regard to the serious consequences of subsidence, if the function of the Fund is to allow owners to make claims for expenditure for preventative or mitigatory works, they should be able to do this before the subsidence occurs. That would not expose the Fund to undue perils, for the Fund remains protected by the requirements that the Board be of the opinion that the owner could reasonably anticipate damage from the subsidence and that the expense incurred be proper and necessary. Further, the Fund is also protected by s 13A, which provides:

> "The Board may carry out, or cause to be carried out such works as, in its opinion, would reduce the total prospective liability of the Fund by preventing or mitigating damage that the Board anticipates would, but for those works, be incurred by reason of subsidence, whether or not the damage anticipated is damage to improvements or household or other effects on the land on which the works are to be carried out."

That too suggests a construction of the Act as operating so as to assist in the prevention of damage rather than merely compensating for damage after it has happened. Section 13A contains very clear language to that effect. That is consistent with selecting a construction for the less clear words of s 12A(1)(b) which effectuates the same function.

41 Further, s 13A strengthens the suggestion that the power of owners of improvements to recover an amount from the Fund to meet the expenses of

preventative or mitigatory work under s 12A(1)(b) is ample: for if the Board will not assist under s 13A, the owners of improvements must assist themselves. If s 13A had created a duty on the Board to undertake preventative or mitigatory work, the room for arguing that the scope of s 12A was narrower would have been increased, because the scheme could then be seen as one in which the initiative lay with the Board with a view to reducing the total sum spent on preventative or mitigatory works by several owners of improvements. But s 13A does not create a duty on the Board: it only grants a power.

Section 12A in relation to the duties on the appellant

42 Section 26 of the *Pipelines Act* 1967 (NSW) provides that a licensee (ie the appellant) shall not permit or suffer the waste or escape of any substance from the pipeline or any part thereof, on pain of a criminal sanction of 40 penalty units for each day on which the offence occurs. A penalty unit is $110[40]. Section 27(b) provides that a licensee (ie the appellant) "shall maintain the pipeline in good condition and repair", on pain of a criminal sanction of 40 penalty units for each day on which the offence occurs. On the construction advanced by the Court of Appeal majority, in emergencies, or even crises falling short of emergency, pipeline owners would be obliged to make expenditures for preventative or mitigatory purposes without the possibility of recompense under s 12A(1)(b). If they wanted to keep that possibility alive they would have to wait until a subsidence had actually occurred.

43 Underlying ss 26 and 27(b) are the gravest considerations of public safety – for gas can be a very dangerous substance – and public convenience – for interrupting the supply of a necessity like fuel in the form of gas is very serious for the many people and businesses reliant on it. In addition, the potential commercial consequences to the appellant of its pipeline being out of order because of damage caused by subsidence, and the potential consequences to be feared from the Government of New South Wales, are likely to be grave.

The incongruity of the Board's construction

44 The construction advocated by the Board, if accepted, would have several inappropriate consequences in the conduct of practical affairs. First, it would prevent owners of improvements, who may not have unlimited liquidity, from

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40 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 17.

obtaining from the Fund an amount to meet expenses to prevent or mitigate damage, leaving owners much worse off under the Act than they would have been under the general law.

45 Secondly, the Board's construction inhibits owners of improvements, such as the appellant's gas pipeline, from responding early to the strong pressures of the criminal law and of commercial and political considerations, by taking steps to protect their interests by dealing with threats to the safety of the improvements, rather than waiting on a decision by the Board under s 13A.

46 On the other hand, the preferred construction of the legislation by the appellant does not carry these consequences.

The meaning of anticipation of "damage" from a subsidence that has taken place

47 At times the arguments seemed to rest on an assumption that "anticipate" meant "expect as probable or likely". But the important functions which s 12A(1)(b) performs suggest that its meaning is much wider and that it accommodates outcomes of much lower degrees of certainty. In s 12A(1)(b) "anticipated" is used in the sense described as the ninth meaning of "anticipate" in the *Oxford English Dictionary*[41]: "To look forward to, look for (an uncertain event) as certain." The anticipation referred to in s 12A(1)(b) is a looking forward to an uncertain event, and treating it as certain even though it is not.

48 The Board must form one of two opinions if a claim is to succeed. One is an opinion that there might be damage which the owner could reasonably have looked forward to as an event which was, though in fact uncertain, certain in the sense that it was treated as certain – one which would have arisen had preventative or mitigatory measures not been taken. The other is an opinion that there might be damage which the owner could reasonably have looked forward to as an event which was, though in fact uncertain, certain in the sense that it was treated as certain – one which would arise had preventative or mitigatory measures not been taken. The uncertainty surrounding damage has two ingredients: there is uncertainty as to whether there would be subsidence, and, even if there were, there is uncertainty as to whether it would cause damage. When the Board inquires into what it is that the owner could reasonably have anticipated, what is the object of the verb "anticipated"? Not just damage, but

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41 2nd ed (1989), vol 1 at 522.

"damage … from a subsidence that has taken place". As the appellant submitted, those words refer to a compound future event: damage which has not yet occurred (and may never occur if forestalled by preventative or mitigatory measures) arising from subsidence which has not yet taken place (and may not). There is no reason to limit the hypothetical analysis which the Board concedes must be applied to one part of the compound conception, "damage", and not employ it in relation to the other part, "subsidence that has taken place".

Simultaneity between subsidence and damage

49 Finally, there is another difficulty in the Board's argument. It arises in relation to a reasonable anticipation of a subsidence which causes damage simultaneously with its occurrence. If the subsidence has not taken place at the time when the Board enters upon its task, on the Board's construction the claim must fail. Hence if an owner of improvements could reasonably have anticipated a certain type of damage, there will be a valid claim if the damage is caused slowly by a subsidence that happened before the claim, but no valid claim if the same damage is caused simultaneously with, or very soon after, a reasonably anticipated subsidence that happened after the claim. This would be, as the appellant submitted, a capricious and unfortunate result.

Orders

50 The above reasoning suggests an affirmative answer to the separate question. There was debate about whether answering it with a bare affirmative was sufficient, or whether a fuller answer should be given. The appellant proposed the following answer:

> "It being agreed that the applicant [ie the appellant in this Court] reasonably anticipated, based on expert advice, that cumulative subsidence at Mallaty Creek from approved longwall mining of Longwalls 30-32 was likely to cause damage to its pipeline, the applicant was entitled under s 12A(1)(b) of the Mine Subsidence Compensation Act to an amount from the Mine Subsidence Compensation Fund to meet the proper and necessary expense of preventing or mitigating that damage."

The Board put no submission against that answer being appropriate if the appellant's preferred construction were accepted. That answer should be the answer given.

51 The following orders should be made.

1. Appeal allowed.

2. Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 28 June 2010 and in their place order:

   (a) That the appeal to that Court be allowed.

   (b) Set aside the orders of the Land and Environment Court of New South Wales made on 17 July 2009 and in their place order that the preliminary question of law identified by Sheahan J of the Land and Environment Court of New South Wales, namely:

   > Whether the Applicant is entitled to an amount under section 12A(1)(b) of the *Mine Subsidence Compensation Act 1961* (NSW) in respect of expenses that it incurred in performing work on the Sydney to Moomba Gas Pipeline in circumstances where subsidence occurred at or near Mallaty Creek near Campbelltown in or about October 2005, on the assumption that the Applicant can establish that, for the purposes of that section, the expenses incurred by it were "proper and necessary",

   be answered:

   > It being agreed that the applicant reasonably anticipated, based on expert advice, that cumulative subsidence at Mallaty Creek from approved longwall mining of Longwalls 30-32 was likely to cause damage to its pipeline, the applicant was entitled under s 12A(1)(b) of the *Mine Subsidence Compensation Act* 1961 (NSW) to an amount from the Mine Subsidence Compensation Fund to meet the proper and necessary expense of preventing or mitigating that damage.

   (c) The Board to pay the appellant's costs of the hearing of the preliminary question before the Land and Environment Court and of the appeal to the Court of Appeal.

3. The Board to pay the costs of the appellant of the appeal to this Court.

52 BELL J. The factual background and the issues raised by this appeal are set out in the majority reasons. I have come to a different conclusion from that reached by their Honours concerning the interpretation of s 12A(1)(b) of the *Mine Subsidence Compensation Act* 1961 (NSW) ("the Act"). In my view, the ordinary grammatical meaning of the provision confines valid claims for payment from the Mine Subsidence Compensation Fund ("the Fund") to those made by owners of improvements for proper and necessary expense incurred or proposed for works to prevent or mitigate damage ("preventative works") in circumstances in which, at the time the expense is incurred or proposed, a subsidence has taken place. It is an interpretation that I consider to be consistent with the intended operation of the statutory scheme. For the reasons that follow, I would dismiss the appeal.

Section 12A(1)(b)

53 The provision is set out in the majority reasons. However, it is convenient to set out the material parts of the section again at this juncture:

> "(1) Subject to this section, claims may be made under this Act for payment from the Fund of:
>
> …
>
> (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 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.
>
> (2) A claim under subsection (1):
>
> …
>
> (b) shall be made, in the case of a claim for payment of an amount under subsection (1)(b), within three months after the day on which the expense to which the claim relates became known to the claimant or, where some other time within which such a claim may be made is prescribed by the regulations, within the time so prescribed …"

54 Section 12A(1)(b) authorises the making of claims in either of two circumstances: where the expense has been incurred or where the expense is proposed. In either circumstance a valid claim is dependent upon the Mine

Subsidence Board ("the Board") forming the requisite opinion. In the circumstance of expense incurred the requisite opinion is that the owner could reasonably have anticipated that but for carrying out the works, damage to the improvement would have arisen. In the circumstance of a claim for payment of an amount proposed the requisite opinion is that the owner could reasonably anticipate that but for carrying out the proposed works damage to the improvement would arise. As a matter of grammatical structure I do not read the penultimate subordinate clause as forming part of a compound expression, namely, "damage … from a subsidence that has taken place"[42]. The conjunction "from" links the penultimate clause to the preceding two clauses. In my view it is strained to read the penultimate clause as forming part of the hypothesis upon which the Board's opinion is formed. Moreover, it is a construction that gives no work to the indefinite article, or the words "has taken place", in the clause.

55 The Board must ask in the case of expense incurred: "could the owner have reasonably anticipated that, but for carrying out the preventative works, damage would have been caused to the improvement?" In the case of expense proposed the Board must ask: "could the owner reasonably anticipate that, but for carrying out the preventative works, damage to the improvement would be caused?" The second question necessarily looks to the future because it is concerned with expenditure that is proposed. However, in each case the anticipation is of damage "from a subsidence that has taken place". There is no linguistic incongruity in the requirement, in the case of proposed expense, that the Board form an opinion as to the reasonable anticipation of the prevention of damage in the future arising from an event that has occurred. Nor is there a need to read the word "already" or the word "beforehand" after the words "has taken place" to give the provision meaning.

56 The Court of Appeal minority concluded that the time to which the penultimate clause of s 12A(1)(b) speaks is the time at which the Board forms its opinion[43]. Their Honours considered that construction to be consistent with the use of the present perfect tense of the verb, "has taken place". They said that the past perfect tense, "had taken place", would have been appropriate had the Board been required to form an opinion as to "the reasonableness of the claimant's conduct in incurring the expense, when it was incurred, and so as to exclude reference to anticipated subsidence"[44]. It followed, in the Court of Appeal

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42 At [19].

43 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 43 [144] per Basten JA, 51 [189] per Macfarlan JA.

44 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 43 [143] per Basten JA, 51 [189] per Macfarlan JA.

minority's opinion, that it is necessary that a subsidence "has taken place" but only by the time the Board forms its opinion[45]. It will be recalled that under s 12A(2)(b) a claim must be made within three months after the date on which the expense to which the claim relates became known to the claimant. The Court of Appeal minority's construction is one that results in a valid claim being dependent upon the serendipity of whether the threatened subsidence occurs in the time between the expense becoming known and the Board forming its opinion.

57 The Board's opinion is as to the reasonableness of the owner's anticipation of what "would otherwise have arisen" or "would otherwise arise" as the case may be. The present perfect tense is used to convey that the event (subsidence) has occurred in a period up to the time of incurring or proposing the expense. In my view the tense is not inconsistent with the Court of Appeal majority's construction of the provision. That construction is to be preferred to one that, when read with s 12A(2)(b), produces a result that is anomalous.

58 The appellant submits that its preferred construction (that the words "a subsidence that has taken place" form part of the hypothesis) gains support from the use of the indefinite article, signifying that this is a subsidence about which nothing is known, as distinct from an actual subsidence. The appellant draws attention to the words "actual subsidence" in the definition of "subsidence"[46] and submits that had it been the intention to condition the making of a valid claim on the occurrence of actual subsidence those words might have been used. To this it must be said that, if the drafter's intention were to refer to hypothesised future subsidence, it is not easy to see why the words "has taken place" were chosen to convey that idea. The definition of "subsidence" does not assist the appellant. Sections 12A and 13A were both inserted into the Act in 1969[47] ("the 1969 amendments"). At the date of the 1969 amendments the definition of "subsidence" did not use the words "actual subsidence"[48]. A new definition

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45 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 43 [144] per Basten JA, 51 [189] per Macfarlan JA.

46 *Mine Subsidence Compensation Act* 1961 (NSW), s 4.

47 *Mine Subsidence Compensation (Amendment) Act* 1969 (NSW).

48 A definition of "subsidence" was inserted into s 4 of the Act by the *Mine Subsidence Compensation (Amendment) Act* 1967 (NSW), s 2(1)(a):

> "'Subsidence' means subsidence due to –
>
> (a) the extraction of coal or shale; or

(Footnote continues on next page)

containing those words was introduced into the Act by later amendment[49]. The words "actual subsidence" in the definition serve to distinguish the ordinary meaning of "subsidence", which is the sinking of ground, from the extended meaning for the purposes of the Act, "all vibrations or other movements of the ground", which includes upwards movement of the ground, a phenomenon apparently known within the coal-mining community as "upsidence".

59 The difference between the language of ss 12A and 13A, which, as noted above, were both inserted into the Act at the same time, suggests that the appellant's preferred construction should not be accepted. Section 13A confers power on the Board to carry out works to prevent or mitigate damage that the Board anticipates would otherwise be incurred "by reason of subsidence". The expression "by reason of subsidence" is apt to include actual and anticipated subsidence[50]. Had the intention been to provide for claims under s 12A(1)(b) for preventative works respecting actual and anticipated subsidence it is to be expected that the drafter would have adopted the words used in s 13A to convey that intention. The fact that s 13A conditions the power on the Board's opinion that the conduct of the preventative works would reduce the total prospective liability of the Fund does not lessen the force of this textual indication.

(b) the prospecting for coal or shale carried out within a colliery holding by the proprietor thereof."

49 *Mine Subsidence Compensation (Amendment) Act* 1989 (NSW), Sched 1(1):

"'Subsidence' means subsidence due to:

(a) the extraction of coal or shale; or

(b) the prospecting for coal or shale carried out within a colliery holding by the proprietor of the holding,

and includes all vibrations or other movements of the ground related to any such extraction or prospecting (whether or not the movements result in actual subsidence)."

50 *Mine Subsidence Compensation Act* 1961 (NSW), s 13A:

"**Works for prevention or mitigation of damage from subsidence**

The Board may carry out, or cause to be carried out such works as, in its opinion, would reduce the total prospective liability of the Fund by preventing or mitigating damage that the Board anticipates would, but for those works, be incurred by reason of subsidence, whether or not the damage anticipated is damage to improvements or household or other effects on the land on which the works are to be carried out."

60 The drafting of s 12A(1)(b) may be awkward, but I agree with the Court of Appeal majority that the words "that has taken place", in their natural and ordinary meaning, refer to an actual, past event[51] and do not form part of the hypothesis upon which the Board's opinion is formed.

An unreasonable result?

61 The construction that I favour produces the result that no provision is made under the Act for payment from the Fund of amounts expended by owners on preventative works respecting threatened subsidence. It is said to be an unreasonable result in that it requires the owner of improvements to stand by in circumstances where, as here, the occurrence of subsidence from the mining operations could be predicted with confidence. It is not in issue that it is better to carry out preventative works than to wait until damage is done. The good sense of this proposition was the reason for the introduction of the 1969 amendments. However, the question is not whether it is unreasonable to take no remedial action against threatened subsidence. It is whether the scheme introduced into the Act by the 1969 amendments confers that power on the Board alone. In my opinion the language of ss 12A and 13A makes clear that the answer to that question is that it does. It is a conclusion that is reinforced by reference to the legislative history and extrinsic material[52].

62 The Minister for Mines identified the purpose of the 1969 amendments in his speech on the second reading for the Bill in this way[53]:

> "The bill will provide also for the carrying out of works by the board to prevent or mitigate subsidence damage before it occurs. Proposed new section 13A will empower the board to carry out such works where the total prospective liability of the fund will thereby be reduced.
>
> … As the Act stands at present the board can carry out works only after damage to improvements by subsidence has arisen. This power to repair is to be supplemented by power to carry out preventative works, as the costs of prevention are often cheaper than of cure.

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51 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 31 [66] per Spigelman CJ (Allsop P concurring at 35 [97], Giles JA concurring at 35 [98]).

52 *Interpretation Act* 1987 (NSW), s 34.

53 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 2 October 1969 at 1550-1551.

> It is recognized also that emergencies may occur when it might be necessary for the owner to carry out works to prevent or mitigate damage arising from a subsidence. In such cases proposed new section 12A(1)(b) will empower a claim to be made for the proper and necessary expense so incurred."

63 The Minister referred in the course of his speech to an instance in which the Board had carried out works to a residential property to avoid the damage that was likely to result from a subsidence. The mischief that the 1969 amendments were intended to redress was the lack of statutory authority for the Board to carry out such works. Section 12A(1)(b) is not limited to claims respecting "emergencies" but its language is consistent with the intention that claims by owners be limited to circumstances of some exigency in that damage is reasonably anticipated from a subsidence that has taken place[54].

The appellant's loss of common law rights

64 The appellant's submissions on the hearing of the appeal were principally directed to its loss of common law rights, relevantly to quia timet injunctive relief, occasioned by the statutory immunity conferred on colliery proprietors. The loss of rights is said to speak to the improbability of a legislative intention to circumscribe owners' recourse to self-help. The submission requires consideration of the complex provisions of the Act that disclose the particular terms of the legislative accommodation struck between the interests of colliery

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54 The Explanatory Note to the Mine Subsidence Compensation (Amendment) Bill 1969 listed the objects of the Bill as:

> "(a) to authorise the Mine Subsidence Compensation Board, in certain circumstances, to refuse a claim for damage to improvements used in connection with the carrying on of an extractive industry such as quarrying;
>
> (b) to authorise that Board to reduce the prospective liability of the Mine Subsidence Compensation Fund by carrying out works to prevent or mitigate anticipated damage from subsidence and to enable to Board to pay compensation for damage due to the carrying out of any such works;
>
> (c) to enable the Board to reimburse persons for expense incurred in preventing or mitigating anticipated damage from a subsidence that has occurred;
>
> (d) to make provisions consequential upon or ancillary to the foregoing."

proprietors and the owners of improvements in mine subsidence districts[55]. Before considering how that accommodation was affected by the 1969 amendments, it is useful to say something about the history of the legislative adjustment of the rights of the two groups.

65 The first scheme to provide redress to owners of improvements damaged by subsidence was introduced by the *Mine Subsidence Act* 1928 (NSW) ("the 1928 Act")[56]. The 1928 Act was enacted in the aftermath of episodes of severe subsidence caused by extensive coal-mining activity around Newcastle and Wallsend. Streets had been disrupted and houses damaged[57]. Banks were refusing to lend money on property in areas affected by coal-mining activity[58]. Against this background the legislature adopted a scheme of compulsory insurance. The 1928 Act constituted the Mine Subsidence Board[59] ("the former Board") and provided for the proclamation of mine subsidence insurance districts[60]. Every owner of land within a mine subsidence insurance district was required to insure with the former Board against the risk of subsidence-caused damage to improvements[61]. Mine owners operating mines within the boundaries of a mine subsidence insurance district were required to insure with the former Board against damage to improvements caused by subsidence[62]. Owners of land could obtain payment from the former Board for subsidence-caused damage to

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55 *Alinta LGA Ltd v Mine Subsidence Board* (2008) 82 ALJR 826 at 829 [14] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; 244 ALR 276 at 280; [2008] HCA 17.

56 There was provision under s 155 of the *Mining Act* 1906 (NSW) (in force at the date of the 1969 amendments) for the warden to assess compensation to be paid by the holder of a miner's right (or other entitlement to occupy or enter lands) for loss caused or likely to be caused to improvements on that land or adjoining land by works carried out in pursuance of the right. Similar provision is now made by s 265 of the *Mining Act* 1992 (NSW).

57 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 20 December 1928 at 3095.

58 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 December 1928 at 3122.

59 *Mine Subsidence Act* 1928 (NSW), s 7(1).

60 *Mine Subsidence Act* 1928 (NSW), s 3(1).

61 *Mine Subsidence Act* 1928 (NSW), s 4(1).

62 *Mine Subsidence Act* 1928 (NSW), s 4(4).

their improvements. The quid pro quo for mine owners who were subject to the requirement of compulsory insurance was that they were relieved of liability for subsidence-caused damage to improvements resulting from their non-negligent mining activity[63].

66 The scheme imposed an unfair burden on owners of land located within mine subsidence insurance districts whose land was unlikely ever to be undermined, as they were nonetheless required to insure with the former Board[64]. The recognition of this unfairness informed the current Act, which introduced a scheme based upon the principle that the coal-mining industry should bear the costs of repairing subsidence-caused damage. Under the scheme as enacted, every colliery proprietor was required to contribute to the Fund. In return for their contributions colliery proprietors were relieved of liability for subsidence-caused damage (other than that occasioned by the proprietor's own negligence)[65].

67 The proclamation of mine subsidence districts under the Act resulted in the owners of improvements on land losing common law rights to support and injunctive relief in respect of subsidence-caused damage from non-negligent mining activity. It was a loss of rights that, as the Court of Appeal majority observed, was based on a model that had applied in mine subsidence insurance districts for many years[66]. Owners of improvements received benefits under the regime enacted by the Act that were superior to those conferred on owners of land under the 1928 Act. Their right to compensation was not dependent upon the obligation to insure or otherwise to contribute to the Fund. Compensation was authorised notwithstanding any covenant or stipulation restricting the recovery of damages for damage arising from subsidence[67]. The scheme which

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63 *Mine Subsidence Act* 1928 (NSW), s 6.

64 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 9 March 1961 at 3079.

65 Section 14 of the Act provided that relief from liability under the section was restricted to proprietors of colliery holdings who were not in arrears in their contributions to the Fund, and who had duly observed relevant operational covenants and stipulations.

66 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 33 [83].

67 Section 12(5) of the Act. In his speech on the second reading of the Bill for the Act in the Legislative Council, the Minister for Labour and Industry said: "The presence of covenants or stipulations of this kind has often caused grave hardship and it is unjust that people who have purchased land in good faith should be penalised because of a severance of land and mineral ownerships, mostly years

(Footnote continues on next page)

yielded these benefits to the owners of improvements conferred extensive powers on the Board, which had the effect of restricting owners' freedom to deal with their property. Persons could not erect or alter any improvement on land located within a mine subsidence district without the approval of the Board[68]. Approval could be subject to prescriptive conditions[69]. A purchaser of land on which there was an unapproved improvement had a statutory right to cancel any contract for sale and to recover not only the deposit but also reasonable costs and expenses[70]. Importantly, no claim for compensation was to be entertained, and no payment made under the Act, respecting improvements that were altered or erected without the Board's approval or otherwise than in conformity with the conditions specified in the approval[71].

68 The evident purpose of conferring these powers on the Board is to enable it to reduce the prospective liability of the Fund[72]. They allow the Board to require that an improvement is constructed or altered in accordance with conditions that are designed to enable the improvement to withstand subsidence, or to minimise the extent of damage from subsidence and the cost of repairs to the improvement. Persons owning an improvement that has been erected or altered otherwise than in accordance with the conditions of the Board's approval suffer the loss of rights resulting from the statutory immunity, and yet have no recourse against the Fund. In this respect there is the potential for the scheme to operate harshly in individual cases. However, it is the choice that the legislature has made in devising a scheme that seeks to adjust rights arising out of competing land uses.

The Board's power under s 13A

69 Threatened subsidence may be anticipated to cause damage to improvements located on parcels of land owned by many owners. On the appellant's preferred construction of s 12A(1)(b), each owner might choose to carry out preventative works without consultation with the Board and recoup the

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ago." New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 15 March 1961 at 3183.

68 Section 15(2) of the Act.

69 Section 15(3) of the Act.

70 Section 15(5)(a) of the Act.

71 Section 15(5)(b) of the Act.

72 Each of the powers enumerated above may be found in ss 14 and 15 of the current version of the Act.

proper and necessary expense of the works, notwithstanding that the Board might have carried out works for the benefit of all owners for a lesser sum. The facts of this appeal may illustrate the point.

70 The appellant's pipeline, the Central Trunk Pipeline, is located in the same easement as: an ethane pipeline, operated by Gorodok Pty Limited ("Gorodok"); a natural gas pipeline, owned by Jemena Eastern Gas Pipeline (1) Pty Ltd and Jemena Eastern Gas Pipeline (2) Pty Ltd (formerly owned by members of the Duke Energy group ("Duke") ("the Eastern Gas Pipeline")); and a low-pressure water pipeline. After original approval was obtained for longwall mining respecting Longwalls 29 to 33, the appellant, Duke and Gorodok entered into the Pipeline Undermining Mitigation Project agreement ("the PUMP agreement"). The principal purpose of the PUMP agreement was to allow the parties to undertake mitigatory or preventative works in common so as to pool their expertise and to reduce costs. The four pipes in the easement cross Mallaty Creek within the area of Longwall 32. The appellant's claim on the Board was in respect of the costs attributable to it for the preventative works carried out on the northern side of Mallaty Creek. These works consisted of the excavation of the four pipelines, decoupling the pipelines from the soil, and associated filling. The Board approved the expenditure of $6.2 million on preventative works in respect of the Eastern Gas Pipeline in September 2006. This was before the appellant's preventative works on its pipeline were carried out. The works that the Board carried out on the Eastern Gas Pipeline were similar to the works undertaken by the appellant. At no time did the appellant approach the Board to ask it to carry out preventative works for the benefit of its pipeline. It may be that the cost of the conduct of similar works to protect the two gas pipelines lying in the same easement could have been less overall than the combined cost of the Board's works and the appellant's works[73]. Whether that is so is not known. However, considerations of this character are consistent with a legislative intent to confer the power on the Board alone to carry out preventative works with respect to anticipated subsidence.

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73 It is not known what made up the costs incurred by the Board. It appears that the Board's preventative works were undertaken on both the southern and northern sides of Mallaty Creek. The appellant's claim was confined to its costs of the works on the northern side of Mallaty Creek. The claim for work that it carried out on the northern side was not precluded under s 15(5)(b) of the Act because at the date of the construction of the pipeline the South Campbelltown mine subsidence district, which is on the northern side of Mallaty Creek, had not been proclaimed. The southern side of Mallaty Creek lies within the Appin mine subsidence district. It had been proclaimed under the Act some years before the appellant's pipeline was constructed and in respect of which it would seem no approval had been obtained from the Board.

71 The appellant submits that two related considerations indicate the legislature did not intend that s 13A should be the sole source of power to take action respecting threatened subsidence. First, s 13A authorises the conduct of remedial works only if the Board is of the opinion that the works would reduce the total prospective liability of the Fund. What the appellant did not identify were circumstances in which damage to improvements might reasonably be anticipated as the result of threatened subsidence, but where the Board might consider that taking preventative steps would not reduce its prospective liability. As earlier explained, the 1969 amendments were introduced, inter alia, to address the Board's lack of power to carry out the preventative works that it had been doing. The second consideration is that the legislature chose to confer a power and not a duty on the Board in this respect. To these considerations may be added a third, that no provision is made to appeal against the Board's refusal to exercise its powers under s 13A. However, it remains that the legislature has conferred a broad power on the Board for the conduct of works of a remedial kind in a case in which damage to improvements (or household or other effects) by reason of subsidence is anticipated. The Board may be expected to exercise its powers reasonably. In the event that it does not an aggrieved owner would have recourse to judicial review.

72 The Fund is made up of the compulsory contributions that are exacted from colliery proprietors. Provision is made for the Fund to receive by way of loan or grant such sums as may from time to time be provided for that purpose out of the Consolidated Fund[74]. It is a public fund serving public purposes. The mechanism for its dispersal in connection with preventative works respecting threatened subsidence is confined to work carried out, or caused to be carried out, by the Board under s 13A. The Court of Appeal majority was right to conclude that that choice does not produce an anomalous result in the context of this statutory scheme[75]. In my view, there is no warrant to depart from the ordinary meaning of the provision by the adoption of a construction that gives no work to the indefinite article in the penultimate and final clauses, or the words "has taken place".

Causation

73 The appellant submitted that even if the issue of construction were resolved adversely to it, there remained an issue of causation raised by the Court of Appeal's decision. Submissions were made on the hearing of the appeal in support of the contention that the extraction of coal by means of longwall mining

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74 Section 10(5) of the Act.

75 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 34-35 [92].

is a process and not an event. A number of the appellant's submissions concerning the process of longwall mining raise questions of fact. The proceedings in the Land and Environment Court of New South Wales were conducted on the basis that the separate question[76] could be answered solely by reference to legal principles of statutory construction[77]. The appellant's challenge on the causation issue may have shown that assumption to be erroneous, as Basten JA noted[78]. The appeal to the Court of Appeal was on a question of law[79]. As I am in the minority, it is sufficient to observe that the agreed facts on which the separate question was determined were that the appellant did not anticipate that subsidence arising from the extraction of Longwalls 30 and 31 was likely, in the absence of further mining of Longwalls 32 and following, to result in damage to the pipeline. The works that were the subject of the appellant's claim were carried out in order to prevent damage to its pipeline from subsidence that was anticipated to result from the mining of Longwall 32 and not from a subsidence that "has taken place".

74 I would dismiss the appeal.

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76 At [8].

77 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 20 [2] per Spigelman CJ, 38-39 [114]-[120] per Basten JA.

78 *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16 at 40 [125]-[127].

79 *Land and Environment Court Act* 1979 (NSW), s 57(1).