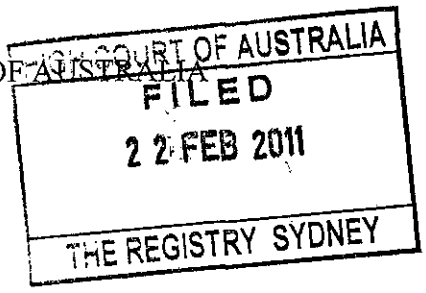
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY



No. S312 of 2010

BETWEEN:

JEMENA GAS NETWORKS (NSW) LIMITED
Appellant

AND:

MINE SUBSIDENCE BOARD
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

1. 12 matters arise for reply.

2. First, at [12] the Respondent Board contends that an important feature of the legislative scheme is the Board's control over improvements and works in mine subsidence districts. That proposition can have little, if any, interpretative significance to ss 12A(1)(b) and 13A of the MSC Act, which provisions are not limited to mine subsidence districts and apply to improvements situated anywhere in New South Wales. The works at issue in this appeal were undertaken on a part of the pipeline located outside any mine subsidence district.

3. Second, at [15] the Board contends that it is "not helpful" to approach the issue of construction by considering the prudence of preventative measures taken by improvement owners, but does not explain why a purposive approach to construction of the section should ignore, as an object of the Act, the prevention of damage from subsidence by the taking of prudent steps. The assertion that s 12A(1)(b) does not require an owner to "wait" until actual subsidence before taking preventative steps may be literally true; the section imposes no positive constraint on an owner's activities. But the *Wambo* construction

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would allow an owner's claim only if he or she waited until actual subsidence before incurring preventative expense and would deny the claim where the owner did not so wait. Such a construction does require the owner to wait if the owner is to have a valid claim on the Fund.

4. Third, at [20] the Board contends that the Appellant's primary construction involves reading in words that do not appear. That is a criticism (if it be one) of all available constructions. The section is ambiguous. The Appellant's primary construction involves reading the section as if the word *"beforehand"* appeared at the end of the phrase *"that has taken place"*. The *Wambo* construction involves reading the section as if the word *"already"* appears in the middle of that same phrase.

5. Fourth, at [23] the Board contends that the disqualifying rider at the end of s 12A(1)(b), *"other than a subsidence due to operations carried on by the owner"*, confirms that the section is dealing with actual, past subsidence. The submission appears to be that an assessment of that matter could only be made in respect of past subsidence. Why that is so is not explained. The facts both of *Wambo* and this case prove that the Board can readily make an assessment that damage would arise from anticipated subsidence not caused by operations carried on by the improvement owner. Far from being *"nonsensical"*, where the owner is not in the business of coal mining such an assessment should be straightforward. With respect, this is an error akin to that made by Tobias JA in *Wambo* in respect of the assessment of whether the expense was proper and necessary: see paragraph 59 of the Appellant's submissions in chief.

6. Fifth, at [25] the Board contends that s 12A(1)(b) does not serve the purpose "prevention is better than cure" in an unqualified way but only to the extent of facilitating self-help to prevent damage from a subsidence that has already occurred. That is to state a conclusion, which assumes the answer to the proper construction of s 12A(1)(b). The same comment may be made of the Board's assertion at [46] that the legislative scheme confers primary responsibility on the Board for dealing with subsidence (including anticipated subsidence).

7. Sixth, also at [25] the Board contends that the text of s 13A makes plain that (unlike s 12A(1)(b)) the Board's powers extend to preventative action in respect of anticipated subsidence. That conclusion is far from obvious. There is no apparent reason why s 13A

should cover a wider field than s 12A(1)(b). Indeed, the language of s 13A *"by reason of subsidence"* is not relevantly different from s 12(1)(a) *"arises from subsidence"*, yet the latter provision applies only to actual subsidence.

8. Seventh, at [26] the Board implies that "emergencies" could only occur when subsidence has in fact already occurred. The description "emergency" is equally applicable to a situation where subsidence has yet to occur but the owner knows it will occur and damage is expected to follow immediately upon the subsidence. Both situations create a need to act before damage. The reference in the Second Reading Speech to "emergencies" is equivocal so far as the primary issue of construction is concerned.

9. Eighth, at [28] the Board challenges the interpretative significance of s 14 of the MSC Act. It relies, first, on the fact that the abrogation of common law rights was a feature of the statutory scheme prior to the introduction of s 12A(1)(b). This is no reason not to give a beneficial construction to all sections of the Act which allow an owner to claim on the Fund. The scheme of the Act is to take away an owner's common law rights (other than its right to sue in negligence) and replace them with a bundle of rights in respect of potential claims on the statutory Fund. That the legislature may, over time, finesse the circumstances in which claims may be made on the Fund does not detract from that basic scheme. The Board's second point is that there is no common law equivalent to the entitlement to payment in accordance with s 12A(1)(b). That, with respect, is not to the point. But for s 14, an owner could sue the miner in nuisance for withdrawal of support for land (*Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 at 147-8)[1] and seek appropriate injunctive relief. In substitution for those rights, the Act permits an owner to make claims on the Fund. They are different rights but the purpose of both is to compensate the owner for loss caused by undermining.

10. Ninth, at [33]-[34] the Board takes issue with Basten JA's interpretative reliance on the use of the word *"has"* rather than *"had"* in the phrase *"has taken place"* by pointing out that the section deals with two scenarios: where expense is proposed and where it is incurred. However, there is no difference between claims for expense proposed and expense incurred

[1] It is conceivable that if (but for the Act) a miner were to be sued in nuisance by an owner, the miner could raise a partial defence to a claim for damages based on the owner's failure to mitigate the damage by taking preventative steps, in which case the common law remedy would approximate the right to compensation under s 12A(1)(b).

when considering the use of *"has"* or *"had"*. In both categories of claim there are two points in time with which the section is concerned: the first, when the owner incurs or proposes the expense; and the second, when the Board comes to form an opinion.

11. Tenth, at [36]-[41] the Board criticises the construction favoured by the minority in the Court of Appeal on the basis that the time at which the Board forms its opinion will largely be a matter of chance leading to the anomalous, if not irrational, result that an owner's entitlement may depend upon whether the Board forms its opinion before or after the subsidence takes place.

12. It is a necessary incident of judicial and administrative determinations that a claimant's entitlement to relief depends on the state of affairs existing at the date of the decision. Ordinary judicial proceedings are determined based on the evidence at the date of hearing. Events may occur between the commencement of the claim and the date of hearing which materially impact a claimant's entitlement to relief. Events may occur after the date of trial which, had they existed at trial, may have produced a different result. A claimant cannot, generally speaking, control when its claim is heard and determined. The risk that success of its claim may depend in part on the date of determination is a normal and unavoidable risk of the process of claims determination.

13. The Board's complaint that the minority construction leads to arbitrary results based on the timing of the Board's decision invites comparison with the *Wambo* construction. The Board's criticism of the minority construction as one which encourages owners to delay incurring the expense *"until as late as possible before"* the anticipated subsidence, must apply, a fortiori, to the *Wambo* construction which not only encourages but requires improvement owners to delay incurring the expense until *after* the anticipated subsidence occurs if they are to have a valid claim.

14. The potential for some arbitrary operation of the section on both the *Wambo* and minority constructions focuses attention on the Appellant's primary construction (dealt with in paragraphs 25-33 of its submissions in chief), which does not suffer from any potential for arbitrary operation based on the timing of claims or their determination. The only temporal limitation on this construction is that the anticipated damage will arise after, and be caused by, the anticipated subsidence.

15. Eleventh, at [42] the Board relies on the *de novo* nature of an appeal under s 39(2) of the *Land and Environment Court Act 1979* (NSW) to suggest that, on the minority construction, the court hearing such an appeal would be required to consider whether subsidence had occurred by the *time of the court's decision*. That is not so. Although an appeal to the court under s 12B(a) of the MSC Act involves a hearing de novo, it is a rehearing afresh of the question before the Board (whether damage could reasonably have been anticipated from subsidence). The court must assess the matter as at the date of the Board's decision. The position is no different from a court exercising the power to set aside an order previously made extending the time for service of a writ: *Savcor Pty Ltd v Cathodic Protection International APS* (2005) 12 VR 639 at [21].

16. Twelfth, at [53] the Board asserts that over the period described in the SOAF subsidence occurred *"on a number of occasions"* and that there were *"distinct instances of subsidence"*. That characterisation is inconsistent with the SOAF. Measurements were taken at various times at various survey points, including where the pipeline crossed Mallaty Creek (survey point J087, subsequently relocated to J087R without any loss in direct comparability of the results): SOAF [36], [42]-[44]. The level of measured subsidence increased over time and it was cumulative. The experts' prediction of cumulative subsidence at the conclusion of each longwall (see SOAF [28]) was a convenient way of showing the increasing and cumulative subsidence over the course of the planned mining. That does not mean that there was a separate subsidence for each longwall. In practical terms the extraction of coal was continuous and the SOAF shows that the ground where the pipeline crossed Mallaty Creek was progressively moving downwards as to the mining continued. To say that subsidence occurred "on a number of occasions" is to misstate the true factual position.

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