

RECENT DEVELOPMENTS

NEW SOUTH WALES

MINE SUBSIDENCE COMPENSATION*

Australian Gas Light Company v Mine Subsidence Board [2006] NSWLEC 494 (Biscoe, J)

Jurisdiction of Court for appeals under s 12B Mine Subsidence Compensation Act 1961 – decision of Mine Subsidence Board

The Land and Environment Court was requested to determine whether the Court had jurisdiction to hear and determine AGL's appeal under s 12B of the *Mine Subsidence Compensation Act 1961* (the *Act*) in respect of certain decisions of the Mine Subsidence Board.

Section 12B

Section 12B provides that a person claiming compensation under ss 12 or 12A of the Act 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.

Jurisdiction

The Land and Environment Court is given jurisdiction to hear and dispose of appeals under s 12B of the Act by reason of s 19(f1) of the *Land and Environment Court Act 1979*. Also, s 16(1A) of that Act provides that the Court has jurisdiction to hear and dispose of any matter not falling within its jurisdiction under any other provision of this Act or under any other Act being a matter that is ancillary to a matter that falls within its jurisdiction.

Relevance

The relevance of the question before the Court is that for the purposes of hearing and disposing of a s 12B appeal, the Land and Environment Court, if it has jurisdiction, has all of the functions and discretions which the Board had by virtue of s 39(2) of the *Land and Environment Court Act*. Hence, the s 12B appeal is a merits appeal. If the Court did not have jurisdiction then jurisdiction rests with the NSW Supreme Court but it only has a judicial review jurisdiction.

Claimed Board Decisions

AGL claimed that the three Board decisions that fell within s 12B were:

- (a) a decision to refuse to issue AGL with a s 15B(3A) Certificate;
- (b) a decision to refuse to entertain AGL's compensation claim under ss12 and 12A; and
- (c) a decision that ss12 and 12A do not provide for AGL's compensation claim insofar as it related to anticipated subsidence.

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These decisions were found in minutes of the Board's meetings and in correspondence to AGL. The Board denied that the three matters were decisions which attracted jurisdiction under s 12B.

It was accepted that if any of the Board's decisions are appealable under s 12B but the others were not then the others are appealable by virtue of the ancillary jurisdiction under s 16(1A) of the *Land and Environment Court Act*.

Decision (a)

The Court held that decision (a) was not a decision within s 12B because s 12B was limited to applications by a person claiming compensation under ss 12 or 12A. An application for a certificate under s 15B(3A) is not such a claim. Also, the refusal of the certificate does not of itself convert the refusal into a decision as to the amount of payment from the Fund even though the effect of the refusal is that AGL receives no compensation.

Decision (b)

It was also concluded that decision (b) was not a decision as to the amount of the payment from the Fund. The decision of the Board was based on s 15(5)(b) which bars it from making a payment or entertaining a claim because the applicant has no s 15B(3A) certificate.

Decision (c)

Decision (c) above was stated by the Board in its letter to AGL and as to the effect that ss12 and 12A do not provide for an owner of an improvement to recover expenses incurred in preventing or limiting the damage that might be caused by anticipated subsidence and this was expressed as the Board's view. The Court held that such a view may be regarded as a decision and that it was a decision as to whether damage has arisen from subsidence or could reasonably have been anticipated.

Consequently, this decision was within s 12B.

Conclusion

The Court therefore had jurisdiction within s 12B to review this decision as well as the other decisions on the basis that the other decisions of the Board come within the Court's ancillary jurisdiction.

***Wambo Coal Pty Limited v Mine Subsidence Board* [2006] NSWLEC 528 (Lloyd J)**

Compensation entitlements under s 12A(1)(b) Mine Subsidence Compensation Act – interpretation using Minister's second reading speech.

Wambo Coal Pty Limited sought payment from the Mine Subsidence Board for a sum of money in respect of expenditure incurred in anticipation of subsidence damage to its surface drift conveyor as a result of subsidence. The Court was asked to determine whether there was an entitlement under s 12A(1)(b) of the *Mine Subsidence Compensation Act 1961* to claim compensation for expense incurred in preventing or mitigating reasonably anticipated damage prior to any

subsidence occurring or alternatively whether it is necessary for damage resulting from a subsidence to have occurred prior to any claimable expenditure being incurred.

Claim history

Wambo lodged a claim for compensation under s 12A of the Act for expenses it incurred in dismantling and removing the conveyor. The Board refused the claim and Wambo Coal commenced proceedings in the Land and Environment Court pursuant to s 12B of the Act.

Section 12A(1)(b)

Section 12A(1)(b) provides that claims may be made under the Act for payment from the Fund of an amount to meet the proper and necessary expense incurred or proposed by or on behalf of the owner of improvements in preventing or mitigating damage to those improvements that, in the opinion of the Board, the owner could reasonably have anticipated would otherwise have arisen or could reasonably anticipate would otherwise arise from a subsidence that has taken place, other than a subsidence due to operations carried on by the owner.

Decision

It was accepted that there must have been actual subsidence before any compensation is payable.

Relying on the Minister's second reading speech when the provision was introduced, the Court concluded that s 12A(1)(b) was intended to provide that the owner of improvements may incur any necessary and proper expense in preventing or mitigating damage to those improvements which the owner could reasonably have anticipated would otherwise have arisen but the claim may not be made until the subsidence has taken place.

To hold otherwise would defeat the purpose of the provision, as explained by the Minister. Also, it avoids absurd results. Therefore, the Court concluded that a proprietor has an entitlement under s 12A(1)(b) of the Act to claim compensation for expense incurred in preventing or mitigating reasonably anticipated damage to improvements and that the expense could be incurred prior to any subsidence occurring. It was not necessary for a subsidence to have occurred prior to the expenditure being incurred but subsidence must have taken place before the claim is made.

PRE-EMPTIVE RIGHTS NOT TRIGGERED*

Lend Lease Real Estate Investments Limited v GPT RE Limited [2006] NSWCA 207 (Spigelman CJ, McColl JA and Basten JA)

Pre-emptive rights – deal with – transfer notice.

The decision at first instance was reported in the Journal at (2005) 24 ARELJ 263.

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