

## Legal Briefing

### Ted Lowery wades into a dispute over the estuarial applicability of the HGCRA

*Van Elle Ltd v Keynvor Morlift Ltd [2023] EWHC 3137 (TCC)*

In the Technology and Construction Court

Before His Honour Judge Stephen Davies sitting as a High Court Judge

Judgment delivered 8 December 2023

#### The facts

Within Fowey Harbour in the river Fowey in Cornwall, the RNLI owned a pontoon that served as a landing stage for the Fowey lifeboat. The RNLI's pontoon was fixed to two berthing piles by means of brackets that rose and fell with the tide. On the river side of the RNLI's pontoon were two mooring piles. The mooring piles were not directly connected to the pontoon or the berthing piles.

It was common ground that Fowey Harbour was approximately 1 mile inland from the sea, that all four piles sat below the tidal low water line and that all four piles were supported only by the ground into which they had been driven.

Under a purchase order issued on 18 November 2021 Keynvor engaged Van Elle to replace the four piles. Following completion of the works, Van Elle commenced an adjudication: in a decision dated 27 June 2023 the adjudicator ordered that Keynvor pay Van Elle some £335,142.33 plus interest.

Keynvor opposed Van Elle's enforcement proceedings on grounds that the adjudicator lacked jurisdiction. Keynvor submitted that the relevant Ordnance Survey map showed the Cornwall county boundary crossing the river Fowey upstream from the RNLI's pontoon: as such the pile replacement works lay outside of England – as defined in the Interpretation Act 1978 and the Local Government Act 1972, which referenced the English counties – and did not therefore comprise construction operations in England to which the HGCRA could apply. Keynvor also alleged breaches of natural justice on grounds that the

adjudicator had failed to take into account its substantive defences in relation to weather downtime, rates, ground conditions and deductions for equipment.

Van Elle submitted that the correct approach was to view the works as a whole, in which context the purchase order encompassed, "...construction operations in England..." by reference to section 105(1)(b) in the HGCRA where the RNLI's pontoon comprised, "... works forming ... part of the land ..." and where the installation of the new piles was part of the alteration, repair or maintenance of the pontoon.

#### The issue

Should the adjudicator's decision be enforced?

#### The decision

The judge stated that the question of what was meant by 'England' under the HGCRA could only be answered by interpreting sections 104 and 105 in the context of the whole of the Act and the relevant surrounding circumstances.

The judge observed that if construction operations were being undertaken in relation to an enclosed area of water, for example a lake or within the non-tidal area of a river, then s.105(1) will usually apply if the works relate to buildings, structures or works forming or to form part of land that are not specifically excluded by s.105(2).

However, if the construction operations were solely to the bed of an enclosed area of water or were taking place in a tidal river, sections 104 and 105(1) needed to be considered with reference to the Interpretation Act, which states that 'land' includes land covered with water, (there being no contrary intention within the HGCRA).

With works on or adjacent to the coast then as per the Interpretation Act and the Local Government Act, reference could be made to the relevant Ordnance Survey map as Keynvor had submitted. However, whilst the Ordnance Survey boundary was specifically intended to demarcate the extent of the realm, generally consistent with the UN's 1958 Convention on the Territorial Sea and Contiguous Zone and its successor, the 1982 Convention on the Law of the Sea (both adopted within the UK by Orders in Council) in terms of identifying the baseline between the land and

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the territorial sea, the judge noted that article 13 in the 1958 Convention and article 9 in the 1982 Convention both provided that in the case of rivers, the baseline should run across mouth of the river where it met the sea.

The judge said he was satisfied that no interested or informed reader would conclude that, at the time of the enactment of the HGCRA, Parliament intended that the dividing line for rivers entering the sea would be as drawn on Ordnance Survey maps: that would be inconsistent with the position that construction operations relating to inland waters were to be covered by the legislation whereas construction operations within territorial waters and on the high seas were not. The judge concluded that the intention of Parliament, assessed objectively, was that the dividing line was to be drawn at the mouth of the river in accordance with the approach taken in the 1958 and 1982 UN Conventions.

Therefore the references to 'the land' in section 105(1) included land covered by inland waters up to the baseline and hence to the mouth of the river Fowey, downstream of the RNLI's pontoon. Thus the purchase order concerned construction operations within England.

The judge likewise dismissed Keynvor's secondary case finding that if the adjudicator had failed to take into account any of the four substantive defences, such failures comprised unintentional oversights: where the adjudicator had produced a detailed reasoned decision and where the amounts involved were modest, the decision had not been invalidated by any material breach of natural justice.

### Commentary

The question posed by the judge of where 'England' ends would appear to have more to do with the philosophy of history than adjudication but the facts of this dispute necessitated a rare foray into what Parliament intended when enacting the HGCRA back in 1996.