



Where does England end? TCC tackles interesting and complex question as to territorial extent of Construction Act

In *Van Elle Limited v Keynvor Morlift Limited* [2023] EWHC 3137 (TCC) HHJ Stephen Davies was asked to consider the “interesting but complex” question of the true territorial extent of Part 2 of the Housing Grants, Construction and Regeneration Act 1996 (the “**Construction Act**”). Or put shortly, where does England end?

Background

Keynvor Morlift Limited (“**KML**”), engaged Van Elle Limited (“**VEL**”) to install replacement piles at a pontoon at Fowey Harbour in Cornwall, which was owned and used by the RNLI to moor a lifeboat (the “**Works**”). The Works took place on the “*seabed*” below the river Fowey’s low water line.

A dispute arose, following which VEL commenced a true value adjudication against KML in respect of its final account. The Adjudicator found in VEL’s favour and KML was ordered to pay VEL c.£335k together with interest, fees and expenses associated with the adjudication (the “**Decision**”).

KML did not pay and VEL applied to the Court to enforce the Decision by way of summary judgment. KML defended the application on the twin grounds of jurisdiction and breach of natural justice.

Held

For the reasons set out below, VEL successfully enforced the Decision and KML was ordered to pay VEL the outstanding sums.

KML’s jurisdictional challenge – what is meant by “England” in the Construction Act?

Sections 104(1) and 104(6) of the Construction Act provides that the right to statutory adjudication will only apply to agreements for “*the carrying out of construction operations*” in “*England, Wales or Scotland*”. “*Construction operations*” is defined in s.105(1) but there is no express definition of “*England, Wales or Scotland*”.

KML sought to defend VEL’s application for summary judgment by arguing that as the Works were undertaken outside of England such that the Construction Act did not apply, the Adjudicator lacked jurisdiction and the Decision was unenforceable.

The question “where does England end” proved anything but straightforward, but after hearing detailed submissions from the parties’ respective counsel, HHJ Stephen Davies ultimately rejected KML’s jurisdictional challenge for the reasons set out below.

- When viewed in context, the Judge was satisfied the Works fell within the scope of s.105(1)(b) of the Construction Act as (emphasis added) “*construction, alteration, repair... of any works forming part of the land, including wall roadworks... docks, harbours, inland waterways, pipelines...*” The Works were not specifically excluded by section 105(2) of the Construction Act and there was nothing to suggest that “*land*” was intended to exclude land covered with water. HHJ Stephen Davies used the example of a bridge crossing an inland lake or river and works to a reservoir to illustrate the point.
- Drawing on various international conventions, orders, the Interpretation Act 1978 and Ordnance Survey (“**OS**”) information, HHJ Davies found that the Works fell within the scope of s.104(6) of the Construction Act which captures works carried out to the ‘baseline’ used to measure the ‘territorial sea’ – a concept familiar in public international law but not expressly referred to within the Construction Act. This was despite the Works being located on the seaward side of the

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notional black line drawn on the OS map as indicating where the river ends, and the sea begins (which KML sought to rely as a means of arguing that the Works fell outside the meaning of the Construction Act). HHJ Davies also reasoned there was no evidence to suggest that Parliament's intention, when assessed objectively, was to exclude construction operations downstream of the notional dividing line adopted by those responsible for drawing up the OS map. Rather, the Judge was satisfied that the intention of Parliament was that the dividing line was to be drawn substantially further downstream, at the mouth of the river.

Had there been a breach of natural justice?

KML also argued the Adjudicator had materially breached the rules of natural justice by failing to consider various defences. This was rejected and the Decision enforced for the reasons set out below in accordance with settled principles summarised in *Pilon Ltd v Breyer Group plc* [2010] EWHC 836:

- KML contended firstly that the Adjudicator had wrongly concluded there was no argument that weather conditions reached a certain contractual threshold, when in fact KML's defence was that there was no evidence that they did. HHJ Davies rejected KML's submission and found that the Adjudicator legitimately considered the issue and was entitled to reject KML's case.
- KML argued that the Adjudicator had wrongly found that the "*rates used are common ground*" when these were contested, and that the Adjudicator had failed to award KML the benefit of an abatement. HHJ Davies determined that, at best, there had been a "*modest and unintentional oversight*" by the Adjudicator in the context of a fiercely contested final account dispute, but the Adjudicator had produced a detailed and reasoned decision and there was no evidence

regarding the materiality of these oversights even on KML's best case. Such oversights did not "*meet the level of seriousness necessary*" for the Decision to be invalidated by a breach of natural justice. In respect of the second point, HHJ Davies also concluded that the Adjudicator was expressly permitted to reach his own valuation of the deduction and was not limited to the parties' positions.

- KML's final argument that the Adjudicator had wrongly found that KML had admitted that ground conditions were not as expected and, as a result, awarded VEL £38,000 was misconceived and took "*words used out of context in a spurious attempt to challenge*" the Decision.

Analysis

The case clarifies a seemingly straightforward, but in reality interesting and complex question as to where England ends for the purposes of the Construction Act, and will be of particular interest to all those who might carry out works to land covered by inland waters.

The rejection of the Defendant's assorted arguments on natural justice also underlines the Court's unwavering commitment to robustly enforcing adjudicator's decisions in accordance with the overriding objective where there is no arguable defence.

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