Neutral Citation Number: [2023] EWHC 3137 (TCC)

Case No: HT-2023-000318

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**TECHNOLOGY AND CONSTRUCTION COURT (KBD)**

Rolls Building,
London, EC4A 1NL

Date judgment handed down: 8 December 2023

**Before**:

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

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**Between:**

**VAN ELLE LIMITED** **Claimant**

**- and -**

**KEYNVOR MORLIFT LIMITED** **Defendant**

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**James Frampton** (instructed by **DAC Beachcroft LLP, Newcastle upon Tyne**) for the **Claimant**
**Andrew Stevens** (instructed by **Adams & Moore Solicitors LLP, London EC2**) for the **Defendant**

Hearing date: 15 November 2023
Supplemental written submissions 28 & 29 November 2023

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# APPROVED JUDGMENT

*Remote hand-down*: This judgment was handed down remotely at 10:30am on 8 December 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**His Honour Judge Stephen Davies**

**His Honour Judge Stephen Davies:**


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## A. Introduction & summary

1. The claimant ("VEL") seeks summary judgment to enforce the decision of an adjudicator, Mr John Riches, who, in a decision dated 27 June 2023, determined that: (a) the defendant ("KML") should pay to VEL the sum of £335,142.33 being his assessment, on the true valuation of VEL's entitlement under the contract made between them, of the sum due to VEL, together with interest; and (b) as between VEL and KML the latter should bear the liability for his fees and expenses.

2. KML defends the application on the twin grounds of jurisdiction and breach of natural justice.

3. I have been greatly assisted by the efficient production of the evidence and bundles and by the impressive submissions of both counsel, written and oral.

4. The jurisdiction defence raises the interesting but complex question of the true territorial extent of Part 2 of the Housing Grants Construction and Regeneration Act 1996 as amended ("the Construction Act"), including the right to adjudicate disputes arising under contracts to which the Construction Act applies.

5. The breach of natural justice defence raises issues in relation to: (a) the adjudicator's decision making process as regards the issue of jurisdiction; and (b) the substantive disputes. Issues

falling within (a) are obviously otiose, since the adjudicator was not given jurisdiction to decide his own jurisdiction and, it follows, my decision on jurisdiction will, whichever way it is decided, supersede the adjudicator's own non-binding determination. Issues falling within (b) will only arise if I determine that the adjudicator did have jurisdiction.

6. As to the jurisdiction issue, it is common ground that, this being a summary judgment application, I should only summarily enforce the decision if satisfied that KML has no real prospect of defending the claim.

7. Mr Stevens submitted, for understandable forensic reasons lest the decision should go against his client, that there were - or may come to be - relevant issues of fact to be determined at trial, such that it was not appropriate to determine the jurisdiction issue on a final basis, save in relation to the proper construction and effect of s.104(6)(b) of the Act. He referred me to the convenient summary of the law and practice in relation to summary judgment in the recent judgment of Joanna Smith J in Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies plc [2023] EWHC 2506 (TCC) at paragraphs 74 – 81.

8. More recent still is the decision of the Court of Appeal in Humphrey v Bennett & Murphy [2023] EWCA Civ 1433, where Lewison LJ repeated the words of Mummery LJ in Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Co 100 Ltd [2006] EWCA Civ 661 at [18]

"In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

9. Nonetheless, in my view this is not a case where there are - or could credibly be expected to come to be - factual disputes which might realistically be expected to make a difference to the outcome assuming a trial. It follows in my view that the court can and should make a final determination now, based on the evidence before it which is contained in or attached to the witness statements of the respective solicitors, Ms Treverton for VEL and Mr Adams for KML.

10. Such a course is in accordance with the policy of robustly enforcing adjudicator's decisions where there is no arguable defence. It is also in accordance with the overriding objective, given the relatively modest value of the claim and the energy, time and (considerable) cost already incurred to date in investigating the jurisdictional issue.

11. In short, for the reasons given below, I am satisfied that there is no defence to summary enforcement of the decision which should, thus, be enforced.

## B. The jurisdiction issue

12. I begin by referring to the relevant sections of the Construction Act before referring to the facts, the evidence as to what is meant by "England" and the submissions before making my decision.

### B.1. The Construction Act

13. As relevant the Construction Act provides as follows:

S.104(1): "In this Part a "construction contract" means an agreement with a person for any of the following— (a) the carrying out of construction operations."

S.104(6): Section 104(6): "This Part applies only to construction contracts which—(a) … (b) relate to the carrying out of construction operations in England, Wales or Scotland."

S.105(1): "In this Part "construction operations" means, subject as follows, operations of any of the following descriptions—

(a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);

(b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, electronic communications apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;

…

(e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;"

S.105(2) identifies five types of operations which are not construction operations within the meaning of Part 2 of the Construction Act. None are of particular relevance for present purposes.

### B.2. The facts

14. It is common ground that the employer, the Royal National Lifeboat Institution ("RNLI"), was the owner of a pontoon at Fowey Harbour in the river Fowey in Cornwall (referred to as "the red pontoon" because of its colour), which it used for the purpose of mooring its lifeboat ("the RNLI lifeboat"). The river Fowey is identified in the relevant statutory Merchant Shipping Notice issued by the Maritime & Coastguard Agency as not forming part of the sea

and being a Category C river (a tidal river or estuary). The Inland Water Association identifies the river Fowey as an inland waterway up to a point downstream of Fowey Harbour. The Google maps exhibited show that Fowey Harbour is well inland of the point where the river Fowey meets the sea. I attach one such map as the first appendix to this judgment, which shows the RNLI Fowey Lifeboat Station and its position relative to the sea. There is clearly some considerable distance between the two. Mr Frampton says that Fowey Harbour is sited approximately 1 mile inland although there is, so far as I am aware, no specific evidence to this effect.

15. The Oxford English Dictionary defines a pontoon as "a floating platform supported by hollow metal cylinders or other floats, used as a landing stage, dock, etc.".

16. The red pontoon is supported, not by floats, but by brackets attached to 2 berthing piles driven into the ground under the river below low water level. The brackets are fixed to allow the pontoon to move up and down with rising and falling water levels. Further, the red pontoon is not connected directly to the riverside seawall but via a hinged ramp ("the hinged ramp") to another pontoon (referred to as the "green pontoon") which, itself, is connected to the riverside seawall by a gangway ("the gangway"). The green pontoon is owned by the Fowey Harbour Authority and is used by other boats for mooring. Both pontoons are served by electricity and water services.

17. The RNLI lifeboat is moored to 2 mooring piles, also driven into the ground below low water level. These 2 mooring piles do not connect in any way to the red pontoon, save indirectly insofar as when the RNLI lifeboat is moored in position it is also secured to the red pontoon by ropes.

18. There is a convenient marked up aerial photograph showing the above features which I attach as appendix 2 to this judgment. It is worth emphasising the following points, which are not factually disputed. (I shall refer to the "pontoon" as shorthand for the totality of all of the above features.)

    a) The piles are all supported only by the ground into which they are driven. The only connection between the mooring piles and the rest of the pontoon is the mooring ropes referred to above. The only connection between the berthing piles and the rest of the pontoon is the brackets, which are reasonably substantial gated brackets which can be unclipped to allow the red pontoon to be towed away when necessary (as was the case whilst the piles were replaced as part of the works the subject of the contract – see below).

    b) The red pontoon and the green pontoon are physically separate structures and are physically separated by water and the only connection between the two is a hinged ramp which is connected to the red pontoon and rests on – but is not connected to – a plate on the surface of the green pontoon.

    c) The green pontoon has its own berthing piles to which it is secured by gated brackets. Access to the green pontoon from the riverside seawall is gained via the gangway, which

is a metal walkway which is connected to the seawall by a reasonably substantial hinged connection and rests upon – but is not connected to - the green pontoon by a small set of wheels which rest against metal tracks, thus allowing the gangway to move up and down along with the movement of the tide. (Mr Adams says that this is a similar design to that used by cruise ships when berthed at harbour. That is not actively disputed by VEL. It is the only potentially disputed fact which Mr Stevens was able to identify when I asked him to identify any such facts and in my view is plainly not such as to require this case to go to a full trial.)

19. By a contract formed by VEL's acceptance of KML's purchase order dated 18 November 2021 VEL agreed to undertake works to "replace the existing pontoon berthing and mooring piles including the installation of new piles including rock socket (piles supplied by KML) and the supply and installation of grout into rock socket (suitable for underwater marine environment)".

20. The purchase order contained a number of provisions which it is unnecessary to recite for present purposes. Attached was a specification, 5 drawings and a geotechnical investigation. These were produced by the RNLI and its project manager for the pile replacement project, in respect of which KML was the main contractor. As relevant, they included the following:

a) The current pontoon berth was completed in 2004.

b) The main contract works comprised the totality of the pile replacement works. This included items such as the temporary removal of the red pontoon and the removal of the existing piles and the reinstatement of the red pontoon, none of which were within VEL's scope of work and none of which involved any works to the green pontoon or to the gangway. VEL's scope of works was limited to the installation of the replacement piles.

c) The site was located within open tidal water, with tidal information showing such data as the highest astronomical tide ("HAT") as 5.6m above chart datum at Fowey and lowest astronomical tide ("LAT") as minus 0.2m below: section 1.5. The drawings showed that the pile closest to the land was sited more than minus 1.0m below datum and the pile furthest from the land was sited more than minus 4.5m below datum. (This is consistent with the Admiralty chart produced by KML in its evidence, which shows that the piles have been installed to the seaward side of the low water line.)

## B.3. Where does England end?

21. There is no definition of England, Wales or Scotland in the Construction Act itself.

22. The defendant refers to and relies upon the definition of England in the Interpretation Act 1978 which states at s.5: "In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule".

23. Schedule 1 includes the following: "England means, subject to any alteration of boundaries under Part IV of the Local Government Act 1972, the area consisting of the counties established by section 1 of that Act, Greater London and the Isles of Scilly".

24. The Local Government Act 1972 includes Cornwall as an administrative county. Part 3 of that Act provides, by paragraph 1, that: "The boundaries of the new local government areas shall be mered by Ordnance Survey". (The Oxford English Dictionary defines the verb to mere as "to mark out (land) as regards its boundaries; to delineate the boundaries of. …".)

25. The Ordnance Survey ("OS") election map identifies the boundaries of counties by a black line. It shows the boundary of Cornwall at Fowey, where the county straddles the river on both sides, as running along each side of the river Fowey, along what appears to be the line between the foreshore and the water, from the point where the river enters the sea down to a point just upstream of the pontoon, where the black line crosses the river in a straight line. A copy of the map is attached as appendix 3 to this judgment.

26. The OS boundary line information document, which may be accessed online and is exhibited by Mr Adams, contains a detailed explanation of the way in which this OS map is produced. Section 2.4 deals with the coastline and explains that "the external bounding line of the Boundary-Line dataset is the extent of the realm (EOR)" and that "the Territorial Waters Jurisdiction Act 1878 and the Territorial Waters Order in Council 1964 confirm that the EOR of Great Britain as used by Ordnance Survey is properly shown to the limit of mean low water for the time being, except where extended by Parliament".

27. Reading this explanation with the OS map makes clear that the EOR runs along the low water line of the river Fowey and, thus, includes the foreshore as exposed at low tide. The EOR where it crosses the river in a straight black line is referred to as Point B, which is identified as the "intangible line across a channel where the level of the river meets the level of the sea at low water".

28. In the same section the OS boundary line information document explains that: "A pier under which water flows is not normally considered to be within the realm. There are some cases, however, where a structure has specifically been included within the realm by act or order, in which case mean high water (springs) mark and EOR are shown around the limits of the structure". These are described as "seaward extensions".

29. Finally, reference is made to "structures in the sea", where it is said that:

    a) Breakwaters may be separate from or joined to the mainland; the latter are generally included within the local government and parliamentary areas (and thus within the EOR); whereas the former are not unless falling within the category of seawards extensions.

    b) Permanent or solid structures in the sea, such as forts, are usually included within the local government and parliamentary areas (and thus within the EOR).

30. In summary, the OS map contains a pictorial representation of the extent of the realm (EOR) which is arrived at by taking the seawards extent of the realm as being the low tide level, including the low tide level of a river, save where a structure to the seaward side has been included within a local government and parliamentary area, in which case it is also shown as included.

31. I had not during the hearing been referred to the statute and the statutory instrument referred to in the OS boundary line information document. Following the hearing I looked at the Territorial Waters Order in Council 1964 ("the 1964 Order") and discovered that it had been revoked and replaced by the Territorial Sea (Baselines) Order 2014 ("the 2014 Order"), made under the Territorial Sea Act 1987.

32. Article 2(1) of the 2014 Order, so far as material, provides that: "… the baselines from which the breadth of the territorial sea adjacent to the United Kingdom, the Channel Islands and the Isle of Man shall be established in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea (Cmnd 8941), as modified and set out in Schedule 1 to this Order". This UN Convention ("UNCLOS"): (a) replaced the Convention of the Territorial Sea and Contiguous Zone, 1958 ("the 1958 Convention"); (b) was adopted in 1982; and (c) came into force in 1994. The UK acceded to UNCLOS in 1997. The Construction Act came into effect on 1 May 1998, at a time when the 1964 Order was still in force and had not yet been revoked and replaced by the 2014 Order.

33. Article 5 of Schedule 1 confirms that the normal baseline for measuring the breadth of the territorial sea adjacent to the United Kingdom begins from the low-water line along the coast, save where otherwise provided. However, article 9, entitled "mouths of rivers", provides that "If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks". Article 10 makes specific provisions for bays, to more complex but, broadly, similar effect. There is no equivalent to article 9 (or article 10 for that matter) in the 1964 Order.

34. It seemed to me that that the meaning of article 9 of the 1964 Order was of potential relevance to this case and I asked counsel to address me on this point if they wished, after which I received submissions from both counsel on this point.

35. Mr Frampton submitted that article 9 supported VEL's case, in that:

(i) The OS map, showing the black line inwards of the pontoon, was based on the OS boundary line information document, which had plainly not been updated to reflect the 2014 Order and should not, therefore, be regarded as determinative.

(ii) UNCLOS Article 8 (albeit not included in Schedule 1 of the 2014 Order) provided that: "… waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State." Applying UNCLOS thus made it clear that the pontoon sits within the internal waters of England.

(iii) Article 11 (Ports) of Schedule 1 to the 2014 Order states that: "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast ...". He submitted that: (a) the pontoon is equivalent to a "harbour system" and the mooring piles are equivalent to "the outermost permanent harbour works which form an integral part" of that system; and thus that: (b) article 11 therefore further supports the Claimant's position that (1) the piles should be considered as part of the pontoon system as a whole, and (2) the pontoon system as a whole forms part of England

36. Mr Stevens submitted that:

(i) To ascertain the boundary of England it is necessary only to refer to the OS map and not to the OS boundary line information document, so that there is no need to refer to, or to consider, the 1964 Order nor the 2014 Order.

(ii) In any event, the stated purpose of the 2014 Order is not to define the outer extent of England, but to define the baseline used for demarcating the territorial sea off the coast of the United Kingdom. This, being a concept from public international law of the extent of the sea and the seabed around coastal states over which a coastal state's marine and maritime jurisdiction and rights extend, has no relevance to the proper construction of the Construction Act, since it says nothing about what is meant by England.

(iii) Article 7 of UNCLOS, which is not included in Schedule 1 to the Order, makes provision for employing a straight baselines procedure where the coastline is deeply indented. Article 9 performs a similar function, and is only intended to simplify the line where the territorial sea meets the high sea and, hence, has no relevance for determining the outer extent of England for the purposes of the Act.

(iv) Given the focus in s.105(1) of the Construction Act on buildings, structures or works which form part of the land, the 1964 Order and the 2014 Order should not be regarded as relevant to the proper construction of England, whether through the reference to the (now repealed) 1964 Order in the OS product information or otherwise. The Interpretation Act 1978 defines "land" as including "building and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land" and there is nothing in the 2014 Order which changes this.

(v) Even if the court was to consider that article 9 should apply, there is insufficiently clear evidence to justify a finding that the pontoon is inland of "a straight line across the mouth of the river between points on the low-water line of its banks" for the purposes of the instant summary judgment application.

37. Upon receipt of counsel's further submissions it seemed to me to be important to understand the extent to which, if at all, the law had changed after the coming into force of UNCLOS and the 2014 Order. The answer, in short, is not at all for present purposes. The most important

change brought about was to extend the territorial sea from 3 miles to 12 miles from the baseline.

38. As immediately relevant to this case, UNCLOS replaced the Convention on the Territorial Sea and Contiguous Zone, 1958 ("the 1958 Convention") which, by article 13, contained almost identical wording to article 9 UNCLOS in relation to the mouth of rivers. The 1964 Order was promulgated to give effect to the 1958 Convention.

39. There is an invaluable summary of the position as it obtained at that time in the decision of the Court of Appeal in Post Office v Estuary Radio Ltd [1968] 2 QB 740. For present purposes it is only necessary to cite what Diplock LJ said at p.754F:

> "Construing the [1964] Order in Council in the light of the [1958] Convention and the law as it was before the Order in Council came into operation, the Crown, in the exercise of its prerogative powers, was thereby asserting a claim which the courts are constitutionally bound to recognise, to incorporate within the United Kingdom that area of the sea which lies upon the landward side of the baseline (that is, internal waters) and within three nautical miles on the seaward side of the baseline (that is, the territorial sea)".

40. It is, however, worth noting that the 1964 Order does not contain a specific article in the same terms as article 13 of the 1958 Convention, unlike the 2014 Order which incorporates article 9 of UNCLOS direct via schedule 1 thereto. Instead, article 2(1) of the 1964 Order states that: "Except as otherwise provided in Articles 3 and 4 of this Order, the baseline from which the breadth of the territorial sea adjacent to the United Kingdom, the Channel Islands and the Isle of Man is measured shall be low-water line along the coast, including the coast of all islands comprised in those territories".

41. Whilst article 3 is irrelevant for present purposes, article 4 contains a provision in relation to bays which is the same as found in the 1958 Convention and in UNCLOS and the 2014 Order. It is not immediately apparent why the provision in the 1958 Convention in relation to the mouth of rivers was not copied into the 1964 Order. However, it is not possible in my view to draw any inference that this was the result of some positive choice to exclude the application of such provision. It would make no sense to include the specific provision as to bays, which was relied upon by the Crown in the Estuary Radio case, whilst deliberately excluding the (less territorially ambitious) provision in relation to rivers. The far more likely conclusion, in my view, was that it was always understood that the Crown asserted a territorial claim in relation to inland rivers up to their mouth, which did not, therefore, need to be specifically included in the 1964 Order.

42. Having undertaken this lengthy analysis, I must conclude this section by stating that nothing in this tangle of Acts, OS maps, supporting explanations, Conventions or Orders seems to me to be determinative of the question of what is meant by England on a proper construction of the Construction Act, because this can only be achieved by interpreting s.104(6) in the context of the whole of the Construction Act and the relevant surrounding circumstances, including the above to the extent relevant.

## B.4. The submissions in relation to jurisdiction

43. I will simply summarise the respective submissions, taking as read those recorded above in relation to where England ends.

44. It is convenient to begin with Mr Stevens' submissions.

45. His starting point is that for Part 2 of the Construction Act to apply there must be a construction contract which relates to the carrying out of construction operations in England. This requirement is fundamental, cannot be ignored and must be given effect.

46. As to what is England for this purpose, his primary submission is that in the absence of any definition in the Construction Act or other obvious means of ascertaining what it means, the obvious starting point is the definition in the Interpretation Act 1978. That definition is perfectly workable and sensible, he submits, because it is possible by simple reference to the Interpretation Act and the Local Government Act to refer to the relevant OS map and to see at a glance where England ends on the map for the purposes of the Construction Act. On the basis of this simple test, he submits, Part 2 of the Construction Act has no application to any contract for carrying out construction operations outside that black line.

47. Accordingly, he submits, it is unnecessary to grapple with the meaning of construction operations in s.105 or to consider fine questions such as whether or not the pontoon or its constituent parts are structures or works which form or are to form part of the land or are operations integral or preparatory to or for rendering complete such operations, by reference to authorities in relation to degrees of connection or the application of the law relating to fixtures.

48. In any event, he argues, the task is rendered much simpler in this case than it might be in other cases, because it is clear that: (a) the construction operations to which the contract relates are limited to the installation of the new piles; (b) the new piles are to be installed entirely outside the black line and thus entirely outside England; and (c) there is virtually no substantial connection between the new piles and the seawall, which is the outer extremity of the land for the purposes of s.105.

49. Finally, he seeks to rely upon the decision of HHJ Richard Havery QC sitting as a High Court Judge in 2001 in Staveley Industries plc v Odebrecht Oil & Gas Services Ltd (unrep). That case concerned subcontracts for the design, supply and installation into steel structures (known as modules) of various items of equipment, where the modules were in the course of construction in a yard adjacent the River Tees and were intended to be towed out to the Gulf of Mexico, there to be fixed to legs founded on the sea bed for use as living quarters for oil or gas rig operatives. The question was whether or not the Construction Act applied to such contracts.

50. In deciding whether or not the modules were "to form part of the land" so as to fall within s.105(1), HHJ Havery considered a variety of different submissions (including a submission based on s.104(6) of the Construction Act), but did not find any of them to be conclusive.

His reason for holding that the modules did not form part of the land appears from paragraphs 13 and 14 of his judgment. There he noted that: (a) s.105(1) derived from section 567(2)(a) of the Income and Corporation Taxes Act 1988; (b) that sub-section expressly included offshore installations, whereas s.105 did not; (c) it followed that in his view the Act intended that "structures which are, or are to be, founded in the sea bed below low water mark are not structures forming, or to form, part of the land".

51. His equation of offshore installations with structures to be founded in the seabed below low water mark flows from the decision of the Second Division of the Court of Session in Argyll & Bute D.C v Secretary of State for Scotland [1976] S.C. 248. That was a case which turned on the proper construction of the Town and Country Planning (Scotland) Act 1972, where it was held that although in that case, as in the Interpretation Act 1978, land was defined to include land covered with water, on a proper construction that only included land which was subject to tidal water covering but not the seabed.

52. Accordingly, Mr Stevens submits, by parity of reasoning the piles in this case were founded in the sea bed below low water mark and, hence, were not structures forming or to form part of the land.

53. Mr Frampton's submission is that the correct approach is to: (a) view the works to the piles as works to the pontoon as a whole; and (b) ask a single question as to whether the contract involved "construction operations in England". He submits that, adopting that approach, the test is satisfied by reference to s.105(1)(b) because: (a) the pontoon comprises "works forming…part of the land"; and (b) the installation of the new piles was part of the alteration, repair or maintenance of the pontoon. He further submits that: (i) the illustrative list of examples of "works forming part of the land" under section 105(1)(b) includes "docks and harbours", "coast protection or defence", and "inland waterways"; (ii) these were all structures which must include, and largely relate to, structures below the low-water mark; so that (iii) it must follow that Parliament intended for those structures to be subject to the Construction Act and did not intend for an arbitrary cut off at the low water mark.

54. His alternative submission is that the same arguments justify the conclusion that the contract falls under section 105(1)(a) because: (a) the pontoon is a structure "forming…part of the land"; and (b) the installation of the new piles was part of the alteration, repair or maintenance of the pontoon. His final alternative submission is that they justify the conclusion that the contract falls under section 105(1)(e) because the installation of the new piles is an integral part of the maintenance of the pontoon, akin to the laying of foundations, where there is no requirement that such operations must form or are to form part of the land.

55. He seeks to buttress his conclusion by reference to passages from Hansard relating to debate in the House of Lords in relation to what became the Construction Act. However, in my view such references add nothing to the arguments already advanced. The statements made on behalf of the Government as recorded in Hansard are not an admissible aid to interpretation of a statute, because in my view this is not a case where the legislation is ambiguous or where the literal reading leads to a manifestly absurd or unreasonable result, such being the test

established in Pepper (Inspector of Taxes) v Hart [1993] AC 593 and Bennion, Bailey and Norbury on Statutory Interpretation (8th edn, 2020), at paras. 24.11 and 24.12). The exchanges to which he refers contain no reference to the issue of the territorial extent of the Act nor sufficient reference to the specific issues which arise in this case such as would cause a court to make a different decision.

56. Mr Frampton does, however, refer, in support of his argument that the court should consider the question by reference to the pontoon as a whole, to the decision of Akenhead J in Savoye v Spicers Ltd [2015] BLR 151 and, in particular, his summary of the relevant principles at paragraph 36 as including the following:

> "…
>
> (c) Whether something forms or is to form part of land is ultimately a question of fact and this involves fact and degree.
>
> …
>
> (f) To be a fixture or to be part of the land, an object must be annexed or affixed to the land, actually or in effect. An object which rests on the land under its own weight without mechanical or similar fixings can still be a fixture or form part of the land. It is primarily a question of fact and degree.
>
> (g) In relation to objects or installations forming part of the land, one can and should have regard to the purpose of the object or installation in question being in or on the land or building. Purpose is to be determined objectively and not by reference simply to what one or other party to the contract, by which the object was brought to or installation brought about at the site, thought or thinks. Primarily, one looks at the nature and type of object or installation and considers how it would be or would be intended to be installed and used. One needs to consider the context, objectively established. If the object or system in question was installed to enhance the value and utility of the premises to and in which it was annexed, that is a strong pointer to it forming part of the land.
>
> (h) Where machinery or equipment is placed or installed on land or within buildings, particularly if it is all part of one system, one should have regard to the installation as a whole, rather than each individual element on its own. The fact that even some substantial and heavy pieces are more readily removable than others is not in itself determinative that the installation as a whole does not form part of the land. Machinery and plant can be structures, works (including industrial plant) and fittings within the context of s 105(1)(a)–(c) of the HGCRA."

57. He submits that, applying those principles, then "actually and in effect" the pontoon as a whole is one structure which includes the piles and which is fixed to the land at the seawall and the purpose of the installation is to "enhance the value and utility" of the pontoon by providing a safe and convenient place to moor and access boats on a permanent basis – save only for essential maintenance.

58. He submits that the illustrative list of examples of works forming part of the land under section 105(1)(b), including docks and harbours, coast protection or defences and inland waterways shows a contrary intention in the Act to using the definition of England in the Interpretation Act 1978. He submits that the reasoning in Staveley should not be followed insofar as on proper analysis it was inconsistent with his submissions in this case, because the offshore installations which were excluded by the Income and Corporation Taxes Act 1988, viz the exploitation or exploration of mineral resources in or under the shore or bed of controlled waters, were themselves separately and elsewhere excluded in the Construction Act anyway, albeit without reference to controlled waters.

## B.5. Analysis and determination

59. It is clear that s.104(6)(b) is intended to limit the application of Part 2 of the Construction Act to contracts relating to the carrying out of construction operations in England, Wales and Scotland.

60. It is worthy of note that, unlike s.104(5), which states that "where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations", s.104(6)(b) requires that the contract must "relate to the carrying out of construction operations in England". There is no room for a hybrid contract, where part is within Part 2 and another part is not, as there is with contracts relating only in part to construction operations. To take the example given by Mr Stevens in argument of the construction of a pipeline from Kent to Calais, with a pipe running on the seabed supported by piles at regular intervals, it would not be possible in my view to say that Part 2 applies to such part of the works as related to construction operations within England, however that is defined, but not to the remainder. Either Part 2 applies to the whole contract or not at all.

61. Mr Frampton's argument involves reading s.104(6)(a) as re-wording s.105(1)(a) and (b) so that the references to "land" should be treated as reading "land within England"[1]. Applying this approach, so long as the construction operations fall within one or more of these sub-sections it matters not whether these operations extend out into a tidal river, a tidal estuary or the sea and, if so, whether beyond the low water mark or not, with the only "control" being the connection between the construction operations and the land required by the words of these sub-sections as further explained by the judgment of Akenhead J in Savoye v Spicers.

62. However, this formulation begs the question as to whether land means only dry land or also includes: (a) the foreground down to low water mark; (b) land permanently submerged by water within inland waters, e.g. lakes and rivers; (c) land outside the low water mark and within the territorial sea.

63. Whilst I accept that it might be possible to adopt the suggested approach and to resolve the issue on a case by case basis by reference to the particular location, nature and extent of the

[1] With (c) read likewise and (d) and (f) also being read on the basis that the buildings and structures there referred to form part of land within England, and (e) already having such words read in through the reading in through the same process.

particular construction operations and the extent of its connection to "land", to adopt such an approach clearly has the potential to introduce an undesirable element of uncertainty.

64. However, I can also see that Mr Frampton's argument has some attractive features. Given the references to docks and harbours, to inland waterways and to coast protection and defence installations, it is highly likely that works falling within such definition would extend out beyond the existing land and also beyond the low water mark. If one adopted the definition contended for by Mr Stevens and referred simply to the OS Map, whilst that would have the attraction of simplicity and certainty it would appear to be inconsistent with the breadth of the above references, especially when it would appear that anything more than a minimal encroachment of a building, structure or works beyond the low water mark would have the effect of meaning that the whole contract would fall outside the Construction Act.

65. In my judgment the starting point ought to be the recognition that the question is only ever likely to arise in relation to construction operations undertaken over, under or adjacent to water, because if they are undertaken wholly on land within the mainland there is unlikely to be any possible room for dispute.

66. If construction operations are being undertaken in relation to an enclosed area of water – for example an internal lake – or within the non-tidal area of a river, then in most cases the answer will be provided solely by reference to s.105(1) and (2). If they fall within s.105(1), because they relate to buildings, structures or works forming or to form part of land, or operations integral, preparatory or completion related thereto, and are not specifically excluded by s.105(2), then they will fall within the Construction Act.

67. If, however, the works involve, for example, construction operations solely to the bed of an enclosed area of water or a non-tidal river, then it would be necessary to know whether or not such works fall within the scope of the Construction Act. A reading of s.104(6) and s.105(1) would not, in my view, provide the answer by itself. Hence, the Interpretation Act 1978 is a logical starting point for any further enquiry. There, one would discover that, unless any contrary intention appears, land includes land covered with water.

68. In my judgment no contrary intention appears, because the references to "land" in s.105(1) do not clearly show that only land not covered by water is included. To take some examples beyond the express references to docks and harbours, inland waterways, coast protection and defence installations, what about roadworks to create a bridge crossing an inland lake or river whether for a road or a railway? Would it make a difference whether they were, or were not, supported by supporting columns founded off piles driven into the ground of the inland lake or river? What about a power-line or a pipe-line running along the ground of an inland lake or river? What about boring a tunnel under the ground below an inland lake or river? What about works to form a reservoir or well? Even though all of the individual works in question are specifically described in s.105(1), if land covered by water is not included they would be excluded, which seems to me to be contrary to the width of the words used and the absence of any specific words or other circumstances indicating that such works should not be included.

It follows in my view that land covered by water is included and that such operations would fall within the Construction Act.

69. What, then, about works in or adjacent to the coast? This raises a number of issues. Again, in my view a reading of s.104(6) and s.105(1) and (2) would not provide the answer by itself and, again in my view, the Interpretation Act 1978 is a logical starting point. As already indicated, that informs the reader that, unless any contrary intention appears, England means the area consisting of counties established by section 1 of the Local Government Act 1972 and, by the train of enquiry summarised above, that one looks to see what has been set out by the Ordnance Survey.

70. In the absence of any contrary intention I accept that one would adopt this approach because, by reference to the OS map, one would see the position of the black line as providing an apparently straightforward and reliable answer. I do not, however, accept Mr Stevens' argument that this is where the enquiry would also end, because in my view any interested reader would want to know the basis for the demarcation line and, referring to the OS boundary line information document, would see that the black line is intended to demarcate the EOR (extent of the realm), where the 1964 Order confirms that the EOR is properly shown to the limit of mean low water for the time being, except where extended by Parliament.

71. As I have already explained, that would generally appear to be consistent with the 1958 Convention and the 1964 Order in terms of setting the baseline between the land, including internal waters, and the territorial sea, as explained in the Post Office v Estuary Radio case. It would also be consistent with UNCLOS which was, as I have said, in existence at the time of the coming into force of the Construction Act, and which made no substantive changes to the pre-existing position.

72. However, if the interested reader needed to know whether the OS map was correct as regards its treatment of the river Fowey (and, no doubt, many other similar rivers with tidal sections), they would see that the black line lies - undoubtedly in my judgment - in a very different position to that mandated by Article 13 of the 1958 Convention and Article 9 of UNCLOS and, in my view, also where one might expect to find it, at the mouth of the river where it meets the sea.

73. Although Mr Stevens does not accept that the mouth of the river is plainly at the point contended for by VEL, and submits that its position relative to the piles is a question of fact and, possibly, expert evidence, and thus unsuitable for summary determination, it is plain beyond argument in my judgment that on a simple application of these articles the pontoon is well inland and upstream of where the black line would be if the articles had been applied. As Mr Frampton pungently submitted in his responsive supplemental submissions, "the suggestion that the Court cannot determine the location of the mouth of the river is, with respect, a nonsense. The concept of a mouth of a river is well known, it is where it enters the sea (or a lake). The mouth of the river Fowey is roughly the line between Readymoney Cove and Polruan on [the Google maps plan in the Appendix]. Regardless of the precise line, it

cannot realistically be argued by the defendant that the pontoon sits beyond, i.e. to the sea-side, of the mouth of the river".

74. If the interested reader was to attempt to understand the rationale for the OS map approach difference they would note the lack of any rational explanation given by the OS boundary line information document. The only explanation I can think of is that whoever was responsible for this approach had followed the 1964 Order and assumed, in the absence of express reference to the river mouth approach in the 1964 Order, that the low water approach should be adopted in the case of tidal rivers in the way described in the OS boundary line information document.

75. It is not necessary for me to speculate as to whether this is indeed the explanation, still less whether it produces an accurate answer in relation to other respects in which it is necessary to know where the EOR is to be found. It is sufficient for me to say that I am satisfied that no interested or informed reader would feel able to conclude, in the light of all of the above facts and matters, that it was the conscious intention of Parliament at the time of the enactment of the Construction Act that the dividing line in relation to rivers entering the sea was as drawn on the OS map. That is plainly inconsistent in my view with the fact that construction operations in relation to inland waters were (as I have found) plainly intended to fall within the Act, whereas construction operations in relation to territorial waters and the high seas were not. I am satisfied 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 clear approach in the 1958 Convention and UNCLOS. There is no good reason in my judgment to consider that Parliament's intention was to exclude construction operations downstream of the notional dividing line adopted by those responsible for the OS map.

76. The end result, in my judgment, is that on a proper interpretation the Construction Act applies to construction contracts which relate to the carrying out of construction operations in England, where England ends on the baseline as established by the 1958 Convention and UNCLOS, and by the 1964 and the 2014 Orders, all of which are, on a proper analysis, mutually consistent. It also follows, in my judgment, that the references to "the land" in s.105(1) include land covered by water and, hence, land covered by inland waters up to the baseline which, in the case of rivers such as the river Fowey, extends to the mouth of such rivers.

77. When applied to the facts of this case, it is not realistically open to KML to argue, therefore, that the contract for piling works the subject of this case was not a contract for construction operations in England.

78. In reaching this decision I have of course considered the decision of HHJ Havery in Staveley v Odebrecht, discussed above. I am not strictly bound by that decision, but if the principle it stated and applied was directly applicable to the current case I would, of course, follow it unless satisfied that it was wrong. In my view that is not the case here, because what it decided was that "structures which are, or are to be, founded in the sea bed below low water mark are not structures forming, or to form, part of the land". Nothing in my decision is

inconsistent with that approach. Further, as appears from the headnote in the case report for the Argyll & Bute DC case on which HHJ Havery relied, that case was decided on the basis that, having regard to the definition of "tidal lands" as contrasted with the definition of "tidal waters" in previous statutes, the Town and Country Planning (Scotland) Act 1972 excluded the area below low-water mark from planning jurisdiction. A decision of the Court of Session on the proper construction of a completely different statute on completely different facts is not, with respect, either binding upon me or of any direct relevance to my decision in this case.

79. That is sufficient to dispose of the jurisdiction issue. However, I should also briefly address the further point which has been argued, namely the argument based upon Savoye v Spicers, in case I am wrong in relation to my principal conclusion in relation to the proper definition of "land" and on the assumption that both England for the purposes of s.104(6) and "land" for the purposes of s.105(1) ends at the foreshore of the river Fowey at the location of the pontoon.

80. In short, I would not have decided that the contract the subject of this case fell within the scope of s.105(1) on this approach, because:

(i) The contract with which I am concerned is the contract for the new piles which, on any view, is not a contract for construction operations within England or for the construction etc. of buildings, structures or works to form part of the land. I am not persuaded that it is proper to consider the whole of the pontoon as an existing structure and to find that the works the subject of this contract are works of construction etc. of buildings, structures or works forming or to form part of the land. This contract did not include the demolition of the existing piles or any other works to the structure of the pontoon. It only involved the installation of self-standing piles which were not connected in any meaningful or permanent way to the pontoon.

(ii) Even if it was permissible to consider the wider structure of the pontoon, it must be borne in mind that there is a clear distinction between the red pontoon the property of the RNLI and the green pontoon and access thereto the property of the Harbour Authority. Again, it would be wrong simply to agglomerate the two. Even if there was a sufficient connection between the piles – or, possibly, the two to which the brackets were attached – and the red pontoon it is apparent in my view that there is no sufficient connection between the red and the green pontoon, since the former simply has a ramp which rests on the latter and which is not fixed in any permanent or semi-permanent way. And finally, the same is true of the connection between the gangway leading down to the green pontoon from the harbourside. As a matter of fact and degree I would not have been satisfied on this basis that the works the subject of this contract fell within any of the individual sub-sections to s.105(1) of the Construction Act.

## C. Natural justice

81. There are four respects in which KML contends that the adjudicator failed to take into account its substantive defences: (1) weather downtime, (2) rates, (3) ground conditions and (4) deduction for equipment not included in valuation.

### C.1. Legal principles

82. Before I deal with each in turn I should briefly refer to the legal principles, which are not in dispute and which are well summarised in Construction Adjudication by Sir Peter Coulson 4th edition, 2018, in Part IV (Natural Justice) chapter 13 under the heading "Failing to address a matter in issue" at paragraphs 13.38 – 13.55.

83. This was also the subject of his decision in Pilon Ltd v Breyer Group PLC [2010] EWHC 837 (TCC) where he summarised the position at paragraph 22 as follows and as relevant to this case:

"22.1 The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question, then, whether right or wrong, his decision is enforceable: see *Carillion v Devonport*.

22.2 If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see *Ballast, Broadwell, and Thermal Energy*.

2.3 However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see *Bouygues and Amec v TWUL*.

22.4 It goes without saying that any such failure must also be material: see *Cantillon v Urvasco* and *CJP Builders Ltd v William Verry Ltd*. In other words, an error must be shown to have had a potentially significant effect on the overall result of the adjudication: see *Kier Regional v City and General (Holborn) Ltd*."

84. At paragraph 13.55 he suggested that such challenges rarely succeeded for two reasons: "Firstly, an inadvertent failure to address a particular issue is in the nature of an error within the adjudicator's jurisdiction rather than a breach of the rules of natural justice. Secondly, and if that is wrong, it would be an unusual case where the court would both draw the inference that an issue had not been addressed and conclude that the failure to address the issue was so significant that it meant that the adjudicator had not decided the dispute referred to him and/or that the conduct of the adjudication was so unfair that the decision should not

enforced. The more significant the issue, the less likely it is to be inadvertently overlooked; the less significant it is, the more likely it is that it has been taken account of in the round."

85. I was also referred to the summary of the relevant principles by O'Farrell J in Global Switch v Sudlows [2020] EWHC 3314 at paragraph 44 onwards, which I need not set out here.

## C.2. Weather downtime

86. The complaint, as summarised in Mr Stevens' skeleton, is that the adjudicator awarded £85,750 on the basis that "there is no argument" that weather conditions reached a certain contractual threshold (decision §136), when in fact KSL's defence was that there was no evidence that they did (see Response: (i) §128 (third bullet point): "VEL have not produced records demonstrating abnormal weather"; (ii) §130 "there are no records to suggest those days should be compensated on the basis of weather exceeding the normal that might be expected"; and (iii) §135 "VEL have not been able to demonstrate with records when or how their works were prevented by weather that could be said to be abnormal".

87. In his detailed submissions in response Mr Frampton contended, in summary, that: (a) the claim was made on the basis of downtime for weather and lack of craneage; (b) one of the principal issues before the adjudicator was whether VEL had produced any records demonstrating abnormal weather, as to which the adjudicator decided that it had and that they were sent to KML, thus rejecting KML's case that VEL had not done so; (c) what the adjudicator actually stated in paragraph 136 was that: "Predicted with the weather contemporaneously there is no argument that the conditions being encountered were not above normal which is the benchmark in the contract"; (d) read in context, what the adjudicator was saying, in colloquial terms, was that given his findings he was rejecting KML's case rather than suggesting that KML had not even argued this point; (e) in any event, it would have been open to the adjudicator to find for VEL on the basis of the separate craneage obligation and there is no basis for considering that he did not.

88. In my judgment Mr Frampton's submissions are to be preferred. The adjudicator clearly considered the issue and made a decision which is at least as consistent with his preferring VEL's case on the merits as opposed to his being erroneously – but genuinely – confused as to whether or not there was an issue as to the weather conditions.

89. In the circumstances, this argument does not on an application of the relevant principles establish a material breach of natural justice.

## C.3. Rates

90. Mr Stevens' summary of KML's case was that the adjudicator wrongly found that the "rates used are common ground" (decision §137 and §147) when in fact the rates used (which VEL sought to increase above the contractual rates) were expressly contested (see Response §48-50 and §60) leading to a significant and material increase in the sum awarded.

91. In his submissions Mr Frampton acknowledged that the adjudicator did apparently overlook KML's argument that VEL should be limited to the rates in the purchase order for 4 items in the final account.

92. However, he submitted, that was not a material breach of natural justice for four reasons: (i) the adjudicator did not deliberately exclude or fail to consider the defence; (ii) the adjudicator inadvertently overlooked one sub-issue (rates) in a final account dispute, wrongly stating "the rates used are common ground"; (iii) the mistake was not caused or induced by the Claimant; and (iv) overall the adjudicator addressed the dispute referred to him as to the value of the final account. Thus, Mr Frampton submits, the error he made was an error within his jurisdiction.

93. In oral submissions Mr Frampton also emphasised that KML had failed to give a clear explanation as to the materiality of this issue, noting that where this was dealt with in the evidence in opposition to the application there was no analysis of the overall actual financial difference between the adjudicator adopting VEL's rates and adopting KML's rates – especially on the assumption that the adjudicator's decision as to the number of days could not be challenged by way of enforcement.

94. Overall, I accept Mr Frampton's submissions. This is a modest and unintentional oversight in the context of a fiercely contested final account dispute, where the adjudicator produced a detailed reasoned decision and where there is no evidence as to the materiality of the oversight assuming KML's best case. In the circumstances this does not meet the level of seriousness necessary for the decision to be invalidated by breach of natural justice.

## C.4. Ground conditions

95. Mr Stevens contended that the adjudicator found that KML had admitted that ground conditions were not as expected (Decision §150) and, as a result, awarded £38,000, even though KML set out at length submissions that ground conditions had been as expected at one location and that VEL initially used inadequate drilling equipment for the expected conditions (Response §153ff).

96. Mr Frampton submitted that it is plain that in fact what the adjudicator had done was to address and reject KML's defence on the merits, so that this ground of challenge is hopeless, referring me to paragraphs 150 – 152 of the decision where the adjudicator stated:

> "150.00 Despite the fact that KML deny that the ground conditions have changed from the site inspection data and therefore do not accept liability they have actually admitted that they agree the ground conditions had changed.
>
> 151.00 The KML 8 March 2022 email from Simon James of KML agrees and admits there is a change to ground conditions.
>
> 152.00 On that basis I find that KML are liable and should pay the sums claimed."

97. I agree with Mr Frampton. This challenge is misconceived, taking words used out of context in a spurious attempt to challenge the adjudicator's decision on the merit which, right or wrong, must be enforced in accordance with settled principles.

## C.5. deduction for equipment not included in valuation

98. In paragraph 98 of the witness evidence in opposition to the application it was said that: "At paragraph 84 of its Referral, VEL was content to award KML an "abatement" worth £15,833 in respect of its equipment. KML accounted for the reduction in a different way, but it was not disputed between the parties that KML should have the benefit of an abatement of £15,833. Indeed, the adjudicator recorded at paragraph 107 of his Decision that "this is a voluntary reduction made by VEL". Despite that, and despite neither party contending for it, he awarded VEL the amount of £15,833".

99. Mr Frampton's submission was that the proper analysis is that: (i) the dispute before the adjudicator was the true value of VEL's works, which the adjudicator decided; (ii) the £15,833 deduction offered by VEL was not agreed and KML put forward a different deduction; (iii) as part of deciding the value of the final account, the adjudicator was entitled to reach his own valuation of the deduction and was not limited to the parties' positions; (iv) the adjudicator acted within the bounds of what he had been asked to do, especially in circumstances in which the Notice of Adjudication gave him jurisdiction to value the works and award payment for "such other sum as the Adjudicator may decide".

100. Again, I prefer and accept Mr Frampton's submission. Even if, as is most likely, the adjudicator did not make an abatement for this amount due to an oversight then, as with the rates issue, I conclude that it was an unintentional oversight in the context of a fiercely contested final account dispute, where the adjudicator produced a detailed reasoned decision and where the amount involved was modest in the extreme. In the circumstances this does not meet the level of seriousness necessary for the decision to be invalidated by breach of natural justice.

## Appendices

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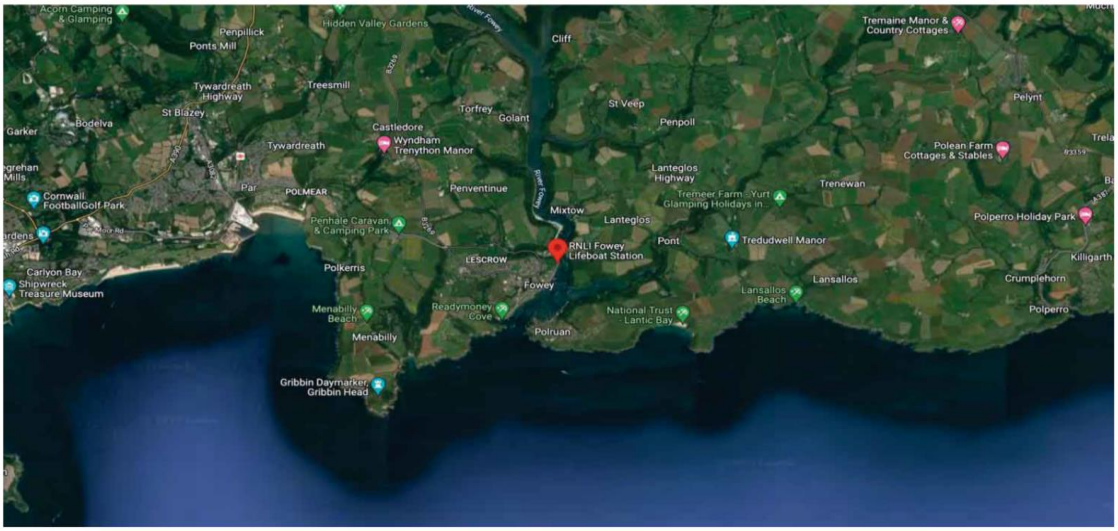


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Passage Street
North Street
Approx pile location