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Insights

BUILDING SAFETY ACT: NEW TCC CASE ON BUILDING INFORMATION ORDERS

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SUMMARY

Section 130 of the Building Safety Act 2022 (BSA) allows the High Court to make building liability orders (BLO) if it considers it just and equitable to do so. Section 132 allows the court to make an information order to enable applicants to decide whether to apply for a BLO. In this Insight, Marcus Birch considers the recent TCC decision in BDW Trading Ltd v Ardmore Construction Ltd & Ors [2025] EWHC 434 (TCC), which provides guidance on the circumstances in which the court will entertain an application for an information order, and the types of information and documents which it will include in such an order.

BACKGROUND

BDW, as developer, engaged ACL as design and build contractor on five residential projects that completed between 1999 and 2005. After the Grenfell Tower tragedy in 2017, fire safety and/or structural defects were discovered in the developments, for which BDW accepted responsibility and agreed to fund remedial works. BDW is claiming against ACL for the costs, in Defective Premises Act 1972/ Civil Liability (Contribution) Act 1978 claims brought by way of adjudication, arbitration or litigation. In respect of the one case to go to adjudication, BDW obtained an order in the region of £14 million, which decision was enforced in the High Court (see BDW Trading Limited v Ardmore Construction Limited [2024] EWHC 3235 (TCC)) and subsequently paid. BDW's remaining claims are valued at around £70 million. BDW, having concluded that ACL does not have the financial reserves to satisfy such liabilities, intends to apply for a BLO against ACL's three parent companies.

In order to assist that application, or to decide whether to make it, BDW applied to the High Court for information orders against ACL and its three parent companies in relation to whether any other entities (including overseas entities) are associated with Ardmore, and up-to-date financial information on each of the respondents.

THE DECISION

The case raised four issues of note.

1. Against whom can an information order be made?

2. What is required to satisfy the condition of a "*relevant liability*"?

3. What kinds of information can be specified in an information order?

4. How should the court approach the exercise of whether it is appropriate to make an order in respect of the information sought?

PROPER RESPONDENT

On the first issue, HHJ Keyser KC clarified that an information order can only be made against the body corporate that has the relevant liability. This is known as the "*original body*" in section 130, and will be the party with the primary liability to the applicant. So here, an information order could only be made against ACL and not against any of its associates.

The judge noted that in this respect, the Explanatory Notes to the BSA were wrong in that they envisaged an information order against associates.

RELEVANT LIABILITY

Section 132(3)(a) requires that the court be satisfied that the original body be subject to a relevant liability. BDW contended that this could be satisfied where there is both technical evidence to support liability and lawyers' advice that there is a cause of action. ACL contended that this required an actual determination of liability, either in other proceedings or in the information order proceedings themselves.

The judge chose a middle course. On the one hand, it is not enough for the applicant to show that the respondent is, or is potentially, "*in the frame*" for a relevant liability. The court can only consider an application if it forms the view that the respondent is in fact currently liable in relation to a building safety related claim relating to the specified building in respect of which it is considering making an application for a BLO.

On the other, however, the judge held that the BSA does not require that a relevant liability has already been established. The court can be satisfied of the liability sufficient to make an order, but without hearing evidence and making a determination to that effect.

On the facts, the judge was not satisfied that the condition was satisfied: in respect of one development, ACL no longer had a liability because it had paid the adjudication award; in respect of the four others, liability was disputed and yet to be determined. Accordingly he declined to make any order.

SCOPE OF AN INFORMATION ORDER

Section 132 does not stipulate the kinds or categories of information or documents that can be specified in an information order. HHJ Keyser KC said that they clearly included information and documents that could enable the applicant to identify associates of the original body; and that they could include information and documents concerning the financial position of the associate(s). Beyond that, an application should be assessed line-by-line against the purpose set out in the BSA.

APPROPRIATENESS

Section 132(3)(b) requires the court to be satisfied that it is "appropriate" to require provision of the material sought for the purpose of enabling the applicant to make, or consider whether to make, an application for a BLO.

BDW had sought a wide range of information, in 17 different categories. Even had he held that the "relevant liability" condition to have been made out, the judge would have refused the vast majority of the requests as inappropriate. This was for a variety of reasons, including that the material sought was:

- not necessary to identify associates or to assess whether it was worthwhile applying for a BLO against one or more of them;
- unlikely to be within the control of ACL; and/or
- related to ACL and not to its associates.

The judge would have been willing to make a limited order for information relating to two Irish companies and two BVI companies mentioned in ACL's latest accounts.

DICTA ON BUILDING LIABILITY ORDERS

While this was an application for an information order, such that no issue arose for decision as to BLOs, HHJ Keyser KC recognised that section 132 is ancillary to section 130, so considered the evolving case law on the procedure for applying for BLOs. He noted that recent TCC decisions in Willmott Dixon Construction Limited v Prater [2024] 1190 (TCC) and Southwark Park Road RTM Company Limited v Click St Andrews Limited [2024] EWHC 3179 illustrated that:

- applications for BLOs can be made before the trial of the original body's liability;
- such applications can proceed in tandem with the litigation on that liability;
- it may in some cases be convenient to defer consideration of a BLO application until after the trial of the original body.

He further clarified that he did not understand Jefford J in those cases to have decided that a BLO cannot be made before the existence of a liability of the original body is established. In the judge's view, a BLO can be made before, or at the same time as, or after, the establishment of the original liability. He reasoned that a BLO could operate as an indemnity in favour of the applicant.

COMMENTS

This is the first TCC case on applications for information orders, and the guidance provided is invaluable. It points to a very restrictive approach, in two ways. First, the court was not satisfied that ACL was "under a liability" in relation to either a satisfied judgment or pending proceedings. On that logic, the court would only be satisfied as to that condition where a decision or judgment had been made but had not been paid. Secondly, as to "*appropriateness*", the court was not satisfied by requests relating to the original body, or by requests for documents which the original body would not necessarily have. If an order can only be made against an original body, but only in respect of related companies, and the court has "*no good reason for supposing that [the original body] is entitled to those documents*", then it is difficult to imagine the circumstances where the applicant will obtain much of any value.

The dicta on BLOs is more helpful to applicants, continuing the courts' flexible approach and approving the concept that a BLO can operate as an indemnity in respect of existing or future substantive proceedings.

In practice, BDW is now in a good position to apply for a BLO against ACL's parent companies. However, its application for an information order having failed, it will have to decide whether to do that, and to continue to incur the costs of its substantive proceedings against ACL, with only the information about the parent companies' assets that it can learn from Companies House or through a private asset investigation. It must litigate at the risk of finding that its defendants do not have the assets to satisfy a liability.

RELATED PRACTICE AREAS

- Construction Disputes

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