Neutral Citation Number: [2025] EWHC 434 (TCC)

Case No: HT-2024-000316

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 February 2025

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

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Between:

BDW TRADING LIMITED	**Applicant**
- and -	
(1) ARDMORE CONSTRUCTION LIMITED	
(2) ARDMORE CONSTRUCTION GROUP LIMITED	
(3) ARDMORE GROUP LIMITED	
(4) ARDMORE GROUP HOLDINGS LIMITED	**Respondents**

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Rupert Choat KC and **Max Twivy** (instructed by **Howard Kennedy LLP**) for the **Applicant**
Sean Brannigan KC and **Thomas Crangle** (instructed by **Mantle Law (UK) LLP**) for the **Respondents**

Hearing date: 18 February 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 February 2025 by circulation to the parties or their representatives by email and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Background

1. The applicant ("BDW") has made two applications for an order for information and documents ("information order") pursuant to section 132 of the Building Safety Act 2022 ("the 2022 Act") or alternatively section 37(1) of the Senior Courts Act or the inherent jurisdiction of the court. The first application, dated 13 December 2024, is against the first respondent ("ACL"). The second application, dated 3 February 2025, is against the second, third and fourth respondents (respectively, "R2", "R3" and "R4"; collectively, "R2-4").

2. The matter arises in this way. BDW, which is a subsidiary company of Barratt Developments PLC, was the developer of five relevant building projects that completed at various times between 1999 and 2005; these are known as (1) Crown Heights, (2) Explorers Court, (3) Pierhead Lock, (4) Galleria, and (5) Citiscape.[1] On each of these projects BDW engaged ACL as the design and build contractor. Following the Grenfell Tower tragedy in 2017, fire safety defects and/or structural defects have been discovered in those five developments. BDW has accepted responsibility to the building owners and apartment owners and has agreed to meet the cost of necessary remedial works. BDW has notified ACL of claims in respect of the fire safety and structural defects at the five developments, on the basis that (i) the defects were caused by ACL's breach of its duties under the Defective Premises Act 1972, in circumstances where the defects rendered the dwellings unfit for habitation when completed, and/or (ii) pursuant to the Civil Liability Contribution Act 1978 ACL is liable to make a contribution and/or to indemnify BDW in respect of the cost of remedial works. In one case, ACL's liability was established in an adjudication award that has been paid and is not disputed (though ACL does dispute one of the bases of the award—see below). ACL disputes its liability in respect of the other four developments. In two cases, there are pending arbitration proceedings. In two cases, litigation in this court is at an early stage.

3. BDW has concluded, on the basis of ACL's latest publicly available accounts, for the year ending September 2023, that ACL does not have the financial reserves to satisfy its alleged liabilities, which are estimated to be of the order of £85m in respect of the five developments. It therefore intends to apply for a building liability order under section 130 of the 2022 Act against entities "associated" with ACL within the meaning of section 131. By these applications it seeks the provision of information and documents to enable it to make, or consider making, an application under section 130.

4. ACL is a wholly owned subsidiary of R2. R2 is a wholly owned subsidiary of R3. R3 is a wholly owned subsidiary of R4, which is the ultimate parent company. R2 and R3 admit that they are associates of ACL for the purposes of sections 130 to 132 of the 2022 Act. R4, which was incorporated in June 2024, after BDW had informed the other respondents of its intention to apply for a building liability order, has not admitted that it is an associate of ACL, though BDW contends that it is.

[1] In these applications, BDW originally relied on a further two developments, known as Centrium and Becket House, but it no longer does so.

5. In broad terms, the information sought by BDW relates to whether R4 is an associate of ACL, whether any other entities (including entities incorporated in the British Virgin Islands or in the Republic of Ireland) are associated with ACL, and up-to-date information on the financial positions of the respondents.

6. The applications are supported by the third, fourth and fifth witness statements of Mr Mark Pritchard, the solicitor with conduct of the application for BDW. In response the respondents rely on the witness statement of Mr Robert Goodship, the Head of Risk, Insurance & Compliance for Ardmore Group and a qualified solicitor. I have read those statements but do not think it necessary to recite their detailed contents in this judgment.

7. I am grateful for the written and oral submissions of Mr Rupert Choat KC and Mr Max Twivy for BDW, and for those of Mr Sean Brannigan KC and Mr Thomas Crangle for the respondents.

Building Safety Act 2022

8. The Preamble to the 2022 Act describes it as follows:

> "An Act to make provision about the safety of people in or about buildings and the standard of buildings, to amend the Architects Act 1997, and to amend provisions about complaints made to a housing ombudsman."

9. Section 1 of the 2022 Act provides in part:

> "(1) This Act has 6 Parts, and contains provisions intended to secure the safety of people in or about buildings and to improve the standards of buildings.
>
> …
>
> (6) Part 5 contains further provisions, including—
>
> (a) provisions about remediation and redress; …"

10. Part 5 of the 2022 Act comprises sections 116 to 160. The provisions about remediation and redress are in sections 116 to 135. There are specific provisions about remediation in sections 116 to 125. I have been referred in particular to sections 123 and 124, which confer on the First-tier Tribunal power to make remediation orders and remediation contribution orders respectively, but I do not think it necessary to make further reference to those provisions or to dicta of the First-tier Tribunal concerning their breadth and operation[2]. The present case concerns the provisions dealing with building liability orders, which are sections 130 to 132. They provide in relevant part as follows.

[2] See *Waite v Kedia* Ltd (2023) 210 ConLR 166; *Triathlon Homes LLP v Stratford Village Development Partnership & ors* [2024] UKFTT 26 (PC), 212 ConLR 1; and *Grey GR Ltd Partnership v Edgewater (Stevenage) Ltd & ors* (2025) CAM/26UH/HYI/2023/0003.

"130. *Building liability orders*

(1) The High Court may make a building liability order if it considers it just and equitable to do so.

(2) A 'building liability order' is an order providing that any relevant liability (or any relevant liability of a specified description) of a body corporate ('the original body') relating to a specified building is also—

(a) a liability of a specified body corporate, or

(b) a joint and several liability of two or more specified bodies corporate.

(3) In this section 'relevant liability' means a liability (whether arising before or after commencement) that is incurred—

(a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or

(b) as a result of a building safety risk.

(4) A body corporate may be specified only if it is, or has at any time in the relevant period been, associated with the original body.

(5) A building liability order—

(a) may be made in respect of a liability of a body corporate that has been dissolved (including where dissolution occurred before commencement);

(b) continues to have effect even if the body corporate is dissolved after the making of the order.

(6) In this section—

'associate': see section 131;

'building safety risk', in relation to a building, means a risk to the safety of people in or about the building arising from the spread of fire or structural failure;

'commencement' means the time this section comes into force [28 June 2022];

'the relevant period' means the period—

(a) beginning with the beginning of the carrying out of the works in relation to which the relevant liability was incurred, and

(b) ending with the making of the order;

'specified' means specified in the building liability order.

131. *Building liability orders: associates*

(1) For the purposes of section 130, a body corporate (A) is associated with another body corporate (B) if—

(a) one of them controls the other, or

(b) a third body corporate controls both of them.

Subsections (2) to (4) set out the cases in which a body corporate is regarded as controlling another body corporate.

(2) A body corporate (X) controls a company (Y) if X possesses or is entitled to acquire—

(a) at least half of the issued share capital of Y,

(b) such rights as would entitle X to exercise at least half of the votes exercisable in general meetings of Y,

(c) such part of the issued share capital of Y as would entitle X to at least half of the amount distributed, if the whole of the income of Y were in fact distributed among the shareholders, or

(d) such rights as would, in the event of the winding up of Y or in any other circumstances, entitle it to receive at least half of the assets of Y which would then be available for distribution among the shareholders.

…

(4) A body corporate (X) controls another body corporate (Y) if X has the power, directly or indirectly, to secure that the affairs of Y are conducted in accordance with X's wishes.

…

(6) In determining under any of subsections (2) to (4) whether one body corporate (X) controls another, X is treated as possessing—

(a) any rights and powers possessed by a person as nominee for it, and

> (b) any rights and powers possessed by a body corporate which it controls (including rights and powers which such a body corporate would be taken to possess by virtue of this paragraph). …
>
> 132. *Order for information in connection with building liability order*
>
> (1) A person of a prescribed description may apply to the High Court for an information order.
>
> (2) An 'information order' is an order requiring a specified body corporate to give, by a specified time, specified information or documents relating to persons who are, or have at any time in a specified period been, associated with the body corporate.
>
> (3) An information order may be made only if it appears to the court—
>
> (a) that the body corporate is subject to a relevant liability (within the meaning of section 130), and
>
> (b) that it is appropriate to require the information or documents to be provided for the purpose of enabling the applicant (or the applicant and others) to make, or consider whether to make, an application for a building liability order.
>
> (4) In this section—
>
> 'associate': section 131 applies for the purposes of this section as it applies for the purposes of section 130;
>
> 'building liability order': see section 130;
>
> 'prescribed' means prescribed by regulations made by the Secretary of State;
>
> 'specified' means specified in the information order."

11. It is convenient at this point to refer to two examples of the operation of these provisions given in the Explanatory Notes to the 2022 Act. First, the example given for building liability orders:

> "A 14 storey residential building is developed by a body corporate A. A few years after it is completed later, it is discovered that there are serious fire compartmentation issues within the building and the local fire and rescue authority order the building to be evacuated until the risk from fire is

> reduced. To seek recompense for the remediation costs, the freeholder speaks to lawyers about whether they can make a civil claim. The lawyers advise the freeholder that they can make a claim under the Defective Premises Act as the building is unfit for habitation.
>
> The freeholder discovers the development company was dissolved once the building was completed and the freehold sold off. The freeholder's lawyers advise that they can establish that the development company's parent company is associated, as the parent company directly controlled the actions of the development company.
>
> The freeholder applies to the High Court for a building liability order to be applied to the parent company. The freeholder must show that the parent company is associated with the development company. The High Court must consider whether it is just and equitable to grant the building liability order, for example whether the parent company can receive a fair trial.
>
> In this example, the request for a building liability order is granted. The freeholder can now make a claim under the Defective Premises Act against the parent company. The court proceedings would then proceed as normal."

Then, the example given for information orders:

> "A 14 storey residential building is developed by body corporate A. A few years after it is completed, it is discovered that there are serious fire compartmentation issues within the building and the local fire and rescue authority orders the building to be evacuated until the risk from fire is reduced. To seek recompense for the remediation costs, a leaseholder within the building speaks to lawyers about whether they can make a civil claim. The lawyers advise the leaseholder that they can make a claim under the Defective Premises Act as the building is unfit for habitation.
>
> The leaseholder discovers the development company was dissolved once the building was completed and the freehold sold off. The leaseholder suspects that the development company's parent company is associated, therefore, they wish to be able to apply for a building liability order in order to seek damages from the parent company. However, the leaseholder is unable to show that the parent company is associated to the degree needed to be granted a building liability order.
>
> The leaseholder applies to the High Court for an information order to be applied to the parent company. The leaseholder must show that they intend to seek damages under a relevant

> liability (in this instance the Defective Premises Act) and that the information order could support them in applying for a building liability order.
>
> In this example, the request for an information order is granted. The High Court places an information order on the parent company, and they are then required to share with the leaseholder details of all companies which were associated with them during a time period specified by the courts. The leaseholder now has the information required to show that the parent company is associated with the development company, as the parent company directly controlled the actions of the development company.
>
> The leaseholder is then able to apply for a building liability order, to support them in making a claim under the Defective Premises Act against the parent company."

Building liability orders

12. The present applications are not for building liability orders under section 130 but for information orders under section 132. The construction and operation of section 130 are, therefore, not themselves matters that fall for determination. However, they are relevant, because section 132 is ancillary to section 130: it is not freestanding but exists to provide a means by which a prospective applicant for a building liability order can obtain information or documents to enable it to make, or consider whether to make, such an application.

13. Certain features of a building liability order may be noted. First, it concerns a relevant liability "relating to a specified building": section 130(2). A building liability order cannot make associated companies liable for the entire liability of the original body to the applicant across a number of developments. The court can, of course, make any number of individual building liability orders in respect of the relevant liabilities of one original body, but each such order will be discrete. Second, the precise and in that sense carefully confined definition of "associate" is nevertheless relatively extensive on account of the definition of "the relevant period".

14. Third, I can see nothing in section 130 that makes it a precondition to the making of a building liability order that the relevant liability of the original body shall already have been established. Recent decisions of Jefford J illustrate that applications for such orders may be made before the trial of the original body's liability, that such applications may proceed in tandem with the litigation against the original body, and that it may in a given case be convenient to defer consideration of an application for a building liability order until after the trial against the original body; see *Willmott Dixon Construction Ltd v Prater* [2024] EWHC 1190 (TCC), 214 ConLR 164; *381 Southwark Park Road RTM Company Limited v Click St. Andrews Limited* [2024] EWHC 3179 (TCC). However, I do not read any of the Judge's observations in those cases, made in specific factual contexts, as meaning that a building liability order cannot be made before the existence of a liability of the original body is established. If they did have such a meaning, I would respectfully be of a different opinion, for the following reasons. (1) There are many simple and obvious ways in which such a condition could

have been expressed, but it was not. (2) It is unnecessary to imply such a condition. (3) It makes perfectly good sense to allow a building liability order to function as what might be termed an indemnity ("If this original body has any relevant liability in respect of this specified building, this associate shall also have that liability"). In a given case, it may be very convenient to know in advance that an associate will be liable, if the original body's liability is subsequently established, so that the associate knows where it stands when it seeks to defend the substantive allegations. (4) The use of the word "any" in section 130(2), rather than merely "a", suggests that an indemnity is permissible. Especially in view of the definition of "relevant liability", "a" would have done very well to refer to an established liability. (5) The use of the word "is" ("… specified building is also …"), rather than "shall also be", is not a significant contraindication, in view of (a) the use of "any", (b) the fact that a liability may be said to be extant though it is (falsely) disputed and not yet established by judicial determination, and (c) the next reason. (6) Subsection (5) makes clear that a building liability order can be made even if the original body has been dissolved. This clearly envisages that the original body does not have to be restored to the register—if it were restored, mention of its dissolution would be pointless. There is nothing to suggest that the original body must have had liability established against it before its dissolution, and in view of the circumstances in which the Act was passed (the appreciation, after Grenfell, that many buildings had serious but hitherto latent safety issues) and the extended limitation periods provided for in section 135 of the Act (15 or 30 years), section 130 is clearly designed to catch the situation where the original body has passed into history and either could not be restored to the register or, if it were restored, would be a mere empty shell. (7) The example of a building liability order in the Explanatory Notes supports this construction. For reasons mentioned below, any reliance on such an example can only be cautious, because the example of an information order is badly flawed. But in this case the example is consistent both with the wording of section 130 and with good sense. Of course, the construction here advanced does not at all mean that a building liability order cannot be made after liability has been established against the original body, only that it is not available only in such circumstances.

15. In this context, and with reference to the particular facts of this case, I turn to consider the present applications for orders for information.

Who can apply for an order for information?

16. Regulation 12 of the Building Safety (Leaseholder Protections) (England) Regulations 2022 provides:

> "12. For the purposes of section 132 of the Act, any person making, or intending to make, an application for a building liability order under section 130 of the Act may apply to the High Court for an information order."

It is common ground that BDW is a "person of a prescribed description" for the purposes of section 132(1) and regulation 12.

Against whom can an order for information be made?

17. The body corporate mentioned in section 132(3)(a) can only be the body corporate mentioned in section 132(2). It follows that an order for information can only be made

against a corporate body that "is subject to a relevant liability": section 132(3)(a). I accept the submission on behalf of R2-4 that no order for information can be made against them, because there is no basis for supposing that they have any relevant liability within the meaning of section 130. ACL alone was party to the underlying building contracts and ACL alone could have a relevant liability. R2-4 are, at most, associates of a company with a relevant liability. Therefore the application under the 2022 Act against R2-4 must fail.

18. This conclusion is contrary to the example of information orders given in the Explanatory Notes to the 2022 Act. The example shows an information order being made not against the "original body" (here, putatively, ACL) but against the company believed to be an associate (here, each of R2-4). That is, in my judgment, impossible to square with the wording of section 132. The corporate body required to give the information (section 132(2)) is the corporate body subject to the relevant liability (section 132(3)(a)), not an associate of that corporate body. The use to which Explanatory Notes to a statute may be put was discussed in *Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103, [2007] 1 WLR 482, where Brooke LJ said:

> "15. The use that courts may make of Explanatory Notes as an aid to construction was explained by Lord Steyn in *R (Westminster City Council) v NASS* [2002] UKHL 38 at [2]-[6]; [2002] 1 WLR 2956; see also *R (S) v Chief Constable of South Yorkshire Police* [2004] UKHL 39 at [4], [2004] 1 WLR 2196. As Lord Steyn says in the *NASS* case, Explanatory Notes accompany a Bill on introduction and are updated in the light of changes to the Bill made in the parliamentary process. They are prepared by the Government department responsible for the legislation. They do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. They are intended to be neutral in political tone: they aim to explain the effect of the text and not to justify it.
>
> 16. The text of an Act does not have to be ambiguous before a court may be permitted to take into account an Explanatory Note in order to understand the contextual scene in which the act is set (*NASS*, para 5). In so far as this material casts light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, it is always an admissible aid to construction. Lord Steyn, however, ended his exposition of the value of Explanatory Notes as an aid to construction by saying (at para 6):
>
> > 'What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.'

Accordingly, although the Explanatory Notes are an admissible guide to the interpretation of a statute, what matters is the interpretation of the statute, not that of the Explanatory Notes. The Explanatory Notes cannot override the statute. See, for example, *Aspinalls Club Ltd v HM Revenue and Customs* [2013] EWCA Civ 1464, [2015] Ch 79, *per* Moses LJ at [22]; and *R (on the application of McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559, per the Court at [37]. It cannot be assumed that the Explanatory Notes correctly state the effect of the statute. In this instance, in my view, they do not.

19. In oral submissions, Mr Choat candidly accepted that the example in the Explanatory Notes was inconsistent with section 132. Insofar as BDW's application against R2-4 rests on the jurisdiction to make an information order against them, it must fail.

Section 132(3)(a): general considerations

20. Section 132(3) stipulates two conditions that must be satisfied before the court has power to make an information order. The first is that "it appears to the court … that the body corporate [here, ACL] is subject to a relevant liability". ACL disputes that this condition is satisfied. The first question that falls to be considered is the construction of section 132(3)(a) and what is required to satisfy the condition. On this question there appears to be no existing authority.

21. For BDW, Mr Choat submitted that the condition was satisfied in circumstances where (as is established by the evidence in the present case): (i) the applicant (here, BDW) has received advice from competent and qualified experts that in respect of each of the developments there are serious fire safety and/or structural failures that give rise to serious risks to the safety of people in or about the buildings and that require remedial works; (ii) in respect of each development the applicant has been advised by lawyers that a claim can be made against the original body (here, ACL) under the Defective Premises Act 1972; and (iii) the applicant intends to seek damages from the original body. In support of this interpretation of section 132(3)(a), Mr Choat relied on the example of an information order given in the Explanatory Notes. Although he accepted that the example was inconsistent with section 132(2) in respect of the body corporate against whom an information order could be made, he submitted that it was consistent with a construction of section 132(3)(a) that was both possible and practically sensible.

22. If that primary submission were wrong, Mr Choat submitted that the court could nevertheless be satisfied that ACL had a relevant liability, for either of two reasons.

    1) The court ought to consider it implausible that ACL could defeat the case against it in respect of every single one of the five developments. Although a single building liability order can relate to liability only in respect of a single building, it only takes one such instance of liability to satisfy the condition in section 132(3)(a). ACL's latest company accounts, those for the year ended September 2023, include substantial provision for liabilities for remedial works on previous projects (as, indeed, do those of R2 and R3). BDW's requests for information as to the particular projects to which this provision relates have been refused.

    2) If section 132(3)(a) requires that a relevant liability shall actually have been established before an information order can be made, the condition is satisfied

in respect of the Crown Heights development. That dispute went to adjudication, in which BDW was awarded its entire claim of about £14.5m on two bases: (i) breach of the building contract, in respect of which a limitation defence was rejected on the grounds of deliberate concealment; (ii) the Defective Premises Act 1972. Joanna Smith J subsequently gave summary judgment enforcing that award: *BDW Trading Ltd v Ardmore Construction Ltd* [2024] EWHC 3235 (TCC). The liability has been discharged and is not disputed. ACL has obtained permission to appeal in respect of the second basis of the award (liability under the Defective Premises Act 1972) but as it does not dispute the alternative basis of the award (breach of contract) and does not seek repayment of the moneys paid, permission to appeal was granted on condition that ACL pay the costs of the appeal in any event. Mr Choat accordingly submitted that there were relevant liabilities in respect of the Crown Heights development, namely, first, the liability found by the adjudicator and, second, the liability in respect of the costs of the appeal, which were likely to be of the order of £120,000.

23. For ACL, Mr Brannigan submitted that, for the condition to be satisfied, it must appear to the court that ACL is, not that it might be or has previously been, subject to a relevant liability: that is, that it actually is liable in respect of such a liability, not merely that it might be liable or that it has a potential liability. The main points in his argument may, I think, be summarised as follows.

1) The wording of section 132(3) is clear. The words "it appears to the court that" naturally indicate the requirement for a judicial determination or conclusion; that is how they are repeatedly used in the Civil Procedure Rules 1998 (among other examples, r. 3.4(2), r. 6.15(1), r. 44.11(1)). The words cannot properly be construed to mean "the applicant, on advice, considers that", or any such thing.

2) What must appear to the court is that the body corporate against which the information order is to be made "is subject to a relevant liability", not that it might be, nor that it has previously been. Further, there is no arguable distinction between having a liability and being subject to one.

3) Parliament could easily have framed the condition by reference to a possible or potential liability but did not do so. By way of contrast, Schedule 8 to the 2022 Act (which concerns remediation costs and section 122) refers, in paragraph 9, to service charges in respect of certain services "relating to the liability (or potential liability) of …".

4) Section 132 is only ancillary to section 130. As a relevant liability is required for the making of a building liability order, it would be strange if one were not required for the making of an information order. (I should say that Mr Brannigan did not place much weight on this particular argument, partly because he accepted that an application for a building liability order could be made before any relevant liability was established—see above—and partly in the face of my scepticism of the suggested construction of section 130.)

5) The requirement for the court to be satisfied as to the existence of a relevant liability is entirely appropriate, because an information order is capable of requiring the provision of information and documentation that not only relates

to non-parties to the application but also may be confidential or commercially sensitive; the provision of such information or documentation might even constitute an interference, requiring justification, with the non-parties' rights under Article 8 of ECHR.

6) The primary case for BDW on the construction of section 132(3)(a) rests entirely on the example in the Explanatory Notes. However, the example is seriously flawed. First, as already mentioned, it misunderstands the way that section 132 operates, in that it supposes that an information order can be made against an associate, whereas in fact it can only be made against the original body with the relevant liability. Second, it entirely ignores the requirement in section 132(3)(a), moving without explanation from the assertion of the applicant's case to the conclusion that an information order will be made. (Mr Brannigan made other critical observations on the example, but they seemed to me to be, arguably, indicative merely of rather loose drafting and not to go to the heart of this issue.)

7) Thus for the condition in section 132(3)(a) to be satisfied, the court had to be satisfied of the existence of a relevant liability. This could be achieved in either of two ways. First, the liability could already have been established, most obviously by judicial or arbitral determination or by admission. Second, the applicant could persuade the court by adducing evidence at the application and seeking to prove the existence of the specific relevant liability. This latter course would not be available at all in respect of any development pursuant to a contract containing an arbitration clause: section 9 of the Arbitration Act 1996. In other cases, it could conceivably be available but would require disclosure of documents and examination of factual and expert evidence in a manner akin to a trial (skeleton argument, paragraph 43(c)(iii)).

8) In the case of not a single one of the five developments could the court, on this application, be satisfied as to the existence of a relevant liability:

    a) *Crown Heights*: The liability established in the adjudication has been discharged; therefore it is not an existing liability: ACL did have a relevant liability, but it does not now do so. As for the liability to pay BDW's costs of the appeal: first, that is no more than a potential liability, because the appeal might not be pursued; second, in any event, such liability is neither a liability "incurred under the Defective Premises Act 1972" nor a liability "incurred as a result of a building safety risk". It is therefore not a relevant liability.

    b) *Explorers Court, Pierhead Lock*: These two developments are subject of ongoing and confidential arbitration proceedings, in respect of which no award has been issued. Therefore no relevant liability has been established. Further, in view of the existence of the arbitration agreement it would not be open to the court to make any determinations as to the existence of such a liability.

    c) *Galleria*: BDW has commenced proceedings against ACL under claim no. HT-2023-000370. In December 2024 ACL served an Amended

Defence disputing both liability and quantum. No relevant liability has yet been established.

d) *Citiscape*: BDW has issued proceedings against ACL, but these have been stayed pursuant to a consent order dated 3 November 2023 to enable compliance with the Pre-action Protocol, and there has been no exchange of statements of case. Again, therefore, no relevant liability has been established.

9) In these circumstances, with the exception of Crown Heights, where there was but is not now a relevant liability, each of the projects involves only contested and unresolved claims in which no relevant liability has been established. As BDW does not seek to establish the existence of such liability on this application—for example, by factual and expert evidence on the substantive issues of liability—the condition in section 132(3)(a) is not satisfied.

24. Those are the competing submissions. I turn to my consideration of the matter.

25. First, I do not consider that the primary interpretation of section 132(3)(a) contended for by BDW does sufficient justice to the wording of the statute. However one may precisely put the matter, it would come to saying that the condition is satisfied if the court considers that a relevant liability is asserted on reasonable, or plausible, or credible grounds; that (to put the matter colloquially) the party against whom the information order is sought is, or is potentially, in the frame for a relevant liability. I have not found such an interpretation of the provision to be without attraction: it would accord with the example in the Explanatory Notes; it would be consistent with the fact that the provision does not require there to have been any prior adjudication or admission of relevant liability and would address what I think is a very real practical problem where such liability has not previously been established; and it would fit well with the fact (as I think it to be) that a building liability order can be made when the original body's relevant liability remains in dispute. These are not, however, sufficient reasons in my view to adopt this interpretation.

1) The example in the Explanatory Notes is of very limited assistance, both because it is clearly wrong in another respect—see above—and because it entirely fails to address this particular issue.

2) It is very difficult to see how "it appears to the court" can indicate anything other than a view arrived at by the court. That is what it naturally suggests. That is how it is used in the CPR. I have not been referred to any uses of the expression in primary legislation, but it is how it is used in the only such instance of which, without proper research, I am aware.[3] If what was required was only that the court was satisfied of the possibility of the existence of a state of affairs, rather than of the actual existence of the state of affairs, this would easily be achieved; for example, by providing "if it appears to the court that there are grounds for believing that …", or some such wording.

[3] Section 2(1) of the (now repealed) Protection of Animals (Amendment) Act 2000 provided: "If, on the application of the prosecutor, it appears to the court from evidence given by a veterinary surgeon that it is necessary in the interests of the welfare of the animals in question for the prosecutor to do one or more of the things mentioned in subsection (2), the court may make an order authorising him to do so."

3) Similarly, I find it hard to see how "is subject to a relevant liability" can be construed to mean anything like "might have a relevant liability" or "is a person against whom a relevant liability might be established".

4) The fact that one can apply for a building liability order before the relevant liability of the original entity has been established neither entails nor, in my view, suggests any particular construction of the requirement in section 132(3)(a), because one can certainly apply for a building liability order after the relevant liability has been established.

26. Second, however, section 132(3)(a) does not require that a relevant liability shall already have been established against the corporate entity. Again, it would have been easy to stipulate some such condition.

27. Third, in a measure of disagreement with Mr Brannigan's submissions, I do not think that section 132(3)(a) requires the court to make any determination of liability as such in a case where liability has not already been established. In my view, the actual wording—"it appears to the court (a) that the body corporate is subject to a relevant liability"—deliberately reflects two things, each of which is important: first, that it is not necessary that the existence of a relevant liability should already have been established; second, that the court, upon an application under section 132, is <u>not</u> determining the question of liability but is simply forming a view on the question for the purpose of considering the application for an information order. I do not regard this latter point as a distinction without a difference.

28. Fourth, for this reason, I should not consider that section 9 of the Arbitration Act 1996 had any bearing on the matter. Section 9(1) provides:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."

Legal proceedings to determine matters of liability that are covered by an arbitration agreement would fall within section 9(1). But an application for an information order would not, in my view, fall within section 9(1), because it would not be an application "in respect of a matter which under the [arbitration] agreement is to be referred to arbitration". And I do not think that it would fall within section 9(1) just because of the condition in section 132(3)(a) of the 2022 Act, as the court dealing with such an application would not be determining questions of liability at all but would simply be forming its own view for the purpose of deciding whether to make an information order.

29. Fifth, there is no difficulty if the relevant liability has been established by judgment, arbitration award, adjudication decision or admission. But both the applicant and the respondents are agreed—rightly, in my view—that the power to make an information order exists even where there has been no such prior determination of liability. This does, I think, give rise to a practical question. What is to be expected on the hearing of an application in such circumstances? In this regard, I think it important to have firmly

in mind that section 132 is merely ancillary to section 130. It is not a vehicle for trying or resolving building disputes and it is not a method of early neutral evaluation; its only purpose is to provide a means of enabling persons to apply for building liability orders or consider whether to apply for them. In my view there should be no question at all of having anything like trial procedures; the suggestion in the written arguments that there might be examination of lay and expert witnesses appears to me (with respect) one that ought not to be entertained. But I am little more enamoured of the idea that, when there is an active building dispute (as there is in four of the cases relied on by BDW), the applicant should be putting its evidence before the court and inviting an assessment (albeit non-binding) on the merits. Applications under section 132 ought (in my view) to be short and uncomplicated, and I do not consider that they impose on the court any obligation to become embroiled in assessments of the merits of disputed matters. If this means that applications for information orders will be made sparingly in cases where liability is in issue, I cannot see why that is a bad thing. Further, as a judge dealing with such an application is not making any determination of liability but merely saying how things appear to him, he ought not to be required to do more than say how things appear to him; detailed reasons for why one view is to be preferred to another do not seem to me to be appropriately required.

30. Sixth, I do not regard objections concerning privacy, confidentiality or commercial sensitivity as being of great importance as regards the question of statutory construction. The effect of section 132(2) is that the body corporate can only be required to provide information or documents relating to associates, as these are defined in section 130 in terms of "control". More importantly, perhaps, section 132(3) imports a condition of appropriateness, which gives the court ample power to control inappropriate disclosures. There is also, of course, the court's power to impose restrictions and conditions on the use that can be made of information and documents. The whole matter needs also to be considered in the context that Parliament has decided that extensive impositions of liability upon companies that otherwise could have no relevant liability are justified in the public interest.

Section 132(3)(a): the present case

31. For reasons given above, BDW's primary contention, which rests on the example in the Explanatory Notes, fails.

32. As for Crown Heights, the liability in the adjudication award and the subsequent judgment has been discharged by payment in full; I do not see how ACL can be said to be subject to that liability now.

33. The alternative argument concerning Crown Heights rests on the order of Coulson LJ dated 11 February 2025: "Permission to appeal is granted on condition that Ardmore pay the costs of the appeal, including the costs incurred by BDW, such costs to be assessed on the standard basis if they cannot be agreed." A question might arise as to whether that creates an existing liability, especially if ACL has not decided to pursue an appeal on the stipulated condition. However, I shall assume that there is an existing costs liability. Even so, I would not consider it as providing any basis on which to make an information order. First, I doubt whether the liability is a "relevant liability" as defined in section 130(3) of the 2022 Act. It is a costs liability in respect of Joanna Smith J's conclusion that the adjudicator, who had jurisdiction to deal with disputes arising "under the contract", thereby had jurisdiction to deal with the claim under the

Defective Premises Act 1972. It is not clear to me that this costs liability can be said to be "incurred under the Defective Premises Act 1972 … or as a result of a building safety risk." Second, even if the costs liability would suffice to ground the court's jurisdiction to make an information order, I should not consider it sufficient to justify making such an order. Sections 130 to 132 are concerned with enabling the identification of bodies corporate to whom liability for serious building defects can be passed, not with costs protection. (The Court of Appeal has the power to order an appellant to give security for costs in an appropriate case: CPR r. 25.15.)

34. As regards the other four developments, BDW's argument was that it was likely that ACL had a relevant liability in respect of at least one development if not more, in the light of several pieces of evidence. First, a relevant liability was established in respect of the Crown Heights development. Second, the claim in respect of each of the other four developments is supported by expert technical and legal opinion. Third, the latest company accounts for each of ACL, R2 and R3 include very substantial provision for liabilities for remedial works on previous projects. The respondents have refused to specify which projects this provision relates to; they have not asserted that it does not relate to any of the four developments in question. Fourth, in the Crown Heights adjudication proceedings ACL denied that it was seeking to evade responsibility for issues for which it was culpable and stated that it "ha[d] spent or [was] spending over £80m of its own funding to remediate buildings with fire safety defects." Fifth, ACL has refused BDW's request to agree to putting before the court the technical experts' joint statements in the Explorers Court arbitration; it is said that an adverse inference ought to be drawn from that refusal.

35. Mr Brannigan submitted that this argument of BDW could not succeed, because the building liability order must relate to a relevant liability relating to a *specific building*; thus the attempt to satisfy section 132(3)(a) by contending that it was likely that at least one indeterminate claim would succeed did not reflect the statutory provisions. In my judgment, there is force in this submission, at least in a modified form. The requirement to identify a relevant liability "relating to a specified building" concerns the definition and therefore the nature and scope of a building liability order. But "relevant liability" is itself not defined by reference to a specified building but by reference to the nature of the thing that gives rise to the liability. Therefore one could, strictly, conclude that a respondent was probably subject to a relevant liability even if one could not actually say which of several buildings such a liability, or liabilities, related to. However, the very purpose of the information order is to facilitate an application for (or consideration whether to make an application for) a building liability order, and such an order would have to do with a relevant liability "relating to a specified building". I conclude that either as a matter of construction or, at least, as a matter of appropriateness, the applicant for an information order must satisfy the condition in section 132(3)(a) in respect of a relevant liability relating to the specified building in respect of which it is considering making an application for a building liability order. This would dispose of the present applications.

36. Anyway, the most I am prepared to say on the basis of the information before me is that it appears to me that ACL may well have a relevant liability to BDW. But it does not appear to me that it actually has such a liability. I specifically reject the submission that an adverse inference ought to be drawn against ACL because of its refusal to have selected arbitration documents introduced in evidence, because I think that a party to

arbitration proceedings is entitled to stand on the confidentiality of the arbitration process.

37. For these reasons, the condition in section 132(3)(a) is not satisfied. This means that I cannot make an information order.

Appropriateness and the scope of section 132

38. It follows that the condition in section 132(3)(b) does not strictly fall for consideration. However, I shall say something about it fairly briefly.

39. Section 132 says two things about the permissible scope and purpose of an information order: first, that the information or documents must "relat[e] to persons who are, or have at any time in a specified period been, associated with the body corporate"; second, that it is appropriate to require the information or documents to be provided for the purpose of enabling the applicant to make, or consider whether to make, an application for a building liability order. Paragraph 1095 of the Explanatory Notes to the 2022 Act relates to section 132:

> "1095. This section has been created to prevent companies using more complex and opaque structures to prevent a building owner, landlord or leaseholder from being able to prove how companies are associated and therefore undermine the intended outcome of building liability orders as defined in section 130. Information orders provide a route for persons to obtain information in order to support them applying for a building liability order and to support them in receiving adequate recompense to correct building safety defects."

40. Section 132 does not stipulate the kinds or categories of information or documents that may be specified in an information order. These will clearly include information and documents that enable the applicant to identify associates of the respondent. In an appropriate case, they will, in my view, also include matters concerning the financial position of the associate; such matters may, in a given case, be highly material to the decision whether or not to apply for a building liability order. If the information and documents are publicly available (for example, from Companies House), or if an applicant does not need the provision of information or documents in order to make an application under section 130 or to decide whether to make such an application, it is hard to see why it should be appropriate to make an information order. However, it is probably not very fruitful to try to decide in the abstract what sort of information or documents might be the subject of an information order; it is better to look at the terms of the particular application and consider whether it is appropriate to require the information and documents to be provided for the specified purpose, as required by section 132(3)(b).

41. The information and documents sought by BDW at the hearing were set out in the Schedule to its skeleton argument, though very little was said about them in oral argument. The text at the head of the Schedule explained the detailed requests:

> "Information and documents regarding (a) all bodies corporate which since 2006 have or have arguably been associated with

> ACL for the purposes of s. 131 of the Building Safety Act 2022 ('Associates') and thus including, per s. 131(4), if any of the Associates have or have had (or arguably have or have had) the power, directly or indirectly, to secure that ACL's affairs are conducted in accordance with the Associate's wishes; and (b) the financial standing of ACL and Associates."

42. The specific requests and my brief comments on them are as follows.

43. *A.1 Details of the corporate structure in which ACL and the Associates sit, including the identities of all Associates. Includes information and documents related to all Associates (including, but not limited to, whether AGHL is associated with ACL)*

I would not have ordered the provision of this information and documentation in respect of R2-4. The corporate structure is clear and simple and R2 and R3 acknowledge that they are associates of ACL. R4 has not made a similar admission, but its structural relationship with the other respondents is clear. BDW has contended that, as R4 is not admitting that it is an associate, BDW requires and is entitled to further documentation that is not within the public domain. I do not think that this is so. The test for whether R4 is an associate of ACL is in section 131(1): first, does R4 control ACL? second, does a third body corporate control both of them? The first part of the test turns on the application of subsections (2), (4) and (6) to the facts. The second part of the test requires knowledge of whether there is an even more ultimate corporate body. But Companies House shows that Mr Cormac James Byrne has 75% or more of the shares and of the voting rights in R4. The argument relating to R4 concerns not factual uncertainty but the application of section 131(1) to known facts. I understood Mr Choat to have acknowledged this in the course of argument. I would, however, have been willing to make a limited order to elicit information concerning two Irish companies that are said in ACL's latest accounts to be "related" to ACL, and concerning two companies incorporated in the British Virgin Islands and in which ACL has subscribed for shares (see *Ardmore Construction Ltd v Revenue and Customs Commissioners* [2018] EWCA Civ 1438, [2018] 1 WLR 5571, at [4]).

44. *A.2 In relation to the incorporation of AGHL [i.e. R4]: (1) the intended purpose and/or primary function of AGHL; (2) board resolutions and/or minutes which relate to the incorporation of AGHL and the allocation of AGL shares in AGHL; (3) advice prepared for the ex-directors of AGL in relation to the transfer of assets to AGHL; (4) whether the directors of AGHL intend to make a financial provision in the next set of accounts to be filed by AGHL for the cost of remedial works to the seven BDW Developments built by ACL; and (5) if such a financial provision will be made (a) whether the provision for liabilities will include allowances for remedial works at the seven BDW Developments built by ACL; and (b) the amount of financial provision made in respect of each of those Developments.*

I would have disallowed this request, on the basis that, having regard to the information that is publicly available and that BDW already has, the information was not required to enable BDW to identify R4 as an associate of ACL or to assess whether it was worthwhile applying for a building liability order against it. In that context, I regard the request as commercially intrusive without sufficient justification. I also accept that ACL itself is unlikely to have much of this information; it is not enough to say that other parties in the group can provide it.

45. *A.3 Details of the group security structure in which ACL and the Associates sit, including any cross-guarantees/cross guarantor structures - with details and copies of any current letters of credit, parent company letters of support, performance bonds*

I would have refused this request. This, again, is commercially sensitive information to the extent that it goes beyond information at Companies House. It does not seem to me to be required either for the purpose of identifying associates of ACL or to enable BDW to form a view as to the financial viability of associates. I bear in mind that the information is being sought before liability has been established and before it is even known whether ACL will discharge any liability. That does not preclude an order being made, but it does seem to me to be relevant when considering whether an intrusive order ought to be made now. I would not, however, have refused the request simply on the ground that the information related to ACL rather than, as is required, to the associates, as it seems to me to relate to both.

46. *B.1 Management accounts and reports for ACL and each of the Associates for: the year ending 30 September 2023; the year ending 30 September 2024; the quarter ending 31 December 2024. To include profit and loss; balance sheet and cash flow statements (standalone and consolidated where applicable); total assets less current liabilities; claims received (with the total liabilities faced and reasonably anticipated sums falling due); cash in hand; and historical performance on a monthly basis.*

I would have refused this request. Insofar as it relates to ACL's management and accounts and reports, it does not fall within the permitted scope of an information order: section 132(2). Insofar as it relates to the associates' management accounts and reports, there is no good reason for supposing that ACL is entitled to those documents. More generally, I am not satisfied that the documents are required for BDW to decide whether to apply for a building liability order.

47. *C.1 In relation to the provision for liabilities for remedial works on previous projects made in the accounts of ACL, ACGL and AGL for the years ending 2022 and 2023: (1) whether the provision for liabilities in the filed accounts record that ACGL and AGL have made financial provision for the cost of remedial works to seven BDW Developments built by ACL; (2) whether the provision for liabilities in the filed accounts include allowances for remedial works at those seven Developments; (3) the amount of financial provision made in respect of each of the seven Developments; (4) management reports and management accounts prepared for the directors of ACL, ACGL and AGL in relation to the provisions; (5) board resolutions and/or minutes which relate to these provisions and the payment of dividends from ACL, ACGL and AGL; and (6) board communication with shareholders and investors regarding these provisions.*

I would have refused this request. First, insofar as it relates to ACL, it is not within the proper scope of an information order. Second, I have not been persuaded that the information in respect of the associates is actually required for the purpose of assessing their ability to meet any liability under a building liability order; it seems to me to have more to do with assessing the group's (confidential) view as to the likely extent of liabilities to BDW. This is the sort of information that, if I were to order it at all, I should be reluctant to order before liability had been established. Third, the information relating to the associates appears to be within the control of the associates, not of ACL.

48. *C.7 Detail for ACL and each Associate of all existing banking and lending arrangements (including overdraft facilities), associated covenant details, and the most recent schedules of covenant compliance*

I would have refused this, for largely similar reasons. Even if ACL has the right and power to provide this information in respect of its associates, I am not persuaded that BDW reasonably needs it for the purpose of considering an application for a building liability order, and I should see no good reason for ordering such information relating to associates when ACL's liability had not been established.

49. *C.8 Details for ACL and each Associate of all ongoing contracts, including value, delivery status, completion timing and payment terms of each contract as well as any intentions to novate any contracts*

I would have refused this for similar reasons.

50. *D.2 Medium-term forecasts (on a monthly basis) to 31 December 2025 including projected profit and loss, cash flow and balance sheet for ACL and each Associate. Include associated workings and assumptions as well as forecast contract schedule cashflows per project and any cost saving plans.*

Again, insofar as it relates to ACL the information is not within the scope of section 132(2), and insofar it relates to the associates the information is not ACL's to give. Further, although it is said that this information is relevant to BDW's consideration of whether to make an application for a building liability order, I am not persuaded that it is likely to play a sufficiently significant role in making any such decision to justify the requirement to provide such highly intrusive and commercially sensitive material.

Alternative bases: section 37(1), Senior Courts Act 1981, and inherent jurisdiction

51. If and to the extent that, contrary to BDW's primary case, section 132 does not permit an information order to be made against R2-4 and any of the requested information or documents do not fall within the scope of an information order that can be made against ACL (because they are not within ACL's possession or control), BDW seeks the same information and documents on either or both of the following grounds: (a) section 37(1) of the Senior Courts Act 1981; (b) the inherent jurisdiction of the court to make ancillary orders, including orders for the provision of documents and information, to ensure the effectiveness of its orders.

52. Section 37(1) of the Senior Courts Act 1981 provides:

> "(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

53. As for the inherent jurisdiction of the court, in *Quay House Admirals Way Land Ltd v Rockwell Properties Ltd* [2022] EWHC 545 (Ch), Mr Simon Gleeson, sitting as a Deputy High Court Judge, considered the submission that the court's inherent power to cancel or discharge inhibitions had been supplanted by section 57 of the Land

Registration Act 1925, which conferred a similar statutory power, and that when the Land Registration Act 2002 did not continue the statutory power, the inherent power did not revive. The deputy judge said:

> "84. I do not think that this is correct. I think the position is correctly stated in the commentary to s.19(1) [of the Senior Courts Act 1981] in the White Book (at para 9A-67), which observes that 'The court may execute its inherent jurisdiction even in respect of matters which are regulated by statute', citing *Willis v Earl Beauchamp* (1886) 11 PD 59 at 63 per Bowen L.J. It is therefore entirely clear that the court's inherent jurisdiction can exist alongside a statutory jurisdiction, and that the creation of a statutory jurisdiction does not necessarily exclude the court's inherent jurisdiction.
>
> 85. Applying this approach to the 2002 Act, I cannot see any provision of it which conveys with the necessary clarity the idea that the inherent jurisdiction of the court is somehow displaced by the creation of an extrajudicial mechanism for application to the registrar directly for the amendment of the register. Consequently, I am satisfied that the inherent jurisdiction of the court to order the register to be amended in the way that the claimants seek remains intact, and has not been extinguished by the 2002 Act."

54. There is a fair amount of learning and authority on both section 37(1) and the inherent power of the court. I was not referred to very much of it. Perhaps that does not matter greatly. Even if (which I doubt) the court has power to make the suggested orders against R2-4 under either section 37(1) or the inherent jurisdiction, I can see no good reason for exercising the power. The entire exercise in the present case relates solely to the remedy provided in section 130 of the 2022 Act; there is no general power to impose on one person the liabilities of another person just because it seems desirable or convenient to do so. Section 132 represents Parliament's ancillary provision to secure the efficacy of section 130. Even if technically it could, I do not think that the court should disregard the limits placed on the power to make information orders because it thinks that some wider power than that actually provided for would be more convenient.

Conclusion

55. The applications are refused.