IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA313/2022
[2024] NZCA 514

IN THE MATTER OF SOLICITOR-GENERAL'S REFERENCE (NO 1 OF 2022) FROM CRI-2021-463-55 ([2022] NZHC 556)
Referrer

Hearing: 10 October 2023

Court: Cooper P, Brown and Wylie JJ

Counsel: B J Thompson and W J Harvey for Referrer
T Mijatov and S A Davies as counsel assisting the Court

Judgment: 11 October 2024 at 11.00 am

JUDGMENT OF THE COURT

We answer the question of law (arising from *Cancian v Tauranga City Council* [2022] NZHC 556) as follows:

> **Was the Court correct to find that the issue of producer statements (following or as a result of construction monitoring) in relation to non-compliant building work does not give rise to liability under s 40 of the Building Act 2004?**
>
> **No.**

REASONS OF THE COURT

(Given by Cooper P)

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Introduction

[1] This judgment concerns a question of law referred to this Court by the Solicitor-General with the leave of this Court under s 313(3) of the Criminal Procedure Act 2011:[1]

> Was the Court correct to find that the issue of producer statements (following or as a result of construction monitoring) in relation to non-compliant building work does not give rise to liability under s 40 of the Building Act 2004?

[2] The question relates to the application of s 40 of the Building Act 2004 (the Act) to producer statements issued following or resulting from construction monitoring. The answer depends on the interpretation of "building work" as it appears in that provision — a point of law on which there are conflicting High Court authorities.[2] Section 40 reads as follows:[3]

> **40 Building work not to be carried out without consent**
>
> (1) A person must not carry out any *building work* except in accordance with a building consent.
>
> (2) A person commits an offence if the person fails to comply with this section.
>
> (3) A person who commits an offence under this section is liable on conviction to a fine not exceeding $200,000 and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence has continued.

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1 *Re Solicitor-General's Reference (No 1 of 2022)* [2022] NZCA 338. The words "following or as a result of construction monitoring" were added on Mr Thompson's application at the hearing.

2 *Andrew Melvin King-Turner Ltd v Tasman District Council* [2021] NZHC 343 at [18]–[24] and [43]–[48]; and *Kwak v Park* [2016] NZHC 530 at [49]–[54].

3 Emphasis added.

[3] For the purposes of this judgment, we refer to building work carried out except in accordance with a building consent, in breach of s 40(1), as "non-compliant building work".

[4] The case from which the question arose is *Cancian v Tauranga City Council*, decided by Lang J at the High Court at Rotorua.[4] The Tauranga City Council (the Council) had alleged that five defendants, including Bruce Cameron and The Engineer Ltd (TEL), a company of which Mr Cameron was the sole director, had carried out non-compliant building work.

[5] On 10 December 2020, after a lengthy trial before Judge Mabey KC sitting alone in the District Court at Tauranga, convictions were entered against all defendants.[5] On 28 April 2021, they were sentenced in respect of those convictions.[6] Three of the defendants then appealed their convictions: Mr Cameron, TEL, and a Mr Danny Cancian.[7]

[6] On 28 March 2022, Lang J allowed appeals by Mr Cameron and TEL against their convictions on charges laid by the Council under s 40 of the Act, quashing the convictions and fines imposed by the District Court.[8] The Judge allowed Mr Cancian's conviction appeal only in part.[9] The Solicitor-General's reference cannot affect the outcome of the case in the High Court.[10]

[7] In order to make sense of the arguments that arise, it is necessary to say something about the factual circumstances which gave rise to the prosecutions.

Relevant facts

[8] Mr Cameron was an engineer who issued producer statements in connection with a residential subdivision and development near Tauranga known as The Lakes.

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4 *Cancian v Tauranga City Council* [2022] NZHC 556 [High Court judgment].
5 *Tauranga City Council v Cancian* [2020] NZDC 25470 [District Court judgment].
6 *Tauranga City Council v Cancian* [2021] NZDC 7606.
7 Mr Cancian also appealed his sentence, which was allowed in part: *Cancian v Tauranga District Council* [2022] NZHC 862.
8 High Court judgment, above n 4, at [83].
9 At [47].
10 Criminal Procedure Act 2011, s 314(6).

His role involved on-site construction monitoring, physical investigations and testing, and the provision of instructions or directions to building contractors in respect of the next stages in construction.

[9] The developer of The Lakes was Bella Vista Homes Ltd (Bella Vista), a company controlled by Mr Cancian. Bella Vista engaged TEL to carry out engineering work in relation to the subdivision.

[10] Bella Vista obtained resource consents from the Council and began to construct dwellings on the sections within the subdivision. Both the Council and WorkSafe New Zealand became aware of issues concerning the quality of the work being carried out. Following an intervention by WorkSafe in response to site safety concerns, building work ceased, after which a number of the homes were declared to be either dangerous or affected buildings. Some homeowners who had already moved into their homes in the subdivision were required to vacate.

[11] The Council laid charges under s 40 of the Act against Mr Cancian, Mr Cameron, and a Mr Darrel Joseph, who had been engaged by Bella Vista to provide block-laying services. Charges against Bella Vista and TEL were brought under ss 40 and 386, the latter being directed to principal/agent liability. The charges focused on building work that had been carried out on eight properties. Judge Mabey considered that, because of the particularisation of each charge, he was "effectively required to rule upon 93 charges".[11] He convicted both Mr Cameron and TEL on six charges, and the other defendants were each convicted on three charges.

[12] We are concerned here only with the charges laid against Mr Cameron and TEL. Both were convicted of carrying out non-compliant building work, but as recorded above their convictions were quashed on appeal.[12] The High Court noted that the Council advanced its case against them on the basis that they had provided the

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11 District Court judgment, above n 5, at [8].
12 High Court judgment, above n 8.

Council with producer statements, related to restricted building work carried out at the sites referred to in the charges, which did not accurately reflect what had been done.[13]

[13] The Act does not provide for producer statements, unlike its predecessor the Building Act 1991.[14] But they are commonly used to advise building consent authorities about construction work that has been carried out in the course of implementing building consents. Their provision by suitably qualified persons may be accepted by building consent authorities as an accurate representation of work that has been carried out and as giving reasonable assurance the work has been carried out in accordance with the building consent and the building code.[15] This process enables building consent authorities to reduce the cost and delays that would be incurred if they carried out their regulatory functions under the Act using only their own employees.

[14] There are four commonly used kinds of producer statement.[16] As summarised by Mr Thompson for the Solicitor-General, these are:

> 59.1 PS1 Design – issued by a design professional, such as an architect or engineer, certifying to the building consent authority that, in their opinion, a proposed design complies with the building code;
>
> 59.2 PS2 Design Review – issued by a design professional as a peer review of a design prepared by another design professional.
>
> 59.3 PS3 Construction – issued by a builder or other tradesperson who has constructed building work, confirming they have done so in accordance with the relevant building consent and in compliance with the building code; and
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> 59.4 PS4 Construction Review – issued by a design professional, such as an engineer, who has undertaken construction monitoring or observation, confirming that, in their opinion, the works have been

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13 At [40]. "[R]estricted building work" is defined in s 7(1) of the Building Act 2004 as any building work or design work declared by the Governor-General by Order in Council to be restricted building work. An order made under s 7(1) is secondary legislation (s 7(2)). Relevantly, restricted building work includes the construction or alteration of the primary structure of a house or small-to-medium apartment building, bricklaying, carpentry, foundations work, and roofing: see Building (Definition of Restricted Building Work) Order 2011, s 5.

14 See definition of "[p]roducer statement" in s 2 of the Building Act 1991 as "any statement supplied by or on behalf of an applicant for a building consent or by or on behalf of a person who has been granted a building consent that certain work will be or has been carried out in accordance with certain technical specifications".

15 Building Regulations 1992, sch 1 (building code).

16 See Association of Consulting and Engineering New Zealand, Engineering New Zealand and New Zealand Institute of Architects Inc *Guidance on use of producer statements* (Oct 2013).

> done in accordance with the relevant building consent and in compliance with the building code.

[15] Producer statements are usually in standard forms depending on the kind of statement that is being provided. The relevant producer statements in this case were PS4s signed by Mr Cameron on behalf of TEL. The signed producer statements bear the logos of the Institution of Professional Engineers New Zealand (IPENZ), the New Zealand Institute of Architects Inc, and the Association of Consulting and Engineering New Zealand (ACENZ). They were issued to Bella Vista, to be supplied to the Council.

[16] As an example, we take the PS4 form signed by Mr Cameron, dated 3 March 2016.[17] The form was headed "Producer Statement – PS4 – Construction Review". It was issued in respect of "Block foundation wall *footing* pre-pour construction investigation and certification" at one of the properties in the subdivision — 297 Lakes Boulevard. It recorded that TEL had been engaged by Bella Vista to provide CM3 Construction Monitoring, in respect of "clause(s) B1 Structure, B2 Durability … of the Building Code for the building work described in documents relating to Building Consent No. 56531".[18] It stated "[w]e have sighted [the] Building Consents and the conditions … attached to them." It continued:

> On … the basis of … these review(s) and information supplied by the contractor during the course of the works and **on behalf of the firm** undertaking this Construction Review,[19] **I believe on reasonable grounds** that … Part only[20] of the building works have been completed in accordance with the relevant requirements of the Building Consent and Building Consent Amendments identified above, with respect to Clause(s) **B1, B2** ….of the Building Code. I also believe on reasonable grounds that the persons who have undertaken this construction review have the necessary competency to do so.

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17 We note that the Solicitor-General has dated this document as 3 March 2017 in both submissions and the exhibit index. It is apparent from Mr Cameron's site inspection records that the Solicitor-General was correct to refer to 2017 in each case.

18 CM3 is one of the five levels of monitoring mentioned on the standard PS4 form. We discuss this more fully below at [20].

19 That is, TEL.

20 The expression "Part only" is one of options on the printed PS4 form, appearing after "All", both accompanied by a tick box to mark to reflect what the producer statement was covering.

[17] On the form, Mr Cameron also recited his professional memberships and qualifications as an engineer, and stated that TEL held a current policy of professional indemnity insurance in a sum of no less than $200,000.

[18] We note that the standard PS4 form states it "is to accompany **Forms 6 or 8 of the Building (Form[s]) Regulations 2004** for the issue of a Code Compliance Certificate". Form 6 of the Regulations is the relevant form for present purposes.[21] It is the "prescribed form" for an application to a building consent authority for a code compliance certificate, referred to by s 92(2)(b), which must be submitted by an owner as soon as practicable after the building work has been completed.[22]

[19] Form 6 requires the applicant to list both the "licensed building practitioner(s) who carried out or supervised the restricted building work", and the "personnel who carried out building work other than restricted building work."[23] In the case of the PS4s for 297 Lakes Boulevard, the only person referred to by name was Mr Cameron. We note also that the form contemplates attachments, including certificates from the personnel who carried out the work. Mr Cameron's producer statements were on the face of it in this category, relating to the CM3 construction monitoring TEL had been required to carry out, as noted on the form.

[20] CM3 construction monitoring is one of the five levels of monitoring mentioned on the standard PS4 form. Judge Mabey explained in his judgment what was involved in CM3 level construction monitoring, referring to the relevant guidance from the Ministry of Business, Innovation and Employment | Hīkina Whakatutuki.[24] This required TEL/Mr Cameron to:

> Review, to an extent agreed with the client, random samples of important work procedures, for compliance with the requirements of the plans and specifications and review important completed work prior to enclosure or on completion as appropriate.

[21] He was also required to be available to provide the constructor with technical interpretation of the plans and specifications.

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21 Building (Forms) Regulations 2004, sch 2 cl 6, Form 6.
22 Building Act, s 92(1) and 92(2)(a).
23 Building (Forms) Regulations, sch 2 cl 6, Form 6.
24 District Court judgment, above n 5, at [220]. We were not provided a copy of this document.

[22] Judge Mabey relied on the High Court's decision in *Kwak v Park*, which held that filing a producer statement amounts to carrying out "building work" for the purposes of the Act.[25] In respect of all four charges relating to defective block-foundation work, the Judge found Mr Cameron had failed to adequately inspect and notice significant departures from the plans contained in the building consent.[26]

[23] Mr Cameron and TEL were convicted of two further offences in respect of Mr Cameron's certification of site ground-bearing capacity.[27] The charges alleged Mr Cameron had wrongly certified the adequacy of the ground-bearing capacity of the land at 303 and 307 Lakes Boulevard. In each case the producer statement signed by Mr Cameron referred to construction monitoring, in respect of "B1 Structure of the Building Code", and specifically "Building foundation ground preparation construction investigation and certification."

[24] In respect of these final charges, the relevant PS4 forms specified that the construction monitoring was to be carried out at CM2 level, which required that the person:[28]

> Review, preferabl[y] at the earliest opportunity, a sample of each important work procedure, material or construction and component for compliance with the requirements of the plans and specifications and review a representative sample of each important completed work prior to enclosure or completion as appropriate.
>
> Be available to provide the constructor with technical interpretation of the plans and specifications.

[25] The Judge found that the testing work carried out by Mr Cameron in order to certify "good ground" was inadequate. The evidence called by the Council satisfied the Judge that the land was not good ground as required by the building consents and that Mr Cameron's PS4s certifying that there was good ground were wrong.[29]

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25 At [95] and [167], citing *Kwak v Park*, above n 2.

26 District Court judgment, above n 5, at [241], [257], [260]–[261], [281], [292], [322], and [347]. In addition to 297 Lakes Boulevard, Mr Cameron was convicted in respect of the CM3 monitoring he carried out at 301, 303 and 307 Lakes Boulevard. The Judge convicted TEL on the basis of the same facts.

27 At [397]–[399] and [424].

28 Western Bay of Plenty District Council *2009 Development Code* (September, 2009) at [3.1].

29 District Court judgment, above n 5, at [389] and [398]–[399].

[26] In the result, Mr Cameron was convicted in the District Court on six charges of carrying out non-compliant building work contrary to s 40 of the Act.[30] TEL's convictions mirrored those of Mr Cameron. As noted above, both parties appealed to the High Court.

The High Court judgment

[27] The High Court held that "the issuing of producer statements in relation to non-compliant building work does not give rise to liability under s 40 of [the Act]".[31] In accordance with this conclusion, Lang J allowed the appeals of Mr Cameron and TEL.[32]

[28] In reaching that conclusion, Lang J followed the reasoning of Ellis J in *Andrew Melvin King-Turner Ltd v Tasman District Council*, a case decided after Judge Mabey's decision in this case.[33] In that case, Ellis J stated that the issue of a producer statement that wrongly confirms that building work has been completed in accordance with the building code or a building consent is not capable of constituting an offence under s 40 of the Act.[34]

[29] Lang J considered that several of the factors identified by Ellis J in *King-Turner* plainly counted against liability. He relied on the fact that producer statements have no official status under the Act, and emphasised that the builder and building consent authority are the only entities responsible for ensuring the terms of a building consent have been complied with.[35] He was also influenced by the manner in which the Act allocates responsibilities between different actors in the building industry.[36]

[30] In relation to the allocation of responsibilities under the Act, the Judge noted the summary given by Ellis J in *King-Turner*, referring to:[37]

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30 See [508]–[509]. Mr Cameron's convictions relate to 297, 301, 303 and 307 Lakes Boulevard.
31 High Court judgment, above n 8, at [80].
32 At [83].
33 At [80], citing *Andrew Melvin King-Turner Ltd*, above n 2, at [17]–[24].
34 *Andrew Melvin King-Turner Ltd*, above n 2, at [48].
35 High Court judgment, above n 8, at [72].
36 At [72].
37 At [69], citing *Andrew Melvin King-Turner Ltd*, above n 2, at [25].

(a) The responsibility of an owner to obtain and ensure compliance with, any necessary building consent (s 14B);

(b) The responsibility of a designer to ensure relevant plans and specifications or the relevant advice are sufficient to result in the building work complying with the building code if the building work were properly completed in accordance with those plans and specifications or that advice (s 14D);

(c) The responsibility of a builder (defined as "any person who carries out building work") to ensure the building work complies with the building consent and the plans and specifications to which the building consent relates, and to ensure that building work not covered by a building consent complies with the building code (s 14E(2));

(d) The responsibility of [a licensed building practitioner] who carries out restricted building work to ensure that the work is carried out or supervised in accordance with the requirements of the 2004 Act and that he or she is licensed in a class authorised to carry out or supervise that work (s 14E(3));

(e) The responsibility of a building consent authority to check to ensure that an application for building consent complies with the building code, to ensure that building work has been carried out in accordance with the building consent for that work and to issue building consents and certificates in accordance with the requirements of the Act (s 14F).

[31] Further, the Judge noted that to establish a charge under s 40, even if building work had been carried out, it would be necessary to go on to determine whether that work was non-compliant with the building consent. In this case, he held that question had to be answered in the negative, because the building consent did not refer to producer statements. The consent provided no standards or requirements for information to be provided in any producer statement, nor did it impose standards in relation to any inspections that precede the provision of a producer statement. This meant it was not possible for Mr Cameron and TEL to issue a producer statement that breached the building consent.[38]

[32] The Judge thought it significant that a producer statement will necessarily relate to building work that has already been undertaken. He observed that generally, criminal liability would only be imposed on the person actually carrying out the work (the principal) or those who had arranged for the offence to be committed or encouraged or assisted the commission of the offence (a party).[39] In the latter case,

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38 High Court judgment, above n 8, at [75].
39 At [76], citing Crimes Act 1961, s 66(1).

party liability would generally only arise for acts committed prior to the point when the offence had been committed. After the offence, the only path to liability would be as an accessory after the fact.[40]

[33] Lang J noted that Ellis J had left open the possibility that an issuer of a producer statement might have a responsibility to ensure that restricted building work is carried out or supervised in accordance with the requirements of the Act (and, therefore of a building consent).[41] However, he considered, having read the judgment as a whole, that Ellis J had restricted this reservation to situations where no building consent had been issued.[42]

[34] As a result of this analysis, he concluded:

> [80] It follows that, like Ellis J, I consider the issuing of producer statements in relation to non-compliant building work does not give rise to liability under s 40 of the 2004 Act. This is sufficient to dispose of the appeals by both Mr Cameron and [TEL].

The Solicitor-General's reference

[35] As we have noted above, s 40(1) of the Act provides that "[a] person must not carry out any *building work* except in accordance with a building consent."[43]

[36] There are two competing interpretations of "building work", as it appears in s 40 of the Act, reflected in apparently conflicting High Court authorities. Under *Kwak v Park*, followed by the District Court in this case, the issue of a producer statement constitutes building work.[44] Under *King-Turner*, followed by the High Court, it does not.[45]

[37] In *Kwak v Park*, Woolford J had to decide whether a claim was time-barred under the Weathertight Homes Resolution Services Act 2006. That issue turned on whether producer statements that had been issued constituted "building work" for the

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40 High Court judgment, above n 8, at [76].
41 At [78], citing *Andrew Melvin King-Turner Ltd*, above n 2, at [43].
42 High Court judgment, above n 8, at [79].
43 Emphasis added.
44 *Kwak v Park*, above n 2, at [49]–[54].
45 *Andrew Melvin King-Turner Ltd*, above n 2, at [18]–[24] and [43]–[48].

purpose of that Act.[46] Woolford J considered that they did, being "work for, or in connection with the construction of a building".[47] He reasoned:

> [50] … First, the completion of producer statements is work, which can be defined as exertion or effort directed to produce or accomplish something. There is no logical reason why the ordinary meaning of work should not apply or the definition be restricted to physical work. Second, the work of completing a producer statement is in connection with the construction of a building, just as much as the physical work of applying a waterproof membrane.

[38] In the present case, Judge Mabey relied on *Kwak* for his conclusion that the producer statements made by Mr Cameron were work for or in connection with the construction of a building.[48]

[39] Following Judge Mabey's decision, the judgment in *King-Turner* was delivered. Ellis J distinguished *Kwak v Park* as a case involving "different statutory provisions, and different policy concerns".[49] She explicitly stated that it was not necessary for her to "go so far as to say [she considered] that the decision in *Kwak* is wrong".[50]

[40] Mr Thompson contends that the issue of a producer statement (following or as a result of construction monitoring) in relation to non-compliant building work *is capable* of constituting an offence under s 40 of the Act. Mr Thompson says that the wording of s 40 is sufficiently broad to encompass the issue of producer statements.

[41] In summary, Mr Thompson submits that Lang J erred by:

(a) Misconstruing what is involved in the issue of a producer statement. The Judge confined his analysis to the final act of issuing the statement, rather than the full process leading up to its issue. The producer

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46 Woolford J noted that the word "built" in s 14(a) of the Weathertight Homes Resolution Services Act 2006 was intended to be construed by reference to the expression "building work" in ss 7 and 393 of the Building Act 2004: *Kwak v Park*, above n 2, at [46], citing *Osborne v Auckland Council* [2014] NZSC 67, [2014] 1 NZLR 766 at [26]–[27].

47 At [49]–[50].

48 District Court judgment, above n 5, at [95] and [167].

49 *Andrew Melvin King-Turner Ltd*, above n 2, at [47].

50 At [47].

statements issued by Mr Cameron should be understood as a record of the work that he himself had done, and his confirmation as a qualified engineer that, as a result of his work, he could confirm that what he monitored/inspected was compliant with the building consent and relevant clauses of the building code.

(b) Not recognising the physical onsite work done by Mr Cameron in order to issue his producer statements. Mr Cameron's role was not merely issuing a piece of paper at the completion of the works, but was ongoing and had a direct impact on what was constructed. There is no reason why engineers like Mr Cameron should escape liability, while those people involved in physical construction work, who the engineer was monitoring, are liable. A professional engineer will be better placed to assess whether work has been done in accordance with the relevant building consent. In this case, Mr Cameron also conducted physical work, as was shown by his driving of a Scala Penetrometer into the ground to test its load-bearing capacity.

(c) Not applying the ordinary meaning of "building work", as defined in the Act. The reasoning of Lang J (and Ellis J) on differentiated responsibility can be rebutted:

(i) sections 14A–14G of the Act are not definitive or exhaustive;

(ii) there is no reason an engineer is not a "builder" for the purposes of the Act; and

(iii) section 14E(3) of the Act supports the liability of a person in Mr Cameron's position through its provision that a licensed building practitioner carrying out or supervising restricted building work is responsible for ensuring it is carried out or supervised in accordance with the Act's requirements.

Mr Thompson submitted that *Kwak v Park* cannot be distinguished and should be applied.

(d) Misconstruing the requirements of the building consent documentation before him in finding that the building consent did not refer to the producer statements. The building consent documents established requirements for the types of inspection that were needed and made reference to producer statements. For example, for 301 Lakes Boulevard, the specifications forming part of the building consent stated:

> Blockwork shall be constructed and inspected to the requirements for Grade B masonry. Inspection by the Engineer will be in accordance with NZS 4230.

And the required items report forming part of the building consent listed "Engineers Report PS4 Structure" under the heading "Producer Statements Required".

[42] Mr Thompson maintained it would be unfair, by analogy to *Tan v Auckland Council*, for engineers to escape liability, given their expert knowledge, when others less qualified might be liable as the owner or builder.[51] Left uncorrected, the High Court decision would mean that chartered professional engineers would be treated differently to other parties involved in the construction of buildings. But for the work of Mr Cameron, the buildings would not have been erected. Those "wielding the hammers" would be liable for criminal prosecution, but highly qualified engineers would not be — an outcome both arbitrary and unfair.

Submissions of counsel assisting the Court

[43] Mr Mijatov submitted that the application of principles of orthodox statutory interpretation yields the answer that s 40 cannot apply to the issue of a producer statement.

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[51] *Tan v Auckland Council* [2015] NZHC 3299. In that case, Brewer J held that a project manager was liable for "carrying out" building work without a building consent on the basis that the phrase "carry out" included supervision or instruction of others who did the physical work: see [73].

[44] He argued that:

(a) The wording of the Act means that a producer statement is not "building work" that is "carr[ied] out … in accordance with a building consent" (in terms of s 40(1)). Producer statements have no status under the Act at all and have a very limited function. The requirement under s 40(1) for work to be done in accordance with a building consent is just a prerequisite; only work which can be done in compliance with a building consent can be the subject of criminal prosecution for a failure to carry out work in accordance with the consent. This is fatal to the Solicitor-General's interpretation, as a producer statement is never issued in accordance with a building consent. This interpretation is supported by *King-Turner*: s 40 only criminalises work for which authorisation via consent is required. *Kwak v Park* can be distinguished due to the different context in which the interpretative exercise was being carried out in that case.

(b) The issue of a producer statement is "design work" and not "building work", terms which are differentiated by the Act.[52] Design work can only be building work if it is restricted building work — a category which does not include producer statements. Producer statements are not a source of how anything is to be constructed or altered. Rather, they record a professional opinion about whether building work is compliant with the building code or consents. Inspection is not building work, as by definition, it is not even contemporaneous with building work.

(c) Extending criminal liability to those issuing producer statements would be inconsistent with the roles and responsibilities set out by Parliament. The strict criminal liability imposed by s 40 also militates against its application to producer statements: Mr Mijatov submitted that the nature of producer statements and the work necessary to issue them involves

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[52] See s 7(1), defining "restricted building work", and s 401B(2), referring to "building work or design work".

questions of opinion, degree, and judgement ill-suited to a strict liability regime, given the absence of an objective measure of compliance.

(d) There is no unfairness in this result: accountability is promoted through civil and disciplinary liability rather than criminal. As Ms Davies emphasised in the oral argument, buildings can remain safe without criminalising the giving of a professional opinion. This outcome is not unfair because:

(i) other specialists, like architects and tradespeople, also escape liability;

(ii) the engineer is still accountable, their accountability merely lies elsewhere and with others;[53] and

(iii) there is no indication in the Act that Parliament intended to expand criminal liability to all persons involved in every capacity in the construction process.

[45] Mr Mijatov submitted that the aims of the Act, being public safety and the promotion of accountability, are able to be achieved without an overly broad interpretation of s 40.

Analysis

[46] For the reasons we give below, we conclude that the issue of producer statements (following or as a result of construction monitoring) in relation to non-compliant building work is capable of giving rise to liability under s 40 of the Act. We reached this conclusion on the basis of the Act's text and purpose.

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[53] *Andrew Melvin King-Turner Ltd*, above n 2, at [44].

Statutory text

[47] The meaning of legislation "must be ascertained *from its text* and in the light of its purpose and its context".[54] Accordingly, we begin with the statutory text.

[48] Section 40 has been set out earlier. Subs (1) states that "[a] person must not carry out building work except in accordance with a building consent." Under subs (2) a person commits an offence if the person fails to comply with the section. It is clear that the interpretation of "building work" is central to the application of the section.

[49] At the time relevant to this case, s 7(1) of the Act defined "building work" as follows:

> **building work—**
>
> (a) means work—
>
> (i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and
>
> (ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and
>
> (b) includes sitework; and
>
> (c) includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act …; and
>
> (d) in Part 4, and the definition in this section of supervise, also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4 …
>
> …

[50] The word "sitework" was defined as meaning:

> [W]ork on a building site, including earthworks, preparatory to, or associated with, the construction, alteration, demolition, or removal of a building

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54 Legislation Act 2019, s 10(1) (emphasis added).

[51] The definition of "building work" is broad — para (a)(i) clearly captures *any work* for or in connection with the construction of a building. Further, work performed on site to assess compliance will qualify as building work under para (c) because it is "sitework", that is work on a building site associated with the construction of a building.

[52] As noted above, the PS4 producer statements signed by Mr Cameron affirmed that TEL had been engaged to provide CM3 construction monitoring services in respect of nominated provisions of the building code for the building work described in documents relating to a specified building consent. On the producer statement, he recorded:

(a) he had sighted the building consents and conditions attached;

(b) on the basis of these reviews, "and information supplied by the contractor during the course of the works and **on behalf of the firm** undertaking this Construction Review", he believed on reasonable grounds that the building works had been completed in accordance with the relevant requirements of the building consent with respect to the specified clauses of the building code (B1 — Structure, and B2 — Durability); and

(c) he believed "on reasonable grounds that the persons[55] who have undertaken this construction review [had] the necessary competency to do so".

[53] As the District Court Judge noted, CM3 construction monitoring required Mr Cameron to review random samples of important work procedures "for compliance with the requirements of the plans and specifications and to review important completed work prior to enclosure or on completion as appropriate".[56] He was also required to be available to provide the builder with "technical interpretation of the plans and specifications".[57]

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55 In that context, this was a reference to himself and TEL.
56 District Court judgment, above n 5, at [220].
57 At [220].

[54] We consider that while the Act does not provide for producer statements, or formally recognise the role they continue to play, they clearly fall within the ambit of building work, as defined. It is plain from the evidence that they have a recognised scope: the existence of standard printed forms bearing the logo and implicit endorsement of the relevant professional engineering and architectural associations demonstrates this is so. The requirement contained in the form that persons signing the statement note their membership of IPENZ or NZIA, and record their qualifications emphasises the formal nature of the statement, as does the requirement that the "Construction Review Firm issuing this statement holds a current policy of Professional Indemnity Insurance no less than $200,000".

[55] We conclude that although it is not a statutory document, a producer statement is a standard document with well understood content and purpose, intended to contain reasonable statements of professional opinion that the building works to which they relate have been completed in accordance with the building consent and the building code. In Mr Cameron's case, as is typical, this necessarily involved on-site construction monitoring, physically carrying out investigations and testing, and providing instructions or directions to building contractors in respect of the next stages in construction.

[56] The PS4 producer statements can be understood as a record of the work completed by Mr Cameron. The statement signed by Mr Cameron for 297 Lakes Boulevard effectively said he had reviewed the work carried out on the block foundation wall footing to the extent sufficient for him to believe on reasonable grounds that the work had been carried out in accordance with the relevant requirements. He could only properly issue the certificate if he had carried out the necessary investigations. And in respect of 303 and 307 Lakes Boulevard, the producer statements asserted his reasonably held belief that there was "good ground", founded upon his on-site "[b]uilding foundation ground preparation construction investigation". The site inspection records that Mr Cameron provided with the PS4s recorded the observations that he made on site and confirmed in each case "[o]k to proceed with construction".

[57] The work necessary to issue a producer statement fits easily within the definition of sitework. And the work carried out on site to put the author of the producer statement in a position to be able to certify compliance will constitute "sitework" as defined. What then if the producer statement asserts the work has been carried out in accordance with the relevant requirements of the building consent and the building code when that is not the case? The focus here must be on the building work carried out by the author of the producer statement, that is his or her investigation of the work carried out by the builder. The liability of the author of the producer statement is not one and the same as the non-compliant actions of the builder: we are dealing here with what the author of the producer statement has wrongly asserted.

[58] Producer statements are regularly provided to and accepted by building consent authorities to save time and money, while giving reasonable assurance of compliance. We also do not agree with Lang J's statement that "the building consent did not refer to producer statements".[58] In this instance, the building consent documents made reference to the producer statement — the building consent[59] for 301 Lakes Boulevard issued on behalf of the Tauranga City Council listed the documents attached, which included a "Required Items Report". This report listed "Engineers Report PS4 Structure". But even if that were not so, there was non-compliance with the building consent. A statement by a qualified professional that there has been compliance when that is not the case will itself be building work that is not in accordance with the building consent.

[59] As noted earlier, the reasoning of the High Court was partly based on the propositions that the building consent itself provided no standards or requirements for information to be provided in any producer statement, nor did it impose standards in relation to any inspections that precede the provision of a producer statement. Consequently, Mr Cameron and TEL could not issue a producer statement that breached the building consent.[60]

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58 High Court judgment, above n 8, at [75].

59 The building consent was in the prescribed form: Building (Forms) Regulations, sch 2 cl 5, Form 5.

60 High Court judgment, above n 8, at [76].

[60] We are not able to agree with this reasoning. We do not see the absence of standards or information requirements in the building consent itself as decisive. Producer statements have a standard form, which makes plain what their essential contents are to be. There is no doubt about what the statement is required to say, or as to the standards or requirements to be met. And the standard of inspection to be met can fairly be described as the standard necessary to establish reasonable grounds for belief in the assertions made in the statement. The statement comes from a person professionally qualified to make it, who makes the statement intending that it be relied on.

[61] All involved in the process, including the building consent authority, are entitled to proceed on the known basis of what must be provided in producer statements. Here, the producer statements breached the requirements of the Act by wrongly stating work had been carried out in conformity with the requirements of the building consent and building code when that was not the case.

[62] Once it is established that there has been non-compliance with the building consent and the building code, it is natural to describe a statement certifying compliance as work, completed in connection with the construction of a building, that is not carried out in accordance with a building consent. There was therefore a breach of s 40(1).

Statutory purpose

[63] We consider this result accords with the purposes of the Act set out in s 3. That provides as follows:

> **3 Purposes**
>
> This Act has the following purposes:
>
> (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
>
> (i) people who use buildings can do so safely and without endangering their health; and

(ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and

(iii) people who use a building can escape from the building if it is on fire; and

(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:

(b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

[64] On the view we take, holding the author of the producer statement accountable under s 40 accords with these purposes. The producer statement is procured by the builder for the purpose of assuring a council that the work has been carried out by the builder in accordance with the requirements of the building consent and building code. Requiring such statements to be accurately made clearly furthers the statutory purpose of promoting the accountability of the owner and the builder for the work that is done. It also assists the building consent authority to carry out its responsibilities as the regulator, thus promoting public safety and wellbeing.

[65] Seen in this light, the producer statement helps achieve the purposes of the Act by assisting a number of actors comply with their roles under the Act. In this way, the potential for liability under s 40 in respect of producer statements wrongly issued promotes the accountability of all those who need to ensure that building work complies with the requirements of the building code in accordance with s 3(b). And the purposes set out in s 3(a) are also served.

Concluding remarks

[66] We do not see our conclusion as being in conflict with what was said by the High Court in this case, and by Ellis J in *King-Turner,* about the way in which the Act allocates responsibilities to different actors in the building industry.[61] We accept that pt 1 subpt 4 of the Act sets out the responsibilities of different groups: owners; owner-builders; designers; builders; building consent authorities; and product

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[61] High Court judgment, above n 8, at [69], citing *Andrew Melvin King-Turner Ltd*, above n 2, at [25].

manufacturers or suppliers.[62] But we do not accept it will always be correct to compartmentalise these responsibilities as the exclusive domain of the particular actors referred to. First, it is necessary to note the reservations in s 14A, to the effect that the responsibilities set out in ss 14B to 14G are not intended to be definitive or exhaustive but are an outline only; and that they are for guidance only.

[67] More importantly, in the case of responsibility for ensuring building work complies with the building consent and building code, that is the responsibility of the owner under s 14B(b), the builder under s 14E(2)(a), and the building consent authority under s 14F(a). As we have said, a producer statement assists each of these actors to meet their individual responsibility for achieving compliance. The owner and the builder have the assurance of a qualified expert that the work is compliant. The building consent authority is also able to rely on the authoritative nature of the statement. The absence of statutory reference to the role of producer statements is not significant when the provision of the statements *in fact* assists all the parties who have relevant responsibilities under the Act to fulfil their responsibilities.

[68] We are not persuaded by Mr Mijatov's argument that a producer statement is design work. Section 14D(1) of the Act describes a designer as a person who "prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code". Section 14D(2) then states that a designer is responsible for ensuring that the plans and specifications or advice in question are "sufficient to result in the work complying with the building code", if properly completed in accordance with the plans, specifications or advice. This is essentially prospective: the duty is to ensure plans of proposed work, if followed, will result in a complying building. We see this as essentially different from the work involved in issuing a producer statement, which relates to the work that is being done on site to implement the design.

[69] We accept the force of Mr Mijatov's argument that the outcome of the interpretation that we favour will be to criminalise what might be described as the giving of an opinion in the context of a statutory offence provision that creates strict

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62 Building Act 2004, ss 14B–14G.

liability. However, the producer statement is more than an opinion — it reflects the work the author has carried out to be able to express the opinion, and confirms the author has reasonable grounds for belief in compliance.

[70] Building consents and the building code have prescriptive and verifiable standards as to what they each require. The author of the producer statement will not be criminally liable unless it is established beyond reasonable doubt that the matters certified in the statement are incorrect. In the present case, Judge Mabey was readily able to conclude beyond a reasonable doubt that the producer statements were wrong. If that standard could not be met, no offence would be committed.

Result

[71] We answer the question of law (arising from *Cancian v Tauranga City Council* [2022] NZHC 556) as follows:

> Was the Court correct to find that the issue of producer statements (following or as a result of construction monitoring) in relation to non-compliant building work does not give rise to liability under s 40 of the Building Act 2004?
>
> No.

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