

**IN THE MATTER OF THE ARCHITECTS' REGISTRATION BOARD  
AND IN THE MATTER OF DISCIPLINARY PROCEEDINGS  
CONCERNING MR. IAN SALISBURY**

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**OPINION**

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**Background**

1. (1) This matter relates to the Architects Registration Act 1997. Unless the contrary appears, references in the Opinion to “Sections” are references to sections of that Act - which will itself be referred to as “the Act”.

(2) Section 20(1) provides that:-

*“A person shall not practise or carry on business under any name, style or title containing the word “architect” unless he is a person registered under this Act.”*

2. I am instructed by Mr Ian Salisbury, who is a person registered under, but subject to, disciplinary proceedings under the Act. Those proceedings are based upon a report dated 7 December 2005 (“the report”) made to the Professional Conduct Committee of the Architects Registration Board - apparently by a Mr Rider of solicitors Field Fisher Waterhouse. The report charges Mr Salisbury with “*unacceptable professional conduct*”. The Act prescribes a range of orders which can be made by the Professional Conduct Committee in the event of a finding of guilt. Those include the removal of the condemned professional’s name from the Register of Architects maintained under the Act (“the Register”).

3. Paragraph 1.1 of the report is in the following terms:-

*“The allegations of unacceptable professional conduct are:-*

(a) *That the Architect did not maintain an appropriate level of professional indemnity insurance; alternatively*

(b) *That despite requests from the Architects Registration Board, the Architect failed to produce to the Architects Registration Board evidence demonstrating that he maintains an appropriate level of professional indemnity insurance.”*

4. In paragraph 2.2 of the report it is explained that:

*“The allegations at paragraph 1.1 above against the Architect arise from his obligations under Standard 8 of the Code of Conduct. Architects in business or practice carrying out professional work are under an obligation to maintain a minimum level of indemnity of £250,000 and must certify by compliance to the Architects Registration Board in accordance with Standard 8.”*

5. Paragraph 3 of the report is in the following terms:-

**3. The Allegations**

3.1 (a) *The Architect completed his Statement of Compliance with Standard 8 for 2002 and 2003.*

(b) *On 15 March 2004, the Architect wrote to the Board stating that he had taken “a commercial decision” not to renew his professional indemnity insurance policy, which had expired on 13 March 2004.*

(c) *Despite further correspondence from the Architects Registration Board (27 April 2004, 2 June 2004 and 19 November 2004) the Architect has not provided any evidence to the Board that he has maintained Professional Indemnity Insurance.”*

6. Standard 8 of the Architects’ Registration Board’s Code of Conduct (“the Code”) is in the following terms:-

**“Standard 8**

***Architects should not undertake professional work without adequate and appropriate professional indemnity insurance cover.***

8.1 *The need for cover extends to professional work undertaken outside an Architect’s main professional practice or employment and to work undertaken by employees of an Architect.*

8.2 *Employed Architects should, as far as possible, ensure that professional indemnity insurance cover or other appropriate cover is provided by their employer.*

8.3 *Without limiting an architect's duty to maintain professional indemnity cover which is adequate and appropriate for the work the architect is undertaking, architects must maintain, in any event, minimum cover in accordance with the Board's guidelines on professional indemnity insurance issued from time to time and provide such evidence in such form as the Board may require demonstrating compliance with this standard."*

7. In a letter to Mr Salisbury, dated 31 July 2007, Mr Rider, writing on behalf of Field Fisher Waterhouse LLP, stated:-

*"I am instructed to confirm on behalf of the Board that it is no longer proceeding with the allegation contained in paragraph 1.1(a) of my Report dated 7 December 2005 but it is proceeding with the allegation in paragraph 1.1(b)."*

It is clear, therefore, that the case against Mr Salisbury is not that he did not at the material time, or does not, maintain the appropriate level of professional indemnity insurance. The sole case against Mr Salisbury is of a breach of the requirement in Standard 8 of the Code (i.e. in 8.3) to provide evidence required by the Board demonstrating that he did have the appropriate level of professional indemnity insurance.

8. There is provision in Section 14 for disciplinary action to be taken in relation to:-

*"(a) unacceptable professional conduct (that is, conduct which falls short of the standard required of a registered person); or*

*(b) serious professional incompetence" -*

See Section 14(1).

However, Section 13(4) provides:-

*"Failure by a registered person to comply with the provisions of the code -*

*(a) shall not be taken of itself to constitute unacceptable professional conduct or serious professional incompetence on his part; but*

*(b) shall be taken into account in any proceedings against him under section 14."*

## The Questions

9. A review of the procedure adopted in this case in the context of the Act raises a number of procedural questions, but I am not instructed to address those.

The questions addressed to me are:-

*ONE, whether the present Code Standard 8 is expressed in terms which are consistent with the Act, having regard to s.13 and anything in the following sections which could be relevant for the purposes of applying and executing the legislation according to its true interpretation (as distinct from according to enforcement of a policy which may be thought to be both reasonable and desirable if it were actually authorised by the legislation)?*

*TWO, whether s.14 authorises proceedings against a registered person based only on the admitted fact that despite requests from the Board pursuant to Standard 8 of the Board's present Code the architect had failed (or had expressly refused) to provide the Board with evidence that he maintained an appropriate level of Professional Indemnity Insurance."*

10. It is material to note that these issues have arisen out of the concerns of Mr Salisbury, who is himself a former member of the Board, as to whether or not the Board is acting in excess of its statutory powers.

## General Principles

11. The fundamental principle applicable to all statutory bodies with limited powers is accurately summarised in Halsbury's Laws of England, 4<sup>th</sup> Ed. vol.1(1) at paragraph 20:-

*"Excess of power: substantive limits. A public body with limited statutory powers must not exercise authority not conferred upon it. Thus, a local authority empowered to establish wash-houses must not set up a municipal laundry, nor may it engage in other ventures in public enterprise in competition with private enterprise without the necessary statutory authorisation. Powers granted for one purpose are to be used to achieve that purpose and not an extraneous purpose. Powers expressly conferred will, however, be so interpreted as to authorise by implication the performance of acts reasonably incidental to those explicitly granted. ..."*

12. Subsidiary principles include that reflected in the maxim *delegatus non potest delegare* - the principle

*"... that where a function has been entrusted by statute to body "X", the function should be performed by "X" and not delegated by "X" for*

*performance by body “Y”. The theory is that the legislature has delegated power to “X” and that a delegate does not itself have power further to delegate such power.”*

(See Bailey Jones and Mowbray’s Administrative Law, 4<sup>th</sup> ed. pages 463-4).

13. Other principles which are of potential relevance are:-
- (1) the principle of construction that statutes imposing criminal or other penalties, or encroaching on rights or imposing burdens should be narrowly construed in favour of the person proceeded against or affected - see Maxwell’s Interpretation of Statutes 4<sup>th</sup> Ed. p.238 et seq.
  - (2) the principle enacted in Section 3(1) of the Human Rights Act 1998 that, so far as it is possible to do so, primary and secondary legislation must be read and given effect in a way which is compatible with rights under the European Convention of Human Rights (“the Convention”) - in my opinion a right to registration under the Act is “*property*” within the terms of Article 1 of the First Protocol to the Convention.
  - (3) the maxim *expressio unius exclusio alterius*, the rule that assertion of one or more things of a particular class may be regarded as silently excluding all other members of the class - see Maxwell Op. Cit. p.293 et seq.

## **Material Provisions of the Act**

### General

14. The Act is expressed to be “*An Act to consolidate the enactments relating to architects*”, and it does in fact consolidate the provisions of the Architects (Registration) Act 1931 (“the 1931 Act”) as amended in subsequent legislation which culminated in substantial changes made in Part III and Schedule II of the Housing Grants, Construction and Regeneration Act 1996 (“the 1996 Act”). In the construction of a consolidating Act the presumption is that Parliament did not intend to alter the existing law. However, the history of the legislation does not appear to me to be of particular materiality for present

purposes - except, perhaps, in so far as it explains the lack of consistency in the provisions of the Act.

### The Registrar

15. Within the Act, provision is made for the appointment of a Registrar. He has the functions provided by the Act and any other functions which the Board directs [Section 1(3)]. The Registrar is required to maintain the Register of Architects. Entry into the Register of the name of every person entitled to be registered under the Act is mandatory [Section 3(1)].

### Registration

16. In Section 4(1) it is provided that:-

*“A person who has applied to the Registrar in the prescribed manner for registration in pursuance of this section is entitled to be registered if -*

- (a) he holds such qualifications and has gained such practical experience as may be prescribed; or*
- (b) he has a standard of competence which, in the opinion of the Board, is equivalent to that demonstrated by satisfying paragraph (a).”*

Section 4(2) provides that:

*“The Board may require a person who applies for registration on the ground that he satisfies subsection (1)(b) to pass a prescribed examination in architecture.”*

Section 5 provides for suitably qualified nationals of EEA States to apply for registration, on terms which are similar to those in Section 4.

17. Section 6(1) makes provision for an applicant for registration to pay a registration fee. Section 6(3) provides that:-

*“The Board may prescribe the information and evidence to be provided to the Registrar in connection with an application for registration in pursuance of section 4 or 5.”*

18. Section 25 “*prescribed*” is defined as meaning “*prescribed by rules made by the Board*”, and “*prescribe*” is defined as meaning “*prescribe by rules*”.

## Removal from Register

19. Part II of the Act includes the following provisions:-

“8. (1) *The Board may require a registered person to pay a retention fee of a prescribed amount if he wishes his name to be retained in the Register in any calendar year after that in which it was entered.*      *Retention of name in Register.*

(2) *Where, after the Registrar has sent a registered person who is liable to pay a retention fee a written demand for the payment of the fee, the person fails to pay the fee within the prescribed period, the Registrar may remove the person's name from the Register. ...*

9. (1) *Where the Board is not satisfied that a person who -      Competence to practise*  
(a) *applies for registration in pursuance of section 4 or 4;*  
(b) *wishes his name to be retained or re-entered in the Register under section 18,*  
*has gained such recent practical experience as the Board may prescribe, his name shall not be entered or re-entered in the Register, or shall be removed from it, unless he satisfies the Board of his competence to practise.*

(2) *Where the Board decides that the name of a person to whom paragraph (b) of subsection (1) applies is by virtue of that subsection to be removed from, or not to be re-entered in, the Register, the Registrar shall serve written notice of the decision on him within the prescribed period after the date of the decision. ...*

11. *Where the Registrar serves notice in writing on a registered person asking if he has changed his regular business address -      Failure to notify change of address.*

(a) *if no answer is received within six months from the sending of the notice, the Registrar shall serve further written*

*notice on him; and*

- (b) *if no answer is received within three months from the sending of the further notice, the Registrar may remove his name from the Register.”*

#### Discipline and Professional Standards

20. The following provisions of the Act are relevant for present purposes:-

“13. (1) *The Board shall issue a code laying down standards of professional conduct and practice expected of registered persons.* Code of practice.

- (2) *The Board shall keep the code under review and vary its provisions whenever it considers it appropriate to do so. ...*

- (4) *[See paragraph 8 above].*

14. (1) *Where an allegation is made that a registered person is guilty of -* Professional misconduct and incompetence

- (a) *unacceptable professional conduct (that is, conduct which falls short of the standard required of a registered person); or*

- (b) *serious professional incompetence.*

*or it appears to the Registrar that a registered person may be so guilty, the case shall be investigated by persons appointed in accordance with rules made by the Board*

- (2) *Where persons investigating a case under subsection (1) find that a registered person has a case to answer, they shall report their finding to the Professional Conduct Committee.*

- (3) *Where the Professional Conduct Committee receives a report under subsection (2) in relation to a registered person, the Committee shall consider whether he is guilty of unacceptable*



*professional conduct or serious professional incompetence.*

(4) *Before considering whether a registered person is guilty of unacceptable professional conduct or serious professional incompetence the Professional Conduct Committee shall -*

(a) *serve written notice on him outlining the case against him; and*

(b) *give him the opportunity to appear before the Committee to argue his case.*

(5) *At any such hearing the registered person is entitled to be legally represented ...*

15. (1) *The Professional Conduct Committee may make a disciplinary order in relation to a registered person if -*

(a) *it is satisfied, after considering his case, that he is guilty of unacceptable professional conduct or serious professional incompetence; or*

(b) *he has been convicted of a criminal offence other than an offence which has no material relevance to his fitness to practise as an architect ...”*

21. As can be seen, sub-sections (2) to (5) spell out a detailed procedure for the purposes of ascertaining whether or not a charge is made out.

#### Use of Title “Architect”

22. As already indicated, the use of the word “*architect*” as a business name by someone other than a person registered under the Act is prohibited by Section 20(1).

23. Section 20 further provides ...

“(3) *Subsection (1) does not prevent a body corporate, firm or partnership from carrying on business under a name, style or title containing the word “architect” if -*

- (a) *the business of the body corporate, firm or partnership so far as it relates to architecture is under the control and management of a registered person who does not act at the same time in a similar capacity for any other body corporate, firm or partnership; and*
- (b) *in all premises where its business relating to architecture is carried on it is carried on by or under the supervision of a registered person.*
- (4) *The Board may by rules provide that subsection (3) shall not apply in relation to a body corporate, firm or partnership unless it has provided to the Board such information necessary for determining whether that subsection applies as may be prescribed. ...”*

### Rules

24. Part V of the Act includes the following provision in relation to the making of rules:-

- “23. (1) *The Board may make rules generally for carrying out or facilitating the purposes of this Act.* Rules
- (2) *The Board shall, before making any rules under this Act, publish a draft of the rules and give those to whom the rules would be applicable an opportunity of making representations to the Board. ...”*

### **Discussion**

#### Registration and Retention on Register

25. It is of interest that the pre-conditions to registration relate exclusively to qualifications and competence. If an applicant is able to fulfil the criteria in either sub-sections (a) or (b) of Section 4(1) [See paragraph 16 above], and has applied “*in the prescribed manner*”, and has “*such recent practical experience as the Board may prescribe*” within the terms of Section 9(1), he is entitled to have his name entered on the Register. These provisions of the Act, unless validly supplemented in some way, rule out consideration of any criteria other than those specified in Section 4(1). Questions as to the conduct of an applicant, as to whether or not he was “*a fit person*”, or as to whether or not he had adequate insurance cover would be immaterial, and an applicant who

fulfilled the statutory criteria could not be refused registration on the grounds of alleged misconduct, or because of the absence of insurance.

26. The position under the provisions of the Act referred to in the last paragraphs could not be affected by any rules made under Section 6(3) of the Act [As to which, see paragraph 17 above]. This is because under Section 4(1) an applicant for registration only has to apply “*in the prescribed manner*”. “*Prescribed manner*” is prima facie a reference to “*form*”, and, because this is a penal statute and because of Article 1 of the First Protocol to the Convention, it must be strictly construed. Rules made under this provision could not be used to impose additional qualifying criteria of substance - as opposed to form. The statutory criteria could not be supplemented by such rules. Nor could such rules require the provision of information or evidence which was not necessary for the purposes of assessing whether or not the statutory criteria were fulfilled.

27. The analysis set out in the last paragraph appears to be recognized in the substantive rules governing Application for Registration. These appear to be those set out in Rule 11 of the Architects Registration Board’s General Rules, which is in the following terms:-

*“Every applicant for registration pursuant to Section 4 or 5 of the Act shall:*

- a. complete and sign the appropriate application form, together with acceptable documentary evidence satisfying the Registrar of their identity;*
- b. submit documentary evidence of award of qualification or certification of completion of studies or examinations in architecture and, in the case of an applicant pursuant to Section 5, a certificate from the relevant competent authority in the member state pursuant to Section 5, (5)(a) or (b) of the Act;*
- c. submit evidence of practical training and experience in architecture undertaken;*
- d. provide name and regular business address for inclusion in the Register; and*
- e. provide such other information as the Registrar may from time to time require.”*

28. It is not clear to me whether the Registrar has required or does require “*other information*” from an applicant, but he could not require information which

was not reasonably necessary for the purposes of assessing whether or not the statutory criteria were fulfilled, and if, under sub-paragraph (e) of Rule 10, he purported to do so, his act would be invalid - either on the basis that that sub-paragraph is to be restrictively construed as being intended to be limited to apply to information specifically related to the statutory criteria, or, if it could not be so construed, on the basis that it was expressed in terms which were too wide and hence were ultra vires.

29. In relation to retention on the Register, the only pre-condition to retention of a registrant's name would be the payment of a retention fee (if required), unless the Board was not satisfied that the registrant had "*such recent practical experience*" as the Board may have prescribed - see Sections 8(1) and (2) and Section 9. Again, therefore, issues as to conduct or standards other than standards of competence and practical experience etc. are immaterial. Consistent with this analysis is the fact that whereas the Act provides a detailed procedure to be followed in the case of any proceedings under Section 14, including a provision empowering the Board to make rules for the conduct of proceedings by the Professional Conduct Committee, no such procedure or provision is prescribed in relation to the retention on the Register of the name of a person who is already registered. [A counter-argument based on the absence of fact-finding procedures for the purposes of dealing, under Section 15(1)(b), with a person convicted of a criminal offence, would be misplaced: in the case of a criminal conviction the investigation of the facts will have been carried out by the court in which the registered person is convicted, and hence the Board is not concerned with the issue of innocence or guilt in such a case].

#### Discipline

30. Under the 1931 Act, a registered person's name could only be removed from the register on grounds of conduct if he was convicted of a criminal offence or if, after inquiry, it was found that he had been "*guilty of conduct disgraceful to him in the capacity of an architect*" - see Section 7 of that Act. These terms remained unchanged until the introduction, by the 1996 Act, of the wording and regime now to be found in Part III of the Act. Thus it was only in 1996

that any provision was made for the Board to issue a code laying down standards of professional conduct and practice, and that the power to remove a registered person's name from the register was widened to include unacceptable professional conduct or serious professional incompetence: at the same time, the range of criminal offences relevant for this purpose was narrowed to exclude offences which had no material relevance to the registered persons fitness to practice as an architect - see Section 15(1)(b) at paragraph 20 above.

31. It can be seen, therefore, that now (as in 1931) the legislation did not provide for any enquiry into an architect's conduct prior to registration. The disciplinary provisions only applied and apply to "*registered persons*". A reluctance to assert a disciplinary jurisdiction over persons who were not yet registered is entirely understandable. However, it seems a little odd that the statutes did not provide that an applicant for registration should be, in effect, a "*fit and proper person*". However, the 1931 Act did not do so, and nor do the provisions of the Act, which (true to the nature of a consolidating statute) are consistent with the original scheme.

32. Because of the terms of Section 13(4) [see paragraph 8 above] and because of the fact that the procedures for the promulgation of the Code and of rules are not uniform, it is important to distinguish between provisions of:-

- (1) the Code; and
- (2) "*rules*" made by the Board under its rule-making powers.

It is a matter of interest in the present case that there does not appear to be any rule requiring a registered person to provide evidence demonstrating his compliance with the Board's guidelines on professional indemnity insurance - assuming, for the moment, that there is power to promulgate such a rule. There is no such requirement in the General Rules: PII guidelines issued by the Board in 2001 include the statement that "*All Architects will be required in 2002 to complete a certificate of compliance confirming the protection in place for professional liability*", but there is no evidence that those guidelines have been promulgated as, or subject to the procedures necessary for them to become, "*rules*".

### The General Power

33. As noted in paragraph 24 above, the Board has a power to make rules generally for carrying out or facilitating the purposes of the Act. However, this would not entitle the Board to arrogate to itself powers not conferred by the Act. The purposes of the legislation were expressed in the 1931 Act to be “*to provide for the registration of architects and for purposes connected therewith*”. This was not altered by the amending legislation. Nevertheless, it is apparent that the purpose of the legislation has been to provide for a register of the title “*architect*” (originally, under the 1931 Act the title was “*registered architect*”) on the basis of specified conditions, to prohibit unregistered persons from practising under that title, and to provide for the de-registration of registered persons in circumstances specified in the legislation. In those circumstances, in my judgment it is clear that the Board could not, under the general power in Section 24, make rules which imposed conditions for registration or retention not required by the express terms of the statute, nor, rules which for the purposes of registration or retention, required information or evidence which could not be required by rules made under Section 6(3) - as to which, see paragraph 26 above, last sentence. This conclusion is not affected by the fact that, since 1996, the purposes of the legislation have included the issue of a code of professional conduct and practice for registered persons, or by the enlargement of the grounds for de-registration to include “*unacceptable professional conduct*” and “*serious incompetence*”.

### Other Powers

34. Section 14 (see paragraph 20 above) includes the following rule-making provisions to enable the Board to make rules as to the procedure to be followed when a “complaint” is made under that section - see sub-sections (1) and (6).
35. The Board has made rules not only as to the procedure to be followed by the Professional Conduct Committee but also as to the procedure to be followed by the persons referred to in Section 14(1) (see paragraph 20 above). These

rules are entitled “*Investigations Rules*” and the persons referred to in Section 14(1) are described as the Investigations Committee.

36. Rule 17 of the Investigations Rules is in the following terms:-

***“Powers of the Registrar and of an Inquirer and of the Board’s Solicitor***

*17. Under these Rules the Registrar, an Inquirer or the Board’s Solicitor shall each have power to call upon any Registered Person to produce such information, books, papers, records and plans as they consider necessary for discharging their functions under these Rules and to permit the inspection of such information, books, papers, records and plans at the business premises of the Registered Person and, where necessary to permit any copying (at the Board’s expense); and every Registered Person must promptly, fully and frankly comply with any requirement made upon him or her under this Rule. This requirement shall not apply to any information in relation to which the Registered Person is entitled to legal professional privilege or the disclosure of which is prohibited by law.”*

37. Further, Standard 10 of the Code includes the following paragraphs:-

*“10.7 An Architect is required to co-operate with an Investigator appointed under the Architects Act 1997.*

*10.8 Failure by an Architect to co-operate promptly and fully with enquiries by such an Investigator will count against them in the event of disciplinary proceedings and related matters before the Professional Conduct Committee. Failure to co-operate may also in itself constitute grounds for disciplinary proceedings.”*

38. In the allegations made against Mr Salisbury no reliance is placed upon any of the provisions referred to in the preceding two paragraphs, and no reliance could be placed upon them now. In any event it seems to me that:

- (1) the grounds upon which a charge can be made must pre-date the date when the charge is first notified to the respondent, and if any “*misconduct*” arises after that date it could only be dealt with in a subsequent charge;
- (2) the validity of Rule 17 of the Investigation Rules is subject to question on the grounds that it is doubtful whether the Board has any power to compel “*discovery*” of a respondent’s papers, let alone to delegate such

power to the Registrar or the Board's Solicitor who is identified under the Professional Conduct Committee Rules as, in effect, the Prosecutor (see rule 11e). An analogous point (though one with which I am not concerned) arises in relation to Rule 8(c) of the Investigation Rules which, construed literally, provides for the Board's Solicitor to make a report which is required by Section 14(2) of the Act to be made by the Investigations Committee.

- (3) it is doubtful whether the Board has power to include a power within the Code to compel a respondent to "*co-operate*" in disciplinary proceedings against himself.

### **Question One**

39. In relation to Question Two I have come to the conclusion that Section 13(4) provides Mr Salisbury with an obvious and complete defence to the charge against him - even assuming that the answer to Question One is unfavourable to him. Question One, however, is more complicated. It involves consideration of, amongst other points:-

- (1) Whether Section 13 requires the Board not only to promulgate standards of professional competence and conduct in a code, but, by implication, requires the Board to be pro-active in enforcing them, and hence (arguably at least) to have the power to require registered persons to provide it with evidence;
- (2) What is the effect, if any, if the Board merely has a power and not a duty to be pro-active in enforcing the code.
- (3) Why, if the Board was intended to be able to promulgate a code including provisions requiring the supply of evidence or information to the Board this was not spelled out - as it is in the case of Section 20(4).
- (4) Whether, the Board's overriding purpose under the Act as a whole is to protect the title of "*architect*", or to protect "*consumers*", or something between.



- (5) Whether the register is essentially an administrative device, and the Board is simply an administrative organ for maintaining and publishing the register, and not a professional body with power to admit or exclude from the profession.
- (6) Whether, as has been suggested, the overriding purpose of Part III of the Act is to protect accused persons from misguided, spiteful or extravagant allegations which would result in undeserved disciplinary orders or other injustice.
40. In the time available I have not been able to reach a concluded view in relation to Question One. nevertheless, in the light of the firm conclusion which I have reached in relation to Question Two, it is unnecessary to do so.

### **Question Two**

41. Question 2 arises, of course, on the basis of the assumption that paragraph 3 of Standard 8 is *intra vires*, valid, and effective, and I approach this question on the basis of that assumption.
42. The term “*unacceptable professional conduct*” is defined in Section 25 as having “*the meaning given in Section 14*”. In Section 14 the meaning is given in the bracketed words in sub-section (1)(a):-
- “that is, conduct which falls short of the standard required of a registered person.”*
43. The only place where such standards can be found is under the Act, and the only place under the Act where they can be found is in the Code which, by Section 13(1), the Board is required to issue - laying down standards “*expected*” of registered persons. [It is odd that in one section the word “*expected*” is used, and that in the other the word used is “*required*”, but in the absence of any other “*requirements*” under the Act as to standards of competence or conduct, it is difficult to see what can be referred to in Section 14(1)(a) if it is not to the Code provided for in Section 13(1)].

44. What, however, is one to make of Section 13(4)? If failure to comply with the standards laid down in the code cannot “*be taken of itself to constitute unacceptable professional conduct*” how can professional conduct ever be unacceptable? The answer must be that there must be some additional factor involved - an X factor. What may Parliament have had in mind?
45. It seems to me that the terms of Section 13(4)(a) could only be justified in circumstances in which there was a breach of the Code but no actual prejudice. Thus, for example, a complaint by a client that he had discovered that a registered person whom he had retained did not have the requisite insurance cover, even if true, could not be taken to constitute unacceptable professional conduct, if the client had terminated the retainer before any loss was suffered by himself or anyone else. In the obverse case, where the client only discovered the absence of the requisite insurance cover when it was too late, with the result that the client was actually prejudiced, there would be a factor which was additional to the fact of the breach of the Code.
46. In any event, whatever the nature of the additional factor (an X factor) required to negate the effect of Section 13(4)(a), in the present case there is no evidence of any factor over and above Mr Salisbury’s failure or refusal to comply with the request to provide the Board with the evidence, requested by the Registrar, demonstrating that he had the minimum insurance cover prescribed in the Board’s guidelines as required in paragraph 3 of Standard 8 of the Code. He is not in breach of any “*rule*”, and even if he was, it is strongly arguable that the fact that that breach was also a breach of the Code, together with the terms of Section 13(4), would provide him with an answer.
47. The fact that the request to provide such evidence was made more than once seems to me to be immaterial. There has simply been a continuing non-compliance with the requirement to provide the requisite evidence in the form required. Further, it appears to me that it would be no different even if there were a number of separate (and even different) breaches of the Code, provided none of them included an ‘X’ factor - Section 1(1)(b) of the Interpretation Act

1889 would apply to Section 13(4)(a) so as to include the plural in the singular. This would not be the case if “*a contrary intention*” appeared from the Act, but such a contrary intention is not evident. It is also material to recall that this is a penal statute, and must be construed in favour of the registered person who’s right to remain on the Register is under challenge.

48. For the sake of completeness, I should state that I do not perceive that Section 13(4)(b) presents any particular difficulty. The effect of (a) and (b) of Section 13(4) is to require any breach of the Code to be taken into account in any proceedings against a registered person under Section 14 but for any charge of unacceptable professional conduct or serious professional incompetence to be rejected if no ‘X’ factor is established and all that remains of the charge is a mere breach of the Code.
49. It is for the reasons set out in paragraphs 40 to 47 above that I have reached the conclusion that Section 13(4)(a) provides Mr Salisbury with an obvious, clear, and complete defence to the charge against him. However, since I have not addressed the actual terms of Question Two, I now turn to do so.
50. Proceedings under Section 14(1) may be “*triggered*” by:-
  - (1) “*an allegation*” that a registered person is guilty of unacceptable professional misconduct or serious professional incompetence; or
  - (2) by the Registrar if it appears to him that a registered person may be so guilty.
51. No criteria are required to be fulfilled before “*an allegation*” can be entertained - indeed once an allegation is made it must be investigated. Hence, the investigation by the Investigations Committee of a complaint under Section 14(1) of whatever nature, even if the case is one to which Section 13(4) applies, would be entirely proper and “*authorised*” by the Act.
52. The Registrar, however, before raising an allegation of such misconduct or incompetence on his own initiative, would be bound to consider whether, on the evidence, the case was one to which Section 13(4) applied. Since his

judgment involves the exercise of a statutory power, it would be susceptible to judicial review, and would be capable of being set aside if, in making his decision, he failed to take account of the provisions of Section 13(4), or if he took them into account, and concluded that the case was one in which there was the necessary additional 'X' factor when in fact there was no evidence to support that conclusion, or if his overall conclusion that the registered person might be guilty of professional misconduct or incompetence was one which no reasonable person, properly directing himself, could reach.

53. The position would be the same in the case of the Investigating Committee when making its report, to the Professional Conduct Committee under Section 14(1), as to whether there was a case to answer, and, incidentally, in the case of the Professional Conduct Committee when making its decision in relation to the charge referred to it.
54. A decision which is subject to judicial review on the grounds referred to above may be regarded as ultra vires in the sense that the power to make that decision has not been exercised as Parliament intended, this being the principle upon which the intervention of the courts is often justified - see, for example, per Lord Browne-Wilkinson in Reg v Hull University Visitor, Ex parte Page [1993] AC 682 @ 701. On that basis, the continued prosecution of proceedings following a decision by the Registrar, or a report of the Investigations Committee, which would be found, in judicial review, to be wanting for any of the reasons referred to in paragraphs 50 and 51 above, would be "unauthorised". This would still be an apt description even if it was a case in which the court, in its discretion, declined to intervene on the basis that the more convenient course was to allow the matter to proceed by way of the statutory appeal provided by Section 22.
55. My conclusion in relation to Question Two, therefore, is essentially in the affirmative, but in the light of the view which I have expressed in paragraph 51 above the answer needs to be expressed in slightly different terms to those of the question itself. Accordingly, I respond to Question Two by stating as follows:-

*“Section 14 does not authorise the Registrar to initiate, or the Investigations Committee to report a case to answer in, proceedings against a registered person based only on the admitted fact that despite requests from the Board pursuant to Standard 8 of the Board’s present Code the architect had failed (or had expressly refused) to provide the Board with evidence that he maintained an appropriate level of professional Indemnity Insurance.”*

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