IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Appeals Division
Claim No. 2023/APP/sts/00007

IN THE MATTER of an appeal pursuant to s. 21 of the Medical Act, 2014 (***the Act***) **AND IN THE MATTER** of an appeal against the Decision of The Bahamas Medical Council, given on the 17th day of February A.D. 2023, by letter dated the 17th day of February A.D. 2023, *inter alia*, that: *"The Council finds that while you have provided evidence of training in multiple jurisdictions, as well as various certifications, all of which have been considered by the Council, you have not provided certification from the Royal Colleges of the United Kingdom (UK) and their equivalent bodies in the Commonwealth and the Diplomate Boards of the United States of America (USA) as proof of qualification, nor have you provided certification from 'such other institutions providing postgraduate training and certification as approved by the Minister on the recommendation of the Council' which the Council shall accept as proof of qualification. Having regard to the matters set forth above the Council finds that you are not eligible to be registered as a specialist in the specialist register, as you have not satisfied the Council that you have obtained the relevant qualification from an institution or body recognized by the Council. For the reasons stated above the decision of the Council is as follows: Your application to be registered and licensed as a fully licensed specialist in Radiology is denied."* (***the Decision***)

BETWEEN:

DR. GAURI SHIRODKAR

Appellant

-and-

THE BAHAMAS MEDICAL COUNCIL

Respondent/Defendant

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Kahlil Parker KC, Roberta Quant and Lesley Brown for the Appellant Gail Lockhart-Charles KC for the Respondent
Hearing Dates:	26 June 2023, final submissions 7 July 2023

RULING

KLEIN J.

Statutory Appeal—Decision of the Bahamas Medical Council refusing Appellant registration as a specialist in radiology—Preliminary Point—s. 21 of Medical Act 2014—Ambiguity in statutory provision—Whether s. 21 permits an appeal by a specialist refused registration—Statutory construction—Literal v Purposive Approach—Ambiguity in provision—Unreasonable or absurd meaning—Rectifying construction—Reliance on Hansard as an aid to interpretation—Estoppel—Earlier Ruling of the Court in Judicial Review proceedings—Abuse of Process—Henderson v Henderson principle

INTRODUCTION

1. This is a statutory appeal to the Supreme Court, purportedly brought under s. 21 of the Medical Act 2014 ("the Act"), by Dr. Gauri Shirodkar against the decision of the Medical Council ("the Council") dated 17 February 2024 refusing to register her as a specialist in radiology.

2. The Council's decision was taken following the Ruling of this Court dated 22 July 2022 in judicial review proceedings ("the Judicial Review ruling") brought by Dr. Shirodkar against an earlier decision of the Council (dated 13 January 2021) refusing to register her as a specialist. In that Ruling, I held that the decision of the Council was *ultra vires* and unlawful, as well as irrational and unreasonable. I quashed the decision and granted mandamus for the Council to reconsider it according to law.

3. The issue with which this Ruling is concerned—and the reason the appeal has been referred to as "purported"—is that the respondent has taken the preliminary point that section 21 of the Act does not grant a right of appeal to the Supreme Court by a specialist refused registration. I directed this point to be heard as a preliminary issue under the Court's case management powers at CPR 26.1.

4. As formulated by the respondent, the preliminary issue is as follows:

> "Whether the appeal filed by Dr. Gauri Shirodkar pursuant to s. 21 of the Medical Act 2014 ought to be dismissed on the grounds that the decision sought to be appealed, namely the decision of the Council denying Dr. Gauri Shirodkar's application to be registered and licensed as a fully licensed specialist in Radiology, is not a decision from which there is a statutory right of appeal pursuant to s. 21 of the Medical Act, 2014 ("the Preliminary Issue")."

5. It raises a narrow but important point of statutory interpretation. Not only might the determination of the issue be dispositive of the appeal, but it is of considerable significance to the medical profession in connection with the appeal rights of specialists and the administration of the Act.

Background

6. The background to the appellant's long and acrimonious fight with the Council over her applications to be registered as a radiology specialist is set out in the Judicial Review Ruling and does not need to be rehashed here.

7. The process by which the Council made the current decision under challenge and the reasons for that decision are set out in the First Affidavit of Dr. Merceline Dahl-Regis dated 26 April 2023. The genesis of the preliminary issue is the following assertion [paragraph 13]:

> "13. The Decision by the Council is plainly not one of the decisions which s. 21 of the Act states the applicant or medical practitioner may appeal against, as it is neither (a) the refusal of the Council to register the applicant as a medical practitioner nor (b) the termination of a medical practitioner."

The Legal Framework

8. I summarized the main purpose of the Act in the Judicial Review ruling as follows:

> "[T]he governing Act is the Medical Act 2014. It is a revising Act, which repealed the 1974 Medical Act. Its main objectives are to provide for the regulation of the medical practice in The Bahamas, the registration and licensing of medical practitioners, and disciplinary control over medical practitioners. The latter two functions are carried out through the Council, which is the professional body established under s. 3 of the 1974 Act and continued by s. 4 of the Act. Atop the various functions set out at s. 6 is the responsibility to "register and license persons who satisfy the requirements under the Act…".

9. Part IV of the Act deals with "Registration and Licensing". Section 15 provides for a person "*who desires to be registered by the Council to practice medicine or surgery*" to apply to the Council for such registration. The Act defines "*medical practitioner*" to mean "*a person who is registered to practice medicine or surgery under this Act and who possesses the qualifications under s. 16*" (s. 2). A specialist is defined as "*a medical practitioner who has special training, experience and qualifications approved by the Council in the areas determined under section 8*."

10. The Act provides separate procedures for the registration of medical practitioners and specialists, although (as indicated below) there is some overlap. As noted, section 15 provides generally for the registration of any person who desires to practise medicine or surgery. Section 16 sets out the qualifications for registration as a medical practitioner. Section 26 sets out the general requirements to be registered as a specialist, and the Third Schedule sets out the relevant qualifications and training required for each specialty (see paras. 11-14 of the Judicial Review ruling). "Form A" of the Second Schedule applies to the registration of both medical practitioner and specialist; "Form B" prescribes the registration certificate for the former; and "Form C" applies to the latter.

11. Appeals against refusal of registration are governed by s. 21. That section is set out in full under para. 32 below (in an excerpt from the Judicial Review ruling), but it provides in material part as follows:

> "(1) Where--
>
> (a) an applicant is aggrieved by the refusal of the Council to register the applicant as a medical practitioner…
> the applicant or medical practitioner may, within three months of the date of the notice of refusal or termination, appeal to the Supreme Court against the decision of the Council."

12. Section 55 provides for a right of appeal to the Supreme Court against disciplinary measures by a medical practitioner or specialist as follows:

> "(1) A medical practitioner or specialist who is aggrieved by the decision of the Council to—
> (a) censure him; or
> (b) suspend his registration or terminate his registration and cause his name to be removed from the register;
>
> may, within three months of the receipt of any such notification, in writing, appeal against the decision of the Council to the Supreme Court."

13. It is also useful to contrast the appeal provision in the 2014 Act with the corresponding provision in the predecessor Act ("the 1974 Act"). Section 23 of the 1974 Act provided as follows:

> "23. (1) Any person aggrieved –
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> (a) by the failure or refusal of the Council to register him under this Act; or
> (b) by an order made by a disciplinary committee under section 18 in relation to a complaint made by or against him,
>
> may appeal in respect thereof to the Court of Appeal, and in relation to every such appeal section 10 of the Court of Appeal Act shall apply *mutatis mutandis* as if the matter in respect of which the appeal is brought were a judgment or order of the Supreme Court.
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> (2) No further appeal shall lie from the decision of the Court of Appeal under this section."

14. As might be immediately perceived, there are several significant differences between the 1974 Act and the 2014 Act relating to appeals. For example, the 1974 Act provided for an appeal to the Court of Appeal and for the Court of Appeal's decision to be final (see, as an example of the exercise of this appellate jurisdiction under the old Act, **Shanmugavel v. The Bahamas Medical Council** [2012] 3 LRC 448). By contrast, the 2014 Act provides for an appeal to the Supreme Court and does not prescribe for finality. Further, while the current Act distinguishes between a "*medical practitioner*" and a "*specialist*" in several provisions relating either to appeals or disciplinary proceedings, it is notable that the 1974 Act made no distinction—no doubt because there was only a single Register for medical practitioners.

The Appellant's arguments

15. The appellant advances several arguments in support of her case that the provisions of the 2014 Act should be construed as providing a right of appeal to a specialist refused registration.

16. Firstly, as a matter of general approach to interpretation, she rejects the strict literal and grammatical construction contended for by the respondent, citing Lord Diplock's observations in

Nothman v London Borough of Barnet [1978] 1 All ER 1243 [1246, f], decrying such an approach:

> "I have read that passage at large; because I wish to repudiate it. It sounds to me like a voice from the past. I have heard many such words 25 years ago. It is the voice of the strict constructionist. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal and grammatical construction of the words, heedless of the consequences. Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive' approach. ….In all cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose underlying the provision'. "

17. The second point is that although the Act does in several places use the terminology "*medical practitioners or specialists*" to distinguish between the two categories, the term "*medical practitioner*" is also employed occasionally to include both general medical practitioners and specialists. In this regard, attention was drawn to ss. 29, 30 and 31, which govern the licensing of persons registered under s. 15 of the Act.

18. For example, s. 29 provides as follows:

> "(1) A person registered under section 15 may, upon application and payment of the fee specified in the Seventh Schedule, be granted by the Council—
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> (a) a licence as a fully licensed medical practitioner, where he is registered in the relevant section of the register subject to such restrictions or conditions, if any, as the Council may determine;
> (b) in any other case, a licence of a kind appropriate to the extent which, and as the conditions, if any, subject to which, he is registered authorising him to practice medicine or surgery or both to the extent specified in the licence."

There are no separate provisions in the Act relating to the licensing of specialists, and the term "*specialist*" is not mentioned in s. 29. But it is clear that it applies to the licensing of both medical practitioners and specialists, and the fees in the Seventh Schedule include those for both categories.

19. In other words, as far as I understand the appellant's argument on this point, registration "*as a specialist*" is merely a particular type of registration "*as a medical practitioner*". Therefore, in enacting appeal rights for the "*medical practitioner*" Parliament could not have intended to exclude similar rights for the "*specialist*." As the point is argued in her skeleton, the construction contended for by the respondent would be to "*interpret the term 'medical practitioner' to the exclusion of 'specialist' in a way clearly not anticipated by Parliament, and which is inconsistent with the Act when read as a whole*."

20. The third point is that to adopt a strict literal construction would have the consequence of discriminating against specialists with respect to appeal rights. Not only would this give rise to an unreasonable and unjust result, but it would offend constitutional principles against non-discrimination. Therefore, it would be the duty of the court to correct it.

21. In support of this proposition, the appellant relies on **Attorney-General and anor. v. Kasonde and Others** [1994] 3 LRC 144. There, the Supreme Court of Zambia held that legislation that provided for a member of Parliament to vacate his seat if he crossed the floor and joined another party (but not so if he remained independent), or if an independent member joined another party, was discriminatory, and that the Court should, on a purposive approach, have read in words necessary to make the provision fair and non-discriminatory. The Supreme Court said as follows [pg. 160]:

> "It is perfectly clear on the face of it that the article is intended to prohibit floor-crossing generally. In the event the wording of it does not clearly carry out that intention if we were to follow the construction contended for by Mr. Shamwana, the result would be discriminatory in favour of party members who become independent.
> Both Maxwell and Craies said only where there is absurdity or repugnance can the court come in to modify the language used in the statute. We are therefore satisfied that art 71(2) (c) is discriminatory in itself against an independent member who joins any party and a member who resigns from one party and joins another party. It is discriminatory, and therefore, unreasonable and unfair, and it is the duty of the court to make it reasonable as it offends against art. 23 of the Republican Constitution […]. Had the learned trial judge adopted the purposive approach she would undoubtedly have come to a different conclusion. It follows, therefore, that whenever the strict interpretation of a statute gives rise to an unreasonable and unjust situation, it is our view that judges can and should use their good common sense to remedy it—that is by reading words in if necessary—so as to do what Parliament would have done had they had the situation in mind."

22. The fourth strand of the arguments relied on by the appellant is that to give the Act the interpretation contended for by the respondent would deprive specialists seeking entry on the specialist register of a right of appeal which they previously enjoyed under the 1974 Act. She submits that contrary to any intention to abrogate rights of appeal, it appears that the 2014 Act was intended to provide for greater appellate rights for medical practitioners and for judicial oversight of the functions of the respondent. For example, it is pointed out (as has been noted) that whereas the 1974 Act provided for an appeal to the Court of Appeal to be final, there is no such restriction in the 2014 Act on an appeal to the Supreme Court, and further appeals are clearly envisaged.

23. The appellant argues further that there is nothing in the legislative history of the Act or the internal context to suggest that Parliament intended to attenuate appellate rights, and that in any event there is a statutory presumption against abrogation of rights without specific language. She relies on the leading case of **Inco Europe Ltd. and Others v. First Choice Distribution (a firm) and others** [2002] 2 All ER 109, both for the principle that an existing right of appeal should only

be abolished by clear statutory language, and for the conditions that must be present for the court to apply a rectifying construction. In **Inco,** Lord Nicholls stated [115] that before the court could apply a rectifying construction, it had to be sure of three matters:

> "…(1) the intended purpose of the statute or provision in question; (2) that by inadvertence, the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed."

The Respondent's arguments

24. By way of riposte, the respondent advances two key arguments: (i) on a plain reading of s. 21, it is clear that a right of appeal does not lie in respect of a decision regarding registration as a specialist; and (ii) that the appellant is estopped from arguing that she has a right of appeal under s. 21 based on the Judicial Review ruling, and the appeal is therefore (or in any event) an abuse of the process of the court.

25. The respondent contends that s. 21 is clear and unambiguous in providing a right of appeal to a "*medical practitioner*" only, which is a defined term. Apart from reliance on the ordinary meaning of the provision, it is said that this intention is also borne out by a contextual construction of the Act and its legislative history. As stated in its skeleton, the "*different terminology used in ss. 21 and 26 reflects the overall architecture of the 2014 Act, which creates two wholly different types of registration 'as a medical practitioner' or as 'a specialist'* ". This distinction, it is submitted, can be seen at multiple places in the Act where the expression "*medical practitioner or specialist*" is used to set off the two categories of practitioners (Parts VIII and IX, ss. 46, 47, 49, 51, 52, 53, 54, 55, 56 and 57).

26. In light of this, the respondent contends that the appellant's attempt to conflate the terms flies in the face of the clear procedural distinction between registration "*as a medical practitioner*" and registration "*as a specialist*" laid down by the 2014 Act and causes an irreconcilable inconsistency within the terms of the Act. In this regard, the respondent contrasts the provisions of s. 15(5) and 26(4), which deal respectively with the registration of a "*medical practitioner*" and "*specialist*". Section 15(5) provides, in part, that where the Council is satisfied that an applicant is qualified pursuant to s. 16 to be registered as a "medical practitioner" the Council may *"(a) register the applicant in the relevant section of the register…"* and "(b) *"grant a certificate of registration ….as set out in Form B…".* Section 26(4) provides that where the Council is satisfied that an applicant "*is qualified to be registered as a specialist, the Council may…grant to the applicant a certificate of registration as set out in Form C…".*

27. The respondent submits that if Parliament intended to extend s. 21 to applicants aggrieved by a refusal to register them on the specialist register, it could have simply said so by adding *"specialist*" to the language, as had been done at other places, and it is therefore impermissible for the Court to read words into the statute "*for its own purposes*." For the principle illustrating the

boundary between permissible interpretation and amendment (which is not the province of the Court), the respondent refers to the decision in **Simmons and another v Town Planning Committee and 4M Harbour Island Ltd.** [2019/pub/JRV/00018]. There, the Court referred to the remarks of Lord Nicholls in **Inco Europe v First Choice Distribution** [2002] 2 All ER 109 [at 115], as follows:

> "It has long been established that the role of the court in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretive function, the court will add words, or omit words or substitute words. Some notable instances are given in Professor Rupert Cross's admirable opuscule, ***Statutory Interpretation***, 3rd ed. (1995). Pp. 93-105. He comments, at p. 103:
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> > 'In omitting or inserting words, the judge is not really engaged in a hypothetical reconstruction of intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'
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> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretive. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way, the court must be abundantly sure of three matters:
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> (1) The intended purpose of the statute or provision in question;
> (2) That by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and
> (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill be noticed.
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> The third of these conditions is of crucial importance. Otherwise, any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation."

28. The respondent also relies on **R v Secretary of State for the Environment Transport and Regions and Another, ex parte Spath Holme Ltd.** [2001] 1 All ER 195, where the House of Lords stated that where statutory language is clear and is in no way ambiguous or obscure, no recourse to legislative history or *Hansard* was permissible. There Lord Hutton said [at p. 233]:

> "Therefore, for the reasons which I have sought to give, I respectfully consider that the Court of Appeal erred when it expressed the opinion that it could look for a purpose in an earlier legislation and use such a purpose to restrict the words of s.

> 31 of the 1985 Act, which in my opinion are clear and unambiguous. Because I am of the opinion that the words of s. 31 of the 1985 Act are clear and unambiguous I further consider that this case does not satisfy the first threshold stated by Lord Browne-Wilkinson in **Pepper (Inspector of Taxes) v Hart** [1993] 1 All ER 42 at 69, [1993] AC 593 at 640, with the agreement of the other members of the House."

29. In any event, the respondent contends that even if there were ambiguity and it were possible to refer to *Hansard* or the legislative history—both parties did in fact, with the leave of the Court, refer to extracts from *Hansard* when the bill was debated in April of 2014—it does not help to illuminate the interpretation point. This is because while the *Hansard* references demonstrate that the intention was to provide a separate facility for the registration of specialists, there is nothing in the comments by the promoter of the bill about appeal rights or anything suggesting an intention to extend s. 21 to registration in the Specialist Register.

30. The respondent also argues that the appellant is caught by the doctrine of issue estoppel, relying on the well-known cases of **Henderson v Henderson** (1843) 3 Hare 100, and **Arnold v National Westminster Bank Plc** [1991] 2 AC 93. It is also submitted that the issue estoppel rule applies to public law proceedings: **Konodyba v Royal Borough of Kensington and Chelsea** [2012] EWCA Civ 982.

31. To lay the foundation for the application of the issue estoppel rule, reference was made to para. 41 of the judicial review Ruling, which I set out below in the context in which it appears in the ruling:

> "[39] For completeness, the alternative remedy point had been canvassed during the *ex parte* application for leave, and Mr. Parker was aware that a challenge could be mounted at the substantive hearing as a ground for refusing judicial review, or any relief. At the leave stage, the question was raised as to whether the appeal process was available to the applicant, based on the provisions of s. 21. In this regard, it is to be noted that s. 23 (1) of the Medical Act 1974 provided a right of appeal (then to the Court of Appeal) generally to "*any person aggrieved*" by the failure or refusal of the Council to register him under the Act, or by an order made by a disciplinary committee. The 2014 Medical Act, which repealed the 1974 Act, prescribed a right of appeal to the Supreme Court, but the right to appeal is expressed in language which is far more circumscribed:
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> "21 (1) Where—
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> (a) an applicant is aggrieved by the refusal of the Council to register the applicant as a medical practitioner; or
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> (b) the Council has terminated the registration of a medical practitioner in accordance with section 19(2),
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> the applicant or medical practitioner may, within three months of the date of the notice of refusal or termination, appeal to the Supreme Court against the decision of the Council.
>
> (2) The Judge, at the hearing of the appeal, may—

(a) dismiss the appeal;
(b) on the basis of a finding of procedural irregularity, direct the Council to reconsider the application; or
(c) allow the appeal and direct the Council to register the applicant.

[40] Mr. Parker submitted that based on a plain construction of the section, it appears that the right to appeal is granted only in respect of a refusal to register, or the termination of the registration of, a *medical practitioner* as opposed to a *specialist.* In fact, medical practitioner and specialist are separately defined in the definition section, and while one must necessarily be a practitioner to be registered as a specialist, the provisions relating to registration as a general medical practitioner and as a specialist are discrete. However, as there was no substantive challenge to the judicial review proceedings being heard on the ground of alternative remedy, the court did not have to come to a definitive construction of the section. So there remains, for another day, the question as to whether Parliament intended to exclude from s. 21 a right of appeal for a medical practitioner refused registration as a specialist.

[41] I would indicate in passing, however, that it does not seem logical that the statute would have intentionally created a dichotomy between the two categories with respect to the availability of a right to appeal. But it would have been a very easy thing for the draftsman to say that the right of appeal was being granted against refusal to register, or the termination of registration, as a medical practitioner or a *specialist.* I was (and am) satisfied, therefore, that any doubts as to the availability of an appellate remedy under s. 21 to a medical practitioner refused specialist registration based on the possible construction of the Act, ought to be resolved in favour of the applicant. I therefore exercised my discretion to grant leave on that basis."

32. It is contended, therefore, that the basis upon which the Court granted leave was its conclusion that s. 21 did not extend to a refusal to register the appellant as a specialist, and therefore it was an issue that was "*determined"* at the leave stage in the appellant's favour. This was said to be a point that was fundamental to the Court's decision to grant leave. Consequently, it is said that it would be unfair and an abuse of process for the appellant to "*come back for a second bite at the cherry, now encouraging the court to reverse itself on the issue*".

33. The respondent notes, however, that the Court recorded that there had been no substantive hearing on whether a right of appeal was available under s. 21, and that it specifically stated that the issue "*remains, for another day*" [40]. However, it is contended that the fact that the issue was not fully argued does not alter the contention that it was necessarily determined for the purposes of granting leave.

ANALYSIS AND DISCUSSION

Approach to statutory construction

34. I begin by identifying the modern approach to statutory interpretation. As I indicated in **Gabriele Volpi v Delanson Services Ltd. et. al**., and **Delanson Services Ltd. v Matteo Volpi et. al.** [Consolidated Arbitration Appeals 2020/APP/sts/00013, 2020/APP/sts/00018]:

> [351] The starting point is to ascertain the "*ordinary linguistic meaning of the words used*": Bennion at [10.4]; and see also *R v A (No. 2)* [2001] English HL 25, per Lord Steyn at [44]. But the court does not examine the language of the statute in isolation. It must be read in context, which includes the statutory and historical context, and with any permissible aids to interpretation: *R (Jackson) v Attorney-General* [2005] English HL 56, per Lord Bingham at [29].
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> [352] It is also trite law that in construing an enactment, the overarching aim of the Court is to ascertain the true meaning of the words used by Parliament and to give effect to the legislative purpose: "*Bennion"(supra)* at [12.2] and *R (Quintavalle) v Secretary of State for Health* [2003] English HL 13 per Lord Bingham at [8]:
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> > "The basic task of the Court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment. But that is not to say that attention should be confined and a literal interpretation given to the particular provision which gives rise to difficulty. […] The court's task within the permissible bounds of interpretation, it to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."
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> [353] In this vein, I also bear in mind the observation of Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Region, ex p Spath Holme Ltd.*, [2001] 2 A.C. 249, 396-97, who expressed the concept in the following terms:
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> > "Statutory interpretation is an exercise, which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention, which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or any other person

> who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individuals or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when the courts say that such-and-such a meaning "cannot be what Parliament intended," they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Read said in *Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 591, 613: 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.' "
>
> [354] However, because language is innately imprecise, it is not always so easy to discern the meaning Parliament intended, and oftentimes the efforts of the very best draftspersons culminate in statutory language that is unclear or admits of one or more meaning. The courts have developed over many centuries various approaches as well as canons and presumptions of statutory construction (some of which have been mentioned) to assist them when confronted with interpretative difficulties. A taxonomy of those approaches would have little more than academic value here since a court rarely relies on any single approach. But the modern approach is to apply what is called a 'purposive construction', which is really a composite approach that gives primacy to statutory purpose insofar as it can be derived from a textual, contextual and holistic construction of the Act (see cases cited above). That is the approach that will guide me in considering the proper interpretation of these provisions."

Whether appeal provisions ambiguous

35. In **R v Secretary of State for the Environment, Transport and the Region, ex p Spath Holme Ltd.,** [2001] 2 A.C. 249, Lord Cooke said [400]:

> "In ordinary legal usage, I think that a provision is ambiguous if reasonably open on orthodox rules of construction to more than one meaning. In this sense, I think that s. 31(1) and (2) of the 1985 Act, and their forerunners s. 11(1) and (2) of the Housing Rents and Subsidies Act 1975, are ambiguous."

36. In that same case, Lord Nicholls further stated [398]:

> "This constitutional consideration [that citizens should be able to rely upon what they read in an Act of Parliament] does not mean that when deciding whether

> statutory language is clear or unambiguous and not productive of absurdity, the courts are confined to looking solely at the language in question in its context within the statute. That would impose on the courts much too restrictive an approach. No legislation is enacted in a vacuum. Regard may also be had to extraneous material, such as the setting in which the legislation was enacted. This is a matter of everyday occurrence."

37. In approaching the question of the construction of s. 21, I remind myself (as noted in **R (Quintavalle) v Secretary of State for Health**) that the court should read the controversial provision "*in the context of the statute as a whole, and that the statute as a whole should be read in the historical context of the situation which led to its enactment.*" In this sense, I think that s. 21 of the 2014 Act and its forerunner s. 23 of the 1974 Act are ambiguous.

s. 23 of the 1974 Act

38. The appellant asserts that under the 1974 Act the right to appeal a refusal to register a person as a specialist "*would have been beyond reasonable dispute*" under the 1974 Act. The respondent contends that "*it is highly doubtful*" that there would have been any right of appeal under the 1974 Act in respect of a refusal to register a specialist qualification pursuant to s. 10.

39. In this regard, the respondent argues, *inter alia*, that:

> "The right of appeal under s. 23 of the 1974 Act relates to a "*failure or refusal of the Council to register him under the Act*" (emphasis added). By definition, a person seeking registration of a specialist qualification under s. 10 is already a "*person registered under this Act*", so any refusal by the Council to register an additional specialist qualification would not be a refusal to "*register him [or her] under the Act*." [Underscoring in the original.]

40. While I accept that the appellant may have overstated the position regarding the possible interpretation of s. 23, I am also of the view that the respondent's position is based on an overly-literal construction.

41. In this regard, section 10 of the 1974 Act provided as follows:

> "10. Every person registered under this Act who obtains a medical qualification approved by the Council as higher than or additional to that in respect of which he is registered shall be entitled to have such higher or additional qualification inserted by the Registrar in the Register in substitution for or in addition to, as the case may be, the qualification of which he is registered." [Emphasis supplied.]

42. At paragraph 44 of its skeleton submission, the respondent acknowledges, however, that the Act provided for the registration of specialist qualifications and recognized a "*specialist*" as a discrete category of medical practitioner for disciplinary purposes:

> "The only mechanism within the 1974 Act for registering a specialist qualification is the general provision (including s. 10) allowing each registered medical practitioner to have entered on the register details of their qualifications, coupled with a disciplinary offence under s. 15(2) (j) of holding out as 'as specialist or specially qualified in any particular branch of medicine' without a registered qualification in that branch."

43. No case was drawn to my attention in which the Court had to embark upon a construction of s. 23 of the 1974 Act, and I did not come across any in my research. In **Shanmugavel**, the challenge was by a medical practitioner who was refused registration for private medical practice, notwithstanding that he was previously registered as a radiologist working in the public health system. The Court of Appeal simply referred to s. 23 and stated that:

> "This Court's jurisdiction to hear the appeal is given by section 23 of the Act, which provides that anyone aggrieved by the failure of the Council to register him under the Act may appeal to the Court of Appeal. That section further applies the provisions of section 10 of the Court of Appeal Act, with the effect that such appeals are treated as if the matter in respect of which the appeals is brought, was a judgment or order of the Supreme Court."

44. In my view, even though the language of s. 23 does not specifically state a right to appeal a refusal to register specialist qualifications, it would have been open to the Court to conclude that a compendious reading of ss. 10, 15(2)(j) and s. 23 provided for such a right, on a reasonable construction of that provision. Firstly, even though the 1974 Act only provided a single Register for all medical practitioners, it is clear from s. 15 that the Act recognized a person specially qualified in any branch of medicine as a "*specialist*". In this regard, s. 10 provided for the additional qualification to be inserted in the Register in addition to, or "*in substitution for*…", the qualifications for which he was registered. Thus, a refusal to register specialist qualifications could be considered tantamount to a refusal to register a medical practitioner as a specialist, if he were seeking to have those qualifications substituted for his original registration qualifications.

45. Further, s. 10 provided that a person with additional qualifications was "*entitled*" to have them registered, and it is unlikely that Parliament would have created an *entitlement* without providing a remedy ('*ibi jus, ibi remedium'*). Moreover, s. 15 makes it "misconduct" for a medical practitioner to hold himself out as a specialist without registration of such qualifications, and s. 23 provides for an appeal against an order made by a disciplinary committee under s. 18, which would include conduct specified under 15. The upshot of the respondent's construction would be that a person could be disciplined for holding himself out as a specialist under the Act, with a right of appeal in this regard, but he could not in the first place appeal the failure of the Council to register such specialist qualifications.

46. I am of the view that it is more than arguable that, if the Court had been called upon to construe that provision, it could have on a reasonable construction concluded that there was a right to appeal against the failure to register additional (specialist) qualifications. But my views on this are neither here nor there for the purposes of construing s. 21 of the 2014 Act, which has to be

construed according to its own terms. As pointed out by the respondent, it is not a consolidating statute but a revising Act that sets out a "*new and updated regime*".

s. 21 of the 2014 Act

47. It was on the premise that s. 21 of the 2014 Act is not free from ambiguity that leave was given by the Court for the parties to refer to *Hansard* as an aid to interpretation, under the rule in **Pepper (Inspector of Taxes) v Hart** [1993] 1 All ER 42. That rule is to the effect that parliamentary materials may be used as an aid to construction where the following conditions are satisfied: (a) the legislation was ambiguous or obscure, or led to an absurdity; (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill; and (c) the effects of such statement were clear.

48. I must indicate that the references to *Hansard*, and the extract from the speech by the promoter of the bill, the-then Minister of Health, did not in the end turn out to be of any great assistance to the court on the interpretation issue. But this does not mean that the reference was futile. As stated by Lord Cooke in **ex parte Spath**, *supra* [403-404] the fact that *Hansard* might not provide a clear indication of what Parliament intended is no reason not to look at the parliamentary material as an aid to construction where a party contends it reasonably supports their interpretation of ambiguous legislation. At the very least, it disclosed that the parliamentary intention was to create a *separate* register for the registration of specialists, which I do think is of some significance to the construction issue.

49. I accept the argument of the respondent that the creation of two separate Registers indicates that Parliament intended to differentiate between medical practitioners and specialist with respect to registration process. But I reject the suggestion that the creation of different Registers justifies the inference that Parliament intended to treat these two categories of practitioners differently in their ability to challenge by appeal their registration and any disciplinary proceedings brought against them. As has been pointed out, at some sections of the Act the draftsman does use the term "*medical practitioner*" as inclusive of a specialist, which may only be infelicitous drafting, but this inconsistent usage does create textual ambiguity. Further, s. 55, on which the respondent places significant reliance, provides the same rights of appeal for a "*medical practitioner or a specialist*" aggrieved by the decision of the Council to censure him, or suspend or terminate his registration, or remove his name from the Register.

50. I am not of the view that s. 55 helps the construction contended for by the respondent. In fact, that provision duplicates some of the provisions of s. 21 and illustrates the point that the Act was perhaps not drafted with the care it might have been. For example, the right given to a medical practitioner to appeal the termination of his registration under s. 55 is already provided for by s. 21(1)(b). That provides for a "*medical practitioner*" to appeal the "termination" of his registration if made under any of the grounds mentioned in 19(2). Section 19(2) provides for termination of a medical practitioner where the Council is satisfied that he does not qualify for registration or is disqualified from registration under the grounds referred to in (1)(b) [conduct which in the public

interest would militate against him being allowed to practice], (c) [physical or mental condition which impairs ability to practice], and (d) [where the applicant's registration as a medical practitioner was cancelled in another country on grounds that would justify cancellation in The Bahamas]. It is also notable that at s. 55 the draftsperson thought fit to grant appellate rights to medical practitioners and specialists *pari passu*, including (as noted) the right to appeal against termination of registration. This is a clear indication that the rights in s. 21 were *not* intended to be exclusive to a medical practitioner.

51. Accepting the respondent's interpretation, it would mean that Parliament would have specifically provided for a person to be registered as of right as a specialist, but in the same breath denied him a right to appeal from any refusal thereunder (no matter how illegal or perverse the Council's decision)—the effect of which would be to deny him registration outright. By the same token, it would have created a right for a specialist (once registered) to appeal against being censured, or suspended or terminated, etc. That would be a most absurd and arbitrary outcome. His decision to be registered would be at the whim of the Council and un-appealable, but if registered he would have full rights of appeal. Further, the draftsman would have granted equal appellate rights to both the medical practitioner and specialist under s. 55 in respect of disciplinary measures, but nonetheless would have purported to single them out for separate and unequal treatment in s. 21 by denying a right of appeal to a specialist. It seems unlikely, as argued by the appellant, that s. 21 was intended to cut down on the appeal rights of persons eligible for registration under the Act.

52. In this regard, it may be noted, for comparative purposes, that the UK Medical Act 1983 sets out an expansive list of what are called "*appealable registration decisions*", which are defined by the nature of the decision and not just by reference to the registration of the practitioner. They include (obviously) a failure to include a person's name in the Specialist Register [Sch. 3A, para. 2A(1) (b)], and even extend to a decision not to indicate a certain field in the Specialist Register [Sch. 3A, para. 2A(1) (c)]. This is not to suggest that the specific provisions of the UK Act have any direct relevance for the interpretation of the 2014 Act. But it is clear that the 2014 Act looks toward the UK practice in adopting a separate Specialist Register and in establishing equivalent overseas certification for registration as a specialist (e.g., the qualification recognized by the Royal Colleges of the United Kingdom for registration as a specialist are considered equivalent (Part 1, First Schedule)). Thus, the approach under that regime is instructive.

53. The appellant also argues that the respondent's interpretation would be productive of rank discrimination between a medical practitioner and specialist, which would not only create unfairness, but would likely be repugnant to constitutional principles. I was not addressed on the constitutional point in any detail, and (as the Court noted at paras. 93-94 of the Judicial Review ruling) "*discrimination*" is a term of art defined by the Constitution and can only be invoked on the basis of any of the grounds enumerated in article 26(3). I doubt that this case would come within any of the defined categories—i.e., "*race, place of origin, political opinions, colour or creed*"—but I am satisfied that it leads to an unjust and absurd result.

54. In the circumstances, I think that this is clearly a case in which the **Inco** conditions for the Court to apply a rectifying construction are made out, and I am satisfied of the following: (i) that the intended purpose of s. 21 was to provide for a right of appeal equally for a medical practitioner and specialist against refusal of registration; (ii) that by inadvertence the draftsman failed to give effect to that intention in s. 21; and (iii) that Parliament would have provided for that right, had the error in the Bill been noticed.

55. I would therefore order and direct that s. 21(a) should be read with the underscored words added, as follows:

> "21 (1) Where—
>
> (a) an applicant is aggrieved by the refusal of the Council to register the applicant as a medical practitioner or a specialist; or…."

56. I am of the view that this construction is well within the bounds of permissible interpretation. I will leave it to the draftsman, however, to consider whether in light of s. 55, s. 21(1)(b) is not rendered otiose and can be omitted from the Act or, alternatively, whether the formulation "*medical practitioner or a specialist*" ought to be added to 21(1)(b).

Estoppel, abuse of process

57. I have therefore held that the Act, properly construed, provides for a right of appeal by a person refused registration as a specialist. Therefore, the appeal is not incompetent and I refuse the respondent's application to dismiss it. This, however, does not resolve the question of whether it would be an abuse of process, or whether the appellant would be estopped, from pursuing the appeal on the grounds that the issue has already been determined in the judicial review proceedings.

58. I deal fist with the estoppel point. The defendant argues that the issue of whether the appellant had a right of appeal was "*necessarily decided*" by the Judicial Review ruling and that gives rise to an issue estoppel. Therefore it cannot be re-argued in these proceedings. Further, it is said that the rule of issue estoppel applies in public law proceedings, based on the English authority of **Konodyba v. Royal Borough of Kensington and Chelsea** [2012] EWCA Civ. 982.

59. For the reasons provided below, I do not think this is a case where issue estoppel applies. Firstly, there are specific requirements that must be present to establish to issue estoppel. In this regard, I would refer to the judgment of Clarke L.J. in **The Good Challenger** [2014] 1 Lloyd's Re. 67, where (albeit in the context of international arbitration), four requirements were set out as follows:

> "The authorities show that in order to establish an issue estoppel four conditions must be satisfied, namely (1) that the judgment must be given by a [foreign] Court of competent jurisdiction; (2) that the judgment must be final and conclusive on the merits; (3) that there must be identity of parties; and (4) that there must be identity

> of subject matter, which means that the issue decided by the [foreign] court must be the same as that arising in the [English] proceedings: see in particular *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (No.2) [1967] 1 AC 853, *The Sennar* (No. 2) [1985] 1 WLR 490, especially per Lord Brandon at p. 499; and *Desert Sun Loan Corporation v. Hill*; [1996] 2 All ER 847." [Brackets added to offset words that can be omitted.]

60. Further, the particular issue in question must form a "necessary ingredient" of the cause or action or matter which is in fact being determined: *Arnold v National Westminster Bank National Bank* [1991] 2 AC 93 (HL) per Lord Keith at 105. In practice, this means that the issue must be a "necessary step" in the decision or a "*matter which it was necessary to decide*": *Carl Zeiss Stiftung v Rayner & Keeler Ltd.* (No. 2) (*supra*).

61. It is not for this Court to explain or justify its Judicial Review ruling. However, notwithstanding the claim by the respondent that the issue of leave to appeal was necessarily decided, it is plain that there was no determination of the issue on the merits. The court did not embark on a construction of the section in question and the parties were not requested to argue the point. The court exercised its discretion to grant leave for judicial review, as it was entitled to do, on the basis that any doubt as to whether or not there was a right of appeal (i.e., an alternative remedy) should be resolved in favour of granting permission for judicial review proceedings. In fact, as the respondent notes, the Court specifically indicated in the JR Ruling [para. 41]:

> "So there remains, for another day, the question as to whether Parliament intended to exclude from s. 21 a right of appeal for a medical practitioner also refused registration as a specialist."

62. Nevertheless, the respondent attempts to explain this away, incredulously, by saying that while "*the proper construction of s. 21 may remain to be argued on another day in a different case, but not as between these parties where the issue has already been determined*." However, the construction and interpretation of legislation can never be an issue to be determined *inter se* between parties to a dispute; it is a matter of public importance that creates precedent.

63. Neither was the question of the availability of a statutory appeal a necessary step for the court to decide in the judicial review proceedings. As noted by the Court [para. 37], there is no inflexible rule that judicial review is only suitable where no other means of redress is available, or where such measures have been exhausted, a point that the respondent accepts (para. 13 of its skeleton). There are many factors which may go into a court considering whether or not to grant leave. And therefore, unlike the position seemingly contended for by the respondent, there was no requirement for the court to determine whether or not a statutory appeal was available before deciding to grant leave.

64. In **Medical Council of Guyana v Ocampo Trueba** (2018) 93 WIR 318, the Guyanese Court of Appeal explored in some detail the question of whether the existence of a statutory appeal precludes the court from examining the merits of an application for judicial review. After

extensive review of the authorities, that Court concluded that it did not (and its observations on this point were affirmed on appeal by the Caribbean Court of Justice) and referred in particular to an excerpt from the leading text of Wade and Forsyth on *Administrative Law* (10th edn. 2009), where the learned authors state (602):

> "In principle there ought to be no categorical rule requiring the exhaustion of domestic remedies before judicial review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal in order to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from the judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeal, which has already been emphasized. The only qualification is that there may occasionally be special reasons which will induce the court to withhold discretionary remedies where the more suitable procedure is appeal, for example where the appeal is already in progress, or the object is to raise a test case on a point of law."

65. For completeness, in my judgment the respondent's reliance on **Konodyba v. Royal Borough of Kensington and Chelsea** for the application of issue estoppel in public law is also misplaced. That case involved the determination of the applicant's application for housing assistance which the Court of Appeal had already dismissed by a judgment that was unappealed. On an appeal against her second application based on the same facts, the Court of Appeal upheld the county court's decision that it was an abuse of process for her to attempt to relitigate the same issue again based on the same facts. Thus, that case involved an attempt to relitigate matters which had been disposed of by a final judgment which was unappealable, and it is very different from the facts of the matters under current consideration.

Abuse of Process

66. The respondent also argues abuse of process on the grounds that it is a long-standing principle that it constitutes an abuse of process to raise in new proceedings points that should have been raised in previous proceedings (the *Henderson v Henderson* principle). That principle is based on the public policy of avoiding multiplicity of suits, and it requires a litigant to bring forward to the court for decision all the issues or facts which were clearly part of the subject matter of the earlier proceedings, and which the parties with reasonable diligence could have brought forward at the time.

67. The rule against abuse of the court's process is a salutary one and the court itself will always be astute to protect its process from abuse. But I am far from persuaded that it is apposite the current proceedings. As indicated above, the question of whether or not s. 21 provided a right of appeal was not an issue that needed to be determined as part of the subject matter of the judicial review proceedings. The issue of alternative remedies is always a consideration for the court in considering whether to exercise its discretion to grant leave, but the existence of an alternative remedy is not determinative of that question. Leave may be a contested issue and, if anything,

the onus was on the respondent to mount any challenge in relation to it. The respondent did not challenge the grant of leave on this ground. Thus, the fact that the issue arises here for determination cannot be an abuse of the court's process, as the matter has not been litigated.

68. Secondly, the issue of whether s. 21 provides an avenue of appeal to a specialist refused registration has been raised in the current proceedings by the *respondent*. Therefore, it cannot lie in the mouth of the respondent to assert that the appellant is abusing the process of the court.

69. The third point is this: to the extent that it is implicit in the argument of the respondent that the issues raised in this appeal were disposed of, or could have been disposed of in the judicial review proceedings, that would be misconceived. In fairness to the respondent, they have not made this argument in so many words, but is it clearly to be implied in the line of authorities relied on in their original written skeleton (see further below).

70. It is plain that an appeal is very different from a judicial review application: the former is merit-based; the latter is based mainly on procedural legality. Further, the decision challenged in the judicial review proceedings was the decision of 13 January 2021, in which the Council indicated to the Claimant that it was "…*unable to verify your specialist qualifications.*" The court found in the judicial review proceedings that this constituted a failure to provide reasons or adequate reasons, and was one of the reasons for quashing the decision. As noted in the **Medical Council of Guyana v Ocampo Trueba** (*supra*), the issue of whether reasons are provided for the decision can be an important factor in determining whether a statutory appeal would be more efficacious.

71. The decision sought to be appealed here is the decision of the Council communicated by letter dated 17 February 2023, in which the Council sets out its reason for its decision that "…*you [the Claimant] have not satisfied the Council that you have obtained the relevant qualification from an institution or body recognized by the Council.*"

72. It is clear that pursuing both an appeal and judicial review proceedings may not necessarily be an abuse of process, having regard to the differences in the remedies and the nature of the decisions being challenged. In this regard, a passing reference might also be made to the cases involving Dr. Mandela Kerr, where Winder J. (as he then was) granted an appeal by the appellant under s. 21 against the refusal of his registration under s. 15 (**Dr. Mandela Kerr v The Bahamas Medical Council** [2018] 1 BHS J. No. 186), and subsequently granted leave to apply for judicial review and quashed the decision of the Council made following the appeal registering him subject to conditions which the Court found undermined the registration and licensure (**Dr. Mandela Kerr v Bahamas Medical Council** [2020] 1 BHS J. No. 87].

73. I would also remark that the respondent's reliance on **Leon Smith v Bar Council** (Civil Appeal No. 38 of 2003) for the principle that "*attempting to circumvent the lack of a statutory right of appeal is an abuse of the process of the court*" is inapposite and does not support the respondent's case. That case involved a situation where the plaintiff/applicant sought judicial

review of the Bar Council's decision finding him guilty of misconduct, notwithstanding that the finding had already been appealed to the Court of Appeal and dismissed, in circumstances where the Act provided for the Court of Appeal's decision to be final on such an appeal. Those were the circumstances in which the Court of Appeal found that the reliance on the judicial review proceedings and the appeal from those proceedings to the Court of Appeal (the second appeal) constituted an abuse of the court's process. This case plainly does not come within the sort of circumstances existing in **Leon Smith**.

CONCLUSION

74. In all the circumstances and for the reasons given above, I dismiss the preliminary challenge by the respondent and hold that s. 21 of the Act, properly construed, provides for a right of appeal by an applicant refused registration as a specialist. I also dismiss, for the reasons given, the respondent's claim that issue estoppel applies, so as to preclude the Court hearing the matter, or that the appeal would constitute an abuse of the Court's process.

75. I award the costs of this application to the appellant, which I will summarily assess on hearing submissions from counsel.

KLEIN, J.

8 July 2024