NHS Resolution

11 July 2025

8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

Tel: 020 3928 2000
Email: nhsr.appeals@nhs.net

REF: SHA/26538

COMMISSIONER:	**NHS ENGLAND**
PERFORMER	**DR [REDACTED] ("the Appellant")**
DISPUTE RESOLUTION:	**NATIONAL HEALTH SERVICE (PERFORMERS LISTS) (ENGLAND) REGULATIONS 2013**

1 Outcome

1.1 I determine that the Appellant was not entitled pursuant to paragraph 4(1)(b) of the 2015 Determination to suspension payments for the period April 2019 to March 2022.

1.2 I determine that NHS England is not estopped from recovering the overpayment made during the period April 2019 to March 2022 and that the Appellant cannot rely on a change of position. As a result, the Appellant should repay the payments which were made in error.

A copy of this decision is being sent to:

Clyde & Co on behalf of Dr [REDACTED]
Hill Dickinson LLP on behalf of NHS England

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1 INTRODUCTION

1.1 The above named Appellant has referred the matter for consideration under the National Health Service (Performers Lists) (England) Regulations 2013 ("**the Regulations**").

1.2 The Secretary of State for Health and Social Care has directed that NHS Resolution, the operating name of NHS Litigation Authority, exercise the functions under Regulation 13(5) to (9) on their behalf. Primary Care Appeals discharges that function for NHS Resolution and I, as an authorised officer, have made this determination.

2 THE APPEAL

2.1 By a letter dated 27 February 2025 Clyde & Co on behalf of the Appellant applied to Primary Care Appeals for consideration of a decision by NHS England to refuse to make a payment to the Appellant during the period of suspension ("**Notice of Appeal**");

2.2 I have had regard to the following documents made available to me in consideration of this matter to ensure that it is just, expeditious, economical and final:

2.2.1 The Appellant's Notice of Appeal;

2.2.2 NHS England's representations dated 26 March 2025 ("**NHS England's Representations**");

2.2.3 Email from the Appellant's representative dated 31 March 2025;

2.2.4 Email from the Appellant's representative dated 8 April 2025; and

2.2.5 The Appellant's observations dated 11 April 2025 ("**Appellant's Observations**").

2.3 The matter relates to the entitlement of a medical practitioner to suspension payments under Regulation 13 of the Regulations and in turn the Secretary of State's Determination: Payments to Medical Practitioners Suspended from the Medical Performers List 2015 ("**the 2015 Determination**").

3 BACKGROUND AND SUBMISSIONS

3.1 The background below is taken from the Appellant's Notice of Appeal, NHS England's Representations, and the Appellant's Observations.

3.2 The Appellant provided medical services in partnership, pursuant to a PMS Agreement dated 1 October 2005.

3.3 The Appellant was suspended from the medical performers list in November 2018 because of allegations of dishonesty, following concerns raised about misconduct regarding misdirecting prescriptions.

3.4 On 4 February 2019 NHS England determined that he was eligible for suspension payments, the first of which was received in January 2019.

3.5 The Appellant resigned from the partnership in April 2019 as a result of his ongoing suspension.

3.6 The Commissioner was notified of the Appellant's decision to resign and the partnership sent the contract variation to the Commissioner on 5 and 11 April 2019. The Commissioner actioned this variation on 17 April 2019.

3.7 In October 2021 the Performers List Decision Panel decided to remove the Appellant from the Performers List. The Appellant appealed this decision but the appeal was subsequently withdrawn on 18 March 2022 due to ill health.

3.8 All suspension payments ceased with effect from 18 March 2022.

3.9 On 5 November 2024, NHS England issued its decision ("**Decision**") that the Appellant was not entitled to suspension payments with effect from 1 April 2019, the date that he left the practice.

3.10 Payments continued to be made to the Appellant after this date.

3.11 NHS England sought to recover the overpayment for the period June 2019 until March 2022, the period during which the Appellant was purportedly ineligible for payments.

3.12 The Appellant sought to appeal this decision to Primary Care Appeals by letter dated 6 December 2024.

3.13 The Appellant was informed by NHS Resolution that as the letter of 5 November 2024 was the first decision made by NHS England, it had a right to request to reconsider its Decision.

3.14 The Appellant wrote to NHS England requesting a reconsideration of its Decision to seek recovery of the suspension payments for the period.

3.15 On 3 February 2025, NHS England issued its reconsidered decision ("**Reconsideration**") determining that the Appellant is not entitled to the amount set out in its Decision.

3.16 Following the Reconsideration, the Appellant submitted the Notice of Appeal on 27 February 2025 to NHS Resolution.

<u>Notice of Appeal</u>

3.17 By letter of 27 February 2025, Clyde & Co on behalf of the Appellant stated:

> "1. This is an appeal against the decisions of NHS England ("the Respondent"), details of which are set out in its solicitor's letter dated 5th November 2024 and their

reconsideration letter dated 3rd February 2025. The appeal is brought in accordance with s.13(5) of The National Health Service (Performers List) (England) Regulations 2013 ("the NHS Regulations"). In summary, Dr [REDACTED] avers that the decision of the Respondent to pursue recovery of alleged overpayments is:

(a) Procedurally flawed, breaches Dr [REDACTED]'s legitimate expectations, and is disproportionate; and/or

(b) Impermissible due to the doctrine of estoppel and/or change of position.

Relevant Background

2. Dr [REDACTED] provided medical services in a partnership, pursuant to a PMS Agreement dated 1.10.05. He was suspended from the medical performer's list in November 2018. Subsequently, on 4.2.19 it was determined that he was eligible for suspension payments in accordance with s.13 of the NHS Regulations. The first payment was made in January 2019 (not November 2018 as wrongly averred at para.6 of the Respondent's letter).

3. In April 2019 Dr [REDACTED] chose to resign from the partnership as a result of his ongoing suspension. Dr [REDACTED] was unaware at the time that this would negate or adversely impact on his entitlement to suspension payments, nor was he ever categorically advised that his suspension payments would cease as a result. Had he been so advised he would have considered against resigning as a partner, or would alternatively have sought to vary his status to that of a contractor, which may have led to continued entitlement to suspension payments.

4. In April 2019 the Respondent was notified of Dr [REDACTED]'S decision to resign as a partner. Dr [REDACTED] understands that the partnership sent the contract variation to the Respondent on 5.4.19 and 11.4.19, and that the Respondent actioned this variation on or before 17.4.19 (exhibit 1).

5. The subsequent email exchange is relevant (exhibit 2):

(a) On 15.4.19 (15:37) Ms [W], (senior professional standards officer employed by NHS England) emailed Dr [REDACTED]; she referred to "earlier correspondence" and sought a copy of the varied contract following Dr [REDACTED]'s resignation, in order to provide this to the West Midlands Team of NHS England. Ms [W] informed Dr [REDACTED] that she intended to send this on to the West Midlands Team, and advised Dr [REDACTED] that his resignation "may affect [his] suspension payments." She concluded by informing Dr [REDACTED] that "*the West Midlands Team will contact you directly regarding your suspension payments in due course*…."

(b) On 15.4.19 (16:42) Dr [REDACTED] responded to Ms [W]'s email and asked for details of any person he could liaise with "so that the suspension payments matter can be clarified" and he would have a point of contact if he had further queries.

(c) On 15.4.19 (17:11), Ms [W] sent a further email to Dr [REDACTED] which included details of a finance officer retained by the West Midlands Team. However the email made clear that Ms [W] "will notify PCSE to retain [Dr [REDACTED]'s status]" and informed Dr [REDACTED] that the West Midlands Team would deal with the suspension payments, and that an appeal process would be available if the decision was not satisfactory.

6. As a result of these emails Dr [REDACTED] reasonably believed that:

(a) The decision as to whether or not his suspension payments would be adversely impacted by his decision to resign would be made by the West Midlands Team of NHS England;

(b) That Ms [W] intended to notify the West Midlands Team of Dr [REDACTED]'s resignation;

(c) That the West Midlands Team would contact him directly regarding the suspension payments; and

(d) That he would be given a reasonable chance to challenge any decision of the West Midlands Team accordingly.

7. Based on this exchange, Dr [REDACTED] reasonably believed that he would receive notification of any decision in due course from the West Midlands Team if his payments were indeed affected. He also reasonably assumed that if he did not receive adverse communication from the West Midlands Team then he would continue to be entitled to receive suspension payments.

8. Despite the matters set out above, and despite notifying the Respondent in April 2019 of the fact of Dr [REDACTED]'s resignation from the partnership, the Respondent chose not to terminate the suspension payments; payments to Dr [REDACTED] continued as before, without any apparent concern from the Respondent. In fact on 9.8.19 Dr [REDACTED]'s suspension payment was delayed and accordingly he contacted the Respondent by email that day (exhibit 3). Dr [REDACTED] received a positive response from the Respondent. The Respondent duly made payment, and did not question Dr [REDACTED]'s entitlement despite full knowledge that he had previously resigned from the partnership.

9. In September 2019 Dr [REDACTED] received further communication from the Respondent (exhibit 4).

(a) On 16.9.19 (14:13) Ms [W] confirmed her assumption: "*I am assuming that you are still receiving suspension payments from NHS England as I have not been advised otherwise*."

(b) On 19.9.19 (08:02), Dr [REDACTED] responded with confirmation that he was still in receipt of suspension payments and had been so "*since your last email*."

(c) On 20.9.19 Ms [W] confirmed an extension to Dr [REDACTED]'s suspension and advised Dr [REDACTED] "*to ensure that [he] does not remove [himself] from the Medical Performer' List to ensure that [he] continues to be eligible for suspension payments.*"

10. As such, at all times the Respondent:

(a) Was aware that Dr [REDACTED] had resigned from the partnership in April 19;

(b) Was aware that Dr [REDACTED] was in receipt of suspension payments, and had continued to receive such payments, even after suspension; but

(c) Did not question nor challenge those payment at all, allowing Dr [REDACTED] to reasonably believe that he was entitled to the said payments. <u>At no stage did Dr</u> [REDACTED] <u>hide any material facts</u>. The Respondent's letter dated 28.10.24 (exhibit 5) confirms that there is no allegation of wrongdoing on Dr [REDACTED]'s part.

11. In October 2021 the Performer's List Decision Panel decided to remove Dr [REDACTED] from the performer's list. Dr [REDACTED] appealed, but then withdrew the appeal due to ill-health on 18.3.22. As a consequence, all suspension payments ceased thereafter. At paragraph 15 of the Respondent's letter dated 5.11.24 it wrongly claims that the suspension payments were stopped "once it came to our client's attention that the payments had been made in error". This is incorrect – the suspension payments ceased following the conclusion of the appeal process in respect of the decision to remove Dr [REDACTED] from the performer's list.

12. Dr [REDACTED] was suspended by the MPTS for 3 months in November 2022, which was subsequently extended. However, as to paragraph 11 of the Respondent's letter – Dr [REDACTED]'s suspension was extended in April 2023 due to a relapse of his ill-health, and further extensions were requested by Dr [REDACTED] due to his ill-health.

Basis of Appeal

(1) Procedural Failings:

Lack of Transparent Decision Making

13. It is an implied facet of a fair process of decision making that the decision will be transparent, properly reasoned, and in compliance with the relevant statutory regime. The decision in this case was taken without granting Dr [REDACTED] any chance to make any representations on the issue, and without even explaining the reasons properly. For instance the letter fails to address the following obvious issues:

    (a) When did the Respondent first become aware of the resignation of Dr [REDACTED] from the partnership and how?;

    (b) Why were suspension payments continued even after the Respondent was informed of the resignation of Dr [REDACTED] from the partnership in April 2019?;

    (c) Why did the Respondent not take action sooner?;

    (d) Why did the Respondent wait till 5.11.24 to initiate the index claim for recoupment?; and

    (e) Why did the Respondent fail to allow Dr [REDACTED] the right to request reconsideration?

14. In fact, the decision maker has completely failed to address the fact that the Respondent was notified of Dr [REDACTED]'s resignation from the partnership back in April 2019 and that Dr [REDACTED] continued to communicate with the Respondent on salient matters (as referred to above). The Respondent has also failed to address the issue of why the payments were continued, and why the Respondent failed to contact Dr [REDACTED] from 2019-2022 to question or challenge the payments despite knowledge of his circumstances. These, it is submitted, are not accidental omissions in the Respondent's decision letter – they are plainly incapable of rational or proper explanation.

(2) Estoppel and/or Change in Position Defence

15. It is trite law that where a representation of fact is made, by words or conduct (express or implied), which would enable a recipient of funds to reasonably believe that he was entitled to those monies, and where there is evidence that the recipient

has placed detrimental reliance on the same, (i.e. treated the money as his own and changed his position accordingly) the payor may be estopped from seeking recoupment (see exhibit 6: NatWest Bank v Somer International UK Ltd (2001) EWCA Civ 790 [11-14];).

16. In the present case:

(a) The Respondent was notified of Dr [REDACTED]'s resignation from the partnership in April 2019; of this there can be no doubt. The Respondent was accordingly aware of Dr [REDACTED]'s status at all relevant times. Although Ms [W] implied the possibility that this "may" affect his suspension payments, she made clear that she intended to send the information to the West Midlands Team who "*will contact you directly regarding your suspension payments in due course….*" Dr [REDACTED] reasonably believed that he would receive notification of any adverse decision in due course if the fact of his resignation impacted on his eligibility.

(b) In fact the Respondent chose to continue payments. No issue was taken as to Dr [REDACTED]'s eligibility, even when he questioned delayed payments in August 2019.

(c) On 16.9.19 (14:13) Ms [W] confirmed her belief that Dr [REDACTED] was still in receipt of suspension payments, which Dr [REDACTED] reconfirmed he was. Again, no issue was taken by the Respondent.

(d) In the circumstances:

i. the continued receipt of payments after Dr [REDACTED] notified the Respondent as to his changed status constituted a representation of fact (by conduct) that Dr [REDACTED] was entitled to those payments;

ii. Dr [REDACTED] treated the monies as his own accordingly. Dr [REDACTED] satisfied all tax liabilities on the same and incurred ordinary living expenses. He did not apply for financial benefits from the government during the period he was not working, nor did he apply for any alternative employment. He relied on the Respondent's representation by conduct (that he was entitled to suspension payments) and changed his position accordingly, by spending the said money, paying tax, and treating the money as his own.

iii. It would be unconscionable to allow the Respondent to recoup the monies (or any part thereof) accordingly. The circumstances give rise to a defence of estoppel and/or change in position.

17. Accordingly, it would be unconscionable for the Respondent to claim recoupment, several years after the events in question, particularly given that Dr [REDACTED] can no longer be restored to the position in which he was before.

Conclusion

18. In the circumstances the appeal ought to be allowed and the decision of the Respondent set aside."

NHS England's Representations

3.18 In a letter dated 26 March 2025 Hill Dickinson on behalf of NHS England stated:

"BACKGROUND TO THE APPLICATION

1. The Application purports to set out the relevant history to this matter but is inaccurate and incomplete in some significant respects. Although we do not entirely dispute the chronology of events provided, we submit the summary of the key contextual points below for completeness and will address any factual points of contention.

2. The Applicant was formerly a general medical practitioner who provided medical services in a partnership, pursuant to a Personal Medical Services Agreement dated 1 October 2005 (the "Contract"), at Welbech Road Health Centre, Bolsover.

3. In November 2018, the Applicant was suspended from the NHS Medical Performers List pursuant to Regulation 12(1)(b) of the NHS (Performers Lists) (England) Regulations 2013 (the "Regulations"). This was in response to allegations of dishonesty, following concerns raised about misconduct regarding misdirecting prescriptions.

4. At the time of the initial suspension, the Applicant was eligible for suspension payments under Regulation 13 and the Payments to Medical Practitioners Suspended from the Medical Performers List 2015 (the "Determination") (Exhibit 1). Amongst other things, the Applicant fell within paragraph 4(1)(b) of the Determination: '*the suspended medical practitioner is one of two or more individuals practising in a partnership'*.

5. Accordingly, the Applicant was eligible from November 2018 for suspension payments at a monthly rate of £9,840.

6. In April 2019, the Applicant ceased to be a partner of the partnership. As a result, and from that point onwards, the Applicant was no longer entitled to suspension payments under paragraph 4(1)(b) of the Determination, because he was no longer "*one of two or more individuals practising in a partnership*" and did not fall within any other limb of paragraph 4(1).

7. The Applicant has provided some further details as to the circumstances of him ceasing to be partner but whether he resigned, was expelled, or otherwise, this point is irrelevant to the factual question of whether he remained "*one of two or more individuals practising in a partnership*". There is no dispute between the parties that he was no longer a partner from April 2019 onwards.

8. The Respondent was notified of the Applicant's change of status in April 2019 and the Contract was varied accordingly on 17 April 2019. The Applicant was removed from the Contract as a practice partner with effect from 13 May 2019.

9. On 3 June 2019, the NHS England (Midlands) finance team, who were responsible at that time for the administration of suspension payments in the Midlands region, were notified of the Applicant's change of status (Exhibit 2). It was noted that the Applicant would be contacted and informed that his suspension payments would cease and that there would be an overpayment to be recovered. As we detail below, this did not happen, and the Applicant continued to erroneously receive suspension payments until 18 March 2022.

10. In the interim, the Applicant's suspension period was extended via the First-tier Tribunal while his criminal investigation was ongoing under Regulation 12(6)(a). On 7 October 2020, the Applicant was convicted at Northern Derbyshire Magistrates' of fraud and abuse of position, and was sentenced to 12 months' imprisonment suspended for 24 months. Subsequently, an oral hearing was held by the Performers List Decision Panel in October 2021 which confirmed the Applicant's removal from the Performers List. The Applicant appealed the decision but later withdrew the appeal in March 2022. The removal then took effect.

11. For the sake of clarity, we note that the Application contends that the Respondent ceased the suspension payments following conclusion of the appeal process in respect of the decision to remove the Applicant from the Performers List. The Respondent previously indicated that the payments stopped in March 2022 once it came to their attention that the payments had been made in error. The Respondent became aware of their error in issuing suspension payments after the appeal process had been concluded in March 2022 so there is no significant disagreement in this regard. The Application, at exhibit 5, in fact provides a letter from the Respondent to the Applicant dated 28 October 2024, in which it is confirmed that an internal review had taken place following recent audits.

12. On 5 November 2024, the Respondent's solicitors wrote to the Applicant by way of a Letter of Claim and to give formal notification that the Applicant was not entitled to the suspension payments he received from June 2019 up to March 2022 and that the Respondent intended to recover these sums in accordance with its statutory entitlement. However, as per the letter at exhibit 5 of the Application, by this stage the Applicant had already been informed that steps would be taken to recover the overpayments and to offer the Applicant an opportunity to meet with the Applicant to discuss further or raise any questions.

13. The Applicant's representatives wrote to Primary Care Appeals (the "PCA") requesting an appeal of the original decision on 2 December 2024. It was noted that the PCA did not, at that stage, have jurisdiction pending the Respondent's reconsideration of their decision. In the circumstances, the Respondent opted to reconsider the decision and to treat the appeal papers lodged by the Applicant to the PCA as a request for a reconsideration under Regulation 13(3). The Applicant's representatives were notified of this intention to reconsider the decision on 19 December 2024.

14. The Respondent reconsidered their decision and informed the Applicant of the outcome of this reconsideration on 3 February 2025 (Exhibit 3). The present Application is being made following this reconsideration and the Respondent's confirmation that it remained of the position that it was entitled to recover the overpayments made to the Applicant.

RESPONSE TO APPLICATION

15. We now turn to the Respondent's position and the Applicant's basis of appeal, and in doing so outline the Respondent's submissions for why the appeal ought to be dismissed.

16. Firstly, it is noted that the Applicant does not advance any grounds of appeal to the effect that he had any legal entitlement to the £305,040 of public funds received. We submit that this is because the Applicant and his representatives acknowledge that no such grounds exist. Rather, the Applicant argues that he should be allowed to keep the £305,040 of public funds, solely on grounds of 'procedural failings', estoppel and change of position.

NHS England's position

17. The right to recover overpayments of suspension payments is set out at Regulation 13 of the Regulations and paragraph 7 of the 2015 Determination. The 2015 Determination gives a right for the Respondent to recover overpayments where the medical practitioner was not entitled to receive all or any part of that payment where the conditions relating to or underlying entitlement to the payment were not met. Further, Regulation 13(2) gives the Respondent the right to recover the overpayment as a civil debt where the practitioner was not entitled to receive all or any part of it.

18. Accordingly, while the Applicant remained on the Medical Performers List, his resignation from the practice meant he no longer fulfilled the statutory criteria (as set out in paragraph 4(1)(b)) necessary for receiving suspension payments. As he was no longer entitled to receive suspension payments, they should have ceased from this point onwards. This position was affirmed in the case of *Sandals vs NHS England [2022] EWHC 1582 (Admin)* by NHS Resolution Primary Care [sic] and subsequently by the High Court by way of judicial review.

19. As noted in *Sandals*, and as a result of the Applicant no longer being a partner, he was no longer entitled to be compensated for a lack of partnership income. NHS England continued to make payments to the Applicant erroneously which resulted in the Applicant being unjustly enriched. This runs contrary to the purpose of the 2015 Determination, which is aimed at compensating practitioners for a loss of income caused as a result of their suspension, not for loss caused a result of any other reason (such as, in this case, a voluntary resignation from a partnership).

20. The intention of paragraph 4(1)(b), considered alongside the judgment in *Sandals*, is clear: a practitioner is only eligible to receive suspension payments under paragraph 4(1)(b) so long as they are within a partnership which holds a contract with NHS England. The Applicant ceased to be within a partnership from 13 May 2019 and was therefore not entitled to suspension payments after that date.

21. It should be duly noted that Paragraph 6(b)(ii) sets out that, as a condition of the suspension payments, the suspended medical practitioner has undertaken to inform the Respondent immediately of any change to circumstances that might affect their entitlement to payments by virtue of the 2015 Determination. It is submitted that the Applicant's resignation from the partnership is a change in circumstances that should have warranted the Respondent being appropriately informed. This is also pertinent to the question as to whether the Applicant should have queried the ongoing receipt of the payments, as detailed further below.

22. It should be noted that the abovementioned provisions provide a right to recover overpayments even where a 'mistake' has been made by NHS England in applying the Determination. The payments in question in this case are ultimately made from public funds and therefore, in taking the decision to recover the overpayments as a civil debt, NHS England does so bearing in mind its obligations with regard to the use and management of public monies. The 'discretion' on the part of NHS England as to whether to recover overpayments is explored in Managing Public Money (Exhibit 4). This recognises that many overpayments are simply made in error and that "*in principle public sector organisations should always pursue recovery of overpayments, irrespective of how they came to be made*." The importance of being able to recover public funds is further highlighted in *Banca Intesa Sanpaolo SpA v Comune di Venezia [2023] Bus LR 384 §412*, in which Foxton J opined that the defence of change of position (which the Applicant has raised) should not be available where the weight to be attached to the unjust factor is greater than that to be attached to the change of position (as, for example, where the unjust factor is the unlawful obtaining of a benefit by a public authority).

23. The Respondent is however mindful of any financial hardship that the Applicant may come to experience as a result of repayment. For this reason, and if any financial hardship is evidenced, the Respondent is willing to consider payments by instalment, should the PCA uphold the Respondent's right to recover the overpayments.

Procedural failings

24. We address the alleged 'procedural failings' referenced in the Application below; however, we would emphasise that any such procedural failings are, in any event, irrelevant to the PCA's task of determining this appeal.

25. It is submitted that a detailed process of review of the Applicant's case has been followed and that the decision to recover the overpayments has been properly reasoned in compliance with the relevant statutory regime.

26. It is accepted that the Respondent had imputed knowledge of the Applicant's resignation in April 2019. However, the fact that the payments continued to be made by way of administrative oversight and/or error is not sufficient to determine any procedural failings on the Respondent's part. It is accepted that the Applicant did at no stage hide any material facts in relation to his entitlement of suspension payments and there is no allegation of explicit wrongdoing on the Applicant's part. However, it is noted that the Applicant took no steps to clarify the position, despite it having been confirmed to him in correspondence that resignation from the partnership could have an impact on entitlement to suspension payments.

27. Under paragraph 23 of the Letter of Claim dated 5 November 2024 (as exhibited to the Application), the Applicant was informed of his entitlement to appeal the decision if he disagreed with the Respondent's decision that he was not entitled to suspension payments from June 2019 up to March 2022 and/or if he disagreed that the Respondent is entitled to recover the overpayments made to him during this period.

28. Accordingly, as contained in the enclosures of the letter above, Regulation 13(3) outlines a practitioner's right to request a reconsideration of any decision in respect of the recovery of what NHS England considers to be an overpayment under paragraph (2).

29. It is NHS England's position that, at all times, the Applicant was allowed the right to request reconsideration. Indeed, the Respondent took the appeal papers received on 2 December 2024 as an opportunity to reconsider the decision, despite a detailed review process already having been undertaken. The content of the correspondence, to which the Applicant has objected, does not alter the correctness of the Respondent's decision and subsequent reconsideration. In view of the above, the Respondent's decision was not procedurally flawed.

30. The Application avers that the Respondent's decision breaches the Applicant's legitimate expectations. It is trite law that, in order for there to be a legitimate expectation, a decision maker must have made a clear and unambiguous representation, without relevant qualification, that it will adopt a particular form of procedure, or its regular practice amounts to such a representation, above and beyond that which it would otherwise have been required to adopt (see, for example, *R (MP) v Secretary of State for Health and Social Care [2020] EWCA Civ 1634 §41-53*). The public authority, in those circumstances, may not frustrate that expectation if to do so would be so unfair as to amount to an abuse of power. The 'expectation' in this case cannot be considered enforceable and is therefore not applicable for the following reasons:

    i. It is not clear, unambiguous, and devoid of relevant qualification: the representation should leave no room for doubt as to the Respondent's intention. Here, any communication or conduct that the Applicant has been subject to has not expressly indicated a continuing entitlement to suspension payments. Indeed, as early as April 2019, the Applicant was informed that his entitlement to suspension payments could be affected. It simply cannot be said that any unequivocal representation was made to the Applicant in respect of the payments.

ii. It is not reliable, regular and consistent: the expectation should be founded on a consistent practice or some firm assurance. In this instance, while there was an indication that a review of the Applicant's suspension payments would be undertaken, there was no affirmative commitment to maintain suspension payments.

iii. It is not supported by statutory or policy framework: suspension payments under the 2015 Determination are linked to a performer's active contractual relationship with a practice. The Applicant's resignation from the practice directly triggered the termination of his entitlement under paragraph 4(1)(b). It is submitted therefore that, even if a legitimate expectation could be said to exist on a factual basis, it is clearly not supported by the statutory framework governing suspension payments.

31. Accordingly, the criteria required to establish an enforceable legitimate expectation is not met in this instance, as at no point in the communications or through its conduct did the Respondent's actions give rise to an affirmative entitlement to suspension payments. Moreover, given that the Applicant's contractual status changed with his resignation, from this point onwards the legal basis for suspension payment ceased, making any claim to a continuing expectation legally untenable.

Estoppel and/or Change in Position Defence

32. The Applicant raises the doctrine of estoppel in their Appeal which, if relevant in the circumstances, operates to prevent a party from going back on a clear and unequivocal representation that has the effect of inducing another party to rely on that representation, to their detriment. Its application is not appropriate here and the relevant test is not met in this case, given that the circumstances of this Application do not meet the following criteria:

i. Clear and unequivocal representation: the representor must have made a clear and unequivocal representation that they will not enforce their strict legal rights. In *Spliethoff's Bevrachtingskantoor Bv v Bank of China Ltd [2015] EWHC 999 (Comm) §156*, Mrs Justice Carr made clear that any such representation '*must be clear or unequivocal, or precise and unambiguous*'. In this case, there is no such definitive assurance, and any communication or conduct falls well short of the clear representation as required.

ii. Reasonable reliance: the Applicant must have relied on the representation in a manner that altered their position. As established in the landmark case of *Freeman v Cooke (1848) 2 Exch. 654 §653*, there can be no estoppel if the representation was not one that a reasonable man would rely upon. Here, any reliance by the Applicant on the conduct or communication he had was inherently limited and it is submitted that there is no convincing evidence that it was reasonable to rely on a continuing entitlement to suspension payments.

iii. Detriment: the Applicant must demonstrate that he suffered a detriment as a result of the reliance. As found in *Lipkin Gorman v Karpnale Ltd [1991] AC 188 §580,* merely spending money is an insufficient detriment unless it is clearly tied to the representation. A defendant must prove that, but for receipt of the enrichment, they would not have suffered the detrimental change of circumstances. In this case, no evidence has been provided that the Applicant's alleged reliance has a clearly tied and significant detriment that would render it inequitable to recover the overpayment.

33. Further to the above, the Applicant alleges that he has suffered a detriment in reliance on the alleged representation that would make it unconscionable not to retain the monies, but provides no evidence of this. It is submitted that this is a high bar to reach evidentially, and that '*satisfying tax liabilities and incurring ordinary living expenses*' is expenditure that, in any event, would have been incurred by the Applicant regardless of the status of the suspension payments (and indeed, in respect of tax liabilities, by reason of the operation of law). The mere fact that the Applicant may have spent the money, either in whole or in part, does not itself render it inequitable that he should be called upon to repay monies to which he was never legally entitled to in the first instance. In any event, as has been noted, the Applicant has not provided any detailed evidence of the expenses in question, let alone as to how those expenses are inextricably linked to any reliance upon the ongoing receipt of suspension payments.

34. We further note that the Applicant is seeking to rely on limited correspondence after his resignation in support of his assertions as detailed above. This reliance is misguided.

35. It is submitted that at no point in communications with the Applicant was his entitlement to suspension payments affirmatively confirmed. It is instead submitted that the communication that the Applicant had with [AW], Senior Professional Standards Officer, only stated that the NHS England West Midlands Team would contact the Applicant directly regarding his suspension payments, as the Applicant's entitlement may be affected. This did not amount to representations that the Applicant was entitled to continue receiving suspension payments. In any event, it is the Respondent's position that the individual communicating with the Applicant was not in a position to make such decisions as regard to a continuing entitlement of suspension payments on behalf of NHS England.

36. The Application asserts that the Applicant reasonably believed that the NHS England (Midlands) team would contact him directly regarding the suspension payments but that, when they did not do so, he assumed that he was entitled to continuing receipt of the suspension payments. This is misguided. At all material times, the Applicant had the opportunity to query when or whether the NHS England (Midlands) team would be considering the matter, and chose not to do so, despite being made aware that he may not be entitled to receipt of the suspension payments. This important backdrop must be considered alongside the allegations against the Respondent at all times.

37. Indeed, much as it is suggested by the Applicant that the Respondent should have contacted him to confirm the position, the Applicant himself ought to have contacted the Respondent to confirm the position (and indeed, the 2015 Determination makes clear that practitioners are expected to cooperate with the Commissioning Board in respect of entitlement issues – see, for example, Paragraph 6(b)(ii), as mentioned above). Indeed, the email from Ms [W] dated 15 April 2019, as exhibited to the Application, in fact provides specific contact details of the individual the Applicant could contact to ascertain the position. In such circumstances, reliance upon the communications from the Respondent without taking further steps to clarify the position cannot be considered reasonable.

38. It is further submitted that merely a lack of administrative action in failing to stop the payments sooner does not constitute a clear and unequivocal representation that the Applicant had a continuing right to receive suspension payments, nor does it demonstrate that NHS England objectively intended the Applicant to rely upon any representation. This lack of administrative action is demonstrated by a much more considerable period of time from September 2019 to October 2024 where there is no contact regarding the suspension payments, which would instead suggest a lack of administrative action and that it was not reasonable for the Applicant to rely on

any representations allegedly made by Ms [W] in 2019. In any event, as is noted above, the comments of Ms [W] themselves made clear that an issue could arise in respect of entitlement. In such circumstances, the Application therefore appears to seek to 'cherry pick' the aspects of the communications on which the Applicant seeks to rely, with no explanation provided as to why it was considered reasonable for the Applicant to nonetheless ignore the comments from Ms [W] in respect of the potential effect of his resignation on suspension payments.

MATTERS FOR DETERMINATION BY THE PCA

39. In light of the above, it is NHS England's position that, should the Application not succeed, then the Respondent is entitled to pursue legal action in respect of the overpayments, including the issuance of proceedings against the Applicant in the event that proposals for repayment are not forthcoming. All of the Respondent's rights are reserved in this regard.

40. We therefore respectfully invite the PCA to determine that:

i. The appeal is dismissed;

ii. The Applicant was not entitled to receive suspension payments paid in the sum of £305,040; and

iii. The Respondent is entitled to recover the overpayment as a civil debt."

Appellant's Observations

3.19 "We refer to the Respondent's response dated 26 March 2025 ("the Response").

In this Rebuttal:

(a) except where set out below and except where the same consists of admissions the Appellant joins issue with the Respondent on the contents of the Response;

(b) where any averment is stated not to be admitted, the Appellant cannot confirm or deny such averment;

(c) references to paragraphs are references to paragraphs of the Response unless otherwise stated;

(d) the Appellant adopts the defined terms used in the Appeal and the Response;

(e) and where nomenclature, headings or abbreviations are adopted from the Response, that is for the sake of convenience and no admissions are made thereby.

Rebuttal to the Background

1. It is noted that paragraph 4 confirms that the Appellant's eligibility was by virtue of Regulation 13 and the Determination. It is important to note that at no point is it suggested that the Appellant was aware of these criteria, such that he would have been on notice that he may become ineligible should these specific elements change. This is because the Appellant did not know of the criteria and at all times placed reasonable reliance upon the Respondent as to his continuing eligibility.

2. As to paragraph 9, the Response suggests that the Respondent's Exhibit 2 demonstrates that the NHS England (Midlands) finance team understood the implications of the Appellant's suspension upon his eligibility for future payments,

when in fact the emails reveal no such understanding; this from the team who, in the Respondent's own words, were responsible at that time for the administration of suspension payments in the Midlands region. If they did not understand the eligibility criteria then it is manifestly unreasonable to expect that the Appellant had a better understanding or was the more appropriate party to identify the error or review the position.

3. Exhibits 3 and 4 of the Appeal set out the subsequent correspondence between the Appellant and the NHS England (Midlands) finance team. Contrary to the suggestion in paragraph 9, the Appellant was contacted by the NHS England (Midlands) finance team, after the June 2019 emails, who were aware that payments were continuing to be made. In contrast to the Respondent's position, the NHS England (Midlands) finance team advised the Appellant not to remove himself from the Medical Performers' List to ensure that he continue to be eligible for suspension payments. This demonstrates that the team had still not concluded that he was ineligible for continuing payments.

4. Despite the emails in June 2019, the NHS England (Midlands) finance team represented to the Appellant in September 2019 that he would continue to be eligible for suspension payments. They had considered the issue in June 2019 (to which emails the Appellant was not a party) and thereafter in September 2019 placed reasonable reliance. This is particularly the case where multiple individuals were party to the correspondence and there were multiple points of contact following the June 2019 emails where the Appellant's eligibility was not questioned with him. This is not a case of the finance team having failed to communicate his ineligibility, but instead positively confirming his eligibility provided he did not remove himself from the Medical Performers' List.

Rebuttal to the Response

5. As to paragraph 16, and whilst it may be a matter of semantics, the Appellant rebuts the suggestion that he is looking to "keep" the £305,040 of public funds in the sense of him having just been sent the funds, they're sitting in his account, but is refusing to return them. This is not the case and the legal principles of estoppel and change of position should be applied. The Respondent is attempting to brush over these established legal principles as if they are mere technicalities; they are not. The test is not whether the Appellant was entitled to the funds or whether he can keep them, but whether it would be just and equitable under the legal principles of estoppel and change of position for him to now have to return the funds which he has placed reliance on being able to keep. This should be noted alongside the backdrop of the Appellant having received the payments due to suspension and thereby not being able to work. The Appellant has still not been able to return to work since 2018 due to physical and mental health difficulties.

Rebuttal to NHS England's position

6. As to paragraph 18, it is notable that the Respondent relies upon a decision of 2022. Whilst it is accepted that the case affirms the position generally, it demonstrates a lack of clarity prior to that date. In any event the facts of the *Sandals* case are very different to the instant case and has no bearing on the principles of estoppel and change of position which are the subject of this Appeal.

7. As to paragraph 21, the Appeal confirms that the Appellant informed the Respondent of the change in circumstances. It is clear that the Respondent was aware of this in emails as early as April 2019.

Rebuttal to Estoppel and/or Change in Position Defence

8. As to paragraph 32, the Appellant considers the evidence exhibited to the Appeal demonstrates a clear and unequivocal representation upon which he placed a reasonable reliance to his detriment. The Respondent conveniently avoids addressing the Appellant's exhibits.

9. As to paragraph 33, the suggestion that the tax liabilities and living expenses which the Appellant incurred would have been incurred in any event is patently false. The payments, and the representations that he was entitled to them, enabled the Appellant to maintain his lifestyle and financial commitments for a number of years and there was no suggestion that he should not have been entitled to do so; as far as he was aware he was eligible for the payments and to spend his money as he had been doing before. His tax liabilities were naturally higher as a result, returning a large proportion of the overpayment to the public purse, and there was no need to re-assess day-to-day spending given the apparent ongoing entitlement. The Respondent now seeks to reverse years of routine expenditure after having represented to the Appellant that he was entitled to the monies and should be estopped from doing so. Furthermore, it is unlikely that the Appellant would be entitled to a tax rebate after such a significant delay, exacerbating the detriment to him if the Respondent is permitted to reclaim the overpayments.

10. As to paragraph 35, the Appellant rebuts the averment that no such representations were made. The April 2019 emails suggested that payments "may" be affected, and the Respondent's internal June 2019 emails confirmed that Ms [W] was "not sure". It should also be noted that 'decision makers' within the Respondent were a party to this internal email thread. It is submitted that the subsequent September 2019 emails were an unequivocal representation as to the Appellant's continuing entitlement through the use of the word "ensure" in relation to the Appellant's continued eligibility. If "ensure" is not an affirmative confirmation then the Appellant does not know what is.

11. As to paragraph 36, the Appellant rebuts the averment that he did not query his entitlement or that the NHS England (Midlands) finance team had not considered represented to the Appellant regarding his continuing eligibility and that he should not change anything. There was therefore no reason for the Appellant to believe that he was not entitled to payments following such representations.

12. As to paragraph 37, the NHS England (Midlands) finance team specifically said they were looking into the matter and so they would be in contact with the Appellant. The September 2019 emails made no suggestion that the Appellant's entitlement remained under review or that a review was pending. Five months had elapsed and, following fresh confirmation that the Appellant's eligibility was ensured if he made no changes, it was reasonable to conclude that a review had been completed given the finance team were responsible for the payments.

13. As to paragraph 38, the earlier paragraph 26 accepts that "*the Applicant did at no stage hide any material facts in relation to his entitlement to suspension payments and there is no allegation of explicit wrongdoing*." However the Respondent now asserts that the Appellant is "cherry-picking" aspects of the communications rather than addressing the fact that the NHS England (Midlands) finance team made the unequivocal representation regarding the Appellant's eligibility being ensured. The Respondent has failed to address the September 2019 emails in the Response.

14. It is also incorrect for the Respondent to suggest there was no contact between September 2019 and October 2024. Please see the email and letter from May 2022 exhibited hereto which suggests again that eligibility ceased following removal from the Medical Performers' List, not the resignation from the partnership. This amounts to a further representation to the Appellant about the eligibility criteria and that, save for the overpayment set out within the letter, he was entitled to the payment made

until that point. Again, it was reasonable for the Appellant to rely upon this representation.

15. Upon receiving this letter dated 25 May 2022, the Appellant promptly returned the sum of £4,443.87 on 26 May 2022 as requested which further undermines the Respondent's suggestion that the Appellant is seeking to "keep" monies to which position apply [sic] as to the attempt to recover significant sums years after they have been paid, spent and ratified by multiple representations to the Appellant.

Conclusion

16. In the circumstances the appeal ought to be allowed and the decision of the Respondent set aside."

4 CONSIDERATION

4.1 Regulation 13(5) of the Regulations enable a medical practitioner to appeal NHS England's reconsideration of a decision relating to the medical practitioner's eligibility for suspension payments.

4.2 The Notice of Appeal is in respect of the suspension payments that the Appellant received between June 2019 and March 2022, which the Commissioner claims were made erroneously but the Appellant is of the view that the recovery is due to a procedurally flawed process and that the Appellant had legitimate expectations to receive the payments. Further, the recovery of the alleged overpayment is impermissible due to the doctrine of estoppel and / or change of position.

4.3 I will first look at the question of eligibility and if the Appellant was entitled to receive suspension payments.

4.4 The 2015 Determination, under paragraph 3 states:

Qualifying Medical practitioners

(1) A medical practitioner may be entitled to receive payments from the Board by virtue of this Determination if sub-paragraphs (2) and (3) apply to that medical practitioner.

(2) This sub-paragraph applies to a medical practitioner who-

(a) is suspended; and

(b) immediately prior to the suspension (or the circumstances giving rise to the suspension) is or was-

(i) a contractor (including a partner in a partnership which is a contractor),

(ii) a person employed or engaged by a contractor to perform primary medical services,

(iii) a locum who has, or has had, a contract for services with a contractor to perform primary medical services,

(iv) a locum employed or engaged by a body that provides or provided locum or deputising services to contractors who, in the period of six months beginning immediately prior to the suspension, performed

primary medical services which were provided at a contractor's practice,

(v) a locum who does not, or did not, have a contract of service or a contract for services with a contractor or a body referred to in paragraph (iv) but who, in the period of six months beginning immediately prior to the suspension, performed primary medical services which were provided at a contractor's practice.

(3) This sub-paragraph applies to a medical practitioner to whom sub-paragraph (2) applies who, apart from the suspension, and any suspension from the register of medical practitioners which does not provide grounds for removal from the medical performers list under regulation 28 of the 2013 Regulations (grounds for removal from the medical performers list), is able and permitted to perform primary medical services.

4.5 It is not disputed that the Appellant meets the criteria in paragraph 3(2) by way of being employed as a partner in a partnership which is a contractor immediately prior to the suspension and further that paragraph 3(3) also applied.

4.6 I note that there is no dispute that the Appellant was in partnership and held a PMS Agreement and therefore was entitled to payments under paragraph 4 of the 2015 Determination which states:

Entitlement to payments

(1) A medical practitioner to whom paragraph 3(2) and (3) applies ("a suspended medical practitioner") is, subject to the following provisions of this Determination, entitled to payments from the Board in respect of any complete calendar month, or part of a calendar month, for which-

(a) where the suspended medical practitioner is a contractor who is an individual medical practitioner, that practitioner's normal monthly payments (or a pro rata amount in the case of a part month) are withheld or deducted by the Board in accordance with the terms of the contractor's primary medical services contract;

(b) where the suspended medical practitioner is one of two or more individuals practising in a partnership, that medical practitioner is not entitled to receive at least 90% of the normal monthly drawings (or a pro rota amount in the case of a part month) from the partnership account, whether or not that medical practitioner is actually in receipt of those drawings;

(c) where the suspended medical practitioner is or was employed or engaged by a contractor, other than as a locum, that medical practitioner is not entitled to receive at least 90% of that medical practitioner's normal monthly NHS earnings from work as a performer of primary medical services (or a pro rata amount of such earnings from such work in the case of a part month), whether or not that medical practitioner is actually in receipt of at least that amount from the contractor; or

(d) in a case where the suspended medical practitioner is a locum, that medical practitioner is not entitled to an amount under the contract of service or the contract for services representing at least 90% of what the Board considers is a reasonable approximation of that medical practitioner's normal monthly NHS profits (or a pro rata amount in the case of a part month) from locum work as a performer of primary medical

services, whether or not the suspended medical practitioner claims or is in receipt of that amount.

(2) For the purposes of determining what is or are "normal" income, payments, drawings, earnings or profits in respect of this paragraph and paragraphs 5 and 6, an average of the most recently available six complete months of data is to be taken, unless such a calculation is impossible or produces an amount which the Board considers represents an unreasonable amount by way of protected earnings for the medical practitioner during the period in which that practitioner is suspended.

4.7 I am of the view that, the Appellant was entitled to payments whilst he was suspended as they were "*one of two or more individuals practising in a partnership"* as set out in paragraph 4(1)(b) above.

4.8 It is not disputed that the Appellant resigned from the PMS Agreement in April 2019 and that there was a contract variation which was sent to the Commissioner on 5 and 11 April 2019. It is further agreed between parties that this was actioned by the Commissioner on 17 April 2019, at which time the Appellant ceased to be "*practising in a partnership*".

4.9 From the date that the Appellant ceased being a partner in the Practice, he ceased being entitled to his normal partnership income, not as a result of his suspension but as a result of him not being a partner. If the Appellant is not a partner, he cannot be entitled to partnership income. Therefore, NHS England cannot compensate him for income lost as a result of him no longer being a partner and I consider that to do otherwise would go against the purpose of the 2015 Determination, which in my view is to compensate practitioners who are unable to practice as a result of their suspension and not if they lose income for some other reason.

4.10 I also note that paragraph 6(1)(b)(ii) (Conditions of Payment) states that no payment may be made by NHS England unless it is satisfied that the suspended medical practitioner has "*undertaken to inform the Board immediately of any change to circumstances that might affect entitlement to payments by virtue of this Determination (such as that medical practitioner taking on alternative work)".* I consider that the entitlement to suspension payments during the period of suspension is therefore not absolute; it is subject to the conditions in paragraph 6. A failure to meet the conditions can result in the payment being stopped. As such, I consider that the entitlement to payments can be assessed on a month by month basis because a failure to meet the conditions can result in the payment being stopped (and also being recovered if overpaid, pursuant to paragraph 7, which I will come on to later). I also consider that paragraph 6 is clear that entitlement can change as a result of a change in circumstances (for example, leaving a partnership); it is not the case that once entitlement has been established (as is the case with the Appellant in relation to the period in question) that entitlement is fixed for the duration of the entire suspension period.

4.11 I note that both parties make reference to *Sandles v National Health Services Litigation Authority (Primary Care Appeals) [2002] EWHC 1582 (Admin)* (the "***Sandles Case***"). In the *Sandles Case*, Cooke J sets out a clear methodology for applying the conditions for entitlement to a suspension payment as detailed in paragraphs 3, 4 and 5 of the 2015 Determination.

4.12 I am of the view that the Appellant was no longer a partner to the PMS Agreement with effect from 17 April 2019 and therefore was not entitled to payments, as set out in the 2015 Determination, with effect from this date. It is unclear why NHS England considered June 2019 to be the date from which the Appellant was not entitled suspension payments from.

4.13 Whilst I have determined that the Appellant was not entitled to payments with effect from 17 April 2019, payments continued during this period and only finally ceased in March 2022.

4.14 I next move on to the question of the recovery of those payments by NHS England.

4.15 I note that there is some disagreement between the parties as to whether the payments ceased as a result of the removal of the Appellant's name from the Performers List or as a result of NHS England realising that payments had been made in error.

4.16 I am of the view that the reason for the stopping of the payments is irrelevant as, as set out above, the Appellant was not entitled to receive these payments with effect from April 2019.

4.17 I note that the Appellant was eligible for suspension payments from November 2018 at a monthly rate of £9,840 and that payments were made from this date and that this is not in dispute.

4.18 The 2015 Determination, paragraph 7 states:

Overpayments

7. If the Board makes a payment to a suspended medical practitioner pursuant to this Determination and that medical practitioner was not entitled to receive all or any part of that payment whether because -

(a) the conditions relating to or underlying entitlement to the payment are or were not met; or

(b) the payment was calculated incorrectly (including where a payment on account overestimates the amount that is payable),

the Board may recover the amount of the overpayment by deducting an equivalent amount from any other payment which is payable by the Board to the suspended medical practitioner pursuant to this Determination.

4.19 Regulation 13 states:

Payments during suspension

(1) During a period of suspension under regulation 12, payments may be made by the Board to, or in respect of, a Practitioner in accordance with a determination by the Secretary of State.

(2) If such a payment is made but the Practitioner was not entitled to receive all or any part of it, the amount to which the Practitioner was not entitled ("the overpayment") may be recovered by the Board as a civil debt.

(3) Where requested by a Practitioner to do so, the Board is to reconsider any decision—

(a) to refuse to make a payment to, or in respect of, the Practitioner under paragraph (1);

(b) as to the amount of a payment to, or in respect of, the Practitioner under paragraph (1); or

(c) in respect of recovery of what the Board considers to be an overpayment under paragraph (2).

(4) Following the reconsideration of such a decision the Board is to notify the Practitioner in writing of the outcome of its reconsideration ("the reconsidered decision") together with the reasons for it.

(5) Following notification of the reconsidered decision, the Practitioner may, within a period of 28 days beginning on the day on which the Practitioner is notified of that reconsidered decision, give the Secretary of State a notice of appeal.

(6) A notice of appeal under paragraph (5) must include—

(a) the name and address of the Practitioner;

(b) a contact name and address to be used by the Board for the purposes of the appeal;

(c) a copy of the reconsidered decision; and

(d) a brief statement of the grounds for appeal.

(7) The Secretary of State must thereafter send a written request to the Practitioner and the Board ("the parties") to make, in writing and within a specified period, any representations they may wish to make about the matter: the request to the Board is to include a copy of the Practitioner's brief statement of the grounds for appeal.

(8) Once the period specified pursuant to paragraph (7) has elapsed, the Secretary of State is to—

(a) give a copy of any representations received from each party to the other party; and

(b) request that each party make any written observations which that party wishes to make on the representations of the other party.

(9) The Secretary of State is to, as soon as is reasonably practicable, having taken into account any such representations or observations as referred to in paragraphs (7) and (8) and such other evidence as the Secretary of State sees fit—

(a) decide the appeal, and notify the parties of its decision and the reasons for it; and

(b) give the Board such directions in writing, if any, on the matter as the Secretary of State thinks fit.

4.20 I note the arguments from NHS England and its view that, whilst the payments were made, and there is no dispute over this, they should seek to recover these monies as set out in the document "Managing Public Money" and in particular Annex 4.11 "Overpayments".

4.21 I note, from the information provided to me by the Appellant, that there was correspondence between the Appellant and NHS England during September 2019 following a delay in payment being received. I note that the Appellant contacted NHS England as a result of this delay and the payment resumed. I note that the Appellant

was in further contact with NHS England later in September 2019 and I note the contents of these emails.

4.22 I note the position of the Appellant that as they were continuing to receive these payments there was a legitimate expectation that they were correct payments.

4.23 I note the comments from the Appellant that "*The test is not whether the Appellant was entitled to the funds or whether he can keep them, but whether it would be just and equitable under the legal principles of estoppel and change of position for him to now have to return the funds which he has placed reliance on being able to keep."*

4.24 I will now consider the reasons given by the Appellant that he is not required to repay the overpayment. I note that the Appellant claims that NHS England is estopped from recovering the monies overpaid on the basis that the Appellant relied on the emails from NHS England and in particular Ms [W] in that "*I am assuming that you are still receiving suspension payments from NHS England as I have not been advised otherwise*" and the response from the Appellant in which they confirmed that they were still in receipt of suspension payments. I note that in response to this, NHS England confirmed that there was an extension to the Appellant's suspension and that "*to ensure that [he] does not remove [himself] from the Medical Performer' List to ensure that [he] continues to be eligible for suspension payments.*"

4.25 The Appellant seeks to argue that NHS England, at all times, was aware that the Appellant had resigned from the partnership in April 2019; was aware that the Appellant was in receipt of suspension payments and had continued to receive such payments; and did not challenge those payments. The Appellant continued to reasonably believe that they were entitled to the suspension payments and at no time did the Appellant hide any material facts. This is not disputed by NHS England, who confirm that there is no allegation of wrong doing on the Appellant's part.

4.26 The question remains however as to whether the Appellant should retain the monies which were inadvertently paid to the Appellant when the Appellant was no longer eligible to receive such payment by virtue of no longer being in partnership.

4.27 The Appellant relied on representations from NHS England that the amount being paid to them was correct and that he was in a position to be able to continue to receive these monies.

4.28 Although I consider that estoppel can be used as a defence against a claim of unjust enrichment (which I consider further below), it is perhaps easier to comment on the estoppel argument first.

4.29 NHS England disputes that the Appellant can rely on estoppel not to repay the overpayment on the basis that:

4.29.1 *"Clear and unequivocal representation: the representor must have made a clear and unequivocal representation that they will not enforce their strict legal rights. In Spliethoff's Bevrachtingskantoor Bv v Bank of China Ltd [2015] EWHC 999 (Comm) §156, Mrs Justice Carr made clear that any such representation 'must be clear or unequivocal, or precise and unambiguous'. In this case, there is no such definitive assurance, and any communication or conduct falls well short of the clear representation as required.*

4.29.2 *Reasonable reliance: the Applicant must have relied on the representation in a manner that altered their position. As established in the landmark case of Freeman v Cooke (1848) 2 Exch. 654 §653, there can be no estoppel if the representation was not one that a reasonable man would rely upon. Here, any reliance by the Applicant on the conduct or communication he had was*

inherently limited and it is submitted that there is no convincing evidence that it was reasonable to rely on a continuing entitlement to suspension payments.

4.29.3 *Detriment: the Applicant must demonstrate that he suffered a detriment as a result of the reliance. As found in Lipkin Gorman v Karpnale Ltd [1991] AC 188 §580, merely spending money is an insufficient detriment unless it is clearly tied to the representation. A defendant must prove that, but for receipt of the enrichment, they would not have suffered the detrimental change of circumstances. In this case, no evidence has been provided that the Applicant's alleged reliance has a clearly tied and significant detriment that would render it inequitable to recover the overpayment."*

4.30 The Appellant is seeking to rely on correspondence between themselves and a Senior Professional Standards Officer at NHS England. NHS England state that the correspondence in question was limited and does not positively confirm that there is an entitlement to suspension payments.

4.31 NHS England argue further that the author of these emails was not in a position to make such decisions. NHS England go on to assert that the Appellant was advised that they would be contacted by the payments team. Whilst it is accepted that it should have been NHS England who contacted the Appellant with regard to the monies, NHS England seek to argue that when this did not happen, the Appellant should have contacted the relevant department to establish entitlement and should not have taken no communication to the alternative as confirmation that they were entitled to suspension payments.

4.32 I note the language of the email upon which the Appellant seeks to rely. The Appellant has stated that he believed that he would receive notification if his payments were affected. I note that this claim is repeated within his representations. I consider that, in effect, what the Appellant is stating is that NHS England established a situation whereby silence was akin to an overt statement that his suspension payments would not be affected. I note that in normal circumstances silence is not sufficient to establish estoppel; however, if there is an agreement whereby that silence can be given a specific meaning, this may be sufficient.

4.33 However, having considered the correspondence between the parties, as provided, I note that the language used in the relevant email indicates only that NHS England "*will contact you*". I further note that this is devoid of any caveats or conditions. I am mindful of the case law provided by NHS England, that the language used must be clear and unequivocal. I have not been made aware of any express wording by which NHS England accepted an obligation to inform the Appellant only where his payments were adversely affected. Instead, I consider it plain that the only inference one could possibly take, from the language in the email referred to by both parties, is that NHS England had intended to contact the Appellant irrespective of whether the impact on his suspension payments was negative or positive, to confirm whatever the impact of his resignation was. I consider that in order to create an estoppel position by silence then it is that initial statement to do so that must be clear and unequivocal, and I have not been provided such a statement.

4.34 Further to this point, I note that both parties agree that the email in question directly indicated that his suspension payments may be affected. I note that this statement is clearly not a statement that his entitlement to suspension payments had, or had not, been affected.

4.35 I note that the Appellant has stated that the Appellant reasonably believed that they would be contacted in the event of an adverse impact. However, what I have not been provided with is an explanation of why this belief was reasonable, given that there was no such statement made, and, if anything the statement made appears to contradict

such a situation. Whilst the Appellant might very well have assumed it to be so, I do not consider this a reasonable conclusion given that this was not what had been communicated to him, the express statement made was that the Appellant "will be" contacted, and there was no other evidence to support such a position.

4.36 I further note that NHS England has stated that the Appellant took no steps to clarify this position. I consider it odd that the Appellant, in the same email chain which I have referred to, asked for whom to contact in regard to suspension payments, and then, when no further communication was forthcoming, did not follow up his query.

4.37 I note the comments from the Appellant that they were not aware what the impact of resigning from the partnership would have on any future payments whilst they remained suspended. I am of the view that it was a matter for the Appellant to understand and, if and as appropriate, seek their own independent advice on what would happen if they were to cease being a partner to a PMS Agreement. I am of the view that whilst NHS England may have guidance and direct Performers to this guidance, it is not a matter for NHS England to advise what a Performer should do in such a situation.

4.38 I am also mindful that the Appellant had already resigned from the partnership at the point in time he had contacted NHS England. I note the Appellant's comments with regard to the fact that the *Sandles* Case demonstrates the lack of clarity in this area. However, having had regard to the 2015 Determination, the impact of resignation is clear from the language therein. I note that the *Sandles* Case upheld a straightforward interpretation of the language of the 2015 Determination and did not alter or further clarify it in any way. On this basis I consider that it was open to the Appellant to review the 2015 Determination and come to the same conclusion reached in the *Sandles Case*, prior to it being made. I have not been provided with any suggestion that the Appellant did seek to review the 2015 Determination, or seek any advice on its impact. It is unclear why he did not do so.

4.39 The Appellant has indicated that in September 2019 payments were delayed for an unknown reason. I note that he has indicated that correspondence surrounding this may be sufficient to establish estoppel. However, no questions of eligibility were engaged in this correspondence. Instead, a previous email chain, which was in regard to initial suspension payments, was responded to, and a query raised specifically regarding a late payment. I consider this correspondence very limited in scope and detail, and not clear enough to provide a representation upon which the Appellant could reasonably rely.

4.40 I note that the Appellant has indicated that an email of 20 September 2019 either contributed to or established the estoppel. As I have noted, the Appellant was informed by NHS England that information regarding his suspension payments were to come from a specific individual, Ms [O]. Having had regard to this email, it was not this individual, who was making the statement, but a separate person, Ms [W], who the Appellant had already been told within the correspondence at the time that they did not have authority to take decisions in regard to suspension payments. I also note that, again, no statements were made as to eligibility in consequence of his resignation from the practice, but resignation from the practice and removal from the list are both separate actions and both lead to a loss of entitlement. Whilst NHS England told the Appellant not to remove themselves from the list in order to protect the Appellant's position, the partnership resignation had already occurred and thus negated the guidance. These two factors, taken together, I consider do not amount to a sufficient statement to establish estoppel.

4.41 In the absence of final decisions by NHS England, the lack of clear and unequivocal representations (whether by conduct or by the emails) and also on the basis of the Appellant not contacting NHS England to establish the position, I am of the view that the Appellant cannot seek to rely on the doctrine of estoppel to avoid repayment.

4.42 I consider that the main issue in relation to the repayment of the overpayment is the claim that NHS England is entitled to recover the overpayment as a civil debt.

4.43 Considering the authorities together and, in particular, NHS England's comments, I consider that a determination as to whether there has been unjust enrichment requires consideration of four questions:

4.43.1 Has the Appellant benefited or been enriched?

4.43.2 Was the enrichment at the expense of NHS England?

4.43.3 Was the enrichment unjust?

4.43.4 Is there any specific defence available to the Appellant (such as change of position)?

4.44 I have considered these questions in turn.

4.45 On the first question, I consider that the Appellant has benefited/been enriched. I consider that this is a simple factual issue – whether the Appellant received payments over and above what was due. I do not consider that "benefited" or "enriched" here requires a consideration of what the Appellant subsequently did with the additional monies. I consider this point later in relation to the defence of change of position.

4.46 On the second question, I consider that it is not in dispute that it was NHS England that made the additional payments and therefore I find that the enrichment was at the expense of NHS England.

4.47 On the third question, I consider that the enrichment was unjust on the basis that the additional payments were made by mistake. I do not imply into consideration of "unjust" any bad faith on behalf of the Appellant. I simply find that any payment made by mistake will be unjust because it is inherently not correct. As above, I leave consideration of whether it is "unjust" or "unfair" to require repayment to the section on change of position below.

4.48 It is the fourth question above that poses the most difficulty. The Appellant relies upon the defence of change of position such that he should not have to pay back the overpayment. The basis of the Appellant's claim is that he spent the money, in good faith, treating it as his own money as a result of the funds made available to them by NHS England. I note from the authorities that the issue is not quite as simple as this as simply spending money that is overpaid may not be enough to constitute a change of position.

4.49 I consider that, based on the authorities provided to me, to rely on the defence of change of position, the Appellant would have to be able to demonstrate that:

4.49.1 its circumstances have changed detrimentally;

4.49.2 there is a causal connection between the unjust enrichment and the change of position; and

4.49.3 it has acted in good faith.

4.50 I now consider the Appellant's defence of change of position in more detail. Firstly, there is no evidence presented before me that makes me consider that the Appellant has not acted in good faith. I further note that the Appellant did communicate with NHS England and did raise the issue of a non-payment when it was received late in September 2019. Whilst the Appellant raised the issue of non-payment, this was then

paid and monies continued to be paid by NHS England, it appears without any review. I consider that the Appellant should have investigated their own eligibility and concluded that resignation would directly impact their entitlement; however I do not consider that this failure amounts to an act of bad faith.

4.51 I turn now to consider the first two elements of change of position, namely whether the Appellant's circumstances have changed detrimentally and whether there is a causal connection between the overpayments and the change. I consider that these two elements are best considered together.

4.52 I note that the Appellant in all its submissions indicates that the money it received as a result of the overpayment was spent on general cost of living and that all tax implications were paid and met.

4.53 I note that the Appellant states that it will not be able to repay the monies due as these have been spent on ordinary living expenses. I have reviewed the case law provided by NHS England, specifically *Lipkin Gorman v Karpnale Ltd [1991] AC 188 §580*. Having considered the judgement therein, the following paragraph from Lord Goff is particularly enlightening:

I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things.

4.54 I am mindful that this does not mean that expenditure needs to be extraordinary in order to satisfy the requirements for a change of position defence. Instead, the question is that, in the absence of the money, would the same expenditure have been incurred? I am mindful of the statements by the Appellant, that these were "*ordinary living expenses*" and "*to maintain his lifestyle*". Consequently, I find it difficult to understand how the Appellant's position has been changed. I note that nowhere in his submissions is there any suggestion that the Appellant would have lived a lesser lifestyle were he not in receipt of the money. To the contrary I consider that the statements made suggest that these were exactly the sort of expenditure Lord Goff was suggesting are excluded from the change of position defence.

4.55 I also note that the Appellant has provided statements as to what they might have done in the absence of suspension payments. In his Notice of Appeal, the Appellant states that he did not seek alternative employment, he then provided in his observations that he had been unable to work since 2018. It is not clear if he would have sought employment in the absence of suspension payments. I consider that these statements further confuse the question of what the Appellant would have done in the absence of the suspension payments, if anything. I consider that a key element of any "change of position" must be a change, and that everything I have been provided with is suggestive of a position remaining unchanged.

4.56 However, I note the comments regarding tax payments made by the Appellant and that these would not have been made were there no suspension payments being received. Nonetheless, I do not consider that the paying of obligatory taxes on payments would engage the change of position defence and there is no information provided by the Appellant to suggest otherwise. This is particularly compounded by the lack of any certainty indicated by the Appellant regarding whether any tax would or would not be recovered if the overpayments were recovered. Instead, it has been stated that "it is unlikely that the Appellant would be entitled to a tax rebate", without any justification, explanation of why it would be limited, or statutory provisions which would allow me to verify this assertion.

4.57 Had I been provided with confirmation of any such monies which may not be recoverable, it may be that these amounts were not suitable for recovery as an overpayment; however I have not been provided with suitable evidence or explanation to take such a view. I am mindful that a change of position is not a complete defence to overpayment and instead it may prevent the recovery of such sums as induced by said change of position. In the absence of any clarity that there are any unrecoverable sums, or the amounts that they may pertain to, and with the burden of proof being on the Appellant to provide such clarity, I do not consider that these payments represent a change of position either.

4.58 Without this element, I do not consider it necessary to have regard to the question of whether there was a causal connection, and conclude that a change of position defence cannot be relied on.

4.59 As regards to any legitimate expectation, it is unclear to me what exact expectation was being impeded. It was clear that suspension payments were only to continue for as long as the Appellant was entitled to them under the 2015 Determination, and were dependent on eligibility as detailed therein. It was clearly stated in the Regulations and the 2015 Determination there may be recovery of any overpayments to which the recipient was not entitled. If there was any legitimate expectation that overpayment recovery would not be pursued, I have not been provided with such evidence. I have not been directed to any information indicating the practice of not seeking recovery of overpayment in these circumstances, and so I do not consider that legitimate expectation is of any aid to the Appellant's position.

4.60 I note the Appellant's comments relating to its financial situation. NHS England should liaise with the Appellant to put in place a phased recovery over several months so as to mitigate the impact.

5 DETERMINATION

5.1 I determine that the Appellant was not entitled pursuant to paragraph 4(1)(b) of the 2015 Determination to suspension payments for the period April 2019 to March 2022.

5.2 I determine that NHS England is not estopped from recovering the overpayment made during the period April 2019 to March 2022 and that the Appellant cannot rely on a change of position. As a result, the Appellant should repay the payments which were made in error.

Head of Appeals
NHS Resolution