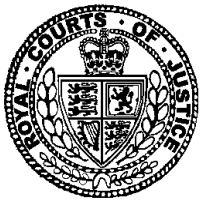

Neutral Citation Number: [2024] EWHC 3005 (Admin)

Case No: AC-2024-LON-001714

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 November 2024

Before :

MRS JUSTICE LANG DBE

- -

Between :

PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL CARE	**Appellant**
- and -	
(1) GENERAL PHARMACEUTICAL COUNCIL	**Respondents**
(2) R2	

- -
- -

Nyasha Weinberg (instructed by **Browne Jacobson LLP**) for the **Appellant**
Helen Fleck (instructed by the **Legal and Enforcement Department of the General Pharmaceutical Council**) for the **First Respondent**
Simon Livingstone (instructed via the **Direct Access Scheme**) for the **Second Respondent**

Hearing date: 22 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 25 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE LANG DBE

Mrs Justice Lang :

1. The Appellant ("the Authority") has referred, under section 29(4) of the National Health Service Reform and Health Care Professions Act 2002 ("the 2002 Act"), the decision of the Fitness to Practise Committee ("the Committee") of the First Respondent ("the Council"), dated 22 March 2024, to impose a stay of the fitness to practise ("FTP") proceedings against the Second Respondent ("R2").

2. The Committee found that R2 had a substantive legitimate expectation that no further action would be taken against him in connection with his alleged involvement in a fraudulent scheme for the sale of medication overseas, and the Council could not properly resile from this decision. Therefore the allegations were not capable of being referred under rule 6 of the General Pharmaceutical Council (Fitness to Practise and Disqualification etc. Rules) Order of Council 2010 ("the 2010 Rules"), and the Committee had no statutory power to make a determination.

3. The Committee also found three serious irregularities in the Council's handling of the case. First, the case should not have been referred under the urgency provision in rule 6(5)(b) of the 2010 Rules as there was no urgency. Second, the Council breached rule 11(1) of the 2010 Rules by failing to notify R2 of the referral within the requisite time period of 10 days, and he was only notified six months later. Third, R2 was never given reasons, in breach of rule 11(3) of the 2010 Rules, for the direct referral to the Committee, bypassing the Investigating Committee, until the Committee directed disclosure on day 4 of the hearing.

4. The Committee found that this was an exceptional case, and stated:

> "184. It has concluded that in these circumstances, in a case where R2 had a legitimate expectation that its case would not be reopened, and where there were three serious irregularities, its sense of justice would be offended if the case against R2 were permitted to continue. In order to protect the integrity of the regulatory system, the Committee directed that the entirety of R2's case be stayed for abuse of process."

5. The Authority submitted that the Committee:

   i) wrongly directed itself on the erroneous closure of the case by the Council (Ground 1);

   ii) wrongly concluded that the allegation was not capable of being referred under rule 6 of the 2010 Rules (Ground 2); and

   iii) wrongly applied the test for the imposition of a stay for abuse of process (Ground 3).

6. In consequence, the Authority submitted that the Committee's determination was insufficient for the protection of the public, as the allegations that R2's fitness to practise was impaired were never determined, and the public interest was not properly considered. Therefore the Committee's decision should be quashed and remitted for reconsideration by a fresh panel.

7. The Council conceded that the appeal should be allowed and the decision quashed and remitted for reconsideration. The Council also applied for the adverse costs order made by the Committee to be quashed.

8. R2 resisted the appeal, and instead invited the Court to uphold the reasoning and the decision of the Committee.

History

9. R2 has been a registered pharmacist since 2009. He and his brother, Mr Mohammed Amier, were co-directors of a pharmacy ("P Ltd"). Mr Amier was also the owner/director of Mojji LS Ltd, trading as British Chemist. Mr Amier was referred to the Council in March 2020. In the light of evidence that emerged in the course of the investigation against Mr Amier, R2 was referred to the Council in October 2021.

10. The allegations put to Mr Amier and R2 concerned the fraudulent sale of high-value short supply medications overseas and included the preparation of falsified prescriptions and the dishonest wholesaling of medicines secured against prescriptions for supply to patients. The purpose of the fraud was to arbitrage medicines prices across the EU, with the impact for patients of reducing the domestic supply of high value short supply medicines.

11. Mr Amier admitted the fraud, but said that R2 was not involved in it. R2 denied the allegations and emphasised that he had no involvement with wholesale operations at P Ltd.

12. The Medicines and Healthcare products Regulatory Agency ("MHRA") found on investigation two order forms and prescriptions where P Ltd had ordered quantities of Eviplera tablets from Alcura UK Limited. Alcura act for Gilead Sciences Limited ("Gilead"), who are the marketing authorisation holder of Eviplera. Gilead had a validation requirement that Eviplera was not to be purchased for export and that all orders accordingly must contain a prescription. It appeared that R2 made two orders in October 2020 with a prescription provided by Mr Amier, but with R2's name on it. Those products were then sold on to Shakespeare Pharma a few days after receipt.

13. Evidence from Goncalo Sousa concerned sales from Janssen-Cilag to P Ltd between January 2020 to June 2020 where R2's name was used on orders which were sold on for wholesale purposes.

14. Before the Committee, Mr Amier admitted the allegations made against him. The Committee found that Mr Amier's fitness to practise was currently impaired by reason of misconduct. The sanction imposed was suspension from the register for 12 months.

15. Unusually, the stay application was only made by Mr Livingstone, counsel for R2, at the end of the hearing of evidence on the facts. In his evidence and submissions to the Committee, R2 reiterated that he was not aware of the fraudulent activities and was not involved in them. In the light of the Committee's decision to stay the proceedings, no findings of fact were made in R2's case.

Legal framework

The role of the Authority

16. The Authority is a body corporate established pursuant to section 25(1) of the 2002 Act. By section 25 of the 2002 Act, the general functions of the Authority are *inter alia* to promote the interests of users of health care in relation to the performance by medical regulatory bodies of their functions, and to promote best practice in the performance of those functions. The over-arching object of the Authority in exercising its functions is the protection of the public: see *Council for the Regulation of Health Care Professionals v GMC & Ruscillo* and *Council for the Regulation of Health Care Professionals v NMC & Truscott* [2004] EWCA Civ 1356, per Lord Phillips MR, at [60].

17. The decision was a "relevant decision" within the meaning of section 29(2)(a) of the 2002 Act.

18. The grounds for a referral are set out in section 29(4) and (4A) of the 2002 Act, which provide as follows:

> "(4) Where a relevant decision is made, the Authority may refer the case to the relevant court if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.
>
> (4A) Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient—
>
> (a) to protect the health, safety and well-being of the public;
>
> (b) to maintain public confidence in the profession concerned; and
>
> (c) to maintain proper professional standards and conduct for members of that profession."

19. By section 29(7) of the 2002 Act, where a case is referred to the High Court, it is to be treated as an appeal.

The approach of the High Court

20. Under section 29(8) of the 2002 Act, the Court may:

    i) dismiss the appeal,

    ii) allow the appeal and quash the relevant decision,

    iii) substitute for the relevant decision any other decision which could have been made by the committee or other person concerned, or

iv) remit the case to the committee or other person concerned to dispose of the case in accordance with the directions of the court,

v) may make such order as to costs as it thinks fit.

21. Applying CPR 52.21(3), an appeal under section 29 should be allowed if the relevant decision was "wrong" or "unjust because of a serious procedural or other irregularity in the lower court". A procedural irregularity which is not serious and does not render the decision unjust will not necessarily provide a sufficient basis for an appeal: see *Hussain v General Pharmaceutical Council* [2018] EWCA Civ 22, per Newey LJ at [35].

22. In *Ruscillo*, Lord Phillips gave guidance on the approach of the High Court to a reference, as follows:

> "73. What are the criteria to be applied by the Court when deciding whether a relevant decision was 'wrong'? The task of the disciplinary tribunal is to consider whether the relevant facts demonstrate that the practitioner has been guilty of the defined professional misconduct that gives rise to the right or duty to impose a penalty and, where they do, to impose the penalty that is appropriate, having regard to the safety of the public and the reputation of the profession. The role of the Court when a case is referred is to consider whether the disciplinary tribunal has properly performed that task so as to reach a correct decision as to the imposition of a penalty. Is that any different from the role of the Council in considering whether a relevant decision has been 'unduly lenient'? We do not consider that it is. The test of undue leniency in this context must, we think, involve considering whether, having regard to the material facts, the decision reached has due regard for the safety of the public and the reputation of the profession.
>
> …
>
> 76. This passage was cited with approval by Leveson J in *Solanke*. As he observed, not all of it is appropriate in a case where the primary object of imposing a penalty is the protection of the public. We consider that the test of whether a penalty is unduly lenient in the context of section 29 is whether it is one which a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could reasonably have imposed.
>
> …
>
> 78. The question was raised in argument as to the extent to which the Council and the Court should defer to the expertise of the disciplinary tribunal. That expertise is one of the most cogent arguments for self-regulation. At the same time Part 2 of the Act has been introduced because of concern as to the reliability of

> self-regulation. Where all material evidence has been placed before the disciplinary tribunal and it has given due consideration to the relevant factors, the Council and the Court should place weight on the expertise brought to bear in evaluating how best the needs of the public and the profession should be protected. Where, however, there has been a failure of process, or evidence is taken into account on appeal that was not placed before the disciplinary tribunal, the decision reached by that tribunal will inevitably need to be reassessed."

23. In *General Medical Council v Jagjivan* [2017] EWHC 1247 (Admin), Sharp LJ, giving the judgment of the Court, gave guidance on the correct approach to appeals under section 40A Medical Act 1983, which confers a right of appeal on the General Medical Council if they consider that a decision is not sufficient for the protection of the public. She held:

> "*The correct approach to appeals under section 40A*
>
> 39. As a preliminary matter, the GMC invites us to adopt the approach adopted to appeals under section 40 of the 1983 Act, to appeals under section 40A of the 1983 Act, and we consider it is right to do so. It follows that the well-settled principles developed in relation to section 40 appeals (in cases including: *Meadow v General Medical Council* [2006] EWCA Civ 1390; [2007] QB 462; *Fatnani and Raschid v General Medical Council* [2007] EWCA Civ 46; [2007] 1 WLR 1460; and *Southall v General Medical Council* [2010] EWCA Civ 407; [2010] 2 FLR 1550) as appropriately modified, can be applied to section 40A appeals.
>
> 40. In summary:
>
> i) Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.
>
> ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong': see *Fatnani* at paragraph 21 and *Meadow* at paragraphs 125 to 128.
>
> iii) The court will correct material errors of fact and of law: see *Fatnani* at paragraph 20. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing (see *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642; [2003] 1 WLR 577, at paragraphs 15 to 17, cited with approval in *Datec Electronics*

> *Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325 at paragraph 46, and *Southall* at paragraph 47).
>
> iv) When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4).
>
> v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see *Fatnani* at paragraph 16; and *Khan v General Pharmaceutical Council* [2016] UKSC 64; [2017] 1 WLR 169, at paragraph 36.
>
> vi) However there may be matters, such as dishonesty or sexual misconduct, where the court "is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal …": see *Council for the Regulation of Healthcare Professionals v GMC and Southall* [2005] EWHC 579 (Admin); [2005] Lloyd's Rep. Med 365 at paragraph 11, and *Khan* at paragraph 36(c). As Lord Millett observed in *Ghosh v GMC* [2001] UKPC 29; [2001] 1 WLR 1915 and 1923G, the appellate court "will afford an appropriate measure of respect of the judgment in the committee … but the [appellate court] will not defer to the committee's judgment more than is warranted by the circumstances".
>
> vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public.
>
> viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust (see *Southall* at paragraphs 55 to 56)."

24. In *Professional Standards Authority v NMC & X* [2018] EWHC 70 (Admin) Elisabeth Laing J. considered the guidance in *Ruscillo* and *Jagjivan* (at [47] – [48]). On the facts of that case, she concluded that the decisions of the NMC and the Committee to offer no evidence, and to find that there was no case to answer, were decisions that no reasonable NMC or Committee could have reached (at [62]).

Stay of proceedings

25. I refer to the useful summary of the legal principles in 'Disciplinary and Regulatory Proceedings' (10th ed.): Foster, Treverton-Jones, and Hanif:

> "**(6) Stay of proceedings**
>
> **7.53** The civil courts have an inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.[1]
>
> [1] Per Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, at 529 cited with approval by Lord Bingham at para 22E in *Johnson v Gore Wood & Co* [2000] UKHL 65, [2002] 2 AC 1, [2001] All ER 481.
>
> **7.54** The power includes a power to stay proceedings before the disciplinary tribunal of a public authority.
>
> **Abuse of process**
>
> **7.55** It is well established that abuse of process as a doctrine does apply to disciplinary cases.[1] At common law, a tribunal has the jurisdiction to prevent its procedures from abuse: in appropriate cases, it may strike out or stay proceedings as an abuse of process.
>
> [1] See *R v Chief Constable of Merseyside Police ex parte Merrill* [1989] 1 WLR 1077, and *R (on the application of the Independent Police Complaints Commission) v Chief Constable of West Mercia* [2007] EWHC 1035 (Admin).
>
> **7.56** In circumstances where there cannot be a fair trial, or where the principle of fairness dictates that the respondent should not be tried, it may be appropriate for the matter to be stayed.[1] The general test for whether proceedings amount to an abuse of process is whether their prosecution/continuation would offend the Court's sense of justice and propriety. Abuse of process is a broad principle with no determined limits. The doctrine, and the grounds on which proceedings may be stayed in criminal proceedings, were summarised by Lord Dyson in *R v Maxwell*:[2]
>
> "It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the

first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend the court's sense of justice and propriety (per Lord Lowry in *R v Horseferry Road Magistrates' Court, Ex p Bennett[1994] 1 AC 42, 74g*) or will undermine public confidence in the criminal justice system and bring it into disrepute (per Lord Steyn in *R v Latif [1996] 1996] 1 WLR 104, 112f*)."

[1] *R v Beckford* [1996] 1 Cr App R 94 CA.

[2] *R v Maxwell* [2011] 1 WLR. 1837 at [13]."

…..

Other grounds for stay

7.86 Whilst delay is one of the more commonly deployed grounds which the courts have to consider, other important aspects of the doctrine of abuse of process have given rise to applications to stay in the following areas of relevance to regulatory tribunals:

(a) non-disclosure by a prosecutor of relevant material;[1]

(b) inability of the defence to examine evidence;[2]

(c) inability of the defence to call evidence;[3]

(d) inability of the defence to be able to question a prosecution witness;[4]

(e) adverse media coverage;[5]

(f) misuse of the process;[6]

(g) bringing charges in breach of a promise not to prosecute;[7] and

(h) entrapment and other oppressive methods used to investigate.[8]

[1] *DPP v Meakin* [2006] EWHC 1067, *R v Carr* [2008] EWCA Crim 1283.

[2] *R (on the application of Ebrahim) v Feltham Magistrates' Court* [2001] EWHC Admin 130, [2001] 1 WLR 1293, [2001] 1 All ER 831.

[3] *R v Haringey Justices ex parte DPP* [1996] 2 Cr App R 119.

[4] *R v JAK* (1992) Crim LR 30.

[5] *R v Hamza (Abu)* [2006] EWCA Crim 2918, *R v Dunlop* [2006] EWCA Crim 1354.

[6] *CPS v Mattu* [2009] EWCA Crim 1483, held an abuse to prosecute related charges where a basis of plea was entered in relation to earlier charges inconsistent with those related charges.

[7] *Jones v Whalley* [2006] UKHL 41, held no prosecution permissible where the respondent was previously cautioned for the same offence; *R (H) v Guildford Youth Court* [2008] EWHC 506 (Admin).

[8] *R v Looseley, Attorney General's Reference (No 3 of 2000)* [2002] 1 Cr App R 29."

26. In *Council for the Regulation of Health Care Professionals v General Medical Council ("GMC") & Dr Gurpinder Saluja* [2006] EWHC 2784 (Admin), the GMC FTP Panel stayed proceedings on the grounds that the registrant had been entrapped by a journalist into providing sick notes for money. On a referral by the Council for the Regulation of Health Care professionals, Goldring J. held that the FTP Panel erred in imposing a stay. His conclusions on jurisdiction were as follows:

> "44. As I have said, the Council accepts that the FPP had jurisdiction to impose a stay. In doing so the FPP was purporting to apply the principles of English criminal law. That is consistent with what is agreed to be the procedure of such a disciplinary hearing when the facts are being decided. Such a procedure acts as a safeguard for the doctor. While therefore the proceedings are not criminal, as Mr. Englehart rightly submits, it is the application by the FPP of the criminal law to which this appeal relates. It would therefore seem to me artificial when considering the nature of a stay for abuse of process to have regard to the civil jurisprudence relating to different legal provisions in a quite different context.
>
> 45. By definition, the imposition of a stay for abuse of process in a criminal case means that it would be an abuse of the process of the court for the case to be tried. Once such a decision has been taken in a given case it seems to me inconceivable that the case could subsequently be pursued. That must be so whether the abuse is on the grounds of executive malpractice or delay. Such a finding is the effective end of the case. It amounts to its final determination. It is a wholly different situation to that which may obtain in civil appeals. It seems to me Lord Bingham's observations in Attorney General's Reference (No 2 of 2001) referred to above apply equally to the present situation.

> 46. The effect of such a ruling means that the case against the doctor can never be decided on its merits. It means that no penalty at all can ever be imposed. If the ruling was wrong it means that however desirable it might be for the protection of the public for action to be taken in respect of the doctor, it never can be. Although taken earlier in the trial process an erroneous finding of abuse of process would have the same effect as would an erroneous acquittal. The mischief against which section 29 is aimed occurs just as much where a disciplinary tribunal wrongly brings the case to an end on the grounds of abuse of process as where it wrongly concludes the conduct does not amount to professional misconduct or where it imposes too lenient a penalty. It would similarly be anomalous for the court not to be able to intervene."

27. Goldring J. reviewed the authorities and held as follows:

> "78. I derive the following from the authorities.
>
> 79. First, to impose a stay is exceptional.
>
> 80. Second, the principle behind it is the court's repugnance in permitting its process to be used in the face of the executive's misuse of state power by its agents. To involve the court in convicting a defendant who has been the victim of such misuse of state power would compromise the integrity of the judicial system.
>
> 81. Third, as both domestic and European authority make plain, the position as far as misconduct of non-state agents is concerned, is wholly different. By definition no question arises in such a case of the state seeking to rely upon evidence which by its own misuse of power it has effectively created. The rationale of the doctrine of abuse of process is therefore absent. However, the authorities leave open the possibility of a successful application of a stay on the basis of entrapment by non-state agents. The reasoning I take to be this: given sufficiently gross misconduct by the non-state agent, it would be an abuse of the court's process (and a breach of Article 6) for the state to seek to rely on the resulting evidence. In other words, so serious would the conduct of the non-state agent have to be that reliance upon it in the court's proceedings would compromise the court's integrity. There has been no reported case of the higher courts, domestic or European, in which such "commercial lawlessness" has founded a successful application for a stay. That is not surprising. The situations in which that might arise must be very rare indeed.
>
> 82. As will become apparent, I do not accept that for a journalist to go into a doctor's surgery and pretend to be a patient in

> circumstances such as the present is similar to abuse of power by an agent of the state.
>
> 83. Fourth, in the present disciplinary hearing there is no state involvement in the proceedings being brought. These are proceedings brought against a doctor by his regulator in order to protect the public, uphold professional standards and maintain confidence in the profession. These are to a significant degree different considerations from those that apply to a criminal prosecution and misuse of executive powers by the state's agents.
>
> 84. Fifth, it would be an error of law in considering any application for abuse of process for the tribunal not to have well in mind the differences to which I have referred. It would not be appropriate for an FPP to approach the conduct of journalists as though they were agents of the state.
>
> 85. Sixth, "commercial lawlessness" can be a factor in an application to exclude evidence under section 78, although again different considerations apply as between state and non-state agents.
>
> 86. Seventh, when deciding in any given case whether there has been an abuse of process, the tribunal, here the FPP, is exercising a discretion. In doing so, it must consider all the facts of the case as well as the factors to which I have already referred. While guidance can be obtained from such aspects as were referred to in *Loosel*, no one aspect is determinative and the aspects there set out are not exhaustive.
>
> 87. Eighth, if the defendant's Article 8 rights have been infringed that is merely a matter to be taken into account when deciding whether there has been an abuse of process or, (and it amounts to the same thing), his Article 6 rights have been infringed: see for example *R v P* [2002] 1AC 146 and *Jones v University of Warwick* [2003] 1 WLR 954."

Power to correct an error

28. Before me, the parties agreed that the law was correctly stated in *R (Chaudhuri) v General Medical Council* [2015] EWHC 6621 (Admin) by Haddon-Cave J., as follows:

> "*Power to correct decisions vitiated by fundamental mistake of fact*
>
> 43. Mr Kellar submitted that a public body such as the GMC had an inherent or implied power to correct a decision made under a fundamental mistake of fact. Ms Callaghan submitted that, absent an express power, a statutory body has no power to reconsider previous decisions, except to correct minor slips or

accidental errors which do not substantially affect the rights of the parties or the decision arrived at; and the instant case could not properly be described as falling into the category of a 'minor slip'. She further submitted that it was significant that Rule 12 did not give the Registrar power to review a decision that Rule 4(5) was not engaged and an allegation was referable to the Case Examiners under Rule 4(2).

The conflict in the authorities

44. There has been a debate about the power of a public body to correct mistakes other than slips. The debate centred on the correctness of the following passage in the 7th edition (1994) of *Wade & Forsyth, Administrative Law,* at p. 262 (which is also to be found in the last but one edition the 10th edition (2008) at p. 194):

> "Even where such powers are not conferred, it is possible that statutory tribunals would have power, as has the High Court, to correct accidental mistakes; to set aside judgments obtained by fraud; and to review a decision where facts subsequently discovered have revealed a miscarriage of justice."

45. There is a conflict in the authorities on the scope of a public authority's power to review its own decisions: see *Akewushola v Secretary of State for the Home Department* [2000] 1 WLR 2295 (CA) at 2300–2301; *R (Secretary of State for the Home Department) v Immigration Appeal Tribunal* [2001] QB 1224 at [67]; *Porteous v. Wess Dorset District Council* [2004] EWCA Civ 244; *Jenkinson v NMC* [2009] EWHC 1111; *R (B) v Nursing and Midwifery Council* [2012] EWHC 1264 (Admin) at [32]-[39]; and *Fajemisin v. General Medical Council* [2013] EWHC 3501 (Admin).

46. I respectfully adopt the analysis of Keith J in *Fajemisin* (*supra*), who followed the Divisional Court in *Porteous* (*supra*) (Mantell LJ and Sir William Aldous), which held that the local authority had a power to revisit and rescind an earlier decision based on a fundamental mistake of fact. In my view, the inherent jurisdiction of public bodies to revisit previous decisions is not limited simply to correcting slips or minor errors which do not substantially affect the rights of the parties or the decision taken; on the contrary, public bodies have the inherent or implied power themselves to revisit and revoke *any* decision vitiated by a fundamental mistake as to the underlying facts upon which the decision in question was predicated.

Broad corrective principle

47. I have no doubt that such a broad corrective principle exists in administrative law. Public bodies must have the power

themselves to correct their own decisions based on a fundamental mistake of fact. To suggest otherwise would be to allow process to triumph over common sense. There is no sense in requiring wasteful resort to the courts to correct such obvious mistakes. Administrative law should be based on common sense.

48. The vitiating effect of fundamental mistakes of fact is well recognised in other areas of law, *e.g.* fundamental mistake in contract law (c.f. *Bell v. Lever Bros* [1932] AC 161). There have been previous helpful straws in the administrative wind regarding errors of fact giving rise to a duty to reconsider (see e.g. *Rootkin v. Kent County Council* [1981] 1 WLR 1186, *per* Lawton LJ; *R v. Newham LBC, ex parte Begum* [1996] 28 HLR, 646 at 656 *per* Stephen Richards J; Crawley BC v. B [2000] EWCA Civ 50; *R v. Bradford Crown Court, ex parte Crossling* [2000] COD 107; *R v. Inner London North Coroner, ex parte Touche* [2001] EWCA Civ 383 at [36]; *R(Zahid Hafeez) v. Secretary of State for the Home Department* [2014] EWHC 1342 (Admin) *per* Green J at [25]-[37]). Even the High Court has the power to reopen its own appeal procedure to prevent real injustice (see *Taylor v. Lawrence* [2003] QB 528 at [54].)

49. A broad corrective principle of the nature described above is consonant with the principles of proportionality and utility. It is also consonant with the emerging principle of "good administration" in administrative law (see *Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) (No. 2)* [2013] UKSC 39, Lord Sumption JSC at paragraph [32]; *R(Plantagenet Society v. Secretary of State for Justice* [2014] EWHC 1662 and the cases cited at [93] such as *Case T-83/91 Tetra Pak International SA v. Commission of the European Communities*; *Case T-231/97 New Europe consulting Ltd v. Commission*; and *Joined Cases T-33/984 and T-34/98 Petrotub v. Council*; *European Administrative Law*). Not to have such a principle would be inimical to good administration.

50. In my view, the law is correctly stated in the current edition of *Wade & Forsyth, Administrative Law,* the 11th edition (2014), at p. 192:

> "Even where such powers are not expressly conferred, it seems that statutory tribunals have power to correct slips and to set aside judgments obtained by fraud or based on a fundamental mistake of fact."

51. The principle would naturally operate subject to the ordinary principles of fairness in administrative law (*e.g.* legitimate expectation and the rights of persons acting to their detriment in reliance upon such decisions)."

Legitimate expectation

29. A legitimate expectation of a substantive benefit may arise where a public authority expressly promises or assures an individual that they will receive or retain a benefit. The representation must be "clear, unambiguous and devoid of relevant qualification": *R v Inland Revenue Commissioners ex parte MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545, per Bingham LJ, at 1570. It is not necessary to establish detrimental reliance in order to establish a legitimate expectation: *Re Finucane's Application for Judicial Review* [2019] UKSC 7; [2019] 3 All ER 191, per Lord Kerr at [63] and [72]. But the extent of any detrimental reliance may be taken into account in assessing the fairness of a public authority resiling from a legitimate expectation.

30. A public authority may resile from a legitimate expectation if the Court determines it is fair to do so, weighing any overriding interest relied upon for the change against the requirements of fairness: see *R v North and East Devon HA ex parte Coughlan* [2001] QB 213, per Lord Woolf MR at [57]; *Re Finucane* per Lord Kerr, at [62]; *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, per Laws LJ at [35]. There is also authority for the use of a proportionality test. In *Paponette v AG of Trinidad and Tobago* [2012] 1 AC 1, Lord Dyson said, at [38]:

> "The Board agrees with the observation of Laws LJ in *R (Abdi & Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1362, per Laws LJ, at [68]: …
>
> > "The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.""

31. Mr Livingstone referred to *Brabazon-Drenning v UKCC* [2001] HRLR 6, where the Court found that the Professional Conduct Committee acted unlawfully in finding the registrant guilty on charge 6 which the Preliminary Proceedings Committee had previously decided should not be pursued. Elias J. held, at [31]:

> "31. In my judgment, quite independently of the question of legitimate expectation, it seems to me that once the Committee has made its ruling and has determined that there should be no further action taken in respect of that charge, then unless there is some misrepresentation, or unless they are acting under some fundamental misconception of the true position, then they are bound by that determination. I do not think it is open to them to resuscitate it at will, or because they have discovered other charges and they wish to strengthen the case in some way against the individual. If I am wrong about that, then I have no doubt, in any event, that it would be unfair for the matter to be resuscitated in the circumstances of this case, particularly given the unambiguous and unequivocal way in which the decision not to pursue it had been notified to the appellant. The appellant did have a substantive legitimate expectation that the matter would

> not be reopened, and there was no countervailing public interest which justified the Committee frustrating that expectation."

Ground 1

The Committee's decision

32. I begin by setting out extracts from the Committee's summary of the evidence and submissions presented to it by Mr Livingstone, on behalf of R2, and Mr Ross, on behalf of the Council.

33. Mr Livingstone made the following submissions to the Committee:

> "100. R2 was initially informed about a Council investigation into his practice in October 2021. He was advised in September 2022 by solicitors acting for the Council (CMS) that the concern did not meet the Council's threshold, and the case against him would be closed. However, in August 2023 he was then advised by the Council that this "closure letter" had been sent in error. R2 raised a formal complaint against the Council, who stated that his case had been reviewed by a senior lawyer in-house, who disagreed with the original decision to close the case. The Council subsequently apologised for a series of errors, including a lack of communication. R2 explained in his witness statement how disgusted he is by "the most extreme form of injustice and lack of professionalism I had experienced in my life." During his oral evidence R2 confirmed that he has no trust in the Council.
>
> …..
>
> 103. In the letter from CMS to R2 on 29 September 2022, they stated:
>
> "We have now concluded our enquiries into the investigation into your fitness to practise….The focus during any investigation is whether there is enough evidence to support an allegation and also whether the evidence shows that a registrant's fitness to practise is currently impaired…The GPhC have looked carefully at all of the information obtained during the course of our initial enquiries and have decided that the concern should not go to the Investigation Committee. In reaching this decision, the GPhC applied it's 'threshold criteria' and considered that the threshold criteria is not met. The GPhC will not be taking any further action over this matter and the investigation will now be closed."
>
> 104. On 15 August 2023, some 11 months later, R2 received an email from the Council which stated:

"Unfortunately, upon review by our Senior Lawyer, this closure letter was sent to you in error and the case concerning you remains open".

105. Unsurprisingly, R2 was not happy with this, and raised a formal complaint, including that it had taken so long for him to be advised about this. The Council investigated the complaint and confirmed the following chronology:

• 19 September 2022 - the Professional Regulation Manager ("PRM") drafted a decision recommending closure and saved this to the file. He then asked to speak to a senior lawyer at the Council.

• 21 September 2022 - the senior lawyer reviewed the evidence bundle and emailed the PRM setting out why he believed the case should not be closed. He recommended that R2's case be referred to the Fitness to Practise Committee after further enquiries were made, but this decision was not recorded on the file.

• 27 September 2022 - CMS wrote to Ms Longia at the Council asking if the case against R2 can be closed.

• 29 September 2022 - Ms Longia advised CMS that there was a closure decision on file and the case could be closed and the parties notified. R2 was notified accordingly.

• 16 March 2023 - the senior lawyer directly referred R's case to the Fitness to Practise Committee.

• April 2023 - an internal audit picked up that R2's case had been closed, then reopened and advised that he should be notified.

• 15 August 2023 - R2 was notified that his case had been reopened.

106. Mr Livingstone submitted that the Council had not produced any evidence of a "fundamental misconception of the true position" that would justify allowing the case to be reopened. He said that a decision was made by the PRM and that decision was communicated to his client. He said that just because another member of the Council, a senior lawyer, subsequently made a different decision this did not amount to a misrepresentation. He also relied on the reasoning of LJ Rose in the Brabazon-Drenning case that, in any event, it would be unfair for the matter to be resurrected, particularly given the unambiguous and unequivocal way in which the decision not to pursue it had been notified to the appellant, which is similar to R2's case. Mr Livingstone submitted that R2 had a substantive, legitimate expectation that the matter would not be reopened,

and there was no countervailing public interest which justified the Committee frustrating that expectation."

34. Mr Ross made the following submissions to the Committee:

> "107. Mr Ross responded to Mr Livingstone's submission, stating that the Council is permitted to change its decision where the original decision was founded on a mistake. He referred to the Brabazon-Drenning case and submitted that in the present case there was no "misrepresentation", but rather there was a "fundamental misconception" of the position. He said that the "fundamental mistake" was that CMS told R2 that the case was to be closed when it should not have been. He said that there never was a determination by the Council to close the case. Even if the Committee was against him on this point, Mr Ross submitted that the Brabazon-Drenning case was decided some time ago, and since then there have been two reported cases where it was held that a case can be reopened if it was closed by mistake.
>
> 108. The first case Mr Ross relied upon was the case of Femi Julius Abiodun Fajemisin v The General Dental Council [2013] EWHC 3501 (Admin)….
>
> 109. Mr Ross said that the "fundamental mistake of fact" in the present case was that the Council closed R2's case prematurely (although later on in his submissions, recited at paragraph 115 in this decision, he said that the Council's position altered).
>
> 110. The second case which Mr Ross relied upon was R on the application of Dr Anup Chaudhuri v General Medical Council [2015] EWHC 6621 (Admin)…..
>
> 112. The Committee also gave Mr Ross time to take instructions from his instructing solicitors, as the Committee had various questions regarding the chronology of R2's case. Mr Ross subsequently produced a document from the senior lawyer, acting as the Registrar Delegate, dated 24 March 2023, referring R2's case directly to the Fitness to Practise Committee. This stated:
>
> "*I have decided to refer an allegation against the above Registrant to the Fitness to Practise Committee because*
>
> *An allegation has been made that the Registrant's fitness to practise is impaired by reason of article 51(1)(a) (misconduct) and I consider that the public interest is best served by urgent consideration of the case.*."
>
> 113. Mr Ross also produced two internal emails from the senior lawyer at the Council.

The first is dated 21 September 2022 and is addressed to the PRM. This stated:

"Although on first look it looked like closure might be an option my review of the bundle and evidence leaves me uneasy…I think we should be cautious in accepting Mr A's explanation at face value as part of our case is that he engaged in dishonest conduct…I appreciate that [R1] purportedly putting his hands up to it and the fact the emails came from a generic account do look pretty unsurmountable on first blush. However, this was serious dishonesty and simply accepting at face value what is being said by the two people implicated does not look well without really trying to unpick each element of their explanation. Bearing in mind we work on the civil standard any of the lines of enquiry above tending to show it was [R2] will potentially be enough to put before the FtPC. Let me know what you think."

114. The second email is again from the senior lawyer, this time to the Director of Fitness to Practise dated 4 April 2023. The first sentence refers to "*a closed case but which in fact had been reopened following closure. I thought it helpful to set out what happened and also to answer your question about risk etc.*" In that email the senior lawyer stated:

"*The fraud is quite simple. They fabricate patient prescriptions because manufacturers only supply these high value short supply meds against a valid prescription. This is what [R1] did. There is evidence that [R2] was also doing this through a jointly owned pharmacy but [R1] in his response to allegations to CMS claimed [R2] had no knowledge and was innocent. Why any regulator would take at face value an assertion by someone who is cynically and dishonestly fabricating prescriptions to secure medicines is beyond me. Suffice to say on a closer inspection of the evidence it was apparent that [R2's] involvement could still be in issue notwithstanding what [R1] was saying. I reviewed the SAD [Standalone Closure Decision] for [R2]and rejected it as needing more investigation but that was in essence to further reinforce the evidence that [R2] is implicated and to rebut [R1's] admission it was all him.*"

115. Having taken further instructions directly from the senior lawyer overnight, Mr Ross submitted that the Council's case was that there was never any decision to close the case, either by the PRM or the senior lawyer. He said that the case was "technically" closed on the case management system, and that this was done erroneously. This error was identified on 16 March 2023, but then there was a further delay by the manager, so that R2 was not notified until August 2023. Mr Ross submitted that this was against a backdrop of a backlog of cases and an increased referral rate."

35. The Committee reviewed the authorities, including, at paragraph 170, *R (B) v Nursing and Midwifery Council* [2012] EWHC 1264 (Admin) in which I distinguished an "exercise of judgment" from a slip or a fundamental mistake.

36. The Committee's conclusions were as follows:

> "171. The Committee has to decide whether there has been a fundamental mistake of fact which would allow the Council to re-open the case against R2, in accordance with the Chaudhuri case. There does not appear to be any dispute between the parties that the Council has no power to revisit and rescind decisions unless it can be shown there has been a fundamental mistake of fact which would be a fundamental mistake as to the underlying facts upon which the decision in question was predicated. The Committee considered that the onus of satisfying it that there had been a fundamental mistake of fact was on the Council.
>
> 172. The Committee therefore went on to consider whether there had been any fundamental mistake of fact which would give the Council the power to reopen the decision of the PRM.
>
> 173. The Committee considered that the decision by the PRM was an exercise of judgement by an employee of the Council, and not a mistake of fact. The letter from CMS confirmed that the Council had "looked carefully" at the evidence against R2 and had come to the decision that it did not meet the threshold criteria. The PRM had considered the nature of the allegation, which included dishonesty, prior to making the decision. The senior lawyer also subsequently carried out the same exercise and decided that the criteria were met. However, there is no evidence or submission from the Council that the senior lawyer was looking at different evidence, or that there had been a fundamental mistake of fact. Instead, it was just a case of the senior lawyer taking a different view to the PRM (the senior lawyer later stated, "Why any regulator would take at face value an assertion by someone who is cynically and dishonestly fabricating prescriptions to secure medicines is beyond me". The mere fact of a subsequent review of the PRM's decision by the senior lawyer, acting as Registrar Delegate, did not amount to a fundamental mistake of fact.
>
> 174. The Committee considered that where there had been an unequivocal and unambiguous decision made, which was relayed to R2, absent a fundamental mistake of fact, then the Council, as a public body, could not resile from this decision. The evaluation of the senior lawyer was simply a different view from that of the PRM. He had looked at the case and made a different assessment. This did not amount to a fundamental mistake as to the underlying facts upon which the decision had been made. It was a different judgement, but the Council has not provided any evidence of a fundamental mistake of fact. In

> circumstances where the initial decision was made following an exercise of judgement, then the Committee could find no fundamental mistake or misconception which would mean that the Council should be permitted to reopen the case against R2.
>
> 175. The Committee considered that the benefit promised to R2 was substantive, in that he was informed that the allegations would not proceed and that he had no case to answer. In the absence of any change of circumstances, to frustrate this expectation is so unfair it would amount to an abuse of process.
>
> 176. The Committee has therefore concluded that the referral made by the Registrar Delegate to the Fitness to Practise Committee on 24 March 2023 was not capable of being referred under Rule 6 and this Fitness to Practise Committee has no statutory power to make any determination on the Allegation against R2.
>
> 177. Whilst the Committee appreciated it had a public interest role, it was also bound by the statutory framework which governed its functions. In the circumstances, to allow the Allegation to proceed without compliance with Rule 6 would amount to a serious procedural or other irregularity."

The Authority's submissions

37. The Authority submitted that the Committee should have directed itself in accordance with the account given by the Council. The Professional Regulation Manager ("PRM"), Mr Mohammed Choudhury, did not have the authority to make any decision in relation to closure of R2's case or to exercise his judgment on whether the case against R2 should be closed. The case was marked as "closed" in error because the PRM did not have authority to close the case. This was a fundamental mistake of fact and therefore the case should not have been treated as "re-opened".

38. Applying the principles in *Chaudhuri*, the Council had power to correct the error regarding closure. If the Panel had correctly directed itself, it might have taken a different approach to the abuse of process issue.

Conclusions

The Council's decision-making framework

39. By Article 52 of the Pharmacy Order 2010, rule 6 of the 2010 Rules and the Scheme of Delegation, the Registrar is responsible for initial action in respect of allegations.

40. Naturally, the volume of allegations means that the Registrar has to delegate his functions. The Authority Framework sets out the types of authority that have been delegated by the Registrar to people in different types of posts (paragraph 1.5). Table A sets out "General Authorisations" and provides that "Heads" exercise the authority

of the Registrar under the Pharmacy Order 2010 and the 2010 Rules. In the Fitness to Practise department, the Heads include Senior Professionals (Mr Glenn Mathieson, Head of Initial Assessment (Fitness to Practise) and Ms Alicia Marsh, Head of Professionals Regulation, Fitness to Practise) and Systems Regulatory Lawyers (such as Mr Salim Hafejee). Footnote 2 explains that a "small and specified number of senior managers also manage a function and are therefore able to make similar decisions to Heads for the purpose of their role". As Ms Fleck explained, this includes a PRM who is authorised to make final stand-alone decisions on case closure under the Fitness to Practise Investigation Plan and Report Form ("IPR").

41. Part 6 of the IPR provides guidance on closure criteria assessment. It provides as follows *(emphasis added by underlining)*:

> "66. This section includes the closure criteria assessment and how this is done. Once this assessment is completed, do not subject allegations which meet the closure criteria to the Threshold Criteria Assessment, next section.
>
> **A: Case Officer**
>
> **Closure criteria**
>
> 67. The criteria for closing a case and not referring it to the Investigating Committee are set out in the IPR. These are mostly self-explanatory. More information on lack of evidence is included below.
>
> 68. There is a lack of evidence to support the concern. For example, if a concern is raised that a professional dispensed the wrong strength drug, but the label on the medication or the packaging of the medication concurs with the prescription, then you might conclude that you do not have sufficient evidence to support the fact that a dispensing error occurred.
>
> 69. This closure criterion would not apply in circumstances where there is a conflict of evidence. For example, if an allegation is made that a Professional had sexually assaulted a patient and the Professional's version of events differs from that of the alleged victim and there is no other supportive evidence. In these circumstances, you have a conflict of evidence, rather than a lack of evidence, and so this closure criterion would be inappropriate and the allegation should be considered against the threshold criteria..
>
> ….
>
> 71. The reasons given should clearly record which criteria are assessed as being met and the basis for this assessment using an objective and evidence-based approach.
>
> **B: Professional's Regulation Manager**

Allocation

72. From the date this guidance takes effect cases will be allocated to PRMs using the PRM manager queue. PRMs will be able to review and decide upon any case within the queue and will not be barred from assessing cases emanating from their own teams. Externally investigated cases will also be submitted for review in the same queue.

73. The approach to review and decision making is set out below and will follow this process.

[A flowchart then sets out four stages as follows:]

- CO reviews against closure criteria.
- CO provides a recommendation and reasons.
- This is reviewed by a PRM and they make the final decision and provide reasons.
- The reasons are quality assured by DPSRL (initial 6 month period subject to review)

74. The PRM should follow the approach outlined above and consider the case against the closure criteria. The PRM will take account of the recommendation and reasons given by the Case Officer however the decision and reasons given by the PRM will be final. PRMs are encouraged to discuss cases with their PRM peers and other colleagues wherever they consider it beneficial to do so and to give feedback to case officers if their decision differs from the recommendation made.

75. The decision made and the recorded reasons should be capable of acting as a "stand-alone" decision. There should therefore be a clear statement of the criteria against which the case has been assessed and the reasons for determining that any of these have been met. The reasons given should be objective and evidence based, presented in plain English and written in such a way as to demonstrate a person-centred approach.

76. If the closure criteria are met in respect of all parts of the allegation, the assessment ends there and PRM should not move on to consider the threshold criteria. Where the closure criteria apply to part but not all of the allegation the PRM should move on to consider only the remaining elements of the allegation against the threshold criteria.

Part Seven: Threshold criteria assessment, recommended outcome and reasons

> …..
>
> **B: Professional Regulation Manager**
>
> 85. As with the closure criteria, the final decision and responsibility for drafting a clear set of objective, person centred, evidence-based reasons that can act as a free-standing decision document rest with the PRM and where business need requires it, others with delegated authority. The PRM is able to change both the recommendation and the reasons given for that recommendation without need for agreement from the Case Officer or escalation to an SPSRL."

42. In my judgment, it is clear from these extracts from the Authority Framework and the IPR, in particular those that I have underlined, that a PRM has delegated authority from the Registrar to make a final stand-alone decision on case closure. I note that the PRM in this case signed the template IPR Closure form, in his capacity as "Registrar's delegate".

43. The quality assurance scheme by senior lawyers, referred to in the flowchart above, was introduced for a trial period of 6 months, in light of the removal of the requirement for Pre-IC closures to be reviewed by a PRM in a different team. It remained in existence beyond the trial period, but it is only applied in a limited number of cases. The draft policy document titled "IPR: Pre-IC Closures QA Process" provides:

> "The review will be conducted using the attached checklist which is designed to ensure the criteria have been appropriately applied and that the reasons given act as a "stand-alone decision". This review will assess only the quality of the decision and not the outcome reached. SPSRL's are expected to recognise that there will be a range of acceptable outcomes in any given case and that the reasoned application of the criteria which will lead to a decision which is sufficient to protect the public and uphold the wider public interest."

44. I do not consider that the introduction of a quality assurance scheme by senior lawyers removed the PRM's delegated authority. As the flowchart and the draft policy document indicates, the aim of the quality assurance scheme was to check the quality of the PRM's reasoned application of the criteria, not the outcome.

45. In this case, the senior lawyer gave the PRM advice, but he did not dictate the outcome of the PRM's decision. Importantly, he did not make a decision on closure which replaced the PRM's decision. Although the PRM accepted the senior lawyer's advice, the PRM retained the decision-making power. As the email of 25 October 2022 makes clear, it was the PRM who decided to reject the Case Officer's recommendation for closure for further enquiries to be carried out.

The Council's assessment and decision-making in R2's case

46. On 19 September 2022, a Case Officer completed a template form from the Approvals Appendix of the IPR which was headed "Part six: Closure Criteria Assessment". I shall refer to this document as the "IPR Closure form". The Case Officer identified the following closure criteria:

> "The allegation is not capable of being referred …
>
> 3.6 There is a lack of evidence to support the allegation."

The Case Officer stated the reasons for closure as follows:

> "It is recommended that the case be closed with no further action. As detailed above, another registrant (Mr Amier) takes full responsibility for the allegations levied against the registrant and therefore this matter should be closed with no further action."

47. On 19 September 2022, the PRM reviewed the evidence and considered the Case Officer's recommendation. He completed the IPR Closure form, concluding that the closure criteria were met, and he set out the reasons why he recommended closure of R2's case. He signed and dated the IPR Closure form, in his capacity as "Registrar's delegate". Although he also referred to the "threshold criteria", that was probably a drafting error, because under the Council's procedures, if the closure criteria are met it is not necessary to go on to consider the threshold criteria. The completed IPR Closure form was saved on to the Council's case management system ("the System").

48. It is clear from the subsequent correspondence between the PRM and Senior Lawyers that the PRM had made a draft decision, rather than a final decision, because he submitted his decision to the senior lawyers for a quality review, prior to entering a formal closure decision on the System, and prior to notification to R2.

49. On 19 September 2022, the PRM emailed two senior lawyers saying "I have gone with a Pre IC (NFA)[1] as Mr Amier (Registrant 2) has admitted to falsifying [R2's] details …. without his knowledge or consent ….". Following a telephone conversation with the PRM on 20 September 2022, Mr Salim Hafejee, a Senior Lawyer, sent the PRM an email on 21 September 2022 advising further lines of investigation into R2's possible involvement. He said, among other matters:

> "….. Although on first look it looked like closure might be an option my review of the bundle and evidence leaves me uneasy. What worries me in particular is that the totality of orders with Janssen from [P Ltd] were by [R2] ……I have not read through the bundle so I have not checked if there were ever any orders from Moji ….
>
> I appreciate that Mr A purportedly putting his hands up to it and the fact that the emails came from a generic account do look pretty insurmountable on first blush. However, this was serious

[1] Abbreviation for Pre-Investigation Committee (No Further Action)

> dishonesty and simply accepting at face value what is being said by the two people implicated does not look well without really trying to unpick each element of their explanation…
>
> Let me know what you think."

50. The subject line in Mr Hafejee's email stated "Re: SAD (QA Sensor Check)" ("SAD" is an abbreviation of stand-alone decision). In his email, Mr Hafejee did not purport to overturn and re-make a closure decision by the PRM. He advised the PRM to undertake further investigations before making a final decision. Mr Hafejee's subsequent email of 4 April 2023, where he stated that he "reviewed the SAD for [R2] and rejected it as needing more investigation" did not accurately reflect the role of a senior lawyer when undertaking a quality assurance review of a PRM's closure decision in which the PRM was the final decision-maker (see the extracts from the IPR quoted above).

51. Although Mr Hafejee asked the PRM to let him know what he thought, there is no evidence before this Court of any further communication between the PRM and Mr Hafejee concerning this case.

52. The solicitors firm CMS Cameron McKenna Nabarro Olswang ("CMS") are a Panel Firm which provides support services to the Council for its fitness to practise functions. CMS had conducted the investigation into the allegations against Mr Amier and R2, and recommended closure of R2's case. On 27 September 2022, Ms Jennie Roddy, solicitor, emailed Ms Sharan Longia, the Panel Firms GPC Assessment Manager, stating:

> "Subject: Conclusion of investigation: [case number] ([R2])
>
> As you will recall, the above matter was returned with the following two cases ….As the two investigations relating to Mr A are continuing with further enquiries which do not involve [R2], I was wondering if it would be possible to see if the IRF[2] for [R2] is ready for sign off so we can conclude the matter with [R2]?"

53. Ms Longia apparently checked the System and saw the completed IPR Closure form, signed and dated by the PRM. Mr Hafejee's email to the PRM was not saved onto the System and therefore Ms Longia was not aware of it. The System did not record that a decision had been made. However, Ms Longia concluded that the PRM had made a decision to close the case, and so made an entry on the system that a decision to close had been made. She replied to Ms Roddy as follows:

> "Apologies – this IPR was signed off on 19 Sept and not sure why we didn't send it across. Please see attached with the closure agreed. Could you kindly send out closure letters to all relevant parties in the matter?"

54. The document attached to the email was named "IPR Appendix (PRM Sign Off).docx".

[2] Abbreviation for Investigation Report Form

55. On 29 September 2022, Ms Roddy emailed Ms Longia, informing her that she had notified relevant parties of the closure. Ms Roddy sent a letter to R2 dated 29 September 2022 which confirmed that the investigation was closed and no further action would be taken against him.

56. It was not until 25 October 2022 that the PRM notified Ms Longia and Mr Glenn Mathieson, Head of Initial Assessment (Fitness to Practise) that, in the light of Mr Hafejee's advice, he had not, in fact, made a final decision to close the case. He said:

> "I am just going through some of my previous standalone decisions. I have noticed that I didn't forward the outcome of the SPSRL sensor check. Please accept my apologies for the oversight on my part.
>
> I went with a Pre IC (NFA) on the basis that Mr Amier (Registrant 2) admitted to falsifying [R2]'s details on prescriptions/order …. without his knowledge or consent in the other linked cases. There is a linked case involving Mr Amier which is likely to go to FTPC. However, Salim's view was that we need to test the veracity of … Mr Amier's admission …. This in turn will help us understand the true nature [of] [R2's] involvement in the dishonest conduct.
>
> I have therefore rejected the IPR for further enquiries."

57. In my view, the PRM was at fault in leaving the signed and dated IPR closure form on the System for a month without any explanation that he had rejected the recommendation for closure for further enquiries to be undertaken. Furthermore, if he had uploaded Mr Hafejee's email on to the System, it might have prompted Ms Longia to check the status of the case with the PRM before closing it on the System. Arguably Ms Longia was at fault in assuming that the case had been closed when a closure decision was not recorded on the System; she should have checked with the PRM. As it was, Ms Longia acted in the mistaken belief that the case had been closed, which resulted in Ms Roddy sending a formal closure letter to R2.

58. I also consider that the PRM and Ms Longia were at fault in not immediately taking steps to rectify the mistake that had been made, by contacting R2 and informing him that the case against him had been closed in error. Astonishingly, R2 was not informed of this until 15 August 2023 when Ms Longia told him that the "closure decision was sent to you in error and the case concerning you remains open".

59. In my judgment, the closure letter sent by CMS to R2 on 29 September 2022 was based upon a fundamental error of fact, namely, Ms Longia's and Ms Roddy's mistaken belief that the PRM had made a final decision closing the case.

60. In response to R2's complaints, on 29 August 2023, Mr Mathieson wrote to R2, seeking to explain what had happened, and apologising on behalf of the Council. Among other matters he correctly stated:

> "Technically, the case was closed on our system, hence my reference to it being 'reopened'; though the reality is that the closure letter should not have been sent in the first place."

61. I consider that the Committee was mistaken in characterising this chain of events as the PRM closing the case and then the senior lawyer making a different decision on review and re-opening it. In fact, the PRM never closed the case. Ms Longia made an entry on the System that the case was closed[3], but she was not authorised to act as the Registrar's delegate in this matter, and did not purport to do so. She closed the case because she mistakenly believed that she was giving effect to a decision by the PRM.

62. In my judgment, the representation made in the closure letter sent by CMS to R2, on 29 September 2022, did give rise to a legitimate expectation that the case against him was closed and no further action would be taken. However, the Council was entitled to resile from that representation for two reasons. First, because it was based upon a fundamental mistake of fact, namely, that the PRM had decided to close the case. Second, because Ms Longia was not authorised under the Council's Authority Framework and the IPR to make the closure decision herself. In my view this outcome is both fair and proportionate because the public interest in promoting and maintaining public safety and proper professional standards (see Article 6 of the Pharmacy Order 2010) overrides the sub-standard service, stress and disappointment that R2 has experienced. The principle that public bodies have power to correct decisions which they have made based on a fundamental mistake of fact applies here: see *Chaudhuri*.

63. Although the Committee had the benefit of seeing a chronology of events by Ms Marsh in her letter of 21 September 2023, responding to R2's complaint, it was at a disadvantage as it was not provided with copies of the relevant documents, in particular, the emails between Ms Longia and CMS on 27 and 29 September 2022, and the PRM's email to Ms Longia and Mr Mathieson on 25 October 2022 stating that he had not made a decision to close the case; the IPR Closure form completed by the Case Officer and the PRM.

64. The Committee was also not provided with the Council's documents explaining its decision-making framework: Scheme of Delegation, Authority Framework, IPR Guidance and Pre IC Closures QA Process. These would have enabled them to better understand the PRM's responsibilities and Mr Hafejee's role of providing a quality assurance check of PRM proposed decisions.

65. For these reasons, Ground 1 succeeds in that the Committee wrongly directed itself on the erroneous closure of the case by the Council, though my reasoning differs from that of the Authority. In my view, the PRM did have authority to close the case, but on the facts he did not do so.

Grounds 2 and 3

66. It is convenient to consider Grounds 2 and 3 together because of the overlap between them.

[3] Referred to in the letter from Ms Alicia Marsh, Head of Professionals Regulation, Fitness to Practise, to R2, dated 21 September 2023.

The Committee's decision

67. I set out below extracts from the Committee's summary of the evidence and submissions presented to it by Mr Livingstone, on behalf of R2, and Mr Ross on behalf of the Council.

68. Mr Livingstone made the following submissions to the Committee:

> "117. Once Mr Livingstone had seen the Rule 6 referral document and the two internal Council's emails referred to above, he then made a further application, namely that the case against R2 be stayed for abuse of process. He said that having now been provided with a copy of the Rule 6 referral, this makes clear that the senior lawyer referred the allegation direct to the fitness to Practise Committee, bypassing the Investigating Committee, under Rule 6 (5), which states that:
>
> "(5) The allegation must be referred to the Committee instead of to the Investigating Committee if the Registrar considers that—
>
> (a) the Committee should consider making an interim order, and if the Registrar does so consider, the Registrar must notify the Committee accordingly; or
>
> (b) the public interest is best served by urgent consideration of the case.
>
> 118. Mr Livingstone stated that the referral document makes clear that the senior lawyer was engaging Rule 5(b) because he said in that document:
>
> "I am satisfied given the nature, extent and seriousness of the dishonesty, which is not admitted by [R2], that the interests of justice are best served by the urgent consideration of the case by the FtPC rather than a referral to the IC."
>
> 119. Mr Livingstone also noted that in his email to the Fitness to Practise Director on 4 April 2023, whilst setting out the background to this case, the senior lawyer stated:
>
> "Back in September 2022 I reviewed the linked case of [R1] who jointly operated two pharmacies with [R2]. Both are implicated in a 'fraud' on manufactures of high value short supply meds which was lucrative before Brexit but has now died a death…In terms of patient risk there is no direct risk."
>
> 120. Mr Livingstone submitted that this email showed that there was no urgency, and indeed no direct risk to the public. He said that any alleged urgency was not borne out by the chronology of this case. He reminded the Committee that the UK finally left the EU on 31 January 2020. On 16 August 2021 R1 applied to have

> the WDL revoked. On 29 September 2022 there was the "unequivocal and unambiguous" letter of closure to R2. It was then not until 16 March 2023, some six months later, that the case was reviewed, and on 24 March 2023 the senior lawyer decided to invoke the urgency provision. In his email of 4 April 2023 the senior lawyer had stated that the lucrative market had effectively died following Brexit, and there was no direct risk to the public. Mr Livingstone submitted that the use of the urgency provision was therefore exercised unlawfully, as there was no urgency.
>
> 121. Mr Livingstone also submitted that the Council has not complied with its own rules. He referred to Rule 6(8) which states:
>
> "Where the Registrar refers an allegation to the Committee under any of paragraphs (5) to (7B), the Registrar must inform the person concerned and the informant, if any, that the allegation has been so referred."
>
> and Rule 11 (1) which states:
>
> "(1) In the case of a fitness to practise allegation, the information to be provided by the Registrar under article 53(2)(b) or (3)(c) of the Order or under rule 6(8) must be in a notice which is to be sent to the registrant concerned and the informant, if any, no later than 10 days after the date on which the relevant decision was made or, as the case may be, the allegation was referred."
>
> 122. Mr Livingstone stated that the referral was made on 24 March 2023. R2 was not advised of this within 10 days, and even when the Council did finally contact him on 15 August 2023 it still did not provide him with notice of the referral, but instead merely said that "the case concerning you remains open".
>
> 123. Mr Livingstone referred to the case of *R v Maxwell [2010] UKSC 48* …..
>
> 124. Mr Livingstone submitted that the second category is relevant here, i.e. it offends the Committee's sense of justice and propriety to be asked to consider R2's case. He said that a stay is required in order to protect the integrity of the regulatory system."

69. In reply to Mr Ross's submissions, Mr Livingstone made the following points:

> "129. Mr Livingstone was given the opportunity to reply and referred the Committee to paragraph 86 of the Saluja case, which he said provided another important principle….

> 130. Mr Livingstone submitted that his client has been prejudiced, because he was not given the opportunity to make representations to the IC.
>
> 131. Mr Livingstone also referred to Rule 11 (3) which stated:
>
> "(3) The notice under paragraph (1) or (2) must include the reasons for the decision or the referral and be accompanied by any legal advice considered by the Investigating Committee or the Registrar".
>
> 132. He said that no reasons were ever given to R2 for the referral."

70. Mr Ross made the following submissions to the Committee:

> "125. Mr Ross was again given time to seek instructions from the Council. He referred to the case of *The Council For The Regulation Of Health Care Professionals v The General Medical Council And Dr Gurpinder Saluja [2006] EWHC 2784 (Admin)*. He relied on the following passages as key principles which he said were relevant to R2's abuse of process submission: [79] – [84].
>
> 126. Mr Ross submitted that the Committee should not equate "urgency" with "timeliness. He said that a matter may be urgent by reason of its importance, seriousness or complexity. He said that the referral from the senior lawyer made clear that there was a risk to the supply of medication, and in the lawyer's view this made it urgent. He submitted that there was nothing improper with the senior lawyer making the referral.
>
> 127. Having taken instructions, Mr Ross said that R2 was notified that a referral to the Fitness to Practise Committee had been made on 6 November 2023 when the Council served its evidence upon him. He said that ultimately this "takes us nowhere", and that just because a registrant is not told the route by which the case has reached the Fitness to Practise Committee, this does not mean that there has been an abuse of process. He said that this has not in any way inhibited the quality of R2's defence.
>
> 128. Regarding Rule 11, Mr Ross conceded that R2 was not given notice of the referral within 10 days, as is required by the rules, but again, R2 has not suffered any prejudice due to this oversight."

71. The Committee reached the following conclusions on the abuse of process submission:

> "178. Mr Livingstone's second submission was that the case be stayed for abuse of process. The Committee has already ruled

that the PRM did make a decision in September 2022 and that this decision was notified to R2 by CMS. The Committee noted that the referral by the senior lawyer to the Fitness to Practice Committee in March 2023 was under Rule 6(5)(b) on the basis that "the public interest is best served by urgent consideration of the case." The Committee could not find any justifiable grounds for coming to this conclusion. Even the senior lawyer himself, in his email of 4 April 2023 confirmed that by this stage, the market for high value short supply medications had "died a death" due to Brexit, and that "In terms of patient risk there is no direct risk."

179. The Committee was not persuaded by Mr Ross's submission that "urgency" should not be equated with "timeliness". There is no definition of "urgency" in the Rules, so the Committee decided that it should have its own, natural meaning. The Oxford English Dictionary defines the word as "importance requiring swift action", and the Cambridge English Dictionary as "the quality of being very important and needing attention immediately". The allegation may have been serious and complex, but it was not urgent, requiring swift action or immediate attention. R2 was denied his opportunity to make representations to the IC.

180. Even if the referral had been justified, the Committee considered that the Council did not comply with its own rules, by failing to notify R2 that the referral had been made within 10 days, as is required under Rule 11. In fact, it does not appear that either the senior lawyer or the case handler ever told R2 about the referral - he only learnt about it on 21 September 2023, a year after he had been told that his case was closed, when the Head of Professionals Regulation wrote to him in response to his formal complaint. He was formally notified by the Council, according to Mr Ross, on 6 November 2023. That was the second serious irregularity.

181. There was then a third breach of the Rules, as the letter of 6 November 2023 did not, in contravention of Rule 11(3) advise R2 of the reason for the referral. This contrasts with the letter to R1, which did give reasons.

182. There are therefore three serious irregularities which the Committee has identified. The first is that the case should not have been referred under the urgency provision, as there was no urgency. The second is that the Council breached Rule 11 by failing to notify him within the requisite time period (10 days) about the referral, and in fact he was only notified six months later. The third is that he was never given reasons, in breach of Rule 11(3) for the referral direct to the Fitness to Practise Committee (the first time he saw these reasons was on day four of this hearing).

> 183. The Committee has noted the principles set out in the case of Saluja. It accepts that to stay proceedings for abuse of process should be in exceptional cases only. The Committee members have been sitting for this regulator for seven years and have probably dealt with over 200 Principal Hearings. This is the first case in which the Committee has granted an application for a stay of proceedings.
>
> 184. The Committee accepts that there are, to a significant degree, different considerations from those that apply to a criminal prosecution and misuse of executive powers by the state's agents. However, it also considered that it is entitled to look at all of the circumstances of the case and has a discretion to decide whether a stay of proceedings is appropriate. It has concluded that in these circumstances, in a case where R2 had a legitimate expectation that its case would not be reopened, and where there were three serious irregularities, its sense of justice would be offended if the case against R2 were permitted to continue. In order to protect the integrity of the regulatory system, the Committee directs that the entirety of R2's case be stayed for abuse of process.
>
> 185. Again, whilst the Committee appreciated it had a public interest role, it was also bound by the statutory framework which governed its functions. In the circumstances, to allow the Allegation to proceed without compliance with Rules 6 and 11 would amount to a serious procedural or other irregularity."

The Authority's submissions

72. Under Ground 2, the Authority submitted that the Committee wrongly concluded that there were no justifiable grounds, on the basis of urgency, for the referral to the FTP Committee, under Rule 6(5)(b) of the 2010 Rules.

73. The Committee should have recognised the wide discretion in relation to which allegations are "capable of being referred", according to whether they meet the threshold criteria. The Committee should have found that clear and transparent public safety reasons relating to engagement in a fraudulent selling scheme as providing the rationale for referral, and there was urgency due to R2's dishonest involvement in wholesale selling fraud, rather than finding that the urgency related to the specific market opportunity to sell within the Single Market. Had the Committee correctly directed itself, it might have reached a different determination on the case.

74. Under Ground 3, the Committee wrongly interpreted and/or applied the test for the imposition of a stay for abuse of process in *Maxwell* and *Saluja* when it concluded that this was an exceptional case that warranted the imposition of a stay. The Authority accepts that the prejudice caused to R2 was significant as the first time that he saw the reasons for the referral to the Committee was day 4 of the FTP hearing. However, there were alternative remedies available to the Committee, and had the Committee correctly

directed itself, it could have adjourned proceedings to overcome the prejudice. The public interest concerns relating to R2's conduct were not considered by the Committee.

Conclusions

The Pharmacy Order 2010

75. Article 52(1) of the Pharmacy Order 2010 provides that where an allegation is made that a registrant's fitness to practise is impaired:

> "the Registrar must, except in such cases and subject to such considerations as the Council may prescribe, refer the matter (referred to in this article as "the allegation") to the Investigating Committee."

76. Referral to the Investigating Committee is the standard requirement and practice unless one of the exceptions apply.

77. Article 52(2)(a) of the Pharmacy Order 2010 states that rules under paragraph (1) may provide for an allegation not to be referred to the Investigating Committee if it does not meet the threshold criteria for referral.

78. Article 52(2)(b) of the Pharmacy Order 2010 states that rules under paragraph (1) may provide for "an allegation to be referred in prescribed cases, directly by the Registrar to the Fitness to Practise Committee".

79. By Article 52(4) of the Pharmacy Order 2010, where the Registrar refers an allegation to the FTP Committee, he "must inform the registrant who is the subject of the allegation and the person, if any, who made the allegation of that decision". This is a mandatory requirement.

80. Referral of an allegation to the Investigating Committee or the FTP Committee is a significant step which triggers a duty upon the Registrar, pursuant to Article 52(5) of the Pharmacy Order 2010, to notify the organisation/s for whom the registrant provides services and by whom he is employed, as well as the Secretary of State for Health.

81. Article 53 of the Pharmacy Order 2010, titled "Consideration by the Investigating Committee", makes provision for the Investigating Committee to decide whether an allegation "ought to be considered" by the FTP Committee. By paragraph 2, the Investigating Committee may decide to give a registrant, or any other body concerned, a warning or advice instead of referring an allegation to the FTP Committee.

The 2010 Rules

82. Under Rule 6(1)(b) of the 2010 Rules, the Registrar may only refer an allegation where "the allegation is capable of being referred".

83. By Rule 6(5) of the 2010 Rules, an allegation must be referred to the FTP Committee, instead of the Investigating Committee, if the Registrar considers that (a) the Committee should consider making an interim order, or (b) "the public interest is best served by

urgent consideration of the case". Paragraphs (6) to (7B) provide that the Registrar either must or may refer the allegation to the FTP Committee in specific circumstances, none of which is applicable in this case.

84. By Rule 6(8) of the 2010 Rules, where the Registrar refers an allegation to the FTP Committee under any of paragraphs (5) to (7B), the Registrar must inform the person concerned and the informant, if any, that the allegation has been so referred. Rule 11(1) provides that notice under Rule 6(8) must be sent no later than 10 days after the date on which the relevant decision was made or the allegation was referred. By Rule 11(3), the notice must include the reason for the decision or the referral and be accompanied by any legal advice considered. Service of a Rule 11 notice of referral triggers the requirement under Rule 14 to make disclosure of the finalised particulars of the allegation and the evidence, as soon as reasonably practicable.

85. Rule 7(1) of the 2010 Rules provides that where an allegation is referred to the Investigating Committee, the registrant must be sent a notice of referral and copies of all documentation to be placed by the Registrar before the Investigating Committee.

86. Rule 7(2) of the 2010 Rules provides, *inter alia*, that the notice of referral must particularise the allegation; set out any recommendations for disposal by the Registrar; specify a date for the meeting no less than 28 days after the date of service of the notice of referral; inform the registrant of the Investigating Committee's powers; and invite the registrant to provide written representations on the allegation and on any recommendations for disposal made by the Registrar.

87. Rule 9 of the 2010 Rules sets out the procedures of the Investigating Committee and its powers. Rule 9(7) provides:

> "The Investigating Committee must not refer any –
>
> (a) fitness to practise allegation to the Committee unless it is satisfied that there is a real prospect that the Committee will make a finding that the registrant's fitness to practise is impaired;
>
> …"

The Council's assessment and decision-making in R2's case

88. I agree with the Committee's findings and Mr Livingstone's submissions that there were serious irregularities and failings in the Council's handling of R2's case.

89. Following the PRM's decision, recorded in his email of 25 October 2022, that further enquiries were required in R2's case, Ms Longia did not notify R2 that the closure letter had been sent to him by mistake and that his case remained open, until 15 August 2023.

90. Although Mr Hafejee set out recommendations for lines of investigation in his email of 21 September 2022, and the PRM accepted those recommendations, neither they nor anyone else at the Council took any steps to initiate further investigations into R2's case.

91. Ms Longia did not remove the closure decision from the System and did not inform CMS that the case remained open. Therefore CMS only investigated and prepared the case against Mr Amier, not R2.

92. On 24 March 2023, Mr Hafejee referred both Mr Amier's case and R2's case directly to the FTP Committee, instead of to the Investigating Committee. He stated he was satisfied that there was a real prospect that the FTP Committee would find that R2 was dishonestly presenting falsified prescriptions to suppliers to secure medicines for reselling, and that Mr Amier's evidence that R2 was not involved "appears to be a lie". He concluded:

> "I am satisfied given the nature, extent and seriousness of the dishonesty, which is not admitted by [R2], that the interests of justice are best served by the urgent consideration of the case by the FtPC rather than a referral to the IC. I am satisfied that any consideration by the IC in light of the seriousness of the allegations, the absence of full admissions and that any decision on impairment and sanction could only be arrived by a finding of fact on dishonesty will unnecessarily delay the proper resolution of this allegation".

93. In my view, Mr Hafejee did not give due consideration to the criteria for urgent referral set out in Rule 6(5) of the 2010 Rules. The Council's "Operational Guidance for Direct Referral Cases" ("the Guidance") advises:

> "The registrant is given the chance to make submissions to the IC before it considers the case. The registrant might take this opportunity to try to persuade the IC that it should take no further action, or should give advice, or impose warning. These three outcomes would stop the case being referred to the FTPC. The registrant would not need to undergo a principal hearing. If a case is referred directly, the registrant will not have the opportunity to end the case in advance of a principal hearing. It is important, therefore, that a case is referred directly only with caution and only after careful consideration is given to the need for the case to be directly referred."

94. The Guidance gives examples of the types of cases that might be directly referred on grounds of urgency, none of which are comparable to R2's case.

95. The Guidance also advises that a registrant should be given an opportunity to make submissions about a direct referral within 7 days unless the case is too urgent to wait 7 days. However, R2 was not given any opportunity to make submissions.

96. Mr Hafejee does not appear to have acted with "caution" and "only after careful consideration" before depriving R2 of the opportunity to contest the allegations before the Investigating Committee. Despite Mr Hafejee's findings, the investigation team at CMS, the Council's Case Officer and the PRM had all recommended closure of R2's case on the basis of insufficient evidence of his involvement. Mr Hafejee conceded, in his email of 21 September 2022, that "on first look it looked like closure might be an

option" and "Mr A purportedly putting hands up to it and the fact the emails came from a generic account do look pretty insurmountable on first blush".

97. Mr Hafejee went on to suggest some further lines of enquiry to test the evidence further. However, the Council concedes that no further investigation was ever carried out into R2's involvement in Mr Amier's activities because CMS believed the case had been closed. At the time when Mr Hafejee made his decision, he was not aware that R2's case had been closed and not investigated further. He only discovered it was closed when he was unable to make the referral on the System and he then asked Ms Longia to re-open it on the System to enable him to do so.

98. Furthermore, there was no evidence of a need for urgent consideration of the case in the public interest. There was no suggestion of urgency or the need for a direct referral in the email exchanges between the PRM and Mr Hafejee in September 2022. Shortly after the referral, Mr Hafejee made no mention of urgency in his email of 4 April 2023. In fact, his email demonstrated that there was no urgency because he stated that there was no direct risk to patients and, after Brexit, such activities could no longer be pursued:

> "….Both are implicated in a 'fraud' on manufactures of high value short supply meds which was lucrative before Brexit but has now died a death…"

99. In my view, the Committee was correct in concluding that, whilst the allegation may have been serious and complex, it was not urgent, in the ordinary meaning of the word i.e. it did not require swift action or immediate attention. I consider that R2 was unfairly denied his opportunity to make representations to the Investigating Committee.

100. The Council then failed to comply with Rule 11(1) of the 2010 Rules which required notice of the direct referral to the FTP Committee no later than 10 days after the date on which the relevant decision was made or the allegation was referred. By Rule 11(3), the notice must include the reason for the decision or the referral and be accompanied by any legal advice considered. R2 was never informed of the referral by the Council officers with responsibility for his case. He only learnt about it on 21 September 2023 when the Head of Professionals Regulation wrote to him in response to his formal complaint. He was formally notified by the Council on 6 November 2023. However, the letter of 6 November 2023 did not, in contravention of Rule 11(3), advise him of the reasons for the referral. The first time R2 saw the reasons for the direct referral was on the fourth day of the hearing. I agree with the Committee that these were serious irregularities and breaches of the 2010 Rules.

101. The Committee concluded, at paragraph 184 of its decision:

> "…. in these circumstances, in a case where R2 had a legitimate expectation that its case would not be reopened, and where there were three serious irregularities, its sense of justice would be offended if the case against R2 were permitted to continue. In order to protect the integrity of the regulatory system, the Committee directs that the entirety of R2's case be stayed for abuse of process."

102. For the reasons I have set out under Ground 1, the Committee was mistaken in relying upon R2's legitimate expectation that the case would not be re-opened, in support of its conclusion that the case should be stayed for abuse of process. It follows that a stay cannot be justified on that basis.

103. I agree with the Committee that there were three serious irregularities. Furthermore, I consider that the investigation of R2's case was inadequate. The Council failed to investigate R2's case fully because the investigators believed the case had been closed, despite express referral for further investigation by the PRM, on the advice of Mr Hafejee, in September/October 2022, and because the case was never referred to the Investigating Committee.

104. Mr Hafejee's subsequent decision to bypass the Investigating Committee also unfairly deprived R2 of the opportunity to respond to the evidence and allegations against him. Formal consideration by the Investigating Committee provides a useful check on the views of officers and lawyers who have undertaken the initial assessment. Here Mr Hafejee had reached a strongly negative view: in the email of 4 April 2023, he observed "[w]hy any regulator would take at face value an assertion by someone who is cynically and dishonestly fabricating prescriptions to secure medicines is beyond me". In the interests of justice, it was desirable that someone other than Mr Hafejee also scrutinised the case and decided whether the tests for referral to the FTP Committee had been met.

105. A stay for abuse of process is an exceptional step. It is a final step in disciplinary proceedings, and means that the case against R2 can never be considered on its merits, and no action can be taken against him even if the allegations are well-founded. The public interest in the overarching statutory objectives[4] of protecting the public and maintaining professional standards and public confidence in the profession has to be weighed in the balance, together with the public interest in the integrity of the disciplinary process.

106. On a fair reading of the decision, I do not consider that this experienced Committee misdirected itself on the legal principles to be applied, or overlooked the overarching statutory objectives, but the legitimate expectation must have weighed heavily in the balance in the mind of the Committee. On re-considering the matter on the basis that a public authority may resile from a legitimate expectation in circumstances where it is fair to do so, I do not consider that the exceptional step of a stay can be justified, as the competing public interests can be fairly met by alternative measures, namely a full reconsideration of his case. I acknowledge that this will be stressful and difficult for R2, but I consider that expedition will mitigate the burden of the further proceedings.

107. For these reasons, Grounds 2 and 3 are dismissed.

108. I intend to order that the following steps are to be taken, following a timetable to be determined by the Court, in the light of submissions from the parties, to avoid undue delay:

    i) The Registrar shall undertake the Initial Consideration under Rule 6 of the 2010 Rules afresh, and shall only delegate his functions to those who have not

[4] Article 6 of the Pharmacy Order 2010

previously been involved in the cases of R2 and Mr Amier, including the appeal to the High Court.

ii) The Registrar shall conduct a thorough investigation of the allegations against R2.

iii) The Registrar shall decide whether the allegations against R2 are capable of being referred under Rule 6(1)(b), and the threshold criteria are met (Rule 6(2)(a)).

iv) If referral is appropriate, the Registrar shall refer the allegations to the Investigating Committee, applying the procedure in Rule 7 of the 2010 Rules. The Registrar shall not refer any allegations directly to the FTP Committee.

v) The Investigating Committee shall consider any allegations referred to it, in accordance with Rules 9 to 11 of the 2010 Rules.

vi) If the Investigating Committee decides to refer any allegations to the FTP Committee, the relevant provisions of Parts 4 – 7 of the 2010 Rules shall apply to the proceedings of the FTP Committee.

vii) The Council shall expedite the steps set out at (i) to (vi) above, so as to give priority to R2's case ahead of others.

Relief

109. For the reasons set out above, I allow the Authority's appeal, on Ground 1 only. The decision of the Council's FTP Committee to impose a stay of the FTP proceedings, dated 22 March 2024, is quashed. R2's case shall be remitted to the Registrar of the Council, to be disposed of in accordance with directions to be finalised in an order of the Court.

110. The FTP Committee ordered the Council to pay R2's costs assessed in the sum of £10,750 (paragraph 295 of the decision) on the grounds that the handling of R2's case was "seriously flawed and unreasonable", from September 2022 onwards[5]. The Council applies for that order to be quashed if the appeal succeeds. I accept that the Court has power to quash the order for costs. However, I do not consider it is appropriate to do so. Although I have found that the Council was entitled to resile from its representation that R2's case was closed, the Council was wholly to blame for the grossly incompetent errors made in closing his case prematurely, and then not re-opening it or notifying him that it had been re-opened, within a reasonable time. The error made on the part of the FTP Committee was in part attributable to the Council's failure to provide the Committee with all the relevant evidence. In other respects, the Council handled R2's case with gross incompetence and unfairness, to such an extent that I have felt compelled to order it to undertake the whole process again. Therefore, it is reasonable and proportionate for the Council to pay the costs (as assessed by the FTP Committee) which R2 incurred in defending himself up to the date of the FTP Committee's decision.

[5] R2 applied for costs in the sum of £22,010 plus VAT