

National Appeal Panel

Constituted under

THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL SERVICES)

(SCOTLAND) REGULATIONS 2009 (AS AMENDED)

("THE REGULATIONS")

DECISION

of the

CHAIR

of

THE NATIONAL APPEAL PANEL

In the application relating to

69 WEST MAIN STREET, WHITBURN, EH47 OQU

Applicant & Appellant: Logan Gray Ltd ("the Appellant")

Health Board: NHS Lothian ("the Board")

PPC Decision Issued: 9 November 2022

Panel case number: NAP 112 (2022)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1. This is an appeal against the decision of the Pharmacy Practices Committee (“the PPC”) of the Board which was issued on 9 November 2022 in relation to the application of Logan Gray Ltd (“the Appellant”).
- 1.2. The application was originally made on 7 July 2022. The application was considered at a meeting of the PPC on 9 November 2022. The PPC issued its decision to refuse the application on 9 November 2022.
- 1.3. An appeal was lodged against the decision of the PPC by the Appellants on 29 November 2022.

2. Grounds of Appeal

- 2.1. The Appellant has advanced 6 grounds of appeal.
- 2.2. Ground of Appeal 1. That the PPC erred in law by failing to take account of probable future developments of new housing in the relevant neighbourhood when considering whether the existing provision of pharmaceutical service in the neighbourhood was adequate.
- 2.3. Ground of Appeal 2. That the PPC erred in law by failing to consider, or give sufficient weight to, relevant evidence of inadequacy such as the Consultation Analysis Report (“the CAR”), the effect of deprivation in the neighbourhood and the delay experienced by patients at the existing service providers.
- 2.4. Ground of Appeal 3. That the PPC erred in law by taking into account, or affording undue weight to, irrelevant evidence such as visits by the Committee members to the

neighbourhood, the proximity of the site to existing pharmacies and the availability of car parking.

- 2.5. Ground of Appeal 4. That the PPC's decision was irrational and unreasonable in the sense that no reasonable PPC properly considering the evidence before it could have reached the same conclusion that it did had they properly considered and taken into account the clear evidence from the CAR.
- 2.6. Ground of Appeal 5. That the PPC's decision was vitiated by apparent bias, or separately, was procedurally unfair and/or in breach of the Appellant's right to a fair hearing, due to the PPC being guided by Mike Embry, a consultative pharmacist who, in other proceedings, is in dispute with the Appellant.
- 2.7. Ground of Appeal 6. That the PPC is in breach of its statutory duty to give adequate reasons for its decision.

3. Legislative framework

Appeals

- 3.1. The Regulations provide, at paragraph 5(2B) of schedule 3, a limited right of appeal against a decision of the Board. These are errors in law in terms of the application of the Regulations and are as follows:
 - 3.1.1. A procedural defect in the way the application has been considered by the Board;
 - 3.1.2. A failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based; or
 - 3.1.3. A failure to explain the application by the Board of the provisions of these Regulations to those facts.

Consideration by the Chair

- 3.2. The Regulations provide, at paragraph 5 of schedule 3, that as Chair I am required to consider the notice of appeal and:
- 3.2.1. To dismiss the appeal if I consider that they disclose no reasonable grounds or are otherwise is frivolous or vexatious; or
- 3.2.2. Remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out in points 3.1.1 to 3.1.3 have occurred or;
- 3.2.3. In any other case, convene the National Appeal Panel to determine the appeal.
- 3.3. For the avoidance of doubt the Chair is unable to “reverse” the decision of the PPC as is “craved” in this appeal. I can only remit for reconsideration in the circumstances described above.

PPC: Legal test and determination of applications

- 3.4. The Regulations provide, at Regulation 5(10), the relevant test to be applied by the Board when considering an application to be on the Pharmaceutical list. That test, which has in its previous comparable iteration been the subject of judicial treatment is, put simply, whether the present services are inadequate and, if so, whether the application is necessary or desirable in order to secure adequate provision. If the answer is yes to both of these questions the Board is to grant the application.
- 3.5. The Regulations provide, at paragraph 3(1) of schedule 3, those matters that the Board shall have regard to in considering an application. These matters include current service provision, representations received by the Board, the CAR, the pharmaceutical care services plan (prepared by the Board for its area annually), the likely long term sustainability of the services to be provided by the applicant and any other relevant information available to the Board.

4. Consideration

- 4.1. Ground of Appeal 1. This ground of appeal relates to whether the PPC erred in law by failing to take account of probable future developments of new housing in the relevant neighbourhood when considering whether the existing provision of pharmaceutical service in the neighbourhood was adequate. This ground of appeal is not advanced with reference to those grounds of appeal permitted in terms of the Regulations but it does appear to strike as to whether or not the PPC has properly applied the legal test procedurally speaking or with reference to the facts of the case, both of which would be grounds of appeal in terms of paragraph 5 (2B) (a) and (c) of schedule 3 respectively. I have therefore approached this ground of appeal on that basis.
- 4.2. I do not consider that this ground of appeal has reasonable grounds. The appellant references, correctly, the relevant case law on the legal test (*Lloyds Pharmacy Ltd v NAP* 2004 SC 73) and that the PPC must have some regard to probable developments. At Paragraph 11.13 of the PPC's decision it is clear that they took the Heartlands Development into account to the extent of impact thus far, but it does not appear to have gone further in terms of the future phases. Regrettable though this may be it has not, in my view, fallen foul of the legal test as either currently understood or discussed further in *Lloyds Pharmacy Ltd (Petitioner)* [2010] CSOH 22 when looking at a particular proposal in terms of its desirability to secure adequacy.
- 4.3. Grounds of Appeal 2 and 3. These grounds of appeal relate to whether there was a failure of the PPC to properly consider the evidence before it by either failing to give weight to or affording undue weight to that evidence. In particular, the appellant argues that the PPC did not place enough emphasis on the CAR and that it placed too much emphasis on visits, the proximity of existing pharmacies and the availability of car parking. The decision of the PPC illustrates that it did not place as much emphasis on the CAR as the applicant had in submissions and it did take these latter issues into consideration. There is, in my view, nothing defective with this approach.

- 4.4. It is well rehearsed that as a specialist tribunal the PPC is best placed to determine the appropriate standard or weight to be applied to the information and evidence that is before it and that simply disagreeing with the conclusions of the PPC is not a valid ground of appeal.
- 4.5. Taking this into account and further noting that none of these grounds of appeal are advanced with Reference to the grounds of appeal permitted in the Regulations, I have reached the view that none of these grounds have reasonable grounds.
- 4.6. Ground of Appeal 4. This relates to whether the PPC's decision was irrational and unreasonable in the sense that no reasonable PPC properly considering the evidence before it could have reached the same conclusion that it did had they properly considered and taken into account the clear evidence from the CAR.
- 4.7. This relates to Ground of Appeal 2 and the consideration of the CAR which the appellant has taken issue with but this time with reference to "Unreasonableness". Whether a decision is reasonable or not is a well understood ground of Judicial Review. An application for Judicial Review is an application to supervisory jurisdiction of the Court of Session and it is exclusive, at first instance, to that Court; in particular the Outer House. This is not a ground of appeal permitted in terms of the Regulations and, therefore, has no reasonable grounds.
- 4.8. I would add to this conclusion by noting that, as much as simply disagreeing with the conclusions of the PPC is not a valid ground of appeal, neither does it mean that those same conclusions are unreasonable. There are a range of responses open to a reasonable decision maker and this is particularly true when that decision maker is a specialist tribunal.
- 4.9. Ground of Appeal 5. This relates to whether the PPC's decision was vitiated by apparent bias, or separately, was procedurally unfair and/or in breach of the Appellant's right to a fair hearing, due to the PPC being guided by Mike Embry, a consultative pharmacist who, in other proceedings, is in dispute with the Appellant.

- 4.10. This ground is, once again, advanced without reference to those grounds of appeal permitted in terms of the Regulations but with some of the terminology encountered in Judicial Review. That being said, failure to follow the Regulations in terms of those provisions that safeguard against apparent bias or conflicts of interest would represent a procedural defect in terms of the Regulations (paragraph 5 (2B) (a) of schedule 3). I have therefore approached this ground of appeal on that basis.
- 4.11. The Regulations make provision for the (avoidance) of conflicts of interests and apparent bias in two key places. The first is in relation to the PPC hearing itself, namely, that those participating declare any interests at the outset (paragraph 4 of schedule 4). The second is in relation to those PPC members who are entitled to vote and those that are not (paragraph 6 of schedule 4). The first safeguard is self-explanatory. The second safeguard is perhaps less common place but it does recognise or distinguish between those providing professional assessments or technical input to a decision maker but who are not involved in taking the decision itself. Such provision is presumably made in recognition that members of the Pharmaceutical community in Scotland will come into contact with one another from time to time in terms of competition and their regulation.
- 4.12. The decision of the PPC dated 9 November at paragraph 2.2 discloses that members were asked to declare any interests and that none were declared. The Appellant, then the applicant, was represented at that meeting and made no objections at this point. When it came to voting the member mentioned withdrew from the meeting (paragraph 11.18) and was not, therefore, a decision maker.
- 4.13. Given the foregoing there is no procedural defect in the way the application has been considered by the Board in terms of declaration of interests or voting. This ground of appeal discloses, therefore, no reasonable grounds.

- 4.14. Ground 6: This ground relates to the failure of the PPC to properly narrate the facts or reasons upon which their determination of the application was based (paragraph 5 (2B) (b) of schedule 3).
- 4.15. In the decision of the PPC dated 9 November the minutes of the meeting are provided in what appears to be a verbatim note. There is then a concluding section, section 11. Whilst that section is succinct it does, in my view, provide a sufficient narration of reasons upon which the determination of the application was based.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is dismissed in its entirety as it discloses no reasonable grounds of appeal in terms of the Regulations.

(sgd)

C W Nicholson WS
Chair
National Appeal Panel
10 April 2024