

# **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**

**89 Main Street, Winchburgh. EH52 6RA**

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

**Health Board:** NHS Lothian ("the Board")

**PPC Decision Issued:** 1 June 2023

**Panel case number:** NAP 117 (2023)

## 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 1 June 2023 in relation to the application of Logan Gray Ltd (then “the Applicant,” now “the Appellant”).
- 1.2. The application was originally made on 7 November 2022. The application was considered at a meeting of the PPC on 18 May 2023. The PPC issued its decision to refuse the application on 1 June 2023.
- 1.3. An appeal was lodged against the decision of the PPC by the Appellant on 20 June 2023.

### 2. Grounds of Appeal

- 2.1. Ground of Appeal 1. The Board erred in fact and 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.
- 2.2. Ground of Appeal 2. The Board 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.
- 2.3. Ground of Appeal 3. The Board’s decision was irrational and unreasonable in the sense that no reasonable board properly considering the evidence before it (particularly that relating to the housing development) could have reached the conclusion that it did.

- 2.4. Ground of Appeal 4. The Board's decision was procedurally unfair and breached ordinary principles of natural justice, and separately, the Appellant's right to a fair hearing due to one of the Committee members leaving the room during deliberations without the meeting being adjourned.

### **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 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 Board erred in fact and 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.

4.2. In terms of the Regulations, failure to do so as a matter of procedure or with reference to the facts of the case, are grounds of Appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 respectively.

- 4.3. In the Appellant's Notice of Appeal there is also mention of whether the decision reached in this regard was reasonable but I will address that fully in Ground of Appeal 3.
- 4.4. The relevant legal test is set out above at paragraph 3.4. The relevant case law (*Lloyds Pharmacy Ltd v NAP* 2004 SC 73) has made it clear that the decision maker should view adequacy as a binary test. Either the pharmaceutical services available in a neighbourhood are, at the time of considering the application, adequate, or they are not. The decision maker should not view adequacy as a matter of degree or on a spectrum. The ability to make improvements to, or some other possible configuration of, pharmaceutical services would feature on such a spectrum but neither automatically means that existing services are inadequate. This includes matters of convenience. An application may be granted that goes further than is necessary to secure adequacy, that is to say an application that would result in some sort of over-provision would nevertheless be desirable.
- 4.5. That case also clarified, as is now relied upon by the Appellant, that the PPC must have some regard to probable developments when considering adequacy.
- 4.6. In addition there might be, in relation to a particular application, changes or improvements which would be desirable and, directly, without which services may not be adequate, as was discussed in *Lloyds Pharmacy Ltd (Petitioner)* [2010] CSOH 22.
- 4.7. The Minutes of the Meeting of the PPC on 18 May 2023 evidence that the development underway in the Neighbourhood was discussed at length. Indeed, as the Appellant put it, it was the "fundamental reason" for the application. In these circumstances the PPC would have been hard pressed not to have taken it into account. The particular consideration is evidenced at paragraph 15.8 which concludes that the current (adequate) provision of pharmaceutical services is capable of being met for a medium term of 2-3 years. This follows on from the consideration of adequacy generally in the preceding paragraphs.

- 4.8. In my view the legal test has been followed correctly. As a matter of procedure and with reference to the facts of the case, the PPC reached a view as to adequacy, and in doing so took probable future developments into consideration, going so far as to reach a conclusion as to how long the former would last given the latter.
- 4.9. The Appellant goes onto argue in this Ground that the Board should have reached a different conclusion in this respect and with reference to the “desirability” of granting the application. However, disagreeing with a conclusion of the Board is not a valid ground of appeal and one only considers whether an application would be necessary or desirable to secure adequacy, having first established inadequacy.
- 4.10. Grounds of Appeal 2. This ground of appeal relates to whether the Board erred in law by failing to consider, or give sufficient weight to, relevant evidence of inadequacy such as the CAR, the effect of deprivation in the neighbourhood and the delay experienced by patients at the existing service providers.
- 4.11. In terms of the Regulations, failure to properly consider the CAR, as a matter of procedure, is a Ground of Appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 (procedural defect & duty to give reasons). This is because the reasons given must set out a summary of the CAR and how it was taken into account by the Board in arriving at its decision - paragraph 3(6)(a) and (b) of Schedule 3. The CAR is also something the PPC must have regard to in considering an application in terms of paragraph 3(1)(e) of Schedule 3.
- 4.12. The decision of the Board however evidences that it did consider the CAR to the extent required by the Regulations. (Paragraph 14 - Summary of CAR & Paragraph 15 - Decision). Over and above that the appropriate standard or weight to be applied to the CAR and the other information mentioned above is a matter for the PPC, as a specialist tribunal, to determine.
- 4.13. Taking this into account and again noting that simply disagreeing with the conclusions of the PPC is not a valid ground of appeal, I have reached the view that this is not a reasonable ground of appeal.

- 4.14. Ground of Appeal 3. This relates to whether the Board's decision was irrational and unreasonable in the sense that no reasonable board properly considering the evidence before it (particularly that relating to the housing development) could have reached the conclusion that it did.
- 4.15. As was explained in NAP 112/22, 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.
- 4.16. As was also said in that case, as much as simply disagreeing with the conclusions of the Board 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.
- 4.17. Ground of Appeal 4. This relates to whether the Boards's decision was procedurally unfair and breached ordinary principles of natural justice, and separately, the Appellant's right to a fair hearing due to one of the Committee members leaving the room during deliberations without the meeting being adjourned.
- 4.18. This ground of appeal is advanced without reference to those grounds of appeal permitted in terms of the Regulations, but I have approached this ground on the basis it may constitute a procedural defect in terms of paragraph 5(2B)(a) of Schedule 3.
- 4.19. There are of course wider considerations, as the Appellant advances, relating to the principles of natural justice and convention rights arising from Article 6 (right to a fair trial) and the duty of the Board to act compatibly as a public authority and safeguard those rights when making a decision. A decision which was reached in a way contrary to these requirement would be susceptible to Judicial Review.

- 4.20. Returning to the question of whether a procedural defect occurred in the way in which the decision was reached in terms of the Regulations. Where the Board hears oral representations the procedure is, broadly, at the discretion of the Chair, but an applicant and interested party will be notified and, generally, have the opportunity to speak to and amplify what it said in their application or submissions, and respond to questions put to them in that regard.
- 4.21. The Regulations do however make provision as to what is required of the Board when determining an application (Schedule 3) and the manner in which the PPC is constituted and exercises the functions of the Board in this regard (Schedule 4). This includes, in the latter, the quorum at paragraph 5 (the Chair, the two different pharmacists and two lay members) and voting at paragraph 6 in so far as it is the lay members who vote subject to the Chair having a casting vote if required to do so.
- 4.22. The Appellant, whose allegations in this regard I am taking at face value, mentions that the member that left the room was one that participated in the decision-making process, although it is not clear whether this was a voting member or otherwise. Either way, if this was the Chair or a pharmacist member this would breach the requirements around quorum given the numbers present. If this was a lay member it would not, as there would still have been two of those members. At the same time, one would expect the application to be considered by all the members present and the Regulations say as much at paragraph 6(1) of Schedule 4 – *“every application considered by the Pharmacy Practices Committee shall be considered by all members present”* before differentiating between voting and non-voting members. I therefore agree with the Appellant and uphold this ground; the member should have been present to hear all the information being presented to properly reach a decision and the meeting should have been adjourned to allow for this.



## 5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is successful in respect of Ground of Appeal 4. I shall therefore refer the matter back to the PPC for reconsideration.
- 5.2. In doing so I would encourage the PPC to clarify which member left the meeting, why the member left, when the member returned, why this was not mentioned in the minutes and what information had been presented in their absence.
- 5.3. It would then, in my view, fall to the PPC to reconsider that information with its full membership and consider whether it would have reached the same decision or not.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

28 May 2024