

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

2A Hillhouse Road,

Hamilton. ML3 9TB

Applicant and Appellant: David Tanner Ltd

Health Board: NHS Lanarkshire (“the Board”)

PPC Decision Issued: 2 August 2023

Panel case number: NAP 119 (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 2 August 2023 in relation to the application of David Tanner Ltd (then “the Applicant”, now “the Appellant”).
- 1.2. The application was originally made on 7 June 2023. The application was considered at a meeting of the PPC on 18 July 2023. The PPC issued its decision to refuse the application on 2 August 2023.
- 1.3. An appeal was lodged against the decision of the PPC by the Appellant on 23 August 2023.

2. Grounds of Appeal

- 2.1. At paragraph 1.3 of the Appellant’s Notice of Appeal, four grounds of appeal are mentioned. These broadly mirror those permitted in terms of the Regulations and mentioned at paragraph 3.1 below.
- 2.2. They are that: the PPC erred in law, that the PPC misapplied the Regulations, that there has been a procedural defect in the way the application has been considered by the PPC; and that the PPC failed to properly narrate the facts or reasons upon which their determination of the application was based. (An error in law usually relates to the legal test provided for in the Regulations and this is usually approached as a failure to follow that test which would itself constitute a procedural defect.)
- 2.3. The Notice of Appeal itself then advances three Grounds of Appeal. I have chosen to address these grounds given they are the ones that are expanded upon and argued fully.

- 2.4. Ground of Appeal 1. This ground is headed “procedural defects” and relates to a suggestion that there has been a number of procedural defects in the way the application has been considered by the Board.
- 2.5. Ground of Appeal 2. This ground is headed “failure to take into account relevant considerations/irrelevant consideration taken into account”. This relates to what information the Board took into account and the way in which it did so.
- 2.6. Ground of Appeal 3. This ground is headed “the Decision is unreasonable/irrational”. This relates to whether the decision is so unreasonable that no PPC could have come to it and is with reference to the way in which further information was taken into account.

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.

PPC: Legal test and determination of applications

3.3. 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.

3.4. 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 Consultation Analysis Report (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 is headed “procedural defects” and relates to a suggestion that there has been a number of procedural defects in the way the application has been considered by the Board.

Potential failure to notify relevant parties

4.2. The Appellant sets out the requirement in the Regulations for the Board to notify various interested parties when an application has been made. This is set out at

paragraph 1 of Schedule 3. The Appellant considers that a procedural defect has occurred insofar as the Decision does not record such notifications having been made. There is no suggestion that notification did not take place with reference to a particular interested party, but simply that it has not been recorded.

- 4.3. The relevant ground of appeal relates to a procedural defect in the way the application has been considered by the Board [emphasis added]. I do not readily accept that the notification requirements form part of the Board's consideration. Consideration of an application seems more consistent with the determination of an application by the Board under paragraph 3 of Schedule 3. However, a variety of recent cases have advanced arguments relating to procedural defects arising from Regulation 5, 5A and Schedules 3 and 4 so I am prepared to accept that notification requirements form part of the consideration process overall and this is consistent with its importance as to ensuring the participation of interested parties.
- 4.4. It is not unusual to see a decision of a Court or Tribunal issued without schedules of service or notifications like this one recorded on the face of the decision itself. Rather it is more common to find such confirmations in the process or case papers of the application. Such an absence does not, therefore, taint a decision as a generality. That being said, in this instance I cannot from the papers provided to me see that the requirements have been met. Interested parties did participate so they must have been notified of the decision at some point but this is inconclusive as to whether all the requirements have been met. In the cases I have determined previously there is usually either a covering letter from the Board confirming this to be the case or a covering table or schedule of the papers relevant to the application which record when and to whom notifications were made, responses received and so on. I will therefore uphold this ground and remit it back to the Board to clarify this matter.

Attendance of Rowlands at the hearing

- 4.5. Prior to the hearing taking place Rowlands Pharmacy sought to lodge written representations to the Application as they were in the process of acquiring the Lloyds Pharmacy, who had been notified of the Application as an existing local pharmacy and interested party. Those written representations were refused by the Board on the basis

that the change of ownership would not take place in time for them to become an interested party in terms of the Regulations. Lloyds Pharmacy did however lodge written representations and were represented at the Meeting of the PPC on 18 July 2023. Their representative was assisted by a representative of Rowlands Pharmacy.

- 4.6. 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. The notice requirements are set out at paragraph 3(3) of Schedule 3. That paragraph also provides that the Board must permit an applicant or interested party to speak to their own representations or have someone assist them on their behalf. The only prohibition on a person assisting the applicant or interested party is that they are not appearing in the capacity of counsel, solicitor or paid advocate.
- 4.7. It follows, therefore, that the participation of the representative of Rowlands Pharmacy to assist the interested party, Lloyds Pharmacy, was not defective in terms of the Regulations.
- 4.8. As I explained in NAP 121/23, Lloyds Pharmacy (the overall corporate entity) entered into voluntary liquidation earlier this year(2024)., Boards are, therefore, having to consider some difficult procedural questions arising from that event and in relation to applications that are pending or on appeal. In particular, where parties are concerned to have it clarified who an interested party might now be to their application or appeal. In these circumstances the Board was, in my view, correct to refuse the written representations from Rowlands Pharmacy, but them then assisting the interested party, Lloyds Pharmacy, was permissible.

Site visits

- 4.9. The Appellant takes issue with the independent site visits undertaken by the members of the PPC. My understanding is that joint visits took place prior to the Covid-19 pandemic but that individual visits were then facilitated during the pandemic and that this practice has persisted.

- 4.10. In terms of the Regulations, for a defect to exist in the way the application has been considered by the Board that defect will, usually, be with reference to the procedure provided for in the Regulations themselves. In relation to site visits, the Regulations make no provision. It follows, therefore, that the site visits were not defective in terms of the Regulations.
- 4.11. That said, I would suggest to the Board that what visits did take place are more fully recorded in the future, notwithstanding such visits are more concerned with gaining a more general familiarisation with a neighbourhood and the pharmacies, if any, contained therein, rather more a more empirical evidence gathering exercise.
- 4.12. Finally, on this point, the Appellant refers to the site visit not being carried out in accordance with the Regulations, the constitution and functions of the PPC and Scottish Government guidance. None of these assertions are, however, referenced.
- 4.13. Ground of Appeal 2. This ground is headed “failure to take into account relevant considerations/irrelevant consideration taken into account”. This relates to what information the Board took into account and the way in which it did so.
- 4.14. The Appellant argues that the PPC will have exercised its powers unlawfully if it leaves out of account relevant matters or takes into account factors that are in law not relevant. The Appellant considers that the PPC has done both and that this clearly cuts across what is recorded in the Minutes of the Meeting of the PPC on 18 July 2023 which provide, at paragraph 3.2, *“the decision of the Committee would be based entirely on the evidence submitted in writing as part of the application process, and the verbal evidence presented at the hearing itself.”*
- 4.15. The Appellant advances this ground with reference to the documents submitted by them, as the Applicant, and whether these were considered fully, as well as three strands of evidence that appear to have been raised and taken into account by members of the PPC of their own volition, that is to say not based upon the written or oral evidence at hand.

- 4.16. The PPC is required to determine the application in accordance with paragraph 3 of Schedule 3 and this includes, at paragraph 3(1), what information it should have regard to in doing so (see paragraph 3.4 of this decision above). The Board can also hear oral representations in accordance with paragraph 3(3) of Schedule 3. Failure to adhere to these provisions as a matter of procedure or with reference to the facts of the case, would be grounds of Appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 respectively) and I have approached this ground on that basis.
- 4.17. The Appellant considers that because the documents lodged by them were not listed and discussed in turn then it is unclear from the decision how each was treated and the weight attached to each. The Appellant does not advance this ground with reference to a particular document not being discussed, but in the absence of them all being explicitly listed and discussed.
- 4.18. In a similar vein to the first Ground of Appeal, it is not unusual to see a decision of a Court or Tribunal issued without listing and discussing every supporting document lodged in support of an application.
- 4.19. Where the Board hears oral representations, the applicant and interested party(s) 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. By this stage in the process the decision making body will have had regard to the supporting documentation and begun to focus in on salient, relevant points of an application and those points of contention before discussing them and, in turn, reaching a decision based upon them. Such an absence does not, therefore, taint a decision as a generality.
- 4.20. In relation to the three strands of evidence mentioned as having been advanced by members of the PPC, these include relying on experience elsewhere as to viability, its own local knowledge, experience gleaned from site visits and their knowledge of general issues concerning community pharmacy provision in Lanarkshire.

- 4.21. In considering this limb of the second ground of appeal, it is important to note the makeup of a PPC in that it is a specialist tribunal insofar as its membership is made up, in part, of pharmacists; though they do not vote. This recognises or distinguishes between those providing professional assessments or technical input to a decision maker but who are not involved in taking the decision itself.
- 4.22. With this in mind it is not defective in any way for those pharmacist members to call upon their experience to assist in the consideration of an application as that is their role, and this is particularly true when the matters they are discussing relate to pharmaceutical services and the viability of an application in that regard. The PPC is also entitled to reach its own conclusions based on the evidence before it.
- 4.23. In relation to the strands of evidence mentioned, I consider that what was said and considered in relation to the first strand, which related to the viability of the application, was permissible; as was the reference to the site visit. A site visit can confirm what is said elsewhere as seems to be the case here with the reference, at paragraph 19.7, to “experience gleaned from site visits by Committee members”. What is not acceptable is to apply its “own local knowledge” as is mentioned in paragraph 18.10 at question 1. I will, therefore, uphold this ground on this basis. The reference to “their knowledge of general issues concerning community pharmacy provision in Lanarkshire” was permissible as it was with reference to the pharmaceutical care services plan for the area. That document is something that the PPC must consider as outlined at paragraph 3.4 above.
- 4.24. There was also reference to Boots’ own customer feedback when the representative for Boots made their presentation. I do not consider that referring to that feedback was problematic. This was clearly being relied upon in response to the suggestion that existing services were inadequate and whilst it was recorded in the Minutes of the Meeting of the PPC it was not referred to in that part of the Minutes where the decision of the PPC is recorded. That is to say that it was heard by the PPC, but not relied upon in their reasoning. The principle of best evidence would support the view however that in future when such a reference is made by an interested party it is supported by evidence.

- 4.25. Ground of Appeal 3. This ground is headed “the Decision is unreasonable/irrational”. This relates to whether the decision is so unreasonable that no PPC could have come to it and is with reference to the way in which further information was taken into account.
- 4.26. Whether a decision is unreasonable or irrational is a well understood ground of Judicial Review. An application for Judicial Review is an application to the 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.
- 4.27. That being said I have considered the arguments made under this ground as they relate to grounds of appeal that are permissible in terms of the Regulations.
- 4.28. For example, 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.
- 4.29. In these proceedings it is clear the Board considered the CAR and, in particular, they set out a summary of the CAR and how it was taken into account by them in arriving at a decision. In these circumstances the PPC has considered the findings of the CAR and then decided, as the Specialist Tribunal, what weight to apply to it and provided reasons for doing so in that regard.
- 4.30. The same can also be said about the way in which the PPC went about considering the other evidence referred to by the Appellant under this ground, including the Wellhall Medical Practice Letter and the evidence of complaints.
- 4.31. In relation to “assessing adequacy” under this ground, the Appellant takes issue with the reasons provided by the PPC in reaching its decision. A failure of the Board to

properly narrate the facts or reasons upon which their determination of the application was based is a ground of Appeal in terms of paragraph 5(2B)(b) of Schedule 3.

- 4.32. I agree with the Appellant in this regard. It is not sufficient to simply say “for the reasons set out above”. In that part of the Minutes of the Meeting of the PPC headed “Decision”, specific reasons must be given for it considering that the current provision was adequate. I will therefore uphold this ground.
- 4.33. Finally, under this ground, it is submitted that future developments had not properly been taken into account. The relevant case law on the legal test (*Lloyds Pharmacy Ltd v NAP* 2004 SC 73) established that the PPC must have some regard to probable developments. Whether or not the PPC has properly applied the legal test as a matter of procedure or with reference to the facts of the case, would be grounds of appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 respectively. However, future developments were recorded as having been considered in relation to population and housing at paragraphs 19.8 and 19.9 of the Minutes of the Meeting of the PPC.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is successful in respect of Grounds of Appeal 1, 2 and 3. I shall therefore refer the matter back to the PPC for reconsideration.
- 5.2. In doing so the Board should clarify those matters in respect of Ground of Appeal 1 relating to the notification requirements. In relation to Ground of Appeal 2, its reconsideration of the application should be limited to evidence that was either submitted in writing as part of the application process or the verbal evidence presented at the hearing itself. In relation to Ground of Appeal 3 sufficient reasons need to be given when reaching a decision.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

6 June 2024