

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

133 Glasgow Road, Bathgate.

EH48 2QN

Applicant & Appellant: Manorport Ltd (for the Dunamis Pharmacy) ("the Appellant")

Health Board: NHS Lothian ("the Board")

PPC Decision Issued: 8 September 2023

Panel case number: NAP 120 (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 8 September 2023 in relation to the application of Manorport Ltd (for the Dunamis Pharmacy) (then “the Applicant” now “the Appellant”).
- 1.2. The application was originally made on 28 December 2022. The application was considered at a meeting of the PPC on 24 August 2023. The PPC issued its decision to refuse the application on 8 September 2023.
- 1.3. An appeal was lodged against the decision of the PPC by the Appellant on 28 September 2023.

2. Grounds of Appeal

- 2.1. The Appellant makes a number of criticisms regarding the determination of their application including the procedure followed in advance of the hearing, during the hearing and the decision itself. None of these criticisms are made with reference to those Grounds of Appeal permitted in terms of the Regulations.
- 2.2. I have, however, attempted to summarise the arguments or complaints being made, consider whether they relate to any of the permitted grounds of appeal (see paragraph 3.1 below) and whether they are, in turn, reasonable grounds of appeal to the extent of being upheld or not.
- 2.3. Ground of Appeal 1. This relates to whether the Regulations were adhered to when the Board are considered to have accepted written representations outwith the time limit provided for in the Regulations. I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).

- 2.4. Ground of Appeal 2. This relates to the way in which the Board decided upon the issue of neighbourhood. I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).
- 2.5. Ground of Appeal 3. This relates to the inability of the then Applicant to refer to a previous hearing in March 2016 and the resulting unfairness to them. I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).
- 2.6. Ground of Appeal 4. This relates to the consideration of the CAR by the Board; in particular, their assessment of its relevance. 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.

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 relates to whether the Regulations were adhered to when the Board are considered to have accepted written representations outwith the time limit provided for in the Regulations. I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).
- 4.2. In the papers provided to me I can see that the interested parties were notified of the application, in terms of the Regulations (paragraph 1 of Schedule 3), on 18 January 2023. Two interested parties responded within the time limit provided for (30 days). They were Boots and Gordons Chemist on 24 and 23 January 2023 respectively. They would later participate at the meeting of the PPC on 18 May 2023.
- 4.3. Lloyds Pharmacy responded outwith the time limit on 22 February 2023. Their letter was with the papers but they did not participate at the meeting of the PPC. Although received late the PPC may choose, usually at the discretion of the Chair, to consider that letter as part of 'any other relevant information available to it' under paragraph 3(1)(a) of Schedule 3.
- 4.4. The Appellant refers to a second letter from a non-pharmacist at Boots. It is common place for larger companies to have a contract manager or operations manager from their Head Office respond on behalf of the local interested party pharmacist, so a letter from a non-pharmacist is not unusual or defective in terms of the Regulations. In any event I can see no evidence of this second letter with the papers. Nor can I see any letters from "Bathgate Pharmacy" with the papers, or listed as an interested party in terms of the notification that was sent out.
- 4.5. Taking all this into account I have concluded that there was nothing defective in the way in which the Board went about notifying parties and receiving written representations. This Ground of Appeal is not therefore a reasonable one in terms of the Regulations.

- 4.6. Ground of Appeal 2. This relates to the way in which the Board decided upon the issue of neighbourhood. I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).
- 4.7. It is clear the Appellant disagrees with the reasoning of the PPC as to the decision it reached regarding defining the neighbourhood, but simply disagreeing with the conclusions of the PPC is not a valid ground of appeal. The PPC, in its own words, “carefully considered the neighbourhood proposed by the applicant” and disagreed with it for a number of reasons which it went on to set out, including natural boundaries, whether it captured a proposed development and overall its small size in terms of viability. I can see nothing defective in the way the PPC approached the matter or the reasons given in that regard.
- 4.8. The Appellant also advances this Ground of Appeal with reference to previous PPC decisions in the area. Put simply, there are a range of responses open to a decision maker. Based on the same information the decision of one PPC may differ from another but that does not necessarily mean that either decision was incorrectly arrived at.
- 4.9. There was also a suggestion 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. As mentioned above, however, future developments were considered in relation to neighbourhood and, additionally, in relation to population at paragraphs 19.2 and 19.16 respectively.
- 4.10. Taking all this into account I have concluded that there was nothing defective in the way in which the Board went about defining the neighbourhood. This Ground of Appeal is not therefore a reasonable one in terms of the Regulations.
- 4.11. Ground of Appeal 3. This relates to the inability of the then Applicant to refer to a previous hearing in March 2016 and the resulting unfairness to them. I have taken this

ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).

- 4.12. 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.
- 4.13. In these circumstances one of the interested parties was allowed to refer to their speaking notes and diagrams. The decision to allow them to do so was in recognition that the Applicant had been allowed to refer to development plans for the pharmacy which also had not been submitted in advance. A balance had been struck in the interests of fairness. However, allowing the Applicant to refer to previous proceedings had not been permitted in terms of relevancy. Again I find nothing defective with this approach.
- 4.14. Ground of Appeal 4. This relates to the consideration of the CAR by the Board; in particular, their assessment of its relevance. 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.
- 4.15. The summary of the CAR is provided for at paragraph 18.7 of the Minutes of the Meeting of the PPC and the PPC considered it further at paragraphs 19.11 to 19.15. The PPC reached a view that the CAR could not be relied upon given the changes that had taken place and were also underway in the neighbourhood in relation to the provision of pharmaceutical services.
- 4.16. Having gone through the pre-application process, the output of which is the CAR, this will have been of some frustration to the Appellant and those that responded. That being said, the PPC has set out a summary of the CAR and how it was taken into

account by them in arriving at a decision; this includes not relying upon it – and this is acceptable as long as reasons are provided - which they are.

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

28 May 2024