

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

269 High Street, Linlithgow.

EH49 7EP

Applicant: TPB Partnership LLP ("the Applicant")

Appellants: Boots UK Ltd and LP North Sixteen Ltd (for Lloyds Pharmacy) ("the First and Second Appellants respectively or "the Appellants")

Health Board: NHS Lothian ("the Board")

PPC Decision Issued: 12 October 2023

Panel case number: NAP 121 (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 12 October 2023 in relation to the application of TBP Partnership Ltd (“the Applicant”). The Appellants are Boots UK Ltd and LP North Sixteen Ltd (for what was then Lloyds Pharmacy).
- 1.2. The application was originally made on 11 April 2023. The application was considered at a meeting of the PPC on 26 September 2023. The PPC issued its decision to grant the application on 12 October 2023.
- 1.3. Appeals were lodged against the decision of the PPC by the Appellants – (1) Boots UK Ltd and (2) LP North Sixteen (for Lloyds Pharmacy) on 31 October and 27 October 2023 respectively.
- 1.4. At the outset I will address the (Notice of) Appeal of the Second Appellant. Lloyds Pharmacy (the overall corporate entity) entered into voluntary liquidation earlier this year, 2024. Prior to that event it had been going through several phases of what has been described as a “rationalisation of its High Street offering” - that is to say closing or disinvesting in a number of branches throughout the country. There was an acceleration of this activity in the last two years leading up to it going into administration.
- 1.5. This has clearly had an impact on those communities who were reliant upon those branches for accessing pharmaceutical services, in turn those pharmacists who had sought to take on these pharmacies as a going concern and, as is the case here, those pharmacists who have applications pending or on appeal in neighbourhoods (or neighbouring neighbourhoods) and are concerned to have it clarified who an interested party might now be to their application or appeal.

- 1.6. In advance of the hearing on 26 September 2023 the PPC took advice on this matter and decided to proceed by allowing the new owner of what was the Lloyds Pharmacy in the neighbourhood, LP North Sixteen Ltd, to participate at the hearing and rely on the written representations that had been made by Lloyds Pharmacy as the original interested party. For my part, I agree with the approach taken by the Board in this regard.
- 1.7. It would, in my view, have been regrettable to see a successor company or operator rejected arbitrarily from the process. The burden of assuming the operation of what had been an underperforming pharmacy is not an easy one. It would not help, and perhaps would discourage others from seeking to do so, if it were known that they could not participate in a process the outcome of which they would be affected by. The proceedings and resulting decision of the PPC would also, in my view, be the poorer for this lack of participation as well.
- 1.8. Following the determination of the Application, LP North Sixteen Ltd (then trading as Lloyds Pharmacy) lodged their appeal in this process and this was communicated to the National Appeal Panel. In considering an appeal under paragraph 5(5) of Schedule 3, I do so with reference to the notice(s) of appeal sent to me together with the decision of the Board on the application.
- 1.9. In the intervening period NP North Sixteen Ltd, who are still the owners of what was that Lloyds Pharmacy, are now trading as Dears Pharmacy & Travel Clinic. This likelihood was known at the time the PPC determined the application. The Applicant has now written to me taking issue with this development and asking me to agree with them that this Notice of Appeal is invalid.
- 1.10. I do not consider that I have a locus to determine whether a Notice of Appeal is valid or not unless there was some clear nullity to a Notice of Appeal or the proceedings overall; and, unless a Notice of Appeal was subsequently withdrawn, my role is to determine the appeal on the basis of the papers communicated to me as described above.

1.11. In these circumstances the Board has permitted a party to participate at the meeting of the PPC and then allowed them to then appeal by accepting its Notice of Appeal and communicating it to me as Chair of the National Appeal Panel. For the sake of completeness I agree with this approach, both at first instance and on appeal, and I will now determine the appeals on the basis of the papers sent to me.

2. Grounds of Appeal

2.1. The Appellants have advanced a number of grounds of appeal, some of which are made with reference to those Grounds of Appeal permitted in terms of the Regulations, and some not. I have attempted to group and summarise the arguments being made with reference to 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.

2.2. Ground of Appeal 1. This relates to whether the Board's decision was defective in that it that it was inconsistent with the legal test. In terms of the Regulations, failure to apply the legal test properly is a procedural defect and a ground of Appeal in terms of paragraph 5(2B)(a) of Schedule 3.

2.3. Ground of Appeal 2. This relates to whether there has been a failure of the Board to properly narrate the facts or reasons upon which their determination of the application was based. Failure to do so is a ground of Appeal in terms of paragraph 5(2B)(b) of Schedule 3.

2.4. Ground of Appeal 3. This relates to whether there has been a failure to explain the application by the Board of the provision of these Regulations to those facts [the facts upon which the determination of the application was based]. Failure to do so is a ground of Appeal in terms of paragraph 5(2B)(c) 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.

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 relates to whether there was an error in law insofar as the Board’s decision was defective by being inconsistent with the language of the legal test. In terms of the Regulations, failure to apply the legal test properly is a procedural defect and a ground of Appeal in terms of paragraph 5(2B)(a) of Schedule 3.
- 4.2. This Ground of Appeal is advanced solely by the second appellant and relates to the concluding paragraph of the PPC’s decision in which the following is said: “*the Committee determines that it is necessary and desirable to approve the application*” [emphasis added]. The Second Appellant considers that this constitutes an error in law as the decision should, after finding inadequacy, be that the application be granted if it is necessary or desirable in order to secure adequate provision.
- 4.3. As mentioned at paragraph 3.4. the relevant legal test 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.
- 4.4. The relevant case law (*Lloyds Pharmacy Ltd v NAP* 2004 SC 73) has made it clear that 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. With this in mind an application which is desirable will

inherently include those elements that would in the first instance secure adequacy before going further. It follows, therefore, that the formulation deployed by the PPC is not defective in terms of the legal test as the latter will always include the former.

- 4.5. I would say to the Board, however, that it remains preferable to approach this as an “or” rather than an “and” when framing a decision, to avoid unnecessary appeals.
- 4.6. Ground of Appeal 2. This relates to whether there has been a failure of the Board to properly narrate the facts or reasons upon which their determination of the application was based. Failure to do so is a ground of Appeal in terms of paragraph 5(2B)(b) of Schedule 3. The First Appellant has deployed this ground with reference to those reasons given in relation to the availability of the Pharmacy First service. Both Appellants have then deployed this argument with reference to the reasons given in relation to a comparative decision in Bathgate. I will take each of these issues in turn.
- 4.7. With reference to those reasons given in relation to Pharmacy First (PF) the First Appellant considers that those reasons are incomplete. The First Appellant does so with reference to the Minutes of the Meeting of the PPC on 26 September 2023, at paragraph 29.14, in which the PPC stated it was sceptical at to the reasons put forward by the existing pharmacists in Linlithgow that the reason for the low uptake of the PF service was that, as an affluent area, patients would rather meet the cost of items out of their own pocket. The PPC went on to say that they favoured the analysis which held that existing pharmacies did not promote the services because they were, put simply, too busy to do so and the sight of queues would deter customers from pursuing the service.
- 4.8. The First Appellant is correct to say that in the PPC Minutes there is no reference to any analysis that “held” this contrary view. There is, however, evidence of the existing pharmacies being busy. It may be the case that the PPC were attempting to refer to their own analysis of the supporting documentation and a view they reached. As a specialist tribunal it is entitled to reach its own conclusion based on the evidence before it, but it must do so with sufficient clarity in the reasons provided. It is not for me to infer what their reasoning was or for a party, or anyone else reading the decision, to be

left wondering what the PPC meant or were referring to. I will, therefore, uphold this ground of appeal.

- 4.9. The second issue, advanced by both Appellants, is that relating to the decision of the PPC in these proceedings and the decision of another PPC on an application in relation to a pharmacy in Bathgate. In both cases the future of a Lloyds pharmacy was at risk. In relation to this application the PPC considered that the ongoing risk of that pharmacy no longer operating, or no longer operating at existing levels of service, was something that supported the application being granted. In the Bathgate case that PPC considered that the purchase of that pharmacy was at an advanced enough stage to conclude that a further, new, pharmacy was not necessary.
- 4.10. The Appellants take issue with the approach of the PPC in these proceedings when compared with the approach taken by the PPC in the Bathgate case. They are critical of the reasoning provided for at paragraph 29.23-25 of the Minutes of the Meeting of the PPC and, in addition, that the PPC had not properly taken into account the advanced stage of this Lloyds purchase which included a legal commitment and a non-refundable deposit (paragraph 29.20).
- 4.11. Comparative exercises are seldom conclusive as each case will turn on its own merits. In addition 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.
- 4.12. In these circumstances the PPC noted, at paragraph 29.26, “the consideration was finely balanced”. It had also taken advice on what it should take into account in this regard (paragraph 29.25). The PPC considered ongoing issues of inadequacy before concluding, on this issue, that they did not have enough certainty from the existing pharmacists that planned changes would occur and ensure adequate provision in the future. In my view this decision has been properly arrived at in terms of the reasons given.

- 4.13. Ground of Appeal 3. This relates to whether there has been a failure to explain the application by the Board of the provision of these Regulations to those facts [the facts upon which the determination of the application was based]. Failure to do so is a ground of Appeal in terms of paragraph 5(2B)(c) of Schedule 3.
- 4.14. This ground of appeal is advanced by both Appellants and related to the conclusions reached by the PPC in relation to the size and location of the premises mentioned in the Application. In particular, that the PPC incorrectly gave weight to, if the application was granted, having two pharmacies within 100 metres of the Health Centre which was to disregard the existing availability of two pharmacies within 600 metres of the Health Centre. In relation to the size of the proposed Pharmacy the PPC concluded that despite it being smaller than the existing two pharmacies, it would nevertheless be sufficient.
- 4.15. Simply disagreeing with the conclusions of the PPC is not a valid ground of appeal. The PPC is a specialist tribunal and as such is best placed to determine the appropriate standard or weight to be applied to the information and evidence that is before it in reaching a reasoned decision. This is recognised in the Regulations with the limited rights of appeal available. A successful appeal which related to reasoning would need to disclose, therefore, some sort of procedural defect, error in fact or, most commonly, an error in law - in applying the relevant legal test. (Whether 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).
- 4.16. I do not consider any sort of procedural error to have occurred in determining the application nor do I consider the decision to have been based upon an error of fact. The PPC properly came to the conclusions it did, in terms of the size and location of the premises, and it was entitled to do so based on the evidence and information before it.
- 4.17. Although issues of convenience were mentioned in conclusions of the PPC, I do not consider that there was an over reliance on such matters that would fall foul of the

relevant legal test, when considering adequacy, as understood and discussed in *Lloyds Pharmacy Ltd v NAP* 2004 SC 73.

- 4.18. The location of the proposed premises was only one thing the PPC took into account, it was not itself a determinative factor. It had its basis in the findings of the CAR which is something the PPC is obliged to take into account.
- 4.19. Furthermore, inadequacy had already been established by the PPC and the PPC was referring to the desirability of an additional pharmacy being within the 100 metre radius which, compared with 600 metres, would manifestly be the case.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is successful in respect of Ground of Appeal 2. I shall therefore refer the matter back to the PPC for reconsideration.
- 5.2. In doing so I would urge the Board to reconvene as a matter of urgency to reconsider this application. In particular, to provide sufficient reasons as to their decision making regarding the Pharmacy First issue raised by the First Appellant.

(sgd)

C W Nicholson WS
Chair
National Appeal Panel
30 May 2024