

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

4 Blackford Road,

Paisley. PA2 7EP

Applicant: TC Trading (Scotland) Ltd

Appellants: (1) Mackie Pharmacy, (2) Boots UK, (3) Abbey Chemists (“the Appellants” or the First, Second and Third Appellants respectively)

Health Board: NHS Greater Glasgow and Clyde (“the Board”)

PPC Decision Issued: 4 October 2023

Panel case number: NAP 122 (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 4 October 2023 in relation to the application of TC Trading (Scotland) Ltd (“the Applicant”).
- 1.2. The application was originally made on 8 January 2023. The application was considered at a meeting of the PPC on 11 September. The PPC issued its decision to approve the application on 4 October 2023.
- 1.3. An appeal was lodged against the decision of the PPC by the Appellants on (1) 24 October 2023, (2) 18 October 2023 and (3) 22 October 2023 respectively.

2. Grounds of Appeal

- 2.1. The Appellants have each lodged a Notice of Appeal against the decision of the PPC. Given their similarities, I have taken their grounds of appeal together for expediency.
- 2.2. Ground of Appeal 1. This ground relates to whether there has been a procedural defect in the way the application has been considered by the Board. In particular, who was notified as an interested party and in turn participated at the hearing.
- 2.3. Ground of Appeal 2. This ground relates to the application of the legal test in terms of the Regulations. In particular, when considering adequacy, whether those pharmacies in neighbouring neighbourhoods had been taken into account and whether there was an over reliance on the CAR by the Board.
- 2.4. Ground of Appeal 3. This ground relates to whether the reasons given by the Board for their decision were sufficient.

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 relates to whether there has been a procedural defect in the way the application has been considered by the Board. In particular, who was notified as an interested party and in turn participated at the hearing.
- 4.2. The requirements relating to notifying interested parties are set out at paragraph 1 of Schedule 3. Two of the Appellants have questioned the way in which this was actioned by the Board. Failure to adhere to these requirements would constitute a procedural defect and a ground of appeal in terms of paragraph 5(2B)(a) of Schedule 3.
- 4.3. As parties are aware, 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 and prior to 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. Different Boards are taking different decisions and there is not necessarily a right or wrong answer, as much will depend on the circumstances of each application.
- 4.4. In relation to this Application, and it was confirmed in the papers that I received, the relevant notifications were sent out on 21 February 2023, and this included a notification being sent to Lloyds Pharmacy Ltd. Lloyds Pharmacy lodged written

representations on 16 March 2023. Prior to the hearing taking place the relevant Lloyds Pharmacy was sold to Amiry and Gilbride Ltd. It appears to be the case that this was not the only pharmacy they bought in area. The Board noted that as Amiry and Gilbride were not an interested party when the application notifications were issued, they had not in turn submitted written representations and as a result they were not invited to the Oral hearings. The correct procedure was followed and this does not, therefore, constitute a procedural defect in terms of the Regulations.

- 4.5. Ground of Appeal 2. This ground relates to the application of the legal test in terms of the Regulations; in particular, when considering adequacy, whether those pharmacies in neighbouring neighbourhoods had been taken into account and whether there was an over reliance on the CAR by the Board.
- 4.6. As mentioned above 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.
- 4.7. 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.
- 4.8. 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 CAR is also mentioned at paragraph 3(6)(a) and (b) of Schedule 3 insofar as 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. It is clear, therefore, that the importance of the CAR is recognised in the

Regulations, but this is not to say that is itself a determining factor. All the relevant information should be taken into account and carefully weighed and balanced before reaching a view, and care should be taken not to rely disproportionately on one source of evidence or information over another.

- 4.9. It is also the case that the PPC has the ability to assess adequacy with reference to the availability of pharmaceutical services in neighbouring neighbourhoods as was discussed in *Sainsbury's Supermarkets Ltd v National Appeal Panel* 2003 S.L.T. 688. Lord Carloway held that it was legitimate for the panel to have regard to the provision of pharmaceutical services in the neighbourhood not only by pharmacies located in the neighbourhood but also those upon its fringes. Though not binding I agree with those observations and note this approach is now commonplace.
- 4.10. The Minutes of the Meeting of the PPC on 11 September and the decision contained therein confirm that the PPC clearly placed a great deal of emphasis on the CAR. This was not fully to the exclusion of other sources of evidence and information but I do consider over reliance did take place. The Appellants also took issue with the extent to which the CAR could be relied upon given the changes that had taken place in the neighbourhood and the amendment of the definition of the boundary of the neighbourhood itself during the determination of the application. This is to suggest that the PPC should have taken these factors into account when considering the extent to which they could rely upon the CAR. I agree with these views also.
- 4.11. Finally, there is no mention of the pharmaceutical services available in the neighbouring neighbourhoods. In failing to take these into account the PPC has, in my view, failed to properly apply the legal test when considering adequacy. Failure to do so as a matter of procedure or with reference to the facts of the case is a ground of appeal in terms of paragraph 5 (2B) (a) and (c) of Schedule 3 respectively.
- 4.12. Ground of Appeal 3. This ground relates to whether the reasons given by the Board for their decision were sufficient. 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.

- 4.13. Again I agree with the Appellants in this regard. It is not sufficient to simply say “for the reasons set out above”. This is particularly true when that section headed “deliberations” simply narrates what the PPC noted and were mindful of rather than conclusions. Specific reasons must be given for the PPC considering that the current provision was inadequate. I will therefore uphold this ground.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is successful in respect of Grounds of Appeal 2 and 3. I shall therefore refer the matter back to the PPC for reconsideration.
- 5.2. In relation to Ground of Appeal 2, its reconsideration of the application should be undertaken with reference to those other sources of evidence and information and taking care not to over rely on the CAR.
- 5.3. 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

12 June 2024