

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) Boots UK, (2) Abbey Chemists ("the Appellants" or the First and Second and Appellants respectively)

Health Board: NHS Greater Glasgow and Clyde ("the Board")

PPC Decision Issued: 20 June 2024

Panel case number: NAP 122A (2024)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1. This is an appeal against a reconsideration decision of the Pharmacy Practices Committee (“the PPC”) of the Board which was issued on 20 June 2024 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 The application was originally made on 8 January 2023.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 first considered at a meeting of the PPC on 11 September 2023. 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 then Appellants . In a decision dated 12 June 2024 I upheld the appeal and did so in relation to two grounds of appeal, namely grounds (2) and (3), which related to an overreliance on the CAR by the PPC when reaching their decision and a failure to provide sufficient reasons, respectively.
- 1.4. The PPC reconvened on 20 June 2024 to reconsider their earlier decision and address these grounds. It is a matter for each PPC how they go about this exercise, and so unless expressly provided for in a NAP decision, an entirely new panel or the participation of the parties will not normally be required. This may be required if there was some sort of nullity or substantial irregularity at first instance, such as apparent bias. That was not the case here however.
- 1.5. The PPC issued its decision to once again approve the application on 20 June 2024. The Appellants now appeal that decision.

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, once again, taken their grounds of appeal together for expediency.

- 2.2. Ground of Appeal 1. This ground relates to whether the reasons given by the Board for their decision were sufficient.
- 2.3. Ground of Appeal 2. This ground relates to whether there was a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based.
- 2.4. The second appellant has also raised a number of other matters in their notice of appeal and I will address these separately in this decision for completeness – notwithstanding they were not raised as grounds of appeal permitted in terms of the Regulations.

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 the reasons given by the Board for their decision were sufficient. Failure of the Board to properly narrate the facts or reasons upon which their determination of the application was based is, as it was then, a ground of Appeal in terms of paragraph 5(2B)(b) of Schedule 3.

4.2. In relation to this ground I consider that reasons are now provided, and that those reasons are sufficient. They are recorded at paragraphs 15.15 to 15.21 of the decision as reconsidered on 20 June 2024. The reasons are, in summary, threefold: the view reached by the PPC that the main contractor had sacrificed service provision for volume – supported by views expressed in the CAR; the view reached by the PPC that the

assertion that the other contractors had capacity to undertake additional services had not been evidenced; and the view reached by the PPC that the services available from contractors in neighbouring neighbourhoods was not sufficient to address the inadequacy in the neighbourhood.

- 4.3. Ground of Appeal 2. This ground relates to whether there was a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based. 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)(c) of Schedule 3.
- 4.4. In relation to this ground the Appellants consider that a number of errors of fact have occurred.
- 4.5. The first relates to the weight the PPC gave to services available from contractors in neighbouring neighbourhood. The PPC, as mentioned above, considered this. In particular they considered the dispensing data in relation to those services before concluding that this was insufficient to alleviate the inadequacy identified. In doing so the PPC noted that they were limited in considering any further information in this regard as none had been provided to them. The reason given for this was that those additional contractors had not participated in the process in so far as they were able to lodge written representations and speak to those representations at the subsequent hearing.
- 4.6. For my part I accept the approach taken by the PPC. The PPC is entitled to consider any further information it thinks relevant as provided for at paragraph 3 of Schedule 3 but there is a limit to what additional information it can gather and consider itself. The best evidence of services from neighbouring contractors would have been to hear from them and this was, simply, not the case here. The PPC did, however, interrogate the data available to it in this regard and this is consistent with the ability, not a duty, that the PPC has 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.

- 4.7. The second issue relates to a number of findings that the PPC arrived at. The first being in relation to the services provided by the second Appellant, which the PPC considered were consistent with the terms of the CAR, as well as its conclusion regarding not being satisfied that other contractors could improve their services as they asserted. This being on the basis that there was not, in their view, any evidence to support these assertions.
- 4.8. It is clear that the appellants, in particular the second Appellant, disagrees with the PPC's conclusions and also suggests that the legal test has not been applied correctly – though this is not a ground of appeal that has been advanced. The conclusions reached by the PPC and the appropriate standard or weight to be applied to the information mentioned above (paragraph 3.4) is a matter for the PPC, as a specialist tribunal, to determine; though as was previously the case, care must be taken not to over rely upon the CAR - notwithstanding it must be taken into account. Disagreeing with the conclusions of the PPC in this regard is not a valid ground of appeal, and for this reason this ground is not upheld.

Other matters referred to by the second appellant

- 4.9. The second appellant takes issue with a number of other matters in these proceedings.
- 4.10. The first relates to the PPC's decision to seek the advice of a legal advisor from the Central Legal Office and the contents of that advice.
- 4.11. It is, of course, entirely proper for the PPC to seek legal advice when they consider it necessary. In these circumstances the PPC was seeking advice on some procedural matters in terms of the Regulations and, in turn, addressing the points raised in my previous decision. The advice provided clearly assisted the Board and whilst it is not for me to comment upon the contents of that advice I would say that it cannot, by any means, be described as "stepping beyond" what was said in my previous decision.
- 4.12. The second relates to the issue of timescales. The second Appellant advances the view that a fresh application should be submitted. A fresh application, and by extension a

new constituted PPC with more up-to-date information, would secure a more accurate and fairer process and decision.

- 4.13. I fully recognise the frustration felt by parties regarding the delays experienced in this process. However, the PPC is required, in various places, to consider an application and, in particular, adequacy, with reference to current provision or provision already in place. This is at the time the application is made and with reference to the supporting evidence of the application. The first decision of the PPC is also taken within 6 weeks of receipt of the CAR. The PPC has no locus to consider changes in circumstances during the lifetime of an application or appeal. It must make a determination based on the information before it at the relevant time. To do otherwise would represent a procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3.
- 4.14. The second appellant also mentions the Lloyds Pharmacy in this regard, and again under the heading “new Lloyds owners”. In my previous decision I concluded that the correct procedure had been followed in not notifying those new owners and this remains the case. The second appellant makes reference to another decision of mine in an attempt to persuade me to revisit my determination here. However, that other decision related to a different set of circumstances, in particular, the new owners essentially stepping into the shoes of that Lloyds Pharmacy, adopting their written submissions and participating at the following hearing and appeals process. That was not the case here.

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

10 September 2024