

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

30 Laurel Avenue, Dalneigh, Inverness IV3 5RP

Applicant: Green + Healthcare Limited

Appellants: John Ross (Chemists) Ltd

PPC Decision issued: 17 May 2016

1. Background

- 1.1 This is an appeal in relation to the revised decision of the Pharmacy Practices Committee of NHS Highlands (“the PPC”) in the application of Green + Healthcare Limited related to 30 Laurel Avenue, Dalneigh, Inverness. The application was originally heard by the PPC on 19 November 2015 and a decision was issued on 7 December 2016. Lloyds Pharmacy Limited appealed that decision. I issued my decision in that appeal on 20 March 2016 remitting the matter back to the PPC to consider two specific points, as set out in paragraph 6.5 and 6.10 of my decision of 20 March 2016. The PPC duly resat on 17 May 2016 and issued its revised decision the same day.
- 1.2 By letter and Notice of Appeal dated 10 June 2016 John Ross (Chemists) Limited lodged an appeal against the revised decision of the PPC (“the Note of Appeal”). This decision is issued in relation to the appeal of John Ross (Chemists) Limited (“the Appellant”) and is supplemental to, and must be read in conjunction with, my decision of 20 March 2016.

2. Admissibility of Appeal

- 2.1 A preliminary issue is raised in paragraph 12 of the Note of Appeal, namely whether the Appellant, having failed to appeal against the initial decision of the PPC, issued on 7 December 2015, is entitled to appeal against the revised decision of the PPC.
- 2.2 In terms of para. 5 of Sch. 3 of the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009 (“the Regulations”) a person who has received notification of the application in terms of para.1 of Sch. 3 of the Regulations may appeal the decision of the Board (hereinafter referred to as ‘the PPC’) provided they have submitted written representations to the PPC in respect of the application. Such an appeal must be lodged within 21 days of the date on which notification of the decision of the PPC was sent to the Appellant.
- 2.3 The revised decision of the PPC was sent to the Appellant on 20 May 2016 providing a deadline of 10 June in which the Appellant must appeal. The Appellant duly lodged the Note of Appeal by 10 June 2016. The deadline to appeal against the original decision of the PPC had, of course, long passed.
- 2.4 The question which arises is whether, having failed to appeal the original decision, the Appellant is entitled to appeal the revised decision. It is clear to me that, in the circumstances of this case, the answer must be that the Appellant is so entitled. The original decision of the PPC was specifically remitted back to the PPC re consider certain matters which were not covered to my satisfaction by its original decision and to issue a revised decision. That necessarily anticipates that the decision of the PPC may change, be expanded upon or may be further elucidated. It follows that grounds of appeal may become apparent only on review of the revised decision. In these circumstances, the date of issue of the decision in terms of the Regulations requires to be read as referring to the issue of the revised decision. I, therefore, consider that the Note of Appeal has been lodged timeously and must be considered.

3. The Grounds of Appeal

- 3.1 Having decided that this appeal is admissible it falls to consider its terms. The grounds of appeal are restricted to the two issues which the PPC was directed to consider by my decision of 20 March 2016. The specific grounds are as follows:
- 3.1.1 the PPC failed to properly narrate the facts and reasons upon which it determined that it was unlikely that any neighbouring pharmacy would cease to be viable as a result of the grant of the application. In particular, the PPC failed to identify the statistics or period of time referred to in

paragraph 2 of P42 of the decision and failed to provide reasoning as to the conclusion reached from those statistics;

- 3.1.2 that the PPC's statements in paragraphs 3 and 4 of P42 of the decision are contradictory and hence fail to properly narrate the facts and reasons upon which the PPC's determination is based;
- 3.1.3 that there was no evidence that the adequacy of provision of pharmaceutical services had materially changed since the PPC's decision of February 2013 which found that the provision of services in the neighbourhood was adequate and that by contradicting its decision of 2013 the PPC was in error in law and, in any event, failed to properly narrate the facts and reasons for its decision or the application of reg. 5(10) of the Regulations, in the context of its earlier decision; and
- 3.1.4 that in paragraph 5 of P41 the PPC failed to identify what inequalities it was specifically referring to and hence failed to explain the basis for its determination.

4. Legal Framework of Appeal

- 4.1 The basis on which appeals may be advanced against a decision of the PPC are set out in para. 5 of Sch. 3 of the Regulations. The grounds of appeal are limited to where the PPC has erred in law or where (a) there has been a procedural defect in the way the application has been considered, (b) there has been a failure by the PPC to properly narrate the facts or reason upon which their determination of the application is based or (c) there has been a failure to explain the application by the PPC of the provisions of the Regulation to the facts.
- 4.2 In my role as Chair of the National Appeal Panel, I am required to consider the notice of appeal and decision of the PPC and to dismiss the appeal if I am of the opinion that (a) the notice of appeal discloses no reasonable grounds of appeal; or (b) is otherwise frivolous or vexatious. I am required to remit the decision back to the PPC for reconsideration if I am of the opinion that one of the grounds of appeal in para. 5(2B) of Sch. 3 of the Regulations has occurred. In other cases, I am required to convene the National Appeal Panel to determine the appeal.

5. Discussion and Reasons for the Decision

- 5.1 The Appellant's first ground of appeal relates to the PPC's revised decision in relation to the effect of the grant of the application on the viability of neighbouring pharmacies. In terms of paragraph 6.5 of my decision of 20 March 2016 I directed the PPC to consider this matter further. I did so on the basis that I considered it to be incumbent upon the PPC to specifically address this matter as it had been raised before them at the hearing on 19 November 2015. The matter is addressed in paragraphs 2, 3 and 4 of P42 of the PPC's revised decision.
- 5.2 The first ground of appeal is directed at the second sentence of paragraph 2 of P42 of the decision when the PPC states:

“The PPC considered the statistics around the volume of activity per pharmacy over time and concluded that it was unlikely that any adjacent pharmacy would close if this new contract were granted.”

In respect of this paragraph the Appellant states that the PPC does not identify the statistics referred to or the period of time referred to.

- 5.3 When considering a statutory obligation to give reasons, whilst the reasons must be proper, adequate and intelligible, the decision should not be subjected to detailed textual analysis and criticism. Further, the decision must be read fairly and in good faith, as a whole, as if by a well-informed reader who

understands the principal controversial issues in the case. The approach adopted by the Appellant in the first ground of appeal appears to me to be exactly the sort of overly legalistic and narrow analysis which is to be avoided. It is plain from reading the decision of the PPC as a whole, in particular the detailed restatement of the arguments put to it at the hearing, and from the immediately following paragraphs that the PPC is taking cognisance of the increasing population in areas surrounding the neighbourhood and the increased dispensing of neighbouring pharmacies in the years preceding the application in question, as set out earlier in the PPC decision. Accordingly, I consider there to be no merit to this ground of appeal.

5.4 The second ground of appeal is that paragraphs 3 and 4 of P42 are contradictory. In particular, it is said that the statement:

“The population around the Dalneigh area was seen to be increasing and this will be of benefit to the adjacent pharmacies in the future, and possibly to a lesser degree, in Dalneigh, by increasing the number of people requiring pharmaceutical services.”

is contradicted by the subsequent statement that the residents of Dalneigh would use the new pharmacy and would be unlikely to move elsewhere.

5.5 With respect to the Appellant, there is evidently no contradiction between these two statements. The first statement refers to the area *around* Dalneigh. The second statement refers to the residents of Dalneigh. It is plain that the PPC considers that the expanding population in the areas neighbouring Dalneigh will make up for any loss to the neighbouring pharmacies as a result of the usage by the residents of Dalneigh of the proposed new pharmacy. Accordingly, I consider there to be no merit to this ground of appeal.

5.6 The third ground of appeal is directed at the reasoning of the PPC in coming to the conclusion that the provision of services is inadequate in light of a decision of the PPC in 2013 which considered that the provision of services to the neighbourhood was adequate. The Appellant argues that, in light of the decision in 2013, it is incumbent upon the PPC to specifically address the decision of 2013 and that in the absence of evidence that the facts had materially changed it is perverse to reach a contrary conclusion. I disagree. As is made clear in the decision of the Inner House of the Court of Session in *Lloyds Pharmacy Limited v National Appeal Panel* 2004 SC 2004, the PPC is obliged to consider the adequacy of the services provided at the time of the application. To seek to impose an obligation on the PPC to adopt the decision of the prior PPC in respect of adequacy in the absence of evidence of material change is misconceived.

5.7 I should note that the Appellant also refers to the original decision of the PPC in this application in December 2015 as demonstrating that in December 2015 the PPC had found no basis to conclude that the provision of services was inadequate. That decision was of course remitted back to the PPC on the basis that they had failed properly to address the issue of whether or not the provision of services was adequate. As such, nothing can be taken from that decision.

5.8 In any event, it is clear that the PPC has given consideration not only to the 2013 decision but referred to the lack of progress with engagement with core services since 2013 and the increasing pressure on surrounding pharmacies due to the expanding surrounding population. Having considered these factors, the PPC was entitled to reach the decision it did in respect of adequacy. Accordingly, I consider there to be no merit to this ground of appeal.

5.9 The Appellant’s final ground of appeal is that the PPC failed to properly narrate the facts and reasons for concluding that the provision of service was inadequate as a result of the failure of the PPC to identify the inequalities referred to in paragraph 5 of P41 of the decision. Similarly to the Appellant’s first ground of appeal, the Appellant seeks to adopt a narrow and legalistic approach to the interpretation of the decision focusing on the meaning of one word in one paragraph. As set out in paragraph 4.3 above, this approach is to be avoided and the decision is to be read as a whole. Reading the decision as a

whole, it is clear from the restatement of evidence in the decision and by the paragraphs surrounding the sentence focused on by the Appellant that the inequalities referred to relate to the higher than average levels of deprivation in the neighbourhood and the difficulties this presents in terms of accessing pharmaceutical services. I consider the reasoning of the PPC to be clear in this regard and, therefore, consider there to be no merit in this ground of appeal.

Conclusion

- 6.1 For the reasons set out above, I conclude that the grounds of appeal forwarded by the Appellant disclose no reasonable grounds of appeal and accordingly dismiss the appeal in terms of para. 5(5)(a)(i) of Sch. 3 of the Regulations. In doing so, I am cognisant that the test set out in para. 5(5)(a)(i) of Sch. 3 of the Regulations is not a high bar for the Appellant to cross. However, I consider this appeal to be fundamentally flawed in both its approach and its content.

(sgd) JMD Graham

Chair

National Appeal Panel

24th June 2016