

National Appeal Panel

Constituted under

**THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL SERVICES)
(SCOTLAND) REGULATIONS 2009 (AS AMENDED)**

**DECISION
of the
CHAIR
of**

THE NATIONAL APPEAL PANEL

In the application relating to

Unit A, 2 Sycamore Walk, Blackburn, West Lothian

Applicant: CD Chem Ltd

Health Board : NHS Lothian “the Board”

PPC Decision issued : 5 June 2019

Panel case number : NAP 87 (2019)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1 CD Chem Ltd (hereinafter referred to as “the Applicant”) submitted an application to the Board to be included in the pharmaceutical list of the Board to provide pharmaceutical services from and in respect of premises at Unit A, 2 Sycamore Walk, Blackburn, West Lothian (“the Premises”) . The application was dated 3 October 2018.
- 1.2 The application was considered by the Board at a hearing of its Pharmacy Practices Committee (“the PPC”) on 17 May 2019 and a decision was issued on 5 June 2019. The PPC decided that, the current provision of services in the neighbourhood defined by the PPC was inadequate and it was necessary and desirable for the application to be granted in order to secure that the adequate provision of pharmaceutical services to the neighbourhood. The PPC accordingly granted the application.
- 1.3 Appeals were lodged against the decision of the PPC by Boots UK Limited (hereinafter “Boots”) and Lloyds Pharmacy (hereinafter “Lloyds”) on 24 and 26 June 2019 respectively (together “the Appellants”).

2. Grounds of Appeal

- 2.1 The Appellants lodged separate letters setting out their respective grounds of appeal. There is, however, a significant degree of overlap between the respective grounds of appeal. As such, I shall summarise the grounds of the Appellants together.
- 2.2 The grounds of appeal can be summarised as follows:
 - 2.2.1 Ground of Appeal 1: the process behind the Consultation Analysis Report (CAR), both in relation to the questions posed and the timing of the provision of a copy of it to the Appellants, disadvantaged the Appellants;
 - 2.2.2 Ground of Appeal 2: the PPC failed to adequately consider (i) the sustainability of the new pharmacy proposed by the Applicant and (ii) the effect of the new pharmacy on the viability of the existing Boots pharmacy located within the neighbourhood;
 - 2.2.3 Ground of Appeal 3: the PPC took into account complaints made against Boots which were not in their full context, took into account information it obtained from its own inspection of the existing pharmacy and failed to consider the services provided to the neighbourhood by pharmacies located outwith the neighbourhood in assessing adequacy;
 - 2.2.4 Ground of Appeal 4: the PPC failed to consider the adequacy of the services provided to the neighbourhood, particularly by the existing Boots pharmacy located within the neighbourhood, at the time of the decision, having regard to certain improvements in the services said to have been made between the CAR and the decision; and,
 - 2.2.5 Ground of Appeal 5: the PPC failed to take into account Boots plans in relation to the continuity of services within the neighbourhood during works in respect of a new premises.

3. Decision

3.1 Under the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009, as amended, (“the Regulations”), the available grounds of appeal against a decision of the Board are limited to circumstances in which there has been:

3.1.1 an error in law by the Board in its application of the Regulations;

3.1.2 a procedural defect in the way the application has been considered by the Board;

3.1.3 a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based (“Schedule 3 para 5 (2B)(b)"); or,

3.1.4 a failure to explain the application by the Board of the provisions of these Regulations to those facts (“Schedule 3 para 5 (2B)(c)").

3.2 I am required to consider the notice of appeal and:

3.2.1 to dismiss the appeal if I consider that it discloses no reasonable ground of appeal or is otherwise frivolous or vexatious;

3.2.2 remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out at points 3.1.2 to 3.1.4 have occurred; or

3.2.3 in any other case, convene the National Appeal Panel to determine the appeal.

4. Consideration of Points of Appeal

Ground of Appeal 1

4.1 The principal complaint made by Boots under this Ground of Appeal is that the questionnaire which forms the basis of the CAR includes questions which were formulated with the input of the Applicant. It is said that these questions are, in effect, loaded so that any responses are likely to be influenced by the question and, therefore, tainted.

4.2 In relation to the content of the CAR questionnaire, Regulation 5A envisages that the CAR will be a joint exercise between the Board and the Applicant. It is to be carried out for the purpose of establishing (a) whether the existing services are adequate; and (b) determining the level of support for the proposed application. In order for these issues to be addressed it is, in my opinion, necessary and proper that the questions asked will address elements of the existing service which the applicant considers may be inadequate.

4.3 Particular issues are also raised by Boots in relation to the structure of the questions asked. Boots consider that the questions which do not form part of the usual questions contained in the CAR questionnaire either lead the participant to a certain answer or provide no scope for explanation.

4.4 In relation to the leading nature of the first question, I note that provision was provided for participants to explain their answer and these answers have been noted in the CAR. In relation to the second two questions complained of, they are “yes/no” questions. Such questions will naturally lead to a restricted response. However, that does not invalidate the information obtained. It must simply be interpreted carefully having regard to the fact that the answer does not necessarily provide the full picture.

4.4 The CAR is a tool to assist in the assessment of the adequacy of the existing service. In the interests of encouraging a response it may well be necessary to keep the questionnaire and

its questions relatively focused and brief. It is appropriate that they address areas which are perceived by an applicant to be a concern. The questions posed in this instance do not demonstrate any inherent bias and to the extent that the answers may not provide a full explanation of the participants reasoning, the PPC is an expert tribunal and well placed to interpret the CAR accordingly.

- 4.5 For these reasons, I do not consider there to be any merit in Ground of Appeal 1 so far as directed at the content of the CAR.
- 4.6 The second element of Ground of Appeal 1 is that Boots state that they did not receive a copy of the CAR until 5 working days before the hearing. This is said to have prejudiced their ability to prepare a response.
- 4.7 Whilst I can understand the Appellants desire to have all information available to them to assist and focus their representations to the PPC, there is no requirement for the Appellants to be provided with a copy of the CAR in advance of any hearing, should there be one. Notice of the application requires to be given to interested parties. However, the CAR does not form part of the information which requires to be included in the application in terms of Regulation 5(2C). Regulation 5A(5) requires the CAR to be made available to the PPC but not require it to be more widely circulated. As such, whilst I would encourage the Board to ensure that relevant information is available to all parties promptly, I do not consider any delay in the provision of the CAR to the Appellants to represent a procedural defect.
- 4.8 If I am wrong in reaching this conclusion, the Appellants did, in any event, receive the CAR in advance of the hearing and in sufficient time to consider its contents and assess whether they considered the criticisms made to be fair. They will be well acquainted with their own services and able to quickly identify if there are any elements of the CAR which they consider do not reasonably represent the services they provide.
- 4.8 For these reasons, I do not consider there to have been any procedural irregularity. If I am wrong in reaching that conclusion, I do not consider the Appellants to have been prejudiced by any perceived delay in the provision of the CAR. I, therefore, do not consider there to be any merit to this element of Ground of Appeal 1.

Ground of Appeal 2

- 4.10 The Appellants set out specific concerns in relation to the assessment of the viability of the proposed pharmacy. In particular, they raise concerns about (i) the lack of evidence to support the Applicant's position that items currently dispensed outwith the neighbourhood may be dispensed within the neighbourhood by a new pharmacy and (ii) the assessment by the PPC that the number of scripts presently dispensed within the neighbourhood, together with an element of those presently dispensed outwith the neighbourhood returning, could sustain two pharmacies.
- 4.11 As the Appellants set out, the PPC ought to consider the long term sustainability of the proposed pharmacy and the effect the proposed pharmacy may have on the viability of the existing pharmacy as part of its overall assessment of the desirability of the application. In doing so the PPC acts as an expert tribunal. It is regarded as having a significant degree of expertise which will allow it to make this assessment. The Appellants may well disagree with the PPC. However, that of itself does not form a legitimate ground of appeal.
- 4.12 It is evident from the decision of the PPC that serious consideration was given to the viability of the proposed and existing pharmacies. The Applicant was questioned on the long-term sustainability of the proposed pharmacy. Boots were given the opportunity to set out any grounds they may have for believing that their own viability would be impaired should the application be granted.

- 4.13 The Appellant answered the questions put to him by reference to professional advice received in relation to the viability and the threshold for prescriptions which it considered would be sufficient to sustain the business.
- 4.14 Whilst Boots raised the issue of viability they did not expressly state that their own viability would be impaired. Instead they noted that should that be the outcome they may need to consider their position.
- 4.15 It is clear from the decision of the PPC that they have actively applied their mind to the viability of the proposed and existing pharmacies should the application be granted. Their reasoning in this regard is clear having regard to the decision as a whole. The PPC considered that the existing volume of prescriptions dispensed within the neighbourhood was significant and resulted in the existing pharmacy being a busy practice. They also considered that the establishment of a new pharmacy in the neighbourhood was likely to result in a proportion of the prescriptions currently dispensed outwith the neighbourhood being dispensed within the neighbourhood. Taken together this was considered by the PPC to be sufficient to sustain two practices within the neighbourhood.
- 4.16 The Appellants may well disagree with that decision and/or the reasoning provided. However, the PPC is an expert tribunal which is entitled to exercise its own judgment. Having regard to the information presented to the PPC and to the fact that the PPC are an expert body, I consider that they were free to conclude as they did.
- 4.17 For these reasons, I do not consider there to be any merit to this element of Ground of Appeal 2.

Ground of Appeal 3

- 4.18 The letter of appeal submitted by Lloyds extracts three comments from the broader analysis of the PPC in relation to the adequacy of the existing service and questions whether adequate reasons have been given the PPC in light of the three issues highlighted in the decision.
- 4.19 The comments in question are:
- (i) that the PPC accepted that it did not have the full context of the complaints made about the service provided by Boots;
 - (ii) that information on waiting times was not available; and
 - (iii) staff numbers were different during the visit by the PPC and an earlier visit by a member of the PPC.
- 4.20 The comments highlighted by Lloyds are set out as part of the analysis by the PPC of the evidence before it. The first comment represents an acknowledgement that complaints made in relation to the existing service cannot be explored fully and must be considered in that context. The second comment relates to the fact that Boots could not provide details on waiting times in order to contradict any other evidence which was before the PPC. The third comment forms part of an acknowledgement that staffing levels may differ from those in place during a scheduled PPC visit. This is also noted in the comments of the Chair of the Community Council.
- 4.21 The decision of the PPC requires to be read as a whole. When read as a whole, the reasoning of the PPC in relation to adequacy is clear. A number of significant concerns in relation to the existing services were evidenced in the CAR and by the Chair of the Community Council. The PPC accorded significant weight to this evidence. They had regard

to issues raised by the Appellants, particularly in relation to the reliability of the CAR absent the full context of concerns raised within it. However, on balance, the PPC was satisfied that the issues with the existing service set out in the CAR and by the Chair of the Community Council (including the lack of privacy for consultations, errors in dispensing and lack of availability of certain medication) led to the conclusion that the existing services were inadequate.

- 4.22 The letter of appeal submitted by Boots states that the PPC did not consider the services provided to the neighbourhood by pharmacies located outwith the neighbourhood. This is not correct. Paragraphs 23 and 24 of the decision of the PPC expressly address services provided by pharmacies outwith the neighbourhood, particularly in relation to late opening. The majority of the services provided to the neighbourhood are provided by the pharmacy located within the neighbourhood and this formed the main consideration of the PPC, however, it is evident that they did consider the services provided from outwith the neighbourhood.
- 4.23 For the reasons set out above, I do not consider that there has been any failure by the PPC to adequately set out its reasons for concluding that the existing service is inadequate nor to I consider there to have been a failure to consider the services provided by pharmacies located outwith the neighbourhood. I do not consider there to be any merit to this ground of appeal.

Ground of Appeal 4

- 4.24 The letter of appeal submitted by Boots sets out a number of factors which Boots considers have not been considered or given adequate weight by the PPC. In particular, it is submitted that in failing to give adequate weight to these issues the PPC has failed to have regard to the improved services as at the point of the decision.
- 4.25 The majority of the issues set out by Boots have been specifically addressed by the PPC. As such, it cannot reasonably be said that they have not considered them. Indeed, the PPC expressly acknowledge that improvements have been made to the services offered by Boots. However, as is evident from the decision, the PPC were not satisfied that the improvements were such as to address fully the issues in the CAR and submissions from the Community Council which led to the conclusion that the existing services were inadequate.
- 4.25 The issues highlighted by Boots which were not addressed specifically in the decision of the PPC relate to the Minor Ailment Service, evidence of complaints to the Board and the submissions of Boots in relation to the Pharmaceutical Care Plan. It should be borne in mind that the PPC is not required to directly address each submission made to it when providing reasons for its decision. It is sufficient that its reasoning is clear to a party familiar with the surrounding circumstances. The issues raised by Boots which were not directly addressed by the PPC do not directly relate to the reasons why the PPC concluded that the existing services were inadequate. As such, it is reasonable that the PPC chose not to address them directly as they did not bear on its reasoning.
- 4.26 I do not consider there to be any failure by the PPC to address the existing services as at the point of the decision, including any improvement thereto. To the contrary, the PPC have specifically acknowledged that improvements have been made to the existing services. They have simply concluded that the improvements are insufficient to address the issues which they consider result in the service being inadequate. Accordingly, I do not consider there to be any merit in this ground of appeal.

Ground of Appeal 5

- 4.27 The final ground of appeal relates to the consideration by the PPC of the plans of Boots to relocate to improved premises.
- 4.28 Boots consider that they have plans which are well advanced and, from its perspective, certain. The PPC noted that these represent future plans and, whatever the intentions of Boots, there will always be an element of uncertainty as to what may happen in the future. These positions are not contradictory. The approach of the PPC was to consider the existing provision rather than any future improvements which may occur. This is, in my view, the correct approach and in line with the submissions of Boots in Ground of Appeal 4 in relation to the approach which ought to be adopted by the PPC.
- 4.29 For these reasons, I do not consider there to be any merit to this ground of appeal.

Disposal

- 5.1 For the reasons set out above, I have concluded that the grounds of appeal set out by the Appellants have no merit. I consider that they disclose no reasonable grounds of appeal.
- 5.2 In reaching this conclusion I am mindful that the test set out in the Regulations for the rejection of an appeal on the basis that it discloses no reasonable grounds of appeal is a high bar. However, I am satisfied that the grounds of appeal advanced have no realistic prospect of success.
- 5.3 In large part, the grounds of appeal represent a challenge to the merits of the decision of the PPC rather than a challenge which falls within the limited available grounds of appeal set out in the Regulations. It is to be borne in mind that the PPC is an expert tribunal and its substantive determinations ought to be approached on this basis. In addition, when considering the reasons provided for its decision, the decision ought to be read as a whole from the perspective of someone familiar with the surrounding circumstances. If the decision of the PPC is approached in this way I am satisfied that it provides adequate reasons for its decision and properly addresses relevant considerations, including the issues raised by the Appellants in this appeal.
- 5.4 I, therefore, dismiss the appeals of Boots UK Limited and Lloyds Pharmacy on the basis that they disclose no reasonable grounds of appeal.

(sgd) JMD Graham

Interim Chair

Date : 1st October 2019