

# 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**

**1-3 Scotstoun Grove , South Queensferry, EH30 9HP**

**Applicant and Appellant: Samson Ferry Ltd**

**Health Board: NHS Lothian (“the Board”)**

**PPC Decision issued: 24 October 2019**

**Panel case number: NAP 93 (2019)**

## **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 (“PPC”) of NHS Lothian (“the Board”).
- 1.2. The current appeal follows upon a fresh hearing ordered by me in my decision of 28 March 2019 when I remitted a previous decision of the Board following upon a hearing in relation to the same application on 23 November 2018. I decided then that the PPC had failed to properly narrate the facts and reasons upon which its decision was based and instructed the Board to empanel a fresh PPC absent any members who attended the said hearing of 23 November. The current appeal relates to the decision of this fresh hearing held on 24 October 2019.
- 1.3. Samson Ferry Ltd will be referred to as either “the Applicant” or “the Appellant” throughout. The premises for which it submitted an application to the Board to be included in the Board’s Pharmaceutical List are situated at 1-3 Scotstoun Road, South Queensferry, EH30 9HP (“the premises”). The said application was dated 28 March 2018. I instructed that the original Consultation Analysis Report (“CAR”) would suffice for the purposes of the fresh hearing.
- 1.4. The PPC, under delegated authority of the Board, took evidence from the Applicant and interested parties and considered supporting documentation at the said hearing of 24 October 2019 and following upon which it determined that the provision of pharmaceutical services at the premises was neither necessary nor desirable in order to secure adequate provision of pharmaceutical services within the neighbourhood in which the premises were located and that accordingly the Applicant’s application was rejected. In essence, the PPC determined that the current provision was adequate.

### **2. Grounds of Appeal**

- 2.1 The grounds of appeal may be summarised as follows :
  - 2.1.1 The PPC failed to consider evidence contained in the CAR in a manner that was logical, reasonable or clear. Specifically, the PPC quoted concerns contained in the CAR in ascending order e.g. late evening or Sunday opening, overstretched provision, poor transport service etc. and that the comments in the CAR principally related to convenience than more serious concerns which had been raised.
    - 2.1.2. The PPC’s consideration of a letter of support from South Queensferry Medical Practice was unreasonable and illogical. Specifically, that the medical practice had detailed concerns relating to waiting times, MDS waiting lists and problems relating to the obtaining of drugs and that the GP practice felt that a third pharmacy would be an ideal solution to the current inadequacy in service provision and that the PPC’s interpretation of said letter was erroneous.
    - 2.1.3. Evidence concerning waiting times was judged in an erroneous manner. Specifically, that the evidence in the CAR was persuasive in so far as waiting times were concerned in conjunction with the letter from the GPs and that the evidence of Lloyds representative ought to have been discounted from the PPC’s consideration as it was not impartial ; the PPC’s consideration of the letter submitted from all four ward Councillors, MSP and MP was brief and dismissive and that it had failed to narrate the facts and reasons why it disagreed with the views of the elected representatives on the matter of adequacy of provision.

- 2.1.4 Evidence that the core Minor Ailments Service ( 'MAS' ) was being delivered at an inadequate level to the population was not considered in a balanced or reasonable way, specifically that the Applicant had submitted statistical evidence at the hearing indicating that a total of approximately 4% of the population in South Queensferry was registered for MAS at the two Lloyds pharmacies in comparison to other towns of a similar size and deprivation which had enjoyed a level of between 10% and 22%.
- 2.1.5 The matter of viability of existing and future service provision was judged incorrectly. Specifically, that a new pharmacy at the premises would render the existing pharmacy at Roseberry Avenue unviable was considered without basis and was unreasonable.
- 2.1.6 A Freedom of Information Request which the Applicant had presented to the Committee detailing complaints was considered not material and that the Lloyds representative sought to confuse the PPC in the matter.
- 2.1.7 The Applicant had sought to lodge a petition on the day of the hearing and that the Chair had refused to have it tabled thus constituting a procedural defect.

### **3. Discussion**

- 3.1. In terms of 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 or
  - 3.1.4. A failure to explain the application by the Board of the provision of these Regulations to those facts
- 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 grounds 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
- 3.3. A principal consideration is whether or not the PPC has exercised its judgement fairly and given adequate reasons for its decision and that it does not otherwise offend against the provisions of Schedule 3 paragraphs 5(2A) and 5(2B). As mentioned in my previous decision relating to this application the PPC is made up of pharmacists and lay members who may be reasonably expected to understand the issues involved on the evidence before it and that importantly it is regarded as an expert tribunal. I have to be satisfied that any decision of the PPC is both intelligible and adequate. Any reader requires to understand why the matter was decided as it was, the conclusions reached on the principal issues and that its reasoning does not give rise to any substantial doubt that the PPC had erred in law.

### **4. Discussion and Decision**

- 4.1. The various grounds of appeal are addressed as follows:

4.1.1. **Ground of appeal 1:** *the PPC failed to consider evidence in the CAR in a manner that was logical, reasonable or clear particularly with regard to adequacy.*

4.1.1.1. The PPC has considered the CAR in a thorough and exhaustive manner and it is my opinion that it has drawn its own conclusions from the various contributions to it and has justified its conclusions. As to whether it has drawn its various conclusions in ascending or descending order is irrelevant . The PPC may both conduct the hearing and issue its decision in any manner it thinks fit as long as it is reasonable and otherwise accords with the provisions of the Regulations.

4.1.1.2. The PPC's decision has gone on to explain its conclusions in noting that the overall themes of the responses in relation to the provision for late evening or Sunday opening, overstretched provision due to a growing population, lengthy walk to existing pharmacies for elderly and excessive waits and insufficient stock. In considering the responses in detail the PPC took the view that many of the responses were more directed at convenience rather than the provision of an adequate pharmaceutical service itself and that ,for example, whilst the Applicant's proposed hours were attractive to the respondents it noted that extended hours was not a core service and thus not guaranteed. The PPC had commented on the evidence of the representatives for Lloyds and Well Pharmacies that their view was that the current pharmacy services were adequate and that there was an ability to cope with any increase in demand.

4.1.1.3. There was comment in the CAR and, indeed, in the evidence of the Community Councillor that South Queensferry would be better served were the proposed pharmacy situated in the West of the town it having been noted that the premises were situated some 300 yards from the existing Lloyds pharmacy in Roseberry. Further, the Applicant had acknowledged that the West was a preferred location but at the current time no retail units were available. The PPC had noted that there were four pharmacies within a three mile radius. All providing core services. The Roseberry pharmacy had difficulties in accessibility standing that its location was at the top of a steep hill . Similar difficulties would apply to the premises.

4.1.1.4. The CAR had highlighted concerns regarding excessive waiting times but that other than the comment contained there and the letter from the GPs (to which I will refer below) there was no further evidence other than that of the Lloyds representative who had indicated a waiting time at the Loan pharmacy of 11-14 minutes. As far as the Roseberry pharmacy was concerned this appeared from the evidence, to be underutilised with five patients per hour and that the PPC considered a 20 minute waiting time as reported to the Lloyds representative by a resident to be unlikely.

4.1.1.5. A few comments in the CAR related to concerns regarding supply issues. The PPC had acknowledged that Lloyds had previously one supplier and had introduced a further supplier in July 2019 which, on its evidence, will increase the provision for the future. The PPC took the view that following the documentation submitted indicating shortages at Lloyds that they were often for short periods and that shortages were usually often national shortages ; this contention was not challenged by the Applicant. There were only two comments in the CAR relating to errors and omissions in dispensing. As to the Freedom of Information evidence

it was stated that Lloyds had confirmed that every complaint or dispensing error was self-reported via their superintendent. I will address this point later below. In general therefore, the PPC's extensive examination of the CAR and its comments thereon is both reasonable and clear and I trust that my comments following will add further support.

4.1.1.6. I have to add , as I mentioned in my previous decision ,that a CAR is not, of itself, determinative of the issue of adequacy . It is one of many aspects of evidence included in which is the oral evidence of the parties , other documentation and finally the expert judgement of the members of the PPC acting reasonably .

4.1.2. **Ground of Appeal 2 :** *the PPC's consideration of a letter of support from South Queensferry Medical Practice was unreasonable and illogical.*

4.1.2.1. The Letter from the GPs acknowledges and appreciates that the pharmacies are working under challenging circumstances but had highlighted a number of issues relating to (a) waiting times (of 30-60 minutes) which had presumably been relayed back to them by patients (b) dosette box issues and (c) difficulties in obtaining drugs as a result of wholesaler issues. This letter commented that a new pharmacy at the premises would alleviate pressure, particularly in that the Applicant would be using a number of drugs suppliers.

4.1.2.2. The PPC had noted that the Lloyds representative's response to this letter was that it had been discussed with the GPs who had advised that it was prompted by complaints from a small number of patients. Lloyds had reported a good working relationship with the GPs which had not been rebutted by the Applicant, but the fact that the letter had been submitted indicated to the PPC that the relationship between the GPs and the pharmacists was not always positive.

4.1.2.3. The PPC considered that, on the evidence, a 60 minute visit was exceptional and that the average waiting time of 11-14 minutes was more realistic and that in any event, Lloyds had since employed the services of a new supplier which would presumably take some of the strain of wholesaler shortages.

4.1.2.4. In the context of the GPs letter, the Applicant had contended that it was not clear from the PPC's decision whether it had agreed with Lloyds' statement of its conversation with the GPs. It is not for the PPC to agree or disagree but to note the evidence and draw its own conclusions and it is not my responsibility to gainsay that. The fact is that Lloyds' conversation with the GPs was in no way rebutted nor questioned by the Applicant.

4.1.3. **Ground of Appeal 3:** *Evidence of waiting times was judged in an erroneous manner and that consideration of letters submitted from elected officials were brief and dismissive.*

4.1.3.1. The Appellant had made further reference to waiting times referred in the CAR as well as the comments in the GPs' letter referred to. The Appellant has commented that the oral evidence of the Applicant and Interested Parties are unlikely to be impartial. It is arguable that the same may be said of the Applicant's evidence . It is a matter for both the opposing parties and members of the PPC to challenge the evidence of

those parties presenting. The PPC, on the evidence, took the view that the waiting times were not exceptional and it is noted in Lloyds' evidence, had they been so, patients would have used the Roseberry Pharmacy as it was under utilised. The Applicant's representative himself had stated in evidence that he was unaware of the reasons given for the long waiting times as referenced in the CAR. As for the letters from the elected officials, the PPC has at least referred to them but has given little further regard to them other than to state that such support is usually expected from elected officials. I am uncertain what the PPC means by this other than perhaps that such officials would wish to support an application for a new pharmacy. I do not consider the phrase to have had any sinister meaning and that the Appellant may be drawing conclusions that do not merit consideration. I have to add that elected officials do not always appreciate the finer appoints of the Legal Test and the Regulations. It is difficult to determine what further comments the PPC could have made in the circumstances.

4.1.4. **Ground of Appeal 4:** *Evidence that the Minor Ailments Service was being delivered at an inadequate level to the population was not considered in a balanced or reasonable way.*

4.1.4.1. There was evidence that e-MAS was employed, but it is a matter of judgement of patients as to the extent to which each pharmacy employs it although it is expected that pharmacies promote it. Lloyds' evidence was that the low uptake of MAS registration may have been as a result of the social mix of the town rather than any failing of the two Lloyds pharmacies. The PPC considered, on the evidence, that the extent of the MAS scheme was adequate.

4.1.5. **Ground of Appeal 5:** *The matter of viability of existing and future service provision was judged incorrectly.*

4.1.5.1. Lloyds representative had contended that a new pharmacy at the premises would not be viable on the basis of not only extensive salaries for the proposed pharmacists, but also the proximity of the Roseberry Pharmacy (300 yards) which was currently under utilised. If the Application were granted, he argued that it would render both pharmacies unviable and that both Roseberry and Loan pharmacies had, in any event, spare capacity. The PPC had considered that evidence and had noted that the Roseberry Pharmacy was under utilised and had agreed with this unchallenged evidence that a new pharmacy located 300 yards from Roseberry would affect the viability of both pharmacies.

4.1.6. **Ground of Appeal 6:** *The Freedom of Information request presented by the Applicant detailing complaints was considered not material.*

4.1.6.1. I had previously noted this ground of appeal in my previous decision and had rejected it. The PPC had noted that the CAR indicated two comments in relation to errors and omissions in dispensing. The Applicant had contended that Lloyds' Loan Pharmacy had 32 complaints, and the Roseberry Pharmacy had 12. The PPC had noted that Lloyds had confirmed in evidence that every complaint on a dispensing error was self reported via their Superintendent, even where the complaint or error had been resolved. The Applicant had acknowledged that he was unaware of the practice. On this basis, the PPC regarded that the

evidence in relation to dispensing issues was not material and, in my opinion, they were justified in so deciding.

4.1.7. **Ground of Appeal 7:** *The Applicant had proposed to lodge a petition on the day of the Hearing and that the Chair had refused to have it tabled.*

4.1.7.1. The Chair is entitled to conduct the hearing in any manner as he or she thinks fit. To refuse to table a document on the day of the hearing especially so that it appeared to be similar to the CAR is reasonable in the circumstances. .

## **5. Disposal**

5.1 For the reasons set out above I am satisfied that the grounds of appeal stated by the Appellant disclose no reasonable grounds and as such have no reasonable prospects of success.

**(sgd.) J Michael D Graham**  
**Interim Chair**  
**10 February 2020**