

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

203 Greenwell Wynd,

Edinburgh. EH17 8WQ

Applicant & Appellant: Logan Gray Ltd ("the Appellant")

Health Board: NHS Lothian ("the Board")

PPC Decision Issued: 10 May 2024

Panel case number: NAP 126 (2024)

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 10 May 2024 in relation to the application of Logan Gray Ltd (then “the Applicant,” now “the Appellant”).
- 1.2. The application was originally made on 28 October 2022. The application was first considered at a meeting of the PPC on 23 March 2023. The PPC issued its decision to grant the application at or around the same time.
- 1.3. That decision was challenged by way of Judicial Review by the Fleming Pharmacy. That pharmacy had not been notified of the application by the Board as an interested party and were, therefore, unable to participate in the process including appealing the decision of the Board not to notify to the National Appeal Panel.
- 1.4. Although I was not provided with papers relating to the Judicial Review, my understanding is that the decision of the Board dated 23 March 2023 was reduced by the Court of Session in an interlocutor of the Lord Ordinary dated 23 October 2023. This included the underlying decision not to notify the Fleming Pharmacy and to remit the application back to the Board to reconsider anew.
- 1.5. Accordingly the PPC considered the application anew on 29 February 2024 and issued its decision to refuse the application on 10 May 2024. An appeal was subsequently lodged against that decision of the PPC by the Appellant.

2. Grounds of Appeal

- 2.1. Ground of Appeal 1. The Board erred in fact and law and failed in its duties of consistent decision-making and good administration by reaching a different decision to that reached on 23 March 2023, despite considering the same material facts and circumstances as it did in that decision.

- 2.2. Ground of Appeal 2. The Board erred in fact acted irrationally by including Gordon's Chemist as part of the relevant neighbourhood while simultaneously defining the neighbourhood in such a way that it ought to have been excluded.
- 2.3. Ground of Appeal 3. The Board erred in fact and law by failing to take account of probable future developments of new housing in the relevant neighbourhood when considering whether the existing provision of pharmaceutical service in the neighbourhood was adequate.
- 2.4. Ground of Appeal 4. The Board erred in law by failing to consider, or afford sufficient weight to, relevant evidence of inadequacy such as the Consultation Analysis Report (the "CAR"), the effect of deprivation in the neighbourhood and the delay experienced by patients at the existing service providers.
- 2.5. Ground of Appeal 5. The Board erred in law by taking into account an irrelevant consideration, namely the interests of Fleming Pharmacy.
- 2.6. Ground of Appeal 6. The Board's decision was irrational and unreasonable in the sense that no reasonable board properly considering the evidence before it could have reached the conclusion that it did.
- 2.7. Ground of Appeal 7. The Board failed to give adequate and intelligible reasons for its decisions, in breach of the Appellant's legitimate expectations.

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.

3.3. For the avoidance of doubt, the Chair is unable to “reverse” the decision of the PPC as is “craved” in this appeal. I can only remit a decision for reconsideration in the circumstances described above.

PPC: Legal test and determination of applications

3.4. 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.

3.5. 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 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 of appeal relates to whether the Board erred in fact and law and failed in its duties of consistent decision-making and good administration by reaching a different decision to that reached on 23 March 2023, despite considering the same material facts and circumstances as it did in that decision.
- 4.2. Good decision making is based upon a number of principles and the Appellant is correct to note the importance of consistent-decision making and good administration in that regard. That being said, there are a range of responses open to a decision maker. Based on the same information the decision of one PPC may differ from another but that does not necessarily mean that either decision was incorrectly arrived at. This remains the case in these circumstances. Although the material facts and circumstances would have been broadly the same here, there were some differences, like the participation of the pharmacy that had been excluded previously. It is not a valid ground of appeal in terms of the Regulations to simply advance that the PPC had reached a different decision from one reached previously, particularly when that previous decision was reduced by way of Judicial Review. The ground is not, therefore, upheld.
- 4.3. Ground of Appeal 2. This ground of appeal relates to whether the Board erred in fact acted irrationally by including Gordon's Chemist as part of the relevant neighbourhood while simultaneously defining the neighbourhood in such a way that it ought to have been excluded.
- 4.4. Irrationality, like unreasonableness mentioned in relation to Ground of Appeal 6, is a well understood ground of Judicial Review. An application for Judicial Review is an application to the supervisory jurisdiction of the Court of Session and it is exclusive, at

first instance, to that Court; in particular the Outer House. This is not a ground of appeal permitted in terms of the Regulations and, therefore, has no reasonable grounds.

- 4.5. It may be possible to challenge how a neighbourhood has been defined as a matter of procedure, including applying the legal test correctly or, as is the case here, as an error of fact. These would be grounds of appeal in terms of paragraph 5(2B)(a) and (b) of Schedule 3 respectively. This is on the basis that a PPC must first determine what the neighbourhood is before considering whether the services in or available to that neighbourhood are adequate or not; and this was recognised in *Lloyds Pharmacy Ltd v NAP* 2004 SC 73.
- 4.6. The Pharmacy mentioned occupies a corner unit in a small L-shaped parade of commercial premises which also includes a cafe, a number of takeaways, a hairdresser and barber, a sign shop and, finally, so to speak, a funeral directors. Having looked at various maps I would describe that parade as being “off the Captain’s Road”. In relation to the Pharmacy in particular, it has its address listed on one street (Gracemount Drive) but clearly faces onto another (Captain’s Road – one of the boundaries of the defined neighbourhood). To say, therefore, that the Pharmacy is on one or other of those roads is not incorrect - such is the nature of a corner unit. Accordingly, there is no error of fact in relation to this matter.
- 4.7. Ground of Appeal 3. This ground of appeal relates to whether the Board erred in fact and law by failing to take account of probable future developments of new housing in the relevant neighbourhood when considering whether the existing provision of pharmaceutical service in the neighbourhood was adequate.
- 4.8. The relevant case law on the legal test (*Lloyds Pharmacy Ltd v NAP* 2004 SC 73) established that the PPC must have some regard to probable developments. Whether or not the PPC has properly applied the legal test as a matter of procedure or with reference to the facts of the case, would be grounds of appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 respectively.

- 4.9. However, future developments were recorded as having been considered in relation to “population and housing” at paragraph 15.12 and “current pharmaceutical services” at paragraph 15.17 of the Minutes of the Meeting of the PPC dated 29 February 2024. In relation to the latter, and with reference to the legal test in terms of probable versus speculative, the PPC concluded that no evidence had been provided to indicate that the population of Burdiehouse was likely to expand significantly over the next three years beyond a level which existing Pharmacy providers in the neighbourhood could not cope with.
- 4.10. The Appellant takes issue with this conclusion but paragraphs 4.20 – 4.22 of the Minutes disclose that the Appellant’s submissions in this regard would more accurately be described as assertions rather than evidence. The conclusion reached by the PPC was, therefore, one that was properly open to them, and for this reason this ground is not upheld.
- 4.11. Ground of Appeal 4. This ground of appeal relates to whether the Board erred in law by failing to consider, or afford sufficient weight to, relevant evidence of inadequacy such as the Consultation Analysis Report (the “CAR”), the effect of deprivation in the neighbourhood and the delay experienced by patients at the existing service providers.
- 4.12. The decision of the Board (Minutes of the Meeting of the PPC dated 29 February 2024) evidences that the CAR was considered and this is recorded at Paragraph 14 - Summary of CAR, Paragraphs 15.8-10 – Adequacy of existing provision of pharmaceutical services and necessity or desirability and Paragraph 15.9 – Current Pharmaceutical Services.
- 4.13. The appropriate standard or weight to be applied to the CAR and the other information mentioned above is a matter for the PPC, as a specialist tribunal, to determine. 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.
- 4.14. Ground of Appeal 5. This relates to whether the Board erred in law by taking into account an irrelevant consideration, namely the interests of Fleming Pharmacy.

- 4.15. As mentioned above the Board did not previously include the Fleming Pharmacy as an interested party, or as the Regulations provide “any person whose name is included in the pharmaceutical list or the provisional pharmaceutical list and whose interests may, in the opinion of the Board, be significantly affected if the application were granted”, and this was successfully challenged at Judicial Review.
- 4.16. The Appellant now appeals the Board’s revised approach to include the Fleming Pharmacy and this is, essentially, to challenge whether that Pharmacy would be significantly affected if the application were granted. The view reached by the Board in this regard is a subjective one, and I can see why it was not previously included, as it was outwith a one mile radius. Equally, one can appreciate why the Judicial Review was successful and it was subsequently included given it was only just outside that radius.
- 4.17. Leaving aside the subsequent approach in relation to defining the relevant neighbourhood it is, in my view, better to err on the side of caution and include as an interested party those on the fringes of an area. This view is, I think, supported by the PPC’s 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. This ground it not therefore upheld.
- 4.18. Ground of Appeal 6. This relates to whether the Board’s decision was irrational and unreasonable in the sense that no reasonable board properly considering the evidence before it could have reached the conclusion that it did.
- 4.19. As mentioned above, whether a decision is reasonable or not is a well understood ground of Judicial Review. An application for Judicial Review is an application the supervisory jurisdiction of the Court of Session and it is exclusive, at first instance, to

that Court; in particular the Outer House. This is not a ground of appeal permitted in terms of the Regulations and, therefore, has no reasonable grounds.

- 4.20. I would also add, as I have in other cases where a ground of judicial review have been advanced, as much as simply disagreeing with the conclusions of the Board is not a valid ground of appeal, neither does it mean that those same conclusions are unreasonable. There are a range of responses open to a reasonable decision maker and this is particularly true when that decision maker is a specialist tribunal.
- 4.21. Ground of Appeal 7. This relates to whether the Board failed to give adequate and intelligible reasons for its decisions, in breach of the Appellant's legitimate expectations.
- 4.22. Whether a party's legitimate expectations have been breached is, once again, a well understood ground of Judicial Review. As such it is not a ground of appeal permitted in terms of the Regulations. It's deployment here is also superfluous as the Board is required to give reasons, paragraph 3(6)(c) of Schedule 3, and a failure to do so is a ground of Appeal in terms of paragraph 5(2B)(b) of Schedule 3.
- 4.23. On the question of whether reasons have been given I am satisfied, with reference to the concluding paragraphs (15.14 – 15.23) of the Minutes of the PPC dated 29 February 2024, that they were given and that they were sufficient.

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

25 July 2024