

# 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

269 High Street, Linlithgow.

EH49 7EP

**Applicant:** TPB Partnership LLP (“the Applicant”)

**Appellants:** Dears Pharmacy (“the Appellant”)

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

**PPC Decision Issued:** 20 August 2024

**Panel case number:** NAP 121B (2024)

NAP 121B (2024)

## Decision of the Chair of The National Appeal Panel

### 1. Background

- 1.1. This is an appeal against the reconsideration decision of the Pharmacy Practices Committee (“the PPC”) of the Board dated 20 August 2024, in relation to the application of TPB Partnership LLP . It is the second reconsideration decision and the third overall in relation to this particular application.
- 1.2. The application was originally made on 11 April 2023. The application was considered at a meeting of the PPC on 26 September 2023. The PPC issued its decision to grant the application on 12 October 2023 .
- 1.3. Appeals were lodged against the decision of the PPC by the then Appellants – (1) Boots UK Ltd and (2) LP North Sixteen (for Lloyds Pharmacy). The second appellant later became Dears Pharmacy. I issued my decision allowing the Appeal, in part, on 30 May 2024 (NAP 121 (2024)).
- 1.4. The PPC reconsidered the application on 10 June 2024 and issued its decision once again granting the application on 13 June 2024. The Appellants appealed that second decision of the PPC. In a decision dated 18 July 2024 I upheld that appeal (NAP 121A (2024)). This was on the basis that the PPC was not quorate.
- 1.5. The PPC reconsidered the application on 20 August 2024 and issued its decision to once again grant the application at the same time. The remaining Appellant (Dears Pharmacy) has now appealed that decision.

### 2. Grounds of Appeal

- 2.1. Ground of Appeal 1. This is similar to a previous ground of appeal (ground of appeal 3 – considered in NAP 121A (2024)) and relates to changes that have taken place during the consideration of the application and appeal and whether these should be taken into account.

- 2.2. Ground of Appeal 2. This is similar to a previous ground of appeal (ground of appeal 1 – considered in NAP 121 (2024)) and relates to whether the Board’s decision was defective in that it was inconsistent with the legal test. In terms of the Regulations, failure to apply the legal test properly is a procedural defect and a ground of appeal in terms of paragraph 5(2B)(a) of Schedule 3.

### **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 is 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 (“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 relates to changes that have taken place during the consideration of the application and appeal and whether these should be taken into account.

4.2. As mentioned above this argument was advanced previously and it was not upheld. As I explained then, when cases are remitted to the PPC for reconsideration this will be on those grounds of appeal that have been successful - and only those grounds. Succeeding at appeal on a particular point does not automatically entitle a party to a full reconsideration of the application or for new evidence or information to be advanced.

4.3. 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.

- 4.4. How the Board goes about reconsidering an application that has been referred back to them on appeal is a matter for each PPC to decide upon. But this does not include hearing any further evidence for the reasons mentioned above.
- 4.5. Though more informal than a Court, an administrative decision-making body must have some form of consistency as to its procedure. This serves the interests of justice by ensuring that cases are dealt with expeditiously, without undue expense, and without undue demands on the resources of that body.
- 4.6. In this instance, I consider that the approach of the Board was the correct one and not procedurally defective in any way, nor do I consider that the National Appeal Panel requires to be convened to hear this appeal as is suggested towards the end of the Appellant's Note of Appeal. This ground of appeal is not, therefore, upheld.
- 4.7. Ground of Appeal 2. This ground relates to whether the Board's decision was defective in that it was inconsistent with the legal test. The Appellant advances this ground by suggesting that an additional pharmacy is not required - and to the extent that it would not secure adequate pharmaceutical services because it would threaten existing suppliers.
- 4.8. In considering an application the PPC, as noted above at paragraph 3.4, shall have regard to the likely long term sustainability of the services to be provided by the applicant. This is commonly referred to as the viability of the proposed application or pharmacy. The intention of this requirement is to help secure proper and sufficient pharmaceutical services in a neighbourhood by guarding against over-provision. This is in relation to the viability of the application at hand but also, it follows, existing pharmacies.

- 4.9. In relation to the legal test itself, the relevant case law (Lloyds Pharmacy Ltd v NAP 2004 SC 73) has made it clear that the decision maker should view adequacy as a binary test. Either the pharmaceutical services available in a neighbourhood are, at the time of considering the application, adequate, or they are not. The decision maker should not view adequacy as a matter of degree or on a spectrum. The ability to make improvements to, or some other possible configuration of, pharmaceutical services would feature on such a spectrum but neither automatically means that existing services are inadequate. The same case also made it clear that an application may be granted that goes further than is necessary to secure adequacy, that is to say an application that would result in some sort of over-provision could(?) nevertheless be desirable.
- 4.10. In considering this ground of appeal I have referred back to the original decision of the PPC and the reconsideration decision(s). It is clear that the PPC did consider the issue of viability and this allowed them, once they had established inadequacy (rather than improvements to existing services), to reach a view as to whether the application would secure adequate provision. This included considering the application was desirable in so far as it might result in some sort of over-provision. This ground of appeal is not therefore upheld.

## 5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is unsuccessful 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 September 2024