

# **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**

**Old Darnley Mill, 500 Corselet Road, Darnley,**

**Glasgow. G53 7RN**

**Applicant and Appellant:** Sycamore Mill LLP

**Health Board:** NHS Greater Glasgow and Clyde (“the Board”)

**PPC Decision Issued:** 10 May 2023

**Panel case number:** NAP 116 (2023)

## 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 2023 in relation to the application of Sycamore Mill LLP (then “the Applicant”, now “the Appellant”).
- 1.2. The application was originally made on 27 April 2022. The application was considered at a meeting of the PPC on 18 April 2023. At that meeting the application was refused. The Appellant lodged an Appeal against the decision of the PPC on 30 May 2023.

### 2. Grounds of Appeal

- 2.1. The Appellant has lodged 8 separate Grounds of Appeal. Grounds 1 & 2 relate to perceived procedural defects in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3). Grounds 3, 4, 5 & 6 relate to the requirement in the Regulations for the Board to properly narrate the facts and reasons upon which their determination of the application was based – paragraph 3(6)(c) read with paragraph 5(2B)(b) of Schedule 3. Grounds 7 & 8 relate to a perceived failure to properly apply the relevant legal test; failure to do so as a matter of procedure or with reference to the facts of the case are grounds of Appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 respectively.
- 2.2. Ground of Appeal 1. That the PPC erred in procedure when it failed to stay proceedings until the issue of ownership and structure of the pharmacy could be resolved.
- 2.3. Ground of Appeal 2. That the PPC erred in procedure when it informed the Appellant, they could not provide supplementary evidence to support any claims made in their statement.

- 2.4. Ground of Appeal 3. That the PPC failed to accurately narrate the facts by disregarding key elements of the Consultation Analysis Report (CAR).
- 2.5. Ground of Appeal 4. That the PPC failed to accurately narrate the facts by incorrectly concluding that the CAR was inconclusive as to whether the respondents supported the opening of a new pharmacy.
- 2.6. Ground of Appeal 5. That the PPC failed to accurately narrate the facts by disregarding statements made by the Appellant on the basis of a lack of evidence, whilst accepting statements made by the Interested Party who also did not provide evidence.
- 2.7. Ground of Appeal 6. That the PPC failed to accurately narrate the facts by not including Pharmacy First as part of their discussion in whether current pharmaceutical services are adequate.
- 2.8. Ground of Appeal 7. That the PPC erred in law when it failed to consider desirability as part of the legal test stated in the Regulations.
- 2.9. Ground of Appeal 8. That the PPC erred in law when it based its decision on services provided outside of the defined neighbourhood to determine adequacy.

### **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 it discloses no reasonable grounds or is 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 above 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 ( 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. The Appellant considers that the PPC erred in procedure when it failed to stay proceedings until the issue of ownership and structure of the pharmacy could be resolved. As mentioned above, I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).
- 4.2. During their consideration of the application a member of the PPC questioned the validity of the application. In particular the relationship between the applicant LLP (Limited Liability Partnership) Sycamore Mill and the LLP in existence at Sycamore Medical Centre, the latter of which included a GP. The initial discussion is recorded at paragraphs 6.1 to 6.8 of the minutes of the meeting of the PPC dated 18 April 2023. The PPC sought legal advice on the question which is recorded at paragraphs 9.20 to 9.38. I need not rehearse what is said there, other than to summarise that the issue in question was whether the corporate body structure at hand was not compliant with the Regulations which preclude a GP from being on the pharmaceutical list; this was also to say that the Board had incorrectly accepted the application and sent it to the PPC for determination.
- 4.3. The PPC accepted the advice that the question of validity was ultimately one for the Board to consider but rather than “stay” proceedings, they decided to determine the application which was before it whilst the Board confirmed the validity or otherwise of the application. The Appellant considers that the PPC erred in terms of the procedure it followed as it allowed the validity of the application and the merits of the application to be conflated, which was ultimately to their detriment.
- 4.4. Schedule 3, in particular paragraph 3 of Schedule 3, makes provision as to the procedure to be followed by the Board in considering an application. Where that procedure is not followed this would constitute a procedural defect in terms of the Regulations as mentioned above.

- 4.5. The issue that arose does not relate to those procedural requirements in terms of the Regulations. It follows therefore that nothing defective occurred in this regard.
- 4.6. The question posed by the member was not insidious in any way and did not, in my view, result in any unfairness to the then Applicant. It appears to have been a genuine question regarding the corporate structure at hand and whether or not the Board had inadvertently accepted an application that was a nullity. Although ultimately not a matter for the PPC it did, quite properly, take legal advice and did not take a view on validity but on the merits of the application in terms of the Regulations. This course of action was, in my view, the correct one to take. The PPC did not delay proceedings or reject the application. The former would have been regrettable and the latter would have been defective. This ground is not, therefore, a reasonable ground in terms of the Regulations.
- 4.7. Ground of Appeal 2. The Appellant considers that the PPC erred in procedure when it informed the Appellant that they could not provide supplementary evidence to support any claims made in their statement. As mentioned above, I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).
- 4.8. As was mentioned in a recent case (NAP 113-23), the procedure that is followed in terms of the Regulations is straightforward insofar as that an Applicant lodges the Application in Form A. In accordance with Regulation 5, this contains 9 heads of required information. A number of interested parties then have the opportunity to respond. The Board is required to determine the application as submitted and this includes having regard to representations received. Any further submissions or changes to those submissions are at the discretion of the Chair. If any further submissions or changes are permitted other participants will, normally, have the opportunity to respond, or at the very least have notice of them, but this back and forth does not continue in perpetuity.

- 4.9. Where the Board hears oral representations the procedure is again, broadly, at the discretion of the Chair, but an applicant and interested party will be notified and, generally, have the opportunity to speak to and amplify what it said in their application or submissions, and respond to questions put to them in that regard.
- 4.10. 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. In this instance, I consider that the approach of the Board was fair and clearly explained to the Appellant. It was not, therefore, defective in any way.
- 4.11. In their Note of Appeal the Appellant advanced Ground of Appeal 2 together with Ground of Appeal 5; namely, that the PPC failed to accurately narrate the facts by disregarding statements made by the Appellant on the basis of a lack of evidence, whilst accepting statements made by the Interested Party who also did not provide evidence. For the reasons I have given in relation to Ground of Appeal 2, Ground of Appeal 5 is also not upheld. There was nothing defective in the way the PPC went on to consider the information and evidence before it in this regard.
- 4.12. Ground of Appeal 3. The Appellant considers that the PPC failed to accurately narrate the facts by disregarding key elements of the Consultation Analysis Report (CAR). As mentioned above, this relates to the requirement in the Regulations for the Board to properly narrate the facts and reasons upon which their determination of the application was based – paragraph 3(6)(c) read with paragraph 5(2B)(b) of Schedule 3.
- 4.13. It is also the case that particular provision is made in the Regulations regarding the CAR insofar as the reasons given must set out a summary of the CAR and how it was taken into account in arriving at its decision; as required by paragraph 3(6)(a) and (b) of Schedule 3. The CAR is also something the PPC must have regard to in considering an application in terms of paragraph 3(1)(e) of Schedule 3.

- 4.14. The summary of the CAR is provided for in the Minutes of the Meeting of the PPC dated 18 April 2023 at paragraphs 7.35-38. It is a brief summary. The consideration of the CAR is narrated at paragraphs 13.7-11. Again this explanation is brief. Whilst the particular requirements around the CAR have been met, albeit barely, there has been a general failure to properly narrate the facts and reasons upon which the PPC's determination of the application was based. The reasons given fail to disclose the consideration of the CAR when taken together with the pharmaceutical care services plan ("the Plan"). That Plan is also something the PPC must have regard to in considering an application in terms of paragraph 3(1)(f) of Schedule 3.
- 4.15. The absence of reasons in this regard discloses, in my view, that the Board failed to take into account, when looking at adequacy, that one of the services mentioned in the CAR as lacking is a core service in terms of the Plan. This ground could also have been advanced as a failure to apply the Regulations to the facts of the case (paragraph 5(2B)(c) of Schedule 3). In any event, I find this Ground of Appeal to be reasonable and remit it to the PPC for reconsideration.
- 4.16. Grounds of Appeal 3, 4 and 6 had been advanced together but I considered Ground 3 in isolation given the particular issues around the CAR and the Plan. I then went on to consider Ground 4 and 6 together. The issue of convenience was mentioned across these three grounds but I address this later in this decision when discussing the application of the relevant legal test.
- 4.17. Ground of Appeal 4. That the PPC failed to accurately narrate the facts by incorrectly concluding that the CAR was inconclusive as to whether the respondents supported the opening of a new pharmacy. Ground of Appeal 6. That the PPC failed to accurately narrate the facts by not including Pharmacy First as part of their discussion in whether current pharmaceutical services are adequate.
- 4.18. Both of these arguments are advanced with reference to the Board's reasoning and it is clear the Appellant disagrees with the reasoning of the PPC in this regard. However simply disagreeing with the conclusions of the PPC is not a valid ground of appeal.

The PPC is a specialist tribunal and as such is best placed to determine the appropriate standard or weight to be applied to the information and evidence that is before it in reaching a reasoned decision.

- 4.19. In these circumstances, and outwith the response to one particular question (question 7), the responses to the CAR can, in my view, be described as inconclusive. In relation to Pharmacy First (“PF”) this was considered by the PPC and this is evidenced in several places in the minutes of the meeting. The PPC did not, however, address PF as a matter of compliance at a regulatory or service level which the Appellant now takes issue with. That was not, however, the role of the PPC when looking at adequacy in the round. That said, PF is now, as I understand it, a core service as provided for in the revised Plan. In reconsidering Ground of Appeal 3 mentioned above the PPC can now look at PF in further detail as to adequacy, as a core service in the Plan and in accordance with either paragraph 3(1)(d) or (f) of Schedule 3.
- 4.20. Ground of Appeal 7. The ground relates to whether the PPC erred in law when it failed to consider desirability as part of the legal test stated in the Regulations.
- 4.21. The relevant legal test is set out above at paragraph 3.3. 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. This includes matters of convenience.
- 4.22. That case also clarified that the PPC must have some regard to probable developments when considering adequacy and 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 would nevertheless be desirable.

- 4.23. In addition there might be, in relation to a particular application, changes or improvements which would be desirable and, directly, without which services may not be adequate, as was discussed in *Lloyds Pharmacy Ltd (Petitioner)* [2010] CSOH 22.
- 4.24. As set out above the PPC must identify inadequacy before considering whether it is necessary or desirable to grant the application. The conclusion of the PPC was that that threshold was not met and this included the proper consideration of issues of convenience. There was, therefore, no error in law by not going on to consider the application in terms of desirability.
- 4.25. Ground of Appeal 8. This ground relates to whether the PPC erred in law when it based its decision on services provided outside of the defined neighbourhood to determine adequacy.
- 4.26. The ability of the PPC to assess adequacy with reference to the availability of pharmaceutical services in neighbouring neighbourhoods 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. Though not binding I agree with those observations and note this approach is now commonplace.

## 5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is successful in respect of Ground of Appeal 3. I shall therefore refer the matter back to the PPC for reconsideration.

- 5.2. In doing so I would encourage the PPC to consider those matters mentioned in relation to the Pharmaceutical Care Services Plan (as revised) for the Board's area mentioned in relation to Ground of Appeal 6.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

16 May 2024