

# 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

Unit 6, Kinnaird Village, McIntyre Avenue,

Larbert. FK5 4XT

**Applicant:** WEB Pharmacy (“the Applicant”)

**Appellants:** (1) Lloyds Pharmacy Ltd & (2) A D Healthcare Ltd (“the Appellants” or the “first” and “second” Appellant)

**Health Board:** NHS Forth Valley (“the Board”)

**PPC Decision Issued:** 22 September 2002

**Panel case number:** NAP 111 (2022)

NAP 111 (2022)

## 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 22 September 2022 in relation to the application of WEB Pharmacy (“the Applicant”).
- 1.2. The application was originally made on 2 December 2021. The application was considered at a meeting of the PPC on 22 September 2022. At that meeting the application was granted. The first and second Appellants lodged an Appeal against the decision of the PPC on 31 October 2022 and 1 November 2022 respectively.

### 2. Grounds of Appeal

- 2.1. Ground of Appeal 1. This ground is advanced by the second Appellant and relates to the decision of the PPC to allow the premises or Unit mentioned in the application to be amended from “Unit 2” to “Unit 6” during the application process and that this constituted a procedural defect in terms of paragraph 5(2B)(b) of Schedule 3 of the Regulations.
- 2.2. Ground of Appeal 2. Both of the Appellants have advanced an argument in terms of 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.
- 2.3. In particular, the reference to the concept of a “20 Minute Neighbourhood” and the reasons that were given has disclosed a failure by the PPC to properly apply the legal test – failure to do so procedurally speaking 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.

### **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 appeals 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.

#### *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. This ground of appeal relates to the decision of the PPC to allow the premises or Unit mentioned in the application to be amended from “Unit 2” to “Unit 6” during the application process and that this constituted a procedural defect in terms of paragraph 5(2B)(b) of Schedule 3 of the Regulations.
- 4.2. This issue is mentioned in the Minutes of the PPC’s meeting on 22 September 2022 at paragraphs 3.12 to 3.14. The second Appellant had raised the issue then which was, put simply, that the original application that had been made in terms of the Regulations and in the prescribed Form A1 referred to “Unit 2” and that the Board were now being asked to determine an application in relation to “Unit 6”. The second Appellant noted that the Regulations made no provision for such an amendment and, therefore, the change constituted an error of law and the hearing should be adjourned.
- 4.3. In addressing this issue the Chair acknowledged what had been said and replied that the Health Board had been aware of the change and, having taken legal advice, had decided to proceed with the application, since the address for Unit 6 was just 80 metres away from Unit 2 and was within the same building. In the papers provided I was able to ascertain that the change was due to the availability of one unit over another.

- 4.4. I agree with the view taken by the Chair and the Board. Although there might not a dispensing power or procedure to amend in this regard it was not, at the same time, contrary to the Regulations to the extent of being considered defective. The decision to allow the change was, in my view, in the interests of justice and a pragmatic approach in the circumstances. The same could not have been said to either determine an application for the wrong Unit (which would have given rise to a nullity or defect in terms of the Regulations) or to require the applicant to begin the process afresh. It can also be said that it did not prejudice any of parties or affect the overall fairness of the proceedings.
- 4.5. Ground of Appeal 2. Both of the appellants have advanced an argument in terms of 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.
- 4.6. The Board does give reasons at paragraph 23 onwards, however, both of the Appellants have taken issue with those reasons and, in particular, the reliance that the Board placed on a document relating to the concept of a “20 Minute Neighbourhood”. They then go on to suggest that the reasons that were given has disclosed a failure by the PPC to properly apply the legal test by considering the issue of access and convenience above others. Failure to do so procedurally speaking 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.
- 4.7. In relation to the legal test, 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. Matters of convenience feature on this spectrum. That case

also made it clear that the PPC must have some regard to probable developments (not speculative).

- 4.8. 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. That case, whilst not binding, does recognise that a community should not go without improvements to pharmaceutical services. In some circumstances it might also be the case that an application that is desirable might go further than bare adequacy
- 4.9. Under paragraph 3(1)(d) of Schedule 3 the Board can have regard to any other information available to it that it considers relevant. The document mentioned in relation to this ground of appeal relates to the concept of the “20 Minute Neighbourhood”. That concept has its origins in a Scottish Government Programme for Government (2020) which commits the Scottish Government to working with others to achieve places in which residents have the ability to meet the vast majority of their day-to-day needs within a 20 minute walk of their home including through access to cycle routes or public transport. The document in question was prepared by the Climate Exchange and includes recommendations as to how this might be achieved
- 4.10. This was clearly information that the Board was entitled to have regard to and its decision to do so was a matter for them; one can see however, as a matter of public policy, how important such thinking and efforts in relation to climate change are. The document mentions that this thinking is already featuring in a draft Infrastructure Plan for Scotland and the National Planning Framework 4 (NPF4).
- 4.11. However, whilst the Board considered this document as being relevant it is only one of the sources of information that the PPC should have regard to and each source of information it is not itself a determining or special factor.

- 4.12. If Government wanted to pursue the “20 Minute Neighbourhood” in this regard and give it some sort of special meaning above it being a considered as matter of convenience, as is currently the case, it would be free to do so by amending the Regulations. This could be achieved in a number of ways but that is perhaps a matter for Scottish Ministers to reflect upon in good time.
- 4.13. In the absence of such a change being made, it is clear that the Board has nevertheless placed a great deal of emphasis on this document and, in turn, has considered the application in terms of convenience and not whether those services already available are adequate. The Board also made some speculative comments in its reasoning regarding continued house building. Whilst these issues are relevant, their prominence in the Board’s decision making has clearly been to the detriment of those other matters the Board should have addressed. Namely, considering the legal test mentioned above as to adequacy of existing services.
- 4.14. There is no evidence of reasoning that demonstrates a proper assessment of adequacy has been undertaken in relation to the existing provision of services and, in turn, if inadequacy did exist, whether the application under consideration was necessary or desirable to secure such services. I will, therefore, uphold this ground of appeal and remit it to the Board for reconsideration.
- 4.15. The second appellant also made reference in this ground of appeal to the decision relating to defining the neighbourhood. I considered those observations to be frivolous as the neighbourhood had been clearly defined in the decision at paragraph 22.2. and, therefore, considered them no further.

## **5. Disposal**

- 5.1. For the reasons set out above I consider that the appeal is successful in respect of ground of appeal 2. I shall therefore refer the matter back to the PPC for reconsideration.

- 5.2. In doing so I would encourage the PPC to consider approaching its consideration of adequacy squarely in terms of the legal test discussed in this decision and providing sufficient reasons in this regard.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

25 April 2024