

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

14 St Andrew Street, Stranraer, DG9 7EB

Applicant: Creebridge Mill Ltd (trading as Welcome Pharmacy)

Appellants: (1) Gordon’s Chemists, (2) Boots UK Ltd and (3) Lloyds Pharmacy Ltd (referred to as the “Appellants”)

Health Board: NHS Dumfries & Galloway (“the Board”)

PPC Decision Issued: 15 November 2021 & 28 September 2022

Panel case number: NAP 103 (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 28 September 2022 in relation to the application of Creebridge Mill Ltd [trading as Welcome Pharmacy] (“the Applicant”).
- 1.2. The application was originally made on 11 June 2020. The application was considered at a meeting of the PPC on 28 October 2021. The first decision of the PPC on the application was issued on 15 November 2021, approving it. Appeals were lodged against the decision of the PPC by the Appellants. In a decision of the Chair, my predecessor, dated 22 February 2022, the decision was remitted back to the Board for reconsideration. This is an appeal against that reconsideration decision (the decision dated 28 September 2022) in which the PPC once again granted the application.
- 1.3. Reference is made to the decision of the Chair dated 22 February 2022 and with the appeal reference NAP 103 (2022). The then Chair upheld three grounds of appeal, grounds of appeal 3, 4 & 6, having grouped the Appellants’ grounds into a collective list. That list had eleven grounds of appeal in total.
- 1.4. Put broadly, grounds of appeal 3, 4 & 6 were found to relate to a failure of the PPC to provide clarity in their decision making as to the basis on which it concluded that the existing services provided to the neighbourhood were inadequate and, similarly, a lack of clarity as to the basis upon which the PPC concluded that the grant of the present application would assist in securing the adequacy of service. It was considered that this failing was demonstrated by there being a lack of clarity as to the reasoning behind the decision generally but also a lack of clarity as to whether the Legal Test had been applied correctly.
- 1.5. In remitting the decision back to the Board the then Chair also made some observations regarding grounds of appeal 1, 2, 5 & 7-11. This was with a view to minimising the

prospect of further appeals. Those observations recommended further explanation of the PPC's reasoning in relation to grounds of appeal 5 & 7, a clarification in relation to grounds of appeal 9 & 11, that ground of appeal 10 did not have any practical relevance and that, if they had been considered, the remaining grounds of appeal (1, 2 & 8) would have been dismissed on the basis of them having no prospect of success (or reasonable grounds in terms of the regulations).

2. Grounds of Appeal

- 2.1. Three separate letters or notices of appeal were, once again, sent by the Appellants. As was the case previously there is a degree of synergy in the grounds of appeal advanced. They continue to relate to those grounds of appeal that were successful at appeal previously, namely grounds 3, 4 & 6 and I will refer to those grounds as such once again.
- 2.2. Ground of Appeal 3. This ground continues to advance the argument that the PPC has not adequately explained the significance that it has attributed to the findings of the Consultation Analysis Report ("CAR"). In this appeal those arguments have gained further precision given what was said when the matter was remitted back to the Board for reconsideration by the then Chair. In particular the approach of the PPC as to the low response rate, the "lukewarm" answer to question 3 of the CAR and how then the PPC was able to conclude from the CAR that the current provision of pharmaceutical services were inadequate.
- 2.3. Ground of Appeal 4. This ground continues to advance the argument that the PPC erred in Law in its approach to the assessment of whether it is necessary or desirable to grant the application in order to secure the adequate provision of pharmaceutical services in and to the neighbourhood.
- 2.4. Ground of Appeal 6. This ground continues to advance the argument that the PPC failed to properly explain its reasoning when considering submissions in relation to a stated unmet need within the neighbourhood.

- 2.5. In addition the Appellants have also returned to some of those grounds of appeal that were the subject of discussion in the previous appeal (grounds 5 & 7) as well as advancing new grounds of appeal in terms of the procedure followed.

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 include:

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 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 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 3: in their decision dated 28 September 2022 the PPC have addressed what was remitted back to them in relation to this ground of appeal. Namely, the significance that it attached to the CAR when considering the application. In so doing the PPC correctly noted they are required to consider the CAR in terms of the Regulations regardless of the response rate or any other factors that may cause it to be described as wanting. The PPC notes that this requirement was introduced by the Scottish Government some time ago but without any guidance as to the weight to attach to any particular level of response. The PPC then goes on to note that although the response rate was under 1% of the population, 72 people considered that the provision was inadequate and took the trouble to say so. The results showed that a significant majority of those who responded were dissatisfied with the current provision. The PPC then went on to say that if there been no other evidence of under-provision, the Committee would not have based their decision on the adequacy of pharmaceutical provision on the CAR alone. It was nevertheless indicative of such under-provision.

- 4.2. As a specialist tribunal the PPC is best placed to determine the appropriate standard or weight to be applied to the CAR. However, in doing so they appear to have taken one response, a part of question 3 which relates to adequacy directly (which the appellants challenge, namely the figure of 72 people) and used that to reach a conclusion as to inadequacy overall. The PPC describes this as being “persuaded”. The Appellants highlight this approach in their appeals. They note the low response rate and that the responses indicate dissatisfaction and perhaps under-provision in places but not to the extent of inadequacy and not with anything approaching a significant majority. With this in mind and as was the case in the previous appeal the basis on which the PPC was “persuaded” by or able to take a firm view on the CAR as to inadequacy is not clear.
- 4.3. It would at this stage usually fall to me to remit this point back to the Board for reconsideration. This would be with a view to them providing further information as to their decision making on this point. However, in their decision dated 28 September 2022 it appears that the PPC has conceded the point and already downgraded its consideration of the CAR from something that, itself, demonstrated inadequacy of pharmaceutical services to something that is indicative of under-provision. If this is correct then it is unnecessary to remit. For the avoidance of any doubt it remains open to the PPC to take the CAR into account when considering the question of inadequacy in the round (see ground of appeal 4 – para 4.5).
- 4.4. Ground of Appeal 4: this ground of appeal relates to whether the PPC erred in Law in its approach to the assessment of whether it is necessary or desirable to grant the application in order to secure the adequate provision of pharmaceutical services in and to the neighbourhood. This is often referred to as the second part of the legal test. The first part of the test relates to establishing whether present services are inadequate. In responding to this ground of appeal the PPC have addressed both parts of the test for completeness.
- 4.5. In doing so the PPC have set out its rational in concluding that the current service provision was inadequate. In summary these include considering the CAR, the

presentation from the Applicant and responses from the interested parties when considering its response. The PPC further considered the demographics of the local population particularly age, deprivation, chronic disease and drug misuse. The PPC took account of the local GP recruitment issues which have been evident for several years and the role that pharmaceutical services could play in the provision of services against that backdrop. The PPC also listed 9 specific grounds which they consider were sufficient to allow them to determine that current service levels were inadequate. These include issues specific to existing pharmacies and demographics. Having established inadequacy, in their view, the PPC then concludes that an additional pharmacy is both necessary and desirable.

- 4.6. The Appellants once again take issue with both conclusions of the PPC. They are critical of those issues that are said to be specific to existing pharmacies, going so far as to refute them in places and with reference to their own customer data in part. They also say that those issues that do exist such as waiting times, lunchtime cover and staffing generally do not equate to inadequacy. In relation to demographics the Appellants note the information that was considered by the Board but again not to the extent that it reveals or substantiates a finding of inadequacy in relation to the current provision of service.
- 4.7. As was the case with the first decision of the PPC the second decision fails to disclose with any precision their reasoning as to why the existing provision of service is inadequate. In attempting to address the grounds of appeal remitted back to them the PPC has set out the information it considered but this does little more than to identify what was required of them in terms of the Regulations (paragraph 3(1) of schedule 3) and then listing specific information which it considered to be relevant. There continues to exist, therefore, a gap between narrating the procedure followed, relevant material considered and how this supports a conclusion that the current provision of service is inadequate.
- 4.8. In addressing the application of the legal test in the first decision of the PPC the Chair, in his decision dated 22 February 2022, noted that the assessment of inadequacy may

be difficult to place the precise threshold on. That being said, and with reference to relevant case law on the legal test (*Lloyds Pharmacy Ltd v NAP* 2004 SC 73), it is 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.

- 4.9. The PPC's decision dated 28 September 2022 concludes on this ground of appeal that, in their view, "current pharmaceutical provision is inadequate to meet the current and future needs of the area. The addition of another pharmacy would benefit patients in this neighbourhood, in particular one which employs prescribing pharmacists. There is considerable pressure on pharmaceutical services in the area that the addition of another pharmacy would alleviate. The PPC is firmly of the view that a further pharmacy is both necessary and desirable."
- 4.10. This conclusion, as is noted by the Appellants, illustrates that although improvements may be capable of being made to existing services in terms of pressure (or immediacy), as might always be the case, this does not mean existing services are inadequate. There is also particular reference to the benefit of the Applicant introducing a prescribing pharmacist but again, as is noted by the Appellants, this does not mean that existing levels are inadequate. With this in mind it appears that the PPC have, by looking primarily at current service provision as something that can be improved upon (with reference to unmet need or dissatisfaction for example) or the desirability of some other possible configuration of pharmaceutical services, have erred in applying the correct legal test in respect of the application; that is to say in the first instance whether the present services are inadequate or not. This is also supported by the fact the PPC have referred to future need when looking at current provision; though this can in certain circumstances be permissible, probable developments, for example, or 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 when looking at a the nature of a particular proposal in practice, desirability as to adequacy, and not just access to existing services). Generally speaking, however, the

decision maker must first establish inadequacy before looking to remedy it and looking to the future by “securing” it thereafter.

- 4.11. I will, therefore, uphold this ground of appeal and remit it back to the PPC for further reconsideration. The PPC may benefit from approaching their reconsideration of this ground with clear reference to the legal test in its two parts.
- 4.12. In remitting this ground I am mindful that this application was first made in 2020. It is, therefore, nearly 4 years since it was first considered by the PPC. As Chair of the National Appeal Panel I recognise that part of this delay is due to the time it has taken to find a successor to the previous Chair in myself. That said, it is manifestly the case, as has been noted by the Appellants, that current need and resulting services will have changed in the intervening period, in particular, in response to the pandemic; as will the demographic data relevant to the neighbourhood. I would suggest to the PPC that their reconsideration should also now include whether it can properly arrive at a conclusion as to adequacy based on the information before as it is likely to be dated.
- 4.13. This exposes a tension in the Regulations as the PPC is required, in various places, to consider adequacy with reference to current provision or provision already in place. This is at the time the application is made (with reference to the supporting evidence of the application) and at the time the (first) decision of the PPC is taken; the latter being 6 weeks on receipt of the CAR. It is therefore clear that the Regulations value the benefit of considering relevant information and coming to a decision in good time; this is consistent with the principles of natural justice and the Rule of Law.
- 4.14. The Regulations do not, however, provide for the passage of time between events such as a decision of the Chair and PPC reconsideration and certainly not the passage of time which is, for various reasons, the case here. That being said I consider that it is open to the PPC to take this, the passage of time as noted by the appellants, into account as “any other relevant information available to the Board” in terms of at paragraph 3(1)(d) of schedule 3. For example and in addition, the pharmaceutical care services plan in terms of paragraph 3(1)(f) will have changed perhaps even as much as three

times. This would, in my view, entitle the PPC to take the view, if it so wanted, that the rest of the original information can longer be relied upon.

- 4.15. If this was to occur the application would fall for want of evidence. It would then be open to the applicant to submit a new application and this may prove to be beneficial in terms of reaching a decision based upon up-to-date information; this would also avoid the circularity of another reconsideration and appeal stage in relation to the current application.
- 4.16. Ground 6: This ground relates to the failure of the PPC to properly explain its reasoning when considering submissions in relation to a stated unmet need within the neighbourhood. In its reconsideration decision of 28 September 2022 the PPC has set out the information that it relied upon in reaching a view as to unmet need. The reasoning now provided in this regard is sufficient, in my view, to remedy the previous failure to do so. The Appellants continue to disagree with the PPC's finding in this regard but it is one that the PPC as a specialist tribunal is entitled to reach and no further grounds of appeal are advanced in relation to it. Furthermore I would add that whilst this conclusion was something that the PPC thought relevant in considering adequacy it was not a decisive one. As was discussed in relation to appeal ground 4 (above), unmet need may be indicative of services being in need of improvement but not that they are inadequate.
- 4.17. In relation to those previous grounds that were not remitted but have nevertheless been the subject of clarification I consider that the PPC has provided further information to the Appellants as suggested. Some of these clarifications have been accepted and some not. In any event they relate to findings in fact that the PPC were entitled to reach. As a result there are no grounds of appeal outstanding that are considered "reasonable grounds" in terms the Regulations.
- 4.18. The Appellants have also raised several matters relating to the procedure followed by the PPC. These relate to the notification of decisions and concerns regarding participation. There is also a suggestion that the PPC did not actually reconvene. In relation to the procedural issues these are of concern and I would remind the Board of

the importance of properly adhering to the Regulations in this regard; parties to an application need to be notified in good time and to afford them effective participation. In this instance however, I do not consider that this has resulted in a “procedural defect” in terms of the Regulations. In relation to the question of reconvening, the PPC is required in the Regulations to reconsider the application. How it goes about doing so is a matter for it to determine. This may, one presumes, include reconvening in full, as an item of business at another meeting or by correspondence. The PPC should, however, take care to properly narrate how it did reconsider the application when issuing its reconsideration decision.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeals are successful in respect of ground of appeal 4. 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(s) as well as the wider issue of time passed and delay in line with my comments above.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

9 April 2024