

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

145 High Street,
Kinross. KY13 8DA

Applicant: Kinross Pharma Ltd. ("the Applicant")

Appellants: (1) Davidsons Chemists & (2) Rowlands Pharmacy ("the Appellants")

Health Board: NHS Tayside ("the Board")

PPC Decision Issued: 23 September 2024

Panel case number: NAP 131 (2024)

NAP 131(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 23 September 2024 in relation to the application of Kinross Pharma Ltd. (“the Applicant”).
- 1.2. The application was originally made on 21 May 2024. The application was considered at a meeting of the PPC on 2 September 2024. The PPC issued its decision to grant the application on 23 September 2024.
- 1.3. Appeals were lodged against the decision of the PPC by the Appellants on 10 October 2024.

2. Grounds of Appeal

- 2.1. The Appellants have each lodged a Notice of Appeal against the decision of the PPC. Given their similarities, I have taken their grounds of appeal together for expediency.
- 2.2. Ground of Appeal 1. This relates to whether the Regulations were adhered to when the application was made, namely, whether the information provided regarding the use of the premises for the provision of pharmaceutical services was sufficient. I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3 – read with Regulation 5(2C)(a)).
- 2.3. Ground of Appeal 2. This ground relates to whether there was a failure of the PPC to properly explain the application by the Board of the Regulations to those facts [the facts or reasons upon which their determination of the application was based] (paragraph 5 (2B) (c) of Schedule 3). This is with particular reference to the PPC’s consideration of the CAR.

- 2.4. Ground of Appeal 3. This ground 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 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 relates to whether the Regulations were adhered to when the application was made, namely, whether the information provided regarding the use of the premises for the provision of pharmaceutical services was sufficient. I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3 – read with Regulation 5(2C)(a)).
- 4.2. Regulation 5(2C)(a) provides the following in relation to the information to be included within the prescribed application form, Form A:

“(2C) An applicant's assessment in terms of Form A must include—

(a) a written statement from the person who may grant possession of the premises that (without prejudice to any negotiation in relation to any such grant) the premises may be used for the provision of pharmaceutical services”

- 4.3. The purpose of this requirement is to establish from the outset that the property to which the application relates is capable of being used for the provision of pharmaceutical services. Paragraph (2C) goes on to provide for a number of other requirements for inclusion in Form A, all of which help to ensure that the application is not speculative in any way.
- 4.4. The Appellants advance this ground by saying that, because the lease had not been concluded, that is to say as it was only under offer and still shown as a “property to let” on the marketing company’s website, the requirements mentioned above had not been complied with. Evidence was submitted in their Notice of Appeal to support this position.
- 4.5. I accept the evidence provided by the Appellants in this regard. An offer of a lease on the property had been made but it was not concluded at the time the Application was considered by the PPC. However, this is not what is required in terms of the Regulations.
- 4.6. The Regulations require a written statement from the person who may grant possession of the premises that (without prejudice to any negotiation in relation to any such grant) the premises may be used for the provision of pharmaceutical services. The construction of this paragraph clearly recognises that as part of negotiation to secure a premises – the proposed use of those premises can be discussed and agreed upon before a lease is concluded. It would make little commercial sense to enter into a lease to run a contract Pharmacy before knowing you were permitted to do so in terms of your application being granted.
- 4.7. In the papers provided to me I can see that the offer of an lease was the subject of correspondence on and around 31 October 2023 to the extent that it had been accepted, but not concluded (exchanged), and that the applicant confirmed, after being asked by the Board to do so as part of the application process, that the lease that had been offered was on the basis that the property was to be used as a Pharmacy; this was with reference to clause 12 of the Head of Terms in the lease. The heads of terms having been provided by the person who may grant possession of the premises.

- 4.8. Taking this into account it is clear the Regulations have been complied with. What I am concerned about, however, is the extent to which one of the Appellants (Rowlands Pharmacy) went to prove their point about the lease not having been concluded. It would appear from the evidence submitted with their Notice of Appeal that they instructed their solicitors to see if the property was still to let, with the agents confirming in response that although it was close to exchange that they would be open to other offers.
- 4.9. This course of action was disingenuous to say the least, and potentially risked the applicant's ability to conclude the lease on the event of their application being successful – if it had been taken to be genuine. Hopefully this issue should not arise again given the clarity provided in this decision on the interpretation of the requirement mentioned above, but nevertheless it was a disappointing course of action to have undertaken and then to pray in aid of it to support this ground of appeal, which is, ultimately not upheld.
- 4.10. Ground of Appeal 2. This ground relates to whether there was a failure of the PPC to properly explain the application by the Board of these Regulations to those facts [the facts or reasons upon which their determination of the application was based] (paragraph 5 (2B) (c) of Schedule 3). This is with particular reference to the PPC's consideration of the CAR.
- 4.11. Failure to properly consider the CAR, as a matter of procedure, is also a ground of appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 (procedural defect & duty to give reasons). This is because the reasons given must set out a summary of the CAR and how it was taken into account by the Board in arriving at its decision - paragraph 3(6)(a) and (b) of Schedule 3.
- 4.12. The Appellants make reference to two matters relating to the CAR, the emphasis placed on it by the Board and the completeness of it insofar as it related to the neighbourhood described in the application, which was a neighbourhood that included Kinross but not the neighbouring town of Milnathort, and the subsequent

decision of the PPC, at its meeting on 2 September 2024, that the neighbourhood should be that of Kinross and Milnathort.

- 4.13. In relation to the first issue with the CAR, the Appellants consider that too much emphasis was placed on it and that describing the responses as large or overwhelming was not accurate in comparison to other applications that have been made. Taken together these matters supported the conclusion reached regarding inadequacy being present.
- 4.14. As a specialist tribunal the PPC is best placed to determine the appropriate standard or weight to be applied to the evidence and information that is before it and reach its own conclusions. In these circumstances the PPC considered what was said in the CAR and relied upon it as being indicative that inadequacy was present in relation to the neighbourhood to which it applied. As to the approach taken by other PPCs, comparative exercises are seldom conclusive as each case will turn on its own merits. In addition, 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, and it is not a valid ground of appeal.
- 4.15. In relation to the second issue with the CAR, it is clearly regrettable that the neighbourhood did not include Kinross and Milnathort from the outset given their evident proximity. This clearly limits the usefulness of the CAR when the neighbourhood was subsequently amended. Put simply the CAR poses questions about the provision of pharmaceutical services in Kinross, not Kinross and Milnathort. That being said, the CAR did relate to the neighbourhood defined in the application and to that extent it was properly compiled and subsequently considered by the PPC. This ground of appeal is not therefore upheld, but I will discuss this shortcoming further in relation to the next ground of appeal.
- 4.16. Ground of Appeal 3. This ground 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.

- 4.17. The legal test is set out above (paragraph 3.3) and 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.
- 4.18. The failing here is fairly evident to see and it is similar to that mentioned in relation to the CAR. After amending the neighbourhood to include Kinross and Milnathort, the PPC did not take into account the pharmaceutical services available in Milnathort, namely those available from Davidson Chemists, and this includes their Independent Prescriber – not available in Kinross. By not taking this into account, adequacy was not properly addressed in terms of the legal test. I will therefore uphold this ground of appeal.
- 4.19. In relation to the CAR, a new one cannot be commissioned unless a new application is made, so it falls to the PPC to reconsider this application by asking whether pharmaceutical services available are adequate or not, with reference to the neighbourhood of Kinross and Milnathort, and recognising that the CAR is incomplete in relation to the latter.
- 4.20. For the sake of completeness, it is I think helpful to note that even if the neighbourhood had not been amended the PPC had the 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. Though not binding I agree with those observations.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is successful in relation to Ground of Appeal 3. I shall therefore refer the matter back to the PPC for reconsideration.
- 5.2. In reconsidering the application in relation to that ground of appeal the PPC should consider adequacy with reference to those pharmaceutical services available in the neighbourhood as agreed upon, Kinross and Milnathort, and recognise the extent to which the CAR is incomplete in that it only covers the former.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

6 December 2024