

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

4 McSparran Road, Croy, G65 9HN

Applicant and 1st named Appellant: CD Chem Limited

Health Board: NHS Lanarkshire “the Board”

PPC Decision issued: 4 December 2017

Panel case number: NAP 73 (2017)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1 CD Chem Limited (Company No. SC429140) of 53 Whitehill Avenue, Stepps, Glasgow G33 6BN (hereinafter referred to as “the Applicant“ or “Appellant”) submitted an application to the Board to be included in the pharmaceutical list of the Board to provide pharmaceutical services from and in respect of premises at 4 McSparran Road, Croy G65 9HN (“the Premises”). The application was dated 5 October 2017.
- 1.2 The application was considered by the Board at a hearing of its Pharmacy Practices Committee (“the PPC”) on 17 November 2017. The PPC decided that, as the current provision of services in the neighbourhood defined by the PPC was adequate, it was neither necessary nor desirable for pharmaceutical services to be provided at the Premises in order to secure the adequate provision of pharmaceutical services in the neighbourhood. The PPC concluded that there was no evidence of any substance provided to demonstrate any inadequacy of pharmaceutical services to the neighbourhood of Croy.
- 1.3 An appeal was lodged against the decision of the PPC by the Applicant on 21 December 2017.

2. Grounds of Appeal

- 2.1 There was no disagreement between the PPC and the Applicant with regard to what constituted the neighbourhood area of Croy. The Appellant’s grounds of appeal relate to the PPC’s narration of the facts and their explanation of the application of those facts to their decision and the Regulations. In particular, the Appellant raises concerns that the PPC did not consider, or failed to explain their reasoning in relation to, certain pieces of factual evidence which the Appellant considered to be material in establishing that there was inadequate provision of pharmaceutical services in Croy.
- 2.2 The Applicant advances 6 points of appeal. The points of appeal are numbered 1-5 and 7. There is no point 6 of appeal. Point of appeal 1 is raised on the basis of Schedule 3 para 5 (2B)(b) of the Regulations. The remaining 5 points of appeal are raised on the basis of both Schedule 3 paras 5(2B)(b) and 5(2B)(c) of the Regulations. The points of appeal can be summarised as follows:
 - 2.2.1 Point of Appeal 1: relates specifically to an excerpt of the PPC’s decision at paragraph 16.3.2. The Appellant states that the PPC has misused the term Public Health Service and therefore has failed to properly narrate the facts and reasons for their decision.
 - 2.2.2 Point of Appeal 2: relates to the consideration by the PPC of the Appellant’s argument that it can be determined from statistics which indicate a decline in public health in the neighbourhood that the core pharmaceutical services are not being adequately provided.
 - 2.2.3 Point of Appeal 3: relates to concerns raised by the PPC in relation to the viability of the proposed pharmacy. In particular, the Appellant states that the PPC has failed to

explain the basis on which it has concerns about the viability of the pharmacy on the basis of population given that pharmacies operate in proximate neighbourhoods with similarly low populations.

- 2.2.4 Point of Appeal 4: relates to the PPC's assessment of evidence from the Consultation Analysis Report (CAR). The Appellant states that the PPC has failed to place sufficient weight on the responses to the CAR which are in favour of a new pharmacy, particularly having regard to the weight placed on negative or "don't know" responses.
- 2.2.5 Point of Appeal 5: relates to evidence heard in relation to poor levels of accessibility provided by the CAR, the joint response from local Councillors, MP and MSP and evidence presented orally by the Applicant at the meeting of the PPC. The Appellant argues that the PPC has failed to narrate their reasoning based upon the facts specifically in relation to accessibility.
- 2.2.6 Point of Appeal 6 (stated as 7 on the Appeal): relates to the pharmacies taken into account by the PPC as providing services to the neighbourhood with a view to considering the adequacy of the existing services within the neighbourhood. In particular, the Appellant indicates that the PPC ought not to have taken into account two pharmacies which did not respond to the consultation and one which the PPC notes provides limited services to the neighbourhood.

3. Decision

- 3.1 Under the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009, as amended, ("the Regulations"), the available grounds of appeal against a decision of the Board are limited to circumstances in which there has been:
 - 3.1.1 an error in law by the Board in its application of the Regulations;
 - 3.1.2 a procedural defect in the way the application has been considered by the Board;
 - 3.1.3 a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based ("Schedule 3 para 5 (2B)(b)"); or,
 - 3.1.4 a failure to explain the application by the Board of the provisions of these Regulations to those facts ("Schedule 3 para 5 (2B)(c)").
- 3.2 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 ground of appeal or is otherwise frivolous or vexatious;
 - 3.2.2 remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out at points 3.1.2 to 3.1.4 have occurred; or
 - 3.2.3 in any other case, convene the National Appeal Panel to determine the appeal.

Consideration of Points of Appeal

- 4.1 The first ground of appeal is advanced on the basis of Schedule 3 para 4(2B)(B) of the Regulations. It relates to an excerpt from the PPC's decision which commends the Applicant's enthusiasm and passion to provide pharmaceutical services in Croy. The Appellant is concerned that the PPC's reference to the provision of public health services in addition to core services when, in the Appellant's submission, Public Health Service is considered a core

service. From this, the Appellant infers that the PPC has misunderstood what constitutes the core services provided.

- 4.2 I do not consider that the inference the Appellant seeks to draw is reasonable or sustainable. It is clear from both the broader context of the decision and the specific context in which the language complained of is used that the PPC is simply seeking to commend the Appellant for its desire to provide pharmaceutical services which go beyond the core services. The PPC uses the term public health services in its generic sense rather than in any technical sense. Any cross-over between the language used by the PPC and elements of the core services is no more than co-incidental. Further, this excerpt from the PPC's decision neither relates to the facts of the present application nor does it relate to reasons given for the PPC's decision. Accordingly, I am satisfied that the Point of Appeal has no prospect of success.
- 4.3 The second and fifth grounds of appeal relate to the PPC's reasoning in determining that the existing services provided in the neighbourhood are not inadequate. As such, I will address them together. To some extent, the sixth ground of appeal (numbered 7) is also directed to this issue but its focus is in relation to the information taken into account by the PPC rather than specifically the reasoning of the PPC. It is, therefore, preferable to address the sixth ground separately, which I do below,
- 4.4 In the second ground of appeal the Appellant argues that the PPC has failed to explain its reasoning in concluding that the existing pharmaceutical services are adequate in light of the Appellant's assertion that they cannot be adequate standing the poor standard of public health in the neighbourhood. In the fifth ground of appeal the Appellant argues that the PPC has failed to set out its reasoning in relation specifically in relation to issues with access to pharmaceutical services which are located outwith the neighbourhood.
- 4.5 I am satisfied that the PPC's reasoning in relation to the adequacy of existing services is clear. Paragraphs 16.2.3 and 16.3 set out the PPC's reasoning. They are clear that there are a number of pharmacies which are providing the core services to the neighbourhood and that they are not at capacity. In relation to the specific issue of access, the PPC was clearly satisfied that residents of the neighbourhood will routinely access non-pharmaceutical services outwith the neighbourhood and that those services, together with pharmaceutical services, are readily accessible by public transport.
- 4.6 In relation to the public health figures relied upon by the Appellant, whilst these are not directly addressed by the PPC it is clear that the PPC were satisfied that there was no evidence of the existing provision of services being inadequate. As the Appellant notes, it is not necessary for the PPC to address every line of evidence put to it. As such, the fact that this issue is not directly addressed is of no moment provided the overall reasoning is clear; which I am satisfied it is. In any event, it is clear from the line of questioning put to the Appellant that the PPC was not satisfied that the Appellant was entitled to infer that pharmaceutical services were inadequate simply because public health in the neighbourhood was poor. Public health is a product of a number of factors, of which pharmaceutical services is only part. The PPC, rightly, required specific evidence of inadequacy. It was satisfied that there was no such evidence. For these reasons, I am satisfied that second and fifth grounds of appeal are bound to fail.
- 4.7 The third ground of appeal relates to concerns expressed by the PPC about the viability of the proposed pharmacy given the size of the neighbourhood population. This ground of appeal falls to be disregarded as the PPC has decided that the existing services are adequate. Having done so, the PPC was required to refuse the application, regardless of the merits of the proposed pharmacy itself. As such, the viability, or otherwise, of the proposed pharmacy was not a factor for consideration. That said, I am satisfied that the PPC was entitled to express concerns about the viability of the proposal in light of the limited and principally commuter-based population of the neighbourhood. The fact that other pharmacies have been

able to operate in neighbourhoods with similar populations does not necessarily indicate that all neighbourhoods with similar populations will be able to sustain a pharmacy. For these reasons, I am satisfied that this ground of has no prospect of success.

- 4.8 The fourth ground of appeal relates to the analysis by the PPC of the data produced by the CAR. In particular, the Appellant considers that the decision of the PPC is inconsistent because it considered that “don’t know” responses of around 13% were relatively high whereas it did not appear to consider positive responses of between 76% and 94% to be high. The Appellant asserts that the PPC has failed to explain its reasoning in this regard.
- 4.9 The PPC addresses the CAR in paragraphs 16.4 of the decision. It notes that the majority of complaints related to issues of convenience rather than necessity. It also noted what it considers to be the comparatively high level of uncertain responses to the CAR. In considering the PPC’s analysis of the CAR it is important to bear in mind that it is an expert decision-making body and is entitled to and capable of interpreting the information before it. It is clear that the PPC considered that uncertain responses were indicative of there being no pervasive concerns about the overall standard of pharmaceutical services in the neighbourhood. Equally, when the line of questioning put to the application is considered, it is clear that the PPC considered that high positive responses fall to be given less overall weight because people will generally respond positively when asked if they want a new pharmacy. That is not necessarily indicative of current services being inadequate. That appeared to be accepted by the Appellant during questioning. As such, I consider that the PPC’s reasoning is clear and that, as an expert body, it was entitled to interpret the information presented to it as it did. For these reasons, I am satisfied that this ground of appeal has no prospect of success.
- 4.10 The sixth ground of appeal relates to a comment at 16.2.3 of the PPC’s decision in relation to the existence of three pharmacies at Auchinbee District Centre, Condorrat and Twechar. The Appellant contends that the PPC has taken into account the services provided to the neighbourhood by (a) two pharmacies which did not take part in the application; and (b) a pharmacy which provides limited services to the neighbourhood.
- 4.11 The Appellant asserts that the PPC ought not to take into account the services provided by pharmacies which did not take part in the application. Clearly it is not appropriate for the PPC to disregard services provided by parties which elect not to take part in the application process. To do so would be entirely artificial and create a perceived obligation on service providers to take part in every application made in relation to a neighbourhood in which they provide services. Equally, it would not be appropriate for the PPC to draw an inference from the pharmacies’ decision not to participate in the application, as the Appellant contends, that they do not service the neighbourhood. In relation to the pharmacy at Craigmarloch, the PPC are clear that they consider that it provides limited services to the neighbourhood. Their reference to it requires to be read in this context. As such, there has been no failure by the PPC to properly narrate the facts or reasons on which they based their decision, nor has there been any failure by the PPC to explain the application of the facts to their decision. Accordingly, I am satisfied that this Point of Appeal has no prospect of success.

Disposal

- 5.1 For the reasons set out above, I am satisfied that the grounds of appeal stated by the Appellant discloses no reasonable ground of appeal and is bound to fail. Accordingly, I shall dismiss the appeal.
- 5.2 In dismissing the appeal I consider there to be two broader points which are worth highlighting. The grounds of appeal forwarded in this case were generally indicative of a narrow and technical reading of the decision of the PPC. Such an approach is not

appropriate. The decision requires to be considered in its entirety from the perspective of an individual with all of the relevant knowledge. Had the Appellant considered the decision in this broader context I anticipate that its concerns would have been addressed. Whilst this is the correct approach to considering the decision of the PPC, I would encourage the PPC to ensure that its reasoning is fully narrated when setting out their decision rather than relying on parties to review a lengthy narration of the evidence put to the PPC in order to give context to their reasoning. This would be beneficial both to the PPC and to participants in the process.

(sgd) JMD Graham

Date : 23rd April 2018

Interim Chair