

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

21 Main Street, Monkton, KA9 2QJ

Applicant:	Mr Sean Manson
Appellants:	Boots (UK) Ltd and Burns Pharmacy t/a Toll Pharmacy
Health Board:	NHS Ayrshire & Arran
PPC Hearing Held:	5 December 2017
Panel Case Number:	NAP74 (2017)

1. Background

- 1.1 This is an appeal against the decision of the Pharmacy Practices Committee (“the PPC”) of NHS Ayrshire & Arran (“the Board”) following upon a Hearing that took place on 5 December 2017.
- 1.2 Sean Manson (“the Applicant”) made an application for inclusion in the pharmaceutical list of “the Board” to provide pharmaceutical services in respect of the premises at 21 Main Street, Monkton, Ayrshire (“the Premises”), said application dated 19 October 2017.
- 1.3 The PPC under delegated authority of the Board held a Hearing on 5 December 2017 taking evidence from the Applicant and Interested Parties and considered supporting documentation, following upon which it determined that the provision of pharmaceutical services at the premises was desirable in order to secure adequate provision of pharmaceutical services within the neighbourhood in which the premises are located and accordingly granted the application.
- 1.4 Boots UK Ltd and Burns Pharmacy t/a Toll Pharmacy (respectively referred to as “Boots”, “Burns” and are jointly referred to as the “Appellants”) submitted letters of appeal against the PPC’s decision dated respectively 10 January and 12 January 2018.

2. Summary of Grounds of Appeal

- 2.1 The appellants assert that the letter from Ms Katherine McCulloch on behalf of Monkton Senior Citizens’ Committee (50/50 Club) was not received by the Board in time – i.e. within the 30 days specified in Regulation 1(2)(c) of Schedule 3 of the Regulations. The letter sent by the Board to the Appellants dated 24 November 2017 confirmed only that representations had been received from Boots and Burns and the Area Pharmaceutical Professional Committee (APPC) and that written representation from the 50/50 Club had been received outside the statutory consultation period. Specifically, these representations were received on 30 November 2017, 6 days after the cut off date but at the PPC hearing, the Appellants were informed of a letter dated 20 November 2017 from “.....Monkton Senior Citizens’ Committee ... although this arrived late because its Secretary was seriously ill and unable to deal with correspondence, the Chairman decided to allow it to be considered and circulated it to all parties present on the day.” It is claimed on behalf of the Appellants that they were unable to prepare in advance for the arguments likely to be made by the 50/50 Club and that the Appellants had not been given fair notice. Further, the Regulations state that where there is no active Community Council, Boards are required to seek views of “alternatives who they believe will present a fair account of the views of the local community, such as other elected local representatives” and that as the members of the 50/50 Club were not elected, they could not be deemed to fairly represent the views of the local community.
- 2.2 The PPC acknowledged that Monkton was a reasonably affluent area with a substantial proportion of the population having access to a car and that pharmaceutical services were accessible to the population of Monkton who had a car and that there were two bus services linking Monkton to Prestwick and Troon which ran every half hour with journey times of about 10 minutes.
- 2.3 As to viability the PPC noted only what in their opinion the effect of the proposed pharmacy would have on existing contractors and made no reference to population size and viability of the proposed pharmacy. They state that a village of the size and demographic of Monkton could not support an NHS pharmacy and therefore would not secure a pharmaceutical service. The PPC had stated that because of an unspecified number of residents who might find it difficult to access a pharmacy, they concluded that the services in the neighbourhood were inadequate and had narrated no grounds on which they came to this conclusion and that in any neighbourhood there would always be residents who had difficulty in accessing a pharmacy. Consideration ought to have been given to the relative numbers of such residents compared to those residents who could easily access a pharmacy. The PPC has failed to do so.

- 2.4 Previous applications had been submitted for pharmaceutical premises in Monkton; these had been refused and the population has increased since then by a relatively small amount.
- 2.5 The PPC have accepted that the grant of the application was not necessary but that it was desirable in order to secure NHS pharmaceutical service in the future and had looked into future housing developments and considered how a new pharmacy would help to secure such services. They had acknowledged that, whilst planning permission had not been granted for some of the developments, the land had been zoned for housing and that there was “little doubt” that these developments would happen. The PPC did not state that there would likely be an increased population and accordingly sufficient residents to support a pharmacy. Nor did it make any reference to any future needs of such theoretical increased population. No estimated population was referred to.

3. Evidence of Parties

3.1 The evidence of the Applicant may be summarised as follows:

- 3.1.1 The Applicant considered the neighbourhood to be Monkton bounded on the South by Station Road at the B739 Baird Road (including Adamton Estate) to the West by the A79; to the North by the A78; and to the East by the A77 (including Adamton Estate). The village, including Adamton, comprised 517 houses and National Records Scotland estimated the population of Monkton “and the wider area” as 1952. Although it is suggested that the actual population of Monkton was between 1400 – 1700 there was a caravan site comprising 120 caravans which he estimated housed 240 residents between 6/9 months per annum and a large working population within the village at Spirit Aerosystems, UTC Aerosystems, Semex UK and others which he estimated to be around 2000. There was in addition a primary school, a post office, newsagent, three hotels and other facilities.
- 3.1.2 His pharmacy would offer the core services including the Chronic Medication Service (“CMS”) and Minor Ailments Services (“MAS”) and would seek to offer further negotiated and complementary services.
- 3.1.3 The population of Monkton has increased since 2004 and that there had been three major developments. Land was developed at Whiteside where 67 houses were built in 2004, 56 new houses were built in 2013 and 27 new homes built in 2016. Further land had been zoned for housing to the north east of Monkton, Persimmon Homes were at an advanced stage of consultation planning to build 277 new homes commencing in 2018. No planning application had as yet been made. Further sites are at the consultation stage for the HMS Gannet site but no planning applications had been effected.
- 3.1.4 Residents of Monkton may use their car, public transport or walk to access pharmaceutical services in Prestwick and Troon. Parking spaces are difficult and the bus is unreliable and infrequent and walking is not feasible due to long distances and safety considerations. He argued that the bus service was under threat and that cuts may come in future when existing services may disappear.
- 3.1.5 The Consultation Analysis Report (“CAR”) had a strong turnout of 247 responses. The vast majority of comments in relation to which were in favour of the application. He stated that he was not aware of any complaints in connection with neighbouring pharmacies and that his arguments were not based on quality of service but on difficulties in accessing the pharmacies.

3.2 The evidence of Ms Cowie on behalf of Boots (UK) Ltd may be summarised as follows:

- 3.2.1 She agreed the boundaries as suggested by the Applicant but the neighbourhood was small with limited population and limited facilities and had good transport links to the wider area. She made a further comment that the residents of Monkton made the most of these transport links to access the neighbouring areas of Prestwick and Troon for all but the very basic of

daily needs. She suggested that most residents would shop regularly at stores such as Sainsbury's and Aldi's supermarkets in Prestwick or Morrison's in Troon and Ayr. Most residents would likely be registered with the GP practices in these areas as well as other NHS services including dentists and optometrists. Whilst there was a primary school in Monkton, the families with older children would go daily to Prestwick Academy or Queen Margaret Academy in Ayr. She did not accept that any employees at Prestwick Airport would access any pharmaceutical facilities in Monkton.

- 3.2.2 It was her view that the current population was around 1150 and that in the past 10 years there had been approximately 150 new homes. If all of the people living in these new homes were new to the area this would have resulted in an increase of around 345 people over a 10 year period and these new families are being cared for by the existing pharmacies who could care for many more in the future. Car ownership in the whole of Monkton is higher than the national average with households in half of the area having over 90% car ownership. Whilst there may be pockets of deprivation, generally the population was otherwise affluent and mobile. The current services being offered to the neighbourhood were, in her view, adequate.
- 3.2.3 She argued that as the population was relatively small and that there were no GPs in the neighbourhood generating prescriptions, the actual number of items to be dispensed by the proposed pharmacy would be small which raised the question of the viability of the pharmacy. The dispensing data indicated that all three of Boots pharmacies in Prestwick and in Troon dispensed prescriptions for residents of Monkton. Whilst the pharmacy opening would have a detrimental effect on Boots pharmacies it would not result in any closure but would have implications for staff and employment security. She accepted that the responses to the CAR were high but disagreed that this in any way showed an inadequacy of current services in that a quarter of the respondents were not resident in the neighbourhood and that the comments also indicated that there was a desire for development of further amenities in Monkton and not the requirement of a pharmacy. She felt that the comments indicated that it would be more a matter of convenience for a few and would make no difference to the many who are leaving Monkton to carry on with daily life. The Regulations indicate that it was a matter of necessity or desirability and not convenience that should be considered. She added that there had been no significant material changes in Monkton since 2008 and such changes as there were would not have had a significant impact on pharmaceutical services as all current providers had capacity. She emphasised that as there was no GP in the village the number of prescriptions would be low as most would have them filled when they visited their GP and that the existing pharmacies could continue to adapt and had the capacity to do so to cope with future new housing over the next 10 years.

3.3 The evidence of Ms Burns on behalf of Toll Pharmacy may be summarised as follows:

- 3.3.1 Ms Burns generally agreed with the neighbourhood proposed by the Applicant with the exception of the Adamton Estate which ought to be excluded. She referred to the most recent Census information from 2011 which gave the population for the neighbourhood as defined by the Applicant as being 918 and that the datazone information provided by the Board was inaccurate and that there had been a small increase in the population since the last Census and accepted that the population would now be somewhere between 1300 - 1400. She did not accept that the residents of the caravan park should be included as the population would use their caravans for regular short breaks e.g. weekends and school holidays and were unlikely to use a pharmacy in Monkton any more than on rare occasions. She also considered it unlikely that the workforce on the Industrial areas close to Monkton would ever use a pharmacy in the village. She noted that the proposed new housing developments had not been granted planning permission and that the PPC ought to give no weight to the claim. She considered the suggestion that there were substantial amounts of elderly and disadvantaged residents in the neighbourhood to be incorrect. In the 2011 Census 95% of the population were regarded as being in very good, good or fair health and only 5% considered themselves to be in bad or very bad health i.e. approximately 65 people. 70% of the population had no long term health condition and 80% had no limiting disability or health condition. Finally, 6.6% of the population were regarded as elderly (i.e. over 74). The Applicant had accepted that Monkton contained an affluent population.

3.3.2 Access to pharmacies in Troon and Prestwick may be effected by car or by bus which is a regular short journey. Whilst there are a small number of residents with mobility problems and may be housebound, these patients currently benefit from a delivery service and visits from pharmacists. She commented on the CAR and mentioned some quotes which included "not convenient for those that don't drive", "easier than going to Prestwick", "...a pharmacy in Monkton would be very convenient" and added that the general view of the comments was that a pharmacy would be "convenient". Not one single response gave the reason for support other than convenience. Pharmaceutical contracts should not be granted for the sake of convenience. Any Applicant must show that the existing service is inadequate and her argument was that the application failed to do so. She indicated her concern that the grant would not secure adequacy and that viability of the proposed pharmacy is a matter for the PPC which must be satisfied that the neighbourhood in which the proposed premises are located has, at the very least, sufficient population to support a pharmaceutical service and it must take into account not only the population but the demographics and the likely number of prescription items that the neighbourhood would generate each month. The essential small pharmacy scheme is closed to new applications and hitherto a pharmacy required to dispense less than 1400 prescription items per month below which the NHS has determined was the point at which a pharmacy was not viable. She was of the view that in fact at the present time a conservative estimate would be that the pharmacy would need to dispense at least 2000 items per month to be viable. There is a view that a village such as with a population of Monkton would not generate this number of prescriptions each month. The pharmacy would not be viable. The PPC should not grant an application in a non-viable neighbourhood as a springboard for an entirely different type of business.

3.4 The evidence of Ms Shelton on behalf of the 50/50 Club (Senior Citizen's Group) may be summarised as follows:

3.4.1 Ms Shelton felt the opportunity to have a face to face consultation that was within easy walking distance would be good for the older generation and mothers had indicated it would be nice to walk to a pharmacy if they had a minor problem rather than having to take their children by car or bus or wait for their partner to return with the car. She said it could be a three hour round visit to a doctor in Troon and there was a danger of missing the bus which would turn it into a four hour trip. She added that Monkton did not have a Community Council and although it had been in operation for over 50 years it had recently disbanded

4. The PPC's Decision

- 4.1 Prior to the retiral of all the parties each had confirmed that they had had a fair Hearing.
- 4.2 The PPC noted that the CAR followed upon the joint consultation exercise between the Applicant and the Health Board as a result of which 246 responses had been received. The numbers responding to each question were noted.
- 4.3 The PPC noted the **neighbourhood** as defined by the Applicant and the comments of the interested parties and the APPC were also noted. The appropriate factors were taken into account when defining neighbourhood including those resident in it, the boundaries, general amenities, the provision of parks and other recreational facilities and the distance which residents were required to travel to obtain pharmaceutical and other services and the availability of public transport. Whilst the PPC noted there was little disagreement over the Applicant's definition other than Toll Pharmacy considering it would not include the Adamton Estate they agreed that the neighbourhood should be as defined by the Applicant namely: to the South Station Road/B739 Baird Road (including Adamton Estate); to the West the A79; to the North the A78 and to the East the A77 (including Adamton Estate).
- 4.4 As to **adequacy** the PPC noted there were no pharmacies within the neighbourhood as defined and added that it was not necessary for a pharmacy to be located in a neighbourhood providing access to existing pharmaceutical services was adequate. The PPC noted that there were pharmacies in Prestwick (three branches of Boots and Toll Pharmacy) and Troon (Boots and Willis Pharmacies) currently providing a service to the neighbourhood which

included deliveries.

- 4.5 The PPC noted that the Applicant argued that accessibility of the existing pharmacies were suspect in that the pharmacies were not within walking distance being 3.5 miles distant and roads unsuitable for pedestrians, Prestwick and Troon were easily accessible by car (which the PPC regarded as having sufficient parking), that Monkton appeared to be a reasonably affluent area with a substantial proportion of the population having access to a car and that those without a car would have to rely on public transport and that there were two buses number 4 and number 14, linking Monkton to Prestwick and Troon travelling every half hour with journey times taking only 10 minutes and the round trip to a pharmacy could take a considerable time. The PPC felt that for those without a car, particularly the elderly and those with young children, it was not accessible.
- 4.6 The PPC noted that both Boots and Toll offered the necessary contracted services with the addition of others, there was an effective and responsive delivery service to Monkton with Boots delivering three times a day and Toll going through the village at least once a day, and that Boots also offered visits by pharmacists to those that had received deliveries. In addition, there had been no formal complaints about pharmaceutical services to the neighbourhood made to the Board and none reported in quarterly returns from pharmacies. In any event it was noted that the Applicant had not questioned the quality of the service but concentrated on accessibility.
- 4.7 The PPC acknowledged that the CAR response was high but that many of the comments related to convenience although there were a lot concerning the difficulty of travelling to Troon and Prestwick. 24% of the responses came from people who did not live in Monkton and were perhaps from those who worked there.
- 4.8 The PPC concluded that on the basis of the evidence gathered the service was adequate for some but not for others because of the difficulty in accessing the total range of pharmacy care services apart from the fulfilling of prescriptions. Under the circumstances they determined that the existing pharmaceutical services were therefore inadequate to the defined neighbourhood. Having determined inadequacy the Applicant had noted himself it was more desirable than necessary to grant the application. They noted there was no GP in Monkton and with the other pharmacies being some distance away residents had limited access to full pharmaceutical services unless they travelled. Having looked at future housing developments in Monkton and considered how a new pharmacy would help secure pharmaceutical services it acknowledged that while planning permission had not been granted for the developments the land had now been zoned for housing and there was little doubt that these developments would happen. The PPC considered that given the size of the population and the number of pharmacies in the area the granting of the new contract would have limited impact on existing contractors.
- 4.9 Accordingly the decision of the PPC was that the provision of pharmaceutical services at the premises was desirable in order to secure adequate provision of pharmaceutical services within the neighbourhood in which the premises was located by persons whose names were included in the pharmaceutical list and accordingly the application was granted.

5. Discussion and Reasons for Decision

- 5.1 Every Health Board has a duty to make arrangements as to its area for the supply of persons in that area for proper prescription drugs and medicines which are ordered for those persons by a medical practitioner in pursuance of its functions under the Health Service. The Board require to be satisfied that it is necessary or desirable to grant an application in order to secure in the neighbourhood in which the premises are located the adequate provision by persons included on the list of services as specified in the application. This is underscored by Regulation 5(10) in that the Applicant shall be granted by the Board only if it is satisfied that the provision of pharmaceutical services at the premises named in the application is necessary or desirable.

- 5.2 In terms of paragraph 3(i) of schedule 3 of the Regulations the PPC shall have regard to the pharmaceutical services already provided in the neighbourhood of the premises, the pharmaceutical services to be provided at those premises and any information available to the PPC which in its opinion is relevant to the consideration of the application, the CAR, the Pharmaceutical Care Services Plan and the likely long term sustainability of the pharmaceutical services to be provided by the Applicant.
- 5.3 The grounds of Appeal are limited to areas where the PPC has erred in Law in its application of the provisions of the Regulations, that there has been a procedural defect when the application has been considered, that there has been a failure by the PPC to properly narrate the facts and reasons upon which the determination of the application is based or there has been a failure to explain the application by the PPC of the provisions of the Regulations to those facts.
- 5.4 My function is to determine whether or not the PPC has exercised its judgement fairly and given adequate reasons for it and that it does not otherwise offend against the grounds of appeal set out in Schedule 3 paragraphs 5(2A) and (2B). The PPC comprises pharmacists and Lay Members who may be expected to understand the issues involved on the evidence before it. It is an expert tribunal. Equally, it must be understood, that the PPC's decision must be intelligible and must be adequate. It must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal issues and its reasoning does not give rise to any substantial doubt that it had erred in Law.
- 5.5 There are three principal issues which are raised by the Appeal and the PPC's decision:
- i. Whether evidence ought to have been taken from the 50/50 Club and, if so, whether the Appellants may object at this stage with that evidence standing their failure to object at the outset of the Hearing and the nature of that evidence;
 - ii. Whether the PPC has properly addressed the issue of viability in relation to the proposed pharmacy premises and
 - iii. Whether the PPC has addressed the matter of adequacy sufficiently to satisfy the Legal Test.
- 5.6 The evidence of Ms Shelton of the 50/50 Club was uncontroversial. She added little to the evidence of the Applicant and neither of the Appellants asked any questions of her. In this regard therefore I do not accept the Appellants were unable to prepare in advance for arguments she was likely to make.
- 5.7 A number of issues have arisen following upon examination of the Letters of Appeal and decision of the PPC which require closer examination. I am concerned whether evidence should have been taken from the 50/50 senior citizens and, if so, whether the Appellants may take issue with that evidence at this stage, notwithstanding their failure to object at the outset of the Hearing and the nature of Ms Shelton's evidence. As I have stated the evidence of Ms Shelton added little to the Applicant's evidence and that neither of the Appellants felt it necessary to question her during the course of the Hearing. Nevertheless, it does beg the question as to whether a representative of the 50/50 club ought to have been invited to attend and give evidence. Leaving aside the issue whether or not their representations were received timeously (which, it seems, they were not), it is noted that in Paragraph 1 of Schedule 3 sub paragraph b(v), notice requires to be given by the Board of the Application to any nominated community representative that covers the neighbourhood within which the Applicant intends to provide pharmaceutical services, and that any person so notified may make written representations about the Application to the Board. In the Interpretation Clause 2 of the Regulations, a "nominated community representative" means a person nominated by one or more Community Councils from amongst their elected members for the purpose of making representations in accordance with the procedures set out in Schedule 3". As I understand it, the 50/50 Club is a self-nominated body and would therefore fall outwith the provisions of Paragraph 1 of Schedule 3. In the circumstances, regardless of Ms Shelton's evidence, she should not have been heard. This in itself would render the PPC's decision a nullity.
- 5.8 There was a significant variance among the parties as to the population of the neighbourhood

of in excess of 20%. The PPC has made no reference to the population, not given any reasons why it accepted or rejected the evidence of any party. The population was a significant factor in determining adequacy and one would have expected the PPC to have commented on it. Further, cogent evidence was given by Ms Burns taken from the Scottish Census website of details of the Monkton locality, indicating that 95% of the population were in very good, good or fair health, and only 5% of the population considered themselves to be in bad or very bad health, and 6.6% of the population were regarded to be elderly (i.e. over 74). This is, equally, a significant adminicle of evidence which the PPC has chosen to ignore. Did they accept it? If so, did it have a bearing on its decision?

- 5.9 The PPC concluded that on the basis of the evidence gathered, the pharmaceutical service was “adequate for some, but not for others because of the difficulties in accessing the total range of pharmacy care services apart from the fulfilling of prescriptions”. This is not the Legal Test. It is established law set out in the Opinion of Lord Drummond Young in *Lloyds Pharmacy vs National Appeal Panel 2004* that “adequacy” is a simple concept. Either the pharmaceutical services available in a neighbourhood are adequate, or they are not. It is “... inherent in the ordinary meaning of the word, which denotes a sufficiency for a particular purpose, in this case the provision of pharmaceutical services in the relevant Neighbourhood.”. The provision of pharmaceutical services cannot be adequate for some and inadequate for others. How many others? Is it the 6.6% who are elderly? Is it for the apparently small percentage who are not car owners? The PPC requires to determine first whether the pharmaceutical services in the neighbourhood are adequate. If they are not adequate, they then require to consider necessity and desirability and that with cogent reasons .
- 5.10 Ms Burns had raised the issue of viability and that, at a conservative estimate, a pharmacy in 2018 would require to dispense at least 2000 items per month to be economically viable. She felt in the circumstances, the population would not generate this number of prescriptions each month and that a pharmacy in Monkton was therefore not viable, in that the population resident in the neighbourhood would not be sufficient to make the pharmacy viable and on that basis, the PPC ought to have refused the application. Whilst the PPC have commented that, given the size of the population and the number of other pharmacies in the area, the granting of a new contract would have limited impact on existing contractors, but has made no comment on the viability of the contract under discussion. The PPC ought to have done so.
- 5.11 The PPC ought to consider that if representations or documents on the key issues have not been given any weight to them, it requires to give reasons for that. Key issues in this case relate to the CAR and the comments of the Applicant and Interested Parties thereto, viability, statistical evidence and adequacy.
- 5.12 The PPC have made reference to the CAR and commented on it. In terms of paragraph 3 (6)(a) and (b) of Schedule 3, the PPC’s determination of the Application *must* include a summary of the CAR submitted in accordance with Regulation 5A, and an explanation of how the CAR was taken into account in arriving at that Decision. The PPC has provided a summary of the CAR but merely left it at that. The Appellants had commented upon the CAR, specifically quoting some of the responses and Ms Burns averred that the key message from those who did support the pharmacy was that it would be “convenient”.

6. The Decision

- 6.1 For the reasons set out above, I find that Paragraphs 5(2A) and (2B) of Schedule 3 are engaged.
- 6.2 The Board is advised to empanel a fresh PPC absent any of the members who participated at the Hearing on 5 December 2017 in order to consider the application anew .
- 6.3 There is no requirement to produce a fresh CAR in terms of Paragraph 5(A) of the Regulations, the current CAR being sufficient for the purposes of a fresh hearing .

(sgd) J Michael D Graham
Interim Chair

3rd April 2018