

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 and Appellant: Mr Sean Manson

Health Board : NHS Ayrshire & Arran “the Board”

PPC Hearing held : 28th August 2018

Panel case number : NAP 81 (2018)

Decision of the Chair of The National Appeal

1. Background

- 1.1 Sean Manson, a registered pharmacist, (hereinafter referred to as either the “Applicant” or “Appellant”) made an application for inclusion in the pharmaceutical list of the Board to provide pharmaceutical services from and in respect of premises at 21 Main Street, Monkton, Ayrshire (“the Premises”). The application was dated 19th October 2017.
- 1.2 The Pharmacy Practices Committee (“the PPC”) under delegated authority of the Board, initially held a hearing on 5 December 2017 taking evidence from the Applicant and the then Interested Parties, 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.
- 1.3 Books UK Limited and Toll Pharmacy submitted letters of appeal following upon the PPC’s Decision dated respectively 10th and 12th January 2018 which I considered and in terms of my decision thereon dated 3rd April 2018, I advised the Board to empanel a fresh PPC absent any of the Members who participated at the hearing on 5th December 2017 in order to consider the Application anew. The reasons for my decision are incorporated under panel case reference number NAP74 (2017) and is referred to for its terms.
- 1.4 A hearing on the Application was heard again before a fresh PPC on 28th August 2018 and its decision was that the provision of pharmaceutical services at the Premises was neither necessary nor desirable in order to secure adequate pharmaceutical services within the neighbourhood in which the Premises were located and ,accordingly, the PPC rejected the Application.
- 1.5 An appeal was lodged against this decision by the Applicant on 4th October 2018.

2. Grounds of Appeal

- 2.1 There was no disagreement between the Applicant and the PPC with regard to what constituted the neighbourhood and being generally the village of Monkton.
- 2.2 The Applicant advances 7 points of appeal which may be summarised as follows:-

- 2.2.1 That the Chair had erred procedurally in that he interrupted the Applicant's answer to a question by one of the Interested Parties which he, the Chair, answered on the Applicant's behalf, thus denying the latter the opportunity to do so.
- 2.2.2 The Chair had erred procedurally in permitting the person assisting an Interested Party to answer a question following upon a conversation between the principal and said assistant, and that in breach of Schedule 3 paragraph 3(3)(b) and(c) of the Regulations.
- 2.2.3 The Hearing was adjourned at 16:20 and reconvened at a different venue 3 miles away at 17:00, thus allowing the 'Appellants' (*sic*) time to refine their argument based on what they had heard so far, thus giving them an unfair advantage as also it allowed for further discussion between Committee Members and the 'Appellants'.
- 2.2.4 Mr John Connolly, a non-voting Member of the PPC nominated by the Area Pharmaceutical Professional Committee, was widely known to be friendly with Ms Burns of Toll Pharmacy, one of the Interested Parties. The Appellant alleges that both were involved on a business level through a company called Albapharm Limited. During the course of the years 2008-2013, Mr Connolly was a director of said company, and during that time, Ms Burns was a member of the buying and support group for independent pharmacies. In the circumstances, Mr Connolly, being a member of the PPC, should have declared an interest in terms of Schedule 4, paragraph 4(i) of the Regulations.
- 2.2.5 Whilst not reflected in the Minutes, a Lay Member of the PPC repeatedly asked the Chair as to the expected time the hearing was to close. His apparent impatience put the Applicant at a disadvantage both during the hearing and the decision making process.
- 2.2.6 The PPC did not consider the likely long-term sustainability of the pharmaceutical services to be provided by the Applicant, in breach of Schedule 3 paragraph 3 of the Regulations.
- 2.2.7 Particular points of the decision-making process were erroneous and ought to be considered procedural defects, in particular:
- (a) A Member of the PPC gave his personal views as to the service offered by the existing pharmacies and that his tone was aggressive towards the Applicant
 - (b) The PPC, whilst noting that the results of Consultation Analysis Report ("CAR") in favour of the Application were high,

questioned its validity on the basis that the Applicant was originally from the village of Monkton.

- (c) The PPC did not properly narrate the facts relating to access to other pharmacies by car, bus or foot, thus ignoring these as evidence of inadequacy
- (d) The PPC noted the number of cars in driveways which the Appellant considers a small snapshot of the village. The Appellant goes on to make reference to specific comments by the PPC regarding parking constraints, cost of bus travel, that the PPC was incorrect in coming to the conclusion that Monkton was not a bustling hive of activity, and various other observations effected by the PPC which, in the opinion of the Appellant, have no foundation. These matters will be generally commented upon in my discussion and reasons for decision below.

3. Decision of the PPC

- 3.1 Following upon the evidence of the parties, the Chair invited each individually and separately to confirm that a fair hearing had been received and that there was nothing further to be added, and it was thereafter noted in the Minutes that all parties were indeed satisfied.
- 3.2 The PPC noted that they had jointly undertaken a site visit of Monkton and the surrounding area, noting the location of the Premises, existing pharmacies, General Medical Practices, and facilities and amenities within.
- 3.3 The PPC had noted certain documentation including a map showing Monkton and the surrounding area, covering the location of the pharmacy in relation to Troon Pharmacies and Troon and Dundonald GPs plus Prestwick Pharmacies and Prestwick and Ayr GPs. They also had sight of other documentation including bus timetables and the Board's Pharmaceutical Care Services Plan 2012 and the Consultation Analysis Report, a summary of which latter was included in the PPC's decision.
- 3.4 The PPC determined the neighbourhood to be that as defined by the Applicant and Interested Parties and gave reasons for its determination.
- 3.5 As to **adequacy**, whilst the PPC noted that there were no pharmacies within the neighbourhood, there were six existing pharmacies serving the neighbourhood in Prestwick and Troon. It had, as stated, summarised the CAR and had noted that support for the application was "unusually high" at 93.47% and commented that it was perhaps not surprising given that the Applicant grew up in Monkton and noted that a significant proportion of the responses were handwritten compared to those submitted electronically. The

PPC had agreed with one of the Interested Parties that excellent public support did not equate to a need for the proposed pharmacy and the application could only be granted if the Applicant had demonstrated that the existing pharmaceutical service was inadequate and that the application was necessary or desirable to secure pharmaceutical services for that neighbourhood. The PPC had noted during its site visit, that there were a high number of cars parked in driveways and, in some cases, multiple vehicles and had noted from the statistical information that 81.3% of households had access to a car and 40.2% had one car. The PPC also noted the adequate bus services to and from Monkton to areas which contained pharmacies and whilst parking difficulties at the existing pharmacies in Prestwick and Troon were not ideal, were equally not impossible. The PPC had accepted that whilst delivery services from both Boots and Toll Pharmacies were not part of a core service, they were available, as also were telephone consultations or home visits by pharmacists for those unable to visit a pharmacy, and that the Regulations did not stipulate that a face-to-face patient consultation was necessary, they would benefit from services offered by a pharmacy such as the Minor Ailments Service (“MAS”).

- 3.6 The professional Members of the PPC gained a positive impression of the existing pharmacies during their site visit, including the provision of core services and non-core services and that social services collected prescriptions and delivered medicines to those with care packages.
- 3.7 The PPC had noted that unless residents obtained grocery deliveries via online shopping, it would have been necessary to travel outwith the village to supermarkets as there was only a small convenience store within the village. It had noted the population of the neighbourhood to have been 1540 during peak season with 1300 permanent residents and 240 visitors to the caravan park and that there were 2184 workers within the village proper. Although given that some of the proposed neighbourhood residents may work in Monkton, the PPC considered there may be an element of double counting in the estimated population figures provided by the Applicant.
- 3.8 Whilst future planned developments were considered by the PPC, none was considered to be significantly advanced to be factored in, and consequently not considered to be a certainty and, to date, there had been no planning permission granted for any of the proposed developments.

4. Discussion

- 4.1 Under the Regulations, the available grounds of appeal against the Board are limited to circumstances in which there has been:

- 4.1.1 an error in law by the Board in its application of the Regulations.

- 4.1.2 a procedural defect in the way the application has been considered by the Board
- 4.1.3 a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based (Schedule 3, paragraph 5 (2B)(b))
- 4.1.4 a failure to explain the application by the Board of the provisions of these Regulations to those facts (Schedule 3, paragraph 5 (2B)(c)).
- 4.2 I am required to consider the Notice of Appeal and:
 - 4.2.1 to dismiss the Appeal if I consider that it discloses no reasonable grounds of appeal or is otherwise frivolous or vexatious.
 - 4.2.2 to remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out at points at paragraph 4.1.2 to 4.1.4 have occurred
 - 4.2.3 in any other case, to convene the National Appeal Panel to determine the Appeal.
- 4.3 In terms of the Regulations, an application shall be granted by the Board *“(a) only if it is satisfied that the provision of pharmaceutical services at the premises named in the application is necessary or desirable in order to secure adequate provision of pharmaceutical services in the neighbourhood in which the premises are located by persons whose names are included in the pharmaceutical list”* (Regulation 5(10) .
- 4.4 In terms of Paragraph 3(1) of Schedule 3, the PPC shall have regard to the pharmaceutical services already provided in the neighbourhood of the premises, the pharmaceutical services to be provided in the neighbourhood at those premises, any information available to the PPC which, in its opinion, is relevant to 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.
- 4.5 The principal consideration of the PPC’s decision for the present purposes is whether or not it 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). It is relevant to note that 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 be intelligible and it 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. Such adverse inference will not readily be drawn. A deficiency in service must exist before an application may be granted. Consequently, the existence of such a deficiency must be identified before it is necessary to consider what may be done to provide a remedy.

- 4.6 In his first ground of appeal, the Appellant considers that there has been a procedural error following the Chair's intervention in answering a question on his behalf. The situation that has arisen here is that Ms Burns for Toll Pharmacy had asked whether any of the development zones mentioned in the Applicant's presentation had planning permission and that the Applicant had stated that test drilling was taking place and that planning permission would follow. It was at this point the Chair intervened and stated that the particular area had been designated for residential properties and that whilst no planning permission had been given, the Council had still allocated these zones for residential use. Whilst I agree with the Appellant that the Chair should not have intervened and that it was not his function to answer questions on any parties' behalf, I am unable to determine in what way the Applicant has been prejudiced by this intervention. A question had been asked as to whether planning permission had been granted, and the Applicant had stated that test drilling was taking place and that planning permission would follow, thus suggesting that planning permission had not been granted. I do not accept that the Chair's intervention denied the Applicant the opportunity to answer the question which, in the event, had in essence already been answered. If necessary, the position could have been further clarified after the Chairman's interruption or during the Applicant's summing up. Accordingly, this ground of appeal has no prospect of success.
- 4.7 The Appellant has drawn attention to the evidence allowed of Mr Kerr, who was assisting Ms Watson of Boots, to address the PPC and accordingly this was a procedural breach. In Schedule 3, paragraph 3(3)(b), the PPC must permit the applicant and any person making representations at the hearing to be assisted by another person and that (c) permit the applicant or any person making representation at the hearing either to (i) speak to their own representations or (ii) nominate the person assisting them to speak on their behalf. I am of the view that "assist" in these circumstances means someone acting as an assistant in a subordinate or supportive function, not taking on the principal's role of presentation of the applicant's or interested parties' part in setting out their position. I have noted that the Chair had, following upon Mr Kerr's contribution, recognised that permitting him to speak was unusual, but had taken the view that it had been "necessary in the interests of clarity" but that all further questions to Boots be answered by Ms Watson. I do not regard the evidence of Mr Kerr to have been anything other than supportive and, if it is a flaw, it is most certainly not fundamental. Ms Watson had been asked approximately 25 questions from the Applicant, Interested Parties and Members of the PPC. The one contribution by her assistant, Mr Kerr, related

to the number of prescriptions dispensed by Boots which required a balance and which he had estimated at about 1%. In the circumstances, and in the context both of the number of questions put to and answered by Ms Watson, the nature of the answer by Mr Kerr and the, albeit late, recognition by the Chair that questions ought to be answered by the principal rather than the assistant, this issue is of minor moment. Accordingly, this ground of appeal has no prospect of success.

4.8 In his third ground of appeal, the Appellant avers that he was disadvantaged in that the meeting, having been adjourned at 16:20, was reconvened at a different venue 3 miles away at 17:00. Where a meeting requires to be adjourned for any reason, it cannot be assumed that any advantage attaches to one party or another. It has to be assumed that the Chair obtained all parties' consent to such adjournment to the place and time determined. In the circumstances, this ground of appeal has no prospect of success.

4.9 In his fourth ground of appeal, the Appellant states that there was a conflict of interest between Mr Connolly, a non-contractor member of the PPC, and Ms Burns of Toll Pharmacy, one of the interested parties, in that they were at one time both involved on a business level with each other through Albapharm of which Mr Connolly was a Director between 2008-2013 during the same period that Ms Burns was a member of the buying and support group. The Appellant states that Mr Connolly ought thereby to have declared an interest in terms of Schedule 4 of the Regulations. I do not accept that. The leading authority on bias and conflict of interest is *Porter v McGill [2002] 2AC 357*. The standard of bias is to be assessed against the fair-minded and informed observer. The test is whether there is a real possibility of bias and this has been refined in subsequent decisions in that bias tends to occur when a person exercising a judicial function has a particular interest in the outcome of the proceedings. A PPC may be regarded as exercising a quasi-judicial function. The pharmaceutical community in Scotland is comparatively small. It is likely that a high proportion of this community will know each other. My understanding is that Albapharm is a buying and support group for independent community pharmacists run and owned by pharmacists for its members. I believe too that Albapharm comprises a large number of pharmacists, not all of whom would necessarily be "friendly" with other members, although would have a common interest in furthering the buying power of each unit. A fair-minded and informed observer would not, in my view, have regarded any bias to have existed in the circumstances narrated by the Appellant. In all the circumstances, any declaration of interest was unnecessary and, accordingly, this ground of appeal has no prospect of success.

4.10 As far as the Appellant's ground of appeal 5 is concerned, he acknowledges that Mr Osborne's repeated questions about the expected time for the hearing to close has not been incorporated in the minutes. It is not my function to conduct an enquiry in the matter and even if it were incorporated in the

minutes, the Appellant would require to do more than aver that he was put at a disadvantage by the member concerned. Accordingly this ground of appeal has no prospect of success.

- 4.11 As to the Appellant's ground 6 of his appeal, this 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 its individual merits. As such, the viability or otherwise of the application was not a factor for consideration. Accordingly, this ground of appeal has no prospect of success.
- 4.12 Generally with regard to point 7 of the Appellant's grounds of appeal, the individual members of the PPC are entitled to express their opinion as to the existing services provided to the neighbourhood which, in itself, underscores the adequacy of the existing provision, as the members of the PPC are also entitled to comment upon the CAR as they did. It must be understood that the conclusions of the CAR are not determinative. They are merely one of many aspects of the evidence which the PPC require to take into account. The PPC did make certain observations which the Appellant regarded as merely a "snapshot" occurring at the date and time of the PPC's inspection. They are not less relevant on that account. As mentioned previously the PPC is an expert Tribunal and able to draw its own conclusions on the evidence .
- 4.13 The PPC was clear that there are a number of pharmacies which are providing core services to the neighbourhood and they are not at capacity and it was satisfied that residents of the neighbourhood would routinely access non pharmaceutical services and that those services, together with pharmaceutical services, are readily accessible by public transport. The PPC has given cogent reasons as to why they were satisfied that there was no evidence of the existing provision of services being inadequate. It is not necessary for the PPC to address every line of evidence put to it. It has addressed the CAR and taken the view that most of the responses related more to convenience than adequacy of existing provision which is not necessarily indicative of services being inadequate. 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.

5. Decision and Disposal

- 5.1 For the reasons set out above, I am satisfied that the points of appeal as set out by the Appellant disclose no reasonable grounds and that, accordingly, I shall dismiss the appeal.
- 5.2 In dismissing the appeal, I consider there to be a broader point worth making. The grounds of appeal forwarded in this appeal were generally indicative of a narrow and technical reading of the decision of the PPC and the Regulations.

Such an approach is neither appropriate nor helpful. The decision requires to be considered in its entirety from the perspective of an individual with all the relevant knowledge. Had the Appellant considered the decision in this broader context, I anticipate that his concerns would have been addressed.

(sgd) JMD Graham

JMD Graham
Interim Chair

5 January 2019