OUTER HOUSE, COURT OF SESSION

[2023] CSOH 60

P943/22

OPINION OF LORD HARROWER

In the petition of

BURNS PHARMACY LIMITED

Petitioner

for judicial review of a decision of the National Appeal Panel

Petitioners: Lindsay KC; Cameron McKenna Nabarro Olswang LLP
Second Respondent: James; NHS Scotland Central Legal Office

14 September 2023

The issues

[1] This petition for judicial review concerns the provision of pharmaceutical services in Monkton. The village is served by four pharmacies located in Prestwick to the south, and four others located in Troon and Dundonald to the north. The third respondent to the petition, Mr Sean Manson, wished to provide pharmaceutical services in Monkton village itself, initially, from premises at 21 Main Street. In 2017, he applied to the Ayrshire and Arran Health Board, who is the second respondent, to be included on the pharmaceutical list, being the list required to be kept by the board *inter alia* of the names of persons who undertake to provide pharmaceutical services in its area, and the addresses of the premises from which they undertake to provide them. Only if the board 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 may the application be granted. Mr Manson's 2017 application had a complex procedural history, but it was ultimately refused by the board, and his appeal from the board's decision was dismissed. However, in 2021 Mr Manson applied in respect of different premises at the Old Monkton Primary School. On this occasion, the board granted his application.

[2] The petitioner is Burns Pharmacy Limited. It provides pharmaceutical services from premises in Prestwick. It objected to Mr Manson's inclusion on the list, and appealed to the National Appeal Panel, who is the first respondent. After sundry procedure, described in more detail below, the panel refused the petitioner's appeal. The petitioner now makes this application for judicial review of the panel's decision, complaining that the panel failed to recognise that the board had misunderstood and misapplied the relevant test, and had failed to provide adequate reasons. In particular, in its assessment of the adequacy of existing services, the board had failed to have regard to evidence of the availability of parking at or near the existing pharmacies. Further, in assessing the necessity or desirability of the application, it failed to consider adequately or at all the viability of pharmaceutical services being provided from the premises named in the application, wrongly speculating on the extent to which it might be supported by population growth in the neighbourhood.

[3] The matter came before me for a substantive hearing, at which both the petitioner and the board were represented. There was no appearance for either the panel or Mr Manson. Before setting out the background in more detail, it is necessary to summarise the terms of the relevant legislation.

The legislation

[4] Applications to be included on the pharmaceutical list are governed by the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009 (SI 2009/183) ("the regulations"). Regulation 5(1) requires the relevant health board to maintain a list of the names of persons who undertake to provide pharmaceutical services in its area, the pharmaceutical services they undertake to provide, and the addresses and opening hours of the premises from which they undertake to provide them.

[5] In terms of regulation 5(2), any person who wishes to be included in the pharmaceutical list must first complete a pre-application and joint consultation with the board in accordance with regulation 5A. The purpose of the pre-application and joint consultation is *inter alia* to assess whether there is already adequate provision of pharmaceutical services in the neighbourhood and to establish "the level of support of residents in the neighbourhood to which the application relates" (reg 5A(2)). Following the consultation exercise, a joint consultation analysis report ("CAR") must be produced setting out the methods of engagement used to undertake the consultation, the list of questions and responses, the number and category of respondents and the level of support "for the issues consulted upon" (regs 5A(4) and 5(5)). Once this has been completed, the application itself, if proceeded with, must be completed in accordance with the relevant form prescribed in Schedule 2 to the regulations.

[6] Regulation 5(10) provides that the application shall be assessed in accordance with the procedures set out in Schedule 3 to the regulations, and 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 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".

Schedule 3 includes provisions for notification to *inter alios* any person whose name is included on the list and whose interests may in the opinion of the board be significantly affected by the application if granted (Sch 3, para 1). Schedule 3 then provides that in considering an application, the board shall have regard to the following matters (Sch 3, para 3(1)):

> "(a) the pharmaceutical services already provided in the neighbourhood of the premises named in the application by persons whose names are included in a pharmaceutical list;
> (b) pharmaceutical services to be provided in the neighbourhood at these premises by any person whose name is included in the provisional pharmaceutical list;
> (c) any representations received by the Board under paragraph 1;
> (d) any information available to the Board which, in its opinion, is relevant to the consideration of the application;
> (e) the consultation analysis report submitted in accordance with regulation 5A;
> (f) the pharmaceutical care services plan; and
> (g) the likely long term sustainability of the pharmaceutical services to be provided by the applicant."

[7] The Pharmacy Practices Committee ("the PPC") exercises the board's functions regarding applications for entry to the list (Sch 3, para 3(7); Sch 4, paras 1-2). The PPC is comprised of seven members: a chair who is a member of the board; three pharmacists; and three laypersons (Sch 4, para 3). Any member with an interest in a matter to be determined at the meeting to determine the application, or any association with a person who has a personal interest in such matters, must declare that interest (Sch 4, para 4).

[8] The PPC may determine the application without hearing oral representations where it is satisfied that these are unnecessary (Sch 3, para 3(2)). In other cases, it shall convene a meeting to determine the application and give reasonable notice to the applicant and those that have submitted written representations to enable them to participate (Sch 3, para 3(3)).

[9] Applications are to be determined, except in exceptional circumstances, within six weeks of receipt of the CAR (Sch 4, para 3(4)-(5)). In its determination, the PPC must include (Sch 3, para 3(6)):

> "(a) a summary of the consultation analysis report submitted in accordance with regulation 5A;
> (b) an explanation of how the consultation analysis report was taken into account in arriving at the decision, with regard to the tests under regulation 5(10), as applicable; and
> (c) the reasons for its decision."

[10] The applicant and any interested party who participated in the PPC proceedings (ie any interested party that made written representations) is entitled to appeal and an appeal lies to the National Appeal Panel (Sch 3, para 5 and para 5(7A)). However, appeals may only be taken on restricted grounds (Sch 3, para 5):

> "(2A) The grounds of appeal are limited to where the circumstances in sub-paragraph (2B) have occurred or where the Board has erred in law in its application of the provisions of these Regulations.
>
> (2B) The circumstances are—
> (a) there has been a procedural defect in the way the application has been considered by the Board;
> (b) there has been a failure by the Board to properly narrate the facts or reasons upon which their determination of the application was based; or
> (c) there has been a failure to explain the application by the Board of the provisions of these Regulations to those facts."

[11] The panel is comprised of three members: a chair who must be an advocate, solicitor or solicitor-advocate with no previous medical experience; a pharmacist; and a board-appointed member with no previous medical experience (Sch 4, paras 9-11). Members of the panel are also required to make the same declaration of interest as is required by members of the PPC (Sch 4, para 12).

[12] Notices of appeal are referred to the chair of the panel (Sch 3, para 5(4)). Upon receipt, the chair has three options (Sch 3, para 5(5)-(6)). First, he must dismiss the appeal if

of the opinion that it discloses no reasonable grounds or is otherwise frivolous or vexatious. Secondly, he must remit the decision to the PPC for reconsideration if of the opinion that there has been an error in terms of Schedule 3, paragraph 5(2B). Thirdly, in any other case, he must convene a panel to determine the appeal.

[13] Any decision made by the chair, or the panel where convened to determine the appeal, is final (Sch 3, para 5(5) and 6(5)). The only remedy against such a decision is an application for judicial review.

Background

The first application

[14] As already noted above, Mr Manson had first made an application to be included in the pharmaceutical list in respect of premises at 21 Main Street, Monkton, in 2017. In that application he had maintained that existing services were inadequate, having regard to difficulties residents faced in accessing the nearest pharmacies in Troon and Prestwick. He referred to the poor availability of parking spaces, heavy congestion, unreliable public transport and lack of safety in travelling to existing pharmacies on foot. The CAR had indicated that a pharmacy was desirable in Monkton. The responses to the CAR indicated that residents wanted it. It was envisaged that there would be future housing developments in Monkton. While planning permission had not been granted, the land had been zoned and it was clear that the developments would happen.

[15] Initially, in December 2017, the PPC granted the application. It noted that there were no pharmaceutical services in the neighbourhood. For those without a car, in particular the elderly and young people with children, the pharmacies in Prestwick and Troon were inaccessible. The petitioner and Boots (UK) Ltd both appealed. On 3 April 2018 the panel

allowed the appeal, and remitted the application to the board for consideration by a fresh PPC absent any of the members who participated at the initial hearing.

[16] The fresh PPC hearing took place on 28 August 2018. On 10 September 2018 it refused the application. It found that existing services were adequate and the new pharmacy was neither necessary nor desirable. In relation specifically to adequacy, the PPC referred to census information from 2011 indicating that the population of Monkton was healthy, wealthy and mobile. There was a low need to access services. It acknowledged that the CAR indicated excellent public support for the proposed pharmacy, but noted there was no evidence of complaints to the board regarding existing services. It further observed that many respondents to the CAR were either complaining on behalf of others who allegedly could not access existing services or merely said that services were "not convenient". Site visits undertaken by the PPC also indicated widespread access to cars among residents in Monkton. The parking situation at existing pharmacies was "not impossible". Bus transport was available. Existing providers offered delivery services, telephone consultations and home visits; face-to-face patient consultation was not always necessary. The site visits indicated that residents of Monkton were not using the amenities located there. Residents were not "forced to make special trips" to collect prescriptions, but would be required to travel to Prestwick, Troon, or other surrounding towns in any event, for example, in order to shop at supermarkets.

[17] Mr Manson then appealed to the panel, but on 5 January 2019 the panel dismissed the appeal.

The second application

[18] Mr Manson's second application, the subject of the present proceedings, was made on 5 August 2021, in respect of premises at Old Monkton Primary School, which is located near the premises forming the basis of his first application. The PPC hearing to determine the application took place on 2 November 2021.

[19] On 23 November the PPC granted the application. Due to the outbreak of the pandemic, "visits" to the site had been conducted virtually ie using, among other materials, digital online maps. The PPC attached significant weight to the CAR due to its high response rate. An overwhelming majority of residents (92.04%) supported the opening of the new pharmacy. In terms of the adequacy of existing services, the main issue was accessibility. Travel on foot was unsafe and unfeasible. Public transport was costly and unreliable. It was almost irrelevant that residents had access to cars due to parking difficulties at the existing pharmacies. The personal experiences of members of the PPC indicated that there were difficulties in contacting pharmacies by telephone. Many people did not feel comfortable with triage services and it was desirable that face-to-face contact be encouraged and increased. The first phase of a development had now been completed and future developments were probable. The CAR indicated that this expansion would result in an overwhelming need for services. The growing population would also ensure viability. The impact of the pandemic meant that there was less need to travel outwith the village, for example, to access GP services. The PPC did not agree with the portrayal of the population as young, healthy, wealthy and mobile. The responses in the CAR were largely supportive. A majority of respondents, most of whom were residents, considered the proposals appropriate. This included location, opening times and the list of services to be provided. The proposed pharmacy was to have four dedicated parking spaces. Concerns regarding

traffic in the area were thus unwarranted. In any event, most residents would be able to access the pharmacy on foot. The PPC concluded:

> "**29. The Decision**
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> 29.1. Following the withdrawal of Mr Connolly, Ms Gallagher and Ms Mitchell in accordance with the procedure on applications contained within Paragraph 7, Schedule 4 of the National Health Service (Pharmaceutical Services) (Scotland) Regulations 1909, as amended, the Committee, for the reasons set out above, concluded that current provision to the neighbourhood was inadequate in terms of access.
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> 29.1.1. Having ascertained that pharmacy services to the defined neighbourhood were inadequate, consideration was given to whether the proposed application was necessary or desirable to secure adequate provision of pharmaceutical services for the neighbourhood.
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> 29.1.2. Committee members concluded that the proposed application was necessary in order to secure adequate pharmaceutical services for the reasons outlined above."

[20] The petitioner, Boots, and H & K Willis Ltd appealed. They collectively advanced six grounds. Only grounds 1, 5 and 6 are relevant for present purposes. The first was that the PPC had failed to state the grounds upon which it had concluded that existing services were inadequate. The fifth and sixth grounds related to matters which it was said the PPC ought not to have taken into account, being the personal experience of members regarding difficulties in contacting existing pharmacies and additional information which had not been available at the hearing.

[21] On 28 February 2022 the panel allowed the appeal in respect of the first ground. It remitted the matter to the PPC "to more fully explain its reasoning as to why it concluded that the existing service [was] inadequate" (para 4.1.9). The panel noted that the PPC's decision in relation to inadequacy of existing provision had been based on issues of access only (para 4.1.3). The panel acknowledged that each application required to be considered on its own merits, and that "a previous finding of adequacy, even a recent one, will not

prevent the PPC from concluding that the current services are inadequate" (para 4.1.6). However, it concluded, "in light of the proximity and similarities between the current and the earlier application", that it was "incumbent upon the PPC to provide sufficiently clear reasoning as to why it [had] reached a different conclusion from its earlier decision" (para 4.1.6). It need not address its earlier decision directly, but its reasoning ought to be "clearly understood" (para 4.1.6). The PPC was directed, in particular:

> "to set out clearly its reasoning including the evidence relied upon, as to why the issues with parking resulted in the conclusion that the existing services [were] inadequate" (para 4.1.9).

[22] It was also open to the PPC to clarify the factual position underpinning grounds 5 and 6. In respect of the former, the panel's view was that this had not been a factor in the PPC's decision. As to the latter, it was understood that the material in question had not formed part of the application papers but had been part of the hearing papers. Remittal to the PPC was in the following terms:

> "5.1. For the reasons set out above, I consider that the appeals are successful in respect of ground of appeal 1. I shall therefore refer the matter back to the PPC to clarify its decision. In doing so, I should emphasise that I have not concluded that the PPC has reached the wrong conclusion. It is not my role to do so. However, when clarifying its decision, the PPC should not feel constrained by its original decision. If after further consideration, it reaches a different conclusion it is free to do so. Equally, as I have not concluded that its original decision was wrong, it is free to abide by its original decision but must simply express its reasons more fully and clearly."

[23] The PPC reconvened as originally constituted on 1 June 2022, and issued its refreshed decision on 14 June 2022, maintaining its prior decision granting the application. In its refreshed decision, it noted that it had revisited the evidence to familiarise itself once again with the case and explore its original reasoning. It agreed that all of the content of the original decision should form part of its refreshed decision. The PPC then turned to address all six of the grounds of appeal. It noted that its assessment regarding the viability of the

proposed pharmacy was based upon the anticipated growth in the population, assessed by reference to the completion of the first phase of a development by Persimmon homes comprising 292 homes. It noted that no weight had been placed on members' statements as to their personal experiences, or on the additional material. Addressing the grounds which formed the basis of the remittal, the PPC stated:

> "30.1.9 Turning to the grounds of appeal 1, 4.1.1 to 4.1.9, the PPC reviewed the previous discussion in order to provide greater clarity surrounding its decision and the reasoning for this with the following additions:-
>
> Access –
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> - the PPC noted as per discussion at 28.3.4, page 86 comments made in the CAR which noted that the bus services had been described as 'unreliable', 'infrequent', 'inconsistent' and 'buses from Troon deciding not to visit Monkton because they are behind schedule'. The PPC placed weight on the evidence noted in the CAR and considered this represented poor public transport.
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> - the PPC noted as per discussion at 28.3.4, page 86 the costs of travelling by bus were noted as '£3.60 into Prestwick and £5.40 into Troon'. The PPC considered that public transport was costly for the residents of Monkton.
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> - the PPC noted as per discussion at 28.3.4, page 86 that those with 'mobility issues had difficulty getting on and off buses as did parents with prams and young children'. As 'it was not feasible for residents to access existing pharmaceutical services on foot both in terms of the time it would take and because of safety concerns' the PPC considered that this represented access issues for the residents of Monkton to existing pharmaceutical services.
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> - the PPC noted as per discussion at 28.3.4, page 86 that whilst 'the majority of the population had access to personal transport with 81.3% having access to one or more cars' following individual site visits by the PPC it had been considered that parking at existing pharmacies was 'not readily available'. The PPC added in addition to their observations weight was placed on the comments in the CAR which 'reflected parking difficulties at existing pharmacies'. The PPC considered that residents opted to take the bus to avoid parking in Prestwick and Troon and considered access to cars 'was almost irrelevant as parking was difficult.'
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> The PPC noted poor public transport which was deemed to be costly and unreliable, mobility and safety concerns regarding access on foot and time taken to walk to

existing pharmacies combined with recognised parking difficulties observed by the PPC and comments made in the CAR.

30.1.10 The reconvened PPC had given due consideration to more fully explain the reasoning as to why it concluded that the existing service is inadequate, the evidence relied upon, and to why the issues with parking resulted in the conclusion that the existing services are inadequate and addressed the points raised by the National Appeal Panel.

3 Decision

31.1 Following the withdrawal of Mr Connolly, Ms Gallagher and Ms Mitchell in accordance with the procedure on applications contained within Paragraph 7, Schedule 4 of the National Health Service (Pharmaceutical Services) (Scotland) Regulations 1909, as amended, the Committee taking into account all of the information available, and for the reasons set out in the original decision combined with the additional clarity provided at 30.1.1 to 30.1.10, pages 91 to 93, concluded that it remained the view of the Committee that the provision of pharmaceutical services to the neighbourhood was inadequate in terms of access.

Having ascertained that pharmacy services to the defined neighbourhood were inadequate, consideration was given to whether the proposed application was necessary or desirable to secure adequate provision of pharmaceutical services for the neighbourhood.

Committee members concluded that the proposed application was necessary to secure adequate pharmaceutical services for the reasons outlined above."

The decision under challenge

[24] The petitioner, along with Boots, appealed to the panel. On 10 August 2022 the panel dismissed the appeal. This is the decision under challenge in the present application for judicial review. The appellants had advanced four grounds. In summarising the reasons for its decision, I have referred only to the first and third grounds of appeal, since the other two formed no part of the petitioner's submissions in the present proceedings.

[25] The first ground was that the PPC had failed adequately to set out its reasons for concluding that the existing service was inadequate, in particular insofar as it related to the inadequacy of parking at existing pharmacies. The panel referred to the PPC's expanded

reasons at paragraph 30.1.9 of its decision, where it had explained that its conclusion was based on individual site visits, and the responses to the CAR. The reason that vehicular access had been described as "close to irrelevant" was that residents opted to take the bus due to difficulties with parking. The PPC had set out its rationale for concluding that the availability of access via the bus service was inadequate (para 4.1). The panel concluded that the PPC's reasoning must be reasonably clear to anyone familiar with the underlying facts and circumstances on which the decision was based. The PPC was not required to address each issue or each adminicle of evidence. The panel warned against reasons challenges being used as a "back door" to challenging the correctness of the PPC's decision (para 4.2).

[26] The third ground was that the PPC had not demonstrated that the proposed pharmacy would be viable. The panel considered this was misconceived. It was not for the PPC to demonstrate the viability of the proposed pharmacy. Rather, viability was one factor that the PPC was required to consider when assessing whether it was necessary or desirable to grant the application (para 4.8). The PPC's reasoning was entirely clear. The likely increase in population caused by imminent development would provide an adequate customer base to support the proposed pharmacy. The PPC, as an expert body, was best placed to assess viability (para 4.9).

Submissions

The petitioner

[27] Counsel for the petitioner adopted its note of argument. The panel had erred by failing to recognise errors in the PPC's decision. The panel had conducted only a limited analysis of the terms of the PPC's decision. It simply stated that the decision was sufficiently clear. In upholding the PPC's decision, the panel had acted unlawfully *et separatim*

unreasonably. Given the nature of the challenge, it was necessary for the court to consider the PPC's decision, albeit that this was not the decision directly under challenge. In doing so, according to senior counsel, in his oral submissions at the substantive hearing, the court should be cautious about accepting late reasons (*Chief Constable of Lothian and Borders* v *Lothian and Borders Police Board* 2005 SLT 315, Lord Reed at paras 65, 70).

[28] The panel failed to recognise that the PPC in its refreshed decision had misunderstood and misapplied each of the stages of the test as required by regulation 5(10). So far as adequacy was concerned, the PPC ought to have first considered whether existing provision in the relevant neighbourhood was adequate and, if it was, that was an end of the matter (*Lloyds Pharmacy Ltd* v *National Appeal Panel* 2004 SC 703, Lord Drummond Young, para 8). Only if it concluded that existing provision was inadequate did the issue of whether the proposed pharmacy was necessary or desirable arise. There was no spectrum of adequacy. Either services were adequate or they were not (*Ibid*, para 9). There was evidence "readily available to the PPC", including maps, photographs and oral and written submissions from the 2 November hearing, indicating available parking at or near pharmacies in Troon and Prestwick. This was a relevant and material consideration that it was not clear whether the PPC took into account. Supplementing these written submissions at the substantive hearing, senior counsel argued that the PPC had had given too much weight to the CAR, and, with limited exceptions, had not "engaged" with the evidence from interested parties. The CAR was not a "popularity contest"; nor was it in the nature of a planning report or an expert report: it was, he said, a "record of anecdotal comments made by consultees".

[29] In any event, the PPC failed to explain why parking difficulties were so severe as to render existing provision inadequate. Senior counsel referred to the panel's observation, in

remitting the index application to the PPC, that the situation regarding parking would have to be "particularly severe in order materially to hinder access" (para 4.1.8). This had not been addressed by the PPC in its refreshed decision. There had been no material change in parking facilities since the 2017 application, which the PPC had accepted were adequate at that stage. The PPC had failed to provide adequate and comprehensible reasons to explain why they were now considered inadequate, as it had been required to do by the panel in its remit. If anything, the evidence indicated that bus services had improved since the previous decision.

[30] So far as the second stage of the test was concerned, the necessity or desirability of a proposed pharmacy did not automatically follow from a finding that existing services were inadequate. Viability was an important factor and was live before the PPC. Proposed developments should not have been taken into account by the PPC when assessing likely increases in population (see the guidance issued in Appendix A of NHS Circular PCA (P) 7 (2011), mirroring *Lloyds Pharmacy Ltd* v *National Appeal Panel supra*, para 10). The developments relied upon by the applicant were not probable future developments or fixed plans. No planning application had been made in respect of one of the developments and planning permission had been refused in respect of the other with no appeal taken against that decision.

[31] The petitioner moved the court to grant orders of declarator and reduction in relation to the panel's decision of 10 August 2022, refusing the petitioner's appeal, on the basis that it was unlawful *et separatim* unreasonable.

The board

[32] The board challenged the competency of a number of points now taken in the petition. For example, there had been no submission to the panel about the PPC having allegedly taken into account speculative housing developments. Nor were there any complaints made to the panel regarding the CAR or the conclusions which could properly be drawn from it. It was not now open to the petitioner to take these points. To permit it do so would be to allow a direct challenge to the PPC's decision. Any errors by the PPC were only relevant insofar as they gave rise to an error on the part of the panel. The panel could not be criticised for failing to recognise errors that had not been raised with it in the grounds of appeal.

[33] In any event, it was clear from the terms of the refreshed decision that the PPC understood and applied the two-stage test. Services were inadequate due to accessibility. The CAR provided compelling evidence regarding these difficulties. Counsel for the board urged me to have regard to the affidavit of Linda Semple, chair of the PPC, which, he said, was entirely consistent with the PPC's decisions (cf *Chief Constable, Lothian and Borders Police* v *Lothian and Borders Police Board supra*, Lord Reed at para 70). She confirmed that at least some of the evidence regarding parking, that the petitioner contended was "readily available" to the PPC, was not in fact put before it. It was incumbent upon the petitioner to make its case and place before the PPC all evidence on which it intended to rely. It did not. The PPC could not be criticised for failing to have regard to material never placed before it (*Tayside RC* v *Secretary of State for Scotland* 1996 SLT 473, Lord President (Hope), 480D). The weight to be attributed to evidence that was before the PPC was a matter for the PPC, subject only to review on *Wednesbury* grounds (*R (Khatun)* v *London Borough of Newham* [2005] QB 37, Laws LJ, para 35). It was also of little significance that parking spaces

existed. The issues for those without cars remained. The petitioner's challenge regarding adequacy amounted to a factual dispute with the conclusions reached by the PPC.

[34] Having found the existing provision to be inadequate, it was inevitable that the provision of pharmaceutical services would be necessary to make up the shortfall. There was considerable discussion about viability before the PPC. The PPC took account of the evidence and submissions and considered that the Persimmon Homes development would result in approximately 629 additional residents in the neighbourhood. That would amount to roughly a 50% increase in the population with an obvious and significant impact on the demand for services. There was nothing speculative about this development. The PPC was entitled to conclude on this basis that the pharmacy would be viable. Indefinite viability was not necessary. On this matter, Ms Semple had confirmed that the PPC based their discussion on "completed and delivered new housing, not proposed, whatever the status of the applications for further development".

[35] The conclusions that the PPC reached on the application were reasonably open to it on the evidence. It relied not only on the CAR, but also on site visits that it had carried out. All of this had to be placed in the context of the PPC's function as a specialist tribunal (*Lloyds Pharmacy Ltd supra*, Lord Drummond Young, paras 9 and 11). Its decisions were not to be subjected to unduly critical analysis. The court ought to have proceeded on the assumption that it was probable that the PPC got it right. Deference ought to be shown unless there were clear errors in the decision (*AH (Sudan)* v *Secretary of State for the Home Department* [2008] 1 AC 678, Lord Bingham of Cornhill, para 19 and Baroness Hale of Richmond, para 30).

[36] The board moved the court to refuse the petition.

Decision

Adequacy

[37] The "central point", as the petitioner put it, in this application for judicial review is that the parking facilities "had not changed to any material extent" since Mr Manson's first application. "If the parking facilities did not render the existing provision inadequate at the time of [the first application]", the petitioner asked, "why [did] they render it inadequate now?" The PPC's "complete failure" to engage with this point "demonstrate[d] that they [had] failed to apply the first part of the two stage test in Regulation 5(10)(a) correctly" (note of argument, paras 28-31).

[38] Of course, the PPC is not bound by its own earlier decision in relation to a different application. As the panel pointed out in its decision of 28 February 2022, remitting the second application back to the PPC,

> "Each application must be considered on its own merits and a previous finding of adequacy, even a recent one, will not prevent the PPC from concluding that the current services are inadequate" (para 4.1.6).

It is quite true that the panel went on to say that, "in light of the proximity and similarities" between the two applications, "it is incumbent on the PPC to provide sufficiently clear reasoning as to why it has reached a different conclusion from its earlier decision". However, the panel immediately qualified that by saying, "This does not necessarily require it to address its [earlier] decision directly but does require its reasoning to be clearly understood" (*Ibid*).

[39] The qualification is important, since it makes it clear that the panel did not require the PPC to make any express reference to the previous decision of the PPC, or any part of it, so long as its reasoning was "clearly understood". By "clearly understood", I take it that the panel meant "clearly understandable" by the reasonable well-informed reader, or, as the

panel itself put it, in its decision of 10 August 2022, "reasonably clear to a person who is familiar with the underlying facts and circumstances on which the decision is based" (para 4.3). In particular, the PPC was "not required to address each issue raised before it or address and explain its position in relation to all adminicles of evidence before it" (para 4.3). The petitioner took no issue with these statements of principle. What I take from them is that, while the PPC were not required to make any mention of its own earlier decision on adequacy of access to existing pharmacies, it would have to be reasonably clear to anyone familiar with the underlying facts and circumstances why its refreshed decision differed from the PPC's earlier decision on that particular issue.

[40] Having been represented at the hearings in relation to both applications, the petitioner would of course have been familiar with the underlying facts and circumstances. It would have been aware that the PPC in both cases agreed with the applicant regarding what constituted the neighbourhood, in particular, that it included the Adamton estate. It would have been aware that the PPC in both cases agreed that walking from Monkton village to the existing pharmacies was impractical. But it would also have been reasonably clear that the differently constituted PPCs reached different conclusions on the key aspects of their decisions regarding adequacy of access.

[41] Take parking. In relation to the first application, the PPC considered that parking in Prestwick and Troon, though "not ideal" was "not impossible" (para 19.15). Contrast the conclusion of the PPC in relation to the second application that parking at existing pharmacies was "not readily available". It would also have been reasonably clear that the PPCs reached different conclusions regarding the adequacy of public transport. Again in relation to the first application, the PPC considered that the bus services were reasonably frequent, and while they acknowledged the high cost of a return fare, they noted that

concessionary fares were available to those "most likely to use pharmacy services" (para 19.17). Contrast the conclusions of the PPC in relation to the second application that public transport was both poor and costly.

[42] It would also have been reasonably clear to anyone familiar with the underlying facts and circumstances that the differently constituted PPCs had reached their different conclusions on these matters on the basis of what were, at least to some extent, quite different evidential considerations. The PPC considering the second application reached their conclusion on the inadequacy of parking following individual site visits by PPC members. This was necessarily an evidential basis not available to the PPC considering the first application. Moreover, it was clear that the PPC that considered the first application harboured significant reservations regarding the CAR results. Respondents' complaints were about mere inconvenience rather than inadequacy, and were not based directly on their own first-hand experience (para 19.13). However, this tendency to relegate the evidential status of the CAR to mere hearsay (reflected also in senior counsel's dismissal of the CAR responses as being "anecdotal") was not shared by the PPC that considered the second application. This may have been due in part to the obvious fact that the CARs for each application were entirely separate documents based on entirely separate surveys. Be that as it may, it would have been reasonably clear to anyone familiar with the underlying facts and circumstances that the PPC considering the second application placed weight on the comments in the CAR regarding both parking difficulties at and public transport to the existing pharmacies (paras 28.3.4, 30.1.9).

[43] It might be objected that, if the PPC's initial reasoning were as clear as I have suggested, then it is not clear why the panel considered it necessary to remit the matter back to the PPC in the first place. Further, in its decision remitting the matter back to the PPC, the

panel had drawn particular attention to the PPC's conclusion that, although over 80% of households had access to a car, "issues around parking" rendered that factor "almost irrelevant" (para 4.1.7). And, while parking in town centres might regularly be "challenging", the panel required the PPC to address in detail why parking difficulties were "so unusually severe" as to justify the conclusion that the service as a whole was inadequate (para 4.1.8).

[44] Certainly, in its refreshed decision, the PPC appear to have made quite a point of drawing the panel's attention to reasoning that had already been set out in its original decision. This is obvious from the continual references in paragraph 30.1.9 to the original discussion at paragraph 28.3.4. However, even if there had been nothing substantively new in its refreshed decision, I would have been slow to dismiss its refreshed decision as merely a cosmetic exercise. Paragraph 28.3.4 is a relatively complex and rather lengthy paragraph. Breaking the discussion up into discrete bullet points, as the decision does at paragraph 30.1.9, would have assisted in making its reasoning reasonably clear. And of course it was specifically in order for the PPC to provide greater clarity of reasoning that the panel remitted the matter back to it in the first place.

[45] More importantly, however, the reasoning in paragraph 30.1.9 did go beyond the original reasoning in at least one significant respect. In paragraph 28.3.4, the PPC's criticisms of public transport were confined to observing that it was, in summary, both poor and costly. In its refreshed decision, however, the PPC had gone further and concluded that residents "opted to take the bus to avoid parking in Prestwick and Troon" (para 30.1.9, final bullet point). In other words, the PPC made it clear that it did not regard the deficiencies of the public transport service as an issue whose relevance was confined to the minority of residents, approximately 20% of the population of Monkton, who had no car. On the

contrary, the PPC concluded that even residents *with* cars would prefer to use a public transport service that respondents to the CAR regarded as unreliable, infrequent and expensive, rather than run the risk of not being able to find a parking space at or near the existing pharmacies. To anyone familiar with the underlying facts and circumstances, this additional reasoning made explicit what had only been implicit in the PPC's comment that having access to a car was "almost irrelevant". In doing so, it also made explicit why the PPC considered the inadequacies of parking at existing pharmacies to be "unusually severe".

[46] In the decision under challenge, the panel had regard to the PPC's additional reasons. It drew attention specifically to the PPC's conclusion that residents "opted to take the bus due to difficulties with parking" (para 4.2). The panel concluded that the PPC had reached a decision that was "sufficiently clear" (paras 4.2, 4.4). In my opinion, for the reasons I have given, it was entitled to reach that conclusion. Senior counsel referred me to *Chief Constable, Lothian and Borders Police* v *Lothian and Borders Police Board*, where Lord Reed observed *inter alia* that the court should be cautious about accepting late reasons, where these have been supplied either voluntarily or in response to a court order. However, the present case is one where the panel rather than the court ordered and then accepted late reasons. Even if the panel were considered to be under a duty to be similarly cautious about accepting late reasons, senior counsel did not suggest that it had been in breach of such a duty. If he had, I would have rejected that argument. This was not a case where entirely new reasons were being put forward, but rather one where the PPC made explicit what was already implicit in its own earlier decision.

[47] Nor is there any basis for asserting that either the PPC or the panel misunderstood or misapplied the statutory test, or failed to have regard to the evidence. The relevant

component parts of the statutory test, and the differences between them, were clearly set out throughout the PPC's decision, and more particularly in the dispositive part of its decision (para 31.1). I would also agree with the panel when it said that the PPC was not required to address each issue or address and explain its position in relation to all adminicles of evidence before it (para 4.3). The PPC clearly set out in its decision all the evidence and submissions that it had received. One cannot conclude merely from a failure to address any particular issue or adminicle of evidence that it had not been considered by the PPC. On the contrary, one should assume that it had considered it, unless its decision or its reasons suggest otherwise (*Gillies Ramsay Diamond* v *PJW Enterprises Ltd* 2004 SC 430, Lord President (Gill), para 28). They do not.

[48] Paragraph 17 of the petition contained a list of "evidence" that the petitioner alleged was "readily available" to the PPC but not considered by it. In her affidavit, the PPC's chair, Ms Semple, confirmed that some of this information was before it, and recorded by the PPC in the minutes (notably at paras 7.1.16 and 12.26). To that extent, it falls into the category just discussed of evidence, which it can be assumed that the PPC considered unless its decision or reasons suggest otherwise. To the extent that the information listed in paragraph 17 of the petition was not mentioned in the minutes, Ms Semple confirmed that it was neither submitted to nor considered by the PPC, either as originally constituted or as reconstituted for the purposes of reconsidering its decision. To that extent, the information now relied on by the petitioner cannot properly be described as "evidence" at all. As noted above, the regulations provide that the board must have regard to "any information available to [it] which, in its opinion, is relevant to consideration of the application" (Sch 3, para 3). I did not understand senior counsel to go so far as to suggest that this placed an onus on the PPC to identify available or "readily available" information that had not been

submitted to it by parties. If he were making this submission, I would have rejected it. In my view, the regulations simply make it clear that the PPC is not confined to considering only such information as has been submitted to it by parties.

[49] To conclude this aspect of the case, I would agree with the panel where it stated that, in reality, the petitioner seeks to mount a "back door" challenge to the correctness of the PPC's decision (para 4.3).

Necessity or desirability

[50] I can deal with this ground more briefly by saying that I agree with the submissions of the board.

[51] I would add only this regarding the board's argument based on competency. In its grounds of appeal from the PPC's refreshed decision, under the heading "viability", the petitioner made reference to "the needs of the existing local community" and "population and demographics". It made no reference to proposed developments within the neighbourhood or, specifically, to the PPC having wrongly taken account of the allegedly speculative nature of certain developments on population growth. In its decision, the panel not only considered the PPC's reasoning "entirely clear". It also referred to the PPC having considered the "likely increase in population caused by imminent development", and concluded that this would provide "an adequate population base to support the proposed pharmacy" (para 4.9). In other words, even though the impact of proposed development on the viability of the proposed pharmacy had not been raised in the grounds of appeal, the panel indicated that it was perfectly aware, not only that the issue had been raised before the PPC, but that the PPC had concluded that the development was imminent rather than speculative. In my view, the PPC was entitled to reach that conclusion, for the reasons given

by the board. But more importantly, in the context of what is necessarily a challenge to the panel's - rather than the PPC's - decision, the petitioner had simply failed to provide the panel with any basis upon which to reach any different conclusion. It is difficult to see why the panel should now be criticised for not considering arguments that were never before it. Had there been anything of substance in this ground of review, then I would have rejected the argument as incompetent, the petitioner not having raised the allegedly speculative nature of specific developments in its grounds of appeal to the panel.

Disposal

[52] I shall sustain the second and third pleas-in-law for the board, repel the petitioner's second plea-in-law, and refuse to grant the petitioner's craves for declarator and reduction of the panel's decision of 10 August 2022. I shall reserve any question of expenses.