

4 October 2023

REF: SHA/26058

Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

APPEAL AGAINST NHS ENGLAND DECISION TO GRANT AN APPLICATION FOR CHANGE OF OWNERSHIP FROM LLOYDS PHARMACY LTD TO LP SD FORTY LIMITED IN RESPECT OF 97 LONG STREET, ATHERSTONE, WARWICKSHIRE, CV9 1BB

1 Outcome

- 1.1 The Pharmacy Appeals Committee ("Committee"), appointed by NHS Resolution, quashes the decision of NHS England and redetermines the application.
- 1.2 The Committee determined that the application should be granted.

A copy of this decision is being sent to:

Atherstone Pharmacy
Lloyds Pharmacy Ltd
LP SD Forty Limited
NHS England

Advise / Resolve / Learn

NHS Resolution is the operating name of NHS Litigation Authority – we were established in 1995 as a Special Health Authority and are a not-for-profit part of the NHS. Our purpose is to provide expertise to the NHS on resolving concerns fairly, share learning for improvement and preserve resources for patient care. To find out how we use personal information, please read our privacy statement at <https://resolution.nhs.uk/privacy-cookies/primary-care-appeals/>



REF: SHA/26058

8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

APPEAL AGAINST NHS ENGLAND DECISION TO GRANT AN APPLICATION FOR CHANGE OF OWNERSHIP FROM LLOYDS PHARMACY LTD TO LP SD FORTY LIMITED IN RESPECT OF 97 LONG STREET, ATHERSTONE, WARWICKSHIRE, CV9 1BB

Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

1 The Application

By application dated 14 May 2023, LP SD Forty Limited (“the Applicant”) applied to NHS England for a change of ownership from Lloyds Pharmacy Ltd in respect of 97 Long Street, Atherstone, Warwickshire, CV9 1BB. In support of the application it was stated:

- 1.1 A Fitness to Practice application is also included for LP SD Forty Ltd that relates to this application. With regards to the Directors/ Superintendent and referees these are the same that are listed for additional applications already submitted and being processed for [redacted]. It may be helpful therefore that in particular for the references that that the same references will apply to all these applications. A corresponding FtP reference for [redacted] (same Directors and Superintendent) is FTP - CAS-220965-R0S8T9. This may assist in only having to contact the relevant same referees and director checks once.
- 1.2 Basis of the change of ownership:
- 1.3 Please confirm whether you are buying the pharmacy business on a
 - 1.3.1 “Non debts and liabilities basis” – the Applicant ticked “YES”.
 - 1.3.2 “Debts and liabilities basis, with or without access to the existing bank account – the Applicant ticked “NO”.
- 1.4 Pharmaceutical services to be provided at these premises:
 - 1.4.1 Essential Services (paragraphs 3 to 22, Schedule 4 – pharmacies)
- 1.5 In response to “In my/our view this application should not be refused pursuant to Regulation 31 for the following reasons:” the Applicant stated:
 - 1.5.1 N/a – this is a change of ownership.
- 1.6 Information in support of the application
- 1.7 In response to “Are the services you are undertaking to provide the same as those that the current owner is providing” the Applicant ticked “Yes”.
- 1.8 In response to “Will there be any interruption to service provision” the Applicant ticked “No”.

2 The Decision

NHS England considered and decided to grant the application. The decision letter dated 19 June 2023 states:

- 2.1 NHS England has considered the above application and [I] am writing to confirm that it has been granted. Please see the enclosed report for the full reasoning.

Extract from the decision report

- 2.2 “Thank you for forwarding the change of ownership application in respect of the pharmacy at 97 Long Street, Atherstone. As an excepted application this has been considered and has been approved as:
- 2.2.1 Confirmation has been received from the current owner (Lloyds Pharmacy Ltd) of their intention to transfer ownership to LP SD Forty Limited should this application be approved;
 - 2.2.2 The applicant intends to provide the same services as the current owner;
 - 2.2.3 The applicant has confirmed that there will not be any interruption to the provision of services at these premises;
 - 2.2.4 Confirmation of unamended opening hours has been received;
 - 2.2.5 Satisfactory Fitness to Practise is in place.
- 2.3 I should be grateful if you would notify this decision to the applicant and interested parties, offering third party appeal rights to those on the attached list only.”

3 The Appeal

In an email dated 18 July 2023, Atherstone Pharmacy Limited (“the Appellant”) appealed against NHS England’s decision. The grounds of appeal are:

- 3.1 The decision was notified by letter dated 19 June 2023 (NHS reference CAS-228914-F9M8V1).
- 3.2 The ground of appeal is that the Appellant is concerned that the Applicant did not exist as a legal entity at the time when its application was submitted.
- 3.3 As NHS Resolution will be aware, Regulation 10 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (“the Regulations”) provides that each Health and Wellbeing Board must prepare, maintain and publish 2 lists of persons who undertake to provide pharmaceutical services from premises situated in the HWB’s area.
- 3.4 Regulation 10(7)(a) of the Regulations provides that those who are seeking inclusion in the pharmaceutical list must provide the information contained within schedule 2 to the Regulations.
- 3.5 Paragraph 2 of Schedule 2 to the Regulations provides that applications for inclusion in the pharmaceutical list may be made by an individual or partnership (where the individual or partners must be a registered pharmacist or registered pharmacists) (paragraph 2(2)) or a body corporate (paragraph 2(3)).
- 3.6 In this case, the application has been submitted by a body corporate (LP SD Forty Limited). The Appellant does not know when the application was submitted. The Appellant has requested this information from NHS England but it has not been provided.
- 3.7 However, the Appellant has carried out a search through Companies House in respect of the Applicant, LP SD Forty Limited. Whilst no company registration number is

provided on the decision letter, it is assumed that the Applicant is the company with Companies House registration number 14844780.

- 3.8 A copy of that search entry can be found here – [LP SD FORTY LIMITED overview - Find and update company information - GOV.UK \(company-information.service.gov.uk\)](https://find-and-update.company-information.service.gov.uk/company/14844780) The Appellant attached the Certificate of Incorporation for LP SD Forty Limited (Appendix A).
- 3.9 As can be seen from the Companies House records, LP SD Forty Limited was incorporated on 3 May 2023.
- 3.10 Given that, as far as the Appellant is aware, the Applicant is not included in any pharmaceutical lists, it is reasonable to assume that the Applicant had to undergo fitness to practise checks before its change of ownership application was granted. Given that the grant notification is dated 19 June 2023, it therefore seems very unlikely that the application was submitted after the date that the company was incorporated (i.e. on or after 3 May 2023).
- 3.11 Since, at the time the application form was completed and signed, it would appear from the available information and the relevant timings that the Applicant did not exist as a legal entity, the application is invalid. In short, it was impossible for LP SD Forty Limited to apply for inclusion in the pharmaceutical list (or to complete the application form) before 2 May 2023 if it did not exist until 3 May 2023.
- 3.12 As stated, the Appellant has asked for a copy of the original application form from NHS England to verify the above, but this has not been provided by NHS England.
- 3.13 The Appellant therefore invites NHS Resolution to uphold this appeal and to refuse the change of ownership application.

4 **Summary of Representations**

This is a summary of representations received on the appeal.

4.1 **NHS ENGLAND**

- 4.1.1 Thank you for allowing the opportunity to comment on the appeal received against the decision to approve the above change of ownership application. NHS England have delegated an appropriate officer to make the decision in relation to this change of ownership and therefore provide comment in relation to the appeal.
- 4.1.2 NHS England can confirm that the change of ownership application received was in relation to a pharmacy premises already on the pharmaceutical list where services are provided by Lloyds Pharmacy. The Applicant confirmed that services would continue at these premises, and that the same services would be provided when the change of ownership was completed. There was also confirmation that there would be no break in service provision when the change of ownership occurred.
- 4.1.3 I note that the Appellant's main point of appeal relates to their assertion that the Applicant, LP SD Forty Limited, could not have been a legal entity at the time the application was made, and that the company could not have approved fitness for entry to a pharmaceutical list at the time the change of ownership was approved. I have therefore set out below the pertinent elements of the timeline of the application to aid you in considering the appeal and reaching your decision.

Timeline

4.1.4 3 May 2023

4.1.4.1 LP SD Forty Limited incorporated (copy of Companies House registration provided by the Appellant as part of their appeal letter).

4.1.5 14 May 2023

4.1.5.1 Change of ownership application signed and submitted to PCSE by LP SD Forty Limited. This included a fitness application as well as change of ownership application papers, listing 2 (non-pharmacist) directors and a Superintendent pharmacist, Victoria Steele. The application papers were correctly completed in full by the Applicant, and nothing had to be referred back to the Applicant for clarification or to seek missing information.

4.1.6 26 May 2023

4.1.6.1 Fitness committee report sent to NHS England for determination.

4.1.7 3 June 2023

4.1.7.1 Fitness approved and confirmed to PCSE.

4.1.8 12 June 2023

4.1.8.1 Change of ownership application referred to NHS England for determination.

4.1.9 16 June 2023

4.1.9.1 Decision letter confirming that the application was approved sent to PCSE for distribution to the Applicant and any relevant interested parties.

4.1.10 As you can see from this timeline of the process, the company was registered at the time of making the application and fitness approval had been given prior to determination and approval of the change of ownership.

4.1.11 Therefore, NHS England would contend that the decision made to approve the change of ownership application by LP SD Forty Limited at 97 Long Street, Atherstone, Warwickshire, was correct and followed the requirements of the current Regulations. On that basis, in NHS England's opinion, the appeal should be dismissed, and the decision to approve the change of ownership should stand.

4.2 LLOYDS PHARMACY LTD

4.2.1 Thank you for your letter dated 27 July 2023 advising of the appeal with regards to the above application. Lloyds Pharmacy Ltd wish to respond to the appeal on behalf of LP SD Forty Ltd which is a subsidiary Company of Lloyds Pharmacy Ltd.

4.2.2 The appeal suggests that the Applicant (LP SD Forty Ltd) did not exist as a legal entity at the time the application made. This is not correct. LP SD Forty Ltd was incorporated on 3 May 2023. Lloyds enclose the Certificate of Incorporation from Companies house that confirms this (Appendix B).

4.2.3 The application for Change of Ownership under Regulation 26 was submitted on 14 May 2023. Lloyds Pharmacy Ltd enclose a letter from Primary Care

Support England (PCSE) confirming receipt of the application on this date (Appendix B). The submission of the application for change of ownership was therefore made after the Company LP SD Forty Ltd was incorporated.

- 4.2.4 When an application is made where the applicant is not currently on the pharmaceutical list then Fitness to Practice is provided. Lloyds enclose a copy email from PCSE that acknowledges receipt of the relevant Fitness to Practice details alongside receipt of the change of ownership application and requested the relevant fee to be made (Appendix B).
- 4.2.5 NHS England granted the change of ownership application having been satisfied that the relevant fitness to practice requirements had been made. This is confirmed in the decision report (Appendix B), by NHS England and also in the attached Fitness to Practice approval letter dated 12 June 2023 (Appendix B).
- 4.2.6 The Applicant [sic] has not provided evidence that the application does not meet the criteria of Regulation 26. Lloyds have provided supporting evidence in response to the appeal that the application was submitted following the incorporation of the Corporate Entity and also, confirmation that Fitness to Practice requirements were submitted as part of the application to NHS England and was considered in their decision.
- 4.2.7 Lloyds submit there is no evidence that suggests the application for change of ownership should not be approved and ask for the appeal to be dismissed.

4.3 COMMUNITY PHARMACY ARDEN

- 4.3.1 Community Pharmacy Arden (Coventry & Warwickshire LPCs) would like assurance that LP SD FORTY LTD was formed prior to the application for change of ownership and that there is clarity as to who the Directors are and Superintendent.
- 4.3.2 Should there be any concerns in this regard by NHS Resolution we would further like to understand the implication for all the similar ones that have already gone through change of ownership process and those in mid-process.
- 4.3.3 Community Pharmacy Arden have no further comments and do not wish to unduly delay any change of ownership processes.
- 4.3.4 Community Pharmacy Arden would like to be informed of any oral hearing so that it might send representation if appropriate.

5 Observations

No observations were received by NHS Resolution in response to the representations received on appeal.

6 Consideration

- 6.1 The Pharmacy Appeals Committee ("Committee") appointed by NHS Resolution, had before it the papers considered by NHS England.
- 6.2 It also had before it the responses to NHS Resolution's own statutory consultations.
- 6.3 Since 1 April 2023, Integrated Care Boards have taken on delegated responsibility for the commissioning of pharmaceutical services. NHS England made the decision which is the subject of this Appeal. NHS Resolution will issue this decision to NHS England and it is for NHS England to inform the relevant Integrated Care Board.

6.4 On the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.

6.5 The Committee first considered Regulation 31 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations"), which states:

(1) A routine or excepted application, other than a consolidation application, must be refused where paragraph (2) applies.

(2) This paragraph applies where -

(a) a person on the pharmaceutical list (which may or may not be the applicant) is providing or has undertaken to provide pharmaceutical services ("the existing services") from -

(i) the premises to which the application relates, or

(ii) adjacent premises; and

(b) the NHSCB is satisfied that it is reasonable to treat the services that the applicant proposes to provide as part of the same service as the existing services (and so the premises to which the application relates and the existing listed chemist premises should be treated as the same site).

6.6 The Committee noted that the Applicant had stated "n/a – this is a change of ownership" in Part 5 of the application form. The Committee noted that the wording of the application form only required the Applicant to include information in the relevant section if the proposed premises were adjacent to, or in close proximity to, another pharmacy or dispensing appliance contractor premises. The Committee considered it reasonable to determine that the lack of information in the application form on this point when read with the wording of the application form allowed it to be reasonably satisfied that the Applicant considered that the proposed premises were not adjacent to, or in close proximity to, another pharmacy or dispensing appliance contractor premises. The Committee therefore determined that it was not required to refuse the application under the provisions of Regulation 31.

6.7 The Committee noted Regulation 26(1) (*Change of ownership applications*) of the Regulations, which reads:

"Section 129(2A) of the 2006 Act (regulations as to pharmaceutical services) does not apply to an application from a person who is not included in a pharmaceutical list for inclusion in the list, or from a person included in a pharmaceutical list for inclusion in that list also in respect of other premises than those already listed in relation to that person, if-

(a) the applicant (X) is undertaking to provide pharmaceutical services at premises-

(i) that are already listed chemist premises, and

(ii) at which another person (Y) is providing pharmaceutical services;

(b) X is proposing to carry on at the listed chemist premises, in place of Y, the business in the course of which Y is providing pharmaceutical services at those premises;

(c) X is undertaking to provide the same pharmaceutical services as those that Y is providing; and

- (d) *the provision of pharmaceutical service at the premises will not be interrupted (except for such period as the NHSCB may for good cause allow)."*

6.8 Pursuant to paragraph 9(1)(a) of Schedule 3 to the Regulations, the Committee may:

- 6.8.1 confirm NHS England's decision;
- 6.8.2 quash NHS England's decision and redetermine the application;
- 6.8.3 if it considers that there should be a further notification to the parties to make representations, quash NHS England's decision and remit the matter to NHS England.

6.9 The Committee considered the position in relation to each condition.

6.10 The Committee noted that the above Regulations are specific in the conditions the applicant must satisfy, if its proposed change of ownership is to succeed.

6.11 The Committee has considered each of these paragraphs in turn, applying them to the information provided in the Application Form, unless (in relation to any of those paragraphs) the Applicant has provided amended/updated information.

Regulation 26(1)(a)

6.12 The Committee noted there is no dispute that the application is in respect of listed chemist premises at 97 Long Street, Atherstone, Warwickshire, CV9 1BB. The Committee was satisfied that this was sufficient for the purposes of paragraph (a).

Regulation 26(1)(b)

6.13 The Committee noted the Applicant is proposing to carry on at the listed premises in place of Lloyds Pharmacy Ltd, the business in the course of which Lloyds Pharmacy Ltd is providing pharmaceutical services at those premises.

6.14 The Committee was satisfied that this was sufficient for the purposes of paragraph (b).

Regulation 26(1)(c)

6.15 The Committee noted the Applicant intends to provide the services as those provided by the existing pharmacy. The Committee was satisfied that this was sufficient for the purposes of paragraph (c).

Regulation 26(1)(d)

6.16 On the information before it, the Committee was satisfied that were the actual change of ownership to take place, no interruption, as described in paragraph (d), would occur.

Consequences of satisfying paragraphs (a) to (d) of Regulation 26(1)

6.17 The Committee noted that the Applicant had satisfied the various matters set out in Regulation 26(1).

Other considerations

6.18 The Committee noted the comments in the letter of Appeal with regard to Regulation 10(7) which states:

"(7) Schedule 2, which has effect, contains provisions with regard to—

(a) the information to be supplied by a person—

(ii) seeking inclusion in a pharmaceutical list who is not already included in it, or

(ii) who is included in a pharmaceutical list and who is seeking—

(aa) to open, within the area of the relevant HWB, additional premises from which to provide the same or different pharmaceutical services,

(bb) to relocate to different premises, and at those premises to provide the same or different pharmaceutical services, or

(cc) to provide, from the person's listed chemist premises, services that are in addition to those already listed in relation to that person; and

(b) the procedure to be followed by persons as mentioned in sub-paragraph (a) when making a routine application or an excepted application; and

(c) other related matters.”

6.19 The Committee noted the reference to paragraph 2 of Schedule 2 which states:

“Information to be included in all routine and excepted applications for inclusion in a pharmaceutical list

2.— (1) The information mentioned below in this paragraph must be included in all routine and excepted applications for inclusion in a pharmaceutical list.

...

(3) If A is a body corporate—

(a) A's registered name and any other name under which A trades;

(b) A's company registration number;

(c) A's registered office and any fixed line telephone number relating to that office;

(d) the private address and date of birth of A's superintendent (if A is seeking entry in the list mentioned in regulation 10(2)(a));

(e) the name and date of birth of each director of A (who is not A's superintendent), and if any director of A (who is not A's superintendent) is a registered pharmacist, that director's registration number in the GPhC register;

(f) a declaration that A is, or is entitled to be, lawfully conducting a retail pharmacy business in accordance with section 69 of the 1968 Act, if A is seeking entry in the list mentioned in regulation 10(2)(a); and

(g) if A is already included in Part 3 of the GPhC register in respect of any premises, A's registration number in that Part of the GPhC register, if A is seeking entry in the list mentioned in regulation 10(2)(a).”

- 6.20 The Committee further noted the information provided by the Appellant with regard to the company registration.
- 6.21 The Committee noted that in response to the Appeal, NHS England had provided a timeline and further noted the information supplied by Lloyds Pharmacy in its representations.
- 6.22 The Committee noted that LP SD Forty Limited was registered on 3 May 2023. Further, the application for the change of ownership was submitted to PCSE on behalf of NHS England on 14 May 2023. The Committee noted the comments from NHS England that the application was completed correctly and in full when it was submitted.
- 6.23 The Committee further notes that the fitness to practice checks were carried out and completed prior to the application being determined, with the final decision letter being sent to all parties on 16 June 2023. The Committee noted that this had been confirmed by Lloyds Pharmacy and further that no party had sought to dispute this on receipt of the representations.
- 6.24 Based on the information before it, the Committee was of the view that the application was made correctly and in accordance with the Regulations and that all relevant criteria for inclusion in the pharmaceutical list as well as for a change of ownership application under Regulation 26 had been met and that the application should be granted.

7 **Summary**

- 7.1 In light of its failure to consider Regulation 31, and for its reasons given above, the Committee determined that the decision of NHS England must be quashed.
- 7.2 The Committee went on to consider whether there should be a further notification to the parties detailed at paragraph 19 of Schedule 2 of the Regulations to allow them to make representations if they so wished (in which case it would be appropriate to remit the matter to NHS England) or whether it was preferable for the Committee to redetermine the application.
- 7.3 The Committee noted that when the Appeal was circulated representations had been sought from parties on Regulation 26.
- 7.4 The Committee concluded that further notification under paragraph 19 of Schedule 2 would not be helpful in this case.

8 **Decision**

- 8.1 The Committee quashes the decision of and re-determines the application.
- 8.2 The Committee concluded that it was not required to refuse the application under the provisions of Regulation 31.
- 8.3 The Committee has determined that it should be granted on the following basis:
 - 8.3.1 the Applicant is proposing to continue in place of the existing contractor, the business in the course of which that contractor is providing pharmaceutical services at the same premises;
 - 8.3.2 they can provide the same pharmaceutical services as those that the existing contractor is providing;
 - 8.3.3 that the provision of pharmaceutical services will not be interrupted (except for such period as NHS England may for good cause allow).

8.4 The application is granted.

Case Manager
Primary Care Appeals