

29 November 2023

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REF: SHA/26086

**APPEAL AGAINST NOTTINGHAM AND NOTTINGHAMSHIRE ICB
DECISION TO REFUSE COX NOTTINGHAM LTD APPLICATION FOR
A CHANGE OF OWNERSHIP FROM HARTS CHEMIST LTD IN
RESPECT OF 87 OAKDALE ROAD, BAKERSFIELD, NOTTINGHAM,
NG3 7EJ**

Tel: 0203 928 2000
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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:

Cox Nottingham Ltd (represented by Brabners LLP)
PCSE on behalf of the ICB

REF: SHA/28086

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1 The Application

By application dated 28 April 2023, Cox Nottingham Ltd (“the Applicant”) applied to Nottingham and Nottinghamshire ICB for a change of ownership from Harts Chemist Ltd in respect of Cox Pharmacy, 87 Oakdale Road, Bakersfield, Nottingham, NG3 7EJ. In support of the application, it was stated:

Basis of the change of ownership:

- 1.1 Please confirm whether you are buying the pharmacy business on a
 - 1.1.1 “Non debts and liabilities basis” – the Applicant ticked ‘No’.
 - 1.1.2 “Debts and liabilities basis, with or without access to the existing bank account” – the Applicant ticked “Yes”.
- 1.2 Pharmaceutical services to be provided at these premises:
 - 1.2.1 Essential services (paragraphs 3 to 22, Schedule 4 – pharmacies)
- 1.3 In response to “In my/our view this application should not be refused pursuant to Regulation 31 for the following reasons”, the Applicant left this blank.
- 1.4 Information in support of the application
- 1.5 In response to “Are the services you are undertaken to provide the same as those that the current owner is providing”, the Applicant ticked ‘Yes’.
- 1.6 In response to “Will there be any interruption to service provision”, the Applicant ticked ‘No’.
- 1.7 “Harts Chemist Ltd is demerging into separate companies. Directorship and superintendent are unchanged. For accounting reasons we will be separate companies but nothing else will change.”

2 The Decision

The ICB considered and decided to refuse the application. The decision letter dated 31 August 2023 states:

- 2.1 “We have considered the above application and I am writing to confirm that it has been refused. Please see the enclosed report for the full reasoning.”

DECISION REPORT

- 2.2 “The application meets the criteria of Regulation 26(1), change of ownership.
- 2.3 The application did not meet Regulation 31(2)(b):
- 2.4 The new owner is offering to provide the same hours as the previous owner.
- 2.5 The new owner is offering to provide the same advanced and enhanced services as the current owners and service provision will not be interrupted.
- 2.6 The fitness to practise criteria has been reviewed and approved by NHS England’s Clinical Adviser.
- 2.7 The Committee agreed that the approval of the application will have no impact on those with protected characteristics or on NHS England’s duty on health inequality as the same services and hours are to be provided to the same groups of people.
- 2.8 The Committee rejected this application under Regulation 31(2)(b) (b) by a person already included in a pharmaceutical list for inclusion also in respect of premises other than those already listed in relation to that person.

Appeal rights

- 2.9 Cox Nottingham.”

3 The Appeal

[Any reference to ‘Committee’ in this section is not to be confused with the Pharmacy Appeals Committee of NHS Resolution.]

In a letter dated 28 September 2023, Brabners LLP on behalf of the Applicant appealed against the ICB’s decision. The grounds of appeal are:

- 3.1 “We are instructed on behalf of Cox Nottingham Ltd, the proprietor of the Pharmacy, to submit an appeal in respect of its application for a change of ownership which has been refused by the Nottingham and Nottinghamshire ICB (the “Committee”).
- 3.2 The application has been made in accordance with Regulation 26(1) of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (the “Regulations”).
- 3.3 The Committee asserted in its decision that the application has been rejected under: “Regulation 31(2)(b) (b) by a person already included in respect of premises other than those already listed in relation to that person”. We note that the Regulations do not contain a Regulation 31(2)(b)(b) and presume therefore that this is a typographical error in the Committee’s decision letter.
- 3.4 For completeness, a copy of the application and the Committee’s decision letter area attached at the Annex.
- 3.5 The Regulations state that:
- 3.6 “31(1) A routine or excepted application, other than a consolidated 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 application) is providing or has undertaken to provide pharmaceutical services (“the existing services”) from –

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

(ii) adjacent to premises; and

(b) the NHSCB is satisfied that it is reasonable to treat the services that the application 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 list chemist premises should be treated as the same site)."

- 3.7 We note that, while the decision letter states that the application has been rejected pursuant to Regulation 31(2)(b), no explanation has been provided as to how the Committee considers that such regulation is relevant or applicable to the Committee's decision.
- 3.8 As such, we set out below our understanding as to why we consider that the Committee's decision to reject the application on the basis of Regulation 31(2)(b) was incorrect and unreasonable.
- 3.9 Firstly, without any explanation or reasoning for the rejection of this application under Regulation 31(2)(b), we can only assume that the Committee considered the Applicant's omission to provide any response under section 5 of the application as sufficiently lacking in reasoning to support its view that the application should be refused.
- 3.10 If this is the case, we would refute that argument. Section 5 of the application clearly states that the Applicant only needs to complete the section if the premises included in Section 2 are "adjacent, or in close proximity to, another pharmacy or dispensing appliance contractor premises". The Applicant did not provide any response in this section on the completely understandable and justifiable belief that the Pharmacy is not adjacent to, nor in close proximity, of, another pharmacy or dispensing appliance contractor. Therefore, we submit that the Applicant's failure to provide any response under this section should not in itself result in the application being rejected under Regulation 31.
- 3.11 Notwithstanding the above, we consider that the Committee has failed to apply the correct legislative test when assessing the application in accordance with Regulation 31.
- 3.12 As noted above, the legislative test for refusing an application under Regulation 31 is where both elements (a) and (b) of paragraph 2 apply. In its decision, the Committee has referred to only refuse the application pursuant to Regulation 31(2)(b). No reference is made in the decision letter to Regulation 31(2)(a).
- 3.13 We consider that if the Committee had correctly assessed the application in the context of existing pharmaceutical service provision in the locality, it would have concluded that the Pharmacy is not adjacent to, nor in close proximity to, another pharmacy. By undertaking a simple search of the "NHS Find a Pharmacy" service, it is evident that the closest pharmacy to the Pharmacy is Carlton Hill Pharmacy (NG1 1HW), which is approximately 0.5 miles away. We submit that this is not in sufficiently close proximity to warrant the Committee's refusal of the application pursuant to Regulation 31.
- 3.14 As such, we submit that the application does not satisfy the requirements of Regulation 31(2)(a) and therefore, regardless of the Committee's consideration of Regulation 31(2)(b), the legislative test for Regulation 31 is not satisfied.
- 3.15 For the reasons set out above, we consider that the Committee has failed to adequately consider the details of the application in accordance with the relevant Regulations and has incorrectly assessed the facts in respect of the existing pharmaceutical services provision in the locality. Therefore, we respectfully request that the Committee's decision is overturned, and the application is granted."

4 Summary of Representations

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

5 Consideration

5.1 The Pharmacy Appeals Committee ("Committee") appointed by NHS Resolution, had before it the papers considered by the ICB.

5.2 It also had before it the responses to NHS Resolution's own statutory consultations.

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

5.4 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).

5.5 The Committee noted that the ICB, in its decision letter, had determined that the application should be refused pursuant to Regulation 31(2)(b)(b). In the Committee's view this was a typographical error due to there not being a Regulation 31(2)(b)(b) in the relevant Regulations.

5.6 The Committee noted that the Applicant had not provided any information in the application form on this point but 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.

5.7 The Committee considered that the ICB had misdirected itself in its understanding of Regulation 31. The Applicant confirmed in its appeal that there is no person on the pharmaceutical list providing pharmaceutical services from the same or adjacent premises. This had not been disputed. As such, Regulation 31(2)(b) did not need to be considered. The Committee therefore determined that it was not required to refuse the application under the provisions of Regulation 31.

5.8 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)."*

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

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

5.11 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)

5.12 The Committee noted there is no dispute that the application is in respect of listed chemist premises at 87 Oakdale Road, Bakersfield, Nottingham, NG3 7EJ. The Committee was satisfied that this was sufficient for the purposes of paragraph (a).

Regulation 26(1)(b)

5.13 The Committee noted the Applicant is proposing to carry on at the listed premises in place of 87 Oakdale Road, Bakersfield, Nottingham, NG3 7EJ, the business in the course of which Harts Chemist Ltd t/a Cox Pharmacy is providing pharmaceutical services at those premises.

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

Regulation 26(1)(c)

5.15 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)

5.16 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)

- 5.17 Being satisfied of the various matters set out in Regulation 26(1), the Committee considered that the application should be granted.
- 5.18 Pursuant to paragraph 9(1)(a) of Schedule 3 to the Regulations, the Committee may:
 - 5.18.1 confirm the ICB's decision;
 - 5.18.2 quash the ICB's decision and redetermine the application;
 - 5.18.3 if it considers that there should be a further notification to the parties to make representations, quash the ICB's decision and remit the matter to the ICB.
- 5.19 In light of the reasons given above, the Committee determined that the decision of the ICB must be quashed.
- 5.20 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 the ICB) or whether it was preferable for the Committee to redetermine the application.
- 5.21 The Committee noted that when the appeal was circulated representations had been sought from parties on Regulation 24.
- 5.22 The Committee concluded that further notification under paragraph 19 of Schedule 2 would not be helpful in this case.

6 Decision

- 6.1 The Committee quashes the decision of the ICB and re-determines the application.
- 6.2 The Committee concluded that it was not required to refuse the application under the provisions of Regulation 31.
- 6.3 The Committee has determined that it should be granted on the following basis:
 - 6.3.1 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;
 - 6.3.2 they can provide the same pharmaceutical services as those that the existing contractor is providing;
 - 6.3.3 that the provision of pharmaceutical services will not be interrupted (except for such period as NHS England may for good cause allow).
- 6.4 The application is granted.

**Case Manager
Primary Care Appeals**