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8 May 2025

REF: SHA/26512

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**APPEAL AGAINST BEDFORDSHIRE, LUTON AND
MILTON KEYNES ICB DECISION TO REFUSE
RAINBOW PHARMACY LTD'S APPLICATION FOR
CHANGE OF OWNERSHIP FROM MR ASHOK TOSAR
IN RESPECT OF RAINBOW PHARMACY, 21 WITHAM
COURT, BLETCHLEY, MILTON KEYNES, MK3 7QU**

1 Outcome

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

A copy of this decision is being sent to:

Rainbow Pharmacy
PCSE, on behalf of Bedfordshire, Luton and Milton Keynes ICB

REF: SHA/26512

APPEAL AGAINST BEDFORDSHIRE, LUTON AND MILTON KEYNES ICB DECISION TO REFUSE RAINBOW PHARMACY LTD'S APPLICATION FOR CHANGE OF OWNERSHIP FROM MR ASHOK TOSAR IN RESPECT OF RAINBOW PHARMACY, 21 WITHAM COURT, BLETCHLEY, MILTON KEYNES, MK3 7QU

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1 The Application

By application dated 31 October 2024, Rainbow Pharmacy Ltd ("the Applicant") applied to Bedfordshire, Luton and Milton Keynes ICB ("the Commissioner") for a change of ownership from Mr Ashok Tosar in respect of Rainbow Pharmacy, 21 Witham Court, Bletchley, Milton Keynes, MK3 7QU. In support of the application it was stated:

1.1 "I/we propose to carry on at the above premises, the business in the course of which the above owner is providing pharmaceutical services at the above premises.

1.2 Opening hours

1.3 Core opening hours

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Total
9.00 – 13.00 14.00 – 18.00	9.00 – 13.00 14.00 – 18.00	9.00 – 13.00 14.00 – 18.00	9.00 – 13.00 14.00 – 18.00	9.00 – 13.00 14.00 – 18.00	0	Closed	40:00

1.4 Total opening hours

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Total
9.00 – 13.00 14.00 – 18:30	9.00 – 13.00 14.00 – 18:30	9.00 – 13.00 14.00 – 18:30	9.00 – 13.00 14.00 – 18:30	9.00 – 13.00 14.00 – 18:30	09:00 – 12:00	Closed	45:30

1.5 The Applicant confirmed that Essential services (paragraphs 3 to 22, Schedule 4) were to be provided.

1.6 In response to "If you are undertaking to provide appliances, specify the appliances that you undertake to provide" the Applicant left the section blank.

1.7 The Applicant confirmed that the pharmacy premises will have a consultation room that meets the requirements of paragraph 28A, Schedule 4 of the Regulations.

1.8 In response to why the application should not be refused pursuant to Regulation 31, the Applicant left the section blank.

- 1.9 The Applicant confirmed by ticking “Yes” that the services they are undertaking to provide are the same as those that the current owner is providing.
- 1.10 The Applicant confirmed by ticking “No” that there would not be any interruption to service provision.”

2 The Decision

The Commissioner considered and decided to refuse the application. The decision letter dated 13 January 2025 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

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

- 2.2 “The Pharmaceutical Services Regulations Committee (hereafter referred to as “the Committee”) considers all pharmaceutical services applications for the 6 Integrated Care Boards (ICB) within the East of England footprint. NHS Hertfordshire & West Essex ICB hosts the meeting on behalf of the 6 ICBs, in accordance with the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 as amended (hereafter referred to as “the Regulations”).
- 2.3 The Committee gave careful consideration to the above application, and I am writing to confirm that it has been refused.
- 2.4 The application was considered under the following regulations:
- 2.5 **Regulation 31 – refusal: same or adjacent premises:** [quotes Regulation 31 in full]
- 2.6 **Regulation 31(1)**
- 2.7 The Committee agreed that a change of ownership application is an excepted application and therefore regulation 31(2) was considered.
- 2.8 **Regulation 31(2)(a)**
- 2.9 The Committee noted that Rainbow Pharmacy Ltd is currently included in the pharmaceutical list for the area of Milton Keynes Health and Wellbeing Board (HWB) in respect of the premises listed in the application i.e. at 21 Witham Court, Bletchley, Milton Keynes, Bucks MK3 7QU.
- 2.10 The Committee agreed that Regulation 31(2)(a) therefore applies and moved on to consider Regulation 31(2)(b).
- 2.11 **Regulation 31(2)(b)**
- 2.12 The Committee noted that whilst the person included in the pharmaceutical list for the area of Milton Keynes HWB (Mr Ashok S Tosar) is different to the applicant (Rainbow Pharmacy Ltd), it is noted that Mr Ashok S Tosar is one of the two directors of Rainbow Pharmacy Ltd and is also the superintendent of Rainbow Pharmacy Ltd.
- 2.13 Guidance has been provided by the Administrative Court in R (Pharmacy Care Plus) v FHSU [2013] EWHC 824 (Admin) as to how it is to be determined whether it would

be reasonable to treat services provided by an applicant as part of the same service as an existing provider.

2.13.1 *"34. It is clear ... that it will almost always be an extremely relevant consideration to know whether or not there is any connection in terms of ownership and control between the entities who carry on the existing business and who propose to carry on the proposed new business. So, for example, if an existing business was owned by Company A and the proposed new business was owned by Company B, and there was absolutely no connection at all in terms of ownership and control between the two of them, it would be difficult to see how they could be regarded as providing the same service, even if the services which they were going to provide were complementary to each other. In contrast, if they were both to be provided by exactly the same company, then that would also be an extremely relevant consideration going the other way.*

2.13.2 *35. But also I can well accept that there may be intermediate positions; so, for example, there may be a commonality of ownership but the owners may not be exactly the same, and it may very well be that in such cases one would have to consider things such as the nature of the respective businesses; whether or not they are going to be physically separate or separate from a business point of view; whether or not the employees would be working in both businesses, and any other relevant matters ..."*

2.14 The Committee agreed that there is a common link in terms of ownership and control although it is not precisely co-extensive - the entity currently included in the pharmaceutical list for the area of Milton Keynes HWB is Mr Ashok S Tosar who is also the superintendent and one of the two directors of the applicant, Rainbow Pharmacy Ltd.

2.15 The Committee agreed it was satisfied that it is reasonable to treat the services that Rainbow Pharmacy Ltd proposes to provide, as part of the same service as the existing services provided by Mr Ashok S Tosar at the premises listed in the application.

2.16 The Committee agreed that Regulation 31(2)(b) applies.

2.17 The Committee noted for an application to be refused pursuant to Regulation 31, both 31(2) (a) and (b) must apply.

2.18 The Committee agreed it was satisfied that both Regulation 31(2)(a) and (b) do apply and refused the application.

2.19 **Regulation 26(1) - change of ownership:**

2.20 As the Committee determined that the application was to be refused under Regulation 31, the Committee was not required to consider Regulation 26 in relation to the application.

2.21 **Regulation 66 - conditions relating to providing directed services:**

2.22 As the Committee had determined that the application was to be refused under Regulation 31, the Committee was not required to consider Regulation 66.

2.23 The Committee agreed that the right of appeal be given to the applicant, Rainbow Pharmacy Ltd."

3 The Appeal

In a letter dated 10 February 2025, the Applicant appealed against the Commissioner's decision. The grounds of appeal are:

- 3.1 "I am writing to formally appeal the recent decision by the Bedfordshire, Luton and Milton Keynes ICB (dated 13 January 2025) to refuse the application for change of ownership concerning Rainbow Pharmacy Ltd at 21 Witham Court, Bletchley, Milton Keynes, MK3 7QU.
- 3.2 I was surprised by the refusal of what was supposed to be a routine application for changing my position as a sole trader pharmacy contractor to a limited company contractor. I trust therefore that this submission addresses what was apparently misunderstood during the Committee's consideration of my application.
- 3.3 **1. Regulation 31(2)(a) and inclusion in the Pharmaceutical List**
- 3.4 Firstly, in considering Regulation 31(2)(a), the Committee noted that Rainbow Pharmacy Ltd is currently included in the pharmaceutical list for the area of Milton Keynes Health and Wellbeing Board (HWB) in respect of the premises listed in the application. This statement is **incorrect**. Rainbow Pharmacy Ltd is **not** currently included in any pharmaceutical list. This fundamental error significantly impacts the basis of the Committee's decision. Rainbow Pharmacy Ltd is in fact the entity that, by virtue of the application, I am **seeking to be included** in the pharmaceutical list. [Applicant's emphasis]
- 3.5 The Department of Health guidance clearly indicates the intent of Regulation 31:
 - 3.5.1 *"The purpose of this regulation is to prevent a contractor from applying for multiple inclusions in a pharmaceutical list at the same address with no benefit to patients."*
- 3.6 Given that Rainbow Pharmacy Ltd is not on any pharmaceutical list and there are no extant grants in place, the logical conclusion must be that the premises are not adjacent to, or in close proximity to, another pharmacy or dispensing contractor premises. Therefore, the application does not contravene the intent of Regulation 31 and/or the Committee should have concluded that refusal under Regulation 31 is not required.
- 3.7 **2. Regulation 31(2)(b) and the fact there are no separate services**
- 3.8 Notwithstanding the above and furthermore, it is unmistakable that Regulation 31(2)(b) (including associated guidance) should be interpreted such that, for it to apply, there must be some separate services being provided by the applicant. This is naturally **not** the case here. The services that Rainbow Pharmacy Ltd (the applicant) proposes to provide **are** the existing services that I, Ashok Tosar currently provide. [Applicant's emphasis]
- 3.9 Rainbow Pharmacy Ltd is **not** proposing to provide separate services that could reasonably be treated as part of the same services as the existing services under Regulation 31(2)(b). The services in question are already established and will continue to be provided as they currently are. [Applicant's emphasis]
- 3.10 **3. Conclusion**
- 3.11 In light of the above points, it is clear that the Committee has erred in its interpretation of the facts of this case and/or the regulatory position. The Committee should have concluded that refusal under Regulation 31 is not required and granted the application accordingly. [Applicant's emphasis]

3.12 I respectfully request that the decision is therefore reconsidered in light of the clarifications above. I am confident that upon review, you will find that the application meets all necessary requirements and should be granted.

3.13 Thank you for your time and consideration.”

4 Summary of Representations

This is a summary of representations received on the appeal.

4.1 THE COMMISSIONER

4.1.1 “Please note that from the 1 April 2023, community pharmacy contracting and commissioning has been delegated to Integrated Care Boards (ICBs). Hertfordshire and West Essex (HWE) ICB are hosting the function on behalf of the six East of England ICBs. The six ICBs have formed one Pharmaceutical Services Regulation Committee (PSRC) which is also hosted by HWE ICB.

4.1.2 Thank you for your letter dated 21 February 2025 advising us that Rainbow Pharmacy Ltd (the Appellant) have submitted an appeal against the decision by Bedfordshire, Luton and Milton Keynes (BLMK) ICB to refuse a Change of Ownership (COO) application. The grounds for the appeal are that the ICB have erred in its interpretation of the facts of this case and/or the regulatory position in its understanding of Regulation 31 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, as amended (the Regulations).

4.1.3 The Appellant notes *‘in considering regulation 31(2)(a), the Committee noted that Rainbow Pharmacy Ltd is currently included in the pharmaceutical for the area of Milton Keynes Health and Wellbeing Board (HWE) in respect of the premises listed in the application.’* (Point 1, Appeal letter). This is an administrative error, and it should have been noted that Ashok S Tosar (sole trader) is currently included in the pharmaceutical list *and not Rainbow Pharmacy Ltd*.

4.1.4 The ICB has reviewed the appeal and believe the decision to refuse the COO is correct and we wish to make the following representations:

4.1.5 [Section 129](#) includes a requirement on NHS England to prepare and publish lists of persons who undertake to provide pharmaceutical services from premises in England, and how applications to be included in a pharmaceutical list are to be made and the information that must be contained. Section 129 then goes on to describe applications for inclusion in a pharmaceutical list which may only be granted if NHS England is satisfied with arrangements as mentioned in section 129(2A) – what is referred to as the market entry test i.e. “routine applications.” It also allows for applications where NHS England does not have to consider the market entry test i.e. “excepted applications.”

4.1.6 [Regulation 26\(1\)\(a\)](#) states that section 129(2A) of the NHS Act 2006 (the market entry test) does not apply to an application from a person who is not included in a pharmaceutical list for inclusion in that list, or from a person who is already included in that pharmaceutical in respect of other premises, if the matters in regulation 26(1)(a) to (d) are satisfied.

4.1.7 A change of ownership application is therefore an application to be included in a particular pharmaceutical list in respect of premises that are already included in that pharmaceutical list but are listed in respect of a different person.

- 4.1.8 Looking at the grounds of appeal for the application by the Appellant for the pharmacy premises at 21 Witham Court, Milton Keynes, MK3 7QU the Appellant outlines the alleged intent of regulation 31. However, it is the wording of the regulation that is to be considered.
- 4.1.9 The ICB notes that the requirements of Regulation 26(1) are satisfied as the Appellant states that there is to be no change in pharmaceutical services and no interruption in service delivery.
- 4.1.10 [Regulation 31\(1\)](#) states that a routine or excepted application other than a consolidation application must be refused where regulation 31(2) applies. As identified above, a change of ownership application is an excepted application. If the intention was that regulation 31 could never apply to a change of ownership application, then regulation 31(1) would specifically exclude change of ownership applications as well as consolidation applications. There are other regulations which explicitly state they are only to be considered in relation to certain types of application e.g. [regulation 32](#) (only routine applications) and [regulation 40](#) (routine applications from an NHS pharmacist). The ICB is therefore satisfied that regulation 31 must be considered in relation to the change of ownership application submitted by Rainbow Pharmacy Ltd.
- 4.1.11 **Regulation 31(2)(a)**
- 4.1.12 There is a person included in the pharmaceutical list for the area of Milton Keynes Health and Wellbeing Board (HWB) who is providing pharmaceutical services (“the existing services”) from the premises to which the application relates i.e. 21 Witham Court, Milton Keynes, MK3 7QU. This is Ashok S Tosar. This is evidenced by NHS England’s published [consolidated pharmaceutical list](#).
- 4.1.13 **Regulation 31(2)(b)**
- 4.1.14 As NHS Resolution will be aware, both strands of regulation 31(2) must apply for a routine or excepted application (other than a consolidation application) to be refused. The ICB considered the following case as part of its decision. Whilst it is noted this is centred on regulation 17A of the NHS (Pharmaceutical Services) Regulation 2005, the wording of regulation 31 is similar and it is therefore relevant [R \(on the application of Pharmacy Care Plus Ltd\) v Family Health Services Appeals Unit \[2013\] EWHC 824 \(Admin\)](#).
- 4.1.15 However, in his judgment the judge stated he accepted “*that it will almost always be an extremely relevant consideration to know whether or not there is any connection in terms of ownership and control between the entities*”. He described two ends of a spectrum where:
- 4.1.15.1 the applicant and existing contractor are separate legal entities and there is no connection at all in terms of ownership and control – regulation 31(2)(b) could not apply, and
- 4.1.15.2 the applicant and existing contractor are the same legal entity – regulation 31(2)(b) would apply.
- 4.1.16 He also accepted “*that there may be intermediate positions; so, for example, there may be a commonality of ownership, but the owners may not be exactly the same.*” In this case he said it may be appropriate to consider other relevant matters.

- 4.1.17 The director and superintendent for the Appellant is Ashok S Tosar (date of birth XXX).
- 4.1.18 The sole trader, (the person currently included in the relevant pharmaceutical list in respect of the premises to which the application relates) is:
- 4.1.18.1 Ashok S Tosar (date of birth XXX)
- 4.1.19 In its application Rainbow Pharmacy Ltd has undertaken to provide the same pharmaceutical services as those that Ashok S Tosar provides (the existing services). The ICB is of the opinion that the premises to which the application relates (21 Witham Court, Milton Keynes, MK3 7QU) and the existing listed chemist premises (21 Witham Court, Milton Keynes, MK3 7QU) should be treated as the same site. Indeed, they are exactly the same premises.
- 4.1.20 In conclusion, both strands of regulation 31(2) must apply for a routine or excepted application (other than a consolidation application) to be refused. As outlined in these representations, both 31(2)(a) and 31(2)(b) apply and therefore the ICB remains of the opinion that the application should be refused.”

5 Observations

The following observations were received by NHS Resolution in response to the representations received on appeal.

5.1 THE APPLICANT

- 5.1.1 “Thank you for your letter of 26 March 2025 and the enclosed representations from the Pharmaceutical Services Regulation Committee (PSRC) of Bedford, Luton and Milton Keynes Integrated Care Board (ICB).
- 5.1.2 We wish to submit the following observations in response to the PSRC representations.
- 5.1.3 **Regulation 31(2)(a)**
- 5.1.4 The PSRC, in its representation, explains that it is an administrative error in noting that Rainbow Pharmacy Ltd is currently included in the pharmaceutical list. We consider this to be an implausible explanation. We consider that the PSRC misdirected itself in its interpretation of Regulation 31. It is correct that Ashok S Tosar is included in the pharmaceutical list to provide services from 21 Witham Court, Bletchley, Milton Keynes, MK3 7QU. However, by virtue of this application/appeal, Rainbow Pharmacy Ltd is seeking to replace Mr Ashok S Tosar on the pharmaceutical list.
- 5.1.5 We believe that if the PSRC had correctly assessed the provision of pharmaceutical services in the area it would have found that there is no other person on the pharmaceutical list who is providing or has undertaken to provide pharmaceutical services from or adjacent to 21 Witham Court, Bletchley, Milton Keynes, MK3 7QU.
- 5.1.6 We draw your attention to the declaration at section 8 of the application form where Mr Ashok S Tosar has confirmed that he will withdraw from the pharmaceutical list in respect of the premises listed in section 2 consequent upon the inclusion of the new owner in the list at that address.

5.1.7 We submit that the Application does not satisfy the requirements of Regulation 31(2)(a).

5.1.8 **Regulation 31(2)(b)**

5.1.9 The PSRC states that it considered the judgement in R (on the application of Pharmacy Care Plus Ltd) v Family Health Service Appeals Unit (2013) EWHC 824 (Admin) to establish a connection in terms of ownership and control between Ashok S Tosar and Rainbow Pharmacy Ltd. This has never been in dispute and the BLMK ICB is aware that Ashok S Tosar is the Pharmacy Superintendent of Rainbow Pharmacy Ltd. Indeed, it was at their behest that this application was submitted retrospectively in order to reconcile the entity on the Pharmaceutical List with the owner of the premises on the register of the GPHC – see email evidence attached.

5.1.10 We believe the PSRC has misdirected itself again in asserting that

5.1.11 *“it is the wording of the regulation that is to be considered”*

5.1.12 rather than the intent of regulation 31.

5.1.13 Whilst the background and circumstances of this Application are completely different to the above case it is worthy of note that the intent of Regulation 31 was a significant consideration in the decision in the case.

5.1.14 However, as both strands of Regulation (31)(2) must apply for the Application to be refused under Regulation 31, we submit that the outcome of the legislative test under Regulation 31(2)(b) is irrelevant because, in our opinion, the Application does not satisfy the requirements of Regulation 31(2)(a).

5.1.15 **Regulation 26(1)**

5.1.16 Thank you for giving us the opportunity to consider and comment on Regulation 26(1) of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 in relation to the Application.

5.1.17 We concur with the PSRC that the requirements of Regulation 26(1) are satisfied although we note that the PSRC's conclusion is based on the assessment of only one of the five conditions of Regulation 26(1) i.e. Regulation 26(1)(d).

5.1.18 Regulation 26 states:

(1) 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 services at the premises will not be interrupted (except for such period as NHS England may for good cause allow).

5.1.19 For completeness we have considered each condition in relation to the Application as below:

5.1.20 Regulation 26(1)(a)

5.1.21 The application by Rainbow Pharmacy Ltd (X), is in respect of listed premises at 21, Witham Court, Bletchley, Milton Keynes, MK3 7QU where Ashok S Tosar (Y) is currently providing pharmaceutical services.

5.1.22 Regulation 26(1)(b)

5.1.23 Rainbow Pharmacy Ltd will continue to provide pharmaceutical services from the above premises in place of Ashok S Tosar (Please see declaration at section 8 on the Application Form).

5.1.24 Regulation 26(1)(c)

5.1.25 Rainbow Pharmacy Ltd undertakes to provide the same pharmaceutical services which Ashok S Tosar is currently providing.

5.1.26 Regulation 26(1)(d)

5.1.27 The change of ownership, if granted, will be implemented seamlessly and there will be no interruption to the provision of pharmaceutical services at the premises.

5.1.28 We submit, therefore, that the Application satisfies all the requirements of Regulation 26(1).

5.1.29 For the reasons set out above, we submit that the PSRC has failed to properly consider the details of the Application in accordance with Regulation 31 and has incorrectly assessed the facts in respect of the existing pharmaceutical services provision in the locality of the premises.

5.1.30 Therefore, we respectfully request that the PSRC's decision is overturned, and the Application is granted."

6 Consideration

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

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

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

- 6.4 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) NHS England 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).*
- 6.5 The Committee noted that the Applicant had not provided any information in Part 5 of the application form, 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.
- 6.6 The Committee noted that the Commissioner had sought to refuse the application on the provisions of Regulation 31. The Committee considered that, as the application was not a consolidation application, it must be refused if both Regulation 31(2)(a) and 31(2)(b) were to apply.
- 6.7 The Committee noted the Applicant's comment that "*I was surprised by the refusal of what was supposed to be a routine application for changing my position as a sole trader pharmacy contractor to a limited company contractor.*"
- 6.8 There is no dispute that Mr Ashok Tosar is also a director of Rainbow Pharmacy Ltd.
- 6.9 The Committee further noted the Applicant's comment that "*Given that Rainbow Pharmacy Ltd is not on any pharmaceutical list and there are no extant grants in place, the logical conclusion must be that the premises are not adjacent to, or in close proximity to, another pharmacy or dispensing contractor premises. Therefore, the application does not contravene the intent of Regulation 31 and/or the Committee should have concluded that refusal under Regulation 31 is not required.*" The Committee noted the Applicant does not appear to accept that Regulations 31(2)(a) and 31(2)(b) apply to the application.
- 6.10 The Committee first considered Regulation 31(2)(a).
- 6.11 The Committee noted that, although there appears to have been an error in the decision letter, there is no dispute that Mr Ashok Tosar is currently included in the pharmaceutical list in respect of Rainbow Pharmacy, 21 Witham Court, Bletchley, Milton Keynes, MK3 7QU.

- 6.12 The Committee had regard to the Applicant's comment in its observations regarding Regulation 31(2)(a) that *"We draw your attention to the declaration at section 8 of the application form where Mr Ashok S Tosar has confirmed that he will withdraw from the pharmaceutical list in respect of the premises listed in section 2 consequent upon the inclusion of the new owner in the list at that address."*
- 6.13 The Committee was mindful that whilst Mr Tosar would be replaced on the pharmaceutical list by Rainbow Pharmacy Ltd, should the application be granted, it remains the case that he is currently providing pharmaceutical services at the premises.
- 6.14 The Committee therefore considered that Regulation 31(2)(a) applied as a person on the pharmaceutical list, Mr A Tosar, is providing pharmaceutical services from the premises to which the application relates i.e. Rainbow Pharmacy, 21 Witham Court, Bletchley, Milton Keynes, MK3 7QU and that this was not disputed by either of the parties.
- 6.15 The Committee next considered whether Regulation 31(2)(b) applied.
- 6.16 The Committee noted the Commissioner's reference to *R (Pharmacy Care Plus) v FHSU [2013] EWHC 824 (Admin)*. The Committee considered that this case would likely provide a guide to interpreting Regulation 31(2)(b). Having had regard to it the Committee noted the following wording:
- "it will almost always be an extremely relevant consideration to know whether or not there is any connection in terms of ownership and control between the entities who carry on the existing business and who propose to carry on the proposed new business. So, for example, if an existing business was owned by Company A and the proposed new business was owned by Company B, and there was absolutely no connection at all in terms of ownership and control between the two of them, it would be difficult to see how they could be regarded as providing the same service, even if the services which they were going to provide were complementary to each other. In contrast, if they were both to be provided by exactly the same company, then that would also be an extremely relevant consideration going the other way."*
- 6.17 The Committee noted that the language used by Davies J was not such that if the services were to be provided by the same company this should be definitive but rather that it would be an *"extremely relevant consideration"*. The Committee considered, therefore, that where an applicant is making a routine or excepted application, other than a consolidation application, and the premises to which the application relates, or the adjacent premises, are run by the same directors, then the starting point should be that the application should not be granted under Regulation 31(2)(b). This is on the basis that the connection between the existing and proposed pharmacies would be such that, in most circumstances, the condition set out in Regulation 31(2)(b) would be met.
- 6.18 The Committee considered that this is not an irrebuttable presumption and that circumstances might arise whereby, despite the close connection, the application may not need to be refused. The Committee specifically noted that Regulation 31(2)(b) includes a reasonableness element. It is not, therefore, merely factual but provides for some level of discretion in its application.
- 6.19 The Committee was mindful that where a change of ownership application was made under Regulation 26 the new owner must replace the current owner in the pharmaceutical list under Regulation 75(1). The Committee notes that Regulation 75(1) provides that:

75.—(1) *If, as a consequence of a change of ownership application or a consolidation application, an NHS chemist (C) is no longer to be the person listed in a pharmaceutical list in relation to particular pharmacy premises—*

- (a) *if there are other chemist premises listed in that pharmaceutical list in relation to C, NHS England must remove the listing of the particular premises in relation to C from that list; or*
- (b) *if there are no other chemist premises listed in that pharmaceutical list in relation to C, subject to regulation 76, NHS England must remove C from that pharmaceutical list.*

- 6.20 The Committee noted that where a successful change of ownership application is made, and the notice of commencement is made under Schedule 2 paragraph 34, then, when the Commissioner updates the relevant pharmaceutical list, the preceding entity must be replaced by the incoming. The Committee considered that a change of ownership application will not allow for the continued existence of the pharmacy that is to be changed. The Committee noted that the notice of commencement was necessary for the new owners to be included in the pharmaceutical list; it could not begin to provide services without it. The Committee considered that, if there was no notice of commencement, the existing pharmacy owners would continue to provide services, and the new pharmacy owners would not. The Committee concluded that the combined operation of paragraph 34 of Schedule 2 and Regulation 75 was such that either the new owner could operate, or the old owner could operate, but would not permit both owners to operate at the same time.
- 6.21 The Committee was mindful that NHS Resolution's guidance note states that the Department of Health guidance clearly indicated the intent of Regulation 31:
- "The purpose of this regulation is to prevent a contractor from applying for multiple inclusions in a pharmaceutical list at the same address with no benefit to patients."*
- 6.22 The Committee considered this to indicate that the operation of Regulation 31 was to prevent there being two pharmacies operating at the same location.
- 6.23 Following this, the Committee then considered if it would be reasonable to treat the proposed services as part of the same service as the existing services in accordance with the wording of Regulation 31(2)(b). The Committee noted the Applicant's comment that *"Rainbow Pharmacy Ltd is **not** proposing to provide separate services that could reasonably be treated as part of the same services as the existing services under Regulation 31(2)(b). The services in question are already established and will continue to be provided as they currently are."*
- 6.24 The Committee considered that, despite Mr Tosar also being a director of the Applicant's company, this mandated removal from the pharmaceutical list under Regulation 75 and Schedule 2 paragraph 34 needed to be accounted for. The Committee noted that the application of Regulation 75 was automatic, mandated and specific. It considered that the existing services would have to, by necessity, cease when the new owner was entered into the pharmaceutical list, as they would no longer be on the pharmaceutical list and so no longer be able to operate under the Regulations. The Committee therefore concluded that there could not be two operational pharmacies, as a result of Regulation 75, aligning with the understood intention of Regulation 31.
- 6.25 The Committee also noted that existing guidance on Regulation 31 did not refer to any determinations that were pure change of ownership applications, as is the case in this appeal. The Committee considered that other routine or excepted applications that do

not mandate the removal of the existing owner should, by necessity, be treated entirely differently to the current appeal. The Committee considered that if there was any possibility for the continued service provision by the existing contractor this would result in it requiring the application to be refused. The Committee also considered that each change of ownership needed to be considered on its own facts as there may be certain circumstances that lead to it being reasonable to determine that Regulation 31 (2)(b) is satisfied and the application should be refused.

6.26 The Committee considered that it is not required to refused the application pursuant to Regulation 31 as, due to the mandatory requirement to remove Mr Tosar from the pharmaceutical list, it would not be reasonable to treat the services currently being provided by Mr Tosar as part of the same services that would be provided by Rainbow Pharmacy Ltd, under the application.

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

6.27.1 confirm the Commissioner's decision;

6.27.2 quash the Commissioner's decision and redetermine the application;

6.27.3 if it considers that there should be a further notification to the parties to make representations, quash the Commissioner's decision and remit the matter to the Commissioner.

6.28 The Committee went on to consider whether there should be a further notification to the parties as 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 Commissioner) or whether it was preferable for the Committee to redetermine the application, in relation to Regulation 26(1). However, as a change of ownership application under Regulation 26(1) is not a notifiable application, then paragraph 19 of Schedule 2 of the Regulations did not apply to this appeal. Consequently, paragraph 9(1)(a)(iii) did not apply and the Committee was unable to remit the decision to the Commissioner.

6.29 Given that the Committee had found that the application should not have been refused under Regulation 31, the Committee determined that the decision of the Commissioner must be quashed. The Committee therefore proceeded to consider Regulation 26(1).

6.30 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 NHS England may for good cause allow)."*

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

6.32 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)

6.33 The Committee noted there is no dispute that the application is in respect of listed chemist premises at 21 Witham Court, Bletchley, Milton Keynes, MK3 7QU. The Committee was satisfied that this was sufficient for the purposes of paragraph (a).

Regulation 26(1)(b)

6.34 The Committee noted the Applicant is proposing to carry on at the listed premises in place of Mr Ashok Tosar, the business in the course of which Mr Ashok Tosar is providing pharmaceutical services at those premises.

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

Regulation 26(1)(c)

6.36 The Committee noted the Applicant intends to provide the same 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)

6.37 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)

6.38 Being satisfied of the various matters set out in Regulation 26(1), the Committee considered that the application should be granted.

7 **Decision**

7.1 The Committee quashes the decision of the Commissioner and re-determines the application.

7.2 The Committee concluded that it was not required to refuse the application under the provisions of Regulation 31.

7.3 The Committee has determined that it should be granted on the following basis:

- 7.3.1 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;
 - 7.3.2 the Applicant can provide the same pharmaceutical services as those that the existing contractor is providing;
 - 7.3.3 that the provision of pharmaceutical services will not be interrupted (except for such period as the Commissioner may for good cause allow).
- 7.4 The application is granted.

Case Manager
Primary Care Appeals