***R (Rushport Advisory LLP) v National Health Service Litigation Authority and interested parties (1) Bidford Healthcare Ltd (2) Lloyds Pharmacy Ltd (3) NHS England* [2016] EWHC 907 (Admin)**

Background

The NHS LA granted an unforeseen benefits application made by Rushport Advisory LLP ("Rushport") under Regulation 18 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations"). There was only one suitable premises available from which to run the proposed pharmacy, namely Bidford Health Centre, which was owned by three GPs who practiced there in partnership. Those GPs were also the directors and shareholders of Bidford Healthcare Limited ("Bidford"). Bidford did not wish to lease the premises at Bidford Health Centre to Rushport.

Bidford subsequently made an unforeseen benefits application under Regulation 18 to provide services in the vicinity of Bidford Health Centre. The application was granted by NHS England. Rushport and Lloyds Pharmacy Ltd appealed the grant on the basis that NHS England had failed to take into account the fact that the application made by Rushport had already been granted for the same area. The NHS LA considered the appeals and re-determined and granted the Bidford application.

Judicial review

Rushport commenced judicial review proceedings in respect of the NHS LA's decision to grant Bidford's application. Rushport alleged that the NHS LA:

- could not have been satisfied that the Bidford application would secure improvements, or better access, to pharmaceutical services because those same services were already planned to be provided by Rushport;
- ought to have found that granting the Bidford application would cause significant detriment to proper planning in respect of the provision of pharmaceutical services because it would undermine the plans that NHS England had for the delivery of services by Rushport pursuant to its existing grant;
- failed to take into account that the unforeseen benefits delivered by the Bidford application would also be delivered by the extant Rushport application;
- misdirected itself on the law, in concluding that it was excluded from considering whether Rushport's proposal would deliver the benefits underpinning Bidford's application on the basis that Regulation 18 did not contain a provision relating to the consideration of whether a need had already been; and
- erred in concluding that Rushport's application was immaterial unless and until Rushport served a notice of commencement.

The parties were content for the decision to be quashed, and the appeals remitted for re-determination. However, there was a disagreement about whether any further direction should be given to the NHS LA. In particular, Rushport sought a direction that the NHS LA must allow its appeal and quash the grant made to Bidford. Such a direction was not agreed by NHS LA and Bidford, and the matter was therefore considered by the court at a hearing on 19 and 20 April 2016.

Outcome

Mr Justice Kerr held that the NHS LA had disregarded the relevant consideration that only one building was available within the best estimate of the location given by both grant populations. The decision to grant the Bidford application was therefore quashed and the matter was remitted back to the NHS LA for the appeal to be revisited and freshly determined. In doing so he made the following observations:

- there are no express statutory provisions which would require the NHS LA to decide an appeal in a case such as this in only one permissible way. He did not believe that the court was required to read in a mandatory refusal provision in this case, where none appeared in the Regulations. As such, it was not necessary for the NHS LA to refuse the Bidford application just because the Rushport grant was extant;

- The NHS LA does not have to accept at face value an applicant's pre-application undertakings to provide the services. The NHS LA cannot be expected to "*blind itself to reality*". A statutory pre-application undertaking to provide the services required under a grant, if the application is granted, is conditional on the grantee serving a notice of commencement. Unless and until one is served, there is no entitlement, let alone an obligation, to provide the services. A pre-application undertaking is not legally binding and is little more than a pledge of good faith;

- Rushport alleged that the paragraph 35 procedure under the Regulations (which allows NHS England to service a notice requiring commencement of the services) was enough to prevent the blocking of applications. Mr Justice Kerr was of the view that this was not an answer to the common sense reading of the Regulations, which was that the decision maker must look at the relevant evidence available, assess it and take it into account when reaching a decision. Any other process would be artificial and would not be in the public interest in getting the service provision right. This was also supported by the fact that the case management provisions allowing applications to be deferred, consolidated and so on are plainly there to enable the merits of applications to be weighed against each other.

- In a case where there are two competing applications and one has already been granted, it may be perverse and irrational to grant a second application unless there are good reasons to believe that the service provision required under the first grant is considered undeliverable. Such reasons could include the insolvency of the first grantee, or a public statement that it has lost interest in the pharmaceutical business;

- The NHS LA can, in principle, find that the public benefit test in regulation 18(2)(b) is satisfied in a case where there is already an extant grant if in its judgment it considers the prior grantee will be unable to deliver on its undertaking to provide the services in question. It is for the decision maker considering the second grant application to consider and weigh any evidence casting doubt on the first grantee's ability to deliver on its undertakings. It is not impossible for the second grantee's application to meet the public benefit test in regulation 18(2)(b) by reason only of the first grant, but the decision must be very careful not to decide that it is met in a case where there is a real possibility of services under both grants coming on stream, leading to overprovision at the expense of the public purse.

The full judgment can be read here:
http://www.bailii.org/ew/cases/EWHC/Admin/2016/907.html

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