

Neutral Citation No: [2018] NIQB 47

Ref: McC10663

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

JR

Delivered: 14/05/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PAUL TALLON LIMITED
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

WESTERN HEALTH AND SOCIAL CARE BOARD

MCCLOSKEY J

The Cast

- [1] In this application for leave to apply for judicial review, the protagonists are:
- (a) Paul Tallon Limited ("the Applicant"), a registered company which has operated a pharmacy on Main Street in Sixmilecross, Co. Tyrone for some ten years.
 - (b) The Western Health and Social Care Board ("the Board"), which made the decision/s impugned by the Applicant.
 - (c) Omapharm Limited ("Omapharm"), a pharmaceutical business which, by the Board's decision dated 03 August 2017, in the exercise of its statutory powers, successfully applied for admission to the statutory Pharmaceutical List thereby achieving the requisite authority to operate a pharmacy on the site of the Omagh Hospital and Primary Care Complex, some 1.5 miles outside Omagh (which is around 7 miles from Sixmilecross) where, since 2017, all of the general medical practitioners who previously practised in Omagh town have been operating since 2017.
 - (d) Boots The Chemist Limited ("Boots"), which operates a pharmacy in Omagh and which, having received statutory notification from the

Board, objected unsuccessfully to Omapharm's application for inclusion in the Pharmaceutical List.

- (e) The National Appeal Panel ("NAP"), the statutory appellate body to which Boots has appealed, challenging the impugned decision of the Board.

Timetabling

[2] This application for leave to apply for judicial review was listed as an urgent matter and heard initially, on an *inter-partes* basis, both parties being represented by solicitor and counsel, at two uncompleted hearings on 11 May 2018. The application was adjourned to afford the Board an opportunity to put in evidence any documents, electronic records *et al* pertaining to its anterior decision not to include the Applicant among those notified of Omapharm's application, together with any applicable guidance, criteria or kindred instruments. The court has considered the further documents provided.

[3] The urgency arose by virtue of 16 May 2018 being the date scheduled for the hearing of Boots appeal to the NAP.

Statutory Framework

[4] The Board is the statutory agency which makes decisions regarding admission to the Pharmaceutical List ("the List"). In the context of these proceedings the focus is on two statutory provisions in particular. Both are contained in the Pharmaceutical Services Regulations (Northern Ireland) 1997. By paragraph 1(1) of Schedule 4:

"Where on receipt of any properly completed application the Board shall, within five working days, give written notice of the application to -

- (a) The Local Pharmaceutical Committee;
- (b) The Local Medical Committee;
- (c) **Any person whose name is included in the Pharmaceutical List and who currently provides pharmaceutical services in the Board's area and whose interests may, in the opinion of the Board, be significantly affected if the application were granted ..."**

[emphasis added]

Paragraph 4(1) provides:

“Where a Board has determined an application the applicant or any person mentioned in paragraph 1(1)(c) or 1(2)(c) may appeal against the decision of the Board

[In passing, Boots has been considered by the Board to be embraced by the terms “any person mentioned in paragraph 1(1)(c)”.]

[5] The procedure of the NAP is regulated by Part III of Schedule 4. This contains provisions relating to matters such as membership, quorum and voting. Paragraph 20(1) provides:

“The National Appeal Panel shall determine an appeal in such manner as it thinks fit and may, if it considers that oral representations are unnecessary, determine the appeal without hearing any oral representations and its decision in respect of that appeal shall be final.”

The Challenge

[6] Following an amendment prompted by exchanges with the Bench at the initial adjourned leave hearing, the focus of the Applicant’s challenge to the Board is twofold:

- (a) The main impugned decision, as described above.
- (b) The subsidiary, or anterior, decision of the Board not to notify the Applicant of the Omapharm Application or, insofar as there was no concrete decision to this effect, the Board’s failure to do so.

While the court has been alerted to a further amendment of the Order 53 pleading, this has not yet been considered in the compressed timetable prevailing.

[7] At the initial adjourned leave hearing the Court further observed that some latitude regarding the formulation of the Applicant’s grounds of challenge would seem appropriate, having regard to the haste which has characterised these proceedings from their conception. With a view to expedition and informed and targeted argument, the Court’s initial observations to the parties’ representatives were that paragraph 1(1)(c) of Schedule 4 to the 1997 Regulations clearly confers a discretion on the Board; there is no unreviewable discretion known to public law; the review of how the Board exercised this discretion in the instant (and, indeed, any) case is to be undertaken by reference to the well-established touchstones of

rationality, taking into account all material considerations, disregarding the immaterial, correct self-directions in law and furthering the statutory purpose. The Court further observed that the question to be determined at this stage is whether an arguable case that either of the impugned decisions of the Board is vitiated when judged against any of the aforementioned standards has been demonstrated.

Decision on leave

[8] The factual matters which emerge most pertinently from the Applicant's affidavit are the following: its pharmacy in Sixmilecross is the only one in the village; Omagh town is some seven miles away; patients using the Applicant's pharmacy are registered with general practitioners in Omagh; some 25% to 30% of the pharmacy's prescriptions relate to such patients; and the development of the proposed new pharmacy at the newly centralised Omagh General Practitioner's complex will inevitably bring about a significant reduction in the aforementioned prescriptions.

[9] Mindful that the evidence before the Court is largely unilateral at this stage, I consider that there are sufficient indicators therein, summarised immediately above, to warrant the assessment, to the modest level of arguability, that the Board's decisions are vitiated by non-observance of the public law standards outlined above.

[10] While the legislative framework makes provision for an appeal against the Board's Pharmaceutical List decision, this form of recourse is not available to the Applicant since, unlike Boots, it does not fall within the statutory language noted in [4] above. Thus there is no question of failing to exhaust any alternative remedy, judicial review being the only form of legal challenge available.

[11] Finally the issue of delay must be considered. Whereas the second of the Board's impugned decisions is dated 03 August 2017 and the first impugned act or omission must necessarily predate that, these proceedings were not initiated until 11 May 2018. The Applicant's affidavit contains an averment that Mr Tallon, Director and sole share holder of the company, first learned of Omapharm's successful application in late March 2018. He elaborates on this. He further gives an account of the steps taken by him and his solicitor during the ensuing period of approximately seven weeks. At this juncture the Applicant's averments are persuasive and there is no evidential or other reason to question or reject them. This would not, of course, preclude such a possibility at a later stage of the proceedings.

[12] Order 53, Rule 4 of the Rules of the Court of Judicature (Northern Ireland) 1980 requires the measurement of a three month period from the date upon which the grounds for bringing the challenge first arose. I am satisfied that the Applicant's quest to secure leave to apply for judicial review is not defeated by delay on two bases:

- (a) Having regard to the evidence available at present, the grounds for bringing this challenge are indissociable from the Applicant's state of knowledge and, applying this prism, first arose in the final week of March 2018.
- (b) Alternatively, focusing once again on the Applicant's state of knowledge, I am satisfied in any event that it would be appropriate to extend time.

[13] Finally, the Court is mindful that while the evidence discloses two identifiable decisions of the NAP namely (a) a refusal to permit the Applicant to participate in the appeal proceedings and (b) a refusal to adjourn the forthcoming appeal hearing on 16 May 2018, the Court has no jurisdiction over this agency within the framework of these proceedings. It would appear, therefore, that if the NAP's refusal to adjourn the appeal hearing were to continue the Applicant's only recourse would be to issue a Writ and apply for an immediate injunction in the Queen's Bench Division. Since the fact of the grant of leave to apply for judicial review would be expected to be a potent factor in such litigation context, it would seem regrettable if avoidable legal costs had to be incurred, particularly in circumstances where this Court's final adjudication of the Applicant's challenge will follow a fast track process and can be provided within a matter of weeks. All of the above is subject to considering any proposed reconfiguration of the Applicant's challenge.

[14] The judgment and order of this Court should be served by the Applicant's solicitors on all of the parties/agencies identified in [1] above by 18 May 2018 at latest.