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

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY E.A. BAIRD
(NEWTOWNARDS) LIMITED FOR JUDICIAL REVIEW**

WEATHERUP J

The competing applications for inclusion on the pharmaceutical list.

[1] This is an application for Judicial Review of two decisions of the National Appeal Panel of June 2004. First, the NAP dismissed an appeal by the applicant against the decision of the Pharmacy Practices Committee of the Eastern Health and Social Services Board made on 27 November 2003 refusing the applicant's application to provide pharmaceutical services from premises at Unit 1, Greenway Business Park, Conlig, Bangor. Secondly, the NAP dismissed an appeal by the applicant against the decision of the PPC of 27 November 2003 granting the application of Edward Webb (Bangor) Limited to provide pharmaceutical services from premises at Green Road Development, Conlig, Bangor. Mr Beattie BL appeared for the applicant. Mr Maguire BL appeared for the respondent, the NAP. Mr Comerton QC and Mr AJS Maxwell BL appeared for the notice party, Edward Webb (Bangor) Limited.

[2] There is no pharmacy in Conlig. Both the applicant and Webb have applied to establish a new pharmacy in Conlig. A development described as a neighbourhood centre is proposed at Green Road Conlig and will comprise a new doctors' surgery and retail outlets and car parking. To the right of the neighbourhood centre from Green Road is a roadway known as Greenway that leads into Greenway Industrial Estate. The applicant's proposed pharmacy would be located in Greenway on the opposite side of the road

from the neighbourhood centre. Webb's proposed pharmacy would be located in a retail unit in the neighbourhood centre.

[3] Ultimately there was no dispute between the parties that the relevant neighbourhood for the purposes of the application could be defined by the boundaries of the electoral ward of Conlig and that only one pharmacy was required in the neighbourhood. This application for Judicial Review has given rise to issues about the priority accorded to the order in which applications are received, the so-called first past the post rule, as well as the evidential basis for preferring one application over another and the reasons given for the decisions.

The scheme for inclusion on the pharmaceutical list.

[4] Arrangements for pharmaceutical services are provided for under Article 63 of the Health and Personal Social Services (NI) Order 1972. Every Health and Social Services Board shall, in accordance with regulations, make arrangements in respect of its area for the provision of pharmaceutical services. Regulations shall include provision for the preparation, publication and maintenance of lists of persons who undertake to provide pharmaceutical services and that an application to a Health and Social Services Board for inclusion in such a list shall be made in a specified manner. Further the regulations shall include provision that an application for inclusion in such a list shall be granted only if the Health and Social Services Board is satisfied in accordance with the regulations -

“...that it is necessary or desirable to grant it in order to secure in the neighbourhood in which the premises are located the adequate provision by persons included in the list of the pharmaceutical services or some of the pharmaceutical services specified in the application.” (Article 63(2A)(C).

[5] The relevant regulations are the Pharmaceutical Services Regulations (NI) 1997. Each Board is required to prepare a pharmaceutical list of those who undertake to provide pharmaceutical services (Regulation 6(1)). Any application to be added to the pharmaceutical list shall be granted by the Board, after the procedures set out in schedule 4 have been followed, only if it is satisfied that the provision of pharmaceutical services and the premises named in the application are “necessary or desirable in order to secure adequate provision of pharmaceutical services in the neighbourhood in which the premises are located” (Regulation 69).

[6] Schedule 4 provides for the procedure for applications and that the functions of the Board are to be exercised by the Pharmacy Practices

Committee on behalf of the Board (para 2). The PPC must give notice of its decision together with its reasons (para 3). Appeals from the decision of the PPC are made to the National Appeal Panel, which must give written notification of its decision, together with reasons, to the Board, and the Board must notify the applicant and all interested persons of that decision together with the reasons (para 20).

[7] In September 1997 the Department of Health and Social Services issued "A Guide to the revised arrangements for considering applications to provide pharmaceutical services". In relation to the receipt of more than one application the Guide provides -

"5.20 Where several applications are received for the same or similar locations or where there is a substantial measure of overlap in the population which would be served by the applications, the application shall normally be considered in the order in which they are received. However, there may be other deciding factors and the PPC should be prepared to consider whether the circumstances of any individual case are such as to lead to the conclusion that it should not apply its normal policy or practice. Care should be taken to ensure that procedures do not encourage 'blocking' applications. The range of services offered should be considered and, for example, if it is clear that one applicant is in possession or control of the relevant premises or likely to gain such control, approval should not normally be granted to one of the other applicants simply because his application was received earlier.

5.21 The PPC is entitled, where it thinks fit, to consider applications together, and in relation to each other, but should not unreasonably delay the consideration of an application on this account. The PPC should inform the applicants, and any persons entitled to make representations, of its intentions."

Similarly in relation to appeals the Guide provides -

"6.12 Appeals should normally be considered in the order in which they are received. However, the NAP should be prepared to consider whether the circumstances of any individual case or such as to lead to the conclusion that it should not apply its normal policy or practice.

6.15 The NAP may, where it thinks fit, consider two or more appeals together and in relation to each other. The NAP should inform the applicants, and any persons entitled to make representations, of its intentions. It is open to the parties to be legally represented at a hearing.”

[8] The Guide acknowledges that the legal position is determined by the Order and the Regulations and not by the Guide. In their approach to procedure the PPC and the NAP have adopted the provisions of the Guide.

The processing of the competing applications.

[9] The applicant applied to be included on the pharmaceutical list on 18 May 2003 and Webb made their application on 19 June 2003. The PPC issued its decision in respect of each application on 27 November 2003. The applicant appealed the refusal of its application by notice of appeal dated 5 December 2003. The applicant appealed the decision to include Webb on the pharmaceutical list by notice of appeal dated 19 December 2003. Both appeals were heard on 4 June 2004 with the Board giving notice of the decisions by letter dated 10 June 2004.

[10] Having received the two applications the PPC met on 10 September 2003 to consider how to deal with two applications. Legal advice had been taken and two options were considered. The first option was to hear the first case in time (the applicant) and make a decision and then hear the second case in time and make a decision, and this was described as the usual procedure. The second option was to hear the first case and then hear the second case and then make a decision on necessity or desirability of securing adequate pharmaceutical services for the defined neighbourhood and then decide which of the applicants, if any, should succeed. The second option was preferred by the PPC on the basis that on such an approach the decisions on the applications “...would be down to the merits of the applicants’ cases and this would be likely to pay regard to the range, depth and quality of services offered, the location/accessibility of premises etc”.

[11] Further to a hearing on 27 November 2003 the PPC gave notification of its decisions on both applications on 4 December 2003. The notification set out the decision to refuse the applicant’s application and the decision to grant Webb’s application. The PPC then set out its approach to the applications, which for present purposes included the following –

In accordance with paragraphs 5.20 and 5.21 of the Guide the PPC determined that the two applications should be considered together and in relation to each other.

The PPC accepted that should the establishment of a pharmacy be considered necessary or desirable it could only grant one of the applications.

The agreed criteria to be used to determine which application to grant were first, the range and quality of services for the local community, and second, location and accessibility, and third, all else being equal, the date of receipt of the application.

The PPC stated that it was satisfied that the establishment of a pharmacy was necessary in order to secure adequate provision of pharmaceutical services in the neighbourhood.

As to the first criterion concerning range and quality of services for the local community it was accepted that there was no distinction between the two applications.

As to the second criterion concerning location and accessibility the PPC favoured Webb's application. The basis for this preference was stated to be that the PPC "...took into account that patient's leaving the GP surgery on foot would have to walk further to a pharmacy located at Greenway and would have to cross a moderately busy road, with commercial traffic. It also considered that a pharmacy within the perimeter fence of the proposed retail development would be closer to the GP's surgery. The committee considered the latter to be a safer and more convenient location."

Accordingly the Webb application was granted and the applicant was refused.

[12] The applicant appealed both decisions and submitted additional information for the purposes of the appeals. That additional information included consideration of the issue of the neighbourhood, an analysis of the PPC decision, an analysis of Webb's submission and a discussion under the heading "The First Past the Post Rule." The first past the post principle is stated as being that in proceedings where more than one applicant applies for the same position/contract and have similar merit then the person that applies first should be awarded the position/contract. It was stated that there was no reason that the NAP should deviate from its normal policy and a request was made that the policy be applied and the applicant's application be considered first in time and priority.

[13] Upon receipt of the notices of appeal Brendan Smith, Chairman of the NAP, sought and obtained legal advice as to the NAP approach to the hearing of the appeals. The NAP met on 4 June 2004 and decided to hear the two appeals together and in relation to one another. When the hearing commenced the Chairman notified the parties of the proposed procedure and no objection was taken.

[14] By the NAP decision confirming the refusal of the applicant's application the NAP found that a pharmacy within the neighbourhood was necessary and desirable (para 20); there were no differences in the quality and

service provided by either applicant (para 21); the applicant's application would be dismissed for the reasons that -

- “(a) There was a discernable advantage of the site at the Green Road development regarding location and accessibility;
- (b) There would be a hazard of commercial traffic travelling along Green Way and would be an accident risk both for people and staff accessing a pharmacy on Greenway”.

For the same reasons the NAP dismissed the applicant's appeal against the grant of Webb's application.

Judicial Review Grounds.

[15] The applicant's grounds for judicial review are that the NAP -

- (1) departed from the normal procedure provided for in the 1997 Guide by failing to give priority to the applicant's application;
- (2) misdirected itself by keeping the precise location of the new doctors' surgery as the determining factor in its decision;
- (3) misdirected itself by failing to make the decisions in the light of the adequacy of provision in the neighbourhood.
- (4) failed to give any or adequate reason for its decision;

The First Past the Post Rule.

[16] The applicant contends that the NAP has taken the wrong approach to the issue of priority. It is accepted by the applicant that the Guide provides for a normal practice of hearing applications in the order in which they are received and that there may be circumstances where the normal practice would not apply and in addition that there may be cases heard together. Further the "first past the post" rule operates to provide that where a number of applications are of equal merit the first in time has priority. Accordingly the applicant contends that the PPC was in error in setting out its criteria, in that it failed to adopt as the first criterion that applications of equal merit should be determined by the first in time having priority. In the applicant's words there is a presumption in favour of the first application and that presumption will be rebutted when the second application establishes greater merit. The PPC determined the applications by reference to the first and second criteria and never considered the issue of priority and in so doing the

applicant contends that the PPC disregarded the first past the post rule. Similarly the NAP adopted the same mistaken approach.

[17] The applicants rely on Re Connors Chemist Limited's Application an unreported decision of Girvan J. The applicant and a consortium were competing for the provision of pharmaceutical services in Newry. The applicant applied first and the PPC dealt with the two applications jointly and refused both applications. The consortium appealed first and the NAP upheld their appeal. The application by Connors for Judicial Review of the NAP decision was dismissed. At that time the relevant regulations were the 1973 Regulations as amended by the 1987 Regulations [The Health and Personal Social Services (General Medical and Pharmaceutical) Regulations (NI) 1973 and the General Medical and Pharmaceutical Services (Amendment No 2) Regulations (NI) 1987] and the 1997 Guide had not been issued. However it was stated to have been the practice of the NAP to hear appeals in the order in which they were lodged. Girvan J found that in making its application the applicant was "deliberately stealing a march on the consortium". Girvan J described the practice of hearing appeals in the order in which they have been lodged as a practice which was "...a perfectly rational one which has much to commend it" (p7). However he noted that the NAP must be prepared to consider whether the circumstances of any individual case are such as to lead to the conclusion that it should not apply its policy or practice and if a party who had lodged an appeal second "...could establish that the first appellant had acted improperly or in breach of some fiduciary duty or for some other reason should not be entitled to rely on the priority conferred by the practice the panel of course should be ready to reconsider its practice."

[18] There was placed before the Court an Executive Summary of the Report of the advisory group and the reform of the NHS (Pharmaceutical Services) Regulations 1992 which operate in England and Wales. The advisory group was set up to consider the government's reform proposals announced on 17 July 2003 and further elaborated in the Department of Health's consultation document published on 29 August 2003. The advisory group considered proposals and possible options which included the abolition of the "first past the post" principle for deciding competing applications of equal merit. The advisory group expressed reservations about the proposed abolition of the principle.

[19] Reference was made to Pharmacy Appeals Committee decisions dated 24 April 2003 refusing applications by Papworth Healthcare Limited and Kingchem Limited each for preliminary consent for inclusion in the pharmaceutical list at Papworth Everard, Cambridgeshire, England. The PAC considered that there was no difference in the pharmaceutical services to be provided by either applicant and no discernable advantage of one proposed site over the other. Having concluded that the pharmaceutical services in the

neighbourhood could not be considered adequate, and that one of the applications should be granted, and not finding grounds to distinguish between the applications on the merits, the PAC concluded that the balance of fairness lay with granting the application that applied first and accordingly awarded the contract to Kingchem Limited.

[20] There are two aspects to the question of priority. First there is the order in which cases are to be heard. Second there is the determination of competing applications “of equal merit” by reference to the first in time. The normal practice in the PPC is to consider applications in the order in which they are received. There may be circumstances in which that normal practice would not apply and the Guide instances blocking applications. The Guide also contemplates applications being considered together and in relation to each other. The present case is an obvious instance where such an approach would be considered and it was so considered and adopted by the PPC in the present case. The constraint provided by the Guide relates to the entitlement of the parties to make representations. More generally the Court will ensure that whatever procedure is adopted satisfies the requirements of procedural fairness. Similarly in relation to appeals the normal practice is that they will be considered in the order in which they are received. That is not necessarily the order in which applications were made. Again the NAP may consider that there are circumstances where it should not apply the normal practice. Again the NAP may consider two or more appeals together and in relation to each other. Once again the present case is an obvious case where the NAP could consider such an approach and did so consider and adopt that approach. Again the constraint in the Guide concerns representations by the parties in relation to procedure and again more generally the Court would consider whether the procedure adopted by the NAP in particular cases complied with the requirements of procedural fairness.

[21] However none of the above procedural matters relates directly to the issue raised by the applicant, which concerns the second aspect of priority and the substance of the first past the post rule. There is no challenge to the decisions of the PPC and the NAP to hear the cases together. It is agreed that the rule applies to cases of equal merit. The issue raised by the applicant concerns whether a PPC or a NAP should begin its deliberations with a presumption in favour of the first application or whether it should begin with an assessment of the merits.

[22] I do not find it of assistance to analyse the issue in terms of rebuttable presumptions. The parties agree that the first past the post rule applies when applications have equal merit. Whenever the decision has been properly made that cases should be heard together I am satisfied that it is appropriate for the PPC and the NAP to determine in the first place whether the competing applications have equal merit. If the competing applications are not assessed as having equal merit then the question of priority for the first in

time does not arise. Accordingly I am satisfied that the approach of the PPC and the NAP in the present cases was correct. Having assessed the applications by reference to the merits criteria the PPC and the NAP each determined that Webb's application had superior merits. That being so the PPC and the NAP were entitled to consider that it was not necessary to accord priority to the application that was first in time. It would be unacceptable if the procedures applied by a tribunal that heard competing applications together entitled it to find that while the second application was superior to the first it was nevertheless obliged to find in favour of the first and reject the superior application. None of the materials referred to by the applicant establishes that the first past the post rule operates in the manner contended for by the applicant. The decision in Re Connors Chemist Limited's Application deals with the order of hearing cases. The English cases provide an example of the first application being accorded priority once it has been established that the competing cases are of equal merit. The Advisory Group Report confirms the operation of the first past the post rule in relation to cases of equal merit.

Adequate provision in the neighbourhood.

[23] The applicant's second and third grounds can be dealt with together. By the second ground the applicant contends that the panel misdirected itself by making the new doctors' surgery the determining factor in its decisions and by the third ground the applicant contends that the panel misdirected itself by failing to decide the appeals in the light of the adequacy of provision in the neighbourhood and not just with regard to the doctors' surgery.

[24] It is clear from the legislation that the relevant question for the PPC and the NAP concerns the adequacy of services "in the neighbourhood." The PPC grounds for preferring Webb's application on the second criterion concerning location and accessibility are set out at paragraph [11] above and the focus is on the doctor's surgery. However attention must concentrate on the approach of the NAP as set out in the decisions, and to the extent that it is appropriate to do so, as supplemented by the affidavit of the Chairman. The decisions of the NAP set out the approach of the PPC by reference to adequacy in the neighbourhood and also referring to the new surgery. The decisions also set out the arguments of the parties and the conclusion that a pharmacy was necessary and desirable by reference to the neighbourhood and also referring to the new surgery. The grounds for preferring Webb's application are set out at paragraph [14] above and do not make direct reference to the neighbourhood or the new surgery. The additional information furnished for the purposes of the appeals expressly addressed the issue of the PPC approach and the need to consider the neighbourhood as a whole. By his affidavit the Chairman states that the NAP regarded the location of each of the proposed premises for the provision of pharmaceutical

services vis a vis the proposed new doctors' surgery as a relevant but not a determining factor and in making its judgment about the desirability of each of the applications it viewed each of the proposed locations from the perspective of the servicing of the needs of the neighbourhood as a whole together with the needs of those who may visit it.

[25] A note of caution must be sounded in relation to any additional statement of reasons set out in the course of Judicial Review proceedings. While accepting that affidavit evidence may elucidate the reasons for a decision Butterfield J stated in *R (Lillycrop) v Secretary of State for the Home Department* [1996] EWHC Admin 281 at paragraph 35 -

“Accordingly we conclude that where evidence is proffered to elucidate, correct or add to the reasons contained in the decision letter a Court should examine the proffered evidence with care, and should only act upon it with caution. In particular, a Court should not substitute the reasons contained in proffered evidence for the reasons advanced in a decision letter. To do so would unquestionably raise the perception, if not the reality, of subsequent rationalisation of a decision that had not been properly considered at the time.”

[26] The Chairman's affidavit elucidates the reasons for the decisions. I have considered the decisions of the NAP. I have considered the affidavit evidence with care and caution. I am satisfied from a consideration of the whole of the decisions of the NAP and of the affidavit of the Chairman that the panel did not reach its decision based on the location of the surgery alone but on the adequacy of the services in the neighbourhood.

Evidential basis for preferring Webb's application.

[27] As it has been found above that the PPC and the NAP were entitled to approach the applications in the manner that they did, and further that they applied the correct approach to neighbourhood, the issue turns to a consideration of whether there was an evidential basis for the conclusion that Webb's application was indeed superior on the merits. The NAP agreed with the PPC that the range and quality of services for the local community provided by the two applications demonstrated no difference in quality. Both the NAP and the PPC favoured Webb's application on the basis of location and accessibility. The NAP described Webb's location and accessibility as having “a discernable advantage” and referred to the “hazard of commercial traffic” and “accident risk” related to the applicant's location and

accessibility. This assessment was based on the information furnished and submissions made by the parties and the site visit by the NAP.

[28] For the purposes of the appeal Ian Foster, a Planning Consultant, submitted additional information on behalf of Webb's. He described the neighbourhood centre where the doctors' surgery would be sited and Webb's proposed pharmacy outlet would be sited as having its own on-site car parking facilities and representing a one-stop shop destination meeting the medical requirements of the neighbourhood as well as the day to day shopping requirements of the general population. It is stated that from the applicant's site to the neighbourhood centre is a distance of approximately 110 meters mostly up hill, which would not be suitable for pedestrians such as the elderly, infirm, young mothers with prams; that it is located on Greenway which is an access road to an industrial estate; that the road carries a significant amount of commercial traffic throughout the day; that the applicant's site has a major auction room located to the rear and shares its pedestrian and vehicle access with other premises; that by reason of the popularity of the auction rooms it is not unusual to find traffic congestion in and around this entrance with cars parked on the footpaths along both sides of the Greenway access roads; that Webb's pharmacy would provide a safe and secure location adjacent to the main road for the provision of services.

[29] Additional information was also furnished by Conor Daly on behalf of the applicants. He objects to the PPC assessment of location and accessibility as being wrong in principle in focusing on convenience related to the doctors' surgery rather than catering for the needs of the entire neighbourhood. It is submitted that location and accessibility assessed by reference to the needs of the whole neighbourhood would not favour Webb's application; a challenge is made to the distance of the applicant's site from the neighbourhood centre; the access roads that might be crossed by those attending the applicant's site; traffic flow on the roads; the absence of a road service requirement for a pedestrian crossing points on Greenway; a direct challenge to Ian Foster's points including pointing out that the auction site is only busy on Thursday evenings after the pharmacy and surgery are closed.

[30] The Chairman states that the supporting evidence for the decisions was to be found in the appeal papers and in the oral representations made in the course of the hearing of the appeals and that each of the members of the NAP had visited the surroundings to each of the proposed premises to enable members to have a first hand knowledge of the area in question and of the locus of the proposed premises and that such knowledge invariably informs the NAP's deliberations on an appeal. The NAP decisions set out the considerations advanced by the parties in relation to the applications including the issue about the requirements of the neighbourhood. I am satisfied that there was an evidential basis on which the NAP was entitled to conclude that Webb's application had superior merit on the second criterion

of location and accessibility and do not find any grounds in Judicial Review to interfere with the conclusion on the evidence reached by the NAP.

Reasons.

[31] More generally the applicant challenges the adequacy of the reasons contained in the NAP decisions. Paragraphs 20(2) and (3) of schedule 4 of the 1997 Regulations require the NAP and the Board to give written notification of the decision “together with reasons therefor.” A statutory requirement that reasons be given demands adequate reasons to permit any party affected to understand the basis of the decision so as to enable an effective challenge to that decision to be formulated. While objecting to the applicant raising the general complaint about reasons, Mr Maguire for the NAP made a number of general points in relation to the sufficiency of reasons as follows.

First, regard must be had for the nature of the relevant statutory scheme. In the present case a lay panel is making a corporate decision and must furnish its reasons within five days of the hearing, so that determines the character of the reasons to be expected.

Second, it is necessary to look at the decision as a whole. The present decisions set out six to seven pages of typed text recording background and submissions and conclusion.

Third, the decision is directed at the parties who are an informed audience and the decision maker is entitled to assume a level of understanding. Fourth, there can be no universal approach to the nature of reasons stated. The context determines what is sufficient from case to case.

Fifth, not all issues are susceptible to a clear statement of reasons. While a factual dispute and a finding on facts may be more easily set out, a value judgment may only be capable of a stated conclusion.

Sixth, not all issues raised in proceedings need to be dealt with in the decision. However all essential matters enabling a party to understand the basis of the decision and assess the character of a challenge should be stated. Seventh, the Court should not set aside decisions based on the insufficiency of reasons unless there was “substantial prejudice” to a party concerned arising from that omission.

Eighth, the decision should identify why one party has succeeded and another party has not succeeded.

[32] The issue of reasons for decisions in a planning context has been considered by the House of Lords in South Buckinghamshire District Council v Porter [2004] 4 All ER 775. Lord Browne reviewed the authorities governing the approach to a reasons challenge in the planning context and at paragraph 36 summarised the position as follows -

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was

and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But some adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlining the grant of permission may impact upon future such applications. Decision letters must be read in a straight-forward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

[32] Each of the elements referred to above is present in the decisions. In the context of the present legislative scheme, the character of the panel, the informed audience, the content of the decisions addressing the essential matters, the findings on those matters and the reasons for those findings, I am satisfied that the decisions contain sufficient reasons. In any event I am not satisfied that the reasons are stated in a manner that occasions any prejudice to the applicant. The applicant does not agree with the reasons but they are nevertheless sufficient for the purposes of the present legislative scheme.

[33] As I find against the applicant on each of the grounds advanced, the application for Judicial Review is dismissed.