Neutral Citation No: [2020] NIQB 65 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **LAR11339** *ICOS No:* **20/27848/01** *Delivered:* **09/11/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY LARNE CHEMISTS LIMITED, DOHERTY'S PHARMACY LIMITED, AND B&D ASSOCIATES LTD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE NATIONAL APPEAL PANEL

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Stewart Beattie QC with Philip McEvoy (instructed by MKB Law) for the Applicants
Gordon Anthony (instructed by the Departmental Solicitor) for the Respondent (The National Appeal Panel)
David Scoffield QC with Paul Boyle (instructed by Keystone Law) for the Notice Party (Galar Ireland Ltd)

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LARKIN J

Introduction

[1] This is an application for leave to apply for judicial review of a decision of the National Appeal Panel of December 19 2019 refusing an appeal by Doherty's Pharmacy Limited and others against the decision of the Health and Social Care Board of February 14 2019 approving an application by Galar Ireland Ltd for relocation from premises at 166 Andersonstown Road, Belfast to premises at 156-160 Andersonstown Road as a "minor relocation" as defined by Regulation 6(6) of the Pharmaceutical Services Regulations (Northern Ireland) 1997.

[2] The applicants are limited companies carrying on business as pharmacies, as is the notice party, Galar Ireland Ltd (which trades as Coopers Pharmacy). These parties and the respondent, the National Appeal Panel have agreed, and the Senior Judicial Review judge directed, that this leave hearing is to be treated also, so far as necessary, as the substantive judicial review hearing. Although no express provision exists in the Rules of the Court of Judicature for such a valuably pragmatic proceeding (often called a 'rolled-up hearing') Order 53 rule 3(9) provides that "The Court on considering an application for leave may make an order granting relief by way of an order of mandamus, certiorari or prohibition where it considers that in the

special circumstances of the case such an order should be made forthwith." In a rolled-up hearing when an applicant has satisfied the Court that leave should be granted, it will be necessary for the Court to make provision either dispensing with service of a notice of motion (otherwise required by Order 53 rule 5(1)) or abridging time for service of the notice of motion (see Order 53 rule 5(4)).

[3] No fewer than six affidavits, together with exhibits, constituted the evidence before the Court. The Panel did not file an affidavit and, very properly, let its decision speak for itself, assisted by the defence of counsel. While it is, of course, open to any Tribunal to clarify an aspect of its decision, this can give rise to the concerns identified by Butterfield J in *R (Lillycrop) v Secretary of State for the Home Department* [1996] EWHC Admin 281 when he said 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."*

The Grounds of Challenge

[4] For the applicants it is argued that the Panel decision should be quashed and/or declared to be devoid of legal effect and unlawful on seven broad grounds. These are (1) that the decision misapplied the law, (2) that the decision is vitiated by the Panel's regard to what are described as 'immaterial considerations', (3) that the decision is vitiated by the Panel's failure to have regard to what are described as 'material considerations', (4) that the Panel decision is vitiated by reliance on a material error of fact, (5) that the reasons given by the Panel were so inadequate as to be unfair, (6) that there was an absence of legally necessary inquiry, and (7) that the decision arrived at by the Panel was irrational.

[5] Of these grounds it is, I hope, no discourtesy to say that three of them are far from reaching the, admittedly modest, hurdle of arguability. The Panel was assisted by two counsel both of whom are highly experienced in the field of pharmaceutical appeals. That forms part of the necessary context for the decision of the Panel, it being unlikely that, with such assistance, the Panel would have a substantially incomplete presentation of relevant issues.

[6] An absent or non-existent business plan (the foundation for the claim of inadequate inquiry (paragraph 5 (vi) of the Order 53 statement) was supremely irrelevant to the issues that had to be determined by the Panel and the Panel are to

be commended, rather than criticised, for not wasting time on it. Assuming rather than concluding that the Panel erred in taking the rent for 16 years of the 17 year term as £27,000 rather than as £54,000, (the error of fact complained of in paragraph 5 (iv) of the Order 53 statement) this was an issue so utterly peripheral to the Panel's task that error of the kind alleged is legally irrelevant. As for the claim of irrationality, while we are reminded that this is not synonymous with a claim that a decision-maker has, even temporarily, lost his, her or their reason, the threshold of arguability for such a claim is high and Mr Beattie QC did not submit with any brio that he came close to crossing it.

[7] I refuse leave, therefore, to apply for judicial review on the grounds contained in subparagraphs (iv), (vi) and (vii) of paragraph 5 in the Order 53 statement.

[8] Subparagraphs (ii) and (iii) of paragraph 5 in the Order 53 statement set out a good deal of matter which was claimed by the applicant to be either (as respects (ii)) immaterial considerations wrongly taken into account by the Panel or (as respects (iii)) material considerations wrongly left out of account by the Panel. In the course of submissions Mr Beattie QC was disposed to accept that the value of these grounds was less as precise challenges to the Panel decision but that they should be seen rather more as forming context for the claims that the Panel had erred in law and had failed to give adequate reasons for its decision. Mr Scoffield QC submitted both orally and in writing, that, given the decision in *Re SOS (NI) Limited's Application* [2003] NIJB 252, and their nature as barely concealed disparagements of the merits of the Panel's decision, these grounds were unarguable. I agree, and refuse leave to apply for them accordingly.

[9] Leave is granted for the grounds at paragraph 5(i) (illegality) and (v) (inadequate reasons) of the Order 53 statement. I dispense with service of a notice of motion.

The Arguments: a summary

[10] For the applicants, Mr Beattie QC both orally and in writing argued that the Panel had misinterpreted or misapplied the law in a number of respects. Although not developed in his skeleton argument, he advanced a series of submissions criticising the reasoning of the Panel.

[11] This had the effect that neither Mr Anthony (for the Panel) nor Mr Scoffield QC (for the notice party) had been able to defend the adequacy of the Panel's reasons in written submissions. Both counsel did, nevertheless, develop helpful oral submissions in support of the Panel's reasoning.

[12] Specific submissions of counsel are explored in the consideration below. I wish to pay tribute to the patience with which counsel responded to judicial questioning and to the great assistance they all afforded me.

The Statutory Framework

[13] Part VI of the Health and Personal Social Services (Northern Ireland) Order 1972 deals with pharmaceutical services. Pharmaceutical services are provided either in accordance with arrangements under Article 63 of that Order or in accordance with a direction under Article 63A.

[14] At the heart of this application are the Pharmaceutical Services Regulations (Northern Ireland) 1997. These regulations set out in their first Schedule the several enabling provisions under which they were made.

[15] By Regulation 6 (1) of the Pharmaceutical Services Regulations (Northern Ireland) 1997 the Health and Social Care Board is to prepare a list of the names of persons (other than doctors and dentists) "who undertake to provide pharmaceutical services and of the addresses of the premises … from which these persons undertake to provide such services." This list is known as the pharmaceutical list and a person who wishes to be included on it or to open additional premises or to move premises or to provide pharmaceutical services other than those included on the pharmaceutical list must, by Regulation 6(2), apply to the Board using the appropriate form set out in the third schedule to the Regulations.

[16] Not the least objection to the drafting style of the Pharmaceutical Services Regulations (Northern Ireland) 1997 is the use of a form in a Schedule, rather than a regulation, to impose conditions on applications for inclusion on the pharmaceutical list. A chemist who seeks a "minor relocation" must apply using Form A (MR) in Part I of Schedule 3. This requires "evidence of title, lease or equitable interest in the proposed premises" to be submitted along with a scale map showing the exact location. The form also provides that no application can be granted other than for premises registered by the Pharmaceutical Society of Northern Ireland under the Medicines Act 1968.

[17] An application for a minor relocation is governed by Regulation 6(4) Regulation 6(5), and Regulation 6(6). Regulation 6(5) (designed to prevent any interruption in the supply of pharmaceutical services other than one allowed by the Board) is not relevant to this application. Regulation 6(4) and Regulation 6(6) are set out below:

> *"(4) Where an application is made and-*
>
> *(a) the applicant intends to relocate to new premises, within the neighbourhood in which he provides pharmaceutical services, from the premises already listed in relation to him, and to provide from those new premises the same pharmaceutical services which he is listed as providing from his existing premises; and*
>
> *(b) the Board is fully satisfied that the relocation is a minor relocation; and*

(c) the condition specified in paragraph (5) is fulfilled,

the Board shall grant the application and shall notify its decision in accordance with paragraph 3 (1) of Schedule 4.

(6) In this regulation the reference to a minor relocation is to one where there will be no significant change in the neighbourhood population in respect of which pharmaceutical services are provided by the applicant and other circumstances are such that there will be no appreciable effect on the pharmaceutical services provided by the applicant or any other person whose name is included in the pharmaceutical list and who currently provides pharmaceutical services in the neighbourhood of the premises named in the application."

[18] Although Regulation 6(6) adds, unhelpfully for its straightforward application, the concept of 'significant change in the neighbourhood population' to the concept of 'neighbourhood' in Regulation 6(4)(a), the issue of neighbourhood does not divide the parties.

[19] In contrast, the parties are divided on the issue of pharmaceutical services. As with the concept of neighbourhood, there is a pairing with respect to the concept of pharmaceutical services in Regulation 6(4)(a) and Regulation 6(6). But, a clear (and workable) distinction appears to exist between them.

[20] By Regulation 6(4)(a) a pharmacist seeking a minor relocation must intend to offer the same pharmaceutical services at the 'new' premises as he is listed as providing at the 'old'. He cannot intend to offer pharmaceutical services at the 'new' premises other than those offered at the 'old'. Irrespective of how desirable in policy terms or how conducive to community health it might be that he offer more pharmaceutical services at the 'new' premises, evincing an intention to offer more, and, therefore, different, pharmaceutical services in his application will be fatal to that application.

[21] An application for a minor relocation is determined by the Health and Social Care Board. Paragraph 4 of Schedule 4 to the 1997 Regulations provides for a right of appeal to those persons coming within paragraph 1(1)(c) or 1(2)(c) of that Schedule. The appeal lies to the National Appeal Panel constituted in accordance with paragraphs 14 to 18 of Schedule 4. The Board made its decision allowing the notice party's application on February 14 2019 and the decision was communicated to the notice party and the applicants on February 25 2019. The applicants' appeals were made by letters dated March 15 2019 from their solicitors.

[22] Regulation 6(4)(b) and 6(6) require, relevantly for this application, that the Board or, on appeal, the Panel be 'fully satisfied' that the proposed relocation will have no appreciable effect on the pharmaceutical services provided by the applicant or the pharmaceutical services provided by other chemists in the neighbourhood.

Even if an applicant for a minor relocation intends to provide the same pharmaceutical services (and therefore passes the 'same pharmaceutical services' test in Regulation 6(4)(a)) the Board or Panel may not be fully satisfied that there will not be an appreciable effect either on the applicant's pharmaceutical services or the pharmaceutical services of another chemist.

Evidence and submissions

Issue One: 'the same pharmaceutical services'

[23] While the premises at 166 Andersonstown Road were open for the supply of pharmaceutical services from Monday to Friday, it was proposed that the premises at 156-160 Andersonstown Road open additionally on Saturday. It was agreed by counsel that, setting to one side, the issue of appreciable effect under Regulation 6(6), providing the same service on a further or other day did not constitute a difference in the supply of pharmaceutical services such as would fail the condition in Regulation 6(4)(a). I agree.

[24] Accompanying Galar Ireland Ltd's Minor Relocation Application of November 12 2018 was a series of appendices. The first of these was entitled 'Rationale for Minor Relocation'. This is a short document consisting of two paragraphs, the first of which is devolved to 'current premises' and the second to 'proposed new premises'. By any reckoning these two paragraphs offer an argument to the Board (and, on appeal, the Panel) that the proposed relocation will result in an improvement to (putting the matter in a general way) the services that Galar will offer. The premises at 166 Andersonstown Road "are very small and cramped. There is no consultation room. Private communication with patients is very difficult to achieve and involves inviting patients into a small dispensary area and asking other staff to move into the general retail area. … This prevents full provision of pharmacy services including Medicine Use Reviews. Access within the pharmacy is very difficult for disabled patients or staff."

[25] In contrast, the proposed new premises at 156-160 Andersonstown Road will include "Ease of access into the premises by way of a gentle gradient ramp onto a level surface before entering the premises … Spacious layout of premises internally to allow for easy access of all patients and staff. There will be designated seating areas to allow for a comfortable experience while awaiting pharmacy services … Provision of two consultation rooms, one of which is large enough to allow for an examination couch. … A full range of pharmaceutical services will therefore be available in a private and confidential setting, including Medicine Use Reviews. These rooms will be equipped to give access to PMR and other IT systems."

[26] During the course of argument it was accepted by Mr Anthony that if Medicines Use Reviews were a pharmaceutical service then, on the evidence before the Panel, the notice party was intending to offer a different pharmaceutical service at 156-160 Andersonstown Road than those offered at 166 Andersonstown Road and that the notice party would fail the condition in Regulation 6(4)(a).

[27] Mr Scoffield QC deployed two lines of attack on this issue. First, he said it was not clear that the Medicines Use Reviews were, in fact, a pharmaceutical service at all. Second, he placed emphasis on the words 'pharmaceutical services which he is listed as providing from his existing premises.' He applied for leave on the second day of hearing to introduce evidence that, so ran his instructions, the notice party had carried out Medicines Use Reviews at its old premises, and must have been listed as providing such reviews.

[28] I refused Mr Scoffield's application. It was not for the Court on an application for judicial review to permit a party to retrospectively improve – assuming that it could improve – the evidence that was before the Panel. The notice party had in its rationale appended to its application form, and intended to form part of it (see section 2(d) of Form A (MR)) made it clear to the Board and, on appeal to the Panel, that it could not provide Medicines Use Reviews at 166 Andersonstown Road, but that it intended to provide them at 156-160. While section 2(f) of the form contained the pre-printed text, left unamended by the notice party, "There will be no change in the pharmaceutical services provided …" this was plainly inaccurate, and specifically refuted by the notice party itself, unless, of course, Medicines Use Reviews were not a pharmaceutical service.

[29] There seems little doubt but that the phrase 'pharmaceutical service' has been used by chemists and others for some time with some imprecision, but the statutory expression, 'pharmaceutical services' in Article 63(1) of the 1972 Order means services provided in accordance with Board arrangements (the arrangements themselves to be "in accordance with regulations") and these services are divided into three categories. These are (1) the provision of drugs, medicines or listed appliances mentioned in article 63, (2) such other services as may be prescribed by regulations or (3) "additional pharmaceutical services" provided in accordance with a direction from the Department of Health under article 63A of the 1972 Order.

[30] The status of Medicines Use Reviews was placed beyond argument when, on the second day of hearing, Mr Anthony produced *The Additional Pharmaceutical Services (Medicines Use Review) Directions (Northern Ireland) 2013* which were made by the Department under Articles 63A and 63B of the 1972 Order on April 15 2013. By paragraph 4 of these Directions the Board is authorised to arrange for the provision of a Medicines Use Review service as an additional pharmaceutical service. Medicines Use Reviews are, therefore, included in the definition of pharmaceutical services in the 1972 Order.

[31] It was accepted by Mr Anthony that, given the 2013 Directions, and on the evidence before the Panel provided by the notice party, the Panel was bound to have found that a pharmaceutical service (Medicines Use Reviews) was intended to be provided at 156-160 Andersonstown Road that was not provided at 166 Andersonstown Road. He accepted that what he described (rightly, in my view) as the 'condition precedent' in Regulation 6(4)(a) that the same pharmaceutical

services as are listed as provided at the present location are intended to be provided at the proposed new location ought not to have been regarded as satisfied by the Board on the evidence before it.

[32] Although the possibility is to be acknowledged that the notice party was listed as providing Medicines Use Reviews at 166 Andersonstown Road immediately before making its application, there was no evidence of the content of any pharmaceutical service listing before the Panel. The notice party would have been aware that the issue of different pharmaceutical services was squarely before the Panel. This appears from paragraph 5 of the decision in which these words appear: "they [the appellants before the Panel] rely on Cooper's addition to the range of services to be provided at the new pharmacy, the plan to provide consultation rooms and their use for Medicine Use Reviews, a service not provided by Cooper's at 166, and suggest that, of itself this plan evidences an intention to act in breach of the Regulations." The only inference reasonably to be drawn by the Panel on the evidence before it was that the notice party was not listed as providing Medicines Use Reviews immediately before making its application to relocate to 156-160 Andersonstown Road.

[33] In the light of Mr Anthony's acceptance, which I consider properly made, I allow the application for judicial review on the ground that the Panel erred in law by not determining that Regulation 6(4)(a) was not satisfied by the notice party.

Issue Two: Impact on the pharmaceutical services of the notice party or other pharmacists in the neighbourhood.

[34] In paragraph 8, the final paragraph, of its decision the Panel offered some general observations on the appreciable effect test, as follows:

> *"The Panel recognised that there could not be any hard or measurable evidence of appreciable effect, as it related to what might happen or what was likely to happen in the future, and it relied to a large extent therefore on the professional judgment of the Panel's pharmacists on the issue. Without becoming overly technical or legalistic as to the precise significance to be given to the term 'appreciable effect' in the Regulations and how to apply it to the facts, the Panel sought to rely on a common sense approach. An effect would be 'appreciable' if it made a noticeable difference to the situation or to the facts on the ground."*

[35] Although Mr Beattie QC was satirical at the expense of the words 'overly technical or legalistic' I consider that he did scant justice to the healthy instinct of the Panel: if the Panel acts legally and fairly it need not do more. I consider that the Panel's suggested equivalence between 'appreciable' and 'noticeable' is helpful. I

would add that 'appreciable' connotes something that is clearly noticeable and I propose to regard x as appreciable if x is clearly noticeable.

[36] What is x in this case? In this case x is effect on pharmaceutical services. The Panel, in any appeal before it on a minor relocation application, must ask itself if it is fully satisfied that there will be no noticeable effect on the pharmaceutical services of the person applying for the minor relocation or on those of any other chemist in the relevant neighbourhood. It is only if the Panel can properly answer that question affirmatively on the evidence before it, that it can allow a minor relocation application.

[37] The first sentence in paragraph 8 of the Panel's decision is unhelpful. The Panel must be fully satisfied that an appreciable effect on pharmaceutical services will not occur. The events of the future are, of course, difficult to predict but future uncertainty will tend to tell against a minor relocation application rather than favour it, since uncertainty of impact ought to make a Panel slow to determine that appreciable effect on relevant services will not occur.

[38] Unhelpful too, are the references to "*the situation or to the facts on the ground.*" Such references tend to induce a sense in the reader that the decision-maker is not focussed on the test that must be applied. There is a judgment to be made but it is not a judgment about 'the situation' or about 'the facts on the ground' – it is much less wide-ranging. The judgment to be made is about the effect on (1) the pharmaceutical services of the person making the application for a minor relocation and (2) the pharmaceutical services of other chemists in the neighbourhood.

[39] Paragraph 7 of the Panel decision reads, in part, as follows:

> "*The Panel accepted the general point raised by counsel for the applicant, citing Weatherup J from the judicial review case of Mary Lavery: 'in my judgment it is clear that the whole scheme created by the Regulations is directed at protecting the interests of those who might wish to avail of pharmaceutical services.'* "

[40] Regrettably, I conclude this is an incomplete account of what the 1997 Regulations achieve. It may well be that the words quoted are a fair summary of the policy intention behind them but the words used in Regulation 6(4) and (5) and Regulation 6(9) have the result that the range of considerations in the decision-making by the Board and the National Appeal Panel is not confined to the interests of those "who might wish to avail of", indeed, need to avail of, pharmaceutical services.

[41] The dictum quoted by the Panel from *Re Lavery's Application* [2008] NIJB 319 do, indeed, appear in the report of that case at paragraph [10] but they are quoted (and adopted) by Weatherup J (as he then was) from the decision of Russell LJ in *R (Suri) v Yorkshire Regional Health Authority* (1995) 30 BMLR 78. While *Suri* was a

decision on a minor relocation application (under Regulation 4(3) of the National Health Service (Pharmaceutical Services) Regulations 1992), *Re Lavery's Application* did not concern a minor relocation (under Regulation 6(4) of the 1997 Regulations) but an application under Regulation 6(9).

[42] Russell LJ drew attention to the distinction between a minor relocation application under Regulation 4 (3) of the National Health Service (Pharmaceutical Services) Regulations 1992 and an application under Regulation 4(4) of those Regulations (analogous to Regulation 6 (9) of the 1997 Regulations), holding that "The criteria to be established for a successful application under reg 4(4) are much broader than the four criteria necessary to a successful application under reg 4(3)." (*R (Suri) v Yorkshire Regional Health Authority* (1995) 30 BMLR 78 at 83).

[43] There was not in the 1992 Regulations discussed in *Suri* any equivalent of the requirement in Regulation 6 (6) "that there will be no appreciable effect on the pharmaceutical services provided by the applicant or any other person whose name is included in the pharmaceutical list and who currently provides pharmaceutical services in the neighbourhood of the premises named in the application." The only reported decision dealing with a provision analogous, indeed, materially identical to Regulation 6(6) of the 1997 Regulations is *Boots The Chemists v Ayrshire and Arran Primary Care NHS Trust* [2001] SC 479.

[44] This definition (for, while clumsily expressed, this is what it is) of minor relocation in Regulation 6(6) combines with Regulation 6(4)(b) to impose on the Board (and, on appeal, the Panel) the task of being 'fully satisfied' that an application will not (1) result in significant change in the neighbourhood population – happily not an issue in this application – and (2) being 'fully satisfied' that there will be no appreciable effect on the pharmaceutical services provided either by the applicant or by other chemists in the neighbourhood of the applied-for premises. The contrast between 'no significant change' and 'no appreciable change' is striking. The requirement that the Board be 'fully satisfied' that there be no 'appreciable effect' on the pharmaceutical services provided by an applicant or chemist in the relevant neighbourhood is a low trip wire or, alternatively, a high hurdle for a minor relocation application.

[45] As this case all-too-vividly exemplifies, pharmacists are, quite as much as bookmakers or publicans, engaged in commercial competition with each other and use the present regulatory framework contained in the 1997 Regulations as an arena for that competition. While the 1997 Regulations lend themselves too readily, in my view, to this commercial competition, the purely commercial progress or regress of an individual pharmacy or number of pharmacies is, in itself, irrelevant to the determination of whether or not an application put forward as a minor relocation is to be properly considered a minor relocation.

[46] What must, relevantly for this application, be determined by the Board and, on appeal, the Panel, is whether to the 'full' satisfaction of the decision-maker the

proposed relocation will have any appreciable effect either on the *pharmaceutical services* provided by the applicant or the *pharmaceutical services* provided by other chemists in the same neighbourhood.

[47] Mr Scoffield QC distinguished between the environment in which pharmaceutical services were provided and the actual provision of those services. He accepted that at perhaps an almost unimaginably extreme level the environment might indirectly effect pharmaceutical services but was conceptually distinct from them. Mr Beattie QC sought, while accepting that environment and services are distinct, to locate the possibility of environmental effect on services at a much lower level than did Mr Scoffield.

[48] If Pharmacy A proposed at its new premises to provide a dazzling range of fragrances which would be certain to have a significant effect on the sales of fragrances at Pharmacy B, the loss of turnover by B would not be directly relevant to the determination of an application for minor relocation since the commercial sale of *parfumerie* is not a pharmaceutical service. If, however, there was a claim that this loss of turnover would, for example, lead to a reduction in the dispensing hours of B then the decision-maker would have to be fully satisfied that this reduction in dispensing hours did not constitute an appreciable effect on the pharmaceutical services of B.

[49] From the perspective of sound policy analysis there is much good sense in the Panel's findings at paragraph 6(r) of its decision:

> *"The Panel found that a consultation room was (or should be) a basic facility in a pharmacy to allow for private consultations between pharmacist and patient. Likewise it found that Medicine Use Reviews were a positive service which really required a consultation room. It did not make sense to oppose such facilities or services to patients on the grounds that in a smaller and cramped pharmacy premises the pharmacist did not or could not offer such services."*

[50] This finding ignores that, perhaps regrettably, there is obvious commercial good sense in pharmacy A opposing the improvements in neighbouring pharmacy B that can be secured by a change in location. The passage quoted above from paragraph 6(r) of the Panel's decision appears to contain an acknowledgement that there will, quite apart from Medicines Use Reviews, be an improvement in the quality of pharmaceutical services to be provided at 156-160 Andersonstown Road over that provided at 166 Andersonstown Road.

[51] Inevitably in pharmaceutical appeals there is, as there was here, much discussion about the impact on the number of scripts dispensed, whether that will be affected by the application, positively or negatively or not at all. But effect on pharmaceutical services is not to be measured only in this way. If the effect of a minor relocation is that a pharmacist will provide a better version of the same

service, then it will be for the Panel to be satisfied that the improvement does not appreciably effect the pharmaceutical services of the person applying or any other pharmacist in the neighbourhood.

[52] When the passage from 6(r) quoted above is combined with passages from 6(q) ("there is no provision in the Regulations which attempts to prevent pharmacists from trying to improve their services to patients and customers") and 6(s) ("It is likewise clear that Coopers are committed to serious investment in their pharmacies in the interests, among other things, of advancing the standards of care for patients and enhancing patient choice.") a conclusion that the Panel failed to consider the significance for Regulation 6(4)(b) and (6) of the acknowledged improvements in the pharmaceutical services to be offered at 156-160 Andersonstown Road and erred in law accordingly, is inevitable. I allow the application for judicial review on the ground that the Panel erred in law in its assessment of the effects of the application on the pharmaceutical services provided by the notice party.

[53] Mr Beattie QC argued that there were appreciable effects on the pharmaceutical services offered by other pharmacists in the same neighbourhood, notably Mr Doherty and that the Panel had erred in law in not so finding. Both Mr Scoffield QC and Mr Anthony argued that this aspect of the applicants' case exemplified its true nature as a challenge to the merits of the Panel decision and that the Panel decision on this issue was not open to effective challenge.

[54] It seems to me that on this there is an overlap with the reasons challenge made by the applicants. At the core of Mr Doherty's evidence (and Mr Doherty was to the forefront for the appellants on this issue before the Panel) was a claim that the nature of the 156-160 Andersonstown Road project is such as to require that project, if it is to succeed, to have an adverse effect on the pharmaceutical services of others. This claim was denied by the notice party which argued that the retail element of the new business would subsidise the pharmaceutical services. It does not seem to me that I can be satisfied that the Panel erred in law on this issue, but the issue is not dealt with by the Panel in a satisfactory way and I will address this issue as an aspect of the reasons complaint.

Issue Three: Reasons

[55] On the issue of reasons the battle-lines were predictably drawn, with Mr Scoffield QC and Mr Anthony defending the reasons of the Panel and Mr Beattie QC attacking them. Predictably too, the tactics were, on one side, to invite me to read the Panel's decision as a whole and benignly, and, on the other, to offer selected passages doused in forensic acidity for my disapproval.

[56] There is an obligation in paragraph 20(2) and (3) of Schedule 4 to the 1997 Regulations that the Panel to supply reasons for its decision. This is an obligation planted in the demands of legality and fairness. While the requirement to supply reasons is often a prop for an unrealistic forensic dissection of decisions that – in common with many legal and other texts – might be open to improvement, at its core the requirement, when honoured, enables a reader to see that the right questions have been answered in the right way. There is an analogous duty on the Board by paragraphs 3 (1) and (2) of Schedule 4. Guidance – now regarded as a classic formulation – comes from the opinion of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No 2)* [2004] 1 WLR 1953 at 1964 [35] – [36]. There was, unsurprisingly, unanimity among counsel as to the value of Lord Brown's guidance.

[57] Although in a once famous legal anecdote, a newly appointed Colonial judge of doubtful learning was advised never to give reasons for his decisions (on the ground that while his instincts were sound his capacity to explain the law was not) a requirement to give reasons, when honoured, guides and supports good substantive decision-making. Good reasons can sometimes be given for bad decisions but bad reasons are very seldom given for good decisions. And when the reasons are bad the decision may not survive what McCloskey LJ has described as "an audit of legality" (see *Re Board of Governors of Loreto Grammar School's Application* [2011] NIQB 36 at [3]).

[58] I find that in the following respects the Panel has failed to discharge its duty to give adequate reasons.

1. Having noted in paragraph 5 of its decision the claim that a different service (Medicines Use Reviews) was intended to be provided from 156-160 Andersonstown Road, the Panel simply says (in 6(c)) "The [notice party] intended to provide the same range of services." The evidence (as the Panel now accepts through its counsel) was to the contrary effect. At the very least, (and quite separately from its handling of issue one) it ought to have set out reasons that indicated its proper understanding of the point made to it, and the proper application of that understanding to the evidence before it.

2. On the question of whether the Medicines Use Reviews at 156-160 Andersonstown Road constituted an appreciable effect on the services of the notice party, the Panel restricted (as appears from 6(c) of its decision) consideration to the potential impact on income. This might not be a material error as respects the effect on the pharmaceutical services offered by others but the reasoning in 6(c) pullulates with potential error about the proper approach to the effect on the notice party's own pharmaceutical services. The disabling inadequacy of 6(c) is not saved by the general statements of the statutory test in paragraph 8.

3. Mr Doherty in his written statement to the Panel concluded by saying "The proposed application constitutes a major development of a substantial building. It is inconceivable how a project of this nature could be financially viable without having an appreciable effect on the business and services carried on from our pharmacy and others in the neighbourhood." Bearing in mind that, before allowing an application for minor relocation, a Panel should be fully satisfied that there will be no appreciable effect on pharmaceutical services in the neighbourhood, the Panel's treatment of Mr Doherty's evidence fails to deal adequately with its central contention. Mr Doherty's claim is that the nature of the 156-160 Andersonstown Road project will require it to have an adverse effect on the pharmaceutical services of others. This claim was denied by the notice party which argued that the retail element of the new business would subsidise the pharmaceutical services. These rival claims are not subjected to adequately articulated analysis by the Panel.

[59] Even if it were not for the errors of law, with which the above instances of inadequate reasoning overlap, I would have allowed, and do allow, the application for judicial review on the ground of a failure to discharge the duty to give reasons.

Relief: the exercise of discretion

[60] There was an exchange of correspondence between solicitors for the applicants and the notice party on the issue of interim relief. A theme of this correspondence is that Galar Ireland Ltd is "entirely free to take its own course and to make its own assessment of legal risk in so doing." (Keystone letter of May 22 2020, paragraph 12). By way of pre-hearing compromise, the notice party gave an undertaking that it would retain and not dispose of or otherwise deal with the premises at 166 Andersonstown Road until the conclusion of the judicial review proceedings. It being understood that the notice party was free to place the property on the market. For their part, the applicants gave a cross-undertaking to pay any damage that the court found to be caused to the notice party by its undertaking.

[61] On behalf of the notice party, in his affidavit of August 10 2020 Mr Cooper avers that he is "an experienced businessman" (paragraph 16). In Mr Cooper's estimation the notice party has spent "some £250,000 on refit costs (not including professional fees which are additional to that)." (paragraph 40) He also avers that the new premises confer a 'public benefit' and a safer experience for patients and pharmacy staff (paragraphs 47 to 51).

[62] Mr Scoffield QC, with characteristic skill, urged the Court not to grant any relief that would have the effect of disrupting the supply of pharmaceutical services at 155-60 Andersonstown Road. He relied both on prejudice to the notice party and on the public interest in avoiding such interruption particularly in the present pandemic. He also drew attention to the notice party having previously offered Medicine Use Reviews at 166 Andersonstown Road; alternatively he indicated that

the notice party was prepared to give an undertaking that he would not now offer such reviews at 155-160 Andersonstown Road. He submitted that a temporary stay on any order that the Court might make would avoid such disruption.

[63] Mr Beattie QC suggested that relief such as certiorari quashing the Panel decision and a declaration that Galar Ireland Ltd, trading as Coopers Pharmacy, is not on the pharmaceutical list as respects premises at 156-60 Andersonstown Road Belfast will not prevent the notice party carrying on its purely retail business. He argued that the risk of the disruption attendant on such relief being ordered was freely assumed by the notice party and that the public interest considerations are not of such weight as to prevent relief being ordered. He drew attention to the fifteenth clause in the notice party's lease of 156-160 Andersonstown Road permitting it to break the lease if the minor relocation application is unsuccessful.

[64] I have concluded that the notice party should not benefit from an unlawful decision in its favour. The notice party freely assumed the risk of opening premises for the supply of pharmaceutical services when it was known that the decision of the Panel was under challenge. The notice party has, no doubt, wisely tempered that risk through its undertaking to retain the premises at 166 Andersonstown Road, and by making the provision contained in the fifteenth clause of its lease of 156-160 Andersonstown Road.

[65] That the notice party will be able to supply core pharmaceutical services from premises that remain in his hands diminishes the public interest considerations that might otherwise have great weight in the present pandemic. I do not consider that a consequence of effective relief, without a stay, will imperil the adequate supply of pharmaceutical services generally in the Andersonstown neighbourhood.

[66] There is an obvious public interest in the principle of legality being effective. There is also an obvious public interest in the outcome of litigation being clear. It would offend these aspects of the public interest if the notice party were able to continue to offer pharmaceutical services on the basis of a Panel decision which was incapable in law of supplying such a basis.

[67] Clarity and finality require that, in addition to an order of certiorari quashing the Panel decision and a declaration that the notice party is not on the pharmaceutical list as respects the 'new' premises, there will need to be provision for the disposal of the appeal that will then remain formally undecided. If the only successful grounds of challenge were the errors in reasoning and in the approach to 'appreciable effect' in Regulation 6 (6) of the 1997 Regulations, the proper course would be to remit the matter to the Panel for redetermination. But the evidence before the Panel was, as Mr Anthony accepts, that the notice party intended to provide additional, and, therefore, different pharmaceutical services in the form of Medicines Use Reviews at 155-160 Andersonstown Road from those offered at 166 Andersonstown Road. What services were 'listed' as being provided from 166 Andersonstown Road was not a matter of evidence before the Panel and on the

evidence before it the "condition precedent" (as Mr Anthony describes it) in Regulation 6 (4) (a) of the 1997 Regulations was not met. That ought to have meant – quite apart from any other ground – that the appeal before the Panel be allowed.

[68] There being no criticism of the hearing of the appeal or any suggestion of unfairness in the reception of evidence, the Panel should be directed to determine the appeal before it on the evidence already before it. On that evidence, on the issue of 'the same pharmaceutical services', the appeal must succeed. The Order will, therefore, make provision directing the Panel to allow the appeal in respect of 156-160 Andersonstown Road.

Order

[69] There will be (1) an order of certiorari to bring up and quash the decision of the National Appeal Panel of December 19 2019; (2) a declaration that the notice party Galar Ireland Limited, trading as Cooper's Pharmacy Riverdale is not included on the pharmaceutical list in respect of 156-160 Andersonstown Road; (3) an order directing the National Appeal Panel to allow the appeal made to it in respect of premises at 155-160 Andersonstown Road in the light of the evidence before it that Galar Ireland Ltd, trading as Cooper's Pharmacy Riverdale, intends to offer different pharmaceutical services at 156-160 Andersonstown Road, namely Medicines Use Reviews, from those which it offered from 166 Andersonstown Road at the time of its minor relocation application. The National Appeal Panel shall cite this Order as its reason for allowing the appeal.