

**Neutral Citation No: [2018] NIQB 72**

**Ref: KEE10713**

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

**Delivered: 20/09/2018**

**IN THE HIGH OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**

**IN THE MATTER OF AN APPLICATION BY PAUL TALLON LIMITED  
AND**

**IN THE MATTER OF A DECISION MADE BY THE REGIONAL HEALTH AND  
SOCIAL CARE BOARD**

**KEEGAN J**

**Introduction**

[1] This case concerns a decision made on 3 August 2017 to allow Omapharm Limited ("Omapharm") admission to the statutory Pharmaceutical List by virtue of which it would be able to operate a pharmacy on the site of the Omagh Hospital and Patient Care Complex which is a new facility situated approximately 2 miles out of Omagh town. All of the general practitioners in Omagh have relocated to this site. Omapharm was then created by 7 of the 8 existing pharmacists in Omagh town. This was with a view to provide pharmaceutical services at the new GP facility. The other pharmacy in Omagh is Boots Chemists Limited ("Boots") who objected to the Omapharm application. The author of the impugned decision and the respondent to this challenge is the Regional Health and Social Care Board ("the Board").

[2] This case began as an emergency judicial review application dated 11 May 2018. The urgency was due to the fact that an appeal from the decision was brought by Boots. The appeal hearing was due to take place on 16 May 2018. However, this was adjourned pending the outcome of this judicial review. On 14 May 2018 McCloskey J granted leave in a written ruling reported at [2018] NIQB 47.

[3] In this hearing the applicant was represented by Mr O'Donoghue QC and Mr Henry BL. The respondent was represented by Mr Lyttle QC and Mr Thomas Fitzpatrick BL. I am grateful to all counsel for their written and oral submissions.

[4] In an application of this nature the Board is responsible for either approving or rejecting the application. However, the actual decision-making responsibility is

delegated to the Pharmacy Practices Committee (“PPC”). In this case the application by Omapharm Limited was granted after a meeting of the PPC on 3 August 2017. The applicant challenges this decision on two core grounds (i) That the applicant was not properly notified of the application - the procedural ground and (ii) The decision to grant Omapharm’s application was irrational – the substantive ground.

## **The statutory framework**

### **(i) Notification**

[5] The statutory provision at issue is the Pharmaceutical Services Regulations (Northern Ireland) 1997 (“the 1997 Regulations”). The notification requirement is found in 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.*”

I have highlighted the statutory words which I consider lie at the heart of the challenge.

[6] An appeal from any decision made is also provided for in paragraph 4(1) as follows:

“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.”

[7] There is a guidance document to assist decision makers in exercising the statutory function referred to above. This is entitled “Pharmaceutical Services, A Guide to the Revised Arrangements for Considering Applications to Provide Pharmaceutical Services” (“the Guidance”). Paragraphs 5.2 and 5.3 are the operative paragraphs for the purpose of this case and read as follows:

“5.2. A Board notified under paragraph 5.1(d) above should, in turn, write in similar terms to its own LPC, LMC and 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 the Board, be significantly affected if the application was granted. Those notified have 30 days, from the date the notification was sent to the Board, to make written representations to the Board to whom the application has been made.

(LPC refers to Local Pharmaceutical Committee LMC refers to Local Medical Committee)

5.3 Notifications under paragraph 5.1(c) above should be to those persons who are currently providing pharmaceutical services within a reasonable area of the proposed premises, in other words, those whose current services are likely to be affected. It is not intended to embrace those who are not currently providing services in the area but who may have a concurrent application pending.”

**(ii) Substantive test**

[8] The test for the grant or otherwise a rejection of the application is found at Regulation 6(9) of the 1997 Regulations as follows:

“An application made in any case other than one to which paragraph (3) or (4) applies 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 at the premises named in the application is necessary or desirable in order to secure adequate provision of pharmaceutical services in the neighbourhood in which the premises are located by persons whose names are included in the pharmaceutical list.”

[9] The Guidance deals with this issue as follows:

“5.16 An oral hearing is an option whenever an application is being considered. Oral hearings are not

always necessary, provided the principles of natural justice are followed, but they may be helpful where the issues are complex. In reaching its decision the PPC should consider whether or not the application can be properly be determined without hearing oral evidence. Further comments received following action as in paragraph 5.4 would be an indication of serious conflict and would clearly point to the need for an oral hearing in order that the issues can be aired.”

5.26 The PPC must first decide what area is to be taken as 'the neighbourhood' of the premises named in the application it is considering. Until it has decided this it cannot decide whether the existing provision of pharmaceutical services is adequate for that neighbourhood. It is up to the PPC to decide, on the basis of the information available, what the relevant neighbourhood should be. The PPC is not bound to accept the neighbourhood as defined by the applicant (or by any objector) but may define its own neighbourhood using its own experience, expertise and local knowledge.

5.27 There are no hard and fast rules or formulae for determining the number and distribution of pharmacies. PPCs should not adopt norms or quotas, nor establish fixed rules for example for the distance from another pharmacy. Each application must be considered on its merits.

5.30 The reference, in the test of necessary or desirable, to persons on the pharmaceutical list is important. The Regulations allow for dispensing by general medical practitioners (GMPs) in some circumstances. However, these applications are for dispensing or the supply of appliances by pharmacists or appliance contractors and individual GMPs should not be involved or consulted in the process.”

Paragraph 5.31 refers to information on the following matters which is likely to be helpful to the PPC in making a decision and this is broken down as follows:

- (1) Communities and the normal patterns of travel.

- (2) Existing patterns.
- (3) Anticipation of future developments.

### **The notification decision**

[10] The substantive application by Omapharm is dated 5 April 2017 and is contained in the requisite form (Form A). Upon receipt of this a decision had to be taken as to who needed to be notified of the application. The process is explained in pre action correspondence from the respondent dated 12 April 2018 namely that

“The Pharmaceutical Services Regulations do not require the HSCB to hold a formal meeting to decide who should be notified, in the case of any new application received. In the case of the above application, the BSO emailed the local Pharmacy Coordinator and Pharmacy Adviser in the Western HSCB office seeking direction regarding which contractors should be notified in relation to the above application. The decision was made to notify the eight Omagh pharmacy contractors only.”

[11] There was no issue taken with this procedure. Rather the challenge focussed on the rationale for the notification decision which was taken by Ms Sinead McElroy who is employed by the Regional Health and Social Care Board and who provides support to the PPC in relation to applications in the western area. Ms McElroy has filed an affidavit dated 6 June 2018 in which she explains how she reached the notification decision in the following paragraphs:

“7. I was asked to indicate the persons to be contacted under paragraph 1(1)(c) to be notified of the application. Further guidance in relation to the decision of who should be contacted is provided in the Pharmaceutical Services: Guide to the Revised Arrangements for Considering Applications to Provide Pharmaceutical Services as a true copy of which I have attached hereto and marked SME1 at Tab 2.

8. At the time of the subject application I considered the relevant notice parties to be those pharmacies who provided services within Omagh. I was aware at the time that the great majority of prescriptions issued by Omagh GPs were dispensed

by pharmacies in Omagh. I was aware that there was a significant distance between the rural pharmacies in the area and the pharmacies in Omagh. I was aware that while some patients who used the rural pharmacies are registered with the GP practice in Omagh, these pharmacies largely serve their own communities. The documentation provided indicates that 93.80% of the prescriptions issued in Omagh were dispensed in Omagh with the applicant dispensing 2.5% of prescriptions, which would come from those living local to his pharmacy.

10. The Applicant does not mention in paragraph 20 of the affidavit that approximately 75% of all prescriptions are repeat prescriptions which will not require the patient to attend the GP and thus make it less likely that the Applicant's "customer" would favour any pharmacy 7 miles from Sixmilecross at the Primary Care Complex.

11. When I was asked to consider who should be notified under paragraph 1(1)(c) I did not take a stock approach to the application. I was familiar with all of the pharmacies in the area, and in addition had knowledge from the recent application to open a pharmacy in the Gortin Road in Omagh. My extensive knowledge formed my opinion that the pharmacies whose interest may be significantly affected were going to be the pharmacies proximate to the Omapharm pharmacy in Omagh town and not the rural pharmacies in the rural villages outside Omagh. I have attached a true copy of the relevant e-mailed correspondence which I have marked SMCE1 at Tab 3 at the time of swearing hereof."

[12] Ms McElroy proceeded to notify the eight pharmacies in Omagh. Following from the above, Boots sent a letter of objection dated 16 June 2017. This letter states that the objection is because:

"We do not believe the proposed pharmacy to be necessary or desirable to provide adequate pharmaceutical services in the neighbourhood."

Boots sent a further letter dated 25 July 2017. This confirmed that it did not wish to make oral representations to the PPC however it wished its written representations

to be considered. Those written representations refer to the previous letter and also contain a submission that there were no material changes in Omagh since the refusal of an application by the Lisanelly Group in December 2016.

[13] In addition, the Community Pharmacy of Northern Ireland ("CPNI"), which is an umbrella group representing pharmacists objected to the application by way of letter dated 21 June 2017. This is sparse correspondence which simply states:

"The Committee therefore wishes to object to the granting of this application."

[14] During the course of the hearing I allowed some further affidavit evidence in relation to this objection as it was contended that the PPC may not have considered it. Pursuant to my directions an affidavit was sworn by Helena Doherty dated 29 June 2018. Ms Doherty is the Corporate Business Manager for the Board and provides administrative support to the PPC. In her affidavit Ms Doherty refers to the fact that the file of papers sent to Committee members included the correspondence from Mr Gerard Greene, chairperson of the Local Pharmaceutical Company, (CPNI) dated 21 June and 27 June. At paragraph 6 of this affidavit Ms Doherty avers that:

"I can confirm that the CPNI letter of objection dated 21 June 2017 and letter dated 27 June 2017 from Mr Mark Nelson, BSO acknowledging receipt of the CPNI was shared in advance with all Committee members. Both letters were included within the file of papers issued to Committee members on 11 July 2017."

[15] In her affidavit Ms Doherty also confirms that she wrote to Mr Gerard Greene on 28 June 2017 inviting him to attend the PPC meeting on 3 August 2017 to deliver a brief presentation to the Committee, relating to their objection. She avers that no reply was received to this letter and CPNI did not attend the hearing.

### **The substantive decision**

[16] A meeting of the Health and Social Care Board, PPC took place on Thursday 3 August 2017 at 10.00 am. Present were Mr John Mone, Chairman, Mr Andrew Dawson, Non-Contractor Pharmacist, Mr Laurence O'Kane, Contractor Pharmacist, Mrs Valerie Brown, Non-Pharmacist member, Mrs Frances Robson, Non-Pharmacist member. Also in attendance were Ms Sinead McElroy, HSCB Pharmaceutical Services Advisor and Ms Helena Doherty, HSBC Corporate Business Manager Western Office. A minute of this meeting has been provided which refers to the oral presentations that were made to the Committee prior to the consideration of this application from Mr Patrick Slevin on behalf of Omaphram

Limited (Mr Slevin was accompanied by Mr Michael Geddis and Mr Liam Bradley). The minute also states that a written representation was received from Ms Joanne Watson, Contract Manager, Boots UK Limited dated 25 July 2017 objecting to the application. The minute states that Ms Watson's letter was shared with members and tabled at the meeting.

[17] The minute then explains how the issue of neighbourhood was determined in the following terms:

"The Committee did not accept the neighbourhood as defined by the applicant. During discussion, it was agreed that the neighbourhood affected by this application is a settlement boundary of Omagh; this includes Omagh Hospital and Primary Care Complex and the full extent of the town including all of the retail, residential and industrial areas of Omagh."

[18] In the minute reference is made to the fact that prior to the decision being reached the Contractor Pharmacist Mr Laurence O'Kane left the meeting. The substance of the decision making is then explained as follows:

"The Committee then discussed the application in detail, taking into account the papers submitted by the applicant and objector and the points raised during the presentations. They concluded that the application was necessary and desirable to secure adequate provision of pharmaceutical services within the neighbourhood. The Committee therefore agreed to approve the application.

In reaching its decision the Panel took the following factors into consideration:

(1) Access to service: The relocation of the four Omagh GP practices to the new Omagh Hospital and Primary Care Complex represents a significant change to the provision of healthcare services in Omagh, and in terms of accessibility to services such as pharmacy after GP appointment. Previously the 30,600 patients registered with these GP practices were accustomed to accessing pharmaceutical services when they attended their GP practice at either Omagh Group Pharmacy (located at the health centre) or at nearby pharmacies.



(2) Travel and Transport: This relocation means that most patients require access to transport to attend their GP practice. Many of these patients will be suffering from ill-health or are elderly or living with a disability. Whilst a bus service is available from the centre of town to the new location, many patients will not commence their journey from the town centre and may have to find alternative transport at additional cost. For these patients, it would be desirable to access pharmaceutical services at the same location as their GP and in continuation of a practice of which they are previously accustomed.

(3) Effect on services to patients: The guide to the revised arrangements for considering applications to provide pharmaceutical services states in Chapter 5 paragraph 5.28:

It is the effect on services to patients and not the effect on other contractors as such which must be borne in mind.

Local needs and circumstances will change over time and the pattern of pharmacy provision must adapt accordingly.

Whilst it is acknowledged by the Committee, that the provision of pharmaceutical services in Omagh may be considered adequate, the effect of this significant change in service delivery, in comparison to the service previously available to patients in Omagh makes the application necessary.

(4) Transformational approach to Health and Social Care Services: This application to provide pharmaceutical services at the Omagh Hospital and Primary Care Complex supports the model for integrated health and social care, enabling patients to access a large range of health and social care services on location. Pharmaceutical services will be available at this location six days a week, Monday to Saturday 9.00 am to 6.00 pm.”

[19] Following from this decision the objector Boots lodged a Notice of Appeal. The appeal was scheduled by the National Appeal Panel (NAP) and is now adjourned whilst this case is on-going.

### **The evidence filed on behalf of the applicant**

[20] The applicant's first affidavit is dated 11 May 2018. In this he explains that he has been a qualified pharmacist for 17 years. He states he is the director and sole shareholder of Paul Tallon Limited and he is authorised to swear the affidavit on behalf of the applicant company. He avers that he has been the guiding mind in The Medical Hall pharmacy in Sixmilecross for approximately 10 years. He explains that The Medical Hall is the only pharmacy in the village. He states *inter alia*:

"It provides a valuable service to the rural community within the catchment of the village. Many of the customers using the pharmacy are elderly and have mobility issues that limit their ability to travel. Not all of the pharmacy's customers are in the same position, but a significant number of them are."

[21] The applicant also avers that Omagh town is approximately 7 miles away from the village. He states that as a satellite village to the larger town Sixmilecross has fewer facilities than Omagh. He states that as a result of this historically there has always been and continues to be a relationship between the village and the larger town. The applicant points out that a number of the patients who use The Medical Hall pharmacy in Sixmilecross are registered with general practitioners in Omagh. He avers that approximately 25% to 30% of the prescriptions issued from the pharmacy are to patients registered with Omagh GPs. He states that 25% to 30% is obviously a large portion of the company's business. He avers that:

"Loss of all or even part such a substantial portion of the pharmacy's business would be very significant for the continued financial health and therefore survival of the pharmacy. If the pharmacy loses trade, both the company and the customers will be affected."

[22] The applicant exhibits a table which demonstrates that in December 2017 a total of 1,289 items were dispensed from Paul Tallon Limited and these were prescribed by Omagh GPs. The applicant further points out that this represented 30.17% of his total for that month. The applicant then avers at paragraph 20 of his affidavit:

"I believe that the presence of a pharmacy on site at the GP facility will inevitably result in a downturn in

the number of prescriptions at the Sixmilecross Medical Hall pharmacy will receive. At least a quarter of our customers will be attending the new out of town GP facility and it is inevitable that some will start to use the on-site pharmacy because of the proximity and space and time and the issuing of the prescription to the patient. The patient need not stop anywhere else before going home as they would have to if there was no on-site pharmacy."

[23] The applicant further avers:

"I firmly believe that The Medical Hall pharmacy in Sixmilecross will be (rather than may be as the test sets out) significantly affected if the application were granted."

The applicant also avers that he would like to have made written representations to the Committee on behalf of Paul Tallon Limited and that he was deprived of that opportunity.

[24] This affidavit also deals with the issue of delay. In that regard the applicant avers that he only found out about Omapharm Limited's successful application in late March 2018. He states he heard a rumour around 21 March via one of his supplier van drivers that a licence had been granted. Another pharmacist he says advised him to speak to the National Appeals Panel and he found out by placing a telephone call with Edmund McCosh of the NAP on or about 22 March 2018. He then sets out the steps that he took from that time up to the issue of proceedings on 11 May 2018. The applicant therefore asks that he is not prejudiced by the delay. A further affidavit was filed on behalf of the applicant by Mr Heaney, his solicitor which was sworn on 14 May 2018. That deals with the issue of the appeal hearing and is not particularly relevant to the proceedings as they developed in this case.

[25] The applicant filed a second affidavit which is dated 16 June 2018. In this affidavit he complains that the Board invited the eight Omagh town based pharmacists to attend a meeting in a hotel which he says was for the purposes of inviting them to make an application for permission to open a new pharmacy at the new GP facility. He states that:

"I am concerned by the tension between the respondent actively inviting the application to be made as well as being responsible for its ultimate approval or rejection."

In this affidavit the applicant also refers to a previous application he made in October 2009. He makes the point that this was for a pharmacy in Beragh yet Boots and Gordons were allowed to object. He also refers to an August 2011 application by a Mr Minnagh to which he was allowed to object. He states that "at least one Omagh pharmacy (Boots) some 7 miles away, was put on notice of that application as well." He states "that these instances demonstrate, in my view, that Omagh contractors are put on notice of the applications outside Omagh but not vice versa."

[26] In this affidavit the applicant disputes the Board's assertions that the application was widely publicised. He states that "I was not aware of the application otherwise I would have taken pro-active steps to contest the active application." He therefore points out that he had no standing or opportunity to make representations or object. The applicant also confirms that he is a member of the Community Pharmacy (Northern Ireland) (CPNI) but he states that he was never notified of the application by them. He avers he became aware of the approval through a delivery driver approximately 9 months after the Committee's hearing meeting.

[27] On behalf of the applicant, Mr O'Donoghue submitted that the notification decision was made without sufficient consideration and without reference to the proper test. He contended that limited attention was paid to this issue given the e-mail exchange and as a result the decision-making process is procedurally unfair. Alternatively, he argued that if the notification test was considered it was misunderstood given that the applicant should have come within it. It was submitted that on the evidence this applicant may well be significantly affected by the decision and so he should have been notified.

[28] Mr O'Donoghue also contended that no consideration was given to the CPNI objection at the substantive meeting and that the affidavits of Helena Doherty and John Mone do not remedy the failure. It was submitted that the application should not fail due to lack of promptitude given the applicant's knowledge. Finally, Mr O'Donoghue contended that there was no alternative remedy in this case given that the applicant was not permitted to intervene in the appeal taken by Boots.

### **The Board's evidence**

[29] The Board's evidence is comprised in the affidavit of Ms McElroy in the affidavit of 6 June 2018 which I have already referred to in paragraph 11 herein. I will not repeat that evidence. In addition Ms McElroy sets out the history of the application by Omapharm. Ms McElroy also sets out her knowledge and experience. Specifically, she avers that the application was made in April 2017 by which time she had been involved in several applications from parties who wished to have pharmacies registered on the pharmaceutical list by the PPC. Ms McElroy sets out the statutory framework. Ms McElroy also filed a second affidavit dated 21 June 2018 in which she disputes the applicant's assertion that she applied a "cut off" in

considering notification. She also confirms that she had no vested interest in the process and that she had no involvement with the consortium behind Omapharm.

[30] A further affidavit dated 6 June 2018 was filed on behalf of the Board and sworn by Mr Joe Brogan. In this affidavit he explains that he is the Head of Pharmacy Services for the Regional Health and Social Care Board. This affidavit sets out further context to the application as follows:

“The background to this application is the development of Omagh Hospital and Primary Care Complex. The formal planning process for the hospital began in 2009 and included plans to provide GP accommodation and plans for a community pharmacy. In 2011 the then Health Minister, Mr E Poots, confirmed the first tranche of funding. In 2013 the planning for the site was confirmed; and in 2014 initial works began in the hospital and it was confirmed that a community pharmacy was to be located within the complex. The development of the new local enhanced hospital and primary care complex was widely publicised and there was widespread consultation in relation to the development.”

[31] Mr Brogan then explains that as part of the plans to develop the hospital consideration was given to locating a community pharmacy at the site as part of the plans for provision of health care. This deponent avers that the Western Health and Social Care Trust advised the Health and Social Care Board that they wished to engage with the local pharmacies in Omagh town to consider the potential for a community pharmacy at the new hospital. He states that this followed a similar situation when the Trust had accommodated a community pharmacy at the Omagh Health Centre site. He explains that Omagh Group was set up by three of the existing Omagh pharmacy contractors in and about 1971 and states that the pharmacy was established around the same time as the GP practices moved into the Omagh Health Centre over 45 years ago. Mr Brogan then explains the process and at paragraph 6 he states:

“I contacted the eight pharmacies based in Omagh town. There were two meetings held on 10 February 2014 and 10 March 2014 at a hotel in Omagh which were attended by the contractors representing the pharmacies located in Omagh.”

The deponent said after the meetings it was his understanding that 7 of the 8 Omagh pharmacy contractors decided to form a

consortium and form Omapharm Limited with a view to applying to make an application to the PPC for permission to open a new pharmacy. He says that neither he nor any other person from the Board took an active role with the Omapharm application or the structure of development or the consortium.

[32] Mr Brogan then deals with the applicant's position at paragraph 16 of his affidavit as follows:

"The applicant's pharmacy is based in Sixmilecross; Mr Tallon has been a contractor for 10 years at the pharmacy. This pharmacy has never been contacted in relation to any of the applications for pharmacies based in Omagh to be added to the pharmaceutical list; 12 such applications have been made in the last 26 years, neither the applicant nor his predecessor has made any complaint to either the Health and Social Care Board, the Western Health and Social Services Board or to the Western Health and Social Care Trust."

[33] At paragraph 17 of his affidavit Mr Brogan also disputes some of the applicant's assertions as follows:

"Thhe applicant has indicated that between 25% and 30% of his prescriptions are prescribed by Omagh general practitioners."

This deponent states that the applicant does not provide details of his turnover, his costs or provide any financial analysis in relation to this element of his business. He refers to the fact that the applicant receives a practice allowance of £18,000 per annum from the Board and a rural pharmacy access grant of £10,000.

He then refers to a breakdown of the 2.5% of the scripts written by Omagh GPs which are dispensed at the applicant's pharmacy and a further analysis in relation to scripts.

[34] Finally, Mr Brogan disputes the applicant's assertions as to knowledge. He states that the development was high profile, known to those involved in healthcare in Omagh and in the wider western area. He states that in addition the applicant would have had regular contact with other health professionals in the western area; it would be very surprising he states if this major development never formed part of discussions. Along with the pharmacies of Omagh the local Pharmaceutical Committee CPNI, was notified of the application in May 2017. This deponent points

out that the applicant is a member of CPNI but it appears he was not notified by them of the application, nor did he become aware of the application, in the course of his practice until 11 months after the application was made, over a year from the meetings with the Omagh pharmacists in relation to the possible pharmacy on the site and 9 months from the time that the Omagh GPs moved on to the site.

[35] Mr Brogan filed an additional affidavit dated 21 June 2018. In that affidavit Mr Brogan explains his engagement with the eight pharmacies in Omagh town. He states as follows:

“I reiterate that I had no dealings with the consortium after the meetings...I had no input into which of those pharmacies agreed to be part of any consortium; I had no active role in how their consortium was made up or its business plans; and I had no dealings whatsoever in relation to any application that they made for a new pharmacy.”

In addition Mr Brogan refutes the suggestion that the Board has a vested interest in the success of the application. In that regard he refers to the fact that the decision is made by the PPC.

At paragraph 10 of this affidavit Mr Brogan also explains that he had no dealings in relation to the development of the hospital as he states that was a matter for the relevant Trust and the Department.

[36] I have also considered the affidavit of 29 June 2018 sworn by Mr John Mone, Chairman of the PCC. I allowed this affidavit to be submitted along with Ms Doherty's affidavit to deal with the issue of the CPNI objection which was only raised during the hearing. In this affidavit Mr Mone states that he has read the affidavit of Ms Helena Doherty and notes her description of the procedures. He avers that he recalls the meeting of 3 August 2017 but cannot recall all of the details. However, he states that:

“I have no reason to doubt that the usual procedures were followed for that meeting. I and the Committee would have read the documents furnished and then would have considered the issues and made our decision. I therefore have no doubt that the letter of objection dated 21 June 2017 from CPNI was in the file of papers, which were furnished to the Committee and read by the Committee.

The letter from CPNI was a short letter raising a general objection without any detail. In contrast the Committee had a more detailed submission from

Boots and an oral presentation from the Omapharm representative.

I confirm that the objection letter from CPNI was part of the papers shared with the Committee. Subsequently the secretariat was notified that Boots had provided a more substantial written submission. This letter was dated 25 July 2017. In preparation for the Pharmacy Practices Committee meeting, I advised the secretariat that the letter would be tabled at the meeting to all parties.

The secretariat sent through a running order for me as Chairman on 2 August 2017. The running order does not refer to the CPNI objection. I can confirm that the CPNI objection was part of the pack presented to the Committee and that the Committee would have been aware of the CPNI objection. I cannot recall the specific discussion about the CPNI objection and I confirm that there was no consideration noted by members of the CPNI objection at the day of the Committee meeting. The minutes reflect the issues discussed but are not a verbatim account of the meeting. I do recall that the Committee did consider the written submission by Boots."

[37] In addition to the affidavit evidence a skeleton argument was filed on behalf of the Board and submissions were made by Mr Lyttle. I will confine myself to the central arguments advanced. Firstly, it was submitted that the application was out of time and that the time should not be extended. Secondly, he submitted that the process of notification was properly conducted. Thirdly, Mr Lyttle pointed out that the issue of a pharmacy services attendant to GP services was not new as this had been the status quo with the health centre for some 45 years. Fourthly, Mr Lyttle pointed out to the issue of repeat prescriptions meant that the applicant would not be significantly affected by the grant of this application. Fifthly, he argued that there was an appeal mechanism by which a major objector Boots was entitled to argue about this enterprise and as such the applicant was not prejudiced. Finally, Mr Lyttle referred to the public interest in progressing this matter.

## **Consideration**

[38] The context of this case is important. It is comprehensively explained in the respondent's evidence and is uncontroversial. This is clearly a public project of some considerable importance to the local area. The evidence stresses that the development of the new local enhanced hospital and primary care complex was widely publicised and there was widespread consultation to the development. The



fact of the matter is that GP services in Omagh have been amalgamated at the Health Centre site for 45 years. This facility also offered on site pharmacy provision and so the provision of this type of health care is not new.

[39] With this context in mind, I turn to the three issues for determination in this case namely:

- (i) Should the judicial review be dismissed for lack of promptitude?
- (ii) Whether the decision making is vitiated by procedural unfairness?
- (iii) Whether the substantive decision is irrational and should be quashed?

[40] As to the first issue, Order 53 Rule 4 of the Rules of the Court of Judicature of Northern Ireland 1981 imposes a three month period from the date upon which the grounds for bringing the challenge first arose. This matter was canvassed at the leave hearing and whilst a final determination was not made at paragraph 12 of his ruling McCloskey J stated as follows:

“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 the 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.

I have considered now all of the evidence in this case and I am of the view that the applicant’s averments should be accepted in relation to his state of knowledge as such.”

[41] Having considered the evidence, I adopt a similar approach to the leave judge. Notwithstanding the public profile of this project, I am prepared to accept that the applicant’s knowledge of this particular application first arose in the final week of March 2018. There can be no criticism of the applicant after that date given the efforts made by him and his advisers which are set out upon affidavit. On that basis he has brought his application within time.

[42] I turn to address the two issues of substance. In determining an application of this nature the court's role must be borne in mind. In this type of a case the court is exercising a supervisory jurisdiction. The court is not conducting a merits based review. Rather the court is determining whether the Board acted irrationally in its application of the statutory test rehearsed at [5] above.

[43] I now turn to the first limb of challenge which has been described as one of procedural unfairness. That is perhaps not the most accurate characterisation of the issue given the statutory language contained within the 1997 Regulations. The issue of notification is clearly expressed in terms of a discretion afforded to the Board. In my view the issue is simply whether the Board acted rationally in failing to notify this application to the applicant.

[44] The notification requirement is contained with paragraph 1(1)( c) of Schedule 4. The wording of this requires some close examination. There is no issue that this applicant is a person who is on the pharmaceutical list, providing pharmaceutical services in the Board's area. It is the next part of this provision which is at issue. The test is whether *in the Board's opinion* a person *may be significantly affected* if the application were granted. It is a well-established legal convention that any statutory requirement imposed on a public authority to form an opinion confers a fairly broad discretion. Consequently, it is clear that for a challenge of this nature to succeed the impugned decision must satisfy the high standard of *Wednesbury* unreasonableness.

[45] I must decide whether the impugned decision falls foul of that standard. In that regard I bear in mind the context of the case and the discretion afforded to the decision maker in determining who should be notified of an application. The applicant has referred to the fact that the notification decision was made through an email chain and the case is made that this demonstrates a perfunctory consideration. Such an argument has a superficial attraction. It would undoubtedly have been better for a memorandum to be made at the time however that does not in itself vitiate the decision making process. The decision must be seen in context with the following in mind:

- (i) Ms McElroy states that she has extensive knowledge of the local area and specific knowledge of the various pharmacies and the services provided by them.
- (ii) She states that she had recent knowledge including an application in December 2016.
- (iii) She states that from her knowledge she was aware that the pharmacies significantly affected were going to be those proximate to Omapharm in Omagh town.

[46] These averments were unchallenged and they were supplemented by a comprehensive analysis of pharmacy services in Omagh. There has been no dispute as to the substance of this evidence particularly that 2.5% of the Omagh prescriptions are dispensed by the applicant and 75% are repeat prescriptions. I am not attracted by the arguments made by the applicant about other applications as they involve different factual circumstances. In my view the affidavit evidence of Ms McElroy is convincing as to how it was decided that notification should only be given to the eight Omagh pharmacies. There was clearly an evidential base to this which is set out in the affidavit. Ms McElroy also refers to the Guidance. I accept the evidence of Ms McElroy that she was aware of the relevant test and applied it. In truth, this was a decision which she could reach relatively quickly given her expertise and experience. Further, I do not consider that she has made any material error of fact or misunderstood the test or reached a decision which was outside the bounds of her discretion.

[47] The substantive decision was also impugned. This challenge was primarily based upon the notification argument. That argument cannot succeed for the reasons I have already given. In addition, the applicant claimed that the decision was predetermined or infected due to “vested interests”. I have considered these points however I do not find any merit in either. Firstly, the predetermination argument fails to recognise the structure of the PPC comprising as it does a range of interests through the composition of its members. This is comprehensively explained by Mr Brogan in his evidence which I accept. It follows that I must reject the applicant’s case that the matter was predetermined. Finally, I reject the case made that the decision is vitiated due to “vested interests”. This argument is comprehensively defeated by the evidence of Mr Brogan which I summarise at paragraph [35]. The applicant has failed to persuade me on any of these grounds that the decision reached was irrational.

[48] Finally, a somewhat *ad hoc* challenge was developed during the hearing that the Board did not consider the CPNI objection and therefore did not take into account all relevant considerations. I have considered the affidavit evidence of the Board filed in this regard. Mr Moan who is the Chairman of the Board has averred that the CPNI objection and the Boots objection was considered. I accept his evidence and as such it is my view that this aspect of the challenge cannot succeed.

## **Conclusion**

[49] Accordingly, the application is refused for the reasons I have given. I will hear counsel as to any other matters that arise and as to the matter of costs.