

15 January 2010

REF: SHA/15430

APPEALS AGAINST HAMPSHIRE PCT'S DECISION REGARDING MEASURES TO REDUCE ADVERSE CONSEQUENCES FOLLOWING THE GRANT OF SCARLETT HEALTHCARE LTD'S APPLICATION FOR PRELIMINARY CONSENT PRIOR TO INCLUSION IN THE PHARMACEUTICAL LIST IN THE VICINITY OF SPRING LANE SURGERY, COLDEN COMMON, HANTS SO21 1SB

1 Background

- 1.1 By letter dated 15 May 2009, the FHS Appeal Unit's Pharmacy Appeals Committee, allowed Scarlett Healthcare Ltd's appeal for preliminary consent prior to inclusion in the PCT's pharmaceutical list in the vicinity of Colden Common Surgery, 45 Spring Lane, Colden Common.
- 1.2 The Committee also remitted back to the PCT for consideration in accordance with Regulation 38(14)(c), the question of whether to impose conditions to postpone the making of arrangements under Regulation 60.

2 The PCT Decision

The current decision letter from Hampshire & Isle of Wight Practitioner and Patient Services Agency (on behalf of the PCT) dated 23 September 2009 states:

- 2.1 Following the decision by the NHSLA (Ref: SHA/15125), the application is being considered under regulation 38(14)(c) i.e. whether all or some dispensing patients living within 1.6km of the location of the proposed pharmacy premises should be allowed to continue to receive their medicines from the surgery for a period of time following the commencement of services by the pharmacy. (This process is known as 'gradualisation').
- 2.2 Consideration was first given to the representations received from the applicant, Scarlett Healthcare Ltd and Hampshire and Isle of Wight LPC both of which suggest a period of three months to allow time to inform patients and redeploy staff. The Committee noted that Twyford Surgery had requested a period of 12 months from the opening of the new pharmacy and presented a good argument in terms of personnel and the amount of time needed.
- 2.3 It was noted that no time limits have been laid out under Regulation 38(14) for a lime period for gradualisation.
- 2.4 The Committee considered that Twyford Surgery also own Twyford Pharmacy and patients would have a choice of using the services of Twyford Pharmacy or using the new pharmaceutical services being offered in Colden Common. The Twyford Surgery has known about the NHSLA decision since 15 May and the PAC Committee would have expected the Surgery to have started planning the implementation of gradualisation. The Committee were also aware that the applicant currently has preliminary consent and that it will take time to convert this to full consent.

Decision

- 2.5 It is the decision of the PAC Committee to give a period of 6 months for gradualisation from the date of which the new pharmacy opens.

3 The Appeals

The Family Health Services Appeal Unit of the NHS Litigation Authority (“the Appeal Unit”) received two letters of appeal against the PCT’s decision. The respective grounds of appeal are:

Dr M R W Evans & Partners, Twyford Surgery (letter dated 19 October 2009)

- 3.1 The doctors wish to appeal against the decision of the Hampshire PCT Pharmacy Application Committee under regulation 38(14)(c) gradualisation, offering a 6 month period of gradualisation.
- 3.2 The doctors note that the PCT letter states that representations were received from Scarlett Healthcare and Hampshire & Isle of Wight LPC. This information has not been sent to the surgery and the doctors believe this to be a procedural error.
- 3.3 The doctors view their request for a 12 month period of gradualisation to be reasonable and note the committee’s comment that “Twyford Surgery presented a good argument in terms of personnel and the amount of time needed”.
- 3.4 This is a complex situation in that some staff have dispensary and pharmacy roles. This is not just a straight forward transferring of a loss of dispensing rights to pharmacy rights elsewhere, in that it cannot be estimated how many pharmacy patients will be lost by Twyford pharmacy. It is therefore not possible to be clear what job opportunities and roles, never mind training and consultation will be there after 6-12 months in order to offer jobs to existing staff. It is very difficult therefore to manage this period of transition without this clarity.
- 3.5 Furthermore, it appears that Scarlett Healthcare will open soon as they have purchased a local business. However, contrary to their preliminary application they have steadfastly avoided discussing any of their plans with the doctors, although they have endeavoured to engage with the applicant. This makes further planning and preparation extremely difficult.
- 3.6 During this period the doctors need to advise dispensing patients that they have become pharmacy patients and also of their choices as pharmacy patients. This is more complex than just explaining the change from dispensing to pharmacy patients — which in the doctors experience takes some time for older people and their carers to understand.
- 3.7 During this time it is predicted by the Department of Health there is a high likelihood of a seasonal flu campaign in addition with a swine flu campaign and the likelihood of a swine flu pandemic. It is not in the best interests of patients to make the transition during this same period.
- 3.8 Furthermore, as of October 1, the dispensing fee to dispensing doctors will be reduced from £2.14 to £1.95 and thus there is a further system substantive loss of money to be exacerbated by this further change. For the gradualisation period to be constrained to 6 months and overlap with this period will have a disproportionate and unfair impact on the organisation.
- 3.9 The difficulty in offering pharmacy roles to dispensary staff, with appropriate, planning, consultation and training will prove extremely difficult as it is uncertain how many Pharmacy staff will be required in the ongoing state of flux that will then prevail for the next year. To do this at the same time as explaining these various changes to patients, and at a time of likely significant clinical and financial stress on the service is likely to have an effect on patient services unless it is properly managed over an appropriate period of time. such as 12 months. The doctors feel that the above difficulties make an unusual set of circumstances and the likely difficulties could be

avoided with an appropriate gradualisation period. The doctors therefore request the Litigation Authority approves their request for a 12 month gradualisation.

- 3.10 The doctors therefore request the Litigation Authority approves their request for a 12 month period of gradualisation.

Scarlett Healthcare Ltd, Applicant (Letter dated 2 October 2009)

- 3.11 The applicant welcomes a re-examination of the issue of "Gradualisation" relating to this application by the appeals authority. The applicant asks the appeals authority to reject the six month gradualisation decision made by the PCT and allow their appeal.
- 3.12 Both ourselves and the Hampshire and Isle of Wight LPC suggested a gradualisation period of three months. The applicant feels that a three month period is sufficient to allow for any adjustments (stock, staffing) for Twyford Surgery.
- 3.13 The applicant would also like to inform the Litigation Authority that the Twyford Surgery had been informed of the authorities decision to grant the application on the 15 May 2009. The application for full consent has only recently been submitted (1 October 2009) and it is the applicant's intension to open the new pharmacy no sooner than the 1 December 2009. In this six -month period (May to December) prior to the new pharmacy opening the applicant would have expected the surgery to have not just started planning but be well prepared for the gradualisation process. On top of this six month period the applicant feels the three month gradualisation period requested once the pharmacy opens is more then sufficient for safe transfer of patients from surgery dispensing lists over to the new pharmacy.
- 3.14 Granting a Gradualisation of six months for the surgery would prejudice against pharmaceutical services provided by the new pharmacy. This is because it is unlikely for the pharmacy to receive any significant number of prescriptions and therefore make it financially unattractive to the point of possibly not opening which goes against the prior decision of the Appeals Authority to allow a pharmacy to open.
- 3.15 The applicant would like to bring to the attention of the authority a letter received from the Twyford surgery dated the 11 September 2009. It is clear after reading this letter that the Surgery will attempt to direct patients towards there own pharmacy. This should be strongly discouraged by the PCT and the Litigation Authority. The Surgery must remain impartial and clearly differentiate themselves from Twyford Pharmaceutical Services Ltd. This is limited company that owns the pharmacy in Twyford of which the doctors from the surgery are directors.
- 3.16 The applicant feels they already have an uphill struggle to make this pharmacy viable with so much opposition from the doctors. A six-month gradualisation period would really prejudice against pharmaceutical services to be provided by the new pharmacy. The applicant would also request to the authority a structure to the gradualisation process. Where particular surnames are transferred from the dispensing lists to the pharmacy such as A - J after a month etc. during the gradualisation process. This will stop the surgery from holding onto all prescriptions for the period of gradualisation as indicated by Dr Evans in a recent telephone conversation as something the surgery will do.
- 3.17 The applicant therefore respectfully requests that the facts are re-considered and their appeal for a three month gradualisation is allowed.

Enclosed copy of Dr M R W Evans & Partners letter to the applicant dated 11 September 2009

- 3.18 Thank you for replying to our telephone message to you and for spending some time talking to our Business Manager and Dr Evans.

- 3.19 We are aware that you have preliminary consent to open a Pharmacy in Spring Lane, Colden Common, and that as part of your application you said that you would work with the local GP Practice. We, the Partners of the GP Practice, are concerned that you have made significant steps towards opening the pharmacy without making contact with us. Indeed, we understand that you were reluctant to discuss anything about your business proposal in your telephone calls this week, but offered to arrange a meeting at an indeterminate date in the future.
- 3.20 We have tried since July to arrange a mutual meeting with you, but it seems that you are avoiding the issue. Our reasons for arranging a meeting with you include: clarity about your plans for the pharmacy, a clearer understanding about your proposals for working with us, and an opportunity for you to understand our organisation and the impact that will have on your proposal. In the absence of a meeting we think it appropriate to convey our views in writing.
- 3.21 We currently own the surgeries in Colden Common and Twyford, in addition, we own the Pharmacy based at Twyford. We have a good reputation in our catchment area and a loyal patient base that actively support the surgery. The largest number of our patients attends the surgery at Twyford and with the convenience of the on-site pharmacy; almost all of our patients obtain their medication from our Pharmacy. As most of our GP patient consultations occur at Twyford, Colden Common acts as a branch surgery. providing a service for the small number of patients unable to get to Twyford, so we see that this offers you few opportunities to achieve a successful business in Colden Common. In addition we recently purchased a plot of land alongside the Twyford surgery with a view to future development and are reviewing our plans for the branch surgery.
- 3.22 We have a well developed delivery service which delivers to patients in Colden Common, and other geographical areas. Our delivery driver, pharmacist and dispensers have an extremely good relationship with the patient base in Colden Common.
- 3.23 Whilst the predominantly younger population of Colden Common is less than 4,000 we do not believe that you will attract all of these patients to your pharmacy as they will be served by the Pharmacy at Twyford, where most are seen as patients or already have their prescriptions delivered.
- 3.24 We are happy to enter into healthy competition with you but believe that even if you achieve a gain of 50% of the pharmacy patients in Colden Common; your business plan is flawed and is not viable as the majority of the Colden Common patients will maintain their loyalty to the surgery GPs and its Pharmacy.
- 3.25 We believe that it will be in your commercial interests to meet with us as soon as possible

4 **Summary of Representations**

This is a summary of representations received on the appeal.

Dr M R W Evans & Partners (Twyford Surgery)

- 4.1 Until receiving a copy of the applicant's appeal, the doctors had no notification that a full application had been made, nor of any indication of a start date, which of course makes the implementation of the necessary changes more difficult.
- 4.2 You will see from Mr Hundle's copy of the doctors letter to him that they have tried to contact Mr Hundle and Scarlett Healthcare as they had heard nothing from them. They have returned a minority of the doctors calls, have not honoured their commitments (1 in preliminary application and 2 verbal) to meet and liaise with the doctors.

- 4.3 The surgery is clear about what is required when patients transfer from dispensing to pharmacy as this has now happened twice in the last few years. The doctors are also clear that the patient have full choice to avail themselves of these services from any of the new Pharmacy in Colden Common. the new Pharmacy opening in Sandy Lane, Fair Oak, the Pharmacy in Twyford. or any other, and the patients will be made aware of this choice as before.
- 4.4 The doctors wish to make it entirely clear that at no point has there been any conversation where the surgery has suggested it will hold on to all prescriptions for the period of gradualisation. and strongly resent this slander.
- 4.5 The necessary tasks during gradualisation period are far more than just advising and transferring dispensing patients to pharmacy status at an unusually busy time. The doctors have a number of dispensary staff who have worked for many years providing a high quality service and who know many of the patients personally. The transfer of dispensing to pharmacy patients allows the potential of not just losing jobs but to transfer some roles, some of which are part time in both dispensary and pharmacy currently, which is unusual, into more of a pharmacy role. Particularly at this time of growing unemployment the doctors wish to offer our long serving staff alternative employment wherever possible.
- 4.6 However the uncertainty about Scarlett Healthcare opening together with the recent opening of another pharmacy in this area just to the south of Colden Common, makes it uncertain how many staff will be required in the Twyford pharmacy to service the new pharmacy patients. This is also the most busy time in providing the service with swine flu and Christmas workload growing significantly.
- 4.7 Further more the physically integrated nature of the dispensary and pharmacy at Twyford means that there will need to be a refit required for the separate stock and work area's when the patients are transferred that cannot be done beforehand, and the doctors are still unclear when that will be exactly.
- 4.8 Given all the complexities and difficulties outlined above the doctors hope that the Committee will be able to consider favourably their request for a 12 month gradualisation period.

Scarlett Healthcare Ltd

- 4.9 The applicant feels the request by Twyford surgery of a 12 month gradualisation is completely inappropriate. The pharmacy was due to open on the 7 December 2009 but has been delayed till early January 2010 as the applicant is awaiting the visit from the RPSGB to inspect the premises. The applicant doesn't feel that this is a complex situation as the doctors have known about the application being granted on the 15 May 2009 for so long. Dr Evans has known about the purchase of the local business by Scarlett since August 2009. The new pharmacy is located on the same road as the surgery at a distance of around 100 yards away. The applicant doesn't feel there will be much confusion or difficulty in managing the transition as the doctors have known about the pharmacy since May 2009 and known of the applicant's intention to open since August 2009.
- 4.10 The applicant therefore respectfully request that the facts are re-considered and our appeal for a three-month gradualistaion is allowed.

Hampshire & Isle of Wight Practitioner and Patient Services Agency (on behalf of the PCT)

Appeal by Scarlett Healthcare Ltd dated 2 October 2009

- 4.11 The appellant is incorrect in his assertion that the Twyford Surgery had been informed of the grant of preliminary consent on appeal, by NHSLA letter dated 15

May 2009. The surgery was not informed by NHSLA, as is clearly indicated by the list of addressees on page 19 of the appeal decision. Even when notified some time later by this agency, the surgery was obviously still unaware of what decision the PCT would reach in regard to a gradualisation period when representations were invited in July 2009. It does not seem reasonable, therefore, to expect a dispensing practice to make its plans for the removal of a substantial number of patients from its dispensing list, until a definite timescale is ascertained.

- 4.12 The matter of prejudice to pharmaceutical services is an issue that has not been in dispute since the PCT made its original determination. It was not reconsidered by the NHSLA when the appellant appealed against it, and it is certainly not an admissible factor for the appellant to raise at this very late stage in the determination process. The question of prejudice is in any case one relating to actual pharmaceutical or medical services and not those which might or might not be provided in the future. If the pharmacy should prove not to be viable because of what the PCT believes to be a reasonable period of gradualisation, on the basis that very few patients will use the pharmacy, the PCT believes this is a business matter for the appellant, as future viability of a potential pharmacy plays no part in the determination or appeal process and it is not for the PCT or the NHSLA to attempt to be guarantors of the viability of the appellant's business. The PCT would further suggest that if the appellant's claim is true, the low level of use by patients which he predicts, seriously compromises his former claims as to its desirability.
- 4.13 The PCT notes with concern the appellant's request that the NHSLA prescribe in detail the exact nature of the gradualisation, and would argue that this is highly inappropriate. The PCT believes that it is not in its role, or that of the NHSLA, to be so prescriptive in directing the surgery as to which patients shall cease to benefit from GP dispensing services at which time, but that it is entirely a matter for the surgery to determine, according to the perceived best interests of individual patients. There is, in any case, no regulatory provision for the NHSLA to do so under regulations 29(18)b, 32(10)b, or 38(14)b.
- 4.14 The PCT respectfully suggests the NHSLA to disregard the allegation made by the appellant in the last paragraph of his letter, on the referring to a telephone conversation with the practice which cannot be substantiated.

Appeal by Twyford Surgery dated 19 October 2009

- 4.15 The appellant believes it to be a procedural error that when representations on gradualisation were invited by the PCT, those received from other interested parties were not copied to the surgery. As the question was remitted to the PCT by the NHSLA for determination under regulation 38(14)c, the PCT was under no obligation whatsoever to do more than make such determination; however the PCT considered it expedient to allow (as stated in the PPSA's letter of 1 July 2009) a period of representation to all interested parties before reaching its decision. This confers no right on any party so notified to see representations made by other parties. No such request was made by the practice at the time, and since the regulations and the DoH guidance are silent on the matter, no procedural error can have been committed. The PCT is disappointed that what was, in effect, a voluntarily consultative approach made in the interests of transparency, has been challenged by the appellant as a failure to observe due process.
- 4.16 The PCT notes sympathetically the appellant's concern on the impact of the recent reduction in the GP dispensing fee but would respectfully remind the NHSLA that this proposed cut was not announced by NHS Employers until 3 weeks after the PAC's decision was made. It could not therefore have been taken into account by the PCT in its determination of the period of gradualisation on 3 September 2009.
- 4.17 The PCT therefore respectfully requests that both the appeals be dismissed.

5 Consideration

- 5.1 The Pharmacy Appeals Committee of the FHS Appeal Unit (“the Committee”) had before it the papers considered by the PCT and the results of its own statutory consultations. On the basis of this information the Committee considered it was not necessary to hold an oral hearing.
- 5.2 The Committee had regard to regulation 20(2) of the National Health Service (Pharmaceutical Services) Regulations 2005 (as amended) which provide where the PCT considers that the provision of primary medical services by any provider of such services (other than itself) or pharmaceutical services by any chemist, or local pharmaceutical services by any LPS chemist is likely to be adversely affected in consequence of a grant under paragraph 20(1), it may impose conditions to postpone, for such periods as it thinks fit, the making or termination of arrangements under Regulation 60 (or equivalent provision under the GMS Regulations or PMS Regulations) for the provision by a doctor or a GMS contractor or PMS contractor of pharmaceutical services or dispensing services to patients on the relevant patient list.
- 5.3 The Committee reminded itself of relevant Department of Health guidance.
- 5.4 The Committee noted the PCT had determined there should be a period of 6 months after the applicant’s pharmacy opens, before affected patients are transferred from their doctors dispensing to their prescribing lists. In their appeal, Dr M R W Evans & Partners argued for a 12 months gradualisation period. The applicant thought a 3 months gradualisation period would be sufficient to allow the doctors to make any adjustments. The Committee has not been provided with a copy of the Local Pharmaceutical Committee’s comments to the PCT and therefore has had no regard to them.
- 5.5 The Committee regarded a period of 12 months as being too long, and considered a period of 6 months following the opening of the pharmacy was also generous. Although there would be several considerations for the doctors practice, the Committee was provided with no evidence of exceptional difficulties following the opening of the applicant’s pharmacy. Further, the doctors had already had some time to begin planning for the possible reduction in dispensing activity. Balancing the needs of both medical and pharmaceutical contractors, 4 months should in the Committee’s view be sufficient to reduce any adverse consequences on the practice.

6 Decision

There should be a period of 4 months following the opening of the pharmacy, before dispensing patients are required to be transferred to their doctors prescribing lists.

Ray Bushell
Appeal Officer

A copy of this decision is being sent to:

Mr K S Hundle, Scarlett Healthcare Ltd – Applicant/Appellant
Dr M Evans, Twyford Surgery – Appellant
Mr G Warner – Hampshire & Isle of Wight LPC
Mr N Ford – Hampshire & Isle of Wight PPSA