[2007–09 Gib LR 37]

R. (Application of BRUGADA and BRUGIE LIMITED) v. SCHEME PHARMACISTS BOARD

COURT OF APPEAL (Stuart-Smith, Ag. P., Aldous and Kennedy, JJ.A.): February 13th, 2007

Medicine—pharmaceutical services—Scheme membership—"adequacy" of services—under Medical (Group Practice Scheme) (Pharmaceutical Services) Regulations 1999, regs. 6(1) and 7(1)—pragmatic test used placing services on spectrum from wholly adequate to wholly inadequate—current services sufficient

Medicine—pharmaceutical services—Scheme membership—factors considered—focus on needs of patients using services, not economic demands of Health Service—must reach reasonable conclusion considering all relevant factors

A applied to the Supreme Court for judicial review of the refusal of the Scheme Pharmacists Board to grant membership of the Medical (Group Practice Scheme) to his company, B. Ltd.

A was a registered pharmacist whose company held a trade licence to conduct a pharmacy business in premises on Main Street, approved by the Medical Registration Board. The company was licensed to dispense pharmaceutical products under private prescriptions and applied to become a Scheme Member under reg. 4(1) of the Medical (Group Practice Scheme) (Pharmaceutical Services) Regulations 1999. This would enable it to handle prescriptions issued by doctors within the Government's Health Service. Following an oral hearing, the Scheme Pharmacists Board refused the application.

The Board concluded that there were already "adequate provisions" by current Scheme Members in Gibraltar with a range of quality, cost and location between them. The Board accepted, however, that services could and should be improved. This acceptance of the need for improvement was in overall support of the official review (now the Smith Report). The Board also found that the introduction of a further Scheme Member could threaten the economic viability of smaller Scheme Members, and potentially reduce the choice of pharmaceutical services available in the future.

A and B. Ltd. sought judicial review of the Board's decision. The Supreme Court (Schofield, C.J.) found that (a) there had been a fair hearing and the Board had reached a reasonable conclusion; (b) although there was a certain prolongation of the proceedings, this was neither

undue nor prejudicial to the appellants' case; (c) there may have been minor factual errors made by the Board, for example regarding wheelchair access, but these were not of such significance as to render its decision unreasonable; (d) A had notice of the official review and was therefore aware that it could be considered in the course of the Board's findings; and (e) the application of the test for determining the adequacy of services provided was correct since it was essentially pragmatic and furthermore, it was a matter to which the Board only briefly referred, therefore inconsequential to the appellants' application. The application for judicial review was dismissed. The proceedings in the Supreme Court are reported at 2005–06 Gib LR 185.

On appeal, A and B Ltd. submitted, *inter alia*, that (a) the Supreme Court had mistakenly affirmed the Board's test of "adequacy" of services since it had misjudged (using a spectrum ranging from wholly adequate to wholly inadequate), those services currently available, and whilst doing so, had considered solely the needs of the patients whereas it should have taken account of the perspectives of Government's Health Service; (b) in light of the Smith Report's criticisms of the services, the Board had reached unreasonable conclusions—in deciding that current provisions were adequate and that there was no need for the appellants' services—because it had failed to consider the benefits of the appellants' accounting system in resolving the losses incurred by the Government's Health Service from pharmaceutical fraud; and (c) there had been insufficient disclosure of the Smith Report by the Board which limited the strength of the appellants' arguments when compared with those of the Board.

Held, dismissing the appeal:

(1) None of the grounds raised by the appellants succeeded. The Supreme Court was correct in finding that the current provisions of pharmaceutical services were adequate and the test, using the spectrum of (in)adequacy, was a suitable indicator. Furthermore, the Board had reached a reasonable conclusion in its assessment of the adequacy of services, which rightly reflected the requirements of the patients in need of the services, rather than any commercial or financial demands of the Government's Health Service (paras. 13–15).

(2) Despite the criticisms contained in the Smith Report, the Board had reached a thorough conclusion, since it was not required to have based itself on these criticisms and had considered all that it needed to in reaching its decision. It was not therefore at fault for failing to consider either the Report's findings of financial losses or the potential of the appellants' accounting system for tackling this problem (paras. 16–17).

(3) There had been no failure by the Board in not expressly disclosing the Smith Report to the appellants since it did not rely upon its content, but merely supported the general theme of inadequacy of services. The Report was referred to in arguments seen by the appellants prior to the hearing, and they could have sought disclosure at that stage, which they

did not. Moreover, full disclosure of the Report could not have improved the viability of the appellants' argument, as it could not be sufficiently proved that their computer system could have made any significant difference to the adequacy of services provided (paras. 18–22).

Cases cited:

(1) *Associated Provncl. Picture Houses Ltd.* v. *Wednesbury Corp.*, [1948] 1 K.B. 223; [1947] 2 All E.R. 680; [1948] L.J.R. 190; [1947] 177 L.T. 641; 63 T.L.R. 623; 45 L.G.R. 635; 112 J.P. 55; 92 Sol. Jo. 26, referred to.

(2) *R. (Lowe)* v. *Family Health Servs. Appeal Auth.*, [2001] EWCA Civ 128, *dicta* of Laws, L.J. applied.

Legislation construed:

Medical (Group Practice Scheme) (Pharmaceutical Services) Regulations (L.N. 1999/107), reg. 6(1): The relevant terms of this regulation are set out at para. 5.

reg. 7: The relevant terms of this regulation are set out at para. 5.

J.J. Neish, Q.C. for the appellants;
R.R. Rhoda, Q.C., Attorney-General, for the respondents.

1 **STUART-SMITH, Ag. P.:**

Introduction

This is an appeal from a judgment of Schofield, C.J. given on November 8th, 2006, in which he dismissed the appellants' application for judicial review of a decision of the Scheme Pharmacists Board (the respondents) dated October 10th, 2005.

Background facts

2 The background facts are as follows: Albert Brugada is a registered pharmacist and has been so since September 20th, 2000. He is the beneficial owner of Brugie Ltd. which operates the Trafalgar Pharmacy situated at 48/50 Main Street, Gibraltar, which I shall refer to as "the premises." I shall refer to Mr. Brugada and Brugie Ltd. as "the appellants." The premises were licensed under the Trade Licensing Act but on September 27th, 2004, the licence-holder, J.T. Sons Ltd., applied for an extension to its trade licence to enable a pharmacy business to be carried on on the premises. This was with a view to the licence being transferred to Brugie Ltd. The application was granted on December 31st, 2004, despite the objections of the operators of eight pharmacies, subject to the trade licence being transferred to Brugie Ltd. and approval of the premises by the Medical Registration Board. Registration of the pharmacy was

approved by certificate of the Medical Registration Board, pursuant to s.7 of the Medical Health Act, on May 20th, 2005.

3 On December 29th, 2004, Brugie Ltd. applied to become a Scheme Member pursuant to reg. 4(1) of the Medical (Group Practice Scheme) (Pharmaceutical Services) Regulations 1999. The applicants were already licensed to prescribe pharmaceutical products under prescriptions issued by private practitioners. The effect of membership of the Scheme is that the applicants would be able to prescribe such products under prescriptions issued by doctors within the Government's Health Service. The application was heard by the Scheme Pharmacists Board ("the Board") on September 23rd, 2005, at which hearing the applicant, and various objectors, and their counsel were heard.

The legislative framework

4 Section 3 of the Medical (Group Practice Scheme) Act establishes a scheme by which all persons registered, and their dependants, are entitled to benefits prescribed by Regulations made under the Act. The scheme is administered by the Gibraltar Health Authority (see s.3(3)). Part III of the Act provides for the Board which, by s.12, has the duty of exercising powers relating to applications, regulation of membership of the scheme, and its general administration and regulation. A Scheme Member is described as "a registered pharmacist whose name has been included in the Scheme Pharmacist List" (see s.11). By s.22, the Minister made regulations providing, *inter alia*, for applications to the Board and the criteria to be used by the Board in granting applications.

5 Pursuant to s.22, the Minister made the Medical (Group Practice Scheme) (Pharmaceutical Services) Regulations. Regulations 6(1) and 7 are relevant to this application. They read:

> "6(1) Applications under regulation 4(1) shall be granted only if the board is satisfied that it is necessary or desirable in order to secure the adequate provision of pharmaceutical services in Gibraltar for the purposes of the Scheme.
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> . . .
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> 7(1) In considering any application under regulation 4(1), the board shall have regard to the following matters—
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> (a) whether or not adequate pharmaceutical services are already provided by Scheme Members in the neighbourhood in which the premises named in the application are located;
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> (b) whether or not adequate pharmacy services are already provided by Scheme Members in Gibraltar generally;

(c) any information available to the board which, in its opinion, is relevant to the consideration of the application; and

(d) any objections to the application received by the board."

6 There are then provisions for objections to be made, representations and notice of objections to be given to the applicant, hearings of representations and matters of that sort.

The Board's decision

7 The Chief Justice, having referred to regs. 6(1) and 7; helpfully summarized the Board's decision (2005–06 Gib LR 185, at paras. 8–14). The Board said:

> "'The purpose of the scheme is to ensure that GHA patients have adequate access to pharmacies able to dispense medication on GHA prescriptions. In other words, ensuring that there is adequate provision of scheme members in Gibraltar. Securing adequate provision means that such pharmaceutical services should be easily accessible to GHA patients in terms of their geographical distribution and that the choice and quality of the services they provide are adequate.'

9 The Board then discussed the pharmacies in the neighbourhood of the Trafalgar Pharmacy, and concluded that the pharmaceutical services and facilities provided by all the Scheme Members in the neighbourhood are not markedly different from each other and that the current provision of services is more than adequate. The Board also concluded that the six pharmacies in the neighbourhood are easily accessible to the general public and that at least three of them are accessible by persons in wheelchairs or with prams. The Board also stated that it was satisfied that generally patients do not have an extended wait and that the 'unrefuted evidence' was that waiting time tends to be for a maximum of 10 minutes.

10 The Board then went on to consider the current provision of Scheme Member pharmaceutical services in Gibraltar generally and was again satisfied that the current provision was more than adequate. The Board made reference to a Pharmaceutical Services Review carried out by John Smith of the Health Care Department Team and published in December 2004. The Board said that it was comforted by the conclusions of the Review that Gibraltar is well supplied by the 11 existing pharmacies. The Board said that it was unable to say that the current provision is wholly adequate and concluded that the type of services can be improved. It made a comparison between the services provided by the National Health

Service in the United Kingdom and elsewhere and made reference to a category of Advanced Services and Enhanced Services.

11 The Board said it was satisfied that the recipients of pharmaceutical services had a reasonable level of choice in the neighbourhood and in Gibraltar generally, but said that there is a geographical maldistribution of services.

12 The Board then went on to consider the question of whether it was desirable to grant the application and decided that it would be desirable to grant an application where the applicant offered 'innovation' which it described as 'improved facilities and services designed to upgrade current service provision and to bring Gibraltar's pharmaceutical services closer to the NHS Pharmacy model.' The Board referred to the claimants' facilities, including the supplementary facilities and services they offered, and concluded that it was not satisfied that there would be any added benefit to recipients of pharmaceutical services from the choice of services the claimants proposed to provide as to make it desirable to grant the application.

13 The Board declared that it took into consideration the confidential information which consisted of an analysis of the number of prescriptions dispensed each year by each of the existing Scheme Members. It went on to consider the increase in the cost of medication and the economic impact which an additional member may have on existing members. It concluded that the introduction of an additional member would have the inevitable effect of diluting the market to such an extent that the economic viability of some of the smaller Scheme Members may be compromised, thus driving them out of service. As these Scheme Members are located outside the neighbourhood, this may have a detrimental impact on future overall access to services.

14 . . . [T]he Board disregarded the following in reaching its decision:

(a) the financial investment made by the claimants in the purchase of the lease and the cost of refurbishing the premises;

(b) the fact that the Trade Licensing Authority granted the claimants a trade licence;

(c) objections which were raised regarding Mr. Brugada's qualifications, him being duly registered in Gibraltar; and

(d) objections to the application based on dilution of stock levels to other Scheme Members."

8 The grounds of the application for judicial review were numerous but, in so far as they are still relevant, were summarized by Mr. Neish, Q.C.,

who appeared for the appellants, as follows: (a) the Board's decision was irrational in that it failed to take into account, or give weight to, certain matters; (b) the Board applied the wrong test in considering the application; (c) the Board acted unfairly in not disclosing certain matters; and (d) the Board made serious errors in its findings.

9 The Chief Justice dealt with these submissions in turn. He reminded himself of the well-known test in *Associated Provncl. Picture Houses Ltd.* v. *Wednesbury Corp.* (1), that the question was whether the Board had taken into account matters that it should not have done, or failed to take into account those which it should have done, or whether it had come to a conclusion that no reasonable board could reach. He held that, though there were minor errors in relation to the number of pharmacies that had wheelchair access, and as to the length of the waiting time, that these were of no significance and could not render the decision unreasonable. He rejected the submission that the Board improperly took into account the conclusion, in what has been referred to as the Smith Report, that there was adequate provisions of pharmacies in the neighbourhood. The Board had clearly reached its own conclusion on this, and merely referred to the fact that it took comfort from the fact that this was consistent with what the Smith Report had recorded. He rejected the submission that the Board's decision was unreasonable or irrational.

10 As to the allegation that the Board had applied the wrong test, he cited at length from the judgment of Laws, L.J. in *R. (Lowe)* v. *Family Health Servs. Appeal Auth.* (2). He held that the Board's assessment that the existing services were more than adequate was in accordance with the test laid down in *Lowe* and could not be faulted.

11 The allegation of unfairness, in so far as it is still relevant, related to what was alleged to be the non-disclosure of the Smith Report to the appellants. The Chief Justice held that the appellants had ample notice of the existence of the Report; and that in any event the Board did not rely on it; and in so far as there were errors of fact, he held that such as had been made were of such a minor character that they could not affect the decision.

12 Before this court, Mr. Neish, Q.C. summarized the grounds of appeal under four heads:

(1) having misdirected himself, the learned Chief Justice erred in finding that the Board had properly applied its mind to—

(a) the test of "adequacy"; and

(b) the test of "necessity" and "desirability" and whether the Board and the judge had properly applied such tests to the appellants;

(2) in the light of the Smith Report it was unreasonable for the Board to find that the pharmaceutical services being provided by Scheme Members were adequate and that it was not necessary or desirable to admit the appellants as Scheme Members. The learned Chief Justice erred in not interfering with the Board's finding;

(3) the learned Chief Justice erred in finding that the Board's failure to disclose the Smith Report to the appellants did not amount to procedural unfairness or irregularity; and

(4) the learned Chief Justice failed to give due weight to the need to provide wheelchair access to pharmacies.

The wrong test

13 The Chief Justice quoted the test set out in *Lowe* (2) in the judgment of Laws, L.J. in relation to the English regulation, which is in substantially the same terms as those with which we are concerned, as follows ([2001] EWCA Civ 128, at para. 14):

> "14 I believe that the regulation's true construction may be expressed somewhat more simply through these following five steps.
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> 1 A licence to provide pharmaceutical services is *only* to be granted under regulation 4(4) for the purpose of securing in the relevant neighbourhood the adequate provision by listed pharmacists of the services in question. So much is plain and elementary.
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> 2 What is 'adequate' is a question of degree. There is, as it has been described, a spectrum or 'continuum' of adequacy.
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> 3 That is, I think, ordinarily a feature of the term 'adequate' as a matter of language. But it is in any case a necessary feature of the term as it is used in regulation 4(4) since if it were otherwise—if 'adequate' were to denote a single sharp edge, such that any given set of facts would fall plainly upon one or other side of it—then it would be impossible to arrive at any construction of the earlier phrase, 'necessary or desirable', other than one in which the word 'desirable' were otiose. If the provision were *inadequate*, it would simply be *necessary* to make it up by granting the application. If it were adequate, the application would have to be refused.
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> 4 It follows that, while *on the surface* the first question for the decision-maker is simply whether existing provision is adequate, the real question is where on the sliding scale or spectrum of adequacy does the case on its facts belong.
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> 5 To this, the logically available answers are:
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> (a) Wholly adequate. There is no magic in the word 'wholly'; it

simply refers to a state of affairs in which there is no question but that the existing provision suffices.

(b) Wholly inadequate. Again, there is no magic in the adverb. This looks at a state of affairs where further provision must necessarily be made.

(c) Marginal, or somewhere between (a) and (b). There the decision-maker may conclude that it is desirable to grant the application in order to secure adequate provision. But

(d) There may be some slippage between what is marginal and the extremes, wholly adequate or wholly inadequate. To that extent there may be slippage also between what is necessary and desirable. The judgment to be made is emphatically pragmatic."

14 Mr. Neish's submission is that the Board and the judge considered the question of adequacy solely from the point of view of the patients and not at all that of the Health Authority. He submitted that the Smith Report indicated that there was a substantial level of fraud practised by pharmacists in Gibraltar, such that the Health Authority was sustaining losses of the order of half a million pounds per year. Had the Board considered this aspect of the matter, it should have concluded that the appellants' pharmacy offered a superior computerized accounting system which would have eliminated any possibility of fraud so far as it was concerned. The Board should have taken this matter into account, because it would have had a beneficial effect on the level of fraud generally.

15 I cannot accept this submission. It is clear that the Chief Justice and the Board directed themselves in accordance with the *Lowe* test. The Board held that the provision of pharmaceutical services was not "wholly adequate" because there were other services which could be supplied, and which were supplied in the United Kingdom and which were not generally available in the pharmacies in Gibraltar, but that the appellants were not offering these services either. Furthermore, the Board did consider the economic consequences of licensing a further Scheme Member, in that it might have adverse consequences for the public because the market would be diluted and some smaller pharmacies might be obliged to close. It is clear in my judgment that the primary question when considering the adequacy of the provision must be from the point of view of the patients.

The unreasonableness of the Board's finding of inadequacy and that it was not necessary or desirable to grant the appellants' application

16 This submission is again based on the contents of the Smith Report. What is said is the Smith Report was, overall, critical of the pharmaceutical services provided by the Scheme Members and therefore it was irrational for the Board to say that it was not satisfied that they were

inadequate. However, the criticism in the Smith Report, as I have indicated, related to reluctance by the Scheme Members to provide additional services. But Mr. Neish does not challenge the Board's finding that the appellants were not offering those additional services either.

17 Moreover, the strange thing about this submission is that the Board failed to take into account the findings of the Smith Report in these respects. This contrasted with the criticism of the Board taking comfort from the Report's finding that there were adequate numbers of pharmacies. The Board was not invited to find on the criticisms of the services contained in the Smith Report. Mr. Neish says that this was because the appellants were unaware of the report. That is a matter which is subject to the complaint of non-disclosure of the Smith Report. But Mr. Neish submits that the Board, being aware of the Report and of its contents, should have taken the point themselves. In the end, this submission rested on the question of fraud, and the finding, if that is what it was, that the health services were losing half a million pounds a year. I do not think the Board can be criticized for failing to take account of this finding. The Report was not in evidence, no submissions were made upon it, and it is difficult to see how, even if the appellants' computer system would have eliminated any chance of fraud so far as it was concerned, this could have affected the adequacy of services in the neighbourhood.

Failure to disclose the Smith Report to the appellants

18 It is submitted by Mr. Neish that the Board failed to disclose the existence, and therefore the contents, of the Smith Report to the appellants. The appellants said that although they knew of the review in progress they did not know there was a report. Had they done so, they would have been able to advance their argument with greater force that the computer system would have been a valuable defence against fraud. In my judgment there are a number of answers to this criticism.

19 First, there is no question of the Board disclosing the Smith Report to one side and not to the other. The Smith Report, which is not a report as it is so-called, but a draft report prepared by the Gibraltar Health Care Development Team, the NHS, and the Clinical Government Support Team, was referred to (perhaps variously described) in the objector's skeleton arguments which were seen by the appellants well before the hearing before the Board. If the appellants so wished, they could have sought disclosure of the Report, but they did not do so.

20 Secondly, the Board, as I have indicated, did not rely on the Report or its contents; it merely took comfort from the fact that its finding of adequacy was consistent with that contained in the Report.

21 Thirdly, it was far from clear whether the appellants' PARC Software System was unique or provided better protection against fraud than other

systems. Some other pharmacies had similar computer systems and the evidence was that soon all pharmacies would be linked to the Primary Care Centre by computer, and that all existing systems would have to be changed accordingly.

22 Finally, it would have been impossible for the Board at the hearing of the application to have conducted an enquiry as to which pharmacies were cheating. This was primarily a matter for the police. The Board has statutory powers contained in reg. 10 of the Regulations to conduct an investigation and to apply sanctions to delinquent Scheme Members. Despite this, it had not exercised this power in that it had not conducted such an enquiry or investigation at that time. There is simply no evidence that the appellants' PARC system would have affected the overall level of fraud, which was, in any event, probably largely due to the sale of generic drugs instead of prescribed drugs.

Failure to give due weight to the need for pharmacies to provide wheelchair access

23 This was essentially a matter for the Board to evaluate. Two of the six existing pharmacies in the area had wheelchair access, both located in the same building as the Primary Care Centre, and therefore most likely to be used by wheelchair-bound patients. It may be that the Board made an error in thinking that there were three such pharmacies. Or, it may be that it considered the temporary access shown in one of the photographs qualified as wheelchair access. If there was a mistake, it was not such as could possibly invalidate its decision. Moreover, it appears that under the Equal Opportunities Legislation, wheelchair access will shortly have to be provided as a matter of law, subject to any qualifications.

24 For these reasons, I have come to the conclusion that none of the criticisms of the Board or the learned Chief Justice's judgment are made out, and I would accordingly dismiss the appeal.

25 **ALDOUS** and **KENNEDY, JJ.A.** concurred.

Appeal dismissed.