

Business Focus

Competition? Choice? The plot thickens

David Parker, with the help of solicitors involved in the case, examines the implications of a control of entry judgment in the High Court



Always choice

Will there always be choice found?

The answer to that question is, "No". The court rejected the argument that there would be choice were there only one source and provider of services. It had been argued that, in those circumstances, there was a choice to either use the services offered or not. This, the judge confirmed, was not a

choice. The analysis in the judgment does, however, allow a PCT room for manoeuvre in circumstances in which there cannot be said to be a choice (where, for example, there is only one provider).

Court guidance

The guidance in the judgment suggests that a three-stage approach must be taken.

To summarise. Firstly, the PCT must identify the relevant neighbourhood.

Secondly, the PCT must make a finding as to whether or not the current provision of services is adequate. In making this decision, the PCT must have regard to all relevant factors, including those listed in the regulations (including choice). The weight given to each factor is entirely a matter for the PCT. The PCT will err in law if it does not take into account a relevant factor or takes into account any factor that is irrelevant (this would leave a decision susceptible to judicial review).

Having regard to all of the factors, the PCT must find that the current provision is adequate or inadequate. It was stressed that this "requires the exercise of a qualitative value judgment — the discretion is a wide one, and it is only if the decision-maker strays outside this wide ambit that his decision will be challengeable as irrational or perverse."

The effect of this is that it appears to be acceptable for a PCT to have regard to the fact of there being no choice when dealing with an application to the Pharmaceutical List, but to attribute no or little weight to that fact and conclude that the current provision is adequate.

This is an important judgment because it needs to be considered by any pharmacy contractor wanting to protect its existing position in a neighbourhood (by making representations against an application by a third party), or expand its business into new geographical areas. It is equally relevant to smaller independents looking to break into areas where others already have a foothold.

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Following an Office of Fair Trading report into the control of entry regulations, the Department of Health made limited changes to the regulations in 2005. One of the changes explicitly required the decision-maker to consider "choice" when determining adequacy under Regulation 12.

Rather strangely, although the 2005 Regulations refer only to "choice" without any mention of "competition", the DoH's own guidance notes to PCTs describe this new consideration under the heading of "competition and choice". They also clearly suggest that PCTs should be considerably more inclined to grant a new contract where competition and choice improves upon existing provision. However, in practical terms, since the change to the regulations, the number of new contracts granted under the auspices of "competition and choice" is small.

This apparent contradiction between written regulation and guidance notes and the decisions made by PCTs and the Litigation Authority, to which appeals go, led Assura Pharmacy to ask for a judicial review of two decisions to which the question of "choice" was key.

This is the first time that the High Court has been asked to rule on the meaning of "choice" and as such is new legal territory.

I have asked Nick Austen and Rebecca Tinham of specialist pharmacy lawyers Vertex Law, which was directly involved in the proceedings, to summarise, in practical terms, the key points that can be drawn from the decision. The rest of this article is by them.

Vertex law explains

Applications to the pharmaceutical list in England are made to the local primary care trust, which must apply what is known as the "necessary or desirable test" (Regulation 12) when deciding whether or not to grant the application.

Regulation 12 means that the PCT must consider (amongst other things) whether there is already a reasonable choice with regard to the pharmaceutical services provided in the neighbourhood in which the premises named in the application are located.

The "choice criteria" have been the subject of much debate as to their impact in the determination of applications to the Pharmaceutical List. In two (of three) judicial

reviews brought by the same claimant (Assura) and heard together in January, 2008, the interpretation of Regulation 12 and, in particular, the application of the choice criteria was scrutinised by the Administrative Court.

In one case, services in the neighbourhood were provided by only one pharmacy that was situated at the local health centre. A neighbouring town had five pharmacies. The PCT decided that the provision of services was adequate and refused the application, despite the fact that there was no choice of provider in the neighbourhood. In the other of the two cases, there were two pharmacies already on the list and both of these were owned by the same pharmacy group. Again, the PCT refused the application.

The claimant drew the court's attention to the OFT report and the subsequent Government proposals and reports. The OFT had recommended wholesale deregulation, an option that the Government of the day did not endorse and Parliament did not enact. The Court found that there was no need to have recourse to any material other than the words of the regulation itself when determining its meaning; there were no ambiguities which called for a resolution. In other words, Regulation 12 did not need to be read in light of this background information.

Competition and choice

How did the Court view competition and choice?

The Court was invited by the parties' legal representatives to give a guideline judgment, directing how PCTs should approach applications with regard to the choice criterion (as one of many in Regulation 12).

The Court considered the factors to be considered by a PCT in Regulation 12 and found that:

- Choice was no more or less important than the other factors to which the decision maker is directed and the weight to be attributed to it is a matter purely for the decision maker
- There is "no in-built bias in favour of promoting choice" in Regulation 12
- Regulation 12 requires the decision maker, when considering the "necessary or desirable" test, to have regard to whether the recipients of pharmacy services already had a reasonable choice of services, having regard to both the services provided and the persons who provided them