

**IN THE FAMILY HEALTH SERVICES APPEAL AUTHORITY**

**Mr D Pratt - Chair  
Mrs S Govani - Professional Member  
Mrs M Harley - Member**

**BETWEEN:**

**MR JONATHAN MARCUS MCGILL**

**Appellant**

**-and-**

**DONCASTER PRIMARY CARE TRUST**

**Respondent**

**DECISION WITH REASONS**

1. This is an appeal by Mr J M McGill, a registered pharmacist, against the decision of Doncaster Primary Care Trust ("the PCT"), notified by its letter of 5 December 2006, that *"your inclusion in the Pharmaceutical List should be on condition that you provide written evidence of your commitment to maintaining high standards and ethical responsibilities as Superintendent Pharmacist."* For the reasons set out below we have treated this decision as a contingent removal of Mr McGill from the PCT's pharmaceutical list, under the statutory power conferred by Section 49G of the National Health Service Act 1977, as amended ("the 1977 Act").
2. With the consent of the parties, the Panel considered this appeal on the papers, without an oral hearing, as provided under Rule 38 (1) of the Family Health Services Appeal Authority (Procedure) Rules 2001 ["the Rules"] on 2 April 2007. The unanimous decision of the Panel is to allow the appeal. Mr McGill's name will therefore remain on the Pharmaceutical List of the PCT, without condition.

**FACTS**

3. The Panel finds the following facts to be proved on a balance of probabilities.
4. Mr McGill's name is on the PCT's Pharmaceutical List in respect of pharmacy premises at Sprotborough, Doncaster. He is also the Superintendent Pharmacist of JM McGill Ltd., a company which is also on this PCT's Pharmaceutical List in respect of two other pharmacist's premises at Warmsworth, and Balby, both in Doncaster. Under section 71 of the Medicines Act 1968 pharmacy services may be carried out by a body corporate, provided that the keeping, preparing and dispensing of medicinal products is under the management of a Superintendent (in this case Mr McGill).
5. In addition, the PCT is the "home PCT" of JM McGill Ltd under Regulation 69A of the National Health Service (Pharmaceutical Services) Regulations 2005, as amended ["the Regulations"], which provides that where a body corporate is required under the Regulations to provide information to another PCT where it is operating or proposing to operate pharmacies, it can instead provide that information to the home PCT. We understand from references in the documents that JM McGill Ltd has such premises in nearby PCT areas including at Wath-on-Dearne.
6. By a decision letter dated 15 September 2006 the Infringements Committee of the Royal Pharmaceutical Society ["RPSIC"] informed Mr McGill of its decisions in relation to 5 allegations against him. Each concerned his conduct as the Superintendent Pharmacist of JM McGill Ltd. In each case the RPSIC decided that there was no real prospect of a finding of misconduct being made sufficient to render him unfit to be on the register because the matter was not sufficiently serious. It therefore resolved not to refer him to the Statutory Committee

(the body which may determine misconduct and impose penalties). However the RPSIC decided to issue him with a written warning in respect of each of allegations numbered 1, 4 and 5. No further action was taken in relation to the two remaining allegations.

7. The allegations (to which we have added dates and other supplementary information from information supplied in the notice of appeal and grounds of opposition) were:
  1. A supply of methadone, which was a tenfold overdose, was made on 21 September 2005 to a patient from a pharmacy of which he was the Superintendent Pharmacist. This was characterised by the Infringements Committee as a serious departure from accepted standards and a failure of supervision. Mr McGill had self-reported the incident and admitted the error.
  2. A supply of Methadone in July 2005 to various patients at the Wath-on-Deane pharmacy, when a pharmacist was not available, but Mr McGill made up the prescriptions at the Balby pharmacy and had them delivered to the Wath-on-Deane pharmacy for collection. The RPSIC found this represented a departure from accepted standards and a failure of supervision but that Mr McGill had been trying to act in his patients' best interests. They noted he had self-reported this incident. No further action was taken on this allegation.
  3. A failure to make entries in the correct Controlled Drugs register [i.e. the register for the pharmacy which was the source of the dispensing] in relation to allegation ii above. No further action was taken on this allegation.
  4. A failure, in August 2005, to ensure that controlled drugs were kept under suitable safe custody at [new pharmacy premises] in Doncaster. It is contended in the notice of appeal, and not disputed in the PCT's response, that this was while Mr McGill was obtaining expert advice on storage from the police and Home Office, and meanwhile they were stored in private room with a keypad lock, in a locked cupboard, to which a pharmacist held the keys. A written warning was issued in respect of this allegation.
  5. As Superintendent Pharmacist he failed to ensure the observance of all legal and ethical requirements evidenced by allegations 1 to 4 above.
8. The PCT's Reference Committee held a meeting on 20 November 2006 at which it considered the inclusion of Mr McGill's name in the Pharmaceutical List in relation only to the three findings against him which had resulted in written warnings. This Committee consisted of the Chairman of the PCT, its Interim Director of Nursing, its Director of Public Health and a non-Executive Director. We are informed by paragraph 13 of the PCT's Grounds of Opposition to this appeal that the Reference Committee is the PCT's formal decision making body on all disciplinary matters relating to Independent Primary Care Contractors, including pharmacists. We assume the Reference Committee has a lawful and effective delegated power to act on behalf of the PCT, rather than simply to make recommendations to it.
9. According to paragraph 2 of the Minutes of its proceedings, the Reference Committee expressly considered only the matters where written warnings had been issued (namely allegations 1, 4 and 5 above). Mr McGill attended but was not represented or accompanied by a supporter. He was invited to make comments. His comments are more fully reported at pages 13 to 14 of the appeal bundle. There is no suggestion either in the Minutes of that meeting or in the PCT's grounds of opposition to this appeal that any of the matters put forward by Mr McGill are untrue or incorrect and we therefore accept them as fact.
10. Mr McGill told the PCT Reference Committee, and we accept, the following:
  - a. As to the drug calculation error: Mr McGill acknowledged the severity of the error which resulted from protocols not being followed by a fully trained pharmacy technician. One member of staff had dealt with the prescription instead of the usual four. An error had been made with different strengths of Methadone concentrate stored in similar bottles. All necessary parties had been informed and the patient had been located and admitted to a local hospital: no untoward outcome was reported, so far as we know. Procedures had now been implemented to re-inforce standard operating procedures. He had attempted to source colour-coded bottles without success.
  - b. As to the storage of controlled drugs: there was an unexpected demand for Methadone at newly acquired pharmacy premises, and it was kept in a locked

first floor cupboard on the first floor to which the public did not have access. Meanwhile he took advice from a Drug Squad Officer after a visit, and new cabinets were purchased. In the interim he admitted knowingly storing the drugs in breach of legislation and decided to report his failure, as well as sharing experience with another pharmacist in Sheffield.

- c. As to the failure to observe legal and ethical requirements - when asked what steps he had taken to improve his working practices he explained that:
  - (a) Clinical governance is in place across all pharmacies and each has an identified CG person;
  - (b) Communication with branches in the company had been improved;
  - (c) There was better sharing of information;
  - (d) Pharmacy staff currently meet in separate groups but there are no regular staff meetings yet.

Mr McGill denied that there were any problems with capacity following an expansion of the business.

11. The PCT's Reference Committee then considered the matter. According to the Minutes at pages 14-15 of the appeal bundle, it felt that it had to take into account the serious nature of the incidents and decisions to issue 3 written warnings. It acknowledged Mr McGill had self-reported the incidents and had his own standard operating procedures. It noted there was no local support network for Superintendent Pharmacists and that Mr McGill had had to seek advice from a pharmacist outside Doncaster. It considered that "*by his own admission in relation to RPS allegation 1, Mr McGill had knowingly cut corners and the dispensing error had profound consequences for him as a Superintendent Pharmacist and that systems had been introduced into his practices to minimise the possibility of future error.*" In relation to RPS allegation 4: "*Mr McGill had knowingly acted in breach of CD [controlled drug] legislation but that CD storage in his premises was now compliant with legislation*". In relation to RPS allegation 5 the PCT's Reference Committee felt that it had not received assurances from Mr McGill with regard to how he would fulfil his commitment to observe all legal and ethical requirements as Superintendent Pharmacist.
12. The Reference Committee agreed that the PCT should take further steps in relation to its own practices, which are not material to this appeal, and also that "*a condition should be imposed on Mr McGill's inclusion in the List (**contingent removal**). The condition is that he provides written evidence of his commitment to maintain high standards of professional practice with particular regard to his legal and ethical responsibilities as Superintendent Pharmacist. The condition would be reviewed in 3 months time.*" The words we have emphasised in bold indicate to us that the Reference Committee was considering conditions in the context of its power to direct a contingent removal under Section 49G of the 1977 Act, to which Regulation 48 of the 2005 Regulations applies. We find as a fact that when the PCT speaks of imposing conditions it is this power of contingent removal which was being considered.
13. By a letter dated 5 December 2006 Mr McGill was informed that:

*"The Committee has therefore concluded that your inclusion in the Pharmaceutical List should be on condition that you provide written evidence of your commitment to maintaining high standards of professional practice with particular regard to your legal and ethical responsibilities as Superintendent Pharmacist. The Committee has agreed that the condition will be reviewed in 3 months time."*

#### The appeal and issues raised

14. The Notice of Appeal lodged by solicitors on behalf of Mr McGill raises the following issues:
  - a. Whether the PCT purported to impose the condition under Reg 21 of the 2005 Regulations and if so, whether it has power to do so.
  - b. Whether the PCT has power to impose conditions on Mr McGill personally in respect of allegations relating to premises for which J M McGill Ltd was the pharmacist on the List.
  - c. Whether it was reasonable to impose conditions in light of
    - (a) The fact that only one written warning was issued by a letter from the RPS dated 15 September 2006;

- (b) The nature, seriousness and surrounding circumstances of the allegations, which (it is argued) the RPSIC had found were not so serious as to give a real prospect of a finding of misconduct;
  - (c) The fact that the PCT can only impose conditions with a view to removing any prejudice to the efficiency of the services in question [s 43ZA *NHS Act 1977* is specifically relied on] when, it was argued, no reasonable PCT could conclude that anything done or omitted to be done by Mr McGill was a potential risk to the efficiency of the service.
- 15. The PCT's Reply is set out in a 7 page document entitled "Grounds of Opposition". The PCT produced a bundle of contemporaneous documents on which it relied (which appear as pages 9 to 17 in the FHSAA appeal bundle). In response to the specific issues summarised at paragraph 14 above, the PCT contends that:
  - a. Regulation 21 (1) was not engaged because the PCT was not deciding an application from Mr McGill to be included on its list (in which case Regulation 21 admittedly does not confer a power to admit him on conditions); rather it was contingently removing him under Section 49G of the 1977 Act which does confer that power.
  - b. Regulation 48 of the 2005 Regulations permits the PCT to remove a chemist contingently, where a *chemist* is defined as (a) a registered pharmacist; or (b) a person lawfully conducting a retail pharmacy business in accordance with Section 69 of the Medicines Act. It is contended that the condition which has been imposed on Mr McGill is in his capacity both as a registered pharmacist and as the Superintendent Pharmacist for the body corporate JM McGill Ltd.
  - c. The PCT had not acted unreasonably, and although the written warnings were all contained within one letter, they were in respect of three separate allegations. The matters considered by the RPSIC were prejudicial to the efficiency of the service: the test of prejudice to efficiency was not as high a threshold as the test which the RPSIC had to satisfy. The PCT contended that the fifth allegation underscored the importance of Mr McGill's professional responsibilities and it was this on which Mr McGill had failed to provide adequate assurances as to how he would fulfil his commitment to observe all legal and ethical requirements.
- 16. The Grounds of Opposition contained much other background information.
- 17. Lastly we received further submissions from Mr McGill's solicitors commenting on matters raised by the PCT in the Grounds of Opposition and enclosures.
  - a. The following points were made in relation to the PCT's Reference Committee meeting, and the accuracy or completeness of the Minutes provided to us:
    - (a) It was contended that before attending the meeting Mr McGill had been informed that the meeting was not a disciplinary one and that it was standard practice for the PCT to have such a meeting where there had been an investigation by the RPS. Mr McGill had attended the meeting on that basis.
    - (b) It was contended the minutes did not properly reflect the discussions which took place. From what followed, this appeared to mean that they did not fully reflect everything of significance which had been said, including the measures Mr McGill had explained he had now put in place in relation to protocols, procedures and staff training.
    - (c) It was contended that Mr McGill agreed to a "compliance" visit and to provide the PCT with written evidence of his commitment to high standards, but he was not informed that he had been contingently removed from the PCT's Pharmaceutical List subject to a condition that he complied with that agreement.
  - b. The PCT's written representations characterised this as a contingent removal in order to prevent prejudice to the efficiency of the pharmaceutical services provided by Mr McGill but (so Mr McGill's solicitors argued) nowhere in the Minutes of the meeting of 24 November did the PCT refer to the efficiency of the service provided, and the only reason given by the PCT to justify its decision was

that it felt it had to take into account the seriousness of the allegations and to acknowledge the subsequent decision of the Infringements Committee. It was argued that the decision was by way of punishment and not because of concerns about efficiency. We were asked to consider *R (Richards) v Pembroke CC* [2004] EWCA 1000 in support of the submission that we should determine the appeal based on the reasons given by the PCT at the time and not any retrospective representations by its solicitors.

- c. It was argued that Mr McGill was not on the Pharmaceutical List in respect of any premises where the offending events had occurred: those were premises operated by JM McGill Ltd. If the PCT wished to remove the company contingently from the list, they should formally notify it of that intention, but had not done so.
- d. Lastly, Mr McGill's solicitors addressed us in writing on the distinction between a finding by the RPS Statutory Committee of unfitness to be on the register (the threshold to further action) and any sanction, including reprimand, which could be imposed.

18. The relevant law

- a. Section 49F of the National Health Services Act 1977 ["the 1977 Act"] as provides that a person who is included in the Pharmaceutical List may removed from that List if his continued inclusion "would be prejudicial to the services which those included in the list undertake to provide" [an efficiency case]
- b. Section 49G of the 1977 Act provides that:
  - "(1) In an inefficiency case or a fraud case, the [PCT] may, instead of deciding to remove a practitioner from their list, decide to remove him contingently.
  - (2) If they so decide, they must impose such conditions as they may decide on his inclusion in the list with a view to –  
Removing any prejudice to the efficiency of the services in question (in an efficiency case) or....
  - (3) If the [PCT] determine that the practitioner has failed to comply with a condition, they made decide to –
    - (a) vary the conditions or impose different conditions, or
    - (b) remove him from their list."
- c. Regulation 46(5) of the NHS (Pharmaceutical Services) Regulations 2005 [the 2005 Regulations] provides that where a PCT is considering removal of a chemist's name from its pharmaceutical list under section 49F (2) of the Act (an efficiency case) it shall consider (among other things) certain prescribed information set out in the Schedules to the Act and the matters set out in paragraph (6) including:
  - (a) "the nature of the incident which was prejudicial to the efficiency of the pharmaceutical services provided by the chemist;
  - (b) the length of time since the last such incident occurred and since any investigation into that incident concluded;
  - (c) any action taken by any ....regulatory or other body ...as a result of the incident;
  - (d) the nature of any incident and whether there is a likely risk to users of pharmaceutical services;
  - (e) whether the chemist has previously failed to supply information, make a declaration or comply with an undertaking required by these Regulations..."
- d. Regulation 48 (1) and (2) of the 2005 Regulations requires that where a PCT is considering removal or contingent removal of a chemist's name from the pharmaceutical list under Section 49G of the 1977 Act, it shall first give the chemist:
  - (a) Notice in writing of any allegation against him;
  - (b) Notice of what action the PCT is considering and on what grounds;

- (c) The opportunity to make written representations to the PCT within the period of 28 days beginning with the date of the notification under subparagraph (b) and
  - (d) The opportunity to put his case at an oral hearing before the PCT if so requests within the 29 day period mentioned.
- 19. We have directed ourselves that:
  - a. This appeal proceeds by way of a redetermination of the case brought by the PCT [regulation 30(1) of the 2005 Regulations and section 43 ZA of the 1977 Act]. In consequence we are not concerned with evidence and arguments adduced before any PCT hearing but only with the evidence and arguments presented to us. A further consequence is that ordinarily this Panel is not concerned with alleged procedural irregularities below, but it will be necessary to say something about procedural failures in this case.
  - b. The burden is on the PCT to prove its case.
  - c. We have the powers which the PCT could have exercised [regulation 20 (3) of the 2005 Regulations].
  - d. The standard to which we must be satisfied is whether facts or allegations are proved on the balance of probabilities; whether it is more likely than not to be true. The panel recognises that where serious allegations are raised, cogent and compelling evidence is required if they are to be found proved. When considering whether we are satisfied on a balance of probabilities that an allegation is established we bear in mind that the more serious the allegation, the less likely it is that it occurred and the stronger should be the evidence before we conclude that the allegation is established
- 20. We have also had regard to the Department of Health Guidance on the 2005 Regulations entitled "Fitness to Practise Procedures – Community Chemists: July 2005" including the paragraphs numbered 3.49 to 3.55 under the heading "Contingent Removal from a list" and the paragraphs numbered 3.102 to 3.109 under the heading "Oral hearings".
- 21. In our view the first ground of appeal set out at paragraph 14 above fails. It is true that the PCT's letter notifying Mr McGill of its decision (see paragraph 13 above) talks of including Mr McGill in the List on conditions, but we have found, for the reasons set out at paragraph 12 above, that the Reference Committee was intending to exercise its powers of contingent removal from the List, under Section 49G of the 1977 Act. No question of the inadequacy of its powers under Regulation 21 of the 2005 Regulations therefore arises.
- 22. It is however necessary for us to consider the steps taken to initiate action by the PCT. Mr McGill has raised an issue as to whether he was given incorrect reassurance that this was not to be a disciplinary hearing (see paragraph 17 a, above). This raises an issue as to whether he was notified (i) of the allegations against him and (ii) of the action that the PCT was considering including his contingent removal from the List (and on what grounds) as required by Regulation 48 (2) of the 2005 Regulations. That regulation is simply designed to ensure the pharmacist has a fair opportunity to know what case he has to meet and to give an opportunity to do so. We have not been provided with a letter from the PCT to Mr McGill which satisfies those requirements. We also note that he attended the meeting without a supporter or representation. We find it surprising that he should do so if he knew that his removal from the List was under consideration. The Minutes of the meeting held by the PCT's Reference Committee state "The Reference Committee was convened to discuss Mr McGill's inclusion in the Pharmaceutical List in relation to findings against him [by the RPSIC]". They also state "The Committee was aware that Mr McGill was attending the meeting to make oral representations". Finally they state that in his closing remarks Mr McGill "referred to his inclusion in the List and was concerned about the decision the Reference Committee might make". This may mean he had received prior notice that the PCT would be considering removal, or it may mean it had become clear in the course of the hearing that they were considering it. Where the burden is on the PCT to prove its case, we are obliged to speculate if we are to conclude that the requirements of proper notice were complied with. We are left unpersuaded that they were, on a balance of probabilities, If appropriate written notice was sent, the effect was vitiated, in our view, by telling Mr McGill that this was not a disciplinary

meeting. However, since this appeal proceeds as a redetermination, we do not find it necessary to dispose of the appeal on the basis of probable procedural defects such as these. We are able to deal with it on the merits.

23. Turning to the second ground of the appeal summarised at paragraph 14 above, it does appear to be the case, and we so find, that the relevant incidents took place at premises of McGill Ltd, in respect of which the company was on this PCT's List. It is merely accident that Mr McGill is also on the List in his personal capacity in respect of another set of premises. But for that fact the only entity against which the PCT could have proceeded, was the company. A company may be operating a retail pharmacy and have been included in a PCT's Pharmaceutical List. It is liable to be removed, contingently or finally, on the basis of acts or omissions which prejudice the efficiency of the service. Its Superintendent Pharmacist may be the responsible individual within the company, but cannot ordinarily be removed from the List, simply because he is not personally on the List in the first place. In this case, however, Mr McGill is personally included in the List in addition to the JM McGill Ltd., but in respect of different premises. We know of no reason, none being put forward by the PCT, why they could not have proceeded against JM McGill Ltd for the breaches which had occurred at that company's premises. It is in our view simply inappropriate to proceed instead against Mr McGill and thereafter remove him contingently from the List.
24. But are there no circumstances in which a PCT could remove the individual who is fortuitously registered on its List, either in addition to or instead of the company which was the registered pharmacist at the relevant premises? We do not think this is the case to decide such a point of principle. We can see, for example, that there may be facts which give rise to an irresistible inference that a Superintendent Pharmacist for a company is so flawed in his conduct of the business of the company that he cannot be regarded as capable of carrying on a similar business in his personal capacity without prejudice to the efficiency of the services. That is not this case, and it is not necessary to decide the point for the disposal of this case. However we do find that the decision to proceed against Mr McGill personally was inappropriate in these circumstances and was one example, of which there are others, of lack of clear thinking and a failure to adopt the procedures set out in the Rules, to which we shall return later.
25. The third and, to our mind, substantive ground of appeal was whether it was reasonable to remove Mr McGill contingently from the List. We start, as did the PCT, with the findings and action of the RPSIC. We read those together with the unchallenged explanations given to the PCT by Mr McGill and which we accept.
26. We take into account that these incidents were self-reported, not simply to the RPSIC but also to the PCT. We note that Mr McGill acknowledged the seriousness of the lapses from the outset. We noted that for the purpose of Regulation 46 the events occurred in July to September 2005 and there is no suggestion of any untoward incident since then and that Mr McGill has previously been a fully compliant chemist on the pharmaceutical list.
27. Against the background of those general points we turn to the two substantive allegations which were considered by the PCT.
28. Overprescription of methadone. In assessing the seriousness of the error, one of the matters we take into account (in accordance with Regulation 46 of the 2005 Regulations) is the view taken by the RPSIC, that it was not appropriate to refer Mr McGill to the Statutory Committee, but was appropriate to issue a written warning. The RPSIC is a body which is peculiarly experienced in dealing with breaches of controlled drugs legislation and their Code of Ethics, and in our view it is appropriate to give this some weight. We take into account the further evidence given by Mr McGill that there had been a departure from the Standard Operating Procedures (SOPs) by his employed staff and he had subsequently introduced additional in-house procedures to eliminate mistakes. Details of some of these improvements were provided in the Notice of appeal and we find that these specified improvements had been made by the date of the hearing before the PCT. In our view breaches of controlled drugs legislation arising from system failures are self-evidently capable of amounting to prejudice to the efficiency of the services that members of the Pharmaceutical List provide and therefore potentially give rise to a removal or contingent removal. But there must be such a finding, amounting to a present or threatened prejudice to the efficiency of the services, before a PCT

can consider removal or contingent removal from the List. We can find no such finding either in the notification of this PCT's decision or in the deliberations recorded in the Minutes. Nor can we think that there is a necessary inference that there was such an (unstated) finding. This is a serious omission in the processes adopted by the PCT. However, we approach the matter afresh, in relation to this and the other allegations considered by the PCT. We have set out our conclusions at paragraphs 31 and 32 of this decision.

29. Controlled drugs storage in breach of legislation. The RPSIC also considered there was no real prospect of finding of misconduct in respect of this admitted breach. However it issued a written warning as to future conduct. The period of inappropriate storage appears to have been brief, while advice was taken from a Drug Squad Officer and new cabinets were purchased. Mr McGill self-reported this breach and acknowledged that he should have dealt with the practical problem differently. In the absence of a local support network (to which the PCT resolved to give attention) Mr McGill had consulted an experienced pharmacist in Sheffield on practices in dispensing Methadone.
30. Failure to observe legal and ethical requirements. This allegation necessarily arises from the two specific breaches or failures mentioned above. It was part of the formulation adopted by the RPSIC when considering the professional disciplinary issues. It was not a discrete matter arising on some separate occasion. Insofar as the two substantive matters necessarily involved breaches of the RPS Ethical Code or controlled drug legislation, and may also have involved system failures, we agree that it was perfectly proper for the PCT to consider whether they were confronted with a wider problem here of a pharmacist who was not alive to his obligations or who did not have adequate systems in place to implement them. They asked what actions he had taken to improve or correct his working practices. He told them in evidence of a number of improvements which we have set out at paragraph 11 (c) above, and his written submissions to us have fleshed them out to some extent. We can see no evidence in the minutes of the PCT proceedings that it was ever suggested to him that these improvements were inadequate, or that further specific actions should be taken by him, over and above what he had already done. If the PCT's Reference Committee had these matters in mind, they did not share them with Mr McGill. Nor have they done with us. To the extent that paragraph 17 of the Grounds of Opposition touches on the PCT's reasons for imposing the condition it simply says that the Committee wished to "reinforce the professional standards required of the Superintendent Pharmacist" and does not help us on the question of what further improvements were required.
31. We are satisfied that the implementation of improvements described above, together with the existing SOP's, should make it extremely unlikely that there would be a repetition of the original errors. In our view all the evidence of Mr McGill's conduct, including his prompt recognition of error, his self-reporting, his search for guidance from other chemists or from the police, and his reaction to finding himself before the RPSIC and in due course the PCT, called upon to explain himself, indicate a chemist who has had a nasty professional shock and has responded appropriately and constructively. In our view there is not currently a "likely risk to users of pharmaceutical services" to use the words of Regulation 46 (6) (d). We do not find that at the time we have to consider the case there is any significant risk of continuing or future prejudice to the efficiency of the services.
32. In any event, even if we felt that there was an existing or threatened prejudice to the efficiency of the services, in our view it is difficult if not impossible to see what role there can be for conditions in this case. We are not satisfied that this condition fulfils the criteria required by Section 49 G of the 1977 Act, namely that it is with a view to removing any prejudice to the efficiency of the services in question. In particular, we have found it difficult to identify what specific steps Mr McGill would have to take under the proposed condition, and how the PCT or a FHSAA Panel could sensibly decide whether there had been a breach of the condition at some future date. This is not simply a theoretical point. A pharmacist may be removed from the List for breach of condition. Nor could we see how it could be objectively determined whether and when Mr McGill had fully complied with the condition. What exactly did he have to produce? If he merely provided a document which reproduced his obligations under the RPS Code of Ethics this would be a valueless exercise. If something more than this was required, then it is necessary to set out with some care and particularity what more is



required and what practical issues need to be addressed. This condition was too vague and non-specific to be fair or workable. Mr McGill was exposed to risk of removal for breach of something which nobody had sufficiently defined.

33. We do not know whether the form of the proposed condition was canvassed with Mr McGill at the hearing before the PCT. It would in our view be an exceptional case where this need not be done. For conditions to achieve the objective in an efficiency case, there has to be real confidence that they will be workable and capable of being monitored, and that exercise involves some consideration of how willing and co-operative the practitioner is likely to be.
34. For the reasons stated above this appeal is allowed.
35. In accordance with Rule 42 (5) of the Rules we hereby notify the parties that either party to these proceedings may have a right to appeal this decision under Sec 11 Tribunals & Inquiries Act 1992 by lodging notice of appeal in the Royal Courts of Justice, The Strand, London WC2A 2LL within 28 days from the date of this decision. Under Rule 43 of the 2001 Rules a party may also apply for review or variation of this decision no later than 14 days after the date on which this decision is sent.

10 May 2007

Duncan Pratt  
Chair of the Panel