

HEALTH AND WELLBEING BOARD			
Report Title	Lewisham Hospital - Outcome of the Judicial Review and subsequent Government appeal		
Contributors	Executive Director for Community Services	Item No.	4
Class	Part 1	Date: 19/9/2013	

1. Purpose

- 1.1 This report informs Members of the Health and Wellbeing Board on the outcome of the judicial review heard in the High Court on 2-4 July 2013 and of the subsequent appeal lodged by the Government.
- 1.2 This report also updates Members on the proposed merger of Lewisham Healthcare with Queen Elizabeth Hospital and on the provision of services at Lewisham Hospital.

2. Recommendation

2.1 Members of the Health and Wellbeing Board are recommended to:

- Note the outcome of the Judicial Review which found that neither the recommendations of the TSA nor the decision of the Secretary of State to reduce the facilities at Lewisham Hospital fell within their powers;
- Note the appeal by the Secretary of State for Health which was lodged on 21 August against the decision;
- Note that the planned merger of Lewisham Healthcare with Queen Elizabeth Hospital is unaffected by the outcome of the judicial review or the appeal and will take effect on 1 October 2013; and
- Note that there has been no change to current services at Lewisham Hospital and all services are running as normal.

3. Policy Context

- 3.1 The activity of the Health and Wellbeing Board is focused on delivering the strategic vision for Lewisham as established in *Shaping our future* – Lewisham’s Sustainable Community Strategy and in Lewisham’s Health and Wellbeing Strategy.
- 3.2 The work of the Board directly contributes to *Shaping our future’s* priority outcome that communities in Lewisham should be *Healthy, active and enjoyable - where people can actively participate in maintaining and improving their health and wellbeing.*

4. Background

4.1 The TSA report

- 4.1.1 South London Healthcare NHS Trust (SLHT) was formed on 1 April 2009, as the result of the merger of three NHS trusts. The SLHT operates out of three main sites; Queen Elizabeth Hospital in Woolwich, Princess Royal University Hospital in Farnborough and Queen Mary’s in Sidcup.
- 4.1.2 Due to the SLHT being in severe financial difficulty, the Secretary of State for Health appointed Matthew Kershaw in July 2012 as Trust Special Administrator, under the Unsustainable Providers Regime (UPR). As TSA, Mr Kershaw took on the functions of the chairman and directors of the SLHT and was required to make recommendations to the Secretary of State in relation to the Trust.
- 4.1.3 Mr Kershaw produced a final report in January 2013 *Securing Sustainable NHS Services: The TSA’s Report on South London NHS Healthcare Trust and the NHS in South-East London.*
- 4.1.4 In his report, the TSA made a number of recommendations in relation to Lewisham Hospital. Lewisham Hospital was to lose its fully admitting A and E service, its 24/7 surgical and medical inpatients’ service, its inpatient paediatric service, its critical care and obstetric led maternity units and its complex inpatient surgery unit. It was proposed that Lewisham Hospital become a centre for elective surgery.
- 4.1.5 Following the submission of the TSA’s report to the Secretary of State, the Council made representations to the Secretary of State. In those representations the Council disputed the legal powers of the TSA/Secretary of State to make the service changes proposed at Lewisham Hospital, and the basis for doing so.

4.1.6 The UPR regime required the Secretary of State to make his decision in relation to the TSA's recommendations by 1 February 2013. On 31 January 2013, the Secretary of State accepted the TSA's recommendations, with modifications suggested by Sir Bruce Keogh. The Secretary of State agreed the TSA recommendations in respect of Lewisham Hospital as outlined above. The Secretary of State said his decision would be implemented over a three year period.

5. The Judicial Review

- 5.1 On 20 February, the Mayor agreed that the Head of Law be authorised to pursue judicial review proceedings.
- 5.2 Two separate judicial review applications were brought and heard together in the High Court from 2-4 July 2013; in the first case by the London Borough of Lewisham and in the second case by Save Lewisham Hospital Campaign. Both claimants contended that the decision was *ultra vires* because the powers of the TSA and the Secretary of State are confined to the particular NHS Trust in relation to which the TSA was appointed, and that the tests for reconfiguration were not met. In addition, both parties claimed that the proposals did not have the support of the GP commissioners.
- 5.3 In his judgment, Mr Justice Silber concluded that neither the recommendations of the TSA nor the decision of the Secretary of State reducing the facilities at Lewisham Hospital fell within their powers. He also agreed that support from the Lewisham's CCG should have been obtained as they used most of the services at Lewisham Hospital. As a result, Mr Justice Silber quashed the decision of the Secretary of State insofar as it related to Lewisham Hospital, along with the recommendations of the TSA insofar as they related to Lewisham Hospital
- 5.4 Mr Justice Silber did give the TSA and Secretary of State for Health permission to appeal though on the basis that the issues on which they seek permission are important issues as to when and how Chapter 5A of the National Health Services Act 2006 can be used and because there has been no previous authority on this.
- 5.5 A full transcript of the judgment can be found at the following link:

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/Lewisham-v-SSH310713.pdf>

6. The Appeal

- 6.1 Although the decision of the Secretary of State was quashed at Judicial Review, along with the recommendations of the TSA insofar as they related to Lewisham Hospital, the Government lodged a formal application on 21 August (the last day on which it could do so) to

appeal the decision of Mr Justice Silber at the Court of Appeal. At the time of writing this report, no further information on the detail or timescale of the appeal is available.

7. The Merger

- 7.1 In developing his recommendations for the final report, the TSA undertook a market engagement process to seek input from other organisations on the best organisational solution to deliver clinically and financially sustainable services.
- 7.2 During this process, Lewisham Healthcare NHS Trust proposed coming together with Queen Elizabeth Hospital in order to establish a new NHS Trust. This merger was supported and recommended by the TSA in his final report. The merger is unaffected by the judgment or by the appeal and will proceed on 1 October 2013. The business plan for the new Trust is being finalised and will cover a two year period. It does not include any proposals for changes to emergency or maternity services.

8. Current Position

- 8.1 At the time of writing this report, the substantive grounds on which the Government has appealed are unknown. The Council has issued an application for the appeal to be expedited and for the hearing to take place before the end of October 2013 but this is subject to judicial approval.
- 8.2 If further information is obtained before the meeting of the Health and Wellbeing Board, a verbal update will be provided by the Executive Director for Community Services.

9. Financial implications

- 9.1 The Council has not incurred any costs as a result of the Judicial Review process. In the event of the Council incurring any costs following the Government's appeal against the High Court ruling, then a call against the Council's available corporate resources would be made to cover these costs.

10. Legal implications

- 10.1 In pursuing the Judicial Review, the Council relied on the general power of competence which is a power available to local authorities in England that allows them to do "anything that individuals generally may do". It was provided for in the Localism Act 2011 and replaces the well-being powers in the Local Government Act 2000. The general power of competence does not remove any duties from local authorities.

10.2 As part of their statutory functions, Members are required to encourage persons who arrange for the provision of any health or social services in the area to work in an integrated manner, for the purpose of advancing the health and wellbeing of the area, and to encourage persons who arrange for the provision of health-related services in its area to work closely with the Health and Wellbeing Board.

11. Crime and Disorder Implications

11.1 There are no specific crime and disorder implications arising from this report or its recommendations

12. Equalities Implications

12.1 There are no specific equalities implications arising from this report or its recommendations

13. Environmental Implications

13.1 There are no specific environmental implications arising from this report or its recommendations.

14. Conclusion

14.1 At Judicial Review, Mr Justice Silber decided that the TSA did not have vires to make his recommendations and that the Secretary of State did not have vires to make his decision. The Government has appealed against the High Court ruling. Officers will inform Members of the Health and Wellbeing Board of the outcome of the appeal as soon as it is known.

Background Documents

Approved Judgement – Judiciary.gov – Neutral citation number:{2013} EWHC 2329 (Admin) Case CO/2744/2012 AND CO/2930/2013 Royal Courts of Justice, Strand London. Date:31 July 2013 Before Mr Justice Silber, Between London Borough of Lewisham and Save Lewisham Hospital Campaign and Secretary of State for Health and the Trust Special Administrator appointed to South London Hospitals NHS Trust
<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/Lewisham-v-SSH310713.pdf>

Securing sustainable NHS services: the Trust Special Administrator's report on South London Healthcare NHS Trust and the NHS in South East London, Final report , Volume 1 of 3, 7 January 2013
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/213341/TSA-VOL-1.pdf.

If there are any queries on this report please contact Dr Petula Peters, Consultation and Research Officer, London Borough of Lewisham, on 020 8314 6575, or by email at petula.peters@lewisham.gov.uk