

**IN THE MATTER OF:**

**A PROPOSED PREMIER INN, 16 BLACKFIRARS STREET, HEREFORD, HR4 9HS**

**WHITBREAD GROUP PLC**

**APPLICANT**

**WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANT**

1. This is an application for a new Premises Licence pursuant to Section 17 of the Licensing Act 2003 for a proposed 82 bed Premier Inn at the above location.
2. A hearing is required principally as representations have been received from the West Mercia Police and Herefordshire Council Trading Standards both of whom seek to have imposed on the Licence a condition that (in terms):

"The premises shall operate a Challenge 25 Policy. Such policy shall be written down and kept at the premises. The policy shall be produced on demand of the Police or an 'authorised person' (as defined by Section 13 of the Licensing Act 2003) or an authorised Trading Standards Officer of Herefordshire Council. Prominent, clear and legible signage (in not less than 32 font bold) shall also be displayed at all entrances to the premises as well as at, at least one location behind any sale area advertising the scheme operated."

A Challenge 25 Policy is not agreed or accepted but the application for a new Premises Licence offered a Challenge 21 Policy whereby any person who appeared to be under the age of 21 years of age is required to provide proof of age.

At the time of preparing this document there are some other issues regarding the wording of some of West Mercia Police's conditions, which we hope to clarify and agree with the Police prior to the Licensing Committee hearing.

3. The applicant is Whitbread Group Plc which operates about some 760 licensed premises nationwide. These comprise either stand-alone Premier Inn Hotels (amounting to some 380) or Premier Inn Hotels combined with a pub restaurant operation (of which again there are some 380) - in this case, a stand-alone Hotel with a modest food and beverage provision is proposed.
4. There are 2 other sites licensed within the Herefordshire Council licensing district. Neither of the Licences for these premises have Challenge 25 as a condition. We have reviewed a further 9 premises licensed by Hereford in respect of which we are retained. Of the total 11 sites only 1 includes a Challenge 25 condition, none have been subject to enforcement action connected to underage sales, as far as we are aware. All sites reviewed would be termed 'on-licence' premises.
5. The proposed development of the Premier Inn in Hereford represents a capitalised investment by Whitbread of approximately £6.5 million and will lead to the creation of a minimum of 25 jobs.
6. Whitbread are responsible and experienced operators of licensed premises (the majority in Town or City Centre locations) with robust systems in place for the exercise of due diligence to ensure that their premises are properly and responsibly run in accordance with the Law and to ensure the avoidance of the commission of regulatory offences, and, in particular, to guard against the sale of alcohol to persons under the age of 18. These measures include :-
  - (i) The company wide operation of Challenge 21 throughout England and Wales.
  - (ii) Induction training for all new members of staff on a range of legal responsibilities including under age sales.
  - (iii) Regular refresher training.
  - (iv) The use of smart tools through which challenges to persons under 21 are recorded through a refusals register with an epos till reminder.
  - (v) The regular and estate wide use of independent covert test purchasers to assess the effectiveness of the Challenge 21 system.

7. As a development site, these premises have yet to be constructed but upon completion and before opening, a Designated Premises Supervisor will be appointed, a Senior Manager of the premises with appropriate qualifications and all staff will be trained in accordance with the foregoing and as part of Whitbread's national development programme.
8. For the reasons set out, the applicant submits that the proposed condition requiring a Challenge 25 Policy is unnecessary and disproportionate and gives rise to a number of difficulties concerning its enforceability.

## **The Law**

### **The Licensing Objectives.**

9. Central to the statutory regime are the four licensing objectives which are the only relevant areas for consideration and licensing objectives. They are as follows :
  - Prevention of crime and disorder.
  - Public safety
  - Prevention of public nuisance.
  - Protection of children from harm.

### **The Guidance**

10. Under Section 182, the Secretary of State is required to issue Guidance to Licensing Authorities on the discharge of their functions under the Act. Section 4(3) requires Licensing Authorities to have regard to the Guidance.
11. So whilst the requirement to have regard to the Guidance is binding on Licensing Authorities, paragraph 1.9 of the Guidance recognises that :

“This Guidance cannot anticipate every possible scenario such as circumstances that may arise and, as long as Licensing Authorities have properly understood this Guidance, they may depart from it if they have good reason to do so and can provide full reasons. Departure from this Guidance could give rise to an Appeal or Judicial Review and the reasons given will then be a key consideration for the Courts when considering the lawfulness and merits of any decision taken”.

12. Although the Guidance cannot be said to have statutory force, those parts of the Guidance which express the key aims and objectives of the legislation must have significant regard paid to them because any decision which undermines the legislative scheme may be found to be unlawful (*Padfield –v- Ministry of Agriculture, Fisheries and Food (1968) AC997: R (on the application of British Pub & Beer Association) –v- Canterbury City Council (2005) EWHC 1318 Admin*).

### **The Application Process**

13. Section 17 sets out the procedure for making a Premises Licence Application and Section 18 sets out the provisions for determination of that application where representations have been made by the Responsible Authorities or other persons.

14. Section 18 provides that where an application for a new Licence is properly made, following receipt of relevant representations, the Licensing Authority must hold a hearing following which it may, if it thinks it is necessary, take one or more of the steps set out in Section 18(4) as follows :

(a) to grant the Licence subject to :-

- (i) the conditions mentioned in sub-section 2(a) modified to the extent the Authority considers appropriate for the promotion of the licensing objections; and
- (ii) any condition must under Section 19, 20 or 21 be included on the Licence.

- (b) to exclude from the scope of the Licence any of the licensing activities to which the application relates.
- (c) To refuse to specify a person on the Licence as Premises Supervisor.
- (d) To reject the application.

## **Conditions**

15. The general principles which govern the imposition of conditions upon Premises Licences may be summarised under 4 heads :-

- (1) A condition may only be attached to a Licence if it is appropriate for the promotion of one or more of the licensing objectives.
- (2) A condition must not duplicate other statutory provisions.
- (3) The conditions must be proportionate.
- (4) In order to give rise to criminal liability a condition must be framed so as to give precision and clarity for definition in the prescribed Act.

16. Relevant extracts from the Guidance are as follows :-

- (1) Failure to comply with any condition attached to a Licence or Certificate is a criminal offence, which on conviction, is punishable with an unlimited fine or up to 6 months imprisonment. The Courts have made it clear that it is particularly important that the conditions which are imprecise or difficult for a licence holder to observe should be avoided (paragraph 10(2)).
- (2) The Licensing Authority may not impose any conditions unless its discretion has been engaged following receipt of relevant representations and it is satisfied that as a result of a hearing (unless all parties agree that a hearing is not necessary) that it is appropriate to impose conditions that promote one or more of the four licensing objectives (10.8).

- (3) It is possible that in certain cases where there are other legislative provisions which are relevant and must be observed by the applicant, no additional conditions are appropriate to promote the licensing objectives (10.9).
- (4) The 2003 Act requires that licensing conditions should be tailored to the size, type, location and characteristics and activities taking place at the premises concerned. **Conditions should be determined on a case by case basis and standardised conditions which ignore these individual aspects should be avoided. Licensing Authorities and other Responsible Authorities should be alive to the indirect costs that can arise because of conditions ..... Licensing Authorities should therefore ensure that any conditions they impose are only those which are appropriate for the promotion of the licensing objectives** [Our emphasis] (10.10).
- (5) Sections 19 and 19(a) effectively impose mandatory conditions on all Licences. Under the Policing and Crime Act 2009 a mandatory condition was added to all Licences and prospective Licences in respect of age verification, effectively requiring that the Premises Licence Holder shall ensure that an age verification policy applies to the premises in relation to sale of alcohol and that the policy must require individuals who appear to the responsible person to be under the age of 18 years of age (or such older age as may be specified in the policy) to produce, on request, on being served alcohol, identification bearing their photograph, date of birth and holographic mark.
- (6) At paragraph 10(49) of the Guidance, it is stated that it is acceptable, and indeed encouraged, for premises to have an age verification policy which requires individuals who appear to the responsible person to be under an age greater than 18 to produce such identification upon request. **For example, if premises have a policy that requires any individual who appears to be under the age of 21 to produce identification that meets the criteria listed above, this is perfectly acceptable under the mandatory code.** [Our emphasis]
- (7) The Premises Licence Holder or Club Premises Certificate Holder must ensure that staff (in particular staff who are involved in the supply of alcohol) are made aware of the existence and content of the age verification policy as applies to the premises (10(46)).
- (8) All licensing determined should be considered on a case by case basis (9.42)

- (9) **The Authorities determination should be evidence based** justified as being appropriate for the promotion of the licensing objectives and proportionate to what it is intended to achieve (9.43)[Our emphasis].

### **The role of the Police**

17. At paragraph 9.12 of the Guidance it is stated that in their role as a Responsible Authority, the police are an essential source of advice and information on the impact and potential impact of licensable activities, particularly on the crime and disorder objective. The police have a key role in managing the night-time economy and should have good working relationships with those operating in their local area. The police should be the licensing authority's main source of advice on matters relating to the promotion of the crime and disorder licensing objective, but may also be able to make relevant representations with regard to the other licensing objectives if they have evidence to support such representations. The licensing authority should accept all reasonable and proportionate representations made by the police unless the authority has evidence that to do so would not be appropriate for the promotion of the licensing objectives. **However, it remains incumbent on the police to ensure that their representations can withstand the scrutiny to which they would be subject at a hearing.** [Our Emphasis]

### **Applicant's Case**

18. The licensing objectives which the Responsible Authorities seek to engage through the imposition of a Challenge 25 Policy appears to be the prevention of crime (it being impossible for there to be any allegation or disorder associated with the proposed premises, the crime in question being the sale of alcohol to persons under the age of 18 contrary to Section 146 of the Licensing Act) and the protection of children from harm.
19. The representation from **Trading Standards** by way of their email dated 14<sup>th</sup> February, 2018 and subsequent correspondence makes it clear that the adoption of a policy of Challenge 25 is a general principle of general policy.

This would appear on the face of it to be a standardised requirement unjustified and/or unsupported by any evidence relating to this particular development and as such against the Guidance (as above) and the law (see Daniel Thwaites v Wirral Borough Magistrates [2008]).

20. The **Police** representation is contained in a Memorandum dated 28<sup>th</sup> February 2018. No evidence was offered in support of the suggested contested condition by reference to this particular application and again the requirement would appear to be a standardised one. Indeed Challenge 25 in this context is only a 'preferred option', as above.
21. From a review of a random selection of previous Committee papers it is clear that the **Police** and **Trading Standards** have sought the implementation of a range of standardised conditions on numerous occasions without discrimination and without reference to the specific facts of the application.
22. Section 146 of the 2003 Act is itself designed to prevent under age sales by making it a criminal offence punishable by an unlimited fine. That offence may be committed by the person who actually makes the sale or by another person who may be responsible for the actions of the seller. In the latter case, the legislation provides the accused with a defence of due diligence. More precisely Section 146 (8) provides that where a person (the accused) is charged with an offence under this Section by reason of an act or default of some other person, it is a defence that the accused exercised all due diligence to avoid committing it.
23. So it is the duty of responsible operators to develop systems designed to prevent under age sales by employees if they wish to seek to avail themselves of a statutory due diligence defence and indeed to comply with the mandatory condition referred to above.



24. Whitbread seeks to achieve this by introducing the range of measures outlined in paragraph 6 above including the predominant on-licence industry standard of challenging individuals who appear under the age of 21.
25. If a person is accused with the commission of a Section 146 offence of operating such a system, he may properly escape liability for under age sales, provided he can satisfy the Court that the system represents exercised due diligence. If he does not provide for such an efficient system he will be convicted and punished for the offence. That is a matter for a criminal Court.
26. The proposed Challenge 25 condition seeks to go much further by making it a mandatory requirement that the applicant adopts a mechanism, the sole purpose of which is to avoid commission of a Section 146 offence. Breach of that condition is itself an offence under Section 136 of the Act.
27. The effect is to create two offences, each designed to prevent an unlawful sale of alcohol to persons under the age of 18, the first Section 146 (in primary legislation) and the second Section 136 as a breach of a condition (put in place by the Licensing Authority).
28. To overlay offences created in primary legislation with further offences under licensing conditions in this way gives rise to a number of potentially inconsistent and anomalous results. For example :-
- (a) A person may have been charged with a Section 146 offence but may have been acquitted by a criminal court by establishing a defence of due diligence on the basis that he had an efficient system designed to prevent under age sales which included a Challenge 21 policy. But notwithstanding his acquittal on the Section 146 offence, the same person might be guilty of a Section 136 offence, arising of the very same facts, by breaching a condition requiring him to operate a Challenge 25 policy.
- (b) A person who has made no underage sales at all and whose systems have effectively prevented any such sales would be liable to conviction under Section 136 if he breached a Challenge 25 condition.

(c) A due diligence defence to a charge under Section 146 might typically involve proof of a system which allowed for a margin of error in requiring identification from purchasers (e.g. Challenge 21). Applying the same logic a due diligence defence to a charge under Section 136 for breaching a Challenge 21 condition would require proof of a system allowing for a similar margin of error (say a Challenge 25 policy) and for breach of a Challenge 25 condition the necessary margin of error might mean applying a Challenge 28 policy.

29. The result is to impose by way of condition a greater and therefore disproportionate duty upon the operator of licensed premises than is imposed by Section 146.

30. If these anomalies are to be avoided altogether, the margin of error in challenging the age of potential purchasers for proof of age should be a matter for the seller/operator rather than through a condition which is enforceable under Section 136. If the seller's system is inadequate, he will be convicted under Section 146. If they are adequate, whether by operating Challenge 21 or Challenge 25, he will be acquitted having satisfied the test of due diligence.

31. However, if there is to be an enforceable condition, the potential for these anomalies is significantly reduced by allowing for a reasonable margin of error in assessing the age of potential customers so as to avoid the commission of an offence under Section 146. It is for this reason that the British Beer and Pub Association believe and have always believed that Challenge 21 is an appropriate policy to apply to venues selling alcohol for consumption on the premises. It is also for this reason why, in consultation under the Policing and Crime Bill 2008 the Government proposed Challenge 21 in preference to Challenge 25 as a discretionary condition which licensing authorities may wish to impose upon two or more premises in an area if they consider that those premises are associated with alcohol related nuisance or disorder.

32. By contrast with Section 146 which prohibits the sale of alcohol to anyone under the age of 18, the Challenge 21 policy requires staff members to exercise

subjective judgment in assessing whether a person appears to be under the age of 21 so as to require identification. The inevitable consequence of that, or any other similar policy, is that not all persons who are under the age of 21 will be required to produce identification.

33. From the above, it will be clear that :-

- (i) No evidence is brought forward specific to this proposed development.
- (ii) No evidence is advanced or is otherwise available that Whitbread are not a responsible operator or that they do not have in place an effective and credible proof of age policy (which in their case, in common with the vast majority of the on-licensed trade, is Challenge 21 throughout England and Wales).
- (iii) Different considerations apply in relation to the off licensed trade where Challenge 25 is the increasingly accepted norm but the nature of the "sale" and customer engagement is completely different to the on-trade.
- (iv) The Department of Health Public Health Responsibility Deal moreover was set up to encourage better practice in promoting public health within various sectors of the economy. The commitment in respect of tackling under age alcohol sales was that "we commit to ensuring effective action is taken in all premises to reduce and prevent under age sales of alcohol primarily through the rigorous application of Challenge 21 and Challenge 25". The responsibility deal went on to recite how the pledge may be delivered and says how an operator can delivery this pledge and stated "it is a legal requirement for business to have an age verification scheme in place. Local Authorities Trading Standard Teams are often happy to provide assistance to businesses within their areas on the application of these schemes.

Challenge 21, which is generally applied in the on-trade, was introduced by the British Beer & Pub Association, which has some promotional material available on their website. The off-trade

generally operates a Challenge 25 scheme endorsed by the Wine & Spirits Trade Association and the Association of Convenience Stores" – again reinforcing the points above.

### **Herefordshire Council Licensing Policy**

34. Reference is made by those making representations and particularly the Police to the fact that Challenge 25 is the preferred option for operators within Herefordshire Council's own Licensing Policy. Trading Standards indicate that they set a minimum age of 25 years for all Licences. Please note however:

(a) Introduction - *This policy will set out the general approach that the Licensing Authority will take when it considers opposed applications or notices. It will not undermine the right of any individual to apply for a variety of permissions nor undermine the right to have any **such application considered on its individual merits.*** [Our emphasis]

(b) Paragraph 19.3 of the Statement of Licensing Policy states that "*the Licensing Authority **supports** the use of the Challenge 25 Policy and **recommends** this should be included as part of an applicant's operating schedule.*" [Our emphasis] The implementation of a Challenge 25 policy must not therefore be seen as a mandatory requirement in Herefordshire, and cannot be so legally.

(c) Paragraph 20.3; "Appropriate conditions for the licence or certificate will also depend on local knowledge of the premises the following measures **should not be regarded as standard conditions to be automatically imposed** in all cases. They are designed to provide a range of possible conditions drawn from experience relating to differing situations and to offer guidance." [Our emphasis]

(d) Paragraph 23.28; "*Following test purchases operations within the county, it has been established that Challenge 21 has little effect. The*

*Authority therefore requires premises within the county to operate a 'Challenge 25' policy, other than in exceptional circumstances."* The applicant has not seen the evidence to support this statement. The use of the word **requirement** in this condition may potentially in with the legislation and guidance. It also conflicts with the wording of paragraphs 19.3 and 20.3 above. This paragraph reiterates the statutory guidance in that conditions must be tailored to the individual type, location and characteristics of the premises and events concerned and must not be standardised as they may be unlawful and it cannot be demonstrated that they are appropriate for the promotion of the licensing objectives in an individual case and must be proportionate, justifiable and capable of being met.

### **The Applicant's Case**

35. The Applicant's case is that Whitbread operate well managed premises and provide for a range of carefully risk assessed policies to avoid the sale of alcohol to under age persons. Included within those policies is the use of Challenge 21 by providing a reasonable and adequate margin of error for assessing the age of customers. This policy is in place in all the premises in England and Wales and the use of it is independently tested. There is and can be no evidence relevant to this application and the proposed development to contradict this, nor can there be.
36. For the reasons outlined above, the Applicant submits that a Challenge 25 policy is neither necessary nor proportionate as a mechanism for promoting the prevention of crime and disorder objective or the protection of children from harm objective in the circumstances of this case. It is also the case that this appears to be a standard policy consideration by those making representations and is therefore not tailored to the specific nature of individual premises and the requirement for such a policy of Challenge 25 fails on this test also.
37. No evidence has been produced or to the best knowledge of the Applicant, is available to justify the imposition of the more onerous requirement on these premises at this time, other than that offered by the applicant, namely the

'Challenge 21 test'; nor is there any credible justification for these proposed premises to be singled out from the otherwise general policy operating not unsuccessfully throughout England and Wales by the applicant, Whitbread.

38. Research carried out by the Retail of Alcohol Standards Group (RASG) [a copy of which attached hereto] shows general trends over a period of 8 years. The direction of travel over these 8 years was shown to be maintained and the introduction of Challenge 21 and/or Challenge 25 cannot be shown to be responsible for a change in the culture alone, this suggests that the changes are more nuanced and complex and not limited to a single policy. It cannot be described as a magic bullet. The use of Challenge 21 is not maligned or dismissed, the report states:

- "It is **difficult to establish** the extant societal impact of Challenge 25" [Our emphasis]
- "While **the results were impressive following the introduction of Challenge 21**, it was felt that a greater buffer above 21 could produce an even greater impact. The national retailer – co-ordinated by RASG – therefore voluntarily moved up to 25, **while the on trade continued to operate Challenge 21.**" [Our emphasis]
- "One of the impacts of the implementation of Challenge 25 is that adoption of **the scheme leads to a greater level of training throughout the organisations** that adopt it. While there is a Mandatory Licensing Condition that every premises selling alcohol needs to have a proof of age scheme, there is no prescription of the extent retailers have to go to train staff on its application.

With the adoption of Challenge 25, the supermarkets nationally **not only look to adopt the higher thresholds but also ensure that training is given to support staff in the effective application of the scheme. Often this goes much further to include training on relative topics such as conflict management and proxy sales.** A survey of RASG supermarket members found that an estimated 850,000 people are being trained in the application of Challenge 25 each year in over 12,500 stores. **This has ultimately led to a greater understanding of the importance of applying**

***Challenge 25 and raising the overall standard with regard to the sale of alcohol.*** [Our emphasis]

The primary impact of Challenge 25's introduction therefore appears to be an increase in focused training amongst staff members. Whitbread's policy is that all staff members involved in the retailing of alcohol must undergo mandatory training before being allowed to serve alcohol. Training is already fully adopted by Whitbread which seeks full engagement from team members.

**John Gaunt & Partners**

**March 2018**