

LICENSING PANEL (LICENSING ACT 2003 FUNCTIONS) ADDENDUM

10.00AM, WEDNESDAY, 20 OCTOBER 2021

VIRTUAL

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ADDENDUM

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The Brighton Zip

Madeira Drive

Brighton BN2 1EN

SUMMARY OF APPLICANT'S SUBMISSIONS

For Hearing Wednesday 20 October 2021

Introduction

1. The Applicant is Madeira Leisure Limited, the operator of The Brighton Zip (the "Premises"), a well-known attraction on Brighton seafront. Since opening in 2017, the Premises have been refurbished over time and the food served tailored to appeal more to residents of Kemptown, as opposed to day trippers wanting typical seaside fair. A presentational brochure showing the development of the site with drawings of how it looks at present is included at **appendix 1**. The sole director of the Applicant is Jeffrey Sanders who was previously the operator of the Brighton Wheel from 2011 to 2016. He runs the business with the General Manager, Delso Da Silva.
2. The food and beverage offer includes an ice cream parlour, coffee kiosk and café/restaurant. The café/restaurant is a semi-permanent structure predominantly on the ground floor, comprising a kitchen with a main order/service point for food and drink, seating on the main deck area, a further pop-up kitchen and three W.Cs. There is also a recently constructed Sundeck area with a further smaller bar. Indicative food and drink menus at **appendix 2**. Before

the Covid-19 pandemic patrons queued to order food and drink which was then served to them by a waiter or waitress.

Reasons for Applying for Temporary Event Notices (“TENs”)

3. With no revenue following the shutdown of March 2020, the previous operator of the Premises, Happyvale Limited went into liquidation, albeit that Personal Guarantees remain. Fortunately, the Applicant was able to purchase the assets and continue the business with the same management team and fifty staff. Unfortunately, due to oversight and the employee responsible for the administration of the Applicant being on sick leave due to Long Covid, the premises licence was not preserved within the required 28 days and hence the premises licence permanently lapsed.
4. A permanent lapse of premises licence is devastating for any business. In the writer’s experience, this is usually the death warrant for any operator unless a negligence claim for thousands of pounds worth of damages can be quickly pursued and settled against an Insolvency Practitioner or there is the necessary insurance in place. The Applicant had neither of those options to recover its losses and has had to preserve cash flow and rely on what sales it can get to remain afloat. Usually, the restaurant is responsible for approximately half of total income.
5. Three TENs for 18 to 19 September, 25 to 26 September and 2 and 3 October were initially applied for on the terms of the previous premises licence. Following objection from Brighton Police (more of which below) at a licensing sub-committee hearing on 16 September the first two were rejected but the final one granted. The reason for refusing the first two was to give the Applicant sufficient time to prepare to reopen for the sale of alcohol. Preparation was undertaken and the weekend of 2 and 3 October proceeded without incident. Therefore, a further TEN was applied for to cover 9 and 10 October. To the Applicant’s disappointment, a phone call was received from Mr Mark Thorogood advising that the police would be objecting to this further TEN and hence it was withdrawn and legal advice sought.
6. Keystone Law was then instructed to apply for a new premises licence as soon as possible and, following correspondence with the police, one was made on 7 October 2021. The new premises licence sought is on slightly different terms to that granted in 2019. Most notable it is for a café style, as opposed to restaurant licence, where food must be always available with alcohol supplied by waiter or waitress service to patrons, but where patrons do not necessarily have to have a full table meal. Also, the terminal hour sought for the sale of alcohol is slightly later.

7. The reason for wanting a café licence, as opposed a restaurant licence, is twofold. Firstly, a full restaurant condition with the current setup of the Premises can be difficult to enforce. When customers order drinks to be served at a table, before their table number is recorded, they are always asked if food has been ordered and, when in doubt, a receipt is requested. However, not all customers keep receipts and hence it is very difficult to ensure that only customers taking a full table meal are purchasing alcohol. The fact that there is signage to this effect does not stop a customer misleading staff. Whilst staff do patrol the seating areas, it is difficult to tell who is waiting for food or has finished their meal.
8. Secondly, there remains confusion over what constitutes a table meal. There is case law under the old Licensing Act 1964 which, rather archaically, refers to pickles and beetroot and the like, but nothing under the Licensing Act 2003, hence the confusion last year with scotch eggs being referenced by Government ministers. Many patrons simply want a bowl of chips and the Applicant is, quite rightly, concerned that this may not be sufficient to be a table meal.
9. A café licence provides the necessary reassurance that the premises cannot become a vertical drinking alcohol led establishment which tend to be the main sources of crime and disorder whilst ensuring that the Premises can operate without fear of inadvertently breaching a condition. Having food and drink both ordered and served whilst seated at tables will increase staffing costs, but it is hoped that the additional flexibility will sufficiently increase revenue to cover these.
10. The additional hours sought are to enable the Premises to be financially viable and to ensure sufficient funds are saved to construct a permanent café at the site as per the granted planning permission (see above). It was always the intention to seek to vary the previous premises licence to a café style licence but it lapsed before an application could be made.
11. The TENs now applied for are to, hopefully, prove that the Applicant can operate under the new hours and conditions sought whilst upholding the licence objectives and to bring in some much-needed revenue during this difficult time.

Brighton Police Notice of Objection

12. The police's objection to these TENs is on the basis that: the new conditions will lead to intoxication; there have been previous breaches of condition; there is no confidence that the Premises will be run in a responsible manner; the conditions proffered are unenforceable and

the Halloween weekend presents additional concerns in respect of which minimal information has been provided. The Applicant's comments on each of these concerns are as follows:

The new conditions will lead to intoxication

13. If the TENs are granted as sought, the Applicant does not intend to change the style of operation significantly. The food and drink menu will remain the same but, with no patrons queuing to order food and drink, there will be a greater control of patrons. Additional conditions, above and beyond those on the lapsed premises licence, have also been proffered. It is not an attractive venue for those wishing to binge drink. Alcohol prices are not cheap, nor are there drinks promotions. Furthermore, the range of alcoholic drinks is limited and the open-air nature of the Premises does not lend itself to a long dwell time at this time of year. With no vertical drinking and waiter/waitress service only, the operation of the Premises will be a world away from the packed late-night bars which can see high levels of intoxication.
14. Crucially, off-sales have not been applied for and the Business and Planning Act 2020 deregulation does not apply. Therefore, the Applicant cannot have patrons spilling onto the beach as is the case with many of the licensed venues on the seafront.

Previous breaches of conditions

15. The Applicant has accepted that there were breaches of the lapsed premises licence's conditions and apologised repeatedly at the previous TENs hearing for them. Whilst it does not wish to make excuses for these breaches, there were mitigating factors, namely:
 - a) With the deregulating of off sales and the continued changes to Covid-19 regulations it was difficult to understand how alcohol should be sold, when a table meal condition applied and where this alcohol could be consumed. There were thousands of reported breaches across the country and much time was spent assessing whether operators were in breach of regulations or merely failing to adhere to non-enforceable guidance, if at all. Indeed, thousands more operators flagrantly breached the terms of their premises licence with no comeuppance at all. The Applicant did seek advice, for example, in respect of the new roof terrace, but this was often contradictory and its operation was far more limited than the majority of seafront licensed businesses which developed significant outside areas and are still benefitting from a significant uplift in trade.
 - b) When the breaches occurred, the Premises had only recently reopened after a long period of closure, hence a certain operational rustiness.

- c) August 2021 was an exceptional time as locals and tourists, deprived of foreign holidays, flocked to the seafront. Staff at the Premises were overwhelmed and failed to control who was, and was not, having food. Such demand is never likely to be repeated.

No confidence that the Premises will be run in a responsible manner

16. The police have confirmed that, had the previous premises licence not lapsed, the breaches of condition would have led to a 'stepped approach' with the Designated Premises Supervisor beginning called to a meeting with him. Usually, when there is a serious lack of confidence in management a review application follows, rather than simply a meeting being called. In reality, due to the much-maligned approach of the Licensing Act 2003 to insolvency, the Applicant is in the same position as if the premises licence had been reviewed and revoked. As the licensing sub-committee will be aware, premises licences are usually only revoked following serious crime such as shootings, stabbings, gang activity, open drug dealing etc.
17. The Applicant's team is booked to attend refresher licensing training (see confirmation at **appendix 3**) and all staff have been trained as per proposed condition 7.
18. Unless a series of TENs are granted there is no opportunity of the Applicant to show that it can operate in a responsible manner. The Applicant is happy to adopt further conditions and policies to reassure Brighton police and would welcome any proposals they have.

Conditions proffered are unenforceable

19. It is not acceptable that conditions attached to a TEN are unenforceable and merely advisory. Any breach of a condition attached to a TEN is carrying on a licensable activity on, or from, a premises otherwise than under and in accordance with an authorisation (see section 136 Licensing Act 2003) which is a criminal offence.
20. In addition, any failure to operate according to the conditions attached to any TEN will no doubt be used in evidence at any hearing to determine the application for the new premises licence.

Halloween weekend presents additional concerns

21. The Applicant is aware that Halloween weekend is busy in Brighton. Whilst revellers are generally attracted to the later, noisier, indoor bars and clubs, this weekend has been risk assessed (please see **appendix 4**) and the decision has been taken to employ two door supervisors from 19:00 to midnight if the TEN is permitted to go ahead.

22. Furthermore, as per proposed condition 10, a draft crowd management procedure/dispersal policy has been prepared for approval by Brighton police. Please see **appendix 5**.
23. If Brighton police still consider that further steps have to be taken over Halloween the Applicant would be happy to discuss them.

Section 182 Guidance (the “Guidance”) & Statement of Licensing Policy (the “Policy”)

24. The Guidance explains that ‘the system of permitted temporary activities is intended as a light touch process (author’s emphasis) and this is reiterated in the Policy. As the licensing sub-committee will be aware, the vast majority of TENs proceed unopposed.
25. The Applicant understands the Premises is located in a Cumulative Impact Zone. However, this policy applies to new, or variations to, premises licences or club premises certificates, not TENs. If representations are received to the application for a new premises licence the Applicant will produce evidence of exceptional circumstances including, but not limited to: corporate social responsibility; community support; the ancillary nature of alcohol to other business activity and the general style of operation.

Conclusion

26. The Applicant recognises that the licensing sub-committee hearing to determine these TENs is entirely separate from any further hearing to determine the application for a new premises licence if representations are received. The licensing sub-committee is perfectly entitled to grant the TENs as sought but then refuse the application for the new premises licence or grant it in part. However, without the ability to use TENs the Applicant has no opportunity to show that it can uphold the licensing objectives with the new conditions proposed or to realise some much-needed revenue. With regard to the later, the loss of the premises licence has been truly disastrous and many operators faced with such a shock would have thrown in the towel, closed the business and made the staff redundant.
27. These economic factors can properly be considered in a licensing determination. In *R (o/a/o Hope and Glory Public House Ltd) v City of Westminster Magistrates’ Court and Others* [2011] EWCA Civ 31, the Court of Appeal (per Toulson LJ) observed that [at 42]:

*‘Licensing decisions often involve weighing a variety of competing considerations: the demand for licensed establishments, **the economic benefit to the proprietor and to the***

***locality by drawing in visitors and stimulating the demand**, the effect on law and order, the impact on the lives of those who live and work in the vicinity, and so on.”*

28. It is accepted that mistakes have been made but lessons have been learnt. Save for the routine inspections last Summer, the Premises have not been a concern to the statutory authorities and its owner, Mr Jeffrey Sanders, ran the Brighton Wheel using a council premises licence for many years without complaint. The Applicant would like to work with the police and respectfully asks that the licensing sub-committee to grant the TENs to give the business a chance to succeed.

NIALL McCANN

Partner, Keystone Law

15 October 2021

