Neutral Citation Number: [2020] EWHC 799 (Admin)

Case No: CO/1333/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN BIRMINGHAM
DIVISIONAL COURT

Birmingham Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham B4 6DS

Date: 06/04/20

Before :

LORD JUSTICE HICKINBOTTOM
and
MR JUSTICE SWIFT

- -

Between :

THE QUEEN ON THE APPLICATION OF
TESCO STORES LIMITED

Claimant

- and -

BIRMINGHAM MAGISTRATES' COURT

Defendant

- and -

BIRMINGHAM CITY COUNCIL

Interested Party

- -
- -

Jonathan Kirk QC and **Iain MacDonald** (instructed by **Shoosmiths LLP**) for the **Claimant**
The Defendant neither appeared nor was represented
Richard Barraclough QC (instructed by **Legal and Governance Department, Birmingham City Council**) for the **Interested Party**

Hearing date: 17 March 2020

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Approved Judgment

Lord Justice Hickinbottom :

Introduction

1. Is it a criminal offence for a shop to offer food for sale, or otherwise place it on the market, after its labelled "use by" date? In respect of twenty-two charges in which it is alleged that the Claimant ("Tesco") offered food for sale in those circumstances, the District Judge concluded that it was. In this judicial review, Tesco says that he was wrong to do so.

2. Before us, Jonathan Kirk QC leading Iain MacDonald appeared for Tesco and Richard Barraclough QC for the Council, as they did below. At the outset, I thank them for their helpful contributions.

The Law

The Food Safety and Hygiene (England) Regulations 2013

3. Regulation 19 of the Food Safety and Hygiene (England) Regulations 2013 (SI 2013 No 2996) ("the 2013 Regulations") makes it an offence to contravene or fail to comply with "any of the specified EU provisions" as set out in Schedule 1.

4. Article 14(1) of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 ("the Food Safety Regulation") is one of the specified provisions. Schedule 1 to the 2013 Regulations identifies the requirement in article 14(1) as being a "Requirement that unsafe food must not be placed on the market".

Regulation (EC) No 178/2002: The Food Safety Regulation

5. As the full title of the Food Safety Regulation confirms, the Regulation "[lays] down the general principles and requirements of food law… and… procedures in matters of food safety". Article 5 sets out the general objectives of European food law. One of the objectives is to provide for "a high level of protection of human life and health and the protection of consumers' interests …".

6. That objective is further considered in the Preamble to the Regulation. Paragraph (10) states:

> "Experience has shown that it is necessary to adopt measures aimed at guaranteeing that unsafe food is not placed on the market and at ensuring that systems exist… to protect human health…".

Paragraphs (16) and (17) describe the approach as to how that should be achieved:

> "16. Measures adopted by the Member States and the Community governing food… should generally be based on risk analysis except where this is not appropriate to the circumstances or the nature of the measure….
>
> 17. Where food law is aimed at the reduction, elimination or avoidance of risk to health, the three interconnected

> components of risk analysis – risk assessment, risk management and risk communication – provide a systemic methodology for the determination of effective, proportionate and targeted measures or other actions to protect health".

The Preamble also states both that "The safety and confidence of consumers… are of paramount importance…" (paragraph (23)); and that "a food business operator is best placed to devise a safe system for supplying food and ensuring that the food it supplies is safe; thus, it should have the primary responsibility for ensuring food safety" (paragraph (30)).

7. The substantive provisions in the Food Safety Regulation place the burden of ensuring food safety on the shoulders of "food business operators" ("FBOs"), a term which is to an extent self-explanatory but which is defined in article 3(3) of the Regulation as "the natural or legal persons responsible for ensuring that the requirements of food law are met within the food business under their control".

8. In accordance with the approach set out in the Preamble, article 6 provides that food law is to be based on risk analysis; that risk assessment to be based on available scientific evidence; and that risk management should take account of the results of risk assessment and the precautionary principle. By article 17(1), FBOs are under a duty to ensure that foods satisfy the requirements of food law relevant to their activities and to verify that such requirements are met. That duty applies to all stages of production, processing and distribution within businesses under their control. By article 19(1), where an FBO has reason to believe that a food which it has imported, produced, processed, manufactured or distributed is not in compliance with food safety requirements, it is under a specific obligation to withdraw the food from the market, inform the consumers of the reason for withdrawal and, if necessary, recall from consumers food products already supplied to them. Under article 19(3), each FBO is subject to a further obligation to inform the competent authority if it has reason to believe that food which it has placed on the market may be injurious to human health.

9. Article 14(1) requires that:

> "Food shall not be placed on the market if it is unsafe".

This obligation is imposed primarily on FBOs.

10. Article 3(8) gives "placing on the market" a wide definition, well beyond merely display for sale. It means:

> "… the holding of food… for the purposes of sale, including offering for sale or any other form of transfer, whether free of charge or not, and the sale, distribution, and other forms of transfer themselves."

11. Article 14(2) deems food to be unsafe if it is injurious to health or unfit for human consumption; but the definition of "unsafe" in this context is not synonymous with "injurious to health" and "unfit for human consumption", i.e. "unsafe" is a wider concept than "injurious to health" and "unfit for human consumption" taken together.

Article 14(3) sets out various factors to be taken into account in determining whether any food is unsafe, as follows:

> "In determining whether any food is unsafe, regard shall be had:
>
> > (a) to the normal conditions of use of food by the consumer and at each stage of production, processing and distribution; and
> >
> > (b) to the information provided to the consumer, including information on the label, or other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or categories of food."

In this judgment, references to "article 14" are to article 14 of the Food Safety Regulation, unless otherwise appears.

Regulation (EU) No 1169/2011 (The Food Information Regulation)

12. Article 14 of the Food Safety Regulation has to be read with Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 ("the Food Information Regulation"). This Regulation essentially provides for requirements for information to be set out in labels on pre-packaged food. Article 1(1) indicates the general approach of the Regulation which, it states, provides "… the basis for a high level of assurance of consumer protection in relation to food information…". The Regulation applies to FBOs at all stages of the food chain (article 1(3)).

13. Chapter IV of the Regulation concerns "Mandatory Food Information".

14. Articles 9 and 10 identify information that must form part of the "food information" (defined in article 2(1)) labelled on pre-packaged food made available to consumers. Article 9(1)(f) imposes a requirement to state "the date of minimum durability or the 'use by' date". There are limited specified exceptions to this (set out in paragraph 1(d) of Annex X to the Regulation), but none of these is relevant to the issues in this claim.

15. The "date of minimum durability" is the "best before" date (see paragraph 1 of Annex X). It is defined in article 2(2) as "the date until which the food retains its specific properties when properly stored". Thus, the best before date is concerned primarily with the quality of food rather than its safety.

16. Article 24 of the Food Information Regulation identifies where a use by date, rather than a best before date, must be labelled on food:

> "(1) In the case of foods which, from a microbiological point of view, are highly perishable and are therefore likely after a short period to constitute an immediate danger to human health, the date of minimum durability shall be replaced by the 'use

> by' date. After the 'use by' date a food shall be deemed to be unsafe in accordance with article 14(2) to (5) of [the Food Safety Regulation]".

References in this judgment to "article 24" are to this provision, unless otherwise appears. As can readily be seen, article 24 is concerned with food safety, rather than merely quality. Paragraph 2 of Annex X sets out the required form for use by date labelling.

17. The "deeming" provision in the last sentence of article 24(1), provides the critical link between use by dates and the application of article 14 of the Food Safety Regulation, and is at the heart of this claim. I will return to it. However, on its face, it deems food beyond its labelled use by date to be "unsafe", so that, by article 14 of the Food Safety Regulation it cannot be "placed on the market".

18. Article 8 of the Food Information Regulation concerns who is responsible for food labelling. So far as relevant to this claim, it provides:

> "1. The [FBO] responsible for the food information shall be the operator under whose name or business name the food is marketed….
>
> …
>
> 4. [FBOs], within the businesses under their control, shall not modify the information accompanying a food if such modification would mislead the final consumer or otherwise reduce the level of consumer protection and the possibilities for the final consumer to make informed choices. [FBOs] are responsible for any changes they make to food information accompanying a food."

Thus, in respect of the use by date, the FBO under whose name the food is marketed (the "brand name") is responsible for determining whether any food "from a microbiological point of view, [is] highly perishable and [is] therefore likely after a short period to constitute an immediate danger to human health", assessing an appropriate use by date and then ensuring that food is labelled accordingly. If a retailer further down the line decides to change that date and other food information, he may do so but (i) only if the new information would not mislead the final consumer or otherwise reduce the level of consumer protection, which will require a sound foundation in (microbiological) evidence; and (ii) he becomes responsible for any changes made.

Enforcement

19. As I have already described, the food law obligation not to place unsafe food on the market falls upon the relevant FBO; and article 19 of the Food Safety Regulation imposes upon an FBO an obligation to withdraw and/or recall food where it has reason to believe that it has made or distributed a food not in compliance with the food safety requirements (see paragraph 8 above).

20. However, in the usual way, enforcement of European food law obligations is generally left to individual Member States. Article 17 of the Food Safety Regulation thus provides:

> "1. [FBOs] at all stages of production, processing and distribution within the businesses under their control shall ensure that foods… satisfy the requirements of food law which are relevant to their activities and shall verify that such requirements are met.
>
> 2. Members States shall enforce food law, and monitor and verify that the relevant requirements of food law are fulfilled by [FBOs] at all stages of production, processing and distribution.
>
> For that purpose, they shall maintain a system of official controls and other activities as appropriate to the circumstances, including public communication on food… safety and risk, food… safety surveillance and other monitoring activities covering all stages of production, processing and distribution.
>
> Members States shall also lay down the rules on measures and penalties applicable to infringements of food… law. The measures and penalties provided for shall be effective, proportionate and dissuasive."

21. So far as the United Kingdom is concerned, there are now distinct measures for enforcement and penalties in this field in each home country; but, whilst this case is concerned only with the Regulations in force in England, there are, as I understand it, provisions in each United Kingdom jurisdiction comparable with regulation 19 of the 2013 Regulations making a breach of article 14 of the Food Safety Regulation a criminal offence.

22. Three aspects of the enforcement measures and penalties set out in the 2013 Regulations are relevant to this claim.

    i) Regulation 19 makes it an offence to contravene or fail to comply with any of the "specified EU provisions" listed in Schedule 2 to the 2013 Regulations, which include article 14(1) of the Food Safety Regulation. That is, of course, the offence with which Tesco is charged.

    ii) Under regulation 6, if an authorised officer of an enforcement authority has reasonable grounds for believing that an FBO is failing to comply with "Hygiene Regulations" (defined to include the 2013 Regulations themselves: see regulation 2), he may serve a "hygiene improvement notice" requiring the FBO to take specified measures within a specified time. It is an offence to fail to comply with such a notice (regulation 6(2)); and, where an offence under the 2013 Regulations has been committed, then it is open to the enforcement authority to serve a "hygiene prohibition notice" under regulation 7, prohibiting a person (or identified premises) from being engaged in some or all processes concerned with food.

iii) By regulation 12, it is a defence to any offence under the Regulations for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid commission of an offence either by himself or by any person under his control ("the due diligence defence").

The Facts

23. Tesco owns and operates a variety of shops, selling primarily food and household goods. As a distributor of food it is an FBO. It sells many brands, including own brand products.

24. The charges arise out of visits to three Tesco stores by Environmental Health Officers employed by the Regulation and Enforcement Division of the Interested Party ("the Council"), as authorised officers under the 2013 Regulations and relevant European Regulations.

25. Ten charges relate to Tesco Express, Linden Road, Birmingham. Following a report by a member of the public, an authorised officer, Ms Karen Boyal, visited that store on 17 June 2015 and found six items on display with an expired use by date, which were reported to the relevant primary food safety enforcement authority for Tesco stores. Correspondence ensued, ending with a request by Tesco for the Bourneville store to be re-visited.

26. On 12 April 2016, Ms Boyal went back to the store, where she found 29 items of food in chillers on display for sale past their use by dates (ranging from 26 March to 11 April 2016), which she seized. Her later investigations revealed that Tesco had detailed policies and procedures regarding date code management in place, but the amount of items and the respective use by dates showed, in her opinion, that there was a substantial failure effectively to implement, monitor and verify them. Ten charges, covering the 29 items, resulted from this visit.

27. On 25 May 2017, the Council received a report from a member of the public that he had bought an item from Tesco Metro, 2042-2052 Bristol Road South, Birmingham that was out of its use by date. On 1 June 2017, Ms Boyal and a colleague, David Harris, visited that store, and found 25 items of food in chillers on display passed their use by dates. Eight charges, covering the 25 items, resulted from this visit.

28. On 2 June 2017, another authorised officer, Bethany Cook, visited Tesco Express, Carrs Lane, Birmingham and found 13 items on display for sale passed their use by dates. Four charges, covering the 13 items, resulted from this visit.

29. Of the various food items found with past use by dates, some were Tesco own brand and some were other brands.

The Magistrates' Court Proceedings

30. Thus, 22 charges in similar form were brought by the Council against Tesco in Birmingham Magistrates' Court, on the basis that, by displaying for sale items of food with an expired use by date, Tesco had committed an offence under regulation 19 of the 2013 Regulations, because it had placed food on the market that was "unsafe" in breach of article 14(1) of the Food Safety Regulation. The prosecution rested on the

premise that, by virtue of the last sentence of article 24 of the Food Information Regulation, food beyond its use by date is "unsafe" food.

31. Tesco accepted that all of these items were exposed for sale with expired use by dates – and, indeed, accepted that they should and would not have been on sale if their own internal procedures had been complied with – but relied upon two defences namely (i) that the items were not, in fact, "unsafe", and (ii) a "due diligence" defence under regulation 12.

32. In support of the former, Tesco served an expert report dated 8 September 2017 by Dr Slim Dinsdale, a food microbiologist, to the effect that (i) none of the foods seized was "highly perishable" (paragraph 16.1); (ii) none would cause any immediate danger to human health after a short period beyond the use by date (paragraph 16.3); and (iii) none was unsafe from a microbiological point of view in that, if the cooking/heating instructions were followed, that would have rendered the product safe to eat (paragraph 16.5). Tesco thus submitted that none of the seized items properly fell within (i) article 24 of the Food Safety Regulation (because none fell within the condition of that provision that "from a microbiological point of view, [they] are highly perishable and are therefore likely after a short period to constitute an immediate danger to human health"), or (ii) article 14(1) of the Food Safety Regulation (because none was, in fact, "unsafe"). Consequently, it was submitted, no offence had been committed.

33. An issue consequently arose as to the true construction of the last sentence in article 24, and in particular whether (as the Council contended) the words "After the 'use by' date a food shall be deemed to be unsafe…" creates a rule of law or irrebuttable presumption that, once the use by date has expired, the food item in question is "unsafe" for the purposes of article 24, including for the purposes of a prosecution under regulation 19 of the 2013 Regulations based on that provision; or whether (as Tesco contended) the words in article 24 only created a presumption that the food was unsafe which could be rebutted by evidence such as that of Dr Dinsdale that it was, in fact, not unsafe.

34. The Magistrates' Court directed that this issue be determined as a preliminary issue, in order to determine whether or not the expert evidence which Tesco wished to rely on was admissible. It would only be relevant, and therefore admissible, if, as Tesco submitted, the article 24 presumption was rebuttable.

35. Following two days of legal argument on 21 and 22 January 2019, with both Tesco and the Council as prosecutor being represented by Leading Counsel, District Judge (Magistrates' Court) Jellema held in a written judgment dated 22 January 2019 (but handed down on 19 February 2019) that article 24 created an "absolute presumption" that could not be rebutted by evidence that the relevant food item was not in fact unsafe. He directed that the case be set down for trial, notably of the due diligence defence which still remained, with a time estimate of seven days. As I understand it, the trial has been stayed pending the determination by this Court of the challenge of his ruling.

36. On 8 March 2019, Tesco issued this claim for judicial review, challenging the District Judge's determination of the preliminary issues. In the usual way, the Defendant Magistrates' Court indicated that it proposed to play no active part in the proceedings.

The Council, as the Interested Party, opposed the claim on three grounds, namely (i) the claim, whilst made within three months of the decision, had not been made promptly, (ii) there was an alternative remedy open to Tesco, namely to await the outcome of the prosecution (i.e. after the due diligence issue has been determined) and then to appeal to the Crown Court, and (iii) the merits of the claim were unarguable.

37. On 25 June 2019, on the papers, Pepperall J refused permission to proceed on the second ground; but, on 11 December 2019, a Divisional Court (Hickinbottom LJ and Elisabeth Laing J) concluded that, on the unusual facts of this case, judicial review was an appropriate way of challenging the District Judge's ruling; the claim had been brought reasonably promptly; and the claim was arguable and in any event raised an issue which should be considered on a fully argued basis.

38. The substantive claim is thus before us now.

The Claimant's Case

39. Mr Kirk submits that, on its true construction, article 24 was not intended to – and does not – create any rule of law or irrebuttable presumption that food past its use by date is unsafe for the purposes of criminal proceedings brought under regulation 19 of the 2019 Regulations.

40. Relying on cases such as Credit Foncier Franco-Canadien v Bennett [1963] 43 WWR 545; [1963] BCJ 16 (British Columbia), International Bottling Company Limited v Collector of Customs [1995] 2 NZLR 579 (New Zealand), Godwin v Swindon Borough Council [2001] EWCA Civ 1478; [2002] 1 WLR 997 and Anderton v Clwyd County Council (No 2) [2002] EWCA Civ 933; [2002] 1 WLR 3174, he submitted that the use of the word "deemed" in article 24 does not necessarily create an irrebuttable presumption that the fiction inherent in the deeming provision applies.

41. Whether a deeming provision results in a rebuttable or irrebuttable presumption depends upon the intention of the legislator, considered objectively on the basis of the language used (see, e.g., R (Spath Holme Limited) v Secretary of State for the Environment [2001] 2 AC 349 at pages 398-9 per Lord Nicholls). Where there is a deeming provision, it may not have been the intention for the fiction contained in it to apply in all circumstances (see, for example Inland Revenue Commissioners v Metrolands (Property Finance) Limited [1981] 1 WLR 637 at page 645-8 per Nourse J). The intention of the legislation, particularly in the context of European law, has to be considered in the context of its purpose.

42. Whilst he accepted that a criminal offence could be formulated by reference to a deeming provision, Mr Kirk submitted that such offences are rare because of the abhorrence of finding an individual guilty of a criminal offence on the basis of a presumption which may be untrue. The offence under regulation 19 of the 2013 Regulations was not required by article 14 of the Food Safety Regulation or any other EU provision. It should be construed using English principles of interpretation, i.e. a presumption that any ambiguity be resolved in favour of the accused in the sense that an offence should not be found to exist in any wider form than the legislative language compelled (see R v Hughes [2013] UKSC 56; [2013] 1 WLR 2461 at [27] per Lords Hughes and Toulson JJSC).

43. Mr Kirk submitted that neither the Food Safety Regulation nor the Food Information Regulation nor the 2013 Regulations state in terms that the offence based on article 14 will be committed only on the basis of the deeming provision in article 24. He produced translations of the relevant words in article 24 in each of the EU official-language versions, submitting that none supports the contention that the deeming provision creates an irrebuttable presumption. In respect of the 2013 Regulations, he submitted that, if regulation 19 had been intended to create an offence based upon a fiction derived from article 24, it would have included express words to that effect (e.g. in terms of stating it was a "conclusive presumption" that food beyond its use by date was unsafe). He further submitted that the Council's case, that the offence based on article 14 of the Food Safety Regulation created by regulation 19 of the 2013 Regulations effectively replaced earlier, discrete criminal offences in relation to (i) food safety and (ii) food labelling, is undermined by the fact that regulation 19 came into effect on 1 June 2014, prior to article 24 coming into effect on 13 December 2014: as at the time the offence was first established, it was not subject to the deeming provision in article 24, and so it cannot be said that the passing of the 2013 Regulations in some way endorsed a criminal offence based upon the fiction.

44. Furthermore, he submitted, deeming provisions elsewhere in the EU regulations are not absolute. For example, article 45(3) of the Food Information Regulation provides that a Member State may adopt measures "which it deems necessary" only after a specific period of notification. Some provisions in the Food Safety Regulation also contain deeming provisions that are less than absolute. Article 14(7) provides that, insofar as food complies with specific European provisions governing food safety, it shall be "deemed to be safe"; but article 14(8) allows for restrictions to be imposed on such food "where there are reasons to suspect that, despite conformity, the food is unsafe". Article 15(4) and (5) make similar provisions for feed. That suggests that "deemed" as used in article 24 is also not used in an absolute sense.

45. Turning to purpose, Mr Kirk submitted it was not the purpose of the deeming provision in article 24 to create an immutable rule of evidence in a Member State, but rather to prescribe a fiction only for the purposes of the Food Safety Regulation itself (e.g. for the purposes of identifying an FBO's responsibilities under that Regulation). Applying Metrolands, he submitted that, to treat the provision as applying to define a criminal offence extends the inherent fiction, not only beyond what was required by EU law, but beyond its intended purpose.

46. In further support of the construction he advanced, he submitted that the alternative construction of the offence adopted by the District Judge has practical consequences that could not have been intended. It creates substantial uncertainty over the legal position as to whether (and, if so, how) food that is beyond its use by date, but in fact safe, can be relabelled, e.g. food which has been simply misdated (say, with the wrong year), or wrongly assessed as requiring a use by date at all, or "mischievously" mislabelled by a third party.

47. Further, where an FBO sells or displays for sale food that is beyond its use by date, the hygiene improvement notice process (see paragraph 22(ii) above) provides a proportionate and effective enforcement procedure, which again suggests that the construction adopted by the District Judge is not correct.

Discussion

48. Forcefully as Mr Kirk made his submissions, I am unable to accept them. In my view, the legislative provisions are unambiguous: as a result of article 24, food that is displayed for sale, or otherwise placed on the market, with a labelled use by date that has expired is "unsafe" for the purposes of article 14 of the Food Safety Regulation, and that cannot be controverted by evidence. An FBO which is responsible for placing such food on the market acts in breach of article 14, and is thus guilty of an offence under regulation 19 of the 2013 Regulations.

49. In coming to that conclusion, I have taken into account, in particular, the following.

50. Despite Mr Barraclough's submission that the word "deemed" historically meant "ordained" or "decided" and still generally has the strong connotation of something which is irrebuttable, I accept (as, to be fair, he did) that, depending on the context, the word may connote a presumed state of affairs that exists only until the contrary is proved.

51. With regard to the authorities upon which Mr Kirk relied, Bennett supports that proposition to an extent. That case concerned a provision that a registered owner of a charge was "deemed to be entitled to the estate or interest in respect of which he is registered, subject only to such exceptions and registered charges as appear existing on the register" (section 41 of the (Canadian) Land Registry Act 1960). The British Columbia Court of Appeal held that the provision created a rebuttable presumption, because (i) elsewhere in the Act, where it was intended to create an irrebuttable evidential presumption, that was made clear by the use of the word "conclusive" (see, e.g., section 38); and (ii) if it were irrebuttable, that would interfere with a long-established equitable rule with regard to interests in land, and the court was unpersuaded that it was intended to do so. However, whilst International Bottling (at page 584), Godwin (at, e.g., [72]) and Anderton (at [30]) all accept that "deemed" is capable of meaning "presumed until rebutted by evidence", they each held that, in the context of the particular cases before the court, the deeming provision was not rebuttable, but rather definitional, conclusive or absolute. So, in International Bottling, it was held that the presumption in section 113(1) of the (New Zealand) Customs Act 1966, that goods on which work had been done by a contractor shall be deemed to have been manufactured by the contractor, was definitional and conclusive. In Godwin (at [43], [69] and [73]) and Anderton (approving Godwin at [35]), it was held that a "deemed date of service" by (e.g.) post could *not* be rebutted by evidence as to when the relevant document was in fact received, although that did not prevent someone who had not in fact received it using other procedural rules to mitigate the consequences. In my view, these authorities, looked at as a whole, support the contention that, whilst not conclusive, "deemed" is indeed strongly suggestive of an assumed state of affairs that cannot be rebutted by evidence.

52. Mr Kirk appeared to be on somewhat stronger ground with his parallel submission that, objectively construed, a legislative provision may not intend an assumed state of affairs within a deeming provision to apply in all circumstances. Indeed, that was a proposition accepted in Godwin (see, e.g. at [76]). In Metrolands, which concerned the application of section 181(2) of the Town and Country Planning Act 1971 (under which, upon the service of various notices, a local authority was deemed to be authorised to acquire the interest of the owner of property) to section 45 of the Development Land Tax Act 1976 (which determined the time on which a transfer of

property was made for the purposes of Development Land Tax), Nourse J, having reviewed the relevant authorities, set out the following principles (at page 646G-H):

> "When considering the extent to which a deeming provision should be applied, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. It will not always be clear what those purposes are. If the application of the provision would lead to an unjust, anomalous or absurd result then, unless its application would clearly be within the purposes of the fiction, it should not be applied. If, on the other hand, its application would not lead to any such result then, unless that would clearly be outside the purposes of the fiction, it should be applied."

That again appears to accept that "deemed" often connotes an irrebuttable presumption; but it also suggests that the issue of construction as to the scope of the deeming provision should have a focus on purpose.

53. As I have indicated, Mr Kirk submitted that it was not the purpose of article 24 to create an immutable evidential rule of evidence in a criminal trial in a Member State, but it was rather limited to the internal purposes of the Food Safety Regulation (e.g. for the purposes of identifying an FBO's responsibilities under that Regulation). However, in my view, this submission looks at "purpose" with inappropriate myopia: to consider article 24 in its proper context, the purpose of the European food law scheme, as set out in the Food Safety Regulation and the Food Information Regulation, needs to be considered.

54. That purpose is clear, and is consumer-orientated. As I have described (see paragraphs 5-6 above), the primary aim of European food law is to afford a "high level of protection of human life and health and the protection of consumers' interests…", and the safety of consumers is considered to be "of paramount importance". Consequently, measures adopted by the EU or Member States have to be based generally on the precautionary principle and risk analysis, i.e. that risks to human health are to be avoided or reduced by means of a coherent methodology, devised and implemented by relevant FBOs, involving the prospective assessment, management and communication of risk.

55. Food "safety" has to be seen in this context (as does its antithesis, food "unsafety"). Prior to 2004, so far as the United Kingdom was concerned, section 8 of the Food Safety Act 1990 (and its predecessors) prohibited the sale of food injurious to health, unfit for human consumption or so contaminated that consumption was unreasonable, and it imposed a criminal sanction for breach. Food being "unsafe" is a European food law concept which was introduced by the Food Safety Regulation, first recognised and enforced here by the General Food Regulations 2004 (SI 2004 No 3279), regulation 4 of which made it a criminal offence to act contrary to article 14. However, as I have already indicated, food being "safe" does not, as Dr Dinsdale appears to suggest, mean the same as being fit for human consumption or "safe to eat". In the context of the Food Safety Regulation, what is "unsafe" is a term of art, non-exclusively defined to include food that is considered to be injurious to health or unfit for human consumption by the deeming provision of article 14(2) (see paragraph

11 above). Article 14(2) is clearly definitional, in the sense that "deemed" there means irrebuttably presumed: where food is unfit for human consumption, it cannot be argued that it is in fact not "unsafe" for the purposes of the Food Safety Regulation.

56. The "deeming" provisions in article 14(7) and (8) of the Food Safety Regulation (and the parallel provisions applying to feed in article 15(4) and (5) of the same Regulation), relied upon by Mr Kirk, do not assist him. There, where food complies with the food law regime, it is "deemed" safe subject to an express exception where there are reasons to suspect that it is unsafe. If "deemed" generally implied a state of affairs subject to contrary evidence, that express exception would not be required. Nor do I consider "deems necessary" in article 45 of the Food Information Regulation – where the word "deems" is used to mean simply "considers" in a clearly different context – assists in construing article 24.

57. In my view, in line with the aims of European food law, the deeming provision in article 24 is also "definitional" in this sense: it is purposively designed to include, within the scope of "unsafe", food which is labelled with a use by date that has expired because, on the basis of its generic characteristics and usual treatment, such food is considered to afford an undue risk to human health if consumed.

58. That is consistent with the focus of food law being upon the health and other interests of consumers, and with the requirement for prospective assessment and management of risks to those interests. Of course, foods that are considered highly perishable (and therefore, in general, likely after a short period to constitute an immediate danger to human health) may not, in a particular case, adversely affect human health if eaten after the use by date. But that is not to the point. As I have explained, European food law requires the prospective evaluation of risk: as a matter of precaution it considers that, where foods are highly perishable, the risk to human health is such that after a particular date they should not be used (hence "use by" date). In order to give effect to this precaution, article 14 of the Food Safety Regulation read with the article 24 deeming provision, prohibits food past its use by date being "placed on the market", i.e. it must not be displayed for sale, or even held for the purposes of sale or other form of transfer even free of charge (see paragraph 10 above). The deeming provision in article 24 reflects the outcome of a generic risk assessment required by the EU Regulations that, given the reasons why specific use by dates are required to be determined for and displayed on specific types of food, if such food is past its use by date it is "unsafe".

59. In context, there is nothing either odd or objectionable in this approach. As with many "deeming provisions", these provisions diminish the scope for factual issues by creating a "bright line" which assists in securing the aim and purpose of the Food Safety and Information Regulations, and in turn assists in ensuring consumer safety through adopting a precautionary and risk-averse approach.

60. Therefore, whilst Counsel before us (and the authorities) refer to the fiction inherent with a deeming provision, the term "fiction" in this context is not in my view entirely apposite. Article 24 essentially defines "unsafe" food to include that which, after its use by date, is considered to pose an unacceptable risk to those who might consume it, on a prospective assessment in relation to such a food made by the relevant FBO on the basis of the general characteristics of that food and how it might be treated before

consumption. It thus avoids the need to determine, as a matter of evidence in each case, whether specific food is actually "safe to eat" in the circumstances of the particular case. If someone further down the line considers that that assessment is for any reason wrong, the scheme allows him to re-assess the risk (again, prospectively) and re-label the food; but that can only be done on the basis of (microbiological) evidence (general or specific) and on the basis that he (the re-assessor) bears responsibility for his new assessment and labelling.

61. The "hard cases" relied upon by Mr Kirk, where the use by date for some reason does not reflect the true date after which the specific food will pose the risk assessed upon its general characteristics, do not in my view assist his cause. If the wrong date is put upon food (or a use by date is put on food that does not require such labelling), then the FBO putting on that information, whose mistake the original labelling was, will remain liable for that mistake, which can be corrected by appropriate re-labelling in accordance with the Food Information Regulation regime. If someone mischievously changes an appropriate use by date, then the verification and checking procedures required by the scheme should make that a very short-term issue; and, in any event, the aim of the scheme to protect consumers means that the burden of responding to such mischief should and does not fall upon the consumer, but on an FBO. There is no evidence before us that such mistakes or mischief have occurred in practice; but, if they were to occur, then in my view, the scheme on the basis of the construction advanced by Mr Barraclough is sufficient to respond to it.

62. Nor, in my view, does the tenet of construction that provisions that impose criminal penalties be construed strictly in favour of an accused assist Mr Kirk. On any view, the meaning of regulation 19 of the 2013 Regulations is clear beyond any doubt – it makes a breach of article 14 of the Food Safety Regulation a criminal offence – and for that purpose it is clear (by reason of article 24) that food beyond its use by date is unsafe.

63. Indeed, Mr Kirk accepted that, if enforced by civil process only, the meaning of article 14 was (or, at least, might be) sufficiently clear. But if that is so, article 14 is also sufficiently certain for the purpose of the regulation 19 criminal offence. In coming to that conclusion, I have particularly taken into account the following.

    i) The relevant EU Regulations make it clear (as is usual for European schemes) that the means of enforcement is a matter for individual Member States.

    ii) Mr Kirk accepted that it was open to Member States to enforce the article 14 obligation by way of criminal proceedings and sanction: he eschewed the argument that it would be disproportionate to enforce the obligation in such a way. That concession was, if not inevitable, clearly properly made, as such method of enforcement is well within the margin of appreciation of the constituent parts of the United Kingdom. It is noteworthy that, before the relevant European provisions, the previous UK domestic food safety and labelling provisions were each enforceable by criminal sanction, and some other Members States now enforce article 14 of the Food Safety Regulation by criminal sanctions. The other language versions of article 24 provided by Mr Kirk, insofar as they may assist on the issue of construction at all, do not in my view suggest that the construction he favours is correct: some use a term similar to "deemed" in the sense that it suggests something irrebuttable (e.g.

the French, *"... est dite dangereuse…*", and the German "*... gilt…*"), whilst others are translated as "considered".

iii) In any event, the method of enforcement in respect of a breach of a European provision can have no sensible bearing on the construction of the provision breached.

64. Consequently, in my view, the construction of article 14 of the Food Safety Regulation including the deeming provision in article 24, is clear: there is an obligation, falling on FBOs, to label highly perishable foods with a use by date and, when that date is passed, that food is "unsafe" such that it cannot be displayed for sale or otherwise placed on the market; and that "unsafety", being essentially a question of definition, cannot be controverted by evidence that, by reference to some other safety criteria, the food is "safe". Such food may be relabelled, if it is reassessed for risk; but, whilst any such process is proceeding, the food cannot be placed on display or otherwise "held for sale" (which is included in the definition of "placed on the market": see paragraph 10 above).

65. Mr Kirk referred us to the consequences of that construction, on the basis that they supported his contention that that construction was not correct (see paragraphs 46-47 and 61 above). However, in my view, the wording the relevant provisions in its proper context is clear, such that the consequences of it could only bear upon its true construction if they were perverse such that a construction could not have been the intention of the legislator. The consequences upon which he relied did not fall into that category. Indeed, I consider that the construction has no consequences that could be considered unusual or unintended.

i) Contrary to Mr Kirk's submission, the construction involves no uncertainty. It is clear that, if a shop displays for sale food past its use by date, subject to the due diligence defence, it will be committing an offence. A construction which involved the testing of such food to ascertain whether it was, in fact, unfit for human consumption or "unsafe to eat", would introduce unfortunate and unnecessary factual issues which the legislation was intended to avoid. It is no answer for Mr Kirk to say – as, indeed, is the case – that such evidence may still be required in respect of a due diligence defence or for the purpose of mitigation.

ii) I accept that the hygiene enforcement notice procedure offers an alternative enforcement procedure that may be regarded by enforcement authorities as more appropriate than prosecution under regulation 19 of the 2013 Regulations in some circumstances. However, an authority often has more than one way in which to enforce a regulatory regime. Hygiene enforcement notices may be appropriate where, for example, there appear to be less than adequate policies and procedures in place, to ensure that such are put into place. Here, Tesco had such policies and procedures; but, on the prosecution case, it had failed to ensure they were implemented properly. It cannot be said that the mere availability of the hygiene enforcement notice procedure either makes the criminalisation of a breach of article 14 read with article 24 disproportionate or the apparent construction of article 24 other than true.

Conclusion

66. For those reasons, with District Judge Jellema, I would answer the question posed at the beginning of this judgment, "Yes": subject to any available defence (such as due diligence), it is a criminal offence for a shop to offer food for sale, or otherwise place it on the market, after its labelled use by date.

67. Consequently, subject to my Lord, Swift J, I would refuse this claim.

Swift J :

68. I agree. This application for judicial review should be refused for the reasons given by Hickinbottom LJ. The District Judge was correct to conclude that the expert evidence that Tesco wished to rely on was inadmissible: the food in issue was unsafe for the purposes of the charges brought because it had passed its use by date.

69. On analysis, the issue in this claim comes to two points that can be shortly stated: first, should the words in article 24 of the Food Information Regulation, "After the 'use by' date a food shall be deemed to be unsafe in accordance with Article 14(2) to (5) of [the Food Safety Regulation]", be read as words that conclusively determine that food past its use by date is unsafe for the purposes of article 14; and, second, whether the answer to the first question is affected by the fact that regulation 19 of the 2013 Regulations renders breach of article 14 a criminal offence. As Hickinbottom LJ has explained, the answer to the first is "yes", and the answer to the second is "no".

70. The ordinary language meaning of the words used in article 24 of the Food Information Regulation is clear: if a use by date has passed, the food is to be regarded as "unsafe" for the purposes of article 14 of the Food Safety Regulation. Although in some circumstances, where a legislative provision says that a state of affairs is deemed to be so, that provision can be construed as meaning something to the effect of "deemed unless otherwise proved", whether such a conclusion is correct will depend on context, and in particular on whether the conclusion is consistent with the purpose of the instrument in which the provision appears. In the context of the Food Safety Regulation and of the Food Information Regulation, taking account of (i) the clear purpose of those Regulations as explained by Hickinbottom LJ and, specifically, (ii) the premises in those Regulations for the existence of use by dates, there is no plausible basis for the conclusion that the words in issue in article 14 have any meaning short of their ordinary language meaning. Any different meaning would seriously weaken the regulatory scheme. Thus, both as a matter of ordinary language, and by reference to the purpose of the EU Regulations, the correct meaning of the words in issue in article 24 of the Food Information Regulation is that food passed its use by date is unsafe for the purposes of article 14 of the Food Safety Regulation.

71. In the course of his submissions, Mr Kirk suggested that rejection of his submissions would in some way be at odds with the conclusion reached by the Supreme Court in Torfaen County Borough Council v Douglas Willis Limited [2013] UKSC 59; [2013] PTSR 1088. That case concerned what was necessary to prove commission of the offence under regulation 44(1)(d) of the Food Labelling Regulations 1996 (SI 1996 No 1499) (the predecessors to the 2013 Regulations). I cannot see any connection between any part of the reasoning of that court in that case, and a conclusion in this case that Tesco's arguments should prevail. In fact, the position is quite to the contrary – see, generally, the reasons of Lord Toulson JSC at [21]-[29].

72. As to my second point above, it makes no difference that regulation 19 of the 2013 Regulations renders breach of article 14 of the Food Safety Regulation a criminal offence. Mr Kirk's submission ultimately came to this: (i) the words in article 24 of the Food Information Regulation could not be read at face value because that would result in "hard cases"; because (ii) the words in article 24 must be read at something less than face value, they are ambiguous; such that (iii) the principle in R v Hughes (cited at paragraph 42 above) had to be applied, resulting in the conclusion that food passed its use by date would only be "unsafe" for the purposes of article 14 of the Food Safety Regulation if proved by evidence to be unsafe.

73. That submission breaks down at its first stage. There was no evidence that any of the hard case situations suggested had ever arisen; even if any of them did arise, as explained by Hickinbottom LJ, they could in all likelihood be addressed by the re-labelling provisions contained in the EU Regulations. But even if that were not so, and even if the hard cases suggested were realistic (rather than primarily theoretical) scenarios, that would not require reading-in ambiguity into regulation 24. Every bright line rule will throw up hard cases. When the issue is legislative construction, the question will be whether the possible categories of hard cases are such that taking the purpose of the legislation into account, they require the conclusion that the words enacted must have some other meaning than the one they would otherwise bear. In the present case, the answer to that question is, clearly, "no". The words at the end of article 24 establish a direct connection between whether food is passed its use by date, and whether for article 24 purposes the food is safe. Notwithstanding the possibility (or even the certainty) of hard cases, the existence of such a connection quite clearly fits with the purpose of the Regulations in a way that the alternative construction advanced by Tesco, equally clearly, does not.

74. Lastly on this point, the conclusion reached by the District Judge also favours legal certainty: the words in article 24 of the Food Information Regulations clearly set out the legal consequence if food passed its use by date is put on the market. This enables all FBOs to know with a high degree of certainty one (albeit not the only) set of circumstances that will give rise to a breach of article 14 and hence commission of an offence under regulation 19 of the 2003 Regulations. In respect of certainty, I do not see any substance in the point that article 24 of the Food Information Regulation, although made on 25 October 2011, did not come into effect until 13 December 2014 which was almost a year after regulation 19 of the 2013 Regulations (which came into effect on 31 December 2013). The consequence of this sequence of events is that for a little under 12 months there was no rule that food passed its use by date was unsafe for the purposes of the offence under regulation 19 of the 2013 Regulations of failing to comply with article 14 of the Food Safety Regulations. I cannot see that this alters the effect of regulation 24, once in force, on the circumstances in which a breach of article 14 will occur.