

Offering food for sale after its labelled “use by” date is *prima facie* a criminal offence: R (on the application of Tesco Stores Ltd) v Birmingham Magistrates’ Court [2020] EWHC 799 (Admin)

By Hazel Jackson

On 6 April 2020, the High Court in *R (on the application of Tesco Stores Ltd) v Birmingham Magistrates’ Court [2020] EWHC 799*, dismissed an application for judicial review and held that, by displaying for sale items of food with an expired “use by” date, Tesco Stores Ltd had committed a criminal offence under regulation 19 of the Food Safety and Hygiene (England) Regulations 2013, because it had placed food on the market that was “unsafe” in breach of article 14(1) of the Food Safety Regulation.

Introduction

1. The High Court was asked to determine whether, taken together, the Food Safety Regulation (Regulation (EC) No 178/2002) laying down the general principles and requirements of food law and procedures in matters of food safety, and the Food Information Regulation (Regulation (EU) No 1169/2011) on the provision of food information to consumers, created an irrebuttable presumption that food offered for sale beyond its use by date was unsafe and therefore, subject to available defences, amounted to a criminal offence under the Food Safety and Hygiene (England) Regulations 2013 (SI 2013 No 2996) (“**the 2013 Regulations**”). Tesco Stores Ltd (“**Tesco**”) challenged the District Judge’s finding that there was an irrebuttable presumption, and that expert evidence on the issue of the food’s safety was therefore inadmissible. The judicial review was dismissed.

Legal Background

2. The use by dates on food are currently enforced by the following provisions.
3. The 2013 Regulations. Regulation 19 of the 2013 Regulations makes it an offence to contravene or fail to comply with “*any of the specified EU provisions*” set out in schedule 1. The penalty is an unlimited fine and/or (for individuals) up to two years imprisonment.
4. The Food Safety Regulation. Article 14(1) of the Food Safety Regulation is one of the specified EU provisions and provides that “*food shall not be placed on the market if it is unsafe*.” The concept of placing food on the market is given a wide definition going beyond “*displaying*” it for sale in a shop to also include the “*holding of food*” for sale (Article 3(8)).
5. Under Article 14(2), food is “unsafe” if it is “*injurious to health*” or “*unfit for human consumption*”. Article 14(3) adds that, in determining whether any food is unsafe, regard shall be had: (a) to the normal conditions of use of the 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 category of foods.
6. The burden of ensuring food safety, including the article 14(1) obligation, is imposed primarily on food business operators (“**FBOs**”). FBO’s are under a duty to ensure foods satisfy the requirements of food law relevant to their activities, and to verify that such requirements are met.
7. The Food Information Regulation. Article 14 of the Food Safety Regulation has to be read with the Food Information Regulation requiring information to be set out in labels on pre-packaged food:

- a. Articles 9 and 10 identify mandatory information that must form part of the “food information” labelled on pre-packaged food. Article 9(1)(f) imposes a requirement to state “*the date of minimum durability or the ‘use by’ date*”. The “date of minimum durability” is the “best before” date (see paragraph 1 of Annex X to the Regulation) defined in Article 2(2) as the “*date until which the food retains its specific properties when properly stored*”. The best before date is thus concerned primarily with the quality of food rather than its safety.
 - b. Article 24 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... **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]*” (emphasis added).
8. This “deeming” provision in the last sentence of Article 24(1) was at the heart of the case. It provides the link between use by dates and the application of Article 14 of the Food Safety Regulation: it deems food beyond its labelled use by date to be “unsafe” so that, by Article 14, it cannot be placed on the market.
9. In the conventional way, enforcement of European food law obligations is generally left to each Member State: see Article 17 of the Food Safety Regulation. In each United Kingdom jurisdiction, a breach of Article 14 of the Food Safety Regulation is made a criminal offence. Two other relevant aspects of enforcement measures under the 2013 Regulations are that:
- a. An authorised officer of an enforcement authority may serve on an FBO both a “hygiene improvement notice” requiring the FBO to take specified measures and making it an offence to fail to comply (Regulation 6); and

“hygiene prohibition notice” prohibiting a person or premises from being engaged in processes concerned with food (Regulation 7).

- b. A “due diligence” defence exists to any offence charged under the Regulations: a person charged can prove he took all reasonable precautions and due diligence to avoid the commission of an offence (Regulation 12).

10. In this article, further references to “article 14” are to the Food Safety Regulation, “article 24” to the Food Information Regulation, and “regulation 19” to the 2013 Regulations unless otherwise appears.

The Tesco Case

11. As a distributor of food, Tesco is an FBO. The charges against Tesco were by Birmingham City Council (“**BCC**”) and arose out of visits to three Tesco stores by BCC’s Environmental Health Officers (“**EHOs**”) between 2015-17. During each visit, the EHO found numerous items on display with an expired use by date. As a result, Tesco was charged with 22 offences alleging separate breaches of article 14(1) contrary to regulation 19.

12. All 22 charges were laid before District Judge Jellema in Birmingham Magistrates’ Court. Tesco accepted that all of the items had been exposed for sale with expired use by dates, and that they would not have been on sale if their internal procedures had been complied with - but relied upon two defences, namely that: (1) the foods were not, in fact, “unsafe”; and (2) the “due diligence” defence applied. In support of the former, Tesco served an expert microbiology report that the foods had not been unsafe despite their expired use by dates.

13. BCC’s case rested on the premise that the deeming provision in the last sentence of article 24(1) creates a rule of law or an *irrebuttable presumption* that, once the

use by has expired, the food item in question was unsafe. An issue consequently arose as to the true construction of that sentence and its effect.

14. The Magistrates' Court directed that this issue should be dealt with as a preliminary issue in order to determine whether Tesco's expert report should be admissible. The report would only be relevant, and therefore admissible, if the article 24(1) presumption was rebuttable. District Judge Jellema held that article 24(1) *did* create an "absolute presumption" that could not be rebutted by evidence and thereby excluded Tesco's expert report.
15. Tesco issued judicial review proceedings against that ruling and the trial on the due diligence defence has been stayed pending determination of Tesco's challenge.

The High Court's decision

16. In the High Court, Hickinbottom LJ and Swift J refused the application for judicial review. Their key findings were that:
 - a. The legislative provisions are unambiguous: the words in article 24(1) conclusively determine that food past its use by date is unsafe for the purposes of article 14 and that cannot be controverted by evidence (at [48]). The 'deeming provision' in article 24(1) diminishes 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 (the primary aim being to afford a high level of protection of human life and health) (at [59]), and avoids the need to determine, as a matter of evidence in each case, whether specific food is actually "safe to eat" (at [60]).
 - b. In response to Tesco's submissions regarding the effect of the bright line rule upon cases in which foods have been labelled with the wrong use by date (or did not require a use by date) the Court held that it was the food

business putting on that information, whose mistake the original labelling was, which would remain liable. The mistake can be corrected by relabelling. Verification and checking procedures required of FBO's should identify any mischievous changes to an appropriate use by date (at [61]).

- c. The Court's construction of the Regulations had no "*unusual or unintended*" consequences: it causes no uncertainty, and the availability of the hygiene enforcement notice procedure as an alternative to prosecution did not make "*the criminalisation of a breach of Article 14 read with Article 24 disproportionate or the apparent construction of Article 24 other than true*" (at [65]). The analysis of article 24(1) was thus not affected by the fact that regulation 19 renders breach of article 14 a criminal offence (at [69]).

Impact of the decision

17. The High Court's decision on its face provides some certainty. However, it is questionable whether the reasoning behind its decision to construe article 24(1) as creating an irrebuttable presumption that food displayed for sale after its use by date is unsafe, was correct.
18. First, there are no express words in any of the respective provisions to support the contention that the deeming provision in article 24(1) creates an irrebuttable presumption. Hickinbottom J recognised that the authorities cited by Tesco show that the word "deemed" is "*strongly suggestive of an assumed state of affairs that cannot be rebutted by evidence*" but that this is "*not conclusive*" (at [51]). Indeed, in one case relied upon by Tesco, Credit Foncier Franco-Canadien v Bennett [1963] 43 WWR 545 (British Columbia), it was held that where a provision intended to create an irrebuttable evidential presumption, that was made clear by the use of the word "*conclusive*" (at [51]).

19. Secondly, the Court's determination that article 24(1) means "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" (at [70]) denudes some words within article 24(1) of any utility. Article 24(1) explicitly "deems" food to be unsafe "in accordance with Article 14(2) and (5) of the Food Safety Regulation" when a use by date has passed. Article 24(1) is therefore not free-standing. If food is automatically unsafe when it is displayed after its use by date, the word "deems" has no real purpose and, in any given case, article 24(1) is not determined in accordance with articles 14(2) and (5). Under article 14, various factors are listed to be taken into account when determining whether food items are safe. These factors become irrelevant where food is irrebuttably presumed to be unsafe simply upon the passage of a use by date. The Court justifies this by seeing "unsafety" as a question of definition, a term of art non-exclusively defined by, and going beyond, the circumstances listed in article 14(2) (at [55]). But the words "in accordance with" in article 24(1) appear to be thereby rendered nugatory.
20. The Court considered that the translations of article 24 in each official EU language, provided by Tesco, were inconclusive to determine its correct construction (in so far as they assisted with the issue at all): some used a term similar to "deemed" to suggest something irrebuttable, whilst others translated as "considered" (at [63(ii)]). Interestingly, the Court used the French example ("...est dite dangereuse...") as suggesting something irrebuttable – the translation being "is said to be dangerous". However, the French version still includes the words "conformément à l'article 14, paragraphes 2 à 5, du règlement (CE) no 178/2002", meaning that the decision as to whether food is unsafe after its use by date is determined in accordance with article 14(2) and (5).
21. Thirdly, as a result of the above, there remains uncertainty as to whether food that is beyond its use by date but is in fact safe, can be relabelled. The retailer is allowed to do so where the food is "reassessed for risk" (at [64]) but, whilst any
-

such process is proceeding the food cannot be placed on display, or even held for sale. To do otherwise risks the retailer being prosecuted.

Conclusion

22. Criminal offences formulated by reference to a deeming provision are typically 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 implication of the *Tesco* case is that, once a use by date has passed, a presumption of unsafety is essentially now a matter of strict liability subject only to the due diligence defence. It remains to be seen whether Tesco will run the defence when the Birmingham Magistrates' Court proceedings resume.

Hazel Jackson
21 April 2020