

# Hard to swallow?

Innocent but not allowed to prove it. Slim Dinsdale & Fred Philpott address a statutory fiction in criminal law



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## IN BRIEF

► In the context of criminal proceedings concerning food law the High Court has held that if legislation deems a state of affairs leading to a conviction the defendant cannot adduce evidence to the contrary.

The case involved use by dates. The legislation stated that if a food product was on sale after the date it was 'deemed to be unsafe'. There was evidence that the food products were not unsafe (the double negative is appropriate). That was ruled inadmissible and the criminal conviction was upheld.

## This cannot be right

To make deeming provisions in criminal law can sometimes be justified. Often the factual situation or intention is known only to the defendant so it is right to deem a certain situation or intention from other facts but permit the defendant to show (rebut) that this situation or intention is not correct. The law which places the burden of proof of certain facts on the defendant has always been subject to the right to be able to do so on the balance of probabilities (eg the due diligence defence in regulatory law). It is an entirely different matter to say that a state of affairs is presumed to have existed leading to the defendant being guilty but the defendant cannot call evidence to show that state of affairs did not exist.

## The context of the case

The case was a routine use by date case (*R on the Application of Tesco Stores Ltd v Birmingham City Council* [2020] EWHC 700 (Admin), [2020] All ER (D) 147 (Mar)). However, it was an opportunity to consider fairly new EU legislation on the

subject as this had changed since *Torfaen CBC v Douglas Willis Ltd* [2013] UKSC 59, [2013] CTLC 136, [2013] 4 All ER 1 in the Supreme Court.

## The stark legal reality

A defendant in a criminal case has been convicted on a presumption which was a fiction. The supermarket had food on its shelves with labels indicating a use by date which had passed. The statutory provisions had the result that the food was deemed 'to be unsafe'. The defence had evidence it was not unsafe. The defence could not use that evidence.

## The scientific evidence

The only need for a use by date is if the food is (i) highly perishable, and (ii) likely after a short period of time, to (iii) constitute an immediate danger to human health (Art 24(1) of Regulation).

The scientific evidence was, for example:-

1. Shelf life data from each manufacturer showed that the food was safe to consume well after the expiry of the food's use by date;
2. All food items with expired use by dates satisfied the UK's Health Protection Agency's (now part of Public Health England) microbiological guidelines for ready to eat foods. In particular, no pathogenic bacteria, particularly *Listeria*, were present throughout the shelf life testing.
3. None of the food items constituted a danger to human health, immediate or otherwise.

## The background

In the past food safety has relied on appearance, smell, and taste, and when

food was deemed to be unacceptable it was discarded, or the maxim 'when in doubt, cook it' was invoked. We do not know of any significant harm which came about in our country when this was what people did in their kitchen before date labelling. Even before the UK had to follow what the EU dictated, there was domestic legislation but this was more for the purposes of information (eg sell by dates) rather than a prescriptive rule, ie best before dates only inform the consumer that the quality is guaranteed up to that time if properly stored, but may decline afterwards (but it will still be safe to eat).

## The scientific test

The test itself for use by dates is in itself sensible. To analyse it briefly:

A representative number of food items, packaged ready for sale, are stored under conditions similar to those in the average domestic refrigerator. The storage includes some temperature abuse to simulate, for example, a trip home in a warm car from a supermarket. Regular testing for pathogenic and spoilage bacteria is carried out and the appearance, smell, taste and texture (organoleptic qualities) of the food is also evaluated. This enables the manufacturer to determine the point at which the food begins to deteriorate. If, for example, deterioration (such as loss of colour or texture) begins to start after ten days storage, the manufacturer may set a use by date of seven days to allow a margin of error.

In all of these foods, the organoleptic qualities deteriorate long before any question mark over safety, but it is the organoleptic qualities, not the safety of the food, that the manufacturer uses to determine a use by date. Put simply, the use

by date informs the consumer about the quality of the food only. Food safety is not part of a use by date calculation, contrary to the requirements of the regulations and advice from regulators.

The problem is the way it is enforced.

### The legislation

The *Tesco* case sets this out at length the recitals to EU Regulations and the enforcement. However, the crucial provisions are:

- ▶ After the use by date a food shall be deemed to be unsafe in accordance with Art 14(2) to (5) of Regulation (EC) No 178/2002 and by Art 14(1) it cannot be placed on the market.
- ▶ By Art 24 of Regulation (EU) No 1169/2011 after the use by date a food shall be deemed to be unsafe.
- ▶ Regulation 19 of the Food, etc (England) Regulations 2013 makes a breach of Art 14 a criminal offence.

Leaving aside the other legislations referred to by the court in respect of food business operatives, labelling etc. which is useful background, it is as simple as that.

### An initial reaction

We suspect that, reacting to the above, the average UK lawyer or member of the public would think that the presumption was sensible but, if the defendant (in the notional ‘dock’) could prove the food was in fact safe, the criminal justice system was working (albeit in a somewhat esoteric area of criminal law). Not so.

### The judgment: the authorities

The case was argued by two Queen’s Counsel (one of whom had appeared for the prosecution in *Torfaen* but here represented the Supermarket). The cases the court were asked to consider were distant from the instant case, no doubt because a decision that an irrebuttable presumption against the defence in a criminal case had not apparently been found. There were six cases referred to in the judgments. None were criminal cases. There was a case on land registration in Canada, a New Zealand case on customs, and a case on deemed service. There was no case where a defendant had been presumed guilty notwithstanding unchallenged evidence to the contrary.

### The judgment: the reasons

It may do some justice to their Lordships to cite:-

- ▶ Para [48] – ‘... the legislative provisions are unambiguous: as a result of article 24 food that is displayed for sale is ... unsafe for the purposes of article 14 ...’.

- ▶ Para [50] - ‘... depending on the context, the word may connote a presumed state of affairs that exist only until the contrary is proved’ (with regard to the word ‘deemed’).

The cases (we emphasise not criminal) nevertheless generally appear to have found some route to overcome irrebuttable presumptions (eg ‘other procedural rules to mitigate the consequences’). There were no other procedural rules in the reported cases to mitigate the consequences of being found guilty when the facts are that you are not.

The court referred to a Development Land Trust case (at para 52) where (in *IRC v Metrolands (Property Finance) Ltd* [1981] 1 WLR 637, [1981] 2 All ER 166) Mr Justice Nourse referred to a ‘statutory fiction’ and whether it 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.’

Nourse J said with regard to purpose that unless the application of it would lead to an unjust result, then unless its application would clearly be within the purpose of the fiction, it should not be applied.

The court uses the ‘purpose’ to justify the statutory fiction by reference to EU food safety objectives. Deploying the reasoning of a Development Land Tax case to hold a defendant guilty of something it had not done is worthy of consideration. The word ‘unjust’ in *Metrolands* should have been the real focus.

The divisional court invokes concepts such as ‘term of art’ for unsafe (an orange is a ‘term of art’ for a lemon even if it is a lemon) and the concept of ‘definitional’ (the word ‘orange’ simply ‘defines’ a lemon). Thus safe food is unsafe because it is a term of art and definitional. The conclusion by Lord Justice Hickinbottom was (para 55) that Art 14(2):

‘... is clearly definitional, in the sense that ‘deemed’ there means irrebuttable presumed: where food is unfit for human consumption, it cannot be argued that it is in fact not “unsafe”.’

But it is only ‘unfit for human consumption’ if it is unsafe and the food in this case was not unsafe. Leaving aside the presumption it was safe as a matter of evidence.

### Outcry

If we looked at cases where the defendant could go to prison for a long time on the basis of a statutory fiction there would be an outcry. But if enforcing authorities choose to use the criminal route to enforce legislation such as this the jurisprudential

tests cannot be different. It is appreciated that a finding of criminal guilt on the basis of an irrebuttable prosecution or legal fiction is not unique. The trials by ordeal (float, guilty, drown, innocent) have some similarities. In current jurisdiction one sees such attitudes and they are, of course, a feature of some parts of Europe in the early/middle parts of the last century.

Yes, we are looking at a modest food law matter but when the state, through the courts, prevents an accused bringing evidence to prove their innocence on semantic grounds of purpose, ‘term of art’ and ‘definitional’ perhaps then is cause for concern.

### The human realities

The lack of understanding of use by dates by consumers, a lack promulgated by the Food Standards Agency and other authorities, has produced apprehension and even fear in the ordinary consumer. This has three notable consequences:

- ▶ Foods with expired use by dates (or about to expire) are discarded as waste, and contribute to the annual 4.5 million tonnes of household waste as estimated by WRAP (Waste & Resources Action Programme).
- ▶ Some consumers consider that best before dates are equivalent to use by dates and also discard food past this date further increasing the level of food waste.
- ▶ Discarding food on the basis of flawed assessments of safety is likely disproportionately to affect those in society who can least afford to discard wholesome food, and may add to—ironically—an increasing reliance on food banks containing surplus food donated by supermarkets, other organisations, and the public.

### The future

It may be that the case would have gone further in the absence of the current situation. It is possible it will become an issue afterwards in another case. We hope not; not because the decision is wrong on much wider grounds but that it is hoped trading standards and environmental health officers who have done sterling work in the present crisis will not revert to troubling the courts with food which is edible days and even weeks after its use by date. Nor do we overlook a future where we can consider, not in a critical way, but constructively, what EU food law we wish to retain, amend or discard.

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