



IN THE HIGH COURT OF JUSTICE

No CO/1333/2019

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

DIVISIONAL COURT

[2019] EWHC 3755 (Admin)

Royal Courts of Justice
Strand, London WC2A 2LL

Wednesday 11 December 2019

Before:

LORD JUSTICE HICKINBOTTOM

and

MRS JUSTICE ELISABETH LAING DBE

B E T W E E N :

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) appeared on behalf of the Claimant.

The Defendant was not present and was not represented.

RICHARD BARRACLOUGH QC (instructed by Legal and Governance Department, Birmingham City Council) appeared on behalf of the Interested Party.

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LORD JUSTICE HICKINBOTTOM:

1 The Claimant food store operator (“Tesco”) faces ten charges of placing on the market food which was unsafe, in each case the particulars being that a food item was on display for sale on a date after the marked “use by” date, contrary to regulation 19 of the Food Safety and Hygiene (England) Regulations 2013 (SI 2013 No 2996) (“the 2013 Regulations”).

2 That regulation makes it an offence to contravene or fail to comply with “any of the specified EU provisions”. The relevant “specified EU provisions” for the purposes of this claim are two-fold. First, article 14(1) of the EU General Principles of Food Law and Food Safety Regulation No 178/2002 sets out the general obligation that food should not be placed on the market if it is “unsafe”. Article 14(2) deems food to be unsafe if it is injurious to health or unfit for human consumption. Article 14(3)-(5) set out various factors to be taken into account in determining whether any food is unsafe, injurious to health or unfit for human consumption. Second, article 24(1) of the EU Food Information for Consumers Regulation No 1169/2011 provides:

“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 EU Food Safety Regulation].”

References in this judgment to “article 24” are to this provision.

3 By regulation 12 of the 2013 Regulations, it is a defence to any offence under the Regulations to prove that the person accused took all reasonable precautions and exercised all due diligence to avoid the commission of an offence by an accused or by a person under the control of the accused (“the due diligence defence”).

4 The charges arise out of a visit on 12 April 2016 of an Environmental Health Officer employed by the Interested Party (“the Council”) as the relevant local enforcing authority to

the Tesco Metro Store in Bournville, Birmingham, where ten items with expired use-by dates were found. Tesco accepts that these items were indeed exposed for sale with expired use-by dates – and, indeed, accepts that they should not have been so exposed if internal procedures had been complied with – but relies upon two defences, namely (i) a “due diligence” defence under regulation 12, and (ii) the defence that the items were not, in fact, “unsafe”. It has served expert evidence from a food microbiologist that the relevant food items were not, in fact, unsafe in the sense that, if consumed, “none of the food items [would] cause any immediate danger to human health after a short period of time” (paragraph 16.3 of the report of Dr Slim Dinsdale dated 8 September 2017).

- 5 An issue consequently arose on the charges as to whether “After the ‘use by’ date a food shall be deemed to be unsafe...” in article 24 creates a rule of law that, once the use-by date has expired on a food item, then that food item is “unsafe” for the purposes of article 24 – including a prosecution under regulation 19 of the 2013 Regulations based on that provision – or whether it in effect creates only a presumption that is can be rebutted by the person displaying the food item for sale showing that the item is, in fact, not unsafe.
- 6 The magistrates’ court directed that that be determined as a preliminary issue, together with a consequential issue of whether the expert evidence be admitted. That evidence would be inadmissible as irrelevant if article 24 created a rule of law or irrebuttable presumption of unsafety; but it would be admissible if it created merely a rebuttable presumption.
- 7 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, in a written judgment dated 22 January but handed down on 19 February 2019, District Judge (Magistrates’ Court) Jellema held that article 24 created an absolute presumption (i.e. a rule of law that could not be rebutted by evidence) that the relevant food item was unsafe. She directed that the case be set down for trial, notably of the due diligence defence, with a time estimate of seven

days. The trial has in fact, as I understand it, been stayed pending the determination of this judicial review.

- 8 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 court indicated that it proposed to play no active part in the proceedings. The Council 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.
- 9 On 25 June 2019 on the papers, citing Gillan v Director of Public Prosecutions [2007] EWHC 380 (Admin) and Platinum Crown Investments Limited v North East Essex Magistrates' Court [2017] EWHC 2761 (Admin), Pepperall J refused permission to proceed on the ground that it is not in general desirable to consider a judicial review of an interlocutory matter in criminal proceedings, and this was not an exceptional case in which such a claim should be entertained. Tesco relied on the defence of due diligence which, if successful, would render the judicial review proceedings otiose.
- 10 Tesco now renews that application for permission. Before us, the same Leading Counsel have appeared, namely Jonathan Kirk QC leading Iain McDonald for Tesco and Richard Barraclough QC for the Council.
- 11 The grounds of opposition for the judicial review out forward by Tesco were, as I have indicated, three in number.
- 12 First, it was initially submitted that, whilst the claim was issued within three months, the delay in instituting the judicial review claim is detrimental to the good administration of

justice and is a reflection of how Tesco has sought to delay the ultimate resolution of the charges it faces. It should not be allowed, it was submitted, to profit from its own delay.

13 This ground is no longer pursued by Mr Barraclough today; and, in my view, for good reason. Tesco issued this claim about six weeks after the District Judge concluded that the Council's construction of article 24 was correct, and 2-3 weeks after the written judgment was handed down. There is, in my view, no evidence to support the suggestion that Tesco delayed issuing the proceedings simply to eke out time. It was entitled to take consider the written judgment and take advice on the courses it could and should take following the District Judge's ruling, judicial review (as the Council itself has stressed) not being the only route by which the ruling could possibly be challenged. I will return to the issue of the lapse of time; but in my view, in all of the circumstances, Tesco should not be shut out from pursuing this claim on the basis of delay alone.

14 The second ground of opposition was the ground which found favour with Pepperall J. It is submitted on behalf of the Council that this challenge is premature, and Tesco should contest the charges on the basis of its due diligence defence, and, if and only if that defence does not succeed, then it should seek to challenge the District Judge's ruling on the construction of article 24, and even the not by judicial review but by way of an appeal to the Crown Court.

15 On this issue we have been referred to a number of authorities, including Gillan and Platinum Crown Investments to which Pepperall J referred. It is unnecessary to review those authorities in detail: the principles to be derived from them are, in my view, sufficiently clear and well-settled.

16 In my view, Gillan and Platinum Crown Investments are not of any great assistance, as they primarily concern whether it is appropriate to mount an appeal by way of case stated to challenge an interlocutory order of the Magistrates' or the Crown Court. No such appeal

has been made here: the challenge here is by way of judicial review. As Platinum Crown Investments made clear, that is course is open as a matter of jurisdiction.

- 17 The circumstances in which a challenge to an interlocutory order in criminal proceedings will be entertained by way of judicial review were recently considered by this court in R (Parashar) v Sunderland Magistrates' Court [2019] EWHC 514 (Admin). The judgment of Bean LJ (with whom Simler J, as she then was, agreed) helpfully reviewed the authorities, including the judgments of Leveson LJ in Balogun v Director of Public Prosecutions [2010] EWHC 799 (Admin); [2010] 1 WLR 1915 especially at [31]-[32] and, as President of the Queen's Bench Division, in Director of Public Prosecutions v Manchester and Salford Magistrates' Court [2017] EWHC 1708 (Admin) especially at [12] to [14].
- 18 From these authorities, it is clear that this court does have jurisdiction to judicially review an interlocutory decision of a Magistrates' Court or Crown Court; although it is a jurisdiction which it will rarely exercise when the trial is continuing and to do so will result in an interruption of that trial. Therefore, the cases in which attempts to challenge interlocutory decisions of magistrates by way of judicial review have been deprecated (such as R v Rochford Justices ex parte Buck (1978) 68 Cr App R 114, Hoar-Stevens v Richmond Magistrates' Court [2003] EWHC 2660 (Admin) and Crown Prosecution Service v Sedgemoor Justices [2007] EWHC 1803 (Admin), which are cited by Sir Brian Leveson PQBD in the Manchester and Salford Magistrates case at [12]) concerned evidential issues such as disclosure and admissibility which had occurred during the course of the trial. This court's reluctance to intervene in those circumstances, and thereby upset the course of the trial, is unsurprising.
- 19 The circumstances of this case are, of course, very different. Here, there was no extant trial. The issues determined by the District Judge were not essentially evidential or concerned with the management of the trial, and were identified as suitable to be preliminary issues because they were issues of law that were capable of discrete consideration and were of

potentially wider importance than the facts of this case itself. It was common ground between the parties that the issues should be determined as preliminary issues.

20 In Parashar at [42]-[43], Bean LJ confirmed that, once the trial is underway, this court will only rarely consider an interlocutory challenge, but he also agreed with the submission made in that case that the court would intervene:

- (i) where it is properly arguable that the ability of the defendant to present his defence is so seriously compromised by the decision under challenge that an unfair trial is inevitable;
- (ii) where an important point of principle is raised likely to affect other cases; or
- (iii) where the case has some other exceptional feature which justifies the intervention of the High Court.

21 Whilst this list is, in my respectful view, helpful, it is not of course to be regarded as any form of rigid categorisation into which an applicant must force his case. The last category in any event open. This court must look at all of the relevant circumstances and determine whether, by exercising its power to consider a judicial review of an interlocutory decision of a criminal court, it can further the overriding objective of dealing with cases justly. Dealing with a case justly of course involves consideration of managing cases efficiently and cost-efficiently. However, as Bean LJ indicated, this court will only intervene exceptionally, i.e. rarely.

22 Where this court concludes that it should consider a claim for judicial review of an interlocutory decision of a criminal court, then, as the authorities once more indicate, it should be dealt with promptly because of the imperative of ensuring that criminal proceedings are concluded within a reasonable time.

- 23 In my view, the availability of potential alternative routes of future challenge by way of appeal to the Crown Court (or, indeed, to this court by way of case stated) does not mean that this court should not consider this claim for judicial review now. In this case, the alternative remedies are, in my view, patently inferior. They require the issue of due diligence to be contested before the Magistrates' Court over a period of (the District Judge estimated) seven days in circumstances in which, if its challenge to the District Judge's determination on article 24 is successful, will be wasted time and effort. If the due diligence defence in this case is unsuccessful, then Tesco will be left to appeal, which will, at the very least, mean considerable delay in the ultimate resolution of these charges. Therefore, whatever the result of the trial if it were allowed to proceed, there is substantial risk of delay and additional cost of not proceeding with a judicial review in respect of which both protagonists are now ready to proceed.
- 24 In any event, if the due diligence defence were successful, it would leave Tesco with a finding that they have offered for sale unsafe food in circumstances in which they do not agree that the food is in fact unsafe, which, without a definitive conclusion on the true construction of article 24, is clearly unsatisfactory. Furthermore, it would leave other cases in which defendants may not have a due diligence defence – or such a defence might be unsuccessful – in which the article 24 issue will then have to be contested. As I understand it, there is at least one other prosecution of Tesco currently stayed pending the outcome of this judicial review.
- 25 In my view, the balance is firmly in favour of this judicial review being allowed to proceed.
- 26 That leaves the final ground of opposition by Mr Barraclough, which was, as the submissions were made today, his main ground of opposition, i.e. that the substantive challenge is unarguable on its merits. However, whilst I see the considerable force of the District Judge's reasoning and in the Council's legal arguments on the proper construction of article 24, the merits hurdle at this stage of the claim is modest. Mr Kirk submitted that

the current formulation of the offence is significantly different from its predecessor.

Regulation 44 of the Food Labelling Regulations 1996 simply made it an offence to sell food items bearing a past use-by date. That has been replaced by a deeming provision with regard to unsafety. It could be presumed (he submitted) that that change was intended to have some substantive effect. A crime based upon what is a rule of law or an irrebuttable presumption that food which is in fact safe is unsafe could only be construed as such if it were in the clearest terms. He submitted that regulation 19, taken with the European provisions on which it relies, is not unambiguous.

27 In my view, those submissions, taken with the other submissions on the merits made by Mr Kirk, render the challenge at least arguable. The single issue took two days of argument by Leading Counsel before the District Judge, which is perhaps some mark of the arguability of the issue. But, further, the issue is in my view of considerable potential importance, not just in respect of these ten charges but more widely in the food industry. It is an issue which involves not only public safety issues, but also the practical operations of food suppliers and the possible required destruction of food that is, in fact, safe. The issue is therefore one of considerable public interest too. In my view, it is an issue which should in any event be considered and determined by this court.

28 Consequently, subject to my Lady, Elisabeth Laing J, I would grant permission to proceed.

MRS JUSTICE ELISABETH LAING:

28 I agree.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

**** This transcript has been approved by the Judge (subject to Judge's approval) ****