LOCKDOWN LAW #2

Public and Regulatory Law

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Three recent authorities, handed down during the period of lockdown for Covid-19, are of potential relevance to those practicing in Regulatory Law

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ENVIRONMENTAL REGULATION

Mustafa and Breslin v The Environment Agency [2020] EWCA Crim 597

(Judgment date: 6 May 2020)

To be an exempt facility under the Environmental Permitting (England and Wales) Regulations 2010 (essentially identical to the 2016 regulations) a waste management facility must comply with all the prerequisites under Sch 2 para 3(1); it is not sufficient that it has been registered as an exempt facility and has not been removed from the register by the Environment Agency.

1. This was a Court of Appeal Criminal Division decision on appeal from the Central Criminal Court (HHJ Antony Bate). There had been previous proceedings before Spencer J on the Environment Agency's (EA) application for consent to prefer a voluntary bill of indictment.

2. The case began in Basildon Crown Court before HHJ Lodge. The Appellants were charged with contravention of regulation 12(1)(a) of the Environmental Permitting (England and Wales) Regulations 2010 (the Regulations) by operating a waste operation in Rainham, Essex without an environmental permit.

3. These regulations have been replaced by the Environmental Permitting (England and Wales) Regulations 2016 which are largely in the same form and the principle from this case applies to these new regulations.

4. The facts centred on the company, Prime Biomass Ltd of which the Appellants were directors (together with another, Hennessy, who was acquitted). In 2013 and 2014 their business was to export wood waste to Sweden. Before being exported the wood had to be treated. Therefore, it was supplied to the site at Rainham, was treated there then moved to another site before being exported.

5. The regulation of this site fell under the Regulations.

6. The Regulations are by no means easy to navigate. They govern facilities used for a variety of activities set out in schedule 1 part 2, including burning, refining, processing of ferrous metals and many other industrial processes that no doubt generate waste

and emissions. The list includes waste management. As already stated, the activities at the Rainham site were caught by the Regulations.

7. In order to carry out its activities at the Rainham plant the company needed either an environmental permit or to be registered as an exempt facility.

8. If the facility was not 'exempt' then it was an offence for the company to operate the site without a permit (regulation 12(1)).

9. By regulation 41, where the offence is committed with the consent or connivance of an officer of the company or was attributable to neglect on his part, then that officer is likewise guilty of the offence.

10. A facility is exempt from the requirement for a permit where:

    a. The general and specific conditions in part 1 of schedule 3 of the Regulations are satisfied:

        i. The operation is for the purposes of recovering or reusing the waste, the waste used is suitable for the purposes of the operation; and no more waste is used than is necessary to carry on the operation (the 'general conditions').

        ii. The total quantity of waste treated or stored over any 7-day period does not exceed 500 tonnes; and no waste is stored for longer than 3 months after treatment (the “specific conditions")

    b. The waste operation and an establishment / undertaking is registered in relation to it;

    c. The type and quantity of waste submitted to the operation and the method of its disposal or recovery are consistent with the need to attain the objectives mentioned in Article 13 of the Waste Management Directive (2008/98/EC) (that is, avoiding pollution and harm to human health).

11. The Register is maintained by the Environment Agency (EA). The Regulations provide for maintenance of the Register. It includes a duty to remove the facility from the register where the EA becomes aware it is no longer an exempt facility.

Facts

12. On 21 January 2013 the company registered the operation at the Rainham site as an exempt facility; this allowed up to 500 tonnes of waste wood to be stored or treated at the site over any 7-day period.

13. Between September and December 2013 EA officers found that waste wood on the site exceeded 500 tonnes. Warnings were given and there was some temporary reduction in the amount held on site; but the amount of wood increased until in December it was over 4000 tonnes. There was further correspondence between the company and the EA. In March 2014 the EA officers again visited and found a large amount of waste wood deposited in piles. By this stage they had received complaints from neighbours about nuisance from the emission of waste wood.

14. On 24 March 2014 the EA wrote to the company informing it that the exemption had been removed from the register and the continued storage of material at the site was an offence under the Regulations.

15. The company went into voluntary liquidation on the same day.

The Proceedings - Basildon Crown Court

16. The original indictment charged the accused with two counts: contravention of the Regulations by neglecting in the commission of an offence by the company; and contravention of the Regulations by consenting or conniving in the commission of an offence by the company.

17. On 13 October 2015 HHJ Lodge at Basildon heard defence applications to dismiss both counts. The defence argued that the exemption remains in place and effective until it is removed from the register. The EA argued that if the terms of the exemption are breached then the exemption ceases to have effect.

18. HHJ Lodge accepted the defence argument and dismissed the two counts.

19. He reasoned that the Regulations create a mechanism for the maintenance of a register which determines whether a facility is exempt or not. He was concerned that if the EA was correct then each time the amount of wood on site exceeded 500 tonnes the EA would have a duty to remove the facility from the register and when the amount fell

below the limit the company would be able to reapply; there would be a cycle of registration and deregistration.

20. He agreed with the defence that there needs to be certainty from the Register whether a facility is exempt or not.

The Proceedings - Spencer J

21. The EA challenged this ruling by an application for a voluntary bill before Spencer J. He concluded the charges were wrongly dismissed and there was no reason why they should not go to trial.

22. In contrast to HHJ Lodge, Spencer J saw the nub of the matter as whether the duty imposed on the EA to remove a facility from the register when it ceases to be an exempt facility means that it is the act of removing from the register that causes the facility to cease to be exempt, or whether the removal is merely confirmation that the facility had already ceased to be an exempt facility.

23. He considered that the HHJ Lodge had ignored the plain words of regulation 5 that a waste operation can only be an exempt operation if it meets the requirements of paragraph 3(1) of Schedule 2 (under the 2016 regulations this is paragraph 4(1) of Schedule 2). Under that provision registration is only one of three requirements. While registration is required for a facility to be exempt, it is not sufficient on its own, there must also be compliance with the other two requirements.

24. Furthermore, he reasoned that the duty to remove a facility from the register can only arise once a facility has ceased to be exempt.

25. He did not agree that the scheme for registration, administered by the EA, made the act of removal from the register the "touchstone for determining whether the operation meets the requirements of paragraph 3(1) so as to remain exempt."

The Proceedings - Central Criminal Court

26. The new indictment charged that between 3 September 2013 and 6 December 2013 the company committed the offence under regulation 12(1)(a) - regulated activity

without an environmental permit - and this was with the consent or connivance or attributable to the neglect of Mustafa, Breslin and Hennessy.

27. In October 2018 the trial proceeded at the Central Criminal Court before HHJ Antony Bate. He directed the jury that the prosecution had to make them sure of one of two circumstances:

    a. That the total quantity of waste stored at the site over any 7-day period within the indictment exceeded 500 tonnes; or

    b. That the type and quantity of waste, and method of disposal or recovery at any time within the indictment was, through the escape of dust from the site, inconsistent with the objectives of the Waste Directive.

28. While Hennessy was acquitted, Mustafa and Breslin were convicted and appealed principally on the same grounds as they had argued before HHJ Lodge and Spencer J.

The Proceedings - Court of Appeal

29. Counsel for Mustafa argued that an exemption does not cease to be effective until it is removed from the public register. The public register would be undermined if it showed illegal waste sites as "exempt". He adopted a "purposive" interpretation of the Regulations that was consistent with legal certainty.

30. The CACD (Lindblom LJ, Hilliard J and HHJ Flewitt QC) did not accept this argument. Adopting (at paragraph 70) a "straightforward interpretation" of the Regulations they concluded that a waste operation will only be an "exempt facility" if it fully meets the requirements of paragraph 3(1) (para 4(1) of the 2016 Regulations); if it does not meet these requirements in full it cannot be an exempt facility and must therefore be a "regulated facility" and require a permit to operate without breaching regulation 12.

31. Registration of the facility as exempt by the EA does not mean that it will be regarded as an exempt facility by the EA regardless of whether it complies with the other requirements of paragraph 3(1) (particularly important given that they focus on the extent of the operation and its safety). Being on the register does not bestow immunity for the company breaching the other requirements.

32. Thus, when the company was removed from the register it had already ceased to be an exempt facility.

33. At paragraph 79 Lindblom LJ stated: *"Whether an operation is an exempt facility depends on the operator having registered the exemption and operating within its constraints. It is a matter of fact whether those requirements are satisfied at any given time. If they are not met then for the duration of their not being met the operation has ceased to be, and is not, an exempt facility."*

HOUSING REGULATION

R (Mohamed and Lahrie) v Mayor and Burgesses of the London Borough of Waltham Forest and Others [2020] EWHC 1083 (Admin)

(Judgment date: 7 May 2020)

*Dingemans LJ and Laing J dismissed two related JR claims, ruling that: (1) sufficient information had been provided to Thames Magistrates' Court to justify the issue of summonses against the Claimants for the offence of having control of or managing HMOs without a license contrary to s. 72(1) of the Housing Act 2004 ("the 2004 Act"); **(2) the offence did not require a defendant to know he or she was in control of or managing a property which was an HMO, and which therefore was required to be licensed**; and (3) the offence was a continuing offence, so an information would be in time if it was laid within six months of any day in which the defendant controlled or managed such a property without such a licence.*

Facts and Decisions Challenged

34. The Claimants in both claims are husband and wife and the owners of several properties in the London Borough of Waltham Forest.

<u>The First JR Claim</u>

35. The Defendant in the first action, The London Borough of Waltham Forest ("the Council"), is the local housing authority, responsible for the prosecution of offences relating to HMOs under the 2004 Act.

36. In 2017 the Council undertook an inspection of one of the Claimants' properties, at 24 Eastfield Road ("the Property"). In a letter to Mr Mohamed dated 13 June 2017, this inspection was said to have revealed that the Property was let out to multiple unrelated adults or households and was therefore an HMO. The Council stated the Property required a mandatory HMO licence and an urgent application had to be submitted, warning that a prosecution might follow even if such an application was made.

37. A reply of 7 July 2017 from Mr Mohamed's lawyers asserted that Mr Mohamed was not obliged to continuously monitor and police his tenants' occupation and suggested that the tenants were breaching covenants in their leases against subletting.

38. The Claimants were invited to an interview under caution in relation to the matter in August 2017. They responded by bringing JR proceedings challenging the decision to invite them to be interviewed and seeking a declaration as to the mental element required of an offence under s.72(1) of the 2004 Act ("Issue 2").

The Second JR Claim

39. In January 2017 the Council had laid informations before Thames Magistrates' Court alleging s. 72(1) offences against the Claimants in relation to several of their properties. The Magistrates' Court issued summonses to the Council on 9 January 2017.

40. The criminal proceedings commenced and were transferred to Wimbledon Magistrates' Court. The Claimants raised a preliminary matter about whether the summonses were lawfully issued, contending that there had been insufficient information provided, and that such information would have shown that the informations and summonses were out of time.

41. The preliminary matter was heard before District Judge (Magistrates' Court) Sweet who, in a written judgment on 12 Jan 2019, held that the criminal proceedings would not have been a nullity even if there had been a failure to provide sufficient information, and that the summonses were in time because the offence was a continuing offence being committed each day the person who had control of or who was managing an HMO did not have a licence.

42. The Claimants applied for JR of DJ(MC) Sweet's decision, seeking an order quashing the decision on the grounds that the summonses were not lawfully issued [due to the

provision of insufficient information] ("Issue 1") and in any event were out of time ("Issue 3").

Issue 1: Whether Sufficient Information was Provided for Lawful Summonses

Legislation and Case Law References

43. The judgment refers to a number of statutory provisions including **Rule 100(1) of the Magistrates' Courts Rules 1981**, which provides that an information laid before the Magistrates' Court for an offence is sufficient if it describes the offence in ordinary language *'avoiding as far as possible the use of technical terms and without necessarily stating all the elements of the offence'* and *'gives such particulars as may be necessary for giving reasonable information of the nature of the charge'*.

44. The cases cited include:

    a. ***R (Kay) v Leeds Magistrates' Court*** **[2018] EWHC 1233 (Admin); [2018] 4 WLR 91**, in which it was noted that, when issuing a summons [amongst other things] *"the magistrate must ascertain whether the allegation is an offence known to the law, and if so whether the essential ingredients of the offence are prima facie present…"*;

    b. and ***Johnson v Westminster Magistrates' Court*** **[2019] EWHC 1709 (Admin); [2019] 1 WLR 6238**, where summonses had been quashed because there was insufficient information to show that the elements of the offence might be proved. This case demonstrates the principle that *"[i]f sufficient information could never be provided to the magistrate the Court may quash the decision to issue a summons based on the insufficient information."*

    c. On the other hand, in ***Nash v Birmingham Crown Court*** **[2005] EWHC 338 (Admin); (2005) 169 JP 157**, although the information and summons were defective because insufficient particulars had been provided of the nature of the charge, this did not render the proceedings a nullity or the conviction unsafe, because the particulars were later provided in the course of the proceedings in good time for the accused to be able fairly to meet the case against her. Thus, *"the subsequent provision of sufficient information may remedy the earlier deficiency of information so that the criminal proceedings are fair."*

Outcome

45. The Court held that the information laid in the present case described the offence charged in ordinary language and gave such particulars as were necessary to give reasonable information of the nature of the charge. It identified the relevant legislation and made it clear that what was being alleged against Mr Mohamed was that he managed or controlled HMO property which was required to be licensed but was not.

46. The Council had therefore provided sufficient information to justify the issue of summonses by Thames' Magistrates Court.

47. Even if the information provided had been insufficient, the decision would not have been quashed because further information had been provided in the course of the criminal proceedings which meant that the criminal proceedings could be fairly determined.

Issue 2: The Mental Element Required of the Offence

Legislation and Case Law References

48. The judgment sets out Section 72(1) to (5) of the 2004 Act in full. Subsections (1), (2) and part (5) provide as follows:

> *'(1) A person commits an offence if he is a person having control of or* managing *an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.'*
>
> *(2) A person commits an offence if– (a) he is a person having control of or managing an HMO which is licensed under this Part, (b) he* knowingly *permits another person to occupy the house, and (c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.*
>
> *…*
>
> *(5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse– (a) for having control of or managing the house in the circumstances mentioned in subsection (1), or…'*

49. For the relevant principles on interpreting the mental element required by these provisions, the Court was referred to ***R v Warner*** **[1969] 2 AC 256;** ***Sweet v Parsley***

[1970] AC 132, 149F-G; ***Gammon v Attorney General of Hong Kong*** **[1985] AC 1, 14B-D; and *R v Muhamad* [2002] EWCA Crim 1856, [2003] QB 1031 [7], [15] and [16]**.

50. These authorities make it clear that, although there is a presumption of law that mens rea is required before a person can be found guilty of a criminal offence, this presumption is less strong in regulatory licensing offences such as those contained in the 2004 Act.

Novel Principles and Outcome

51. The Claimants submitted that establishing an offence under s.72(1) of the 2004 Act required the prosecution to show that the defendant who had control of or managed an HMO knew that he was managing or controlling an HMO, which was therefore required to be licensed.

52. In the Court's judgment it was plain that there is no requirement to prove that the defendant knew that the property in question was an HMO, for the following seven reasons

    a. The defendant's state of mind about the way a property was occupied was not part of the comprehensive and full definitions of a "person having control" and a "person managing" in s.263 of the 2004 Act. This suggested that actual knowledge of the nature of occupation was not required.

    b. Use of the word "knowingly" for the distinct offence created by Section 72(2) suggests the drafter of the legislation was well aware how to make clear Parliament's intentions about the mental element in each of the offences created by the section.

    c. The presumption as to mens rea does not apply to the civil enforcement regime under which the local housing authority can impose a civil penalty. If a mental element was required to be proved for the offence it would also need to be proved for the civil enforcement regime.

    d. A defendant's lack of knowledge was relevant to the defence of reasonable excuse created by s.72(5) of the 2004 Act. The existence of this defence lessens the need to have the mental element as part of the offence.

e. As the offence is a regulatory licensing offence, it is easier to displace the presumption that mens rea will apply.

f. The absence of a requirement for a mental element promotes the object of the 2004 Act of promoting proper housing standards for tenants living in HMOs by ensuring those who control or manage such properties take reasonable steps to ensure the properties are registered where necessary.

g. The conclusion accords with other decided cases on the elements of offences under the 2004 Act including ***Thanet District Council v Grant and IR Management Services v Salford CC*** [2020] UKUT 81 [27].

Issue 3: Whether the Summonses Were out of Time

Legislation and Case Law References

53. **Section 127(1) of the Magistrates' Court Act 1980** provides that a Magistrates' Court must not try an information unless the information was laid, within six months of the time when the offence was committed, or the matter of complaint arose.

54. The offence under section 72(1) of the 2004 Act is a continuing offence ***Luton Borough Council v Altavon*** **[2019] EWHC 2415 (Admin); [2020] HLR 4 [8])**

Outcome

55. The Court held that the continuing nature of the offence meant that a new offence occurred on every day a person managed or controlled an HMO which required a license but was not licensed.

56. The Claimants' reliance on the date the council became aware of the circumstances requiring the Property to be licensed as an HMO as the date 'the matter arose' ignored the part of s.127 providing for limitation from the time the offence was committed.

57. The summons was in time if the prosecution proved the commission of an offence within six months of the date of the laying of the information, therefore the DJ(MC) had been right to refuse the application to dismiss the proceedings for being out of time.

R (Tesco Stores Limited) v Birmingham Magistrates' Court [2020] EWHC 799 (Admin)

(Judgment date: 6 April 2020)

On its proper construction Article 24 of EU Regulation 1169/2011 ("the Food Information Regulation") creates an irrebuttable presumption that highly perishable foods which have passed their 'use by' date are unsafe for the purposes of Article 14 of EC Regulation 178/2002 ("the Food Safety Regulation"). As a result it is a criminal offence under Regulation 19 of the Food Safety and Hygiene (England) Regulations 2013 ("the 2013 Regulations") to display such food items for sale after the expiry of that date and it is no defence to argue that the food items are in fact safe by reference to some other safety criteria.

Legislation

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

59. Regulation 12 provides that 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").

60. One of the specified EU provisions in Sch. 1 is 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"). Article 14(1) requires that: *"Food shall not be placed on the market if it is unsafe".*

61. The substantive provisions in the Food Safety Regulation place the burden of ensuring food safety on the shoulders of "food business operators" ("FBOs"), defined in article 3(3) as *"the natural or legal persons responsible for ensuring that the requirements of food law are met within the food business under their control".*

62. 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"; "unsafe" is a wider concept.

63. 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").

64. Article 9(1)(f) of the Food Information Regulation imposes a requirement to state either "the date of minimum durability or the 'use by' date".

65. Article 24 of the Food Information Regulation specifies where a use by date, rather than a date of minimum durability, 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]".*

Facts

66. Between 12 April 2016 and 2 June 2017 three of the Claimant's stores in Birmingham were found, by Environmental Health Officers employed by Birmingham Council ("the Council"), to have 67 items on display for sale in chillers which were past their use by dates.

67. The Claimant had detailed policies and procedures regarding date code management in place; however the number of items and the number of days beyond past expiry (up to 17 in one of the stores) showed, in the opinion of one of the enforcement officers, that there was a substantial failure effectively to implement, monitor and verify those policies and procedures.

The Proceedings - Birmingham Magistrates Court

68. 22 charges were brought by the Council against the Claimant in Birmingham Magistrates' Court. The basis of the prosecution was that, by displaying for sale items of food with an expired use by date, the Claimant had committed an offence under regu-

lation 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. This case relied on the premise that, by virtue of article 24 of the Food Information Regulation, food beyond its use by date is “unsafe” food.

69. The Claimant relied on two defences: that the items of food were not in fact unsafe; and the due diligence defence in regulation 12 of the 2013 Regulations.

70. The Claimant sought to rely on an expert report from a food microbiologist, whose evidence was to the effect that: none of the foods seized were highly perishable; none would cause any immediate danger to human health after a short period beyond their use by date; and the cooking/heating instructions would have rendered the products safe to eat if followed; thus none were unsafe from a microbiological point of view.

71. It was therefore contended by the Claimant that none of the items fell within the condition of article 24 of the Food Information Regulation because none fell within the condition of the provision that from a microbiological point of view they were highly perishable and therefore likely after a short period to constitute an immediate danger to human health. Therefore no offence had been committed.

72. The issue in the case was whether the last sentence in article 24 of the Food Information Regulation creates a rule of law or irrebuttable presumption that, once the date has expired, the food item in question is “unsafe” for the purposes of article 24, or whether it only created a presumption that the food was unsafe which could be rebutted by evidence that it was in fact not unsafe.

73. This was directed by the Magistrates’ Court to be determined as a preliminary issue. The expert evidence would only be relevant, and therefore only be admissible, if the Claimant’s case was correct and the Article 24 presumption was rebuttable.

74. District Judge (Magistrates’ Court) Jellema heard 2 days of legal argument and ruled 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.

75. The Claimant brought JR proceedings to challenge that decision. The trial has been stayed pending determination of the challenge to the District Judge’s ruling.

The Proceedings - Administrative Court

Hickinbottom LJ and Swift J held that:

76. The proper construction of the word “deemed” in any specific case will depend on the context, in particular whether the conclusion is consistent with the purpose of the instrument in which the provision appears.

77. The purpose of the European food law scheme is clear, as set out in the Food Safety Regulation and the Food Information Regulation. It is consumer orientated. Its primary aim is to afford a high level of protection to human life and health and to the interests of consumers. The safety of consumers is considered of paramount importance. Measures adopted by the EU or by Member States have to be based on the precautionary principle and risk analysis.

78. This is the context in which food “safety” must be seen. Food being “safe” does not mean the same as being fit for human consumption or “safe to eat”. “Unsafe”, in the context of the Food Safety Regulation, is a term of art. It includes food that is considered injurious to health or unfit for human consumption, but this definition, under the deeming provision of Article 14(2) is non-exclusive.

79. Article 14(2) is definitional, in that “deemed” as used in the provision means irrebuttably presumed; because food which is unfit for human consumption cannot be proved in fact not to be “unsafe” for the purposes of the Food Safety Regulation.

80. The deeming provision in Article 24 is also “definitional”; it is purposively designed to include, within the scope of “unsafe”, food labelled with a use by date which has expired.

81. The construction of article 14 of the Food Safety Regulations and the ‘deeming provision’ in article 24 is therefore clear: it gives rise to an obligation, falling on FBOs, to label highly perishable foods with a use by date; when that date is passed the food is “unsafe” such that it cannot be displayed for sale or otherwise placed on the market; such “unsafety” being essentially a question of definition which cannot therefore be controverted by evidence that the food is “safe” by reference to some other criteria.

82. 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 of-

fence. It is clear that, for that purpose, as a result of article 24, food beyond its use by date is unsafe.

83. As a result, an FBO will be breach article 14 and be guilty of an offence under regulation 19 of the 2013 Regulations if it places expired food on the market.

84. It is “not to the point” that foods considered highly perishable which are eaten after the use by date may not in particular cases adversely affect human health. The point is that such foods, which in general, are likely after a short period to constitute an immediate danger to human health, are considered by European food law as a matter of precaution, to give rise to a risk to human health such that after a particular date they should not be used.

85. It is to give effect to this precaution that article 14 of the Food Safety Regulation, read with article 24, prohibits food past its use by date being “placed on the market”.

86. As with many “deeming provisions”, article 24 diminishes the scope for factual issues by creating a “bright line”, which assists both with securing the aim and purpose of the Food Safety and Information Regulations and with ensuring consumer safety. It 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.

87. The EU Regulations do not mandate criminal sanction. However, they make it clear that enforcement is a matter of individual Member States. It was therefore open to Member States to enforce the article 14 obligation by way of criminal proceedings and sanction. Such a method of enforcement is well within the margin of appreciation afforded to the United Kingdom.

88. As the wording of the relevant provisions in their proper context is clear, the consequences of the construction adopted by the court could only bear on the true construction if they were perverse, such that the construction could not have been the intention of the legislator. This was not the case here; the construction had no consequences that could be considered unusual or unintended.

89. The Administrative court would answer the issue in the case in the same way as the District Judge did, therefore the JR claim was refused.

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