IN THE HIGH COURT OF JUSTICE CO/4487/98
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST
(DIVISIONAL COURT)

Royal Courts of Justice
Strand
London WC2

Monday 19th April 1999

B e f o r e:

LORD JUSTICE KENNEDY
(Vice President of the Queen's Bench Division)

-and-

MR JUSTICE MITCHELL

- - - - - - -

LINCOLNSHIRE COUNTY COUNCIL

-v-

SAFEWAY STORES PLC

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MR S BLACKFORD (instructed by the Lincolnshire County Council, Lincoln) appeared on behalf of the Applicant.

MR A SCRIVENER QC and MR I PONTER (instructed by Messrs Whiting and Purches, Solihull) appeared on behalf of the Respondent.

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J U D G M E N T
(As Approved by the Court)

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LORD JUSTICE KENNEDY: This is a prosecutor's appeal by way of Case Stated from a decision of a Magistrates'

Court sitting at Grantham which, in May 1998, over five days, heard the case in relation to seven informations which alleged that on seven occasions, between 31st March 1997 and 19th September 1997, the Respondents, Safeways, sold items of food after the use by date displayed on the package.

I deal first with the offence alleged to have been committed on each occasion. Section 16(1)(e) of the Food Safety Act 1990 permits the making of regulations as to the labelling of food. The Food Labelling Regulations (S.I. 1996 No. 1499) were made pursuant to that power. Regulation 44(d) of those regulations, so far as material, provides that:

"If any person sells any food after the date shown in a 'use by' date relating to it, he shall be guilty of an offence."

Regulation 2 defines 'sell' as including offering or exposing for sale. Section 21 of the 1990 Act provides a defence of due diligence. So far as material it reads:

"In any proceedings for an offence
... it shall be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or by a person under his control."

The evidence called before the magistrates showed that on the occasions alleged, items of food were displayed for sale or sold after their respective "use by" dates, but, having heard evidence the Magistrates' Court was of the opinion that the Respondents had made out the statutory defence. The question which the magistrates pose for our consideration at the end of the Case Stated therefore is:

"Whether properly directed in respect of each of the informations, we were entitled to conclude from the totality of the evidence on the balance of probabilities that the Defendant Company had taken all reasonable precautions and exercised all due diligence to avoid the commission of each offence by itself or any person under its control."

For the purposes of this appeal, Mr Blackford, for the Appellant, has chosen to focus on four informations, all relating to sales or exposures for sale from the

Safeway store at Grantham. The first, information

(b) before the Justices, concerned the sale on 6th April 1997 of five Safeway Kabanos with a use by date of

27th March 1997. The second, information (d), before the magistrates, concerns the sale on 7th April 1997 of Safeway British Cooked Mild Cure Ham with a use by date of 28th March 1997. The third, information (f) before the magistrates, concerned the offering for sale on
19th September 1997, of Safeways Somerset Brie Cheese with a use by date of 18th September 1997. The fourth, information (g), concerned the offering for sale on
19th September 1997 of a Safeway Minced Beef and Onion Pie, with a use by date of 18th September 1997.

As recorded in the Case Stated, the prosecution called two customers of Safeway store in Grantham, Mr Bates and Mr Turner and four trading standards officers, Ms Whatton, Mr Goodchild, Ms Allen and Ms Anderson. Safeways called 12 members of staff, and Mr Woodman who was, at the material time, a Senior Environmental Health Officer at Hillingdon and the Home Authority Officer for Safeway between 1993 and 1994. They also called a Safety Consultant, Mr Roger Brown. We are told and I accept that there was an immense amount of evidence given over the period of five days and there were over 300 documents shown to the magistrates in that period. It is very much to the credit of those who drew the Case Stated that the matter has been condensed as far as it has.

The evidence as recorded in the Case Stated displays this chronology. On 31st March 1997 Mr Bates purchased a Polony sausage with a use by date of
23rd March 1997. He was disturbed at what he saw and pointed it out to the checkout and he also pointed it out to Mr Tom Lax, Safeways Consultant Customer Services Manager at that store, who was called when Mr Bates made his complaint. On the following day, 1st April 1997,
Mr Bates wrote to Safeways and also advised the Trading Standards Officer by telephone of his experience.
On 6th April 1997 Mr Bates returned to the store. On that occasion he bought the Kabanos sausage, which was the subject matter of information (b), to which I have already referred, which had the use by date of 28th March. He also bought a cottage pie which had a use by date of 4th April. On the following day, 7th April,
Ms Whatton and Ms Allen, the two Trading Standards Officers, to whom I have already referred, visited and they saw another item, the ham, the subject matter of information (d), to which I have already referred. It was displayed for sale with a use by date of 23rd March. They spoke to Mr Pope, the Store Manager and expressed their concern. On 14th May Ms Whatton wrote to Safeways and as a result, on 3rd July, she spoke to Miss Jane Smith, Safeways Trading

Standards Manager.

On 19th September Mr Turner, a separate customer, bought a pizza at Safeways with a use by date of 18th September and he, too, contacted the Trading Standards Office. As a result, on the same day, Ms Whatton made a return visit, on this occasion accompanied by Ms Anderson and on that occasion they found the Minced Beef and Onion Pie, the subject matter of information (g), which was offered for sale with a use by date of 18th September. They also found the Safeways Somerset Brie Cheese, the subject matter of information (f), which, again, had a use by date of 18th September.

The defence evidence showed that since 1994 the defendants had operated what they described as a Freshness Control Policy which differed according to whether the product had a long or short shelf life.

The policy in outline had been considered by Mr Woodman at its draft stage and he had given his approval, though, as he made clear, he could not comment upon how it operated on a daily basis.

If the shelf life was over seven days, then the policy described as "FC1" was operated. Such products were checked every Tuesday and if they were found to have a use by date of less than seven days, they were recorded with a diagonal line. That record was then used daily to check those items. On the day when they were due to go out of code they were removed to a separate area of the store and the price was reduced. Later in the day, the price would be further reduced if the goods were not sold and if at the end of the day they were not sold, they would be removed and no longer offered for sale.

As to items with a shelf life of less than seven days, a different policy, "FC2" was operated. It involved daily checks on the items themselves once they had come forward for display, but was otherwise similar to the policy operated in respect to items "FC1".

Staff were trained to operate both systems and senior staff operated spot checks. When mistakes occurred, they were traced and staff were counselled, retrained and, if necessary, stood down.

Mistakes did occur, sometimes in the recording of what happened. Replenishment teams in particular, which had to be relied upon to ensure that short-dated stocks were not put on the shelves when the dates were too short for the period of shelf life to be meaningful, did not create paperwork as a matter of course. They were trained to point out short-coded stock verbally, or by a note, to the stock management team. But, as one witness explained, a young lad

might not understand, or even look at the dates. As these instances to which I have referred already show, that was something which could also happen when a more senior member of staff was involved.

Turning to the four informations now under consideration and dealing first with the Kabanos and the ham, Mr Blackford, for the Appellant, submitted that a key factor is the intervention of Mr Bates, who made his complaint about the Polony on 31st March 1997.

The Kabanos, which was bought by Mr Bates on 6th April, was supposed to be used by 28th March. If, as one might expect, it was on display well before its use by date it should, as the FC1 policy provided, have been spotted on Tuesday 25th March and should then have been recorded with a diagonal line. It should thereafter have been checked daily until 28th March when, if not sold, it should have been withdrawn. There was evidence before the magistrates that it was identified on the Tuesday check but was then "missed by the evening checker". Why it was not then subsequently detected is not clear. Even if it came off the daily checklist, it should have been detected by Mr Lax when he checked the shelves and removed some products on 31st March after Mr Bates made his original complaint. Again, it should have detected early on 1st April when, following Mr Bates' original complaint, a full code check was done. After that, it should have been detected on the Tuesday check carried out on 1st April, all of those checks being prior to 6th April when Mr Bates found the item and purchased it. The same timetable can be applied to the ham, which was the subject matter of information (d), which was found on display by the Trading Standards Officers on 6th April.

But, as Mr Scrivener QC for the Respondents points out, the Kabanos and the ham may not have been on display for some time before 25th March. The Kabanos may only have been put on display by the replenishment team shortly before it was sold, and similarly the ham may only have been put out on display shortly before it was seen by the Trading Standards Officers. In the case of the Kabanos, late appearance on the shelf seems unlikely in the light of the evidence of Catherine Meanwell that it was identified on the Tuesday check and then missed. She thought the ham was not there when she checked, but she accepted she could have missed it.

Mr Scrivener also canvassed with us the evidence as to the movement of goods by shoppers but it is not easy to see how that could be relevant to these two particular items.

Mr Blackford's submission, in essence, in relation to these two items is that the system, such as it was, was so defective in operation that the Magistrates' Court was not entitled to find the statutory defence proved.

Turning now to the third information, to which Mr Blackford invites our attention, that which concerned the Somerset Brie Cheese, information (f) before the magistrates. That cheese was also an FC1 product which was one day out-of-date when seen on display on 19th September. The evidence from Collette Jane Smith, the Administration Controller of the store, was that the replenishment team and in particular someone named Chris Wilson had erred by putting it out with a short code without telling the management.

Similarly, in relation to the pie, the subject matter of information (g), its presence on the shelf was attributed to an error on the part of the replenishment team. It was apparently only delivered to the store on the day before it was seen to be displayed and it had been put on the shelf after the daily check without the replenishment team notifying the management.

Mr Blackford submits that reliance on oral reporting by the replenishment team was clearly inadequate. There should have been a written record to ensure that they took responsibility. As he says, the statutory defence is only established if the person charged proves that he took all reasonable precautions and exercised all due diligence with some emphasis on the word "all" each time it appears and, as was said in Rotherham Metropolitan Borough Council v. Raysun (UK) Limited [1988] 153 JP 37 (a trade descriptions case) it cannot avail a defendant if obvious precautions are not taken.

Mr Scrivener, for his part, points out that the wording of section 21 is not such as to render an employer defenceless if there have been failures by his staff, and here there was ample evidence to show, first of all, that staff were trained in the operation of FC1 and FC2 procedures, which the Home Authority had approved. Miss Jane Smith, Safeways Trading Standards Manager, said that "staff were fully trained".

Mr Douglas, the Regional Operations Director, said as recorded in the Case Stated:

"That the replenishment team did not create any paperwork but that they are well trained to communicate any short coded stock either verbally or by a note."

Miss Collette Smith, an Administration Controller at the Grantham store, said that training was given and there was a manual for waste control. She said she received formal training as well as on-the-job training shadowing for a month. She said there is a training pack and a career passport book which staff were expected to work through.

Secondly, Mr Scrivener submits that there were checks apparent from the evidence including random checks by senior staff and those checks were made to try to ensure that the procedures laid down by FC1 and FC2 were operating satisfactorily.

Thirdly, he points out that when errors occurred the system was such that they could normally be traced to the person who made the mistake and that appropriate action on the evidence was then taken in relation to the offender. The action was taken in the form of verbal warnings, for example, which were given to Catherine Meanwell, to Jill Taylor and to Andrew Wright. There was also more general action so that, for example, an awareness board was displayed to try to highlight to staff where errors had occurred. In addition, there was evidence to show that when the mistakes had occurred which led to this prosecution, extra checks were brought into being on Sundays as well as on Tuesdays.

Fourthly, Mr Scrivener points out that there was expert evidence to show that the Safeway system was similar to that operated by other large stores and that to require the replenishment team to create written records, as suggested by the prosecution, would create its own problems. Mr Douglas, one of the witnesses who was called by Safeway, agreed it would be reasonable to look at a written system. Mr Pope gave evidence that the replenishment team which was involved at this store was given further training in the light of what had occurred but the expert evidence which was called by Safeways showed that because of the dynamics of the operation,
it would not, in the view of that particular witness,
Mr Brown, be feasible to add extra paperwork to record what the replenishment team was doing.

Fifthly, Mr Scrivener submits that, although use by dates are important, they are also visible to the customer who can check for himself or herself whether the item is out-of-date and that none of the items, which are the subject matter of these informations, was a hazard to health.

Looking at the matter overall, he submits that the Magistrates' Court was entitled to accept the expert evidence, which was in reality only on one side, that the Safeway system had enough checks and balances. There was frankly no evidence to the contrary.

He has invited our attention to a couple of authorities which relate not directly to this statute, but to a kindred aspect of the law. The first is the well-known decision of the House of Lords in

Tesco Supermarkets Ltd v. Nattrass [1972] AC 153,

a case under the Trade Descriptions Act 1968 which considered the employer's liability for his employees. At page 194B Lord Diplock said this:

"Consumer protection, which is the purpose of statutes of this kind, is achieved only if the occurrence of the prohibited acts or omissions is prevented. It is the deterrent effect of penal provisions which protects the consumer fron the loss he would sustain if the offence were committed. If it is committed he does not receive the amount of any fine. As a tax payer he will bear part of the expense of maintaining a convicted offender in prison.

The loss to the consumer is the same whether the acts or omissions result in him being given inaccurate or inadequate information are intended to mislead him, or are due to carelessness or inadvertance. So is the corresponding gain to the other party to the business transaction with the consumer in the course of which those acts or omissions occur. Where, in the way that businesses are now conducted, they are likely to be acts or omissions of employees of that party and subject subject to his orders, the most effective method of deterrence is to place upon the employer the responsibility of doing everything which lies within his power to prevent his employees from doing anything which will result in the commission of an offence.

This, I apprehend, is the rational and moral justification for creating in the field of consumer protection, as also in the field of public health and safety, offences of 'strict liability' for which an employer or principal, in the course of whose business the offences were committed, is criminally liable, notwithstanding that they are due to acts or omissions of his servants or agents which were done without his knowledge or consent or even were contrary to his orders. But this rational and moral justification [and here come words of significance in the present case] does not extend to penalising an employer or principal who has done everything that he can reasonably be expected to do by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to control or influence to prevent the commission of the offence (see Lim Chin Aik v. The Queen [1963] AC 160, 174; Sweet v. Parsley [1970] AC 132, 163). What the employer or principal can reasonably be expected to do to prevent the commission of an offence would depend upon the gravity of the injury which it is sought to prevent and the nature of the business in the course of which such offences are committed. The Trade Descriptions Act 1968 applies to all businesses engaged in the supply of goods and services. If considerations of costs and business practicability did not play a part in determining what employers carrying on such business could reasonably be expected to do to prevent the commission of an offence under the Act, the price to the public of the protection afforded to a minority of consumers might well be an increase in the cost of goods and services to consumers generally."

Mr Scrivener submits that here the gravity of the injury which might be envisaged is not of the highest and the reaction of the employer and the court must, to some extent, take that into account, although the precautions suggested and which are in play in the present case are hardly such as to increase the cost of the product.

Attention has also been invited by Mr Scrivener to the decision of this court in William Frank Smith v.

T & S Stores plc [1994] Trading Law Reports 337 which concerned precautions allegedly taken to prevent a 12 year-old child from buying cigarettes. The available statutory defence which was relied upon in that case referred to all reasonable precautions and the exercise of all due diligence to avoid the commission of the offence. The wording was therefore identical with that with which we are concerned. The prosecutor there, as here, pointed out what more might have been done. At page 341 Buxton J (as he then was), giving the first judgment of this court, said this:

"The question of whether a respondent has taken all reasonable precautions and exercised all due diligence is, I accept, something to be decided in the context of the overall precaution and diligence that the party has taken and displayed. The fact that there is some other precaution that it might, in one sense, be 'reasonable' for the party to take, does not in my judgment conclude the question of whether for the purposes of s. 7(1)(a) a magistrate is precluded from finding that all reasonable precautions and all due diligence in the circumstances of the case have nonetheless been taken or observed."

At page 342E he said:

"At the end the day the question is simple:
'was it open to the magistrates to conclude, in the light of their findings of fact, that there had been taken all reasonable precautions and all due diligence had been exercised?' That is a question not simply of fact, but of judgment, but it is judgment to be exercised by the magistrates."

In the present case the magistrates' conclusions are set out in paragraph 6 of the Case Stated which reads thus:

"We were of the opinion that Safeway Stores Plc had, on a balance of probabilities, taken all reasonable precautions by having in force an adequate system of checking and had used all diligence in operating the system.

In reaching our decision we took into account the opinion of the expert witness, Roger Brown, that the system used by Safeway had no serious inherent faults. We also took into account the large number of shop floor items which were subject to the freshness checking procedures. We examined the training manual and career passport provided by Safeway for each member of staff.

We felt there was sufficient feedback in that area office and head office were informed very quickly of the problem and both Richard Elphick and Jane Smith instigated investigations.

We felt that there were adequate random checks. We felt that Safeway had taken immediate firm action when errors had been found and that further monitoring was put in place over and above that required by the Safeway Freshness Control policy, the company having been both pro-active and re-active to potential/actual problems.

We came to the conclusion that although mistakes in relation to the documentation had occurred, this was due to human

error at the Grantham store by members of staff, and that Safeway PLC itself and its officers, had done all they could to avoid the situation, and accordingly we acquitted the defendant company."

Mr Blackford complains that the Magistrates' Court lumped all of the informations together, but my clear impression is that in the court below the prosecution did not separate out the informations in the way that they have sought to do in this court. If the court had been asked to address the informations separately, it may well be that they would have come to different conclusions about some of the informations including, in particular, those four which we are asked to consider, or some of them. But that does not mean on the evidence before us, as set out in the Case Stated, the magistrates were not entitled to conclude as they did. Even in reply Mr Blackford was submitting, as I understood him, that the evidence of several examples of out-of-date items being displayed for sale shows that the defence in section 21 could not be established because Safeway could not have been taking all reasonable precautions. In my judgment, the law is simply not to that effect. It is somewhat more complicated, as I have endeavoured to explain.

The fact is, as I see it, that the magistrates having found the facts as they did as set out in the Case Stated, they were entitled to come to the conclusion they did. Accordingly, I would answer the question posed at the end of the Case Stated in the affirmative and would dismiss this appeal.

MR JUSTICE MITCHELL: I agree.

MR SCRIVENER QC: My Lord, I ask for costs.

LORD JUSTICE KENNEDY: That is inevitable, is it not, Mr Blackford?

MR BLACKFORD: I cannot resist that.

LORD JUSTICE KENNEDY: There will be an order accordingly. Thank you both very much.
