# In the Birmingham Magistrates’ Court

# Before DJ(MC) Qureshi

# 19th April 2021

Birmingham City Council

v

Tesco Stores Ltd

Sentencing outline

Background:

1. In brief, this prosecution alleges that Tesco played ‘Russian Roulette’ with customer’s safety.
2. There are 3 sets of offences of breach of EU regs about unsafe food after expiry of ‘use by’ dates. The dates of offences are 12/4/16, 1/6/17, and 2/6/17 at 3 different stores in Birmingham.
3. 1st set of offences were discovered after a complaint by a member of the public on 8/6/15. As a result a EHO visited the store on 17/6/15 to do her own check and found 6 items on display after the use by date. Discussions between the parties took place and no prosecution ensued because Tesco was given a chance to review its procedures and put its house in order. Tesco invited BCC to visit again and do a check. This might be described as an ‘own goal’ because when the EHO visited on 12/4/16, she again found many items displayed for sale after their use by date.
4. Consent to prosecute was obtained from Herts CC (HCC) and 1st hearing at court was 2/6/17. Tesco pleaded NG arguing due diligence and the food was not unsafe. Trial listed in w/c 20/11/17 but later vacated. Tesco applied to HCC to reconsider its consent but failed. Tesco then applied to the SoS Office for Product Safety and Standards to revoke the consent but failed again.
5. Meanwhile, as a result of a complaint by a member of the public in May 2017, other EHOs visited 2 other stores in Birmingham on 1/6/17 and 2/6/17 and found 25 and 13 items beyond their use by dates. HCC refused consent to BCC to prosecute. BCC applied to SoS Office for Product Safety and Standards and the consent was granted. New summons were issued for 3/9/18.
6. On 22/1/19 DJMC Jellema ruled the defence expert evidence was inadmissible. Tesco went to the High Court to appeal. Initially refused permission, they persisted and obtained permission. The High Court dismissed their arguments on 6/4/20. The High Court said ‘the legislation provisions are unambiguous’ and the submission by Tesco was looking at it with ‘inappropriate myopia.’
7. Eventually, on 21/9/20 Tesco entered guilty pleas.
8. On 25/9/20 in a different case, Tesco pleaded guilty at Reading Magistrates’ Court to similar offences committed in October 2017 and were fined £160,000. That is not really a previous conviction as the date of offence post-dates these offences. However, it undermines any suggestion by the defence that this was a local problem at a few stores in Birmingham.
9. Tesco clearly has a policy about food safety and takes it seriously. It has about 2,900 stores. It has a very high standard in the industry and is a household name. Suffice it to say that customers trust Tesco (and the other large supermarkets) in a way they might not trust small shops where they might check dates of foods before buying them. One might even say if you can’t trust Tesco with the food on display, who can you trust?
10. Tesco has a policy not to sell any foods after the date marked. There are many procedures in place to prevent an offence from occurring. For example, all short life foods (shelf life of less than 10 days) should be checked every evening and any not sold should be destroyed. There is also another procedure to check the shelf life about 3-4pm daily. Finally a member of staff can also apply the ‘would I buy it?’ test and remove items in their discretion. The store manager has the overall responsibility to ensure these checks are done by employees. There are also stock reduction procedures and wastage meetings to pick these items out.
11. BCC say that there is little or no evidence of all this being done as some items were as old as 17 days beyond the use by date. BCC say there were 256 missed opportunities to check the products and this was not an isolated incident as items were discovered by EHOs and the public in 2015, 2016 and 2017, so the failures are major. Tesco blames human error for the offences and says at the local shops the hazard does not appear to be fully understood and not all controls are in place. Tesco set up an improvement plan and shift leaders and staff were re-trained. BCC say Tesco is a large company that should have the resources to ensure effective compliance at local level without being picked up for offences by the EHOs.

Sentencing guidelines:

1. Culpability:

Both parties agree it is medium culpability where the company fell short of the appropriate standard and whilst systems were in place, there were not sufficiently adhered to.

1. Harm:

Here the parties disagree. BCC say Cat 2 and Tesco say Cat 3. Both have instructed scientists to give their opinions about the food items.

Dr Dinsdale for the defence analysed identical food items as the original ones were destroyed. He checked the bacteria and thought the levels were fine and rendered the food safe to eat. He would be happy to eat them. He even compared the cotton-like mould on grapes to the mould in blue cheese. He is completely at odds with the feeling of disgust that any ordinary member of the public would have on seeing the mould on grapes. If I am wrong about that, then perhaps someone might pioneer a new market amongst the public for mouldy grapes to be eaten with mouldy cheese, mouldy biscuits and pungent wine. In his opinion some of the food manufacturers are wrong to even put a use by date on some of their foods. In my view, the problem with this methodology is that the ordinary customer does not have access to a scientific laboratory in their kitchen or back garden to test the amount of bacteria in foods beyond the use by date. Dr Dinsdale did the job he was asked to do to test the food, but in my view his opinions about food not being unsafe after the use by date is a cavalier one, and is against the weight of evidence analysed by the EU countries when they considered and brought this legislation into force.

For the prosecution, Dr Forsythe states that food can appear to be normal but can be unsafe and the customer must not be put at risk of ill-health as the use by date is all about safety. He points out the guidance given by the FSA and NHS. He mentions the cost of £9bn to the country from food poisoning cases and other effects. He says that there are vulnerable customers such as pregnant women, the elderly, those undergoing medical procedures, people who cannot read or have difficulty in reading, those who cannot read etc. He says that Dr Dinsdale’s opinion is a dangerous one as it shifts the responsibility of food safety to the customer.

We all know in real life people have spent money on food and may be tempted to take risks by eating it after the use by date. BCC conceded that someone wasn’t likely to die as a result of eating these food items if they were cooked properly but there is a medium risk of adverse effects on different types of individuals, and the industry is undermined as a whole by Tesco’s offending. The defence argue that the risk is low, and base it on Dr Dinsdale’s opinion, which I reject as an affront to common sense. They also say the industry and regulators are not undermined because Tesco has re-visited its systems and improved them. That would a meritorious argument when it comes to the 2017 offences but not in relation to the 2016 offences because Tesco was given nearly a year to sort itself out and signally failed to do so.

1. Factors increasing seriousness:

* BCC says there has been no cooperation by Tesco in this case as BCC have been made to jump every conceivable hurdle. I agree with that. Tesco has tried to avoid being prosecuted and avoided pleading guilty at the earliest opportunity for the 2016 offences. They tried HCC, SoS, High Court but failed dismally.
* There is no self-reporting.
* Tesco still relies upon Dr Dinsdale’s opinions in court and these undermine the food regulatory system. They could have discarded Dr Dinsdale’s opinions and simply come to court to face the music by apologising and taking responsibility. The public will not be left with any confidence that Tesco takes the legislation seriously as Dr Dinsdale says the consumer can decide for themselves whether to buy something, and in my view he belittled the law when he compared the mould on a grape to blue or stilton cheese.

1. Factors reducing seriousness or reflecting mitigation:

* Tesco has an overall good safety and hygiene record. It has nearly 2,900 stores.
* Tesco took steps to reinforce training and resolve the problems, both in 2016 and then again in 2017.
* Tesco denies it has not cooperated. In my view it is not that they have been uncooperative, but my criticism is that this guilty plea must rank as probably the most reluctant guilty plea in legal history.
* Self-reporting is irrelevant in a situation like this.
* Tesco takes its regulatory obligations very seriously. The appeal to the High Court was on an issue that needed determination and was, in the words of High Court ‘of considerable potential importance…more widely in the food industry…The issue is therefore one of considerable public interest too.’

1. My comment about this last point is this. Since 2014 the law has been absolutely clear that food cannot be sold after the use by date. Tesco decided to try to argue that food is still consumable after the use by date and it should not be an offence. They found a scientist who gave that opinion. Lawyers and judges might think and say such arguments are interesting and of public importance. Tesco say the law needed to be clarified. It was crystal clear but Tesco tried to make it confusing. In the world of common sense, such an argument was simply spurious and without any merit in it whatsoever. This needs to be said to Tesco and others in case people want to find ways to avoid complying with the food safety laws. If the Tesco defence was a valid one, no one would ever plead guilty to selling an item after the use by date and they would shop around to find a scientist to say it is still safe to eat. If Tesco had succeeded with this implausible defence about unsafe foods, then the game of Russian Roulette can be described as a safe one! The essence of the defence submissions today are still made in accordance with the opinions of Dr Dinsdale, and in my view there is therefore no genuine contrition about these offences. Tesco are only pleading guilty because they have run out of options.
2. How to work out the fine with a very large organisation and totality:

The Sentencing Council desperately needs to introduce another table into their sentencing tables. They need to give guidance on multi-billion pound companies. I explained in court that 0.18% of a company with a £50bn turnover is £90m. I am informed that the Court of Appeal has said the court should not do multiply the existing figures in the tables by whatever proportion reaches the defendant company before it. Of course, a fine of £90 would be excessive when one applies common sense. It is simply a matter of finding a figure which brings the message home to the defendant company and to others in the food business.

Therefore, I adopt a starting point of £10m for one offence. This is still nothing to such a large company but sufficient for it to feel it and ensure it does not happen again. I increase that figure by 20% to reflect the number of shops involved, the number of offences, and the period of investigation time involved here from 2015 to 2017. That gives me a notional new point of £12m. I make a reduction for the mitigating factors such as no previous convictions and that these are 3 shops out of 2,900, and I reduce the figure by 10% (£12m-10%=£10.8m).

1. Is the fine proportionate to the overall means of the offender (‘step back’): There is no question that Tesco can afford such a fine. It represents a mere 0.02% of their turnover and a small fraction of their profits.
2. Any other factors to warrant adjustment of the fine: None.
3. Reduction for guilty plea:

Tesco did not admit the offences until after it had challenged the case up to the High Court. I stated that I would give a 30% discount as a fair balance between the 25% for the late guilty pleas on the first set of offences and 33% for early guilty pleas on the 2nd and 3rd offences. (£10.8 – 30%=7,560,000).

The fine is therefore £7,560,000.

The surcharge payable is £170.

Costs of the prosecution £95,500 are agreed.