

Mind the Gap

Hidden Pitfalls in Food Labelling

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Overview

- Product liability
- Fraud
- Unfair commercial practices
- Other legal rules
 - health claims
 - procurement
 - public law
 - ADR

Product Liability (1)

- EU Product Liability Directive 85/374/EEC
 - Consumer Protection Act 1987
 - principle of **no fault liability**
 - applies to EU producers
 - where a defective product causes damage to a consumer, the producer may be automatically liable
- Product is defective where it does not provide the safety that a person is entitled to expect, taking all circumstances into account, including:
 - the **presentation** of the product
 - the **reasonable use** of the product
 - the **time when the product was put into circulation**

Product Liability (2)

- Key area in the labelling context
 - failure to include **adequate warnings** (e.g., allergens, pregnancy warnings, mandatory warnings) or other information to the consumer to allow them to use the product safely
- Allergen case study
 - product unintentionally cross-contaminated with an allergen may be defective
 - does labelling advice about the possible presence of the allergen cure such a defect (e.g., “**may contain...**”)?
 - Depends on a number of factors (for example the size and prominence of the advisory statement and consumer expectation as to the nature of the product)
 - case by case assessment

Product Liability (3)

- Reasonable use and time the product was placed into circulation
 - food on the market after its use-by date is “deemed unsafe” (Art. 24(1) FIR).
- What about 24-hour stores?
 - Use-by date is 27 November 2013
 - Consumer purchases product at 00.01am on 28 November 2013?
 - Opens door to potentially frivolous personal injury claims

Negligence

- Fault liability regime for harm to consumers
 - duty of care
 - breach of duty
 - causation
- Well-established that manufacturers owe a duty of care to their consumers to supply safe products
- Must take all **reasonable steps** to ensure the safety of foods
 - labelling!

Fraud (1)



- Food fraud
 - heightened awareness following **horse meat** scandal
 - focus on labelling rather than safety
- UK criminal offence for falsely describing or presenting food (s15 Food Safety Act)
 - up to 2 years in prison and/or a fine

Fraud (2)

- Key aspects of the s15 offence
 - **Label** (whether or not attached to or printed on the wrapper or container) that
 - falsely describes the food; or
 - is likely to mislead as to the **nature or substance or quality** of the food
 - Any person who sells, or offers or exposes for sale, or has in his possession for the purpose of sale, any food the **presentation** of which is likely to mislead as to the **nature or substance or quality** of the food shall be guilty of an offence
 - Due diligence defence!
- *Sussex County Council v Stark Naked Foods Ltd*

Food fraud (3)

- Common law fraud
 - *R v Stansfield (Neil Andrew)* (2010)
 - fraudulent trade in non-organic food marked as organic
- Fraud Act 2006
 - offence to make a **dishonest** false representation and it is intended to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss (s 2(1))
 - up to 10 years in prison
 - no statutory due diligence defence
- Draft EU definition on food fraud
 - focus on action being misleading, non-compliant, deliberate and done for financial gain

Unfair Commercial Practices (1)

- Unfair Commercial Practices Directive 2005/29/EC
 - Consumer Protection from Unfair Trading Regs 2008
- Prohibits **unfair** commercial practices
 - not professionally diligent, and
 - it materially distorts, or is likely to materially distort, the economic behaviour of the average consumer
- Prohibits **misleading** and **aggressive** commercial practices
 - lead a consumer to take a different transactional decision

Unfair Commercial Practices (2)

- Commercial practice
 - any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product
- Due diligence defence
- Statutory enforcers
 - Office of Fair Trading
 - local Trading Standards
 - Food Standards Agency
 - Advertising Standards Authority (self-regulation)

Other Legal Consequences (1)

- Health Claims

- Regulation (EC) No 1924/2006
- Applies to **voluntary** health and nutritional claims made on food (does not apply to puffery)
- Claims must be authorised by the Commission
- Subject to criminal prosecutions in England
- Number of ASA adjudications (Actimel and immunity)
- English cases
- EU litigation
 - E.g., T-296/12 *HFMA and others v European Commission*
 - Seeks annulment of permitted list of health claims adopted under Regulation 432/2012

Other legal consequences (2)

- **Public procurement**

- *Harry Yearsley Ltd v Secretary of State for Justice*
- Contract to supply Halal food to Muslim prisoners
- Food was mislabelled as it did not adhere to Halal standards

- **Administrative redress**

- *R (otao Newby Foods Ltd v Food Standards Agency)*
- Dispute over the description of food
- “meat preparation” or “mechanically separated meat”
- CJEU reference

- **Alternative Dispute Resolution mechanisms**

- Muslim Arbitration Tribunal ruling on **halal**



Summary

- Mind the gap
 - think beyond food labelling laws to other laws that might apply
 - criminal vs civil
 - labelling fraud is under the spotlight
 - continuous risk assessment
 - don't forget procedural and administrative rights!!
- More to come....

Questions?