

London Borough of Barking and Dagenham v Argos Limited [2022] EWHC 1398 (Admin)

The Divisional Court reverses the judgment in *FSA v Bakers of Nailsea* [2020] EWHC 3632 (Admin) in relation to summary offences.

Background

1. Private prosecutions and prosecutions brought by some public bodies (such as regulators and local authorities) are usually initiated by making an application for a summons (previously known as the laying of an information) in the Magistrates' Court. This process is now governed by the Criminal Procedure Rules 2020, which at Rule 7.2(3)(b)(i) includes a requirement that a prosecutor, in that application, "demonstrate that the application is made in time, if legislation imposes a time limit."
2. In *FSA v Bakers of Nailsea* [2020] EWHC 3632 (Admin), the Divisional Court, held that compliance with 7.2(3)(b)(i) above required a prosecutor to specifically state any applicable time limit in the application and why the application was within time, and that a failure to do so caused the prosecution to be a nullity. As a result of that judgment, prosecutions by regulators and local authorities across the country were held to be nullities, and in cases where the relevant time-limit had expired after the initiation of proceedings, the ability to prosecute was lost entirely.

The Prosecution

3. On 19 June 2020 the London Borough of Barking and Dagenham ("**LBB**") made an application for a summons (the "**Application**") to Barkingside Magistrates Court, alleging that Argos Limited ("**Argos**") had, by the act of another, sold a knife to a person under

the age of 18, contrary to s. 141A(1) Criminal Justice Act 1988. The judgment in *FSA v Bakers of Nailsea* was handed down five months later, on 3 November 2020.

4. At a preliminary hearing which was eventually listed by the Magistrates' Court in March 2021, Argos argued that the Application was a nullity, as it did not state within it the applicable statutory time limit (that time limit being the standard six-month limit applicable to all summary-only offences). Argos also argued that the prosecution was an abuse of process, it having received positive advice on its sales procedures from Milton Keynes County Council.
5. The District Judge held that she was bound by the judgment in *FSA v Bakers of Nailsea*, and so was obliged to find that the Application was non-compliant with Crim PR 7.2(3)(b)(i), and that as a result of that non-compliance the prosecution was a nullity. She also held she had no jurisdiction to hear Argos' abuse application.
6. LBBD appealed this decision to the Divisional Court by way of case stated, and Argos also appealed the abuse decision by way of case stated and judicial review.

In the Divisional Court

7. Full argument was heard on 11 May 2022 before Edis LJ and McGowan J.
8. The court handed down judgment on 8 June 2022, finding in favour of LBBD on all questions under appeal.
9. First, Edis LJ gave important guidance on the dividing line between the *ratio* of a judgment, and what should be considered only *obiter dicta*, surveying the case law on this issue. He concluded that the ruling in *FSA v Bakers of Nailsea* on the question of compliance with Crim PR 7.2(3)(b)(i) was indeed *obiter dicta*, the court having already found in that case that the FSA was barred, by virtue of a previous concession, from arguing otherwise.

10. Second, he found that with respect to offences to which the standard six-month summary offence time limit applies (section 127 Magistrates' Court Act 1980), there is no need to explicitly state, in the application, the time limit in order to “demonstrate”, application is in time stating at [38]:

...If the reader knows that the offence is a summary only offence, knows the date when it is alleged to have occurred, and knows the effect of section 127, the reader knows whether the information is in time or not. *Quod erat demonstrandum*, QED.

11. Third, he found that in any event the consequence of non-compliance with Crim PR 7.2(3)(b)(i) in the context of summary-only offences is never nullity. In reaching that conclusion he noted that Crim PR 7.2(3) was a procedural rule meant to codify the position at common law, in contrast (for example) to the requirement at the heart of *R v. Clarke* [2008] UKHL 8 that a bill of indictment be signed by an officer of the court, which appeared in primary legislation. He concluded, at [55]:

It cannot sensibly be suggested that all breaches of procedural rules render the proceedings a nullity, and how is to be decided which have this effect and which do not? It is not possible to do it by interpreting the provision to ascertain the intention of Parliament in enacting it, because it was not enacted by Parliament. The power to make these rules is vested by statute in the Criminal Procedure Rule Committee.

12. Importantly, he said the following with respect to possible future changes to the Criminal Procedure Rules, indicating that in the case of non-standard time limits there may be enacted a specific requirement to state that time limit:

44. ...If Criminal Procedure Rules Committee choose to reconsider rule 7.2(3)(b)(i) in the light of this judgment, that rule might specifically require a prosecutor in a case to which a time limit other than the section 127 MCA 1980 time limit applies to say what that time limit is, and why the information is within it.

13. The court also found that the prosecution was not an abuse of process by virtue of the fact that Argos had a primary authority partnership with a trading standards authority which had issued advice as to how to avoid prosecution by carrying out due diligence, with which Argos said it was complying at the time of the alleged offence (to which the Regulatory Enforcement and Sanctions Act 2008 (RESA) procedures did not apply at the relevant time).
14. This will have important implications both for regulators and for regulated entities, as simply receiving advice which approved of a given system or procedure from one authority will not, without more, prevent prosecution by a different enforcing authority.
15. This judgment clarifies an issue which had far-reaching effects for regulators, local authorities, and regulated entities, as District Judges had been divided on the correct interpretation of the *FSA v Bakers of Nailsea* judgment.
16. It remains to be seen whether permission will be granted to Argos Limited to appeal to the Supreme Court. If permission is granted, there will be a rare opportunity for that court to examine the jurisdictional limits of the Magistrates' Courts and of the Criminal Procedure Rules.
17. Adam Heppinstall QC and Thomas Mallon represented the prosecutor in this case.

Freya Foster

Henderson Chambers

23 June 2022