

Neutral Citation No. [2010] NIQB 133

Ref: **WEA7994**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **18/11/2010**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

CRAIGAVON BOROUGH COUNCIL

Plaintiff;

v.

WESTERN BRAND CHICKENS LIMITED,

WESTERN BRAND POULTRY PRODUCTS

WESTERN BRAND GROUP LIMITED

and

BERTIE ROBINSON

Defendants;

and

EUROFREEZE (IRELAND) LIMITED

Third Party.

WEATHERUP J

[1] The plaintiff is the local authority in Craigavon (referred to as "the Council") with statutory responsibilities for the implementation of provisions under the Food Safety (Northern Ireland) Order 1991 in the Craigavon area. The first three defendants (together referred to as "Western Brand") are related companies involved in the processing and supply of frozen chicken from premises in Mayo. The fourth defendant (referred to as "Robinson") operates as Portadown Cold Store, a cold storage facility in Portadown. The

third party (referred to as "Eurofreeze") operates a cold storage facility in Fermanagh.

[2] The Council claimed damages against the defendants for the expenses of the disposal of chicken products. The chicken products were ordered to be destroyed by a Justice of the Peace on 6 January 2006 under Article 8 of the 1991 Order. The Justice of the Peace also ordered that the defendants should pay the Council's expenses reasonably incurred in relation to the disposal of the chicken. Western Brand have agreed to pay the costs of disposal of the chicken and the legal costs of the proceedings in the total sum of £41,885.06. Western Brand claims against Robinson as the owner of the cold store for the recovery of that amount. The third party proceedings against Eurofreeze have been discontinued. Thus the only issue that remains concerns the determination of responsibility between Western Brand and Robinson for the condition of the chicken that led to its destruction. Mr D Fee QC and Mr Gibson appeared for Western Brand and Mr Kennedy QC and Mr Brady appeared for Robinson.

[3] On 20 December 2005 the Council received information relating to the condition of Robinson's premises in Portadown. As a result the Council carried out an inspection of the premises. The premises contained, amongst other things, 130 pallets of chicken portions, each pallet contained on average 91 boxes and each box contained 10 kilograms of chicken. The result of the investigation was the condemnation of the chicken for non compliance with food safety requirements.

[4] In November 2005 Robinson received Western Brand chicken at the Portadown Cold Store. Western Brand were revamping their facilities in Mayo and required an alternative freezing facility. Initially some chicken was sent to the premises of Eurofreeze but the Eurofreeze premises were unable to accommodate the chicken and they were forwarded to Robinson. The chicken had been despatched from Western Brand's premises in a chilled state at approximately minus 1 to minus 1 ½ degrees centigrade and the chicken required to be frozen.

[5] Western Brand believed that there was an agreement that the chicken was to be frozen by 'blast freezing'. The process known to Western Brand as 'blast freezing' involves the high pressure application of cold air to the product so as to produce the speedy freezing of the product. As far as Robinson was concerned blast freezing had a different meaning. It involved the separation of the items and their gradual freezing in a cold store to a temperature of minus 25 degrees, a process which would take some five to seven days. That is how items were frozen in the days before what Western Brand describes as blast freezing became available to those involved in the trade. One of the hazards of the Robinson process is that if the product is not frozen quickly enough it may become black on the bone and it may become

unfit for human consumption. The process that Robinson applied I will describe as 'chamber freezing' and the process which Western Brand described I shall describe as 'blast freezing'. Robinson had no facility for blast freezing at the premises in Portadown.

[6] On 15 December 2005 Eugene Lannon of Western Brand attended at Robinson's premises and on examination of the product he was satisfied that it was unfit. The condition of the product was then reported to the authorities by Western Brand and that led to the product being condemned.

[7] As between Western Brand and Robinson the first question is what were the terms of the contract between them? No terms were reduced to writing. Western Brand contend that they required blast freezing of the chicken. Mr Lannon gave evidence that he had spoken by telephone to someone at Robinson's premises and that it was agreed that blast freezing would be undertaken. This was disputed by Robinson who contended that he had phoned Mr Lannon in relation to the storage of the product when he discovered that it was not already frozen on arrival and discussed the freezing of the product by the method described as chamber freezing. This in turn was disputed by Mr Lannon. Although there is a dispute between the two parties as to the nature of the contact that occurred I am satisfied that there was contact between a Western Brand representative and a Robinson representative in order to determine what was required in relation to the product.

[8] In any event Robinson agreed to provide chamber freezing, although it would have been described by Robinson as blast freezing. Chamber freezing was all that Robinson could agree to provide because it was the only freezing facility available at the Portadown Store as they could not provide blast freezing. It is the case that Robinson charged Western Brand for blast freezing, a charge that was to represent the cost of the added labour involved in chamber freezing. It is apparent that the parties were not ad idem in relation to the method of providing the service of freezing the product.

[9] I am satisfied that the method of freezing would not have mattered to Western Brand if the product had been frozen and had been found fit for consumption when it was later inspected in the cold store. On 15 December 2005 Western Brand did not consider that the product was fit for consumption, as discovered on the inspection of the premises. The reason for the condition of the product appears to be that either the product was past its date for freezing on arrival at Robinson's premises, in which case it would be Western Brand's fault, or it was not frozen properly at Robinson's premises, in which case it would be Robinson's fault. However the point may be refined slightly. The other products in the store were found to be frozen and fit for consumption when the inspection was carried out by the Council. I have heard evidence of other products being put into storage when frozen

and they were all found to be fit. I have not heard evidence of any product, other than that from Western Brand, that arrived in Robinson's premises in a chilled state only and that then required to be frozen in the Robinson store. The other frozen products illustrate that the store was cold enough, although Western Brand disputed this, but I am satisfied that the store was cold enough. Either the product was past its date for freezing on arrival, and that was Western Brand's fault, or the manner of carrying out the chamber freezing, rather than the temperature of the cold store, was the cause of the problem and that would have been Robinson's fault.

[10] Robinson agreed to undertake the task of chamber freezing by separating out and allowing the product to be reduced to the required temperature. Chamber freezing requires the separation of the individual chicken products so that the cold air can circulate around all of the products. If that is not done properly then each product may not be adequately frozen, even though the store is cold enough to maintain adequate freezing for products introduced in a frozen state.

[11] A determination as to the cause of the problem is handicapped to an extent by the absence of the written records in relation to the consignments to and from Robinsons. The records were lost in a fire that occurred at Western Brand premises in 2006. There were consignment documents with each consignment (known as CMRs). There were 'production labels' and there were 'veterinary control labels' applied to the products in the Western Brand premises. Vincent Jordan, a veterinary inspector with the Department of Agriculture based at the Western Brand plant in Mayo, gave evidence of the process that applied in the Western Brand premises when the labels were attached before the products left the premises. He described the veterinary control labels as not being as strongly adhesive as the production labels and that the loss of some veterinary control labels may occur in transit. It is the case that some labels were missing from the products in Portadown. Mr Jordan was satisfied that in November 2005 Western Brand was complying with the labelling requirements in respect of products leaving the Mayo premises.

[12] Mr Jordan also indicated that, while Western Brand was of the view that there was a 14 day shelf life in respect of the chilled chicken before it was frozen, he was surprised at that length of time and would not have wanted the product remaining chilled and unfrozen for such a long period of time. Other evidence suggested that a five to seven day chilled period was the more probable safe shelf life before freezing. On balance I prefer the evidence in relation to the shorter shelf life being appropriate for this chilled product.

[13] Frank Cronin, an insurance assessor, reported on an inspection of the products at the cold store on 5 January 2006. He noted the presence of 10 consignments delivered on eight dates between 23 November and 12

December 2005. Samples were examined and found to be unfit in consignments delivered on 25 November, 1 December, 2 December and 5 December. The comment was made that Western Brand should have the records of freezing to indicate whether the products were properly frozen prior to delivery to Robinson. This comment was proceeding on the false premise that Robinson received frozen product when in reality Robinson received chilled product that Robinson was to freeze.

[14] David Lynch of the Department of Agriculture reported on 6 February 2006. A number of faults on the part of Western Brand were identified. Some of the labelling was not recovered. Temperature checks had not been recorded and the explanation given was that the plant was being refurbished at the time.

[15] In particular there is no adequate account of the movement of the consignments to and from the cold store. According to the Lynch Report investigations indicated that the first two consignments of 44 pallets were sent to Eurofreeze and then to Robinsons in November and were then returned to Western Brand some days later in November. Further consignments of 147 pallets were sent to Robinsons in November and December. When two of these consignments were inspected on their return to Western Brand in December they were found not to be frozen. In the second returned consignments 12 of the pallets were found to have been dispatched from Western Brand ten days after production. Examination of samples from those pallets did not establish that the product was unfit.

[16] In relation to the 12 pallets it was the evidence of Mr Lannon that the 12 pallets had been sent to Eurofreeze before they found their way to Robinson's premises. It was disputed that the twelve pallets had remained chilled for a period of ten days before they were frozen. The explanation that was offered was that there had been confusion on the part of Western Brand staff when required to produce the relevant documentation to Mr Lynch in respect of the pallets.

[17] I do not accept the Western Brand position on the 12 pallets. They were not in the consignments that were sent to Eurofreeze and returned to Western Brand in November. They were sent to Robinson after the initial consignments intended for Eurofreeze and were returned to Western Brand in December. Nor am I satisfied with the explanation that the ten day unfrozen period is to be accounted for by the presentation of mistaken documentation.

[18] Mr Lannon's evidence was that there were two loads initially sent to Eurofreeze and transferred to Robinson. Mr McCabe of Eurofreeze gave evidence to the contrary. He said that his yard had been secured from 5 November 2005 by food safety inspectors and that it remained secured until January 2006 and no Western Brand chicken had been received in his yard

during that time. It is clear from the evidence that there was telephone contact between Mr Lannon and Mr McCabe about the receipt of chicken and this led to the chicken from the Western Brand plant being diverted to the Robinson store. I am satisfied that it was intended by Mr Lannon that in the absence of a blast freezing facility in Mayo that the chicken should go to Eurofreeze but it remains unclear whether or not it actually arrived at Eurofreeze. I consider that the initial dispatches were probably not received in the Eurofreeze premises and their whereabouts remain unaccounted for until they eventually arrived at Robinson's premises. When Mr Lannon heard of the evidence of Mr McCabe he concluded that the initial two dispatches may have been stored in alternative premises and that Mr McCabe was unaware of this.

[19] Counsel for Western Brand contends that the initial two dispatches were not in the Robinson store on 15 December 2005, having been returned to the Western Brand premises in Mayo in November. Reliance is placed on the Lynch Report to that effect. I am satisfied that that was the case. I am satisfied that there was a period of delay between the despatch of the initial two consignments and the arrival at the Robinson store. The period of delay is unaccounted for and the length of the delay has not been ascertained. The usual transfer period between chilling and freezing would have been two or three days. I am satisfied that the two loads that were initially intended for Eurofreeze were not submitted for freezing in the Portadown store within that period.

[20] I am not satisfied that the records of the consignments are accurate or complete. Not all consignments have been fully accounted for. There were other consignments as the numbers of pallets recorded as having been delivered and the number present in the cold store on inspection do not tally. Counsel referred to a total of sixteen consignments. There were two consignments that were initially destined for Eurofreeze and were diverted to Robinsons and were returned to Western Brand in November. There was no evidence of any defect in those consignments. There were two consignments returned from Robinsons to Western Brand in December that were found to be defective. There were ten consignments in the cold store on inspection. I accept that there was probably a total of sixteen consignments. However the claim relates to the consignments condemned and that totals ten.

[21] There was an issue about insurance of the product in the Robinson store. At the meeting of 15 December Mr Lannon asked about insurance. George McCabe of Eurofreeze was present and he suspected that some impropriety was being suggested when the issue of insurance was discussed and he left the premises. Mr Robinson thought he was being asked to turn off the system so that there would be a failure that would prompt his insurance liability to pay for damaged products. Mr Lannon wanted to know if the damaged products were covered by insurance, which was not the case as Mr

Robinson had insurance limited to power failures. I am satisfied that an inquiry about Mr Robinson's insurance was to be expected upon this investigation being carried out on behalf of Western Brand. Here was a failure of the product and whatever the responsibility may have been it was hardly a surprise that the question of who was insured and the extent of the insurance would be raised. I am not satisfied that there was any impropriety arising from the inquiry made about the insurance position. Nor indeed does that directly affect the issue of the cause of the deterioration of the chicken.

[22] I found Mr Robinson wholly unconvincing when he was being asked about his convictions. He was evasive on the issue as in my opinion he had no wish to reveal that there had been convictions for twelve offences. He had reasons to suggest why he was not responsible in relation to the twelve convictions but his evidence was that he couldn't remember them at all. He said he could not remember whether there had been a fine. When asked he agreed that it may have been £4,000. He said he may have pleaded guilty. I am satisfied that he did not want to make any admissions in relation to the convictions or in relation to the nature of the products or the state of the products. He was just not forthright about any of this.

[23] Apart from the initial two consignments intended for Eurofreeze I am satisfied that the other deliveries went directly from Western Brand to Robinson. There were fourteen other deliveries. In relation to the cause of the deterioration of the chicken that remained in the cold store at the time of the inspection I am satisfied on balance that there was inadequate freezing of the product in that some chicken products were not adequately separated in order to achieve the necessary fast freezing and this resulted in deterioration of the product.

[24] Mr Kennedy QC for Robinson contended that even if the method of freezing was inadequate the condemnation of the chicken was also a result of the inadequate labelling of the products. The regulations require the producers and distributors of food products to maintain traceability by keeping proper records of the products. The chicken products were found not to comply with the food safety requirements by inadequate labelling and the mixed storage of animal and human food products and by inadequate freezing facilities. I am satisfied that some of the products were not labelled properly. I am satisfied that the condition of the product rather than the condition of the labelling led to the condemnation of the product. I am satisfied that the principal cause of the condemnation of the product was the inadequate freezing undertaken by Robinson.

[25] There are records of 47 pallets being returned to Western Brand in December, of which I am satisfied that 12 had been in a chilled state for too long. The first consignment comprised 24 pallets and the second 23 pallets. There had been no delivery to Robinson of 23 pallets so the second returned

consignment did not equate to a particular delivery to Robinson and must have included pallets from more than one delivery. There were ten consignments in the cold store containing 130 pallets. Some of the pallets returned had been in a chilled state for too long and were in the cold store prior to 15 December. I am satisfied that the same would have occurred with some of the pallets that remained in the cold store. While there was inadequate freezing of the products by Robinson I am satisfied that as some of the products were chilled for too long they could never have been fit for consumption on freezing. As 12 out of 47 of the returned pallets were over chilled I am satisfied that the same was the case with some of the remaining pallets and that probably equates to two consignments having been in that condition. I would hold Western Brand responsible for the costs of two of the ten consignments and Robinson responsible for eight consignments. Accordingly there will be judgment against Robinson for four fifths of £41,885.06.