Neutral Citation Number: [2010] EWHC 508 (QB)

Case No: TLQ/09/0532

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 March 2010

Before :

THE HONOURABLE MR JUSTICE STADLEN

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Between :

MCKEOWN	**Claimant**
- and -	
BRITISH HORSERACING AUTHORITY	**Defendant**

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- -

MR IAN WINTER QC & MR ANDREW MONSON (instructed by **CHRISTOPHER STEWARTMOORE SOLICITORS**) for the **CLAIMANT**
MR MARK WARBY QC & MR LOUIS WESTON (instructed by **CHARLES RUSSELL SOLICITORS**) for the **DEFENDANT**

Hearing dates: 14, 15, 16, 19 and 20 October 2009

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Approved Judgment

The Honourable Mr Justice Stadlen:

1. The claimant, Dean McKeown is a senior and experienced jockey. The defendant has responsibility for formulating and implementing the Rules of Racing and is the body responsible for regulating horseracing in this country.

2. On 23 October 2008 a Disciplinary Panel appointed by the defendant found Mr McKeown guilty of deliberately failing to ride a horse on its merits in four races and conspiring with a trainer, a horse owner and various gamblers to commit a corrupt practice by providing inside information to enable the gamblers to place lay bets against horses ridden by him in eight races in breach of two of the Rules of Racing. On 17 December 2008 an Appeal Board appointed by the defendant dismissed Mr McKeown's appeal against the decision of the Disciplinary Panel. In this Part 8 claim Mr McKeown seeks a declaration that the defendant acted unlawfully in finding that he acted in breach of the Rules and an injunction restraining it from continuing to implement the four year disqualification from racing horses which the Disciplinary Panel imposed by way of penalty .That penalty was imposed by the Disciplinary Panel on 23 October 2009 and upheld on appeal by the Appeal Board on 13 February 2009. It is not challenged by Mr McKeown in these proceedings.

Background

3. In 2007 the horseracing regulatory functions of the Horseracing Regulatory Authority, a division of the Jockey Club, were transferred to the defendant, a company incorporated in 1993 under the Companies Act limited by guarantee and formerly known as the British Horseracing Board Limited. The defendant is a separate body from the Jockey Club which no longer plays any role in regulation.

4. On 29 September 2008 a Disciplinary Panel of the defendant began an enquiry into allegations that nine individuals were in breach of the Rules of Racing because of their conduct in relation to eleven races which took place between March 2004 and December 2005. The enquiry was conducted pursuant to the procedural provisions of the Rules of Racing as they stood at the time. They are set out in appendix S to the Rules under the title "The guidelines for disciplinary enquiries". Appendix J to the Rules entitled "regulations for an appeal to the Appeal Board" makes further provision for appeals from decisions of Disciplinary Panels to an Appeal Board. The chairman of the Disciplinary Panel was Mr Timothy Charlton QC a member of the bar in independent practice, who sat with Mr Patrick Hibbert-Foy and Mrs Sandra Arkwright. Mr Hibbert-Foy has been a steward since 1 July 2003 and a member of the Disciplinary Panel since June 2006. Mrs Arkwright officiated as a race course judge between 1985 and 2000 and has been a steward since May 2001 and a member of the Disciplinary Panel since January 2007. The case against the individuals was conducted by external counsel from the independent Bar instructed by in-house personnel from the defendant's legal department.

5. The schedule annexed to this judgment identifies the horses and races which were the subject of the enquiry.

6. The individuals alleged to have been in breach of the Rules of Racing were Mr McKeown, Mr Paul Blockley, Mr Derek Lovatt, Mr Marcus Reeder, Mr Nicholas Rook, Mr Martyn Wakefield, Mr Clive Whiting, Mr Vinnie Whiting and Mr David Wright. Paul Blockley is a trainer and Clive Whiting is an owner of race horses. Vinnie Whiting is his brother.

7. Various breaches of the Rules of Racing were alleged against the nine individuals. The central allegation was that all nine were involved in a conspiracy to exploit inside information about horses trained by Mr Blockley in the eleven races under investigation, all of which were the subject of successful lay bets to lose on the Betfair exchange by one or other of Messrs Wright, Lovatt, Reeder, Wakefield and Vinnie Whiting who all had Betfair accounts. The bets in question risked a total of £182,541 but because every bet was a winner the overall profit was £61,909.

8. The Panel made adverse findings against all nine individuals. All nine were found to have been guilty of committing or conspiring or conniving in the commission of a corrupt practice in relation to racing contrary to Rule 201(v). In relation to Mr Mckeown the Panel found that he was fully implicated in the passing of inside information for the horses which he rode in eight of the eleven suspect races for the purpose of enabling lay bets to be placed by Clive Whiting and his associates. It concluded that while it was impossible to be precise about exactly how and with what he was rewarded for his part in the conspiracy it was legitimate to infer that the rewards would have been substantial. In addition the Panel found that Mr Mckeown failed to ride his mounts on their merits in four of the suspect races (races two, six, seven and eleven) in breach of Rule 157. And that for substantial reward he gave assurance that he would if necessary ride horses so as to ensure that the lay bets succeeded also in breach of Rule 201(v).

9. The Panel found that Mr Blockley was involved in the conspiracy through the passing of inside information in all of the eleven races with which the enquiry was concerned, in breach of Rule 201(v). It did not find him guilty of complicity in the first three of Mr McKeown's non-trier races, but did find that he was complicit in Mr McKeown's breach of Rule 157 in respect of the last one. It therefore found him guilty, not only of involvement in the conspiracy through the passing of inside information in all of the eleven races contrary to Rule 201(v), but also of a breach of Rule 155(ii) in respect of the last non-trier race in that he failed to satisfy the Panel that Mr McKeown failed to comply with his legitimate pre-race instructions on that race.

10. All the other seven individuals were found guilty of involvement in the conspiracy. Clive Whiting was found to be the central figure in the conspiracy. It was held that he was both laying his own horses to lose and the orchestrator of lay betting against horses in the ownership of others on the back of inside information from Mr McKeown and Mr Blockley. Vinnie Whiting was also held to be a critical figure in the conspiracy, regularly relaying information from Mr Blockley and Mr McKeown to his brother Clive Whiting and to

others to enable the lay bets to be placed. The other individuals were all found to have placed lay bets on the basis of inside information relaid to them by one or other of the other conspirators knowing that it was inside information.

11. The Panel's decision and reasons were provided to the parties on 23 October 2008. On that day the Panel held a hearing on penalty. Having retired to consider the appropriate penalties the Panel announced its decision at around 4.30pm that day. Mr McKeown was disqualified for four years, Mr Blockley for two and a half years, Clive Whiting for eight years, Mr Wright for six years, Mr Reeder for eighteen months and Mr Wakefield for eighteen months. Mr Lovatt was fined £20,000. Neither Vinnie Whiting nor Mr Rook was subject to the Rules of Racing. Accordingly they could not be disqualified. Instead Vinnie Whiting was excluded for four years and Mr Rook was excluded for six years.

12. When the penalties were announced on 23 October 2008 the Panel informed the parties that they would not take effect until the expiry of the seven day period subsequent to the publication of their Reasons within which any Notice of Appeal should be lodged. As subsequently set out in the Panel's Reasons for Penalties the thinking behind this was that if any of the parties appealed it would be up to the Appeal Board to decide whether the penalties should come into effect while the appeal was pending. The Reasons for Penalties were published on 6 November 2008. However two days earlier on 4 November 2008 Mr McKeown was found by Stewards at Southwell to be in breach of Rule 157 in the second race that day when riding Rascal in the Mix (USA). The Stewards referred the case to the defendant in relation to the appropriate penalty and on the same day the defendant withdrew Mr McKeown's licence under Rule 2(iv)(a) pending an investigation into that race. In its Reasons for penalties the Panel stated that the recent events concerning Mr McKeown at Southwell showed that it had been wrong to defer the coming into effect of his disqualification:

> "If he is eventually found to have been in breach of Rule 157 over his ride on 4 November 2008 then it is clear that he has been permitted an opportunity to abuse the Rules that it was wrong to give him. Even if he is eventually found not to have been in breach, then it is nevertheless the case that the interests of racing have been compromised by allowing a jockey to continue riding in circumstances which have at least raised serious questions about what he was up to at Southwell. For the future it is likely that a Panel's decision to disqualify will come into effect immediately it is announced unless there are exceptional reasons for not doing this (which it after all what the Rules presently contemplates)" (see paragraph 18).

The disqualification was ordered to commence on 13 November 2008.

13. While I was preparing my judgment I was sent copies of correspondence between the parties relating to Rascal In The Mix. Nothing in that

correspondence seemed to me relevant to this claim and neither it nor the events which I have described in relation to Rascal In The Mix have played any part in the conclusions which I have reached in this claim.

14. Mr McKeown and Mr Blockley alone of the nine individuals found guilty of conspiracy entered Notices of Appeal. Mr Blockley withdrew his appeal before a hearing. Mr McKeown's undated Notice of Appeal was served on 12 November 2008 by his solicitor Mr Stewart-Moore. At the hearing before the Panel Mr McKeown had represented himself, albeit with occasional assistance from Mr Stewart-Moore. Mr Stewart-Moore also gave notice of Mr McKeown's intention to adduce fresh evidence in the appeal in the form of evidence from a horse-riding expert. That application was however withdrawn on 24 November 2008 in the light of discussions with counsel. The grounds of appeal were that there was insufficient material on the basis of which a reasonable decision maker could have made the decision in question (Regulation 17 of the Regulations for appeal to an Appeal Board) and that the decision maker misconstrued or failed to apply or wrongly applied the Rules of Racing (Regulation 18).

15. The appeal was heard at an oral hearing on 15 and 16 December 2008. The chairman of the Appeal Board was Sir Roger Buckley, a retired High Court judge. The other members of the board were The Hon Mrs Jane Gillies and Mr Christopher Hodgson. Mrs Gillies was appointed a steward in January 1979 sat on the Disciplinary Panel from 2004 until 2006 and was appointed to the Appeal Board in 2007. Mr Hodgson was a steward from January 1975 until December 2002, sat on the Disciplinary Panel from 1997 to 1999 and was appointed to the Appeal Board in 2006. Mr McKeown was represented at the appeal by Ian Winter QC who also represented him in front of me leading Andrew Monson and the Defendant was represented by Louis Weston of counsel who appeared before me led by Mr Mark Warby QC.

16. On 17 December 2008 the Appeal Board announced its decision dismissing Mr McKeown's appeal on liability. It published its reasons for its decision on liability on 19 January 2009. On 13 February 2009 the Appeal Board dismissed Mr McKeown's appeal against penalty and ordered that he pay £5,000 towards the defendant's costs of the appeal. No order for costs was sought by the defendant in respect of the hearing before the Panel. Mr McKeown does not challenge the penalty in these proceedings, which are confined to a challenge against the findings of the Panel and the Appeal Board on liability.

The Panel's key factual findings

17. The Appeal Board in its written Reasons summarised the Panel's key factual findings in the following terms (references are to the relevant paragraph in the Panel's written Decisions and Reasons):

(a) The pattern of lay betting led to the inference that it was inspired by inside information (para 22);

(b) A flow of inside information, starting at least with Mr Blockley, caused the lay bets to be struck (para 26);

(c) Clive Whiting was involved in the lay betting (para 27);

(d) Mr McKeown passed inside information to Clive and Vinnie Whiting and, if asked to their friends (para29);

(e) Clive and Vinnie Whiting used Mr McKeown's inside information to cause lay bets to be placed (para 29);

(f) Mr McKeown was aware that the inside information he provided was being used for lay betting (para 30);

(g) Mr McKeown gave extra assurance and incentive for the lay betting that he would, if necessary, ride to ensure that the bets succeed (para 31);

(h) Mr McKeown did so ride in four races (para 32-35);

(i) Mr McKeown was fully implicated in the lay betting and received substantial reward (para 36).

As the Appeal Board pointed out the finding of substantial reward was made by way of inference (which in all the circumstances was, in the Board's view, almost inevitable) rather than direct evidence.

18. Much time was taken up at the hearing by Mr Winter in developing his legal submission that both the Panel and the Appeal Board erred in law in their construction of Rule 201(v). In short he submitted that they were led into error by the defendant's arguments in concluding that Mr McKeown was in breach of Rule 201(v) not on the basis that there was any evidence of his involvement in a corrupt or fraudulent practice but on the basis of the mere passing of information to those who subsequently laid horses. He submitted that a practice only falls within the ambit of Rule 201(v) if it is corrupt in that it involves the element of a bribe or reward or it is fraudulent in that it involves the prejudicing of persons' rights by the purported compliance with the Rules of Racing when in fact the Rules have been breached. The mere passing of inside information by a jockey is not necessarily in itself a breach of the Rules of Racing. Rule 243 permits a jockey to communicate information about a horse for material reward to the owner or owner's representative. Appendix N also permits a jockey to disclose information about a horse in prescribed circumstances for reasonable reward to the press or people attending corporate hospitality events. It cannot, submitted Mr Winter be a corrupt practice in breach of Rule 201(v) to do or agree to do an act that is not prohibited by or is permitted by the Rules.

19. As pointed out by Mr Warby in oral and written submissions, if the Panel's key findings of fact as summarised by the Appeal Board and set out above cannot be successfully challenged as being perverse and not open to a reasonable Panel to make, it is unnecessary in these proceedings to rule on Mr Winter's legal submissions. That is because the conduct as found by the Panel involved both breaches of the Rules of Racing and corrupt or fraudulent practice within definitions accepted by Mr Winter. Rule 247 provides that it is a breach of the Rules of Racing for an Owner to lay any horse he owns. As Mr Winter accepted, there could be a breach of Rule 201(v) if Mr McKeown knew that Clive Whiting laid bets on his own horse or passed information to others about his own horse knowing that they would lay it. As he also accepted, an agreement that would result in a wager being entered into whereby one party knew that the jockey had agreed that he would not ride the horse on its merits in breach of Rule 157 is capable of being a conspiracy to commit a fraudulent practice contrary to Rule 201(v). Further the findings that Mr McKeown received substantial rewards satisfy even the narrow definition of a corrupt practice contended for by Mr Winter namely that someone does or forbears from doing something in relation to certain activities for which they are responsible as a result of or rewarded by the inducement.

Legal principles governing The Court's jurisdiction

20. Before turning to consider the various strands of Mr McKeown's challenge to the decisions of the Disciplinary Panel and Appeal Board it is necessary to identify the legal principles by reference to which the challenge falls to be considered.

21. In *Fallon v Horseracing Regulatory Authority* [2006] EWHC 2030 (QB) a case in which a well known jockey challenged a decision of the defendant's predecessor as the body responsible for regulating horse racing, Davis J held that "it is well established that a decision of a body such as the HRA cannot be challenged by judicial review proceedings. But it is equally well established that the High Court retains a supervisory jurisdiction over such decisions, and the approach to be adopted is essentially that which the Administrative Court would adopt in public law cases." (para 12).

22. The correct approach to be adopted by the court in the exercise of this supervisory jurisdiction was laid down by the Court of Appeal in the two cases of *Bradley v Jockey Club* [2005] EWCA Civ 1056; [2006] ISLR, SLR-1 and *Flaherty v The National Greyhound Racing Club Limited* [2005] EWCA Civ 117; [2006] ISLR, SLR-8

23. In *Bradley* Richards J at first instance conducted a careful analysis of the relevant authorities and applicable principles. In the Court of Appeal Lord Phillips MR of Worth Matravers, as he then was, in a judgment with which Buxton and Scott Baker LJJ agreed, cited what he described as the relevant passages from the judgment of Richards J and held that they correctly state the law.

24. Richards J held that even in the absence of contract the court has a settled jurisdiction to grant declarations and injunctions in respect of decisions of

domestic tribunals that affect a person's right to work. That applies both to "application" cases such as *Nagle v Feilden* and to "expulsion" or "forfeiture" cases in which a person is deprived of a status previously enjoyed, though in the latter category of case it is likely in practice that a contractual relationship will also have been established.

25. He emphasised that the function of the court is supervisory and not that of an original or primary decision-maker. "That brings me to the nature of the court's supervisory jurisdiction over such a decision. The most important point, as it seems to me, is that it is **supervisory.** The function of the court is not to take the primary decision but to ensure that the primary decision-maker operated within lawful limits. It is a review function, very similar to that of the court on judicial review. Indeed, given the difficulties that sometimes arise in drawing the precise boundary between the two, I would consider it surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body. In each case the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision-maker, and so forth." (para 37).

26. "The supervisory nature of the court's role runs through the case-law. In *Nagle v Fielden* Lord Denning MR referred to the concept of abuse of power and said that if those having the governance of a trade or profession "make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad" (page 664-665). …In *McInnes v Onlow-Fane* [1978] 1 WLR 1520, 1529-1530, Megarry V-C referred to the various requirements of natural justice or fairness that have to be observed according to whether a case is a forfeiture case or an application case. He endorsed counsel's concession that in an application case the relevant board was "under a duty to reach an honest conclusion without bias and not in pursuance of any capricious policy" (1533 E). He also expressed the view that "the courts must be slow to allow an implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts…" (1535 F). In the *Stevenage Borough Football Club* case Millett LJ stated that those observations had won subsequent approval and suggested that the role of the court was essentially supervisory." (para 38).

27. Richards J then referred to *Wilander v Tobin* [1997] 2 Ll Rep 293 which, although a contractual case which arose out of disciplinary proceedings by the International Tennis Federation against a leading tennis player under a rule relating to drugs testing, he considered to be of helpful guidance. He quoted from the speech of Lord Woolf (at 299-300): "…Assuming but not deciding that the Appeal Committee is not subject to judicial review because it is not a public body, this does not mean that it escapes the supervision of the High Court. The proceedings out of which this appeal arises are part of that supervision. The Appeals Committee's jurisdiction over the plaintiff arises out

of a contract. That contract has an implied requirement that the procedure provided for in Rule 53 is to be conducted fairly…if the Appeals Committee does not act fairly or if it misdirects itself in law and fails to take into account relevant considerations or takes into account irrelevant considerations, the High Court can intervene. It can also intervene if there is no evidential basis for its decision" (emphasis added). (para 39).

28. Richards J continued: "Those observations were made in what was assumed to be a contractual context …… In my view, however, they have just as much bearing on the non-contractual claim. The supervisory role of the court should not involve any higher or more intensive standard of review when dealing with a non-contractual than a contractual claim. In *Wilander* Lord Woolf was using the language of judicial review; and it seems to me that those concepts are just as applicable here." (para 40).

29. Richards J then quoted from Lord Woolf MR in *Modahl v British Athletic Federation Limited*, an unreported interlocutory judgment of the Court of Appeal dated 28 July 1997 at pages 17 to 18: "The question of whether a complaint about the conduct of a disciplinary committee gives rise to a remedy in public law or private law or is often difficult to determine. However the complaint in both cases would be based on an allegation of unfairness. While in some situations public and private law principles can differ, I can see no reason why there should be any difference as to what constitutes unfairness or why the standard of fairness required by an implied term should differ from that required of the same tribunal under public law."…Indeed in areas such as this the approach of the court should be to assimilate the applicable principles…" Richards J held that although those observations were made in the context of contract they are just as relevant in the context of the non-contractual claim, where there is an equal, if not greater, reason for assimilating the applicable principles. (paragraph 42).

30. The challenge in *Bradley* was to a decision of an Appeal Board to impose by way of substitution a five year period of disqualification for breaches of the Rules of Racing. The issue in the case was thus not one of procedural fairness but the proportionality of the penalty imposed. Richards J held that that underlines the importance of recognising that the court's role is supervisory rather than that of a primary decision maker. "The test of proportionality requires the striking of a balance between competing considerations. The application of the test in the context of penalty will not necessarily produce just one right answer: there is not a single "correct" decision. Different decision-makers may come up with different answers, all of them reached in an entirely proper application of the test. In the context of the European Convention on Human Rights it is recognised that, in determining whether an interference with fundamental rights is justified and, in particular, whether it is proportionate, the decision-maker has a discretionary area of judgment or margin of discretion. The decision is unlawful only if it falls outside the limits of that discretionary area of judgment. Another way of expressing it is that the decision is unlawful only if it falls outside the range of reasonable responses to the question of where a fair balance lies between the conflicting interests. The same essential approach must apply in a non-ECHR context such as the

present. It is for the primary decision-maker to strike the balance in determining whether the penalty is proportionate. The court's role, in the exercise of its supervisory jurisdiction, is to determine whether the decision reached falls within the limits of the decision-maker's discretionary area of judgment. If it does, the penalty is lawful; if it is does not, the penalty is unlawful. It is not the role of the court to stand in the shoes of the primary decision-maker, strike the balance for itself and determine on that basis what it considers the right penalty should be." (Para 43)…

31. "The importance of the court limiting itself to a supervisory role of the kind I have described is reinforced in the present case by the fact that the Appeal Board includes members who are knowledgeable about the racing industry and are better placed than the court to decide on the importance of the Rules in question and the precise weight to be attached to breaches of those Rules. (I treat the Appeal Board as the primary decision-maker since, although its function under Appendix J to the Rules of Racing was largely a review function, it found that the penalty imposed by the Disciplinary Committee was disproportionate and, as it was empowered to do, it substituted a penalty of its own as a proportionate penalty.)"

32. As already mentioned, in this case Mr McKeown's challenge is confined to the decisions of the Disciplinary Panel and Appeal Board on liability and does not extend to the decisions on penalty. Richards J's comments on the approach of the High Court exercising its supervisory jurisdiction on questions of proportionality do not thus apply directly. However by parity of reasoning, in my judgment it follows that in so far as the challenge is to findings of fact made by the Disciplinary Panel and upheld by the Appeal Board, the role of this court in adjudicating on that challenge is not to stand in the shoes of the primary decision-maker and determine what it considers the right findings of fact should be. Just as the application of the test of proportionality as to penalty will not necessary produce just one right answer, so it may be that different tribunals honestly doing their best may reach different findings of fact on the basis of the same evidence. Just as in an application for judicial review of a decision based on findings of fact, the question for the court is not whether had it been the primary decision-maker it would have reached the same or different findings of fact but rather whether the findings of fact actually reached took into account all relevant and excluded all irrelevant considerations and whether they were perverse or such that no reasonable tribunal could have made them.

33. In *Bradley* Richards J emphasised as a reason reinforcing the importance of the court limiting itself to a supervisory role the fact that the Appeal Board in that case included members who were knowledgeable about the racing industry. The relevance of that factor in that case was that they were better placed than the court to decide on the importance of the Rules in questions and the precise weight to be attached to breaches of those Rules when reaching a view on a proportionate penalty. It does not, however in my judgment, follow that the importance and relevance of that factor is confined to cases where the challenge is one to the proportionality of a penalty. There may be all sorts of factual issues in the context of liability where members of a disciplinary

tribunal or Appeal Board who are knowledgeable about the racing industry are better placed than the court to make findings of fact. Obvious examples are where a finding of fact depends wholly or in part on interpreting video evidence of a race in which a jockey's motives and efforts are impugned or on assessing the plausibility of explanations given by a jockey for his conduct of a race or by a gambler for his decision to place a bet.

34. In *Flaherty* Scott-Baker LJ emphasised both the desirability of affording bodies exercising jurisdiction over sporting activities as great a latitude as is consistent with the fundamental requirements of fairness and the fact that sports regulating bodies ordinarily have unrivalled practical knowledge of the particular sport that they are required to regulate.: "It is important to bear in mind the words of Mance LJ in *Modhal v British Athletic Federation Limited* [2001] EWCA Civ 1447; [2002] I WLR 1192 at 1226, [115] to the effect that a conclusion that the disciplinary process should be looked at overall matched the desirable aim of affording to bodies exercising jurisdiction over sporting activities as great a latitude as is consistent with the fundamental requirements of fairness. In this regard he cited the words of Sir Robert *Megarry VC in McInnes v Onslow Fane* [1978] 1 WLR 152 at 1535 F-H approved by Sir Nicolas Brown-Wilkinson VC in *Cowley v Heatley*, The Times, July 24 1986:

> "I think that the courts must be slow to allow an implied obligation to be fair to be used as a means of bringing before the court for review honest decision of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts. This is so even where those bodies are concerned with the means of livelihood of those who take part in those activities. The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burden. Bodies such as the Board which promote a public interest by seeking to maintain high standards in a field of activity which otherwise might easily become degraded and corrupt ought not be hampered in their work without good cause." (para 19).

35. "I respectfully agree with the observations of Sir Nicolas Brown-Wilkinson VC that it is the court's function to control illegality and make sure that a body does not act outside its powers. But it is not in the interest of sport or anybody else for the courts to seek to double guess regulating bodies in charge of domestic arrangements." (para 20).

36. "Sports regulating bodies ordinarily have unrivalled practical knowledge of the sport that they are required to regulate. They cannot be expected to act in every detail as if they are a court of law. Provided they act lawfully and within the ambit of their powers, the courts should allow them to get on with the job as they are required to do. It is important to look at the consequences of anything that appears to have gone wrong. Mr Timothy Charlton QC who has appeared with Mr Jasbir Dhillon for the NGRC, submits that the judge never

explained why he felt it proper to intervene in this case. He never confronted the overall question whether there had been a fair result or whether the procedural defects had produced an unfair result." (para 21).

37. In their skeleton argument Mr Warby and Mr Weston, having referred to *Bradley* and *Flaherty,* made the following submission: "Of course, none of this means that the court should show "unthinkingly servile obeisance" to the decision of an expert sporting tribunal, but there is a "generous margin of appreciation" to be allowed to such tribunals: *Fallon v HRA* at [53] per Davis J. In relation to a finding of fact, it is submitted that the court should interfere only if, allowing for the special expertise of the tribunal and the fact that it saw and heard the witness or (in this case) video evidence, the court is nevertheless satisfied that no reasonable tribunal could have made the finding on the evidence before it." I did not understand Mr Winter to challenge this submission as materially incorrect and I accept it. It emphasises a number of important points: (1) The function of the court is not to make findings of fact but to decide whether it is satisfied that no reasonable tribunal could have made a finding of fact made by the sporting tribunal on the evidence before it; (2) In considering whether it is so satisfied the court should allow for the special expertise of the tribunal and the fact that it saw and heard the witnesses and/or as in this case video evidence; (3) The fact that the tribunal had special expertise does not, however, prevent the court from carefully examining the evidence before the tribunal and concluding in an appropriate case that, not withstanding the special expertise of the tribunal, the evidence before it was such that no reasonable tribunal could have made the findings of fact which were in fact made; (4) The importance of the court not showing unthinkingly servile obeisance to the decision of an expert sporting tribunal is particularly important where, as here, the decision under challenge affects a person's livelihood.

Mr McKeown's criticisms of the Disciplinary Panel and the Appeal Board

38. As set out in the Details of Claim which stood also as Mr McKeown's skeleton argument, and as further elaborated in oral submission, the bases of the challenge to the findings of the Disciplinary Panel and the Appeal Board embraced a number of arguments, some of which overlapped to some extent with others.

39. As already mentioned, Mr McKeown submitted that the Panel and the Appeal Board erred in law in their construction of Rule 201(v). In particular it was submitted that the Panel wrongly concluded that the mere passing of information about a horse's prospects in circumstances where a lay bet was in fact placed amounted to a corrupt or fraudulent practice contrary to Rule 201(v). Second Mr McKeown submitted that the Panel's approach to the evidence was vitiated by a fundamental flaw. None of the four categories of evidence relied on by the defendant in prosecuting the charges against Mr McKeown was individually probative evidence of his having been party to a conspiracy to commit a corrupt or fraudulent practice. The consistent answer to this problem by both the Panel and the Appeal Board was that the evidence should be looked at as a whole. Mr McKeown maintained that this approach was wrong in law, resulted in error of fact and demonstrates the unfair and

biased approach of the defendant to the primary decision and on appeal. It is not possible to cure the absence of probative evidence by an aggregation of separate non-probative pieces of evidence.

40. Third it was submitted that the conclusion of the Panel that Mr McKeown intentionally rode his horse in four of the races otherwise than on their merits was so unreasonable that no reasonable Panel could have come to that conclusion. This was said to have been compounded by the fact that in three of the four races the majority of the video evidence of the races had been destroyed and was unavailable. The Panel stated that "it was very conscious of [the risk that the missing material might have assisted the Claimant's defence] when reaching its conclusions about the alleged non-trier races". The quality of the only available video evidence is poor. The angle of view is wrong for the purposes of reaching conclusions about the Claimant's ride. The video recording cuts out missing crucial sections. To reach any conclusion adverse to Mr McKeown in the absence of the different video angles was unfair and in breach of the principles of natural justice it was the defendant's failure to secure that evidence that resulted in it being destroyed. The defendant knew that Racetech only keep such footage for two years and no explanation has been provided as to why it failed to secure the footage before it was destroyed. The Panel also failed to obtain the tapes of the Stewards' Enquiries which would have contained Mr McKeown's immediate reaction and explanation of his ride.

41. In relation to the alleged "air shots" in two of the rides (Only If I Laugh and Smith N Allen Oils it was submitted) it is simply not possible to say from the single view video shot available if Mr McKeown deployed an air shot so as to pretend to whip the horse. No reasonable Panel could have concluded from that view that Mr McKeown had deployed an air shot. In relation to Only If I Laugh the Stewards did not find that he had used an air shot. They had the benefit of seeing all of the video evidence. No fair or reasonable Panel could find that he had used an air shot in the absence of camera evidence when the Stewards who saw that evidence reached no such conclusion. The Panel and the Appeal Board failed to identify clear and cogent evidence that Mr McKeown was not riding the horse on its merits. The Appeal Board ducked the issue by relying upon the experience of the two bodies. The reality of the process as far as the defendant is concerned is that the Panel and the Appeal Board must be taken to be correct because of their inherent experience or qualification. That is contrary to the principles of natural justice and is unfair.

42. The Defendant declined to place expert evidence of the nature of the rides before the Panel or the Appeal Board. Accordingly there was no witness to cross-examine so as to expose the weakness or erroneous nature of the case. As a result the case proceeded on the basis of submissions by Mr McKeown before the Panel and by his counsel on appeal as to what could or could not be seen on the video footage. This was not answered by either the Panel or the Appeal Board as to the specifics but simply swatted aside on the basis that the Panel and the Appeal Board knew best. That is not a reasonable or fair way to determine the case against Mr McKeown.

43. The absence of an expert witness also meant that there was no evidence from any person unconnected to the defendant or unaware of the other evidence in the case such as the betting evidence. An expert witness would have concentrated on the evidence of the rides and reached an honest and objective opinion as to that evidence without being affected by any other extraneous considerations. Mr McKeown maintained that an expert conducting such an exercise would have concluded that no adverse findings could be made against him from the evidence of the rides alone. Since the other evidence did not implicate him this would have resulted in his exoneration.

44. It was further submitted that in finding Mr McKeown guilty of a breach of Rule 157 in respect of these four rides, but not at the same time finding Mr Blockley the trainer, guilty of Rule 155(ii) in respect of the same rides the Panel acted contrary to Rule 155(iii) and so erred in law.

45. Fourth it was submitted that the decisions of both the Panel and the Appeal Board were vitiated by actual or apparent bias. The case depended upon the conclusion that inside information was passed to the Whitings and on to those placing the lay bets. The inside information could only have come from either Mr McKeown or Mr Blockley the trainer. The essential question therefore was what was the inside information in any particular race? The Panel it was submitted wholly failed to resolve that question evidentially. It was submitted that the evidence clearly demonstrated that the inside information was information about the horse and not information about the jockey, that is to say about the jockey's state of mind with regard to his upcoming ride in the race for example that he had agreed to stop the horse. That information it was submitted plainly came from the trainer and not from the jockey. The Panel wrongly and perversely limited the involvement of Mr Blockley, exonerating him of complicity in Mr McKeown's alleged breaches of Rule 157 on Only If I Laugh, Smith N Allen Oils and Hits Only Cash and only concluding that he joined the full conspiracy in relation to the final race. The necessary consequence of this was to find that Mr McKeown was at the heart of the conspiracy. The bias in favour of Mr Blockley necessarily resulted in adverse conclusions about Mr McKeown. As appears from this summary of Mr McKeown's case on bias, no motive for actual bias was alleged, nor was any direct evidence adduced to support the allegation. At the hearing, in response to questions from me, it was abandoned. As also appears from this summary, the principal basis for the allegation of apparent bias appeared to be that it was an inevitable inference to be drawn from the alleged perversity of the facts found by the Panel and upheld by the Appeal Board.

46. A fifth ground was said to be error of fact in relation to the evidence as a whole. The only reasonable conclusion that the Panel could have reached on all of the evidence was that not only was it not proved that Mr McKeown was party to any conspiracy to conduct a corrupt or fraudulent practice but he was positively not so involved. The only common element to all eleven rides was Mr Blockley, lay bets were placed when Mr McKeown was not even riding and where no criticism was made of the jockey and there was no evidence of a single penny of reward being paid to Mr McKeown for risking his career. This ground appeared to add little if anything to the second ground.

47. It was also submitted that the Appeal Board erred in law in relation to the meaning of the ingredients of Rule 201(v); it compounded the errors of fact in relation to the wrongful aggregation of non-probative evidence to justify a conclusion of guilt; it wholly failed to explain how the Panel was justified in reaching adverse conclusions about the nature of the ride and ducked the issue by asserting merely that the Panel was entitled to reach such conclusions; it compounded the bias or appearance of bias in favour of Mr Blockley and refused to deal at all with compelling evidence that it was Mr Blockley and not Mr McKeown who was responsible for the information about the horse being passed to the gamblers; it failed to give any or any sufficient weight to the clear evidence demonstrating that Mr McKeown was not involved in any conspiracy.

48. In their skeleton argument Mr Warby and Mr Weston identified three further arguments raised on behalf of Mr McKeown. It was said that there was a breach of natural justice and unfairness in the process. This appears to have been based on a number of factors; the lack of independent check or control over the process by which Mr McKeown was found guilty, the refusal to reject the allegations of deliberate non-trying in the three races where not only had the best video evidence been destroyed but the destruction was the responsibility of the defendant and the failure of the defendant to obtain the tapes of the Stewards' inquiries which would have contained Mr McKeown's immediate reaction and explanation of his rides.

49. Second it was alleged that the decisions of the Panel and the Appeal Board that Mr McKeown received reward for passing information were made in pursuit of a capricious policy of the defendant to find reward proved in the absence of evidence. Third Mr McKeown complained that the Appeal Board declined to entertain two arguments which he raised on appeal. The first related to a race in which Mr McKeown submitted that the evidence proves beyond doubt that Skip of Colour, the horse ridden by him, had been deliberately mis-shoed to the knowledge of Mr Blockley. It was submitted that for the Panel to conclude the Mr Blockley was not complicit to the degree that Mr McKeown was until after the tenth race is perverse and tends to indicate bias in his favour. The only reasonable inference was that the inside information on that race was that the horse had been mis-shoed and the only person who on the evidence could have communicated that information was Mr Blockley.

50. The second argument which it was submitted that the Appeal Board wrongly declined to entertain when raised on appeal was that the Panel made a mistake of fact in finding that Clive Whiting's horses left Mr Blockley's yard at the end of 2005. In fact (as is now accepted by the defendant) the horses were removed from Mr Blockley's yard on 4 July 2005, with the exception of Hits Only Money which, being jointly owned by Messrs Blockley, Whiting and Wright remained at Mr Blockley's yard where it continued to be trained by Mr Blockley and which was ridden by Mr McKeown in the fourth of the alleged non-trier races on 19 December 2005. From 5 July 2005 to the time that Mr Blockley was interviewed by the defendant 25 horses owned by Clive Whiting were ridden in races, 14 by Mr McKeown, none of which was laid by any of

the alleged conspirators apart from 2 minor bets on 2 of the horses which were laid on the Wright account resulting in a net loss of £150. It was submitted that this demonstrates that from the moment that Clive Whiting removed his horses from Mr Blockley's yard Mr Whiting was not involved in the placing of any lay bets on his own horses or any other horse trained by Mr Blockley, which it was submitted in turn is very powerful evidence that Mr Blockley was the source of and the reason for the lay bets placed on horses which he trained during the period of the alleged conspiracy and that Mr McKeown was not. It was accepted that Hits Only Money was laid by Mr Wright to lose in the race on 19 December 2005 when it was ridden by Mr McKeown but submitted that the explanation for that was that that horse had not been removed from Mr Blockley's yard and was still being trained by him at the time of the race so that the source of the inside information still existed.

51. Mr Winter submitted that the refusal by the Appeal Board to consider this evidence was because it is impossible to consider it without concluding that it establishes Mr McKeown's innocence and Mr Blockley's complicity. That was said to be wrong in law and fact, unreasonable and evidence of bias or the appearance thereof and was profoundly unfair. Mr McKeown has been deprived of a hearing in which critical evidence establishing his innocence has been considered.

The Panel's analysis of the evidence and findings of fact

52. The Panel identified four strands to the evidence put before it to justify the conspiracy charges: the betting records; the phone records; the interview transcripts and the evidence of the four races where Mr McKeown was said to have been a non-trier. The structure of its analysis of the evidence and factual findings does not make it easy to identify and summarise all the factual findings on which it relied in support of its conclusions that Mr McKeown was guilty both of conspiracy and of a breach of Rule 157. They are not all to be found in one place in its written Reasons. Nor is the full chain of its reasoning.

53. To gain an overall picture of what was going on the Panel stated that it was useful first to state its findings about what emerges from the betting evidence and evidence of contacts between the nine individuals.

54. In relation to the betting records the evidence was said to disclose a number of striking features. The Panel first concentrated on what could be learned from the activity on the Wright account and the two Rook accounts with Betfair on the basis that they were used with greater frequency in the eleven races than the other accounts. Mr Wright laid the Blockley-trained horses in nine of the eleven suspect races and the Rook accounts did so in six of them.

55. The Panel found that Mr Wright's Betfair account shows that the average liability risked was £194. Yet there were twenty three lay bets where £3,000 or more was risked. Of those what it described as a remarkable ten out of twenty three were lays of Blockley-trained horses. Six of the top seven lays on Mr Wright's account were Blockley trained. Mr McKeown rode six of the top twenty three lays, far more than any other jockey. All those lay bets against Blockley-trained and McKeown ridden horses were successful. A number of

them were in the place market (that is bets that a horse would not finish first, second or third) at odds well in excess of what would be expected either from the on course or Betfair win prices. When making lay place bets the account frequently took a dominant share of the available place market on Betfair. Once the defendant's investigation began, the pattern of heavy betting against Blockley-trained or McKeown ridden horses came to an abrupt end.

56. With Mr Rook's two main Betfair accounts a similar pattern of concentration on Blockley-trained or McKeown ridden horses was said to be apparent. On one of them, three of the top four lay bets were trained by Mr Blockley, as were all three of the top lay bets on his another account.

57. The Panel found that this pattern of lay betting on those three accounts was sufficient to raise the inference that they were inspired by inside information, unless there was a good explanation to the contrary.

58. The Panel also found that there were other sizeable lay bets placed by Mr Reeder (just for race one) by Mr Wakefield (just for race two) and by Mr Lovatt (again just for race two). However as these were one-off bets no pattern could be seen to emerge so that the Panel found that no presumption that they were placed in reliance on inside information arises. It was necessary to consider separately the explanations given to the Panel by Messrs Reeder, Wakefield and Lovatt of the reasons why their bets were struck.

59. Finally there were three small lay bets on Vinnie Whiting's account which again because of their size the Panel found did not demonstrate any pattern and the question whether they were placed with inside knowledge needed to be evaluated separately.

60. As to contacts, the Panel found that the timelines prepared to illustrate contacts between the nine individuals on the days surrounding the eleven suspect races clearly show at a minimum that there were regularly conversations in which inside information <u>could have</u> been passed to the various individuals who placed the lay bets. The Panel then asked itself the rhetorical question whether that material did any more than establish the opportunity to convey it. It found that there was a concentration of calls between Clive Whiting and Mr Wright and between Vinnie Whiting and Mr Wright clustered around suspect race times but that there was no similar concentration of any significance that was shown for contacts between others. That was said to be significant because it tended to show that these calls were related to the lay betting on the Wright account rather than being innocent, social or business exchanges. What the phone records generally showed was said to be a timing of calls in relation to each other which is highly significant. The first suspect race – Skip of Colour at Linfield on 9 March 2004 – was said to be particularly striking. On the day of the race a cascade of calls began at 11.10am when Mr Blockley called Clive Whiting. Within seconds Clive Whiting called Vinnie Whiting. Within seconds Vinnie Whiting called Mr Wright. Simultaneously at 11.14am Clive Whiting called Mr Reeder. Within a minute Mr Reeder began to place lay bets against Skip of Colour which was due to race in the 17 30 that day. Mr Wright began laying Skip of Colour at 11.32am. Similar cascades of calls occurred later in the afternoon when Mr

Wright primed his Betfair account with a further £9,000 to enable him to continue lay betting. The Panel found that it is inescapable from those and similar instances in relation to other races that there was a flow of information down the line “starting at least with Blockley” which caused the lay bets to be struck.

61. The Panel also found that there was another means of contact that was important for an overall understanding of what was happening. By early 2004 Clive Whiting had established in the boardroom of his company, Palmers, an informal club where he and other racing enthusiasts would watch racing and also gamble. Mr Rook was there regularly – indeed for sometime he was actually living in the boardroom. Vinnie Whiting was a regular attender. Mr Wright was there sometimes and Mr Lovatt used to go along in the early days. He stopped going towards the end of 2004 because he felt uncomfortable with some of the activities and arguments that occurred. He painted a picture of lay bets being placed by Mr Rook on the new computer which Clive Whiting had brought and of Clive Whiting’s close involvement and funding of this. He also described the enthusiasm with which defeats of Clive Whiting’s own horses were sometimes received. Mr Lovatt was also found to have heard calls after such races between Clive Whiting and a person he believed to be a jockey or trainer in which the message was “job done”. The Panel found that although Mr Lovatt stopped short of identifying the jockey or trainer concerned, it became clear that these calls included contacts with Mr Blockley. The Panel found that this was damning evidence that tied Clive Whiting into the lay betting and Mr Blockley into the provision of information to enable it.

62. The Panel then made findings in relation to each of the nine individuals. In relation to Mr McKeown the Panel found that he regularly rode work at Mr Blockley’s training establishments over the period of the suspect races. He was the jockey of choice for horses of which Clive Whiting was the owner or part owner. Until mid-2005 he rode frequently for Blockley-trained horses owned by others. He therefore had a particular knowledge of horses that he rode both in work (that is to say training) and in races which was inside information.

63. The Panel found that it was clear and that Mr McKeown accepted that he would pass this knowledge on to Clive Whiting and Vinnie Whiting in particular and even, if asked to their friends. Clive Whiting and Vinnie Whiting regularly went to Mr Blockley’s yard when he trained at Southwell, and would press Mr McKeown for information about horses (whether owned by Clive Whiting or not). Mr McKeown was found to have given information freely to them. The Panel said that it was left in no doubt that this information was used by Clive and Vinnie Whiting to cause the lay bets to be placed. The critical question it asked itself was whether Mr McKeown knew that this was being done.

64. Mr McKeown’s relationship with Clive Whiting was found to be much closer than the normal professional relationship of a jockey with an owner for whom he rode regularly. They were friends and had business dealings. Mr McKeown became in effect Clive Whiting’s racing adviser. The Panel then found that Clive Whiting’s horses left Mr Blockley’s yard at the end of 2005 (this is the

finding which the defendant now accepts was factually incorrect, the horses having in fact left in July 2005). Mr McKeown was recorded as having said that this happened after Clive Whiting and Mr Blockley's relationship deteriorated because results were not good. "As he said during interview, 'at the end we did take the horses away'. His use of 'we' in this quotation was not a slip of the tongue as he said in evidence – it was a revealing insight into the role he had come to play as adviser perhaps even as informal manager, of Clive Whiting's racing string. Given this background, the Panel was convinced that McKeown was fully aware that his input about the chances of the horses he rode in eight of the suspect races was being used for lay betting organised by Clive Whiting. Clive Whiting was not the type of character who would have kept these activities secret from McKeown."

65. Before going on to make findings about Mr McKeown's rides in the four alleged non-trier races, the Panel stated that those findings led to the conclusion that Mr McKeown was not just passing on knowledge which he gained from his acquaintance with Blockley-trained horses to enable the lay betting. He was also able to, and did give assurance and incentive for such betting – that he would if necessary ride to ensure that the bet succeeded. I will return to the Panel's detailed findings about the four alleged non-trier races. For present purposes and by way of summary the Panel found that Mr McKeown was guilty of plain breaches of Rule 157 in respect of each race in that he failed to ride his horse according to its merits. It also found that he sought to disguise his non-trying on occasion by delivering air shots. An air shot occurs when a jockey pretends to spur on his horse by giving the impression that he is hitting it with his whip whereas in fact he is ensuring that the whip does not make contact with the horse.

66. The Panel concluded as follows: "The Panel **therefore** decided that McKeown was fully implicated in the passing of inside information for the horses he rode in the eleven suspect races for the purpose of enabling lay bets to be placed by Clive Whiting and his associates. The Panel did not accept that the only rewards he ever received were for winning rides. While it is impossible to be precise about exactly how and with what he was rewarded for his part in the conspiracy, it is legitimate to infer that the rewards would have been substantial." (emphasis added).

67. The Panel added the following explanation: "Finally it is necessary to explain the implications of the Panel's findings that McKeown rode in breach of Rule 157 on four occasions and that the lay betters had the comfort of an assurance that he would ride to ensure their success if he could. These conclusion do not amount to findings that McKeown actually prevented any of the four horses in the non-trier races from winning or from placing (where there were place lay bets). They are findings that he did not make the positive efforts that the Rule required, and that he was trying to conceal this practice by for instance delivering air shots with his whip. This lack of positive effort was in one sense a precautionary measure during the races to protect the lay bets when the outcome was not clear, but the Panel does not find that if he had ridden as the Rules required, then the lay bets would have been lost." It is necessary to set out the Panel's findings in respect both of Mr Blockley and of the individuals

found guilty of being involved in placing lay bets on the basis of information supplied to them by Mr McKeown and Mr Blockley. The significance of the latter findings is that they were one of the building blocks relied on by the Panel in concluding that Mr McKeown was guilty of conspiracy. The finding that the placing of the lay bets by the betters was influenced by the supply of inside information gave rise to the inference that inside information must have been supplied to them by a person or persons with access to that information. Of itself that finding did not give rise to an inference that the supplier of the information was Mr McKeown rather than Mr Blockley or both of them or somebody else. However the Panel also found that there was no doubt that Clive Whiting received inside information about all the horses in the yard both from Mr McKeown and Mr Blockley and that he then passed the information to his brother Vinnie and his friends among whom were Messrs Wright, Lovatt, Reeder and Wakefield and that there was equally no doubt that Clive Whiting was fully aware that the information was being used to lay the horses in the eleven suspect rides. Those findings did not of themselves give rise to an irresistible inference that either Mr McKeown or Mr Blockley or both of them knew when they supplied inside information to Clive Whiting that it would be used by him and/or his friends and associates to place lay bets it did, However they undoubtedly raised the question whether that was in fact the case.

68. The Panel's findings in respect of Mr Blockley are also important. Mr McKeown's case is that the evidence pointed overwhelmingly to Mr Blockley as having been the sole supplier of the information which was used by the lay betters, that Mr Blockley rather than Mr McKeown was at the heart of the conspiracy and that the Panel's findings to the contrary were not only perverse and such as no reasonable tribunal could have found but evidence that the Panel was guilty of actual or apparent bias against Mr McKeown.

69. The Panel found that Mr Blockley accepted that he passed information, both positive and negative, about horses in his yard to Clive and Vinnie Whiting as well as to Mr Wright. This information was much more than just opinions based on public information, such as form. "As he said in evidence, 'I reach my opinions on how they gallop and how they talk to me. I know a horse's eye, how it's eating up. I read the horses.' This information was therefore inside information." The Panel found that Mr Blockley, despite his saying that he was aware that such information should only go to the owners of a particular horse, was shown by the evidence to have been indiscriminate when passing information to the Whitings at least and that his views and opinions about all the horses in his yard were an open book to the Whitings.

70. The Panel also concluded that Mr Blockley was aware from the outset that his opinions would be put to use for the purpose of lay betting through the Whitings. The clearest evidence for this was said to have come from the timelines which showed that in three of the races where Clive Whiting was not the owner there was telephone contact between Mr Blockley and Clive Whiting immediately after those races. In Skip of Colour (race one) and Roxanne Mill (race four), Mr Blockley called Clive Whiting within seconds of the end of the race. After the race for Smith N Allen Oils, Clive Whiting

called Mr Blockley right after the race. The Panel found that Mr Blockley was reduced in evidence to suggesting that maybe a button had been pressed in error on his mobile. It found that there was no legitimate reason for contacts between Clive Whiting and Mr Blockley after these races, where the horses were owned by others. It concluded that these were instances of the "job done" calls which Mr Lovatt heard from the other end of the line. These calls the Panel found would not have taken place unless Mr Blockley had supplied information that was sufficiently strong to cause the lay bets to be placed and were a strong pointer to his involvement in the conspiracy. I interpose to draw attention to the fact that this finding, as emphasised by Mr Winter was a finding that the involvement here referred to by the Panel consisted of supplying information about the horses as distinct from the willingness of the jockey to seek to influence the outcome of the race by not trying.

71. Thus the Panel stated that the next question was whether Mr Blockley was complicit in the actions of Mr McKeown to ride if thought necessary to ensure the success of the lay bets. It held that there was evidence pointing both ways on this matter. Firstly there was the fact, as the Panel found that Mr McKeown did not ride horses on their merits in four of the races. Mr Blockley did not disassociate himself from any of these rides, either at the Stewards inquiries that followed two of them or in evidence before the Panel. His basic position was said to have been that all were ridden to instructions so far as Mr McKeown was able in the circumstances that developed in the races. The Panel observed that, Mr Blockley being a capable trainer and an astute man it was a surprise that he had not seen any of the problems with the rides in those four races which the Panel found to indicate the riding of non-triers by Mr McKeown. That tended to indicate complicity in all the non-triers. On the other hand it was not unknown for trainers to be blind to strange features of rides given to their horses.

72. The Panel said that there was also important evidence from Mr Blockley to the effect that, by mid-2005, he had come to the view that Mr McKeown was past it and that he did not want him to ride races on his horses. It was apparent that from about that time Mr Blockley did not put Mr McKeown up on any of his horses expect those owned by Clive Whiting and perhaps on one or two others where Mr McKeown had a long riding history. "It was suggested by Mr Weston that this 'jocking off' of Mr McKeown indicated that Mr Blockley had become suspicious of the honesty of the rides being given by Mr McKeown and that Mr Blockley was aware that there was a sinister explanation for why Mr McKeown was being used so regularly by Clive Whiting". I interpose to observe that it is clear that, although the Panel mistakenly found that the Clive Whiting horses only left the Blockley yard at the end of 2005 rather than in July 2005, it carefully considered the evidence that in the middle of 2005 there was evidence that Mr Blockley had tried to "jock off" Mr McKeown and that this was evidence pointing to Mr Blockley suspecting that Mr McKeown was up to no good and thus evidence of Mr Blockley's awareness of and complicity in the non-trying aspect of the conspiracy which was found against Mr McKeown. Although that is a different point to the one now made by Mr Winter, namely that the lay bets stopped when Clive Whiting withdrew his horses from the Blockley yard, it strongly suggests that the Panel approached

the evidence against Mr Blockley objectively and without any predisposition to find in his favour or acquit him of dishonestly. It is also the case that the Panel's heavy reliance on what it found to be Mr McKeown's slip of the tongue when he used the word "we" – "at the end we did take the horses away" – as evidence of his role as an adviser and perhaps even informal manager of Clive Whiting's racing string and thus supporting the Panel's conviction that he was fully aware that his input about the chances of the horses he rode in eight of the suspect races was being used for lay betting organised by Clive Whiting is unaffected by the fact that this decision took place at the end of 2005 rather than in the middle of 2005.

73. The Panel recorded Mr Blockley as having rejected Mr Weston's suggestions and having said that his decision came about because he thought Mr McKeown was no good anymore and not because Mr McKeown was stopping horses. The Panel determined that there was a mixture of reasons for Mr Blockley's attempt to "jock off" Mr McKeown – it was partly because of his views on Mr McKeown's strengths as a rider and it was partly because he had come to appreciate that Mr McKeown's rides on Clive Whiting's horses, which he knew were being laid to lose, were deliberate non-triers. The Panel stated that that conclusion would in its view tend to indicate that Mr Blockley was not complicit in the earlier assurances provided by Mr McKeown to the Whitings that he would ride to lose if necessary. The unstated implication behind this stated view would appear to be that if on discovering or coming to appreciate that Mr McKeown had previously ridden deliberate non-triers, that factor influenced Mr Blockley in deciding to "jock off" Mr McKeown, it follows that Mr Blockley could not have been or at least was unlikely to have been aware that Mr McKeown was not trying at the time of those earlier three races. I would interpose that as a matter of logic there is no reason to suppose that this view of the Panel would have been materially different had it appreciated that contemporaneously with Mr Blockley "jocking off" Mr McKeown, Clive Whiting removed his horses from the Blockley yard. It is also important to note that while concluding that Mr Blockley was not complicit in what they found to be the earlier assurances provided by Mr McKeown to the Whitings that he would ride to lose if necessary, the Panel found Mr Blockley guilty of knowing from the outset that the information and opinions he supplied to the Whitings in relation to the horses (as distinct from the willingness of the jockey not to try if necessary) would be put to use for the purpose of lay betting through the Whitings. It also found as appears below that he was very much responsible for the supply of inside information that enabled lay betting on the last of the eleven races, Hits Only Money on 19 December 2005, to the effect that a "confidence run" over an inappropriate distance was going to take place. The Panel thus found that although the breach of Rule 157 which Mr McKeown's ride on Hits Only Money amounted to was of a less serious character than the Rule 157 breaches in the three earlier non-trier races, Mr Blockley was nevertheless party to it. The Panel also held that he was therefore not only in breach of Rule 155(ii) in respect of the Hits Only Money race but that he also thereby became party to the full extent of the conspiracy that operated on that occasion when it was known to the lay betters that a tender ride would be given.

74. Having referred to the evidence of "jocking off" the Panel stated that there was further evidence which needed to be weighed in the balance when deciding if Mr Blockley was always aware that the lay betting was supported by Mr McKeown's assurance about how he would ride. It was suggested that Mr Blockley was under Clive Whiting's control because Clive Whiting was financing Mr Blockley's training operation. The Panel stated that the extent of that control may have been a boast by Clive Whiting but Mr Blockley's evidence persuaded the Panel that the true position was much less extensive than either Clive Whiting or Mr McKeown suggested. Mr Blockley had not been bankrupt or provided with funds to enable him to set up in training at Southwell. Clive Whiting was found to have provided a guarantee to Mr Blockley's bank of a loan which Mr Blockley needed, but that in the view of the Panel gave Clive Whiting limited leverage. Clive Whiting had helped him out by buying a draft of horses which Mr Blockley had bought for another owner, who had let him down, and no doubt in the Panel's view he felt under obligation to Mr Whiting as the trainer of those and other horses. It could therefore be said that this sense of obligation might cause Mr Blockley to "knuckle under" and simply tolerate Mr McKeown's occasional breaches of the requirement to ride to win or get the best possible placing. The Panel also said that it could be said with some force that if Mr Blockley was prepared to participate in a corrupt practice by passing inside information to enable lay betting he might also have been prepared to take the extra step of allowing or tolerating "stopping" rides by the regular jockey.

75. Bearing in mind all those factors and the need to be confident about conclusions of dishonesty the Panel stated that it was not persuaded that Mr Blockley's participation in the conspiracy up to the summer of 2005 included complicity in the full extent of what Mr McKeown and Clive Whiting were up to.

76. It proceeded to make the finding to which I have referred above that he was very much responsible for the supply of inside information that enabled lay betting on Hits Only Money and that although the breach of Rule 157 which Mr McKeown's ride amounted to was of a less serious character than the Rule 157 breaches in the earlier races, he thereby became a party both to the breach and to the full extent of the conspiracy that operated on that occasion when it was known to the lay betters that a tender ride would be given.

77. There are a number of aspects of the Panel's findings in relation to Mr Blockley which are, in my view, important when one comes to consider Mr Winter's criticisms of the Panel's findings in relation to Mr McKeown. Among those criticisms were submissions that the Panel was guilty of apparent bias by being predisposed to find in favour of Mr Blockley and against Mr McKeown, that the evidence that the Whiting horses were withdrawn from Mr Blockley's stable in July 2005 rather than December 2005 and the allegation that Mr Blockley deliberately mis-shod Mr McKeown's horse on the first ride prove that the only source of inside information to the lay betters must have been Mr Blockley and thus that Mr McKeown must be innocent and that no reasonable tribunal could have found that Mr McKeown was guilty of any involvement in the conspiracy to supply inside information

for the purpose of enabling lay betting. Each of those criticisms needs to be considered in turn.

78. It is however striking that there are features of the Panel's finding in relation to Mr Blockley which represent significant obstacles in the path of all those criticisms. As to predisposition to find in favour of Mr Blockley, the fact is that the Panel found him guilty of complicity throughout the eleven rides of supplying horse-related inside information to the Whitings knowing that it would be used to enable lay bets to be placed and guilty of complicity to the full extent of the conspiracy in respect of Hits Only Money when it was known to the lay betters that a tender ride would be given. On their face these findings do not sit easily with a conclusion that the Panel was predisposed to exonerate Mr Blockley of knowledge in relation to the three non-trier races, still less that any such predisposition was motivated by or related to a predisposition against Mr McKeown and a predisposition to find him and him alone guilty of letting it be known to the lay betters directly or indirectly that he would if necessary not try in the earlier races.

79. Moreover the Panel's finding that Mr Blockley was complicit in the tender ride on Hits Only Money but not on the earlier three non-trier races suggests on its face a genuine attempt by the Panel to review the evidence on each race and each allegation separately and on its merits.

80. Further the Panel's findings that as well as Mr McKeown being guilty of supplying both horse-related and non-trier related information to the lay betters, Mr Blockley was guilty of supplying horse-related information to them and non-trier related information on Hits Only Money to them underlines the fact that the Panel's adverse findings against Mr McKeown were not dependent on the limited finding that Mr Blockley was not complicit in the supply of non-trier assurances in the earlier races. This is significant because it raises the obvious point that even if it could be shown that the Panel was wrong (whether by reason of actual or apparent bias or perverse findings) in exonerating Mr Blockley of complicity in the supply of non-trier information on the earlier races it would not necessarily follow that they erred in their adverse findings against Mr McKeown. Put shortly Mr McKeown's guilt was not dependent on Mr Blockley's innocence and a finding that Mr Blockley was guilty to a greater extent than found by the Panel would not by itself prove that Mr McKeown was innocent or that the Panel's adverse findings against him were perverse or affected by bias.

81. The Panel found that each of Messrs Clive Whiting, Vinne Whiting, David Wright, Derek Lovatt, Nicholas Rook, Marcus Reeder and Martyn Wakefield placed or was involved in the placing of lay bets on one or more of the eleven races because of inside information supplied to them.

82. The Panel found that there was no doubt that Clive Whiting received inside information about all the horses in the Blockley yard, both from Mr McKeown and from Mr Blockley. He was in regular phone contact with both of them around the time of suspect races and was a regular visitor to Blockley's yard at Southwell. Mr McKeown was more than just a jockey who usually rode his horses: they were friends and business associates. The Panel concluded that

Clive Whiting passed the information to his brother Vinnie and to his friends among whom were Messrs Wright, Lovatt, Reeder and Wakefield.

83. The Panel also found that there was no doubt that Clive Whiting was fully aware that the information was being used to lay the horses in the eleven suspect races. It found that Clive Whiting was fully involved in the placing by Mr Rook of lay bets while he was in the boardroom at Palmers. The Panel found that he supplied much of the money for Mr Rook's account to enable lay bets to be placed and rejected his evidence that they were loans. Reference was made to a transcript of a telephone conversation with Betfair on 29 September 2004 as showing that Clive Whiting personally tried to put money into a Rook account.

84. The Panel found that what it described as the revealing evidence from Mr Lovatt about the "job done" contacts with Mr Blockley immediately after horses which Clive Whiting did not own had lost and lay bets had consequently succeed showed that he was at the heart of the conspiracy that amounted to a breach of Rule 201(v). (I note that in this context the Panel referred to Mr Lovatt's evidence about the "job done" contacts as having referred to horses which Mr Whiting did not own whereas in the context of its findings as to the contacts between the various individuals it referred to his having described job done telephone calls as having come after races in which Clive Whiting owned horses had been defeated. It is not clear whether this was intended by the Panel or not. The earlier reference would point to Clive Whiting being involved in lay betting against his own horses which is contrary to Rule 247. The latter reference would involve lay bets being placed against horses not owned by Mr Whiting. That would not involve a breach by him of Rule 247 but it would have involved a breach by Mr Blockley of the prohibition in Rule 243 against providing information not publicly available to a person other than the horse's owner or owner's representative if it was for material reward).

85. The Panel also found that Clive Whiting was in breach of Rule 247 in laying horses which he owned or part owned in respect of races two, seven, nine, ten and eleven as well as races three and five where the registered owner was his partner Joanna Hughes but it was in reality admitted that Mr Whiting was the real owner. The Panel found that he shared in the proceeds of Mr Rook's lay betting on some of those races and it inferred that he also received reward from Mr Wright who placed lay bets in close consultation with him.

86. The Panel found that the evidence of Mr Wright's participation in the conspiracy was overwhelming. He placed lay bets on nine of the eleven races and nine of his 13 largest lay bets came on Blockley-trained horses, mostly ridden by Mr McKeown. He was unable to give definitive explanations for this and the Panel found that his suggestions that sometimes he picked on the basis of form, sometimes because they drifted on the market and sometimes because he just "stuck a pin in" to be fatuous. It held that the bets were placed on the basis of inside information mostly relaid to him by Vinnie Whiting and Clive Whiting, but occasionally also obtained directly from Mr Blockley and Mr McKeown.

87. The Panel found that in general Mr Lovatt, who was the source of the evidence in relation to the "job done" telephone calls in Palmers, was a truthful witness. It held that he became very unhappy with the lay betting activities that he witnessed in the Palmers boardroom and elsewhere. The Panel found that he knew that it was taking place on the back of inside information from Mr Blockley and Mr McKeown that Clive Whiting was keen to use and that it was wrong as his evidence about the "job done" calls demonstrated. He then withdrew from the Palmers afternoon racing scene later in 2004 at the cost of personal friendship.

88. However the Panel found that Mr Lovatt had earlier fallen from grace when he permitted a lay bet on his account to be placed from his computer by his partner Ann Mercs. While the Panel accepted that the bet for just over £3,000 which risked the total amount in the account, might have risked more than he intended, it found that Mr Lovatt knew full well that the horse was "not off" that day from his contacts with Clive Whiting and that he unwisely took advantage of that information. The Panel also mentioned that Mr Lovatt had acknowledged in the Appendix S form which he had filed before the inquiry took place that he might have used inside information.

89. The Panel found that Mr Rook was knee deep in the conspiracy and one of the two regular placers of the lay bets. The evidence against him was found to be overwhelming and it was said that in interview he advanced no coherent explanation for the remarkable preponderance of his large lay bets against Blockley-trained and McKeown ridden horses. He did not choose to attend the Enquiry. The Panel held that the descriptions of his activities in the Palmers boardroom reinforced the conclusion that he was acting on inside information in placing those bets and that his accounts were in some measure shared with Clive Whiting.

90. Mr Reeder laid £21,474 to lose on Skip of Colour, the first of the eleven suspect races, realising a profit of £4683. The Panel rejected his explanation that he decided to place this bet entirely as a result of his analysis of the form from the Racing Post, noting that he did not explain what it was he had noticed in his form study to justify the lay bet. The Panel found that Mr Reeder was laying Skip of Colour because he had inside information about why it was not expected to win that day. It held that the timeline was most revealing. Calls were made to Mr Reeder on the day before the race by Clive Whiting, starting immediately after the latter had spoken with Mr Blockley. On the day of the race Mr Reeder's lay betting began within seconds of the end of a call from Clive Whiting, who had himself been speaking seconds before to Mr Blockley. In evidence Mr Reeder said that he did not know what the calls were about but the Panel found the inference to be too obvious to be doubted.

91. Mr Wakefield placed just one lay bet in the races under consideration. He risked £15,900 to win £6,300 on Only If I Laugh. This bet was four times larger in terms of risk than any other lay bet that Mr Wakefield placed. The Panel rejected as untrue an elaborate explanation proferred by Mr Wakefield for why he placed the lay bet. It found it to be inconsistent with an earlier explanation given by him, incapable of belief and supported by the last minute production of a document which he claimed was a betting slip but which the

Panel did not accept was a contemporary record. Having rejected his explanation the Panel found that there could be no doubt that Mr Wakefield was in fact placing his lay bet because he, like others, knew from inside information that Only If I laugh was not "off for this race".

92. Further findings of fact were made by the Panel in its Reasons for the Penalties which it subsequently imposed. Of Mr McKeown the Panel said that he is a senior jockey who participated in the conspiracy described in its Reasons for the Decision on Liability to the fullest extent. He was prepared to ride to lose if necessary to ensure the success of lay betting and on four occasions in his eight races with which the Panel was concerned he did indeed ride in breach of the basic requirement placed on all jockeys – that they ride horses on their merits. The Panel stated that it received no impression that he had been led into this behaviour. He was a capable man who decided to break the Rules in the most fundamental way possible for a jockey. He did so time and again, to profit from it through cheating bets. He did this with his eyes open and without any indication that he was put under outside pressure. Indeed it was more likely that he taught Clive Whiting the ropes rather than the other way round. In imposing a penalty of 4 years disqualification the Panel took into account the time over which the conspiracy operated, the frequency of Mr McKeown's breaches of Rule 157 and his preparedness to commit other breaches of that Rule if it had been necessary in the other races considered.

93. In relation to Mr Blockley the Panel reiterated its findings that he was involved in the conspiracy through the passing of inside information in all of the eleven races with which the Enquiry was concerned and that he was complicit in the last of the Rule 157 breaches when Hits Only Money was given a conditioning race in December 2005. It repeated that it did not conclude that he was involved in the first three stopping rides by Mr McKeown. In rejecting a submission that suspension rather than disqualification was an appropriate penalty the Panel rejected the submission that Mr Blockley's actions were naive rather than dishonest. The Panel stated that Mr Blockley knew full well that information he was providing about the prospects of horses in his care was being used for lay betting purposes and his making of the "job done" telephone calls was perhaps the clearest indication that his participation was dishonest and not merely unwise. This was not a case of incautious "tipping" to the likes of gatemen or punters who approached him for information. It was the considered passing of inside information to people engaged in a dishonest practice to his knowledge.

94. Neither did the Panel accept the suggestion made on behalf of Mr Blockley that he did not profit from his participation. The Panel found that he maintained the continued patronage of Clive Whiting through his supply of information and must also have received other rewards even though it was not possible now to say precisely what they were.

95. The Panel did not feel that suspension would be an adequate form of penalty. Mr Blockley's breaches of the Rules merited more severe treatment and it was necessary to send out a signal to others that abuse of the Rules of this kind would ordinarily lead to banishment from racing. The Panel judged the

appropriate period of disqualification to be two and a half years. While the Panel was prepared to come down from the two and a half year entry point for the single Rule 155(ii) breach (which concerned the least serious type of Rule 157 breach – a conditioning ride), it felt that the overall penalty should be pitched at that level because of the length and seriousness of his involvement in the conspiracy.

96. The Panel was however prepared because of his personal circumstances to allow a dispensation from the full rigour of a disqualification which would otherwise have had the effect of evicting him, his partner and his children from their house, by directing that it should not prevent him from living in his house. The Panel also indicated that it would be prepared to hear an application that could have the effect of allowing him some limited employment within racing. If an appropriate person was granted a licence for his existing yard and was prepared to employ him he could continue to work at the yard and attend gallops locally in Lambourn. However he would not be allowed to go to any other licensed premises including race courses. The Panel stated that it took into account the fact that Mr Blockley who was then 50 years old had only ever worked in racing since the age of 15, lacked skilled for any other work, had no means of supporting his two young children in the event of a blanket disqualification and lived in a house within the licensed premised that he owned in Lambourn. It also took into account that he had already suffered heavily financially through the loss of owners and would continue to suffer even more through a suspension.

97. It is again pertinent to note that among the Panel's findings were findings that Mr Blockley lied in his evidence and that his involvement in the conspiracy was dishonest.

98. The Panel found that Clive Whiting was the central figure in the conspiracy who was and had been a registered owner. He was both laying his own horses to lose and the orchestrator of lay betting against horses in the ownership of others on the back of inside information from Mr McKeown and Mr Blockley. The Panel found that as he recognised at the outset of the inquiry but not earlier he had told a pack of lies to investigators about his relationship with Mr Rook, one of the people whom he used to place the lay bets. "Racing can do without him just as much as he now says he can do without racing and he will be disqualified for 8 years."

99. The Panel found that although the lay bets placed by Vincent Whiting on his personal Betfair account were small, he was a critical figure in the conspiracy, regularly relaying information from Mr Blockley and Mr McKeown to his brother and to others to enable the lay bets to be placed. As he was not subject to the Rules of Racing the appropriate sanction was exclusion for a period of 4 years.

100. The Panel found that Mr Wright was the most regular participant of those actually placing lay bets through his account on the basis of information relaid to him by Clive and Vinnie Whiting. He knew that this information was being improperly used and he was prepared to cheat the punters on the other side of the bets by placing them. The period of disqualification was 6 years.

101. The Panel found that Mr Rook was another prolific user of his Betfair account to place lay bets on the suspect races. There was no reason for treating him materially differently to Mr Wright so the period of exclusion (never having been a registered person he was not liable to disqualification) was 6 years.

102. Mr Reeder already had a period of disqualification behind him for laying his own horse at the time the Panel considered the appropriate penalty in this case. Since the conduct which the Panel was looking at in this Enquiry occurred a few days before the conduct which attracted his other disqualification the Panel ignored it and imposed a period of 18 months disqualification in the light of the single instance of him having placed a lay bet.

103. Mr Wakefield as a registered owner involved on just one occasion was disqualified for 18 months with a minor dispensation entitling him to deal with licensed persons to arrange the sale of his interests in horses.

104. In relation to Mr Lovatt the Panel repeated that it was to his credit that he recognised that something nasty was going on and pulled out of involvement in Clive Whiting's informal afternoon racing club in late 2004, over a year before investigations brought a sudden halt to the lay betting activity of others. Apart from his evidence about his one lay bet which the Panel did not fully accept the Panel recognised that he was essentially a straight forward person who provided valuable evidence at the enquiry. He retained an interest in racing through his ownership of racing stables in Nottingham where he employed a trainer with seven staff. If he were to be disqualified it was likely that in the absence of anybody to take over the licence the trainer and staff would lose their jobs and the trainer would lose his house. Although the entry point penalty for him was, as for Mr Reed and Mr Wakefield, the disqualification of 18 months the wholly different degree of his involvement together with his withdrawal from the conspiracy and his personal circumstances persuaded the Panel not to go down that route but rather to impose a hefty fine of £20,000.

105. In considering Mr McKeown's present challenges to the reasonableness of the Panel's findings against him it is pertinent to point out that the background is that there was been no appeal by any of the other eight people found to have taken part in the conspiracy with him against either liability or penalty (Mr Blokley's appeal having been withdrawn). Nor has there been any challenge by any of them as to the reasonableness of the Panel's findings.

The attack on the Panel's findings of fact

106. Mr Winter on behalf of Mr McKeown submitted that the Panel's decision that he was guilty of breaches of the Rules of Racing was based on extensive errors of fact, which he defined as conclusions of fact, that it was not open to a reasonable tribunal to make or decisions which were clearly or plainly wrong. In the Part 8 Details of Claim Mr Winter identified four separate areas of evidence said to have been relied on by the defendant: (1) evidence of contact between the alleged conspirators; (2) evidence that lay bets were placed on the eleven horses; (3) evidence of what the defendant called "admissions" made by Mr McKeown and (4) evidence of Mr McKeown's rides. He submitted that

those areas of evidence did not amount either individually or by aggregation to evidence of Mr McKeown's involvement in a conspiracy and indeed tended to prove positively that he was not so involved.

107. It was submitted that (1) there was no evidence of any contact between Mr McKeown and any other person other than evidence wholly consistent with his role as a jockey. There was no evidence that he had ever even met any of the alleged conspirators other than Mr Blockley, Clive Whiting, the owner of some of the horses ridden, and his brother Vinnie acting as his brother's representative; (2) there was no evidence that Mr McKeown knew that any of the lay bets had even been placed; (3) there were no admissions made by Mr McKeown and (4) no reasonable Panel or Appeal Board could have concluded that Mr McKeown rode the four horses in the alleged non-trier races otherwise then on their merits.

108. It was submitted that the Panel and the Appeal Board failed to identify any individual piece of evidence probative of Mr McKeown's involvement in any conspiracy to commit a corrupt or fraudulent practice. It was submitted that the consistent answer to this problem by both the Panel and the Appeal Board was that the evidence should be looked at as a whole. Mr Winter submitted that this approach was wrong in law, resulted in errors of fact and demonstrated the unfair and biased approach of the defendant to the primary decision and on appeal. It was submitted that it is not possible to cure the absence of probative evidence by an aggregation of separate non-probative pieces of evidence. "Filling significant gaps in the evidence by a circular process whereby gaps are filed with other gaps exposes the defendant to serious and substantial criticism as to its process, its fairness and its objectivity."

109. Among the more detailed criticisms of the Panel's findings of fact were the following. It was submitted that the only common element to all eleven rides was Mr Blockley, that lay bets were placed when Mr McKeown was not even riding and where no criticism was made of the jockey and there was no evidence of a single penny of reward being paid to Mr McKeown for risking his career. Mr McKeown only ever passed information to Clive Whiting, the owner of five of the horses in question or to his brother acting as his representative. There is no evidence against him that he knew that the Whitings had placed lay bets on their own horses (if they did) or passed the information onto others for that purpose. The Panel failed to separate out the evidence so as to ensure that the only evidence relied on against Mr McKeown did not involve the passing of information to an owner or his representative which it was submitted was permitted by the Rules and thus not unlawful. The Panel and the Appeal Board failed to appreciate the critical difference between a conspiracy to supply inside information about the horse and a conspiracy to breach Rule 157 by informing the lay betters that the jockey will stop the horse if necessary to ensure that the lay bet wins.

110. The Panel and the Appeal Board failed to separate out the evidence so as to consider the races where Mr McKeown was riding for the owner it was said. In such rides the question was whether there was any evidence that the owner had laid his own horse or had passed information to others knowing that they

would lay his horse and if so whether there was evidence that Mr McKeown knew that this was to occur. In relation to contact there was no evidence that Mr McKeown had any relevant contact with Messrs Wright, Lovatt, Rook, Reeder or Wakefield other than the fact that he might have nodded to Mr Lovatt at the race course on 16 June 2004. That tends to suggest that Mr McKeown was not involved in a conspiracy with these persons. There was no evidence that he had any contact with Vinnie Whiting other than as the owner's representative of his brother Clive. There was thus no evidence that his contact with Vinnie Whiting was sinister or could support the allegation made.

111. There was no evidence that Mr McKeown had any contact with Clive Whiting other than as the owner of the horses that he rode. Thus there was no evidence that his contact with Mr Whiting was sinister or that it could support the allegation made. As to the Panel's finding of the friendship between Mr McKeown and Mr Whiting it was submitted that there was no evidence of what is the norm for jockey/owner relationships or that Mr McKeown's relationship with Mr Whiting was anything more than a jockey/owner relationship. There was no evidence that they had any business dealings other than as jockey/owner and the fact that Mr Whiting may have brought a horse from Mr McKeown. It was accepted that Mr McKeown provided informal managerial services to Clive Whiting in relation to his decision to remove his horses from Mr Blockley's yard. It was submitted that even if Mr McKeown had collaborated with Clive Whiting to remove his horses from the yard this occurred after the tenth suspect race and was therefore inconsistent with the alleged aims of the conspiracy. It removed the horses from the central source of inside information, Mr Blockley, and does not therefore prove that Mr McKeown was party to the conspiracy. It is not evidence of any inappropriate relationship between Mr McKeown and Mr Whiting. No reasonable Panel could have found that it was.

112. There was no evidence that Mr McKeown had any contact with Mr Blockley other than as the trainer of the horses he rode and thus no evidence that his contact with Mr Blockley was sinister or could support the allegation made.

113. There was no evidence of any contact at all between Mr McKeown and any one other than Mr Blockley in relation to seven of the eleven races – no evidence of any text messages or voicemail messages having been sent let alone of their content. That it was submitted suggested that Mr McKeown was not party to the conspiracy.

114. There was no evidence from which it was possible to infer that Mr McKeown had indicated that he intended to stop a particular horse. From that it follows that there was no evidence from which it was possible to infer that any gambler could have known that Mr McKeown had agreed to stop that particular horse. Thus no reasonable Panel could have placed any reliance at all on any of the contact evidence.

115. In relation to the betting evidence there was no evidence that Mr McKeown knew that a single one of the lay bets placed in this case had been made. The Panel reversed the burden of proof by concluding that Mr Whiting was not the

type of character who would have kept those activities secret from Mr McKeown. That approach would render all jockeys guilty of a breach Rule 247 if they happen to ride for an owner who is subsequently found to have been of a certain character type. There is no evidence that Mr Whiting had informed Mr McKeown of the fact of a single lay bet. Mr Whiting did not have a Betfair account to Mr McKeown's knowledge and allegedly hid his lay betting through the use of his associate's Betfair account. It was submitted that there were no admissions by Mr McKeown relevant to proof of any of the possible conspiracies or any breach of Rule 157 or 243. No other person made any admission of any fact relevant to Mr McKeown's case.

116. In relation to the four alleged non-trier rides, there was no evidence from the video recording upon which it is possible to conclude that Mr McKeown had agreed that he would not ride the horse on its merits to ensure that a lay bet would succeed. The consequence of the Panel's conclusion that Mr McKeown had not materially affected the result of a single race by a single place is that the evidence of the rides was not probative of the allegation of a breach of Rule 201(v) conspiracy to stop horses. (I deal with the detailed submissions in relation to the rides below). The Panel's finding that there was no evidence that Mr McKeown in fact altered the outcome of a race by a single place was evidence that he did not in fact do anything in furtherance of the conspiracy. To rely on such evidence to fill the gaps in the evidence missing elsewhere was perverse, unfair and contrary to natural justice.

117. It was submitted that the Panel failed to identify and separate out the evidence in relation to each of the eleven rides. Of particular importance was its failure to identify the nature of the inside information allegedly passed on to the betters in relation to any particular race because it is only when the information has been identified that conclusions can be reached as to who was responsible for passing the information to those gambling. If for example the inside information is that the horse has been mis-shod in respect of both its front hooves as occurred in Skip of Colour a strong inference should be drawn that the information was provided by the trainer or farrier rather than the jockey. No jockey would knowingly race at speeds of 40mph a horse that had been mis-shod. No jockey who had dishonestly conspired to stop his horse if necessary would need to resort to such dangerous a practice: he would simply stop the horse.

118. Only by examining the evidence as to who was responsible for passing which information to whom was it possible to reach a conclusion as to whether the passage of the information in such circumstances was in breach of the Rules of Racing. This did not occur.

119. In six of the eleven races the lay bets were placed on horses that neither Mr Whiting nor any of his associates owned. (I interpose to note that in three of those races the horse was owned by Joanna Hughes and that in respect of two of those, races three and five, the Panel found that it was admitted that in reality the owner was Mr Clive Whiting himself and that he was therefore in breach of Rule 247.) For there to be any breach of the Rules of Racing at all in relation to those six rides it would be necessary to prove either that inside information was provided for £100 or more or on a frequent basis (see Rule

243) or that the inside information was that the jockey had agreed to stop his horse (Rule 157).

120. It was submitted that there was no evidence of reward being paid for any of the information or of the type of frequency required by Rule 243. In respect of five of the six horses there was no allegation that the jockey had agreed to stop the horse (the exception being Smith N Allen Oils). Mr McKeown did not ride three of those horses. If the Panel and Appeal Board had correctly analysed the issues and the evidence it could only have concluded that in respect of five of the eleven horses no breach of the Rules of Racing had occurred at all. That would have driven a significant hole through the coherence of the defendant's case against Mr McKeown.

121. In relation to Only If I Laugh and Hits Only Money there was no contact at all between Mr McKeown and Clive Whiting. In the absence of such evidence no reasonable Panel or Appeal Board could have concluded that Mr McKeown had agreed to stop his horse or that he had communicated such agreement to those gambling. Where inside information can be identified in relation to the eleven rides it is information about the horse not about the jockey. Mr Blockley the trainer was common to all eleven rides. Mr McKeown was not: he only rode eight of them. No allegation was made about the other jockeys in the other three rides. That establishes that the jockey was not requisite to the conspiracy: the trainer was.

122. In relation to reward there was no evidence of reward and no evidence upon which any conclusion that Mr McKeown had received any reward could reasonably be based. The only pieces of evidence identified by the defendant in the Case Summary on which the Panel was invited to conclude that Mr McKeown had received reward were (1) that he had admitted in interview that he received gifts from Clive Whiting and (2) that he was given rides from Mr Whiting's horses against the wishes of Mr Blockley. As to the first it was clear that Mr McKeown was talking about a success fee and not a payment for the supply of information. In any event it is not contrary to the Rules of Racing for Mr McKeown as a jockey to receive rewards for the provision of information to Mr Whiting as an owner.

123. In relation to the Appeal Board's conclusion that the Panel's finding of substantial reward was by way of an inference which was almost inevitable, it was submitted that inferences may only lawfully be drawn from the evidence and even then only when the guilty inference is plainly predominant. It was submitted that there was no such evidence capable of supporting the inference that reward had been received at all let alone that it was substantial. For the Panel to have found the reward to be substantial and for that finding to be endorsed on appeal is perverse and contrary to the evidence. It is well known that the defendant has a policy that an inference of reward can be drawn in the absence of evidence of reward It was submitted that such as policy is wrong in law.

Conclusions on the challenge to the Panel's factual findings

124. It is helpful at this stage to stand back and put these detailed criticisms in the context of the Panel's critical findings. It is important not to lose sight of the wood for the trees. The Panel found that (i) the pattern of lay betting led to the inference that it was inspired by inside information; (ii) a flow of inside information starting at least with Mr Blockley caused the lay bets to be struck; (iii) Clive Whiting was involved in the lay betting; (iv) Mr McKeown passed inside information to Clive and Vinnie Whiting and if asked to their friends; (v) Clive and Vinnie Whiting used Mr McKeown's inside information to cause lay bets to be placed; (vi) Mr McKeown was aware that the inside information he provided was being used for lay betting; (vii) Mr McKeown gave extra assurance and incentive for the lay betting that he would if necessary ride to ensure that bet succeeded; (viii) Mr McKeown did so ride in four races; (ix) Mr McKeown was fully implicated in the lay betting and received substantial reward. On the basis of these findings the Panel found that Mr McKeown was in breach of Rule 201(v) in two ways: (a) by supplying inside information relating to horses knowing that it would be used to place lay bets and (b) by assuring the gamblers that he would if necessary ride to ensure that their lay bets succeeded.

125. On behalf of Mr McKeown Mr Winter did not seriously challenge the first three of those findings. Indeed to the contrary he submitted in the Part 8 Details of Claim that: "What the evidence does establish is that Mr Blockley was the source of and the reason for the lay bets in this case. He is the only common denominator in relation to the all of the races and the bets. When Mr Clive Whiting took his horses away from Mr Blockley the claimant remained his jockey but the lay bets on those horses stopped. No reasonable Panel could have concluded otherwise than that Mr Blockley was behind the betting in this case." In relation to Skip of Colour Mr Winter further submitted that the evidence proves beyond doubt that the horse had been deliberately mis-shoed and that Mr Blockley must have known that to be the case and that the only reasonable inference that can be drawn from the evidence is that some-one communicated the fact of the mis-shoeing to Clive Whiting as a result of which £36,000 was risked by laying it and that the only person who could have communicated that information was Mr Blockley. In relation to Only If I Laugh it was submitted that: " It is reasonable to infer that any information about the actual lack of staying power of this horse would have come from Mr Blockley so that Mr Whiting could recoup some or all of the costs of acquiring the horse from the successful lay bet. The only reasonable inference in relation to this race is that there was some information about the condition or fitness of the horse, known to Mr Blockley, that justified the lay bet".

126. Thus while Mr Winter did of course vigorously challenge the reasonableness of the Panel's finding that Mr McKeown was the source of the inside information used to enable the lay bets to be placed, there was no challenge to the reasonableness or legitimacy of the Panel's findings that the pattern of lay betting led to the inference that it was inspired by inside information, that a flow of inside information starting **at least** with Mr Blockley caused the lay bets to be struck and that Clive Whiting was involved in the lay betting. Nor

was it challenged that Mr McKeown passed information in relation to horses owned by Clive Whiting to Clive and Vinnie Whiting and, if asked to their friends. (In fact it was found that he passed information to the Whitings about horses that were not owed by Mr Whiting as well as about those that were.)

127. On Mr Winter's restrictive interpretation of Rule 201(v) the critical questions in assessing the reasonableness of the Panel's finding that Mr McKeown was guilty of a breach of Rule 201(v) in the second way found by the Panel (that is to say by assuring the gamblers that he would if necessary ride to ensure that their lay bets succeeded) are whether a reasonable Panel could have found that (i) he gave extra assurance and incentive for the lay betting that he would if necessary ride to ensure that the bets succeeded and (ii) he received substantial reward for his involvement in the conspiracy. If the answer to those questions is yes, the Panel would have been entitled to find Mr McKeown guilty of breaches of Rule 201(v) even on the restrictive interpretation of that Rule contended for by Mr Winter. Indeed that would be the case even if the answer to the second question is no since a positive answer to the first question would involve a fraudulent agreement by Mr McKeown to breach Rule 157.

128. In answering these questions the Panel relied on inferences which it drew from a combination of its first three findings (i), (ii) and (iii) set out in paragraph 124 above and its findings that Mr McKeown deliberately failed to ride his horses in the four non-trier races on their merits and disguised what he was doing by the use of air shots. As it seems to me if the latter findings were not perverse, were open to a reasonable tribunal to make, and were not arrived at unfairly, it cannot be shown that it was not reasonably open to the Panel to answer those two questions in the affirmative as it did.

129. Assuming that the Panel was entitled to reach the findings it did on the non-trier races, the factual position (as it was entitled to find) against which it had to consider those two questions was as follows. There was a dishonest conspiracy involving the Whitings and the gamblers whereby substantial and exceptional sums of money were risked in placing lay bets on eleven horses all of which were trained by Mr Blockley, eight of which were owned by Mr Whiting (two of them in the name of Mr Blockley's partner Ms Hughes) and six of which were ridden by Mr McKeown. What caused the lay bets to be placed was not luck or study of form but rather a flow of inside information which started at least with Mr Blockley. In four of those races, in which one of the horses ridden by Mr McKeown was owned by Mr Whiting, one was registered in the name of Mr Blockley's partner but admitted to be owned by Mr Whiting and one was owned jointly by Mr Whiting, Mr Blockley and Mr Wright, Mr McKeown breached Rule 157 by failing to ride the horses on their merits.

130. In my judgment in those circumstances it would be wholly unrealistic to suggest that it was not open to a reasonable Panel to conclude that the reason why Mr McKeown failed to ride those horses on their merits was so as to protect the lay bets of the gamblers. No other explanation for the breaches of Rule 157 was suggested by Mr McKeown to the Panel and a reasonable Panel would in my judgment have been entitled to discount any alternative

explanation as wholly unlikely. It would involve findings that (a) by pure coincidence on four of eleven races where substantial lay bets were placed on the basis of inside information the jockey deliberately failed to ride the horses to their merits without any knowledge of or involvement in the lay betting and (b) the lay bets were placed with no knowledge that the jockey was going to deliberately fail to ride the horses on their merits and on occasion disguise his lack of effort with air shots which is in fact what he then proceeded to do.

131. If that is right, it would also follow in my judgment that a reasonable Panel would have been entitled to draw the further inference that Mr McKeown informed the gamblers, whether directly or indirectly through the Whitings and/or (in the case of the eleventh race in which it held that Mr Blockley was also involved in the deliberate non-trying) Mr Blockley matters not, that he would if necessary seek to protect the lay bets which he knew were to be or had been placed. As the Appeal Board held, the fact that Mr McKeown rode as found by the Panel is in all the circumstances clearly probative of some prior arrangement. That is in my view a complete answer to Mr Winter's submission that there is no evidence that Mr McKeown knew that the lay bets were to be or had been placed. The Panel was in my view reasonably entitled to infer the existence of such knowledge as part of the inference to be drawn from the combination of its findings that lay bets were placed in reliance on inside information involving Clive Whiting and that Mr McKeown deliberately failed to ride horses on their merits.

132. It further follows in my judgment that a reasonable Panel would have been entitled to draw the inference that Mr McKeown probably received a substantial reward for his efforts. The gamblers stood to make a lot of money if their bets succeeded, as they did, and to lose even more money if they failed. By contrast Mr McKeown stood to lose his livelihood if his conduct was detected by the authorities. The Appeal Board was in my view quite right to say that on those findings the inference of reward would be virtually inevitable. Mr Warby relied on the facts that Mr McKeown was given rides by Clive Whiting despite the fact that he did not consider him to be in the top 20 jockeys and contrary to Mr Blockley's advice and that Mr McKeown accepted that he had received higher than average payments from Mr Whiting. He submitted that the Panel was entitled to reject his evidence that this was for winning. However the Panel did not base its finding that he received substantial rewards on those facts but rather on the inference which it held it was legitimate to draw. I have no doubt that that was a reasonable inference even in the absence of those facts.

133. In the Details of Claim it was submitted that it is well known that the defendant has a policy that an inference of reward can be drawn in the absence of evidence of reward. That policy was said to be wrong in law. The implication appeared to be that the findings of the Panel and the Appeal Board in this case were based on implementation of that policy. The existence of such a policy was denied by Mr Craig on behalf of the defendant. This was unchallenged evidence and there was no evidence that either body applied such a policy. I therefore reject the submission. In my view the inference was a perfectly reasonable one to draw from the findings of fact which the Panel

made, always assuming that the findings were themselves reasonable ones for the Panel to make.

134. The reasonableness of the Panel's findings would be further supported in my view by their findings (assuming that they were themselves open to a reasonable Panel to make) that Mr McKeown had a particular knowledge of Blockley- trained horses that he rode both in work and in races, both owned by Clive Whiting and by others, that he would pass this information on to the Whitings (who regularly went to Mr Blockley's yard and pressed him for it) and even if asked to their friends, that that information was used by the Whitings to cause lay bets to be laid, and that Mr Mckeown's relationship with Clive Whiting extended to friendship, business dealings and a role of adviser and maybe even informal manager. These findings were relied on by the Panel to draw the inference that Mr Mckeown was fully aware that his input about the chances of horses he rode in the suspect races was being used for lay betting organised by Clive Whiting and thus that he was also in breach of |Rule 201(v) in the second way found by the Panel namely by supplying inside information relating to horses knowing that it would be used to place lay bets. I address the reasonableness of the latter inference later.

135. However for present purposes I record that in my view while the reasonableness of the Panel's findings that Mr Mckeown gave extra assurance and incentive for the lay betting that he would if necessary ride to ensure that the bets succeeded and that he received substantial reward for his involvement in the conspiracy is given added support by these additional findings it is not dependent on them. Thus even if the Panel was not entitled to find that Mr McKeown was involved in the conspiracy by supplying horse related information for substantial reward knowing that it would be used for lay betting it was in my view entitled to find that he was involved in it by giving for substantial reward assurances that he would if necessary ride so as to protect the gamblers' lay bets, if the challenge to the reasonableness and fairness of its findings as to Mr McKeown's breaches of Rule 157 by deliberately not riding horses on their merits fails.

136. On that hypothesis, it would not necessarily follow that the Panel's additional findings that Mr McKeown was involved in the conspiracy by supplying horse-related information to the gamblers knowing that it was to be used for placing lay bets and thus was in breach of rule 201(v) were reasonable and fairly arrived at and based on a correct interpretation of rule 201(v). However two points arise. First, the latter question would be largely academic. Involvement for substantial reward by a jockey in a dishonest conspiracy to place lay bets by deliberately failing to ride horses on their merits so as to protect the lay bets and informing the gamblers accordingly, particularly where the owner was involved in at least some of the lay bets, can hardly be less serious than participation by a jockey in a conspiracy to place lay bets on inside information in the form of passing on inside information related to the condition of the horses. Mr Winter accepted that such conduct would constitute a breach of Rule 201(v).

137. Second and in any event, in addressing the question whether Mr McKeown was also involved in the supply to the gamblers (directly or indirectly through

the Whitings) of horse related information knowing that it would be used for the purpose of lay betting, a reasonable Panel would in my judgment plainly be entitled to consider the evidence on the basis that any denials of guilt by the jockey (for example on the question whether he knew that information supplied by him was being solicited and used for the purpose of placing lay bets) might well be untrue given the finding that he was of guilty of the more serious conduct. It would also be entitled to draw adverse inferences on the questions of reward and the supply of information.

138. In these circumstances it seems to me sensible to start by considering Mr McKeown's challenge to the Panel's findings in respect of the four allegedly non-trier races.

The challenge to the Panel's findings and Appeal Board's approach to those findings in relation to the 4 alleged non-trier races

Only If I Laugh

139. Only If I Laugh ran in the 2. 45 pm on 16 June 2004 at Southwell, finishing third out of a field of nine. The horse had been sold by Mr Blockley to Mr Whiting. The lay bets were placed against the horse coming first and would thus succeed unless it came first.

140. This was the first of the eight impugned races in which Mr Mckeown rode and the first of the four in which it was alleged by the Defendant and found by the Panel that Mr Mckeown failed to ride his horse on its merits in breach of Rule 157.

141. Rule 157 provides that: "Where, in the opinion of the Stewards or the Stewards of the Jockey Club, a Rider has intentionally failed to ensure that his horse is run on its merits the Rider shall be deemed in breach of this Rule and guilty of an offence."

142. Rule 155 defines what is meant by running a horse on its merits. It provides that: "Every horse which runs in the race shall be run on its merits. For a horse to run on its merits the Rider must take all reasonable and permissible measures throughout the race, however it develops, to ensure the horse is given a full opportunity to obtain the best possible placing:

(i) It shall be the duty of the Trainer to give or cause to be given to the Rider of any horse in his care such instructions as are necessary to ensure the horse runs on its merits

(ii) Where any Rider is found to be in breach of Rule 157, the Trainer of the horse in question shall be deemed to be in breach of Sub-Rule (ii) and guilty of an offence unless the Trainer satisfies the Stewards or Stewards of the Jockey Club that the Rider was given by or on behalf of the Trainer instructions which complied with Sub-Rule (i), and that the Rider failed to comply with them.

(iii) Where, in the opinion of the Stewards or the Stewards of the Jockey Club, a Trainer has sent any horse in his care to race with a view of schooling or conditioning the Trainer shall be guilty of an offence. Where a Rider is found in breach of Rule 157 because he was found to have been schooling and conditioning the horse, the Trainer shall be deemed guilty of an offence under Sub-Rule (ii) above unless he satisfies the Stewards or the Stewards of the Jockey Club that the Rider was given by him or on his behalf instructions which complied with Sub-Rule (ii) and that the Rider failed to comply with them"

The Panel's findings

143. The Panel made the following findings adverse to Mr McKeown in respect of his riding of Only If I Laugh:

(1) The horse was strongly restrained by Mr McKeown when the gates opened

(2) That caused the horse to rear

(3) The restraint appeared more vigorous than was required by the riding instructions which Mr Blockley said were to drop him out, settle him and come with a late run.

(4) (By inference) Mr Blockley's evidence that the horse had a mouth like an iron bar was preferred to Mr McKeown's evidence that it had a light mouth, which was rejected as an explanation for the strong restraint.

(5) The clearly objectionable feature of the ride came about one and three quarter furlongs from the finish, when Mr McKeown was about four lengths adrift of the eventual winner. At this point he delivered an air shot.

(6) In relation to the air shot (i) Mr Mckeown pretended to deliver a back-hander with his whip but instead simply brought the whip down past the horse's quarters. (ii) What was particularly revealing for the Panel was that he was holding his whip at about the mid point of its length – i.e. half its length could be seen sticking out of the front of his right hand. (iii) Mr McKeown's assertion that he had made light contact was rejected. (iv)There was no honest explanation for this piece of deception at a critical point in the race. (v) When he did use the whip to make contact three times around the one furlong marker (a) he did so with a different action to the one he used for the air shot and (b) by this stage the winner was gone beyond recall and the lay bets were safe.

144. There was one allegation against Mr McKeown in respect of this race which the Panel rejected. He had been criticised by the defendant for having manoeuvred towards the middle of the track early in the straight so as to keep his horse behind another runner. The Panel viewed this as questionable but because it did not have the full range of recordings to review did not conclude that this feature of the ride showed a deliberate intention to lose.

The Appeal Board's findings

145. The Appeal Board did not address each of the four races in which the Panel concluded that Mr McKeown was in breach of Rule 157 separately. It dealt with them compendiously and reached the following conclusions:

> "15. Rule 157. The case involved allegations of dishonesty. Further, and most unfortunately, some extra video recordings of the four particular races had not been preserved nor had some tape recordings of stewards' enquiries, held after three of the races. Extra caution was thus called for before the Panel reached adverse conclusions in respect of those four races. The Panel directed itself correctly and fairly at paras 13-16 of the Reasons and its approach was not specifically questioned. Mr Winter did, however, submit that the available evidence was simply not cogent enough to sustain findings of breaches of Rule 157 and it was unfair in view of the missing evidence, to have found that it was
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> 16. At paras 32-35 the Panel explained its conclusions that the appellant was in breach of Rule 157 in the four races. It reached the conclusions after studying the video evidence "in great detail with real care, and were sure that this was an air shot" (para 32). The reference to an air shot was because the Panel found that the appellant had pretended to use his whip but was, in effect, playacting. These paras reveal that the Panel was only prepared to make such adverse findings when it was sure of what it saw and, if less than sure, gave the appellant the benefit (see for example 33). That was entirely fair, however, there remains the question whether a reasonable Panel could have been sure on the available evidence. The Panel Chairman, Mr Timothy Charlton QC is an experienced Panel Chairman. Perhaps, of even more importance is that he had the assistance of two experienced and qualified Panel members. Both Panel and Board viewed and reviewed the video recordings. All that it is necessary to note is that the Board saw no reason in its reviewing capacity, **or at all**, to interfere with the Panel's findings in respect of these four rides.(emphasis added)
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> [I interpose to observe that it appears from this passage that the Board, including as it did two extremely experienced stewards, not only viewed the videos more

than once, but concluded from that viewing not just that the Panel's findings were ones which were open to a reasonable Panel on the evidence but ones with which the Board itself agreed. I also note that not only were the Board members applying in sureness a high test (and arguably higher than was necessary) but their conclusions are inconsistent with them having formed the view that it is simply not possible to tell from the surviving video evidence what is going on or that the footage is not clear enough to have entitled or enabled a reasonable Panel with years of experience to conclude that Mr Mckeown was not riding the horses on their merits so that the allegation did not even pass the threshold of a prima facie case which would have entitled the Panel to reach its own subjective view of the video evidence]

17. In his written skeleton Mr Winter seemed to suggest that it was, in any event, "fundamentally unfair" of the Panel to have found the appellant did not ride the horses on their merits and, in particular, to have delivered air shots with his whip, in the absence of the missing videos and or transcripts of the stewards' enquiries. We reject that submission. The Panel directed themselves correctly. In the end, it was a question of looking at the video recordings with all the necessary caution and reminding itself of the possibility that a different camera angle might, in theory, throw a different light on the matter. Clearly the Panel did this (see in particular para 15 and the last 2 or 3 sentences of para 32). If Mr Winter is correct, it would follow that however clearly an event or happening was shown on camera, the existence of an unavailable further film, would prevent a safe conclusion being reached. That is plainly wrong. It is a matter to be determined on the quality of the evidence in each case. Having seen the recordings for ourselves and studied the Panel's clear explanations of its findings in respect of these four races, we do not consider there was any unfairness."

Mr Winter's Submissions

146. In the Part 8 Details of Claim it was submitted that the Panel's conclusion that Mr McKeown was guilty of a breach of Rule 157 on this race was unjustified by the evidence.

147. The following points were made in relation to the alleged restraint of the horse at the start. It was submitted that, the horse being a five furlong sprinter in a

six furlong race, he needed to be restrained to prevent him from burning himself out, as in fact happened. Even though he was restrained by Mr McKeown so as to bring him under control, it was said to be obvious from the video that the horse was exceptionally over eager at the off and was properly restrained by Mr McKeown as he had been instructed to control him and conserve his energy. This is said to have been further underlined as the horse made it way down the first furlong where the video clearly showed that he was running keen and trying to accelerate. Had Mr McKeown truly been trying to lose the race it was submitted that he would have let the horse sprint away, burn himself out and be overtaken at the four to five furlong marker. This latter submission does not seem to me to reflect the correct approach on an application such as this. While it might have been a legitimate submission at the Panel hearing in support of an attempt to persuade it to reach a finding favourable to Mr McKeown, it does not in my view reveal that it was perverse for the Panel to reach an adverse finding. The fact that there might have been another, even another more effective, way of losing the race does not establish that it was perverse to conclude on the basis of the video evidence that it shows that he was trying to lose it or to avoid the risk of winning it in the way the Panel found he was trying to avoid winning it.

148. In relation to the allegation which was rejected by the Panel, namely that Mr McKeown manoeuvred towards the middle of the track early in the straight so as to keep his horse behind another runner, it was submitted that it is obvious from the video that he did no such thing: "All jockeys knew that the all weather course at Southwell at that time was particularly slow and difficult for horses on the left hand side of the track (as raced) at that point. The claimant, along with <u>every single other jockey</u> raced over into the middle of track. He did not do so to go behind another horse. At the point that he made the decision to go right he was blocked ahead by two horses. He moved to the right in order to overtake the horse in front which he then did." Although (given that the allegation was not found proved) this submission is irrelevant except to the challenge based on unfairness and bias, it is in my view an example of one which is based on assertion as distinct from evidence.

149. In relation to the air shot it was said that Mr McKeown could not remember the race at all when interviewed several years later and that he cannot refresh his memory from what he said to the Stewards' Inquiry because the record of that inquiry had been destroyed. He had said in evidence that he thought he had made contact with the horse. It was submitted that it is impossible to conclude whether he did or not make contact with the horse from the video. Close analysis of the video was said to demonstrate that at the time the whip was used (or not) his horse was right on the rear hooves of the horse in front. It could have been dangerous for the horse to accelerate at that moment. It is possible that Mr McKeown changed his mind about the appropriateness of using the whip or only used it gently because of the presence of the horse in front of him. It is likely that the other camera angles would conclusively resolve this issue but they have been destroyed. It was further submitted that the Stewards following their enquiry into the race, having viewed the video which included the various camera angles and knowing about the lay betting

that had occurred, accepted Mr McKeown's explanation for the race and did not conclude that he had used an air shot at all.

150. It was submitted that it was not open to the Panel to conclude that Mr McKeown had used an air shot in the absence of the other camera angles. The rear scout angle in particular would have clearly demonstrated whether the whip connected, did not connect or was deliberately not used because of a change of mind. In the absence of that evidence it was not possible fairly to conclude that Mr McKeown used an air shot. This submission mirrored the more extensive submissions to which I have already referred as to the unfairness of making findings adverse to Mr McKeown on the non-trier races in the absence of the destroyed video footage and Steward Enquiry transcripts and without the Defendant having called an expert who could have been cross examined by Mr McKeown.

151. In relation to the Panel's finding that Mr McKeown had held the whip at the mid point rather than at the top, this was not challenged as being either incorrect or a finding which it was not entitled to make on the evidence. It was submitted that Franny Norton riding the winner O Be Bold held his whip in a similar position and that whips are frequently grasped down the shaft so as to reduce the risk of dropping them. Mr Warby indicated at the hearing that the Defendant does not accept that the fact that Mr McKeown was holding his whip in the middle at this point in the race is consistent with normal practice. This was an example of a submission made by Mr Winter which was unsupported by any expert evidence and which it was thus impossible for me accept as demonstrating that the Panel's findings were perverse.

152. Attention was drawn to the fact that the video misses large sections of the end of the race which was submitted to be a further unfairness in relation to finding Mr McKeown guilty on the basis solely of the video evidence. Reliance was placed on the fact that the video showed Mr McKeown using the whip three times once he was clear of the horse that he was overtaking. In those circumstances it was submitted that there is no basis upon which a reasonable disciplinary Panel could have concluded that Mr McKeown had ridden this race in breach of Rule 157 let alone that the evidence demonstrated that he had joined a conspiracy to stop horses in order to secure the success of lay bets. This submission did not seem to me engage with the Panel's findings which positively relied on the effort shown by Mr McKeown at the later stage of the race because of its opinion that by that stage the winner was gone beyond recall and the lay bets were safe and the contrast with the air shot at the earlier stage which in its view was a critical stage of the race.

153. Arrangements had been made for me to see the surviving video footage of the four alleged non-trier races (and the race in which Mr Winter submitted that Skip of Colour had been deliberately mis-shod by Mr Blockley) in court on a television screen. On enquiry it emerged that the Panel and Appeal Board had viewed the footage on a much larger screen in a viewing room at the defendant's offices in Holborn. It seemed to me that, in view of the central importance of Mr McKeown's attack on the Panel's findings and Appeal Board's approach to those findings, and in particular the submission that it was simply not open to either body to uphold the non-trying allegations on the

basis of the footage, it was right that I should have the opportunity of seeing the footage in the same circumstances as the Panel and Appeal Board.

154. Accordingly on the third day of the hearing the proceedings were adjourned to the Defendant's viewing room where both parties were given the opportunity to have the video footage shown at the direction of their Leading Counsel at speeds and replays of their choosing. As it turned out I found this to be of great assistance in that for whatever reason I found certain aspects of the detail easier to see on the large screen than on the smaller television screen which the parties arranged to be left in my chambers after the hearing and on which after the hearing I replayed the footage of the allegedly non-trier races. The technical arrangements for replaying at different speeds and pausing specific bits of the footage were also significantly better at the defendant's offices where an experienced official operated the controls and responded to requests from Mr Winter, Mr Warby and me to play particular passages at prescribed speeds. When I came to replay the footage on my own I found that apart from the difficulty of controlling the speed at the same time as concentrating on what was on the screen the quality of the footage for whatever reason in some cases made it harder to see particular aspects than my notes recorded had been the case at the viewing in the defendant's offices.

155. Neither party had applied for permission to adduce expert evidence at the hearing. Accordingly it was left to Mr Winter and Mr Warby in turn to draw to my attention such parts of the video footage as they wished and to make submissions as to what could and could not be seen on the screen and the significance thereof. On several occasions it struck me that Mr Winter's submissions strayed into the territory of expressing opinions or asserting facts for which factual or expert evidence would have had to be adduced in order for me to have a legitimate basis for accepting them.

156. At the viewing Mr Winter supplemented his written submissions by making the following additional oral submissions.

157. He submitted that no reasonable Panel could have favoured Mr Blockley's evidence that the horse had a mouth like an iron bar to Mr McKeown evidence that it had a light mouth. That was because Mr McKeown's evidence was consistent with what he had told the Stewards enquiry immediately after the race whereas Mr Blockley's evidence was inconsistent in that regard. Indeed this was cited by Mr Winter as an example of at the very least apparent bias in favour of Mr Blockley displayed by the Panel by preferring his account over that of Mr McKeown when no reasonable Panel could have done so. This submission was illustrative of what struck me as a general theme underlying Mr Winter's submissions on bias, namely that it necessarily follows from the fact that the Panel made findings of fact which no reasonable Panel could have made that it must have been guilty of actual or apparent bias. As appears below in my view that submission is a non sequitur.

158. The record of the Stewards enquiry records that they inquired into the running and riding of Only if I Laugh which finished third beaten by eight and a half lengths. "They interviewed the rider and trainer. The rider stated that Only If I Laugh mainly runs over five furlongs and that today his instructions were to

ride the gelding to get the trip of six furlongs. He added that the gelding has a light mouth and was difficult around the bend and subsequently hung right in the home straight when asked to quicken from mid division. He further stated that Only If I Laugh did not appear to stay, finding nothing in the final stages. The trainer confirmed these instructions, adding that he was satisfied with his rider's efforts, and stating that the gelding would appear better suited by running over five furlongs in future. Having viewed the video recording of the race, the stewards noted these explanations and took no further action."

159. As appears from the record, although Mr Blockley was recorded as confirming Mr McKeown's account of the instructions which he had given to him, he was not recorded as having agreed with Mr McKeown's comment that the horse had a light mouth. Moreover Mr McKeown, who was given the opportunity to cross examine Mr Blockley and did ask a few questions of him, did not challenge his evidence to the Panel that the horse had a mouth like an iron bar or suggest that that evidence was inconsistent with what Mr Blockley had told the Stewards enquiry.

160. Mr Winter relied on the opinion expressed in the Racing Post's pre race verdict that: "Only If I Laugh is the clear pick of the weights and has gone to a stable that does well on sand but he is still to prove this is his trip and at the likely prices he's passed over in favour of OBE BOLD who stays this trip, goes on the ground, has a good chance at the weights and is from a yard back among the winners." In an earlier section the Racing Post's comment on Only If I Laugh was: "Fibre sand winner who has good chance at weights on first run for new yard but still below best last time and still to prove stamina over this trip; may not be one for short odds over this trip."

161. Mr Winter submitted that it is essential for a jockey riding a horse which is better at shorter races to restrain the horse at the start, thereby conserving its energy and producing speed towards the end if he wants to put himself in any chance of winning. He submitted that it was perverse of the Panel to fail to consider the horse's record and the view of the market. Mr Warby pointed out that the Racing Post is not the market. The market placed Only If I Laugh second favourite with O Be Bold as the favourite.

162. Mr Winter relied on a post-race statement in the Racing Post that Only If I Laugh "took second place a furlong out but hung a right and looked ungenuine." He submitted that this supports Mr McKeown's explanation of the race because it commonly happens if a horse is tired because it does not have the stamina for the distance that it may become uncomfortable leading with a particular leg and hangs or drifts to one side or the other. This was criticised by Mr Warby as an example of Mr Winter in effect seeking to give expert evidence under the guise of submissions.

163. Mr Winter submitted that by the time of the alleged air shot the race was already clearly lost, Only If I Laugh being 4 lengths adrift from the eventual winner. Since the lay bets were against the horse coming first, there was thus no need for an air shot and the concomitant risk to Mr McKeown's career if it were to be detected. He added that if there had been an air shot the horse would still have received the threat of the whip which he submitted is what

really causes a horse to go. He linked that submission with the further submission that Only If I Laugh accelerated at that point. The purpose of the submission appeared to be to support the submission that if the whip had connected the added "extra bit" of acceleration caused thereby could not have enabled the horse to catch the front runner.

164. I address the submission that the horse accelerated in my account of my impressions on viewing the video footage. The remaining submissions referred to in the previous paragraph are in my view examples of submissions which were in reality no more than bear assertion on the part of Mr Winter unsupported by any expert evidence. Mr Warby on behalf of the defendant did not accept that at the time of the alleged air shot the race was already clearly lost and I possess neither the requisite knowledge of the respective form and speed of the two horses nor the experience of the distance required on this or indeed any other course to enable a horse such as Only If I Laugh to catch a horse such as O Be Bold to enable me to form a reliable view on the matter, still less to reach the definitive conclusion that no reasonable Panel including members with experience and knowledge of racing could have failed to conclude that by the time of the alleged air shot the race was already clearly lost.

165. This seemed to me one of a number of examples of submissions made by Mr Winter in criticising the findings of the Panel which, at the risk of mixing metaphors, fell at the first hurdle of being unsupported by evidence. Mr Winter was unable to identify any evidence to support his assertion and was in effect forced to submit that it was so obvious from the video itself as to require no evidence; a visual variant of the principle of res ipsa loquitur, namely res ipsa videtur: the video speaks for itself or the proposition is self evident on the video. While in principle one could image a situation in which such a proposition might be correct, for example if Only If I Laugh had been four lengths adrift a yard from the finish line, this was in my view clearly not such a situation. By the same token there was no evidence to support Mr Winter's submission as to the respective effect on acceleration of the threat of a whip and the actual impact of a whip, let alone any evidence to support the assertion that the "extra bit" of acceleration caused by the impact of the whip had it occurred could not have enabled the horse to catch the front runner.

166. Mr Winter submitted that the Panel's finding that there was no honest explanation for the air shot was flawed in that it failed to consider alternative explanations whether honest or dishonest such as a conditioner ride or for handicap purposes. On being pressed he maintained this submission even though no alternative explanation had been proferred by Mr McKeown to the Panel let alone one involving a breach by him of the prohibition in Rule 157 against conditioner rides.

167. In my judgment that submission is misconceived. The premise of the submission is that even if the Panel was entitled to find that there was an air shot it was perverse of it to regard its finding as evidence of deliberate deception from which adverse inferences could be drawn as to Mr McKeown's motives and involvement in the conspiracy. This in my view is unrealistic. It involves the proposition that it was perverse of the Panel to

ignore a theoretical alternative explanation for the air shot in circumstances where no alternative explanation was proferred by way of evidence or submission by Mr McKeown to the Panel, and that it was perverse not to consider whether Mr McKeown had breached Rule 157 in some other way about which he was not telling the Panel. Moreover the submission looks at the Panel's finding on the air shot in isolation. In my view this is not justified. The Panel was entitled, in considering the inferences to be drawn from its finding of the air shot, to take into account its other finding on the race that Mr McKeown had restrained the horse at the outset of the race more vigorously than was required by his riding instructions. The Panel would in any event in my opinion have been entitled to reject a non-proferred alternative explanation for why Mr Mckeown resorted to deception given the coincidence to which I refer below of the significant lay betting which was placed on the race on the basis of inside information. This issue would in any event fall to be considered not at the initial stage of deciding from the video whether Mr McKeown was pretending to hit the horse when he was not but at the subsequent stage of decidinfg what inferences could be drawn from his having done so.

168. In relation to the three admitted uses of the whip by Mr McKeown at around the one furlong marker (with a different action to the one he used for the air shot) and the Panel's finding that by this stage the winner was gone beyond recall and the lay bets were safe, Mr Winter submitted that this showed that Mr McKeown was at that stage doing his best to try and catch Franny Norton's horse. However he asserted that one did not need to be a professional sporting Tribunal to know that none of the other horses including Only If I Laugh ever had a chance of catching it including at the time of the alleged air shot.. He described it as a total impossibility and preyed in aid the fact that before the race Franny Norton had been saying in the weighing room and all round the racecourse: "This horse[i.e. O Be Bold which in the event won the race] is going to win by a mile."

169. In my view this was pure assertion which, unsupported by expert or factual evidence, I was wholly unable to accept. It had two constituent parts. As to the proposition that it was always going to be impossible for Only If I Laugh or any of the other runners to win the race, that would require a knowledge of the relative form and qualities of the horses of which there was no evidence. (One might also have expected it to be reflected in far more one sided odds on O Be Bold than was the case). As to the time of the alleged air shot, it would require expert evidence as to the unlikelihood of (a) any horse in any race and (b) this horse in this race making up a four and a half length gap at that stage of a race. In any event in relation to the three uses of the whip at the one furlong marker, Mr Winter's submission on analysis supported rather than undermined the Panel's conclusion that Mr McKeown's use of the whip three times at that stage, coming at a time when he could not catch O Be Bold, was not inconsistent with and thus incapable of proving the perversity of its finding that at an earlier stage his use of an air shot was designed to disguise an attempt to avoid coming first at a time when he considered that to be a real possibility.

170. In relation to the allegation which the Panel found not proved that Mr McKeown manoeuvred towards the middle of the track early in the straight so as to keep his horse behind another runner in order to ride deliberately slowly, Mr Winter submitted that even though the Panel rejected the allegation its finding that it was nonetheless questionable was unreasonable and demonstrated another unreasonable view taken by the Panel.

171. Mr Winter repeated in the context of this race the written submission made generally in relation to all four alleged non-trier races that the Panel's finding(as he described it) that Mr McKeown did not actually affect a single place is determinative in showing that the evidence of the races does not prove participation in a conspiracy to stop. In my view in so doing Mr Winter critically misdescribed the Panel's findings on this point. It did not make a positive finding that Mr Mckeown did **not** affect the placings in any of the races. Rather it said it did not make a finding that he **did** affect the placings. That is self evidently a different finding and is not inconsistent either with the placings in fact having been affected or, which is critical, with Mr McKeown having thought that there was a possibility that they might have been affected at the times when the Panel found that he was not making the effort required to comply with the duty to ride his horse on its merits .

172. This submission which was first addressed by Mr Winter to the Appeal Board is in my view a complete non sequitur. The Panel's finding was set out in paragraph 37 of its reasons. "Finally it is necessary to explain the implications of the Panel's findings that McKeown rode in breach of Rule 157 on four occasions and that the lay betters had the comfort of an assurance that he would ride to ensure their success if he could. These conclusions do not amount to findings that McKeown actually prevented any of the four horses in the non-trier races from winning or from placing (where there were place lay bets). They are findings that he did not make the positive efforts that the Rule required, and that he was trying to conceal this practice by for instance delivering air shots with his whip. This lack of positive effort was in one sense a precautionary measure during the races to protect the lay bets when the outcome was not clear, but the Panel does not find that if he had ridden as the Rules requires, then the lay bets would have been lost."

173. The critical finding referred to in paragraph 37 was that Mr McKeown's motive and purpose in deliberately failing to make a positive effort was to protect the lay bets when the outcome was not clear. There is in my judgment no inconsistency between that finding as to his motive and state of mind on the one hand and the fact that the Panel did not find that if he had ridden as the Rules required the lay bets would have been lost. The crucial finding from which the Panel drew adverse inferences as to Mr McKeown's involvement in the conspiracy was that he made a deliberate attempt to avoid the risk of winning or being placed. It is not in my view a necessary precondition of that having been his state of mind that as a matter of fact his efforts were successful to the extent of affecting the placings. Even if the Panel had found positively that he did not affect the placings that would not be conclusive. It would merely be evidence to take into account when assessing whether the

alleged motive was proved. In any event the Panel did not make a positive finding that placings were not affected but merely failed to find that they were.

174. It would be different if the Panel had found that Mr McKeown did not believe that his non-trying might be necessary to avoid the risk of coming first (or,where the lay bets were against the horse being placed, being placed) or that he had not deliberately failed to try as a precautionary measure. The Panel did not make such a finding. On the contrary it found that the lack of positive effort was in one sense a precautionary measure during the races to protect the lay bets when the outcome was not clear. As the Appeal Board said, "If a jockey does sense that his horse is going well enough to achieve what is not desired and takes action it can be difficult, if not impossible, to be sure precisely where the horse would have finished if ridden properly. All sorts of incidents during a race can lead experienced commentators, professionals and other experts to different opinions usually expressed with caution." (para 29). As the Appeal Board also found, the Panel's finding was "not a finding that but for the appellant's action or inaction any particular horse would have won or been placed, but neither is it a finding that the appellant's actions/inactions did not make a difference." The finding that the lack of positive effort was in one sense a precautionary measure during the races to protect the lay bets when the outcome was not clear was, as the Appeal Board said, a finding of "a breach of Rule 157 in circumstances where the appellant could not be confident the horse would not win or be placed." As the Appeal Board also found: "The fact that the appellant rode as found by the Panel is, in all the circumstances, clearly probative of some prior arrangement." I return to this below.

175. It is convenient before turning to my viewings of the video footage to deal with the submissions referred to above both generally on the first three rides and specifically on Only If I Laugh as to the significance of the destroyed video footage and tapes of the Stewards' Enquiries and the fact that those Enquiries, which did have the subsequently destroyed footage, did not make the adverse findings which were subsequently made by the Panel and upheld by the Appeal Board.

176. There were essentially two strands to Mr Winter's submissions, first that to reach any conclusion adverse to Mr McKeown in the absence of the missing different video angles and tapes of the stewards inquiries was unfair and in breach of the principles of natural justice and second that no reasonable Panel could have reached any adverse conclusion about the rides in the absence of the additional evidence. The quality of the only available video evidence was poor, the angle of view was wrong for the purposes of reaching conclusions about Mr McKeown's rides, the video recording cuts out missing crucial sections and it would therefore be perverse for a Panel to rely on the surviving evidence as evidence of a breach of Rule 157 let alone to rely upon it as evidence of a breach of Rule 201(v). In support of these submissions he made two further submissions which were in my view inconsistent with each other. The first was that in relation to the alleged air shot on Only If I Laugh it is impossible to conclude whether Mr McKeown's whip made contact with the horse or not from the surviving video and it is likely that the other camera

angles would conclusively resolve this issue. The second was that the destroyed footage would have positively established Mr McKeown's innocence. The latter submission is in my view no more than bare assertion which adds nothing to Mr Winter's detailed submissions on what the surviving video evidence shows. The former submission is speculative. It may or may not be true. It is impossible to know. What is undoubtedly true is that there is at the very least a possibility that the destroyed video evidence would have been conclusive one way or the other.

177. Although the Panel criticised the defendant for not preserving the full video footage and the tapes of the steward's inquiries, there was no allegation by Mr McKeown that the defendant acted in bad faith in allowing the material to be destroyed. In my view the starting point for considering the submissions is that there is no absolute principle whether of fairness or natural justice which would make it unfair or unlawful to make adverse findings against Mr McKeown in the absence of the destroyed evidence. Even if it is assumed that the destroyed evidence was the best evidence of what occurred in the first three non-trier races, or at any rate better than or as good as the surviving video evidence, an assumption I am prepared to make for the purpose of considering this submission, it does not seem to me to follow that it is for that reason necessarily unfair or unlawful for the Panel to have made adverse findings against Mr McKeown without it. There are many situations both in court and disciplinary proceedings where for one reason or another the best evidence is not available. There is no general principle that the absence of best evidence is an absolute bar to the admissibility of other evidence or to the making of adverse findings on the admissible evidence actually available to the tribunal.

178. There was in this case no application before the inquiry began to stop the proceedings on this ground. In my view the question whether it was unfair for the Panel, having viewed the surviving video footage and the report of the steward's inquiry on Only If I Laugh, and heard evidence from Messrs McKeown and Blockley, to make adverse findings depends on a number of factors including first and critically the strength of the surviving evidence, and in particular whether it was strong enough in itself to be capable of satisfying a reasonable Panel that Mr McKeown was guilty of the conduct alleged, and second whether the Panel took into account the possibility that the missing evidence might undermine its provisional conclusions and if so whether it could reasonably conclude that its provisional adverse findings were sufficiently supported by the surviving evidence as to enable it fairly to discount the possibility that the missing evidence might have led to different findings.

179. As appears below in my view the Panel did have well in mind the factors to which I have referred.

180. The following aspects of the Panel's approach on their face suggest a fair and conscientious approach to assessing the allegations and the video evidence unless they are themselves the quasi-judicial equivalent of an air shot, deliberately designed to give the misleading impression that they were

genuinely seeking to weigh the evidence in a dispassionate manner. It was not suggested by Mr Winter that that is what they were doing.

181. First the Panel stated that the members studied the video in great detail and with real care. It was not submitted that that statement was untrue. It was mirrored by the statement in relation to the second alleged non-trier race that "**close** study of the recording shows that he delivered an air shot when he had every chance of challenging for a place"(emphasis added). Second it recognised that the Stewards who held an enquiry on the day of the race would have had the benefit of more camera angles than currently survive and that they merely noted the explanations for the run without picking up that there had been an air shot. It is to be inferred that they took this into account as making the allegation against Mr Mckeown less likely to be true than if the Stewards had not reviewed he video evidence and failed to spot the air shot. It is also to be inferred that they took into account the possibility that the additional camera angles available to the Stewards but not to themselves might have been more favourable to Mr McKeown than the video they were watching. Indeed it goes beyond inference. The Panel explicitly stated that one of the features of the case which provided extra ground for caution was that the lack of full sets of recordings and the lack of tapes of Enquiries affected particularly the cases made against Mr McKeown and Mr Blockley. "Not only did this have a potential effect on the strength of BHA's allegations against them but it also created a risk that McKeown and Blockley were themselves deprived of material that could assist their defence. The Panel was very conscious of that risk when reaching their conclusions about the alleged "non-Trier" races". The Panel expressed surprise that steps were not taken promptly to preserve a full set of recordings given that the investigation which led to the Enquiry was active in 2006 and it was told that Racetech do not keep the full recordings after a two year period and stated that the tapes of the Stewards' Enquiries should also have been preserved.

182. It is thus clear that they had well in mind when viewing the videos of the first three non-Trier races and reaching their conclusions on the allegations against Mr McKeown in respect of them the two separate but related facts that the videos available to them had evidential limitations and that there was a possibility that the missing videos might have been more favourable to Mr McKeown. It is also clear that they had well in mind that both these factors required them to exercise extra caution even above and beyond the fact that because the case against him was one of dishonestly it proceeded on the basis that it had to have clear and cogent evidence before concluding that the allegations against him were made out.

183. Next the Panel stated that it studied the video in great detail and with real care. That it did so is supported by the fact that it referred to its conclusion that Mr McKeown was holding his whip at about the mid-point of its length in the air shot and that it compared the action he used in the alleged air shot with the action he used on the three occasions where he used the whip around the one furlong marker.

184. Further evidence of the Panel having approached its task fairly and conscientiously is to be found in the fact that although it viewed the fact that

Mr McKeown manoeuvred towards the middle of the track early in the straight as questionable, it rejected the criticism that he did so so as to keep his horse behind another because it did not have the full range of recordings to review and thus did not conclude that that feature of the ride showed a deliberate intention to lose. Indeed this shows that the Panel, so far from paying lip service to its recognition of the possibility that missing footage might disprove prima facie impressions gained from the surviving footage, was prepared to act on that recognition where its view of the surviving footage led it to conclude that it was too ambiguous to justify an adverse finding.

185. Finally the Panel stated that it took into account the fact that Mr McKeown's ride was not visible for much of the last furlong in the surviving recording, although it found that whatever he was doing at that stage was irrelevant because the race had already been lost. I would add that in relation to the allegation that Mr McKeown restrained the horse at the start so as to stop the horse, the Panel took into account his explanation that the horse had a light mouth, albeit that it rejected that explanation, although this does not bear directly on the fairness of its approach to the destroyed evidence.

186. The Panel stated its adverse findings in very emphatic terms. It described the air shot as "the clearly objectionable feature of this ride" and stated that the members of the Panel "were **sure** that this was an air shot" (emphasis added). In my view it is clear that the Panel, having taken into account the relevant factors relating to the destroyed evidence, formed the view that the video evidence was such as to enable them to find not just that on the balance of probabilities Mr McKeown was deliberately not trying and pretending to try but that they were sure that this was the case. This is a higher standard than that required to justify an adverse finding against Mr McKeown.

187. In reality therefore in my view the critical question is whether the second of Mr Winter's submissions had been made good, namely whether no reasonable Panel could have reached any adverse conclusion about the rides in the absence of the additional video evidence and tapes of the stewards' enquiries. In the circumstances of this case this in my view in turn turns on whether Mr Winter could show that no reasonable Panel could have made the adverse findings against Mr McKeown which were made having regard not just to the evidence which was before the Panel but also to the known fact of the destroyed evidence.

188. In answering this question it is in my view necessary to bear in mind that in addition to the video evidence the Panel had the benefit of being able to form views as to the credibility of both Mr McKeown and Mr Blockley who gave oral testimony relevant to their findings. It is also necessary for me to bear in mind that it is to be assumed that the members of the Panel and in particular the non-legal members applied their very considerable knowledge and experience of how racing is conducted and how jockeys ride horses in races, and judgments about the likelihood that a horse with the characteristics of Only If I Laugh on this day would have been perceived by this jockey to have a chance of winning. The background of the members of the Panel was put in evidence by the defendant and not challenged by Mr McKeown. It is also relevant to bear in mind that the adverse findings of the Panel based on their

viewing of the video evidence were positively endorsed by the Appeal Board, the background of whose members was also in evidence and not challenged:

> "The reference to an air shot was because the Panel found that the appellant had pretended to use his whip but was, in effect, play acting. These paras reveal that the Panel was only prepared to make sure adverse findings when it was sure of what it saw and, if less than sure, gave the appellant the benefit (see for example 33). That was entirely fair. However there remains the question whether a reasonable Panel could have been sure on the available evidence. The Panel chairman, Mr Timothy Charlton QC is an experienced Panel chairman. Perhaps, of even more importance is that he had the assistance of two experienced and qualified Panel members. The Board also included two very experienced and qualified members. Both Panel and Board viewed and reviewed the video recordings. All that is necessary to note is that the Board saw no reason in its reviewing capacity, or at all, to interfere with Panel's findings in respect of these four rides." (para 16) (emphasis added).

189. It is clear from the words emphasised that the Appeal Board also looked at the video footage more than once and went further than concluding that a reasonable Panel could have been sure on the available evidence. It positively endorsed the findings made by the Panel.

190. It is also clear from a different passage in the Appeal Board Reasons that in rejecting the submission that it was "fundamentally unfair" of the Panel to have found that Mr McKeown did not ride the horses on their merits and in particular delivered air shots with his whip in the absence of the missing videos and/or transcripts of stewards' inquiries, the Appeal Board took the view that the quality of the surviving evidence was such as to justify the making of adverse findings. "We reject that submission. The Panel directed themselves correctly. In the end, it was a question of looking at the video recordings with all the necessary caution and reminding itself of the possibility that a different camera angle might, in theory, throw a different light on the matter. Clearly the Panel did this (see in particular para 15 and the last two or three sentences of para 32). If Mr Winter is correct, it would follow that however clearly an event or happening was shown on camera, the existence of an unavailable further film, would prevent a safe conclusion being reached. That is plainly wrong. It is a matter to be determined on the quality of the evidence in each case. **Having seen the recording for ourselves** and studied the Panel's clear explanations of its findings in respect of these four races, we do not consider there was any unfairness." (para 17). (emphasis added).

191. Mr Winter's response to these findings of the Appeal Board was that they demonstrate "the lip service paid to the complaint" and that "the Appeal Board was not seeking objectively and independently to resolve the claimant's appeal. It was doing its utmost to uphold the decision." In support of those

very serious allegations, Mr Winter relied on two propositions. The first was that Mr McKeown maintains that the other footage would have established his innocence. I have already expressed my view that that is a bare assertion unsupported by evidence . The second is that this was not a case where an event was “clearly…happening…on camera”. It was a case where the evidence was indistinct and inconclusive. It was a case where no adverse conclusions could be reached without further evidence. Thus at its core the challenge both as to unfairness and as to unreasonableness depended, in my view, essentially on Mr Winter’s submissions as to what the video evidence does or does not show. Finally it is necessary to bear in mind the critical fact that neither in front of the Panel nor in front of the Appeal Board nor in front of me did Mr McKeown adduce expert evidence, nor did he seek to do so(his application to adduce evidence from a horse-riding expert to the Appeal Board having been withdrawn in the light of discussions with counsel). The Appeal Board had power under Regulation 25 to allow fresh evidence if satisfied with the reason why it was not or could not reasonably have been obtained and presented at the original hearing and that it was cogent and might reasonably have caused the Panel to reach a different conclusion.). That was his choice.I turn to this crucial factor in greater detail below.

192. As to the absence of the destroyed tapes of the stewards’ enquiries it seems to me that similar considerations apply as in relation to the destroyed video footage. Mr Winter made an additional submission to the effect that it was perverse of the Panel to reach adverse conclusions in respect of races where the Stewards at the Enquiries had not exonerated Mr Mckeown but done so with the benefit of the additional video footage which was not available to the Panel. In fact there was unchallenged evidence from Mr Craig that in each instance where a ride the subject of these proceedings was inquired into by the Stewards on the day of the races the fact that the Stewards “noted” Mr McKeown’s explanation did not mean that they accepted it but rather that they made no finding either way. In my view while that reduces some of the force of Mr Winter’s submission it is not in itself a complete answer to it, in that it does not address the fact that the Panel by making positive adverse findings still went further than the Stewards who were merely neutral. However in my judgment the fact that the Stewards on the day were neutral is not a knock out blow in that it does not demonstrate that the Panel’s findings were perverse. Findings made by Stewards Inquiries do not preclude the setting up of subsequent disciplinary enquiries and such enquiries are not bound by the findings of the race day Stewards’ Enquiries. There is nothing inherently surprising in the fact that a Disciplinary Panel may reach a different conclusion to that reached by a Stewards’ Enquiry, particularly if because subsequent information increases suspicion of breaches of the Rules the Panel scrutinises the video footage with greater care at greater length and with more sceptical eyes than the Stewards’ Enquiry. No doubt the fact that Stewards’ Enquiries failed to make adverse findings on the basis of more comprehensive video material is a factor requiring the exercise of particular care and caution on the part of the Disciplinary Panel. As appears above in my view it is clear that in this case the Panel was conscious of this requirement and did exercise such care and caution.

193. Against this background I turn to deal with my response to viewing the surviving video footage and hearing the submissions of Mr Winter and Mr Warby. I would preface my observations by recording that the experience left me with an overriding feeling that, as might be expected, in seeking to assess the content and significance of what can be seen on the video footage I was at a very significant disadvantage compared to the members of the Panel and the Appeal Board, particularly the non-lawyer members. Having never previously engaged in such an exercise and being wholly unfamiliar with the world of horseracing my impression was that if I had been the first instance trier of fact without the benefit of particular aspects of the video footage being drawn to my attention by counsel I would have found it difficult if not impossible , left to my own devices, to make informed or reliable findings as to what it showed in relation to some of the disputed findings. Even when counsel drew particular aspects to my attention I was conscious that in many cases their attempts to explain the alleged significance of them trespassed into the territory of inadmissible unofficial expert evidence. This did not lead me to conclude that it was for that reason or because of the obscurity of the footage impossible to draw conclusions or make reliable findings as to what it shows but rather that the ability to do so, or at least to reach an informed conclusion that it is impossible to do so by reason of the obscurity of the footage, was very likely to be significantly enhanced if the decider of fact had knowledge and experience of horseracing and/or the benefit of expert evidence to inform his viewing, his ability to know what signs to look out for, what is and what is not significant either by its presence or absence and his interpretation of what can and cannot be seen. Further when I viewed the videos in the defendant's viewing room, the cumulative effect of watching a number of races in close succession, in each case with sections of the video being replayed was such that it was very difficult to form clear conclusions at the time and even more difficult to recollect such impressions as were made on me unaided by my notes. Further both at the public viewing and on the many occasions on which I subsequently reviewed the video footage on my own I was conscious that, unlike the members of the Panel and Appeal Board, I had no independent person to consult with a view to explaining points or confirming or casting doubt on my impressions. Moreover when I reviewed the footage on my own I of course did not even have the benefit of counsel's submissions.

194. My observation of the start of the race was that Only If I Laugh rears up almost immediately after he leaves the starting gate and one sees the jockey apparently pulling the reins. The effect of this appears to be that by the time the horse is under control it is towards the back of the field after only a few seconds. Without the benefit of expert evidence I would find it difficult to reach a conclusion as to the degree of effort applied by the jockey in restraining the horse and the extent if at all to which the rearing of the horse was accountable by the horse having a "light mouth" or indeed whether it is possible to draw an inferences from the video as to whether the horse has a light mouth or an iron mouth. My strong impression was that an experienced observer might well be able to interpret what I saw at least so as to draw a conclusion as to whether the degree of restraint exercised by the jockey was excessive or what was to be expected on the assumption that the horse had a light mouth.

195. In relation to the air shot one could observe that the arm of the jockey riding another horse in sight of Only if I Laugh did not appear to move forward after the contact with the horse and the full extent of the whip protruding down from the hand appeared to be visible. In relation to Mr McKeown on the small screen I was not able to detect sight of the whip as he brought it down. Nor was I able to observe the whip either hitting the horse or failing to hit the horse. It did seem to me that Mr Warby's submission that as Mr McKeown's arm came down it appeared to come down slowly as though he were restraining it was correct. It did not appear that after the whip came down that his horse made up any ground in catching up the fourth horse immediately in front of him. My notes of my viewing on the large screen record that it was possible to see the whip while it was in the air and that it appeared to be being held not at the top of the whip but towards the middle of it. My notes also record that I was unable to see the whip either hitting the horse or not in the sense of seeing air or a gap between the whip and the horse.

196. With the benefit of having been forewarned by Mr Warby's submission that there was a marked contrast between the force with which Mr McKeown whipped the horse at the one furlong mark as against the alleged air shot, it did seem to me that the video showed Mr McKeown bringing his arm down with greater force in the former than in the latter. I very much doubt if I would have picked this out for myself unprompted. It struck me as a good example of the respects in which an experienced observer would be likely to be able to spot significant details which would be wholly lost on a layman such as myself.

197. At the time of the alleged air shot Only if I Laugh was just behind the fourth horse. This was near the two furlong mark. Mr Winter submitted that no reasonable tribunal could have concluded that at this point of the race it was still possible for Mr McKeown to catch the front runner and win the race. Without the benefit of expert evidence I was in no position to assess the weight of that submission. Mr Winter submitted that it was impossible for this horse ever to win the race and certainly not at the time of the alleged air shot and that no reasonable tribunal could have concluded otherwise. In the absence of expert evidence to support that submission I am unable to accept it. Certainly on the basis of my own observation, in the absence of any background knowledge of the significance of the gap between Only if I Laugh and the front runner at that stage and how difficult it would be to catch a horse with two furlongs to go and that much of a lead and what are the variable factors affecting the ability of a horse to make up the ground in the space available, this struck me as a classic example of a submission that could not succeed in the absence of expert evidence of which there was none.

198. On the large screen, but not on the small screen, it was possible to see that Franny Norton appeared to be holding his whip when he was applying what was agreed to be a genuine whip to his horse in roughly the same place as Mr McKeown in the alleged air shot. Again, however, in the absence of expert evidence I do not feel able to draw any inference therefrom, certainly not to the extent of concluding that the similarity demonstrates that no reasonable tribunal could have held that Mr McKeown was guilty of applying an air shot.

199. Mr Winter submitted that after the alleged air shot Only if I Laugh overtook the horse in front of him from which he invited me to infer that no reasonable tribunal could have failed to hold that this was a genuine whip shot. It is right that the next time the two horses come in camera shot, Only if I Laugh has overtaken the one that was fourth at the time of the alleged air shot. However it is not possible on the video evidence that is extant to tell when this occurred and in particular how long after the alleged air shot it occurred. Mr Winter submitted that one could tell even on the video shot immediately following the alleged air shot that Only if I Laugh was gaining ground. I found this difficult to tell because of the angle of the camera.

200. Mr Winter submitted that the conclusion of the Panel that it could not find and did not find that in this or any of the other three non-trier races Mr McKeown actually affected the outcome of the race is inconsistent with its conclusion that he was deliberately trying to slow the horse down so as to avoid coming first or within the first three depending on the lay bet in the relevant race. In my judgment this is a non sequitur. The fact that the Panel did not conclude that Mr McKeown's conduct of the race actually affected the outcome does not carry with it the necessary conclusion that he was not seeking to affect the outcome at various stages in the race. What is relevant in assessing whether he was trying to affect the outcome is his subjective view at the time of the alleged incidents as to whether without such conduct there was a realistic prospect of him winning or coming within the first three. As a non-expert, I was not in a position to form a view as to whether no reasonable tribunal could have concluded at the time of the alleged air shot or the rearing of the horse at the beginning of the race that Mr McKeown may have formed the view that without taking steps to slow the horse down he had a realistic prospect of coming first.

201. I accept Mr Warby's submission that Mr McKeown would have to prove that no reasonable Panel could have found that at the time of the air shot he might have thought that he was still in with a chance to win so that the air shot could not have been designed to conceal the fact that he was trying not to win. In my judgment Mr Winter did not succeed in establishing that. It is certainly not in my view self evident from the video and the distance between Only if I Laugh and the front runner at the two furlong mark and the distance still to be run in the race between the two furlong mark and the finish.

202. My notes on viewing the large screen show that I saw Mr McKeown's arm coming down slowly and not very far in the alleged air shot compared to his later actual whip shots and the action of the other jockeys who were whipping their horses. In relation to the grip of Mr Franny Norton, Mr Warby submitted that Mr Norton was holding the whip further up then Mr McKeown was at the time of the alleged air shot. My notes record that Mr McKeown appeared to be holding his whip lower down than Mr Norton. This was not visible on the smaller screen. However either way I was not in a position without expert evidence to form any meaningful conclusion as to what if any significance there was in any difference in the position with which Mr McKeown and Mr Norton were holding their respective whips.

203. Mr Warby submitted that (1) you can see that the whip in the air shot does not connect (2) you can see that the horse does not speed up (3) you can see that the arm comes down less far and fast than in the agreed real whip shots; and (4) that he was holding the whip further down than Mr Norton. My contemporary notes record that I was not sure if I could see any contact with the horse, I could not assess the speed and distance that the arm travelled in the various shots but that it did look as though Mr McKeown's arm movement was somewhat restrained in the alleged air shot.

204. In reply on the video Mr Winter submitted that the reason I could not see the whip was because it was being held behind Mr McKeown's hand and therefore must be on the horse as it was flexible. He said that Mr McKeown's whip was longer than Mr Norton's because MrKeown is taller and that the handles are different so that one cannot infer anything from the different handling position between the two. This struck me again as an issue on which without evidence I was singularly ill-equipped to form any conclusion.

205. Mr Winter submitted that you can see the whip bouncing off the rear of the horse in the alleged air shot. This submission was inconsistent with the submission in the Details of Claim in which it was submitted that it is impossible to conclude whether or not Mr McKeown made contact with the horse from the video. It is also different from the submission in that document that close analysis demonstrates that at the time the whip was used (or not) his horse was right on the rear hooves of the horse in front and that it could have been dangerous for the horse to accelerate at that moment so that it is possible that Mr McKeown changed his mind about the appropriateness of using the whip or only used it gently because of the presence of the horse in front of him. These latter submissions proceed on the basis that (a) it is not possible from the video definitively to see the whip hit the horse and (b) that it may be that the whip did not hit the horse.

206. Mr Warby first seemed to submit that you can see the whip not hitting the horse but then appeared to modify the submission to submit that in the frame at which you ought to be able to see the whip hitting the horse it is not near the horse. From my own observation I could do no more than say that I could not see the whip hit the horse but I could not positively say that I could see the whip throughout the relevant frames and could see that it was not hitting the horse. . Mr Warby submitted that the horse does not speed up. I was not able to accept that submission any more than I was able to accept the submission that the horse did speed up. I just found it difficult to tell. Mr Warby submitted that one could see Mr McKeown bend his elbow and his arm coming in toward his hip. I did have an impression of that. It struck me as just the kind of point where I would expect that someone with experience of horse-racing and in particular of studying video footage to see if a jockey is making an air shot might well be able from experience to draw an inference as to what was going on.

207. In reply Mr Winter submitted that one cannot see the whip at the time of the alleged air shot and invited me to accept that that must be because the whip was behind Mr McKeown's hand and therefore must be on the horse because it is not a solid stick and it flexes. If the defendant's case was right he

submitted one would be able to see the whip not behind the hand but to the side of it with some air space between it and the horse. This seemed to me first inconsistent with his earlier submission that one positively can see the whip make contact with the horse which I did not and second a submission dependent on the possession of expertise which neither Mr Winter nor I possess (or in his case if he possesses it his views are inadmissible as evidence). Mr Winter's submission might be true or it might not. I have no means of judging.

208. Mr Winter submitted that one can draw absolutely nothing from the manner in which Mr McKeown was holding the whip because Mr McKeown's whip was longer than Mr Norton's because he was about a foot taller than Mr Norton. . Again this to my mind merely underlined the impossibility of this court being in a position to make any relevant finding. I have no means of knowing whether Mr McKeown does have different whip action to any other jockey or most other jockeys or if that is true whether it means that he whips less hard and in a different way to other jockeys. It may be that the Panel or one or members of it were aware of these matters and were able to draw inferences from them from their own knowledge. I know not, although it is the case that Mr Hibbert Foy was said to have seen Mr McKeown race before.

209. Mr Winter submitted that because the missing video footage would have either corroborated or disproved the conclusion of an air shot, it was not open to the Panel to conclude that it was an air shot. In my view that is a non-sequitur. It is a reason for exercising extreme caution. It does not however follow that it was not open to a reasonable Panel including members with experience and knowledge of horse racing and in particular of stewards enquiries and Disciplinary panels to conclude that the evidence of what they did see on the remaining footage was clear enough to enable them to draw an inference that it was an air shot.

210. Mr Winter submitted that one cannot see the whip in the position where it would have to be if it were missing the horse. I could not accept that submission because I do not know as a non- expert where it would have to be in order for it not to hit the horse. As Mr Warby pointed out, Mr McKeown never at the time of the Panel enquiry put forward the alternative submission that he may have done an air shot because he was too close to the horse in front. Mr Winter in reply accepted that you could not see the whip, which I took to be inconsistent with his earlier submission that you could see the whip hitting the horse. In reply he accepted that it is impossible to say whether the whip actually impacted the horse. Mr Winter did not accept that I would need expert evidence to find that if Mr McKeown had failed to hit the horse one would have expected to see the whip in a particular position. I do not accept that submission. He submitted that my human eyes are as good as anyone else's and that if the whip were missing the horse one would be able to see it. I do not accept that submission any more than I accept that if the whip did hit the horse I would necessarily be able to see it.

211. In a revealing passage when Mr Winter and Mr Warby were submitting respectively that one could and could not see Only if I Laugh catch up with the horse in front of it Mr Winter said that this underlined why these sort of cases

should be brought on the basis of expert evidence that can be tested. That seemed to me to identify the fundamental error in Mr Winter's submissions. It may well be that the Panel would have been better assisted if they had had expert evidence. It was not, however, so far as I am aware ever submitted either to the Panel or the Appeal Board by or on behalf of Mr McKeown that it was unfair to conduct the enquiry without the benefit of expert evidence. It was in any event always open to Mr McKeown to seek to adduce expert evidence and he did not do so. Indeed at the Appeal Board he indicated a desire to do so and then withdrew his application for adducing expert evidence. That was a matter for him. The failure of the Defendant to do so did not in my view render the process unfair.

212. There is my view no general requirement flowing from the overriding requirement to conduct disciplinary proceedings fairly either for the prosecuting body to adduce and tender for cross examination or for the disciplinary Panel to ensure the attendance of expert witnesses as a necessary condition for respectively bringing and finding proved against a member of a sporting body. There is in principle no reason why a tribunal including members with relevant experience and knowledge of the sport in question should not draw on their knowledge and experience of viewing and interpreting video evidence and drawing inferences from it and from the evidence relating to such things as the nature and record of the contestants. Indeed there is every reason why they should be free to do so.

213. Whether it is possible for them, drawing among other things on their experience, to reach conclusions adverse to the subject of the disciplinary proceedings without the benefit of expert evidence will vary from case to case and depend on the nature of the factual evidence. It might well be that in an appropriate case it would be unfair to refuse permission to the accused person to adduce his own expert witness(es) but it is not alleged that that occurred in this case. To the contrary, Mr McKeown withdrew, apparently on counsel's advice and in any event following a consultation with the counsel, his application to adduce expert evidence before the Appeal Board. Of no less significance in this case is the fact that Mr McKeown made no application to adduce expert evidence in this court to support Mr Winter's challenge to the findings of fact made by the Panel. That was his choice as was the decision to bring his challenge by way of a Part 8 claim rather than one appropriate to the resolution of factual disputes by factual and/or expert evidence. It had the consequence that, as I have indicated, many of Mr Winter's submissions were entirely unsupported by expert or factual evidence and constituted no more than bare assertions which I had for that reason no basis for accepting.

214. The corollary of Mr Winter's submission as it seems to me is that if it requires an experienced eye to form the necessary judgments and draw the necessary inferences from what is visible on the video as to whether Mr McKeown was deliberately not trying, given that both the Panel and the Appeal Board included two members with relevant experience, this is a classic case which illustrates why it is that where this court is exercising what is a supervisory jurisdiction it should not substitute its own lay, inexperienced and uninformed impressions for those of the tribunal of fact. That is not to say that there are no

circumstances in which the court could not intervene. Thus as previously mentioned if there had been an obvious obstacle between the camera and Mr McKeown's horse at the time of an alleged non-trying episode, the court could find that no reasonable tribunal could have made non-trying findings. In my judgment the evidence in this case was far removed from such a hypothetical situation.

215. Further, even in a less clear cut case, there is no reason in principle why this court could not or should not conclude that a tribunal of fact including members experienced in the relevant sport reached conclusions based on interpretations of or inferences drawn from what appears on video footage which no reasonable tribunal of fact including such members with such experience could have reached. Everything depends in my view on the nature and content of the video footage in question and the nature and quality of the evidence if any relied on to support the challenge to the findings of fact. In so far as it is possible or helpful to venture a general observation it would be that as a matter of common sense the less clear cut the video footage and the more recherché, subtle or nuanced the nature of the issues in dispute, the greater is likely to be the need for compelling expert evidence if the court, comprised as it has to be assumed it will be of a judge will no relevant knowledge or experience of the sport in question, is to be persuaded that it can have sufficient confidence to hold that no reasonable tribunal of fact could have made the interpretations of the footage and drawn the inferences which led to the findings of fact sought to be overturned.

216. I have given anxious consideration to Mr Winter's submission that what can and cannot be seen on the screen speaks for itself and that an untrained judge is as capable of observing what can and cannot be seen as an experienced steward. I bear in mind that this court must not shirk its responsibility to reach conclusions and that there may be circumstances where the court, however inexperienced in the relevant sport, may be able to form the view that it is obvious from its viewing of video footage that there is simply no evidence from which a tribunal, no matter how experienced its members could have made adverse(or indeed favourable) findings based on that footage. In relation the first adverse finding that the horse was strongly restrained which caused it to rear and that the restraint appeared more vigorous than was required by the riding instructions to drop him out settle him and come with a light run, I have come to the clear conclusion that nothing which I saw or did not see would justify a conclusion that no reasonable tribunal could have made the findings made by the Panel. In relation to the alleged air shot I have come to the same conclusion. I am conscious of the fact that I did not record in my notes of the public viewing either that I saw the whip hit the horse or that I saw the whip not hit the horse in the sense of seeing a gap between the whip and the horse. I have considered whether for this reason it can be said that the surviving video footage is not sufficiently clear to enable a reasonable tribunal to conclude that there was an air shot. In my view it cannot. That is partly because I consider it entirely possible that an experienced Panel member could detect what I did not detect. However my conclusion is not dependent on that. It is principally dependent on the clear view which I have formed that there are enough aspects of what I did see at the time of the alleged air shot to make it not only possible

but very likely that an experienced observer would be able to interpret them in a way which would enable them to reach a clear conclusion as to whether there was an air shot. I note in this regard in particular the way in which Mr McKeown held the whip, his action in bringing down his arm and a comparison between his whipping action on the one hand and that of the other riders and also his own whipping action subsequently. I have also reached the clear conclusion that none of the positive points advanced by Mr Winter as being inconsistent with an air shot come close to justifying a conclusion that no reasonable tribunal could conclude that there was an air shot.

Smith N Allen Oils

217. This was the second race in which the Panel found that Mr McKeown was deliberately not trying. Smith N Allen Oils ran in the 2.30 at Lingfield on 8 February 2005. It finished fourth in a field of eleven. The horse was not owned by Clive Whiting. It had been purchased by Mr Blockley's partner, Mrs Hughes, three weeks before the race. Mr Rook placed a lay bet that the horse would not come in first, second or third, risking £3,212 to win £1,953.

218. At the hearing Mr McKeown was criticised for riding wide into the straight of the final bend. The Panel held that although it is correct that he was a little wide that cannot of itself support a finding that he was trying to lose. This was another instance of the Panel rejecting an allegation against Mr McKeown which sits uneasily both with the submissions of bias and with the submissons of unfairness of approach.However the Panel held that "close study of the recording shows that he delivered another air shot when he had every chance of challenging for a place. This cannot have an innocent explanation." The Panel also held that "the effort he put in at this stage was nowhere near sufficient to amount to a ride on the merits, and it contrasted with the genuine effort that he put in close to the finish to keep fourth position. But by this stage the bets laid against Smith N Allan Oils finishing in a place were safe."

219. Thus the factual findings made by the Panel on this race were as follows: (1) Mr McKeown rode a little wide. (2) That was not of itself sufficient to support a finding that he was trying to lose. (3) He delivered another air shot. (4) When he did so he had every chance of challenging for a place. (5) This cannot have an innocent explanation. (6) The effort he put in at that stage was nowhere near sufficient to amount to a ride on the merits. (7) His lack of effort at that stage contrasted with a genuine effort which he put in close to the finish in order to keep fourth position. (8) By that stage the lay bets were safe in the sense that there was no realistic prospect of Mr McKeown coming third.

220. As it seems to me the question for me is whether no reasonable Panel could have made those findings of fact.

221. In the Details of Claim the following submissions were made. In relation to the alleged air shot it was submitted that the evidence from the video is totally unclear as to whether the whip impacted on the horse, it is very poor quality and the other camera angles have been destroyed. To find Mr McKeown guilty of using an air shot on the basis of that evidence is unjustified and unfair. No reasonable Panel or Appeal Board could have come to a positive conclusion as

to the use of an air shot on the basis of that evidence. No challenge was made to findings (4) and (5) that at the time of the alleged air shot Mr McKeown had every chance of challenging for a place and that if it was an air shot it cannot have an innocent explanation.

222. In relation to the findings that the effort Mr McKeown put in at the time of the alleged air shot was nowhere near sufficient to amount to a ride on the merits, it was submitted that Smith N Allen Oils was a bleeder, that it is well known in racing that a jockey should be very careful about whipping a bleeder or expecting too much from him since the increased stress levels may cause a bleed. Mr McKeown had said in evidence that Mr Winston (another jockey) had told him before the race that he had ridden the horse and was of the view that the whip should not be used on him. Mr McKeown's instructions from Mr Blockley as trainer were not to whip the horse. Too conclude in such circumstances that Mr McKeown had not only given the horse a tender ride but had deliberately done so in breach of Rule 157 was unsupported by the evidence. Although well beaten by the leaders Mr McKeown urged Smith N Allen Oils forward so as to maintain fourth place.

223. No challenge was made to findings (7) and (8) namely that the lack of effort at the time of the alleged air shot contrasted with the genuine effort which Mr McKeown put in close to the finish in order to keep fourth position and that by that stage the lay bets were safe in the sense that there was no realistic prospect of Mr McKeown coming third.

224. As to Mr Winston, in fact in the passage relied on in the Details of Claim Mr McKeown said in evidence that Mr Winston's comment was made not to him, Mr McKeown, but rather to Mr Blockley and that Mr McKeown had only learned of this after the race. He did not say that there had been any reference to the horse being a bleeder as a reason for his instructions not to use the whip either in Mr Blockley's subsequent reference to what he had been told by Mr Winston or in his pre-race instructions from Mr Blockley which were: "he was a tricky horse and the trainer Mr Blockley had told him that he did not want me to hit him on this occasion." Mr Blockley in evidence said that the horse had a reputation of bleeding in the past but did not say that he had mentioned this to Mr McKeown in his riding instructions, which were: "I told him he must take him back and switch him off, and don't be in a rush to get there. He does not go for the stick, although he has given him one there, and he shouldn't have." Mr Blockley in evidence to the Panel stated that he only learned that the horse was a bleeder after the race. He could not remember who told him. If that evidence was right it follows that he could not have told Mr McKeown before the race that the horse was a bleeder. In his preliminary interview Mr McKeown had said that he thought that Mr Blockley had been told by a previous trainer that the horse was a bleeder, the implication being that this was before the race. That was inconsistent with his evidence to the Panel.

225. At the Panel hearing Mr Winter submitted that it is counter productive to stress a horse that is a bleeder by whipping it because that can provoke the bleed which will cause the horse to pull up. In relation to the alleged air shot he first submitted that one can see from the video the whip connecting with the

horse and the horse accelerating but later submitted that one cannot see the whip hitting the horse. He submitted that the acceleration of the horse after the alleged air shot is inconsistent with it having been an air shot. He submitted that fourth place was plainly the best place which Mr McKeown could have achieved in that race. The first and last of these submissions were unsupported by any evidence.

226. Mr Warby submitted that it is not possible from the video to see the whip connecting with the horse or the alleged shot making a visible and obvious difference to the acceleration of the horse which was already accelerating before the shot. He submitted that the rounded movement of Mr McKeown's arm at the time of the alleged air shot is in contrast with the movement of other jockeys when using their whips. He submitted that if there had been a real shot one would have expected to see the horse accelerating faster than it did. Generally in relation to the lack of effort point Mr Warby submitted that there was no evidence which would enable Mr Winter to demonstrate that the only possible conclusion by a reasonable tribunal looking at the video would be that Mr McKeown was making sufficient effort.

227. My impression from viewing the video was that immediately before the alleged air shot Mr McKeown's horse appeared to be gaining some ground. On the small screen I was unable to see the whip and thus unable to see it either hitting the horse or not hitting the horse. The horse did not appear to me to be accelerating after the alleged air shot to such an obvious extent that I could be so sure that the acceleration was the result of the whip shot as to conclude that no reasonable tribunal could have failed to hold that the acceleration could only have been caused by the whip hitting the horse. My own impression, ignoring submissions made during the video by Mr Winter and Mr Warby, was that the horse appeared to accelerate both before and after the alleged air shot and if I had been the trier of fact I would not myself, without the benefit of expert evidence, have felt sufficiently confident to conclude that the acceleration after the shot was a result of it. However, in the absence of expert evidence, I certainly feel unable to conclude that the only reasonable conclusion was that the acceleration was the result of the whip hitting the horse. I was thus unable to accept Mr Winter's positive submission that the evidence of acceleration is consistent only with the whip having made contact and thus inconsistent with a finding that it was an air shot.

228. I could not by my own unaided eye either on the large screen or on the small screen see sufficient of the whip during the alleged air shot to see if the whip made contact with the horse. I was thus unable to accept Mr Winter's positive submission (subsequently withdrawn) that it is plain to see on the face of the video that the whip made contact with the horse.

229. Those conclusions do not of course of themselves dispose of Mr Winter's negative submission that because it is not possible from the surviving video footage positively to see the whip making contact with the horse it follows automatically that no reasonable tribunal could have concluded that there was an air shot. I have given much thought to that submission and reviewed the video several times with it in mind. I am unable to accept it.

230. The reference in the Panel's Reasons to "close study" suggests that the Panel members found it harder to detect what they found to be an air shot than they had in the case of Only If I Laugh. It does not follow from that that there were no features of the video which would enable a reasonable tribunal to conclude that there was an air shot. If anything it suggests that reverse. Without the benefit of expert evidence I am not satisfied that there are no features of the video footage whose significance might be lost on me as a lay observer but which would enable and entitle experienced observer such as were on the Panel and the Appeal Board to conclude that there was an air shot. Thus for example while I had the impression that Mr Warby's submission as to the grounded nature of Mr McKeown's arm movement and the position of his sleeve in relation to his breaches being inconsistent with the whip having made contact with the horse seemed plausible and might well be right I did not feel able to conclude that it was conclusive on the point. The same applied to his submission on the inference to be drawn from the rate of acceleration before and after the shot. However both these points struck me as just the kind of points which might well enable an experienced observer to interpret the video as showing an air shot. I was left with a very strong overall impression from the viewing in the defendant's viewing room that throughout the footage which I was shown of the races there were a number of features whose significance or even existence would have been lost on me had they not been brought to my attention by counsel for one or other of the parties. As to their significance the fact that counsel were in law restricted to making submissions rather than giving expert evidence meant that I had to exercise great caution to ensure that I did not give them the weight which I would have been entitled to give had they been expert witnesses. However it left me with the strong impression that there was enough in the video footage to make it entirely likely that someone with the relevant experience and knowledge would have been able to interpet it so as to come to a clear view. Put another way I did not conclude that the video was so obviously obscure as to rule out the possibility that an experienced trier of fact could reasonably have made the findings made by the Panel and endorsed by the Appeal Board. If follows that I do not accept the submission that no reasonable tribunal could have found that there was an air shot.

231. Mr Winter's submission that fourth place was plainly the best which Mr McKeown could have achieved in this race was entirely unsupported by evidence. In the absence of any evidence it follows that in my view the Panel was entitled to conclude that there cannot have been an innocent explanation for the delivery of an air shot when Mr McKeown had every chance of challenging for a place and thus that it constituted evidence that he was not riding the horse on its merits so as to achieve the best possible place.

232. In relation to the allegation of general non-trying if I had been the trier of fact I would have had the impression based on my viewing of the video that Mr McKeown was making more of an effort towards the end of the race when he maintained his fourth place as found by the Panel than at the time of the alleged air shot. However I would not have felt sufficiently confident to reach a conclusion that by reason of that contrast he was deliberately not trying in the slightly earlier phase of the race when the alleged air shot took place. But I

am not the trier of fact and in my view it by no means follows from that that no reasonable Panel could have reached such a conclusion. It seems to be entirely possible if not probable that experienced observers such as were on the Panel and Appeal Board would through many years of experience watching races be able to interpret the way in which Mr McKeown rode at the earlier phase compared to the way in which other riders were riding and to the way in which he rode towards the finish and concluded from that interpretation either that he was or that he was not trying.

233. In order to be satisfied that no reasonable Panel could have found on the video evidence that Mr McKeown was deliberately not trying his best it seems to me that I would have to be satisfied from the video evidence either that it was clear that he was trying or that I could safely exclude the possibility that there were features of the way he was riding at different stages of the race, the way other riders were riding and/or a comparison of the two which might reasonably lead an experienced Panel member to conclude by way of interpretation that he was deliberately not trying. I am quite clear that I could not safely exclude such a possibility and I was not satisfied based on my own observation that it is clear from the video that he was trying.

234. That is not to say that I could not imagine circumstances in which a court exercising a review function such as I am exercising could safely exclude such a possibility. There is force in Mr Winter's submission that a contrary conclusion would in effect render findings of fact by expert tribunals or tribunals including members with expertise or experience of a particular sport unsusceptible to judicial review or its equivalent in the case of a private body. Everything must depend on the facts and circumstances of the particular case and the nature and content of the evidence which led to the finding under challenge. However in practice it seems to me that before concluding that it could safely exclude such a possibility it is likely either that the court will have been assisted by expert evidence identifying and interpreting the various relevant or confirming the absence of any such relevant features and interpreting the significance of their absence or that there is an obstacle between the camera and the event in controversy or that the video evidence show such clear and obvious signs of genuine effort even to the untrained lay eye as to give the court sufficient confidence to trust in its own lay reactions. None of these factors was present in this case.

235. A good example of the need for extreme caution is provided by the fact that one of the Panel members, Mr Hibbert-Foy was said by Mr McKeown in evidence to have viewed him riding in the past and to have seen for himself that the way he used his whip in Hits Only Cash (the third of the alleged non-trier races which I address below) was the same way in which he always used in it rides for which he was not criticised, the manner being dictated by the fact that he had broken both ball joints in his shoulders and his collar bones. It is impossible for this court to assess whether Mr Hibbert-Foy and/or other members of the Panel, in reaching conclusions on Hits Only Cash took account of that evidence, agreed with it or disagreed with it and in either case what if any weight he/they attached to it and if he/they disagreed with it or gave it little weight it is impossible in the absence of expert evidence for this

court to assess whether his/their disagreement or the weight attached to the evidence was so unreasonable that no reasonable Panel member could have treated the evidence in that way.. That is not to say that any conclusion of the Panel based on Mr Hibbert-Foy's views is binding on this court. Nor is it to say that this court is powerless to conclude that it was one which no reasonable Panel could have reached. It is to say, however, in my judgment that the court has not been provided with any evidence on which to reach to make such an assessment.

236. In the absence of any evidence that the Panel was not reasonably entitled to conclude that by the time of the greater efforts which it found Mr McKeown made to maintain fourth place close to the finish there was no realistic prospect of Mr McKeown coming third, in my view the Panel was entitled to draw the inference that the lesser effort which it found he made at a time when he had every chance of challenging for a place was deliberate.

237. In summary I was not satisfied that the adverse findings made against Mr MCKeown in respect of this race were not open to a reasonable Panel to make.

Hits Only Cash

238. This was the third race in which the Panel found that Mr McKeown was deliberately not trying. Hits Only Cash rode in the 2 o'clock at Southwell on 19 April 2005. The lay betting was that it would not be placed in the first three in the race. The findings made by the Panel were that: (1) just before entering the straight Mr McKeown let out the reins and effectively left the horse to make its own way to the finish; (2) that allowed the horse to lose its action and it stumbled three times; (3) Mr McKeown did not take the obvious step of gathering the reins and getting the horse together after any of these stumbles; (4) with loose reins he transmitted no message to the horse with either arms or body; (5) he also delivered a single air shot with the whip preceded by an extravagant high shoulder movement; (6) there was no innocent explanation for this ride.

239. In the Details of Claim it was submitted that there is absolutely no justification in either of the two criticisms made by the Panel that Mr McKeown had let out the reins and left the horse to make its own way to the finish which caused it to lose its action and to stumble and that he had used an air shot. It was submitted that it is obvious from the video that Mr McKeown rode the horse on its merits and no other conclusion was reasonable on the evidence. There was not even a Stewards' Enquiry, not withstanding that the defendant was monitoring the betting activity at the time. It was further submitted that there is no use of an air shot and that Mr McKeown administered two full whips at two furlongs out, two full whips at one furlong out and one at half a furlong out. The conclusions of the Panel and the Appeal Board were said to be unreasonable and unsupported by the evidence. It was not possible to conclude a breach of Rule 157 let alone that Mr McKeown had joined a conspiracy to stop his horse.

240. At the viewing of the video Mr Winter submitted in relation to the air shot that it is not possible from the video to see whether Mr McKeown's whip hits the

horse or whether it does not. It was on that basis that he submitted that it is completely impossible to conclude that there was an air shot. In relation to the alleged letting out of the reins he submitted that there is no evidence from which a reasonable Panel could conclude that Mr McKeown had let out the reins or in any way behaved inappropriately because one can see him with taut reins, the reins coming out when the horse stumbled and being gathered back in afterwards.

241. Mr Warby submitted at the viewing that the Panel's finding that the reins were let out and stayed let out for practically whole of the furlong from the second to the first furlong markers during which Mr McKeown made no progress was probably the clearest example of a finding of fact that is plainly justified on the video evidence. He submitted that the letting out of the reins preceded the stumbles. and that even to the non-expert it is obvious from the video that the horse has reins let out for pretty much the whole of the penultimate furlong. The issue for the Panel was whether the stumbles were caused by something the jockey did by letting out the reins or whether the reins were let out because of the stumbles. Its findings on this were reasonably open to it.

242. In relation to the alleged air shot Mr Warby submitted that it is possible to see Mr McKeown's arm coming through in a sort of rounded motion around his waist coming forward instead of across of the top of his boot. In order to hit the horse he submitted the arm would have had to go down, whereas the arm was arrested as it was brought down rather than coming down in a vigorous way. There was no sign of the whip actually striking the horse. Rather it is seen to come across the thigh in a way which it would not have done if it had hit the horse. Reference was made to a question asked of Mr McKeown by Mr Hibbert-Foy at the Panel hearing in which he pointed out that every other jockey in the race had rather shorter reins than him. That was not challenged by Mr McKeown, who answered: "They were riding different horses who were acting on the surface and the undulations in a different manner to my horse." This is another example of a point of detail which would not in my view be obvious to a lay viewer of the video without the benefit of expert evidence. It was certainly not obvious to me. Nor did I consider it possible in the absence of expert evidence (or evidence from the other jockeys) to form a meaningful view on whether Mr McKeown's answer was factually correct and if so whether or to what extent it answered the criticism made of him.

243. Mr Winter in reply submitted that what mattered was not that the reins were held longer but whether they were taut or not because what matters is whether Mr McKeown was applying tension on the horse thereby controlling it. In relation to the air shot he submitted that the whip was coming out of the back of Mr McKeown's hand and therefore one would not necessarily expect to see it.

244. My impression when looking at the video on the large screen was that it appeared that Mr McKeown let out the reins just before the first stumble rather than after it. I also had the impression that for much of the race between the second and first furlong markers the reins were loose or long when the horse was not stumbling. As to the air shot, although I would not necessarily either have detected this or appreciated its potential significance, once I was alerted

to it by Mr Warby it did seem to me that one could see Mr McKeown's arm coming down and forward in a gentle rounded motion and that one could see the whip coming past Mr McKeown's thigh. I could not see the whip hitting the horse but nor could I see it not hitting the horse.

245. Without the benefit of expert evidence I felt unable to draw any conclusion as to what if any significance could or should be drawn from the fact, if fact it was, that at the time of the alleged air shot Mr McKeown was holding the whip out of the back of his hand. Nor, without the benefit of expert evidence, would I feel competent to reach a conclusion as to whether the explanation for the looseness and length of the reins was that it was responding to the stumbling of the horse or whether it was deliberate and unnecessary or a combination of the two. Nor without the benefit of expert evidence would I feel competent to reach a conclusion on whether, from the point of view from reaching a conclusion as to whether Mr McKeown was deliberately not trying the length of the reins should be disregarded and only the tautness or looseness of the reins should be taken into account.

246. Looking at the video on the small screen it was more difficult to see and form a view on the length and looseness of the reins. As to the alleged air shot it was again impossible to see the whip either hit the horse or not hit the horse. It was, however, possible to detect the gentle rounded motion of Mr McKeown's arm coming forward and the arm passing his white clad thigh. While in the absence of expert evidence I might not myself have concluded that for that reason it was probable that the whip did not contact the horse it seemed to me entirely possible that an experienced observer might reasonably have reached such a conclusion. Accordingly I do not accept Mr Winter's submission that it follows necessarily from the fact that on the video the whip cannot be seen hitting the horse that no reasonable Panel could have concluded that it was an air shot.

247. All in all I was not satisfied from my own viewing of the video that no reasonable Panel could have reached the conclusions which the Panel did in respect of this race. I was certainly not able to accept Mr Winter's submission that it is obvious from the video that Mr McKeown rode the horse on its merits. That is not to say that if I had been the trier of fact without the benefit of any expert evidence on either side I would have reached the conclusion on the balance of probabilities based on my own unaided viewing of the video that Mr McKeown was deliberately not riding the horse to the best of its merits or so as to avoid the risk of coming first, second or third. However that is not the point. The case comes before me not as a first instance trier of fact, but in the context of a supervisory role in which the question I have to decide is whether no reasonable Panel could have reached the conclusions that it did. I am not so satisfied.

Hits Only Money

248. Hits Only Money rode in the 4.20 at Wolverhampton on 19 December 2005. It was jointly owned by Mr Whiting, Mr Blockley and Mr Wright. It finished in sixth place out of a field of 12. The lay bets were that it would not be placed in the first three finishers.

249. The Panel recorded that the horse had been out of action for eight months before the race, had had wind operations and was being tried over nine furlongs – a distance longer than it had ever run before. The Panel recorded that although untried over this distance, Mr McKeown was in no doubt that it was inappropriate, he having said in interview; "The horse would never get nine furlongs in a horse box." The Panel found that he proceeded to give a classic conditioning ride. A conditioning ride was explained to me to be one in which rather than racing the horse to the limit of its abilities and the best of its merits, the jockey rides it with a view to improving its prospects on a subsequent occasion. The Panel found that around the final bend and throughout the straight Mr McKeown made no serious request for effort: "Though it is true that the horse's head went up towards the end of the race to indicate that it had had enough, his failure to ask a question earlier showed that this was another plain breach of Rule 157."

250. In the Details of Claim it was submitted that although the horse lost a place in the straight he won it back only to lose it again in the final sprint. That it was said is what happens in racing. It was submitted that the horse failed to win because it had never run over nine furlongs, had not run at all for eight months since the previous April and was recovering from two wind operations. It was submitted that the Panel's conclusions were unreasonable and unsupported by the evidence, it not being possible to conclude that there had been a breach of Rule 157 let alone that Mr McKeown had joined a conspiracy to stop his horse.

251. At the viewing Mr Winter submitted that it was unreasonable of the Panel to find that this was a classic conditioner race and irrational to infer from its finding that it was, that the motive was to protect lay betting against a place. He cited the evidence that Mr Blockley had telephoned Mr Wright who laid the horse and submitted that the only inference was that the reason that he laid the horse was because he knew it would be given a conditioner ride because Mr Blockley had told him that it would and also because it had not ridden for nine months. Further the Stewards at the time found no breach of Rule 157. He submitted that at the final bend one could see Mr McKeown asking the horse for effort by pushing his arms and that the horse had run out of puff.

252. Mr Warby responded that Mr Winter's submissions were inconsistent with Mr McKeown's evidence to the Panel in which he admitted that he had asked for no more effort. In answer to a question at the Panel hearing as to when in the straight had he asked for more effort, Mr McKeown answered: "He hasn't got any more effort to give. I'm continuing the effort that I've rode him at and I'm still asking him for the same effort, still asking him, still asking him, still asking him. A slap down the shoulder there which is a further effort. Still asking him, still asking him, these horses are going quicker and quicker and this horse is getting slower and his head carriage is suggesting that he is struggling."

253. Mr Warby submitted that the key finding was that Mr McKeown made no **serious** request for effort. He said that a viewing of the video demonstrated that compared with other jockeys who were making obvious requests of their

horses Mr McKeown was not doing so and that he never for example used his whip.

254. If I had viewed this video without any prior notice of what the allegation was, I would not have concluded that it was obvious that Mr McKeown was not making a serious request for effort from his horse. Viewing the video with the knowledge that that was the allegation and having had my attention drawn to features of the footage on which Mr Warby relied, as a matter of impression it struck me that it appeared in parts of the latter part of the race that Mr McKeown was making less energetic efforts both in terms of his body movement and the lack of a use of a whip than some of the other jockeys. However without the benefit of expert evidence, had I been the trier of fact this would not have been enough to lead me to conclude on the balance of probabilities that this was a conditioner ride or that Mr McKeown was not making the best effort to ride the horse on its merits. Mr Warby was no more an expert witness than was Mr Winter, his submissions were no more evidence than were those of Mr Winter and I had neither the knowledge nor the experience to make a reliable judgment as to whether my impressions were correct or not. However as with the other races, that is not the relevant test. I was certainly not satisfied either by Mr Winter's submissions or by my own observation and impressions that no reasonable Panel could have reached the conclusions which the Panel reached. Mr Winter's submissions in my view amounted to no more than points which might have persuaded a different tribunal of fact to reach a different conclusion-in effect a restatement of Mr McKeown's case to the Panel- or assertions unsupported by evidence. Both fell critically short of satisfying the test that no reasonable Panel could have failed to reach the conclusions for which he contended.

255. Thus in respect of none of these four races was I satisfied that the findings made by the Panel and upheld by the Appeal Board were perverse or such as no reasonable Panel could have made.

Relationship between the video evidence and the evidence of the lay betting, contact evidence and admissions

256. I accept Mr Winter's submission that it would have been wrong in principle for the Panel to take into account, for the purpose of deciding whether Mr McKeown failed to ride his horses on their merits in the four allegedly non-trier races, the evidence in respect of each of those four races (as well as seven others) pointing to lay betting having been placed on the strength of inside information. That is because even if the only reasonable inference from the lay betting evidence was that it must have been influenced by some inside information, it was always possible that the inside information was coming from Mr Blockley on his own (or with other(s)) rather than from Mr McKeown either on his own or in conjunction with Mr Blockley. The fact that in the four allegedly non-trier races somebody was supplying inside information to the gamblers did not make it more likely than not that Mr McKeown was deliberately failing to ensure that his horses were run on their merits. Such a chain of reasoning would be a bootstraps approach.

257. Indeed it is to be assumed that the reason the Panel scrutinised the video footage with great care was precisely because, in the light of the defendant's allegations (which they found to be true) that the lay betting evidence showed that the lay bets had been placed in reliance on inside information, they wanted to see whether the video footage did or did not demonstrate that Mr McKeown was deliberately not trying and thus, as submitted by the defendant, must have been in on the conspiracy. To have relied in those circumstances on the conclusion based on the lay betting evidence that someone had supplied the lay betters with inside information as a factor pointing towards the likelihood or possibility that Mr McKeown was deliberately not trying in the races would be to put the cart before the horse or to assume as correct the very question which fair and objective examination of the video evidence was designed to answer.

258. I do not consider from the Panel's Reasons that there is any reason to suppose that they made this error. Taken at face value the Panel's reasons for concluding that Mr McKeown failed to ride his horses on their merits were confined to their viewing and interpretation of the video footage and their assessments of Mr McKeown's and Mr Blockley's explanations based on their views of their credibility. There is nothing to suggest that their conclusions were influenced by their awareness of or conclusions on the other evidence in the case such as the betting evidence. Nor, in my view, is there any basis for concluding that there is any reason not to take the Panel's reasons at face value. As already mentioned, the pleaded allegations of actual bias were not pursued by Mr Winter at the hearing.

259. Of course by the time they reached their conclusions on the video footage if not by the time they viewed it the Panel members were aware of the lay betting evidence and the contact evidence as well as the interviews and oral testimony. It is also the case that they concluded that Mr McKeown was passing on information which he gained from his acquaintance with Blockley-trained horses to enable the lay betting. It does not, however, follow from that that they allowed those matters to influence their interpretation of what can be seen on the video footage.

260. This issue is allied to Mr Winter's submission in the Details of Claim that it was unreasonable and unfair of the Panel and the Appeal Board to determine the case in the absence of an expert witness. He submitted that the absence of an expert witness meant that there was no evidence from any person unconnected to the defendant or unaware of the other evidence in the case such as the betting evidence. An expert witness would have concentrated on the evidence of the rides and reached an honest and objective opinion as to that evidence without being affected by any other extraneous considerations. He submitted that that an expert conducting such an exercise would have concluded that no adverse findings could be made against him from the evidence of the rides alone.

261. I have already pointed out that the latter submission is pure assertion and does not advance Mr McKeown's case. Implicit in the former submission however appears to be a suggestion that the conclusions of the Panel and the Appeal Board were not honest or objective opinions as to the evidence of the rides

because they were affected by their awareness of the other evidence in the case. In so far as that was an intended criticism in my view it is not well founded. Tribunals of fact often have to consider a number of issues, one or more of which need to be decided by reference to discrete parts of the evidence. The fact that in doing so they will be aware of other parts of the evidence does not vitiate the fairness of the process.

262. At one point reliance appeared to be placed on a passage from the judgment of Eady J in *Fallon v MGN Ltd* [2006] EMLR 19 at paragraphs 14-16. That was a libel case in which John McCririck gave expert evidence for the defence on whether the claimant jockey appeared to wait for another horse to close a gap. In fact Mr McCririck did not say that the claimant appeared to wait for the other horse but rather expressed the view that the claimant made a mistake. Eady J said: "Mr McCririck came later apparently to suspect that there might be a different explanation when he heard tell of certain betting patterns, but that is not a matter for a race-riding expert. That is a matter for assessing the statistics and forming a judgment on probabilities…" (para 16). In my view Eady J was there doing no more than saying that questions as to what inferences can be drawn from betting patterns when assessing a jockey's motives are not within the expertise of a racing-riding expert witness. Translating that to the issue with which I am here concerned, it seems to me to go no further than providing indirect support for the proposition, which I have already indicated I accept, that it would have been wrong for the Panel members to allow their interpretation of the video evidence to be influenced by their knowledge of and/or conclusions as to the betting evidence. It does not support the proposition that the Panel was disqualified or precluded by its awareness of the betting evidence from reaching a conclusion on the video evidence as to whether Mr Mckeown was deliberately not riding his horses on their merits and was seeking to disguise his lack of effort by air shots, any more than it supports the proposition that, having concluded that he was doing so, the Panel was thereby disqualified or precluded from reaching a conclusion on the basis of all the evidence and inferences to be drawn therefrom as to whether his motive was that he was seeking to protect the lay bets and whether he was involved in a conspiracy by agreeing to give assurances to the gamblers that he would if necessary ride so as to ensure that their lay bets were successful.

263. What the Panel members did do, as it seems to me, was, having found, on the basis of their interpretation of the video evidence and their view of Mr McKeown as a witness of truth or otherwise based on his oral testimony, that he was not trying in the four allegedly non-trier races, to go on to conclude that the only plausible explanation for his having not tried in those four races was that he was involved in the lay betting conspiracy by giving the lay betters assurance that he would if necessary ride to ensure that the bet succeeded. They no doubt reached that conclusion partly because no alternative explanation as to why he was not trying was put forward by Mr McKeown to the Panel (with the partial exception of Hits Only Money where he asserted that he was following Mr Blockley's legitimate race instructions) or to the Appeal Board. Thus for example in relation to the first of the non-trier races he did not adopt the stance of accepting that he was not trying and putting

forward an alternative explanation such as that he was only doing a conditioner ride.

264. It does not seem to me that the Panel can be criticised for having failed to prefer an alternative explanation to cheating in order to assist the lay betting conspiracy which was not advanced by Mr McKeown to explain why he was deliberately not riding the horses on their merits. Further the Panel plainly did and in my view was entitled to find that, in the absence of an alternative non-conspiratorial explanation for Mr McKeown having deliberately failed to ride the horses on their merits when he was in with a chance of winning (or, as the case may be, being placed findings which I have held it was entitled to make on the video evidence, its assessment of the key witnesses and its knowledge and experience of racing), the only plausible explanation was that it reflected the fact that he was involved in the lay betting conspiracy by giving the lay betters assurance that he would if necessary ride to ensure that the bets succeeded. Any other explanation would have involved an implausible coincidence that on four of the eleven races on which there was overwhelming evidence that the lay bets were influenced by inside information it just so happened that the jockey, for quite unconnected (but unexplained) reasons, decided not to try his best to achieve the win or place which would in fact (but on this hypothesis unknown to him) have led to the lay bets being lost.

265. I have already said that in my view it would have been illegitimate for the Panel to take the lay betting evidence into account in evaluating the video evidence for the purpose of deciding if Mr McKeown was deliberately not riding the horses on their merits in breach of Rule 157. However it by no means follows that, having found as a fact, on the basis of the video evidence and their assessment of the credibility of Mr McKeown and Mr Blockley, that Mr McKeown was indeed not trying his best and disguising his lack of effort by air shots and that his evidence to the contrary was not to be believed, the Panel was not fully entitled to draw adverse inferences from that fact when it came to deciding whether it was persuaded that his reason for so riding was to protect the lay bets, that he was involved in the conspiracy by giving the lay betters assurance that he would if necessary ride to ensure that the bets succeeded and that his involvement was for substantial reward. On the contrary it was in my view plainly entitled to draw such inferences particularly in the absence of any alternative explanation, let alone any plausible explanation, having been proffered by Mr McKeown. I have already set out in an earlier part of this judgment my reasons for concluding that if, as I find is the case, the Panel's findings that Mr McKeown failed to ride the horses on their merits and disguised his lack of effort were neither perverse nor unfair, it was open to a reasonable Panel to find that he was in breach of Rule 201 (v) by giving for substantial reward assurances that he would if necessary ride so as to protect the lay bets. Such conduct if proved is accepted by Mr Winter to constitute a breach of Rule 201(v).

266. Mr Winter relied on the fact that twelve days after the race which is the subject of the Panel's findings Only if I Laugh was backed by Messrs Wright Rook Wakefield and Reader with £12,490 to win at odds of 11 to 10 favourite and that they lost their bet, Mr McKeown coming third out of seven. He

submitted that if there had been a conspiracy involving Mr McKeown, they would have been more likely to lay bets against this race in which case they would have made £200,000. In my view there are two flaws in this submission.

267. First as I understand it this point was not advanced to the Panel or the Appeal Board. Mr Winter submitted that I was entitled to take it into account because it was based on evidence of Mr Phillips which was before the Panel. However the target which Mr Winter has to hit is that of showing that no reasonable Panel could have made the findings made by the Panel and it does not seem to me to assist him in hitting that target to show that amongst the material laid before the Panel there was evidence which it could be argued points against Mr McKeown's guilt if neither that evidence nor its alleged significance was drawn to its attention.

268. Second this seems to me an example of a point which I could and indeed should have taken into account if I had been the trier of fact and if it had been drawn to my attention and relied on by Mr McKeown. But I am not the trier of fact. Nor is this an appeal by way of rehearing. I am exercising a supervisory function with a role that is far more circumscribed, as set out in the authorities to which I have referred. As it is, it does not seem to me to assist Mr Winter. It goes no further than being one piece of evidence which taken on its own might tend to suggest that Mr McKeown was not involved in a conspiracy. It does not follow that no reasonable tribunal which had addressed its mind to this bit of evidence could have decided that it was not of sufficient weight to require it to depart from an adverse finding to which it felt otherwise the evidence as a whole pointed. There could be any number of explanations for why Messrs Wright Rook Wakefield and Reader placed back bets and did not place lay bets on the same horse 12 days later which would not be inconsistent with Mr McKeown's involvement in the conspiracy as found by the Panel. It is not in my view not a knock out blow.

269. It is also necessary to bear in mind the stage in the process of fact finding at which this point would legitimately fall to be taken into account. It was Mr Winter's own submission that it would be wrong for the assessment of the video footage of the race and whether it justifies findings of deliberate non trying and deception to be influenced by extraneous betting related evidence. Once the Panel found that the video evidence coupled with its views as to the credibility of Mr McKeown and Mr Blockley justified a finding that he deliberately failed to try his best and used deception to pretend otherwise, there was in my view strong evidence to justify the inference which it went on to draw that his reason for not trying was that he was involved in the lay betting conspiracy. It is against the strength of that evidence and the inferences to be drawn from it that this point about the subsequent back bets (had it been raised by Mr Mckeown) would have fallen to be considered. It does not in my view carry such weight as to command the conclusion that it would have been perverse of the Panel to conclude that it did not outweigh the evidence and inferences pointing the other way.

270. I have already outlined in general terms the categories of evidence available to the Panel to justify its general conclusion that the explanation for Mr

McKeown's lack of effort was that he had given assurance to the lay gamblers that he would if necessary protect their lay bets. It is instructive by way of example to refer to some of the evidence relevant to this particular race.

271. The evidence of Mr Phillips who had analysed the betting positions taken by the gamblers showed that three of the gamblers (Messrs Rook, Wakefield and Lovatt) had risked more on this race than on any other race they had placed lay bets on. In Mr Rook's case the account had bet on 2623 outcomes and, whilst overall gambling had lost money for him, on four of the races that were part of the alleged conspiracy he had made a profit of over £20,000. Mr Wakefield risked £15,000 on this race, which was 3 times more than he risked on any other of his 126 lay bets. Mr Lovatt risked nearly ten times more (£3,000) than on any other bet. Mr Wright made this his second biggest lay bet, risking £14,877. All of this betting was on a horse that was the second favourite and it involved offering odds of over double the starting price. Three of the gamblers risked more than 80% of their available funds on the outcome of this race.

272. The timeline for the race shows that in the days leading up to the race the gamblers Rook and Wright had primed their betting accounts with additional funds, to allow them to stake more in lay bets. Mr Wakefield did the same on the day of the race. Mr Rook's decision to increase his limit to £50,000 is sandwiched between telephone calls by him to Clive Whiting.

273. The timeline also demonstrates that there was regular telephone contact in the days before the race between Mr Blockley and Whiting, Mr Whiting and Messrs Wright and Rook, Mr Rook and Mr Blockley and Mr Blockley and Mr McKeown. However as with other races the case against Mr McKeown did not depend on the timeline evidence of telephone contacts. In addition to the admitted face-to-face contact between Clive Whiting and the gamblers at Palmers, there was evidence that Mr McKeown frequently talked to Clive Whiting (as well as Mr Blockley) at the Blockley yard. Mr McKeown said: "*I might even have rode work for Paul [Blockley] that morning at Southwell. So, you know, because I haven't phone anyone or spoke to anyone, doesn't mean that I haven't done that in person, as in Southwell is where Paul trains and near where Clive lives"* Mr McKeown also gave evidence that he had on occasion been given lifts by Clive and Vinnie Whiting to races where he was riding a Whiting horse. Thus while the timeline evidence provided strong corroborative evidence that the lay bets in general were placed in reliance on inside information emanating at least from Mr Blockley the absence of evidence of telephone contact between Mr McKeown and the Whitings and/or gamblers is by no means inconsistent with a finding that Mr McKeown gave an assurance that he would if necessary try to protect lay bets on this race.

274. Both Mr McKeown and Clive Whiting sought to explain the decision of the gamblers to lay the horse by reference to a racecourse rumour that O Be Bold ridden by Franny Norton was a very good prospect in the race. Mr McKeown raised that in response to questions from Graeme MacPherson QC who appeared before the Panel on behalf of Mr Blockley, saying that he had discussed the horse with Clive Whiting: "*I said* "*Well there's a rumour that OBE BOLD is on the job"*. Mr McKeown's evidence was far from clear and

consistent in cross-examination on how the rumour was passed, saying he may have had the conversation but he both could and could not remember.

275. Clive Whiting's evidence was to the effect that Mr Wakefield laid the horse because he had heard via Mr Reeder that Mr Whiting was heavily backing O Be Bold because of the racecourse rumour. Mr Wakefield is supposed to have concluded that because Clive Whiting was backing another horse, *ONLY IF I LAUGH* could be laid to lose. But when Clive Whiting was asked about the fact of the gamblers increasing their exposure as shown in the timeline he acknowledged to the Panel "*these are incriminating. I know they look terrible*" .In fact, the timeline strongly suggests that the decision to place lay bets was taken on the morning of the race, and that preparation for it (by increasing exposure on the Betfair accounts) had taken place in the days running up to it. The alleged racecourse rumour (coming to the ears of Mr McKeown and Clive Whiting at the racecourse) could not have justified those earlier decisions to lay the second favourite at such prices. The 'racecourse rumour' story is also at odds with the fact that only one other Betfair account was prepared to risk more than £5,000 on this race, and that that account bet within its normal pattern and parameters. If there was a rumour only the persons before the Panel appear to have reacted to it.

276. Mr Wakefield gave no coherent explanation for the significant bet he placed. Mr Lovatt's explanation for his extraordinary bet included the concession that he was probably told by Clive Whiting about the horse. He offered no other basis for choosing to lay that horse out of the 230 odd horses that were running at meetings across the country that day. Neither Mr Rook nor Mr Wright attended the Inquiry.

277. In my view the Panel was entitled on the evidence available to it to find that at least one of the things that drove the lay betting against Only If I Laugh by the gamblers connected to Clive Whiting was the knowledge that Mr McKeown was in this race ready and prepared to stop the horse winning.

278.

279. *The challenge to the findings that Mr McKeown was in breach of Rule 201(v) by supplying for substantial reward inside horse-related information to the Whitings knowing that it was being used for lay betting organised by Clive Whiting.*

280. I turn now to the challenge as being unreasonable of the Panel's finding, upheld by the Appeal Board, that Mr McKeown was also in breach of Rule 201(v) by supplying inside information relating to horses knowing that it would be used to place lay bets. The Panel found that Mr McKeown passed on knowledge which he gained from his acquaintance with Blockley-trained horses to enable the lay betting for substantial reward.

281. I have already mentioned that there was no real challenge by Mr Winter to the Panel's findings that the pattern of lay betting led to the inference that it was inspired by inside information, that a flow of inside information starting at least with Mr Blockley caused the lay bets to be struck, and that Clive Whiting

was involved in the lay betting. There was evidence, to which I will refer, that Mr McKeown passed inside information relating to horses belonging both to Clive Whiting and others to the Whitings and that Clive Whiting used Mr McKeown's inside information to cause lay bets to be placed. The critical questions are whether a reasonable Panel could have found, as the Panel did that Mr McKeown was aware that the inside information he provided was being used for lay betting and (on Mr Winter's restrictive interpretation of Rule 201(v)) whether he did so for substantial reward.

282. The findings that Mr McKeown passed inside information to the Whitings and that the Whitings used Mr McKeown's inside information to cause lay bets to be placed were supported by the following evidence.

283. Mr Whiting in his evidence to Panel named Mr Blockley and Mr McKeown as his sources of information on the horses at Mr Blockley's gallops. If he rang either of them or visited the yard both of them would tell him anything he wanted to know about any of the horses which had been galloping with one of his own. They would both give him their opinion on horses whether they were owned by Mr Whiting or not.

284. Similar evidence was given by Mr McKeown and Mr Lovatt to the Panel. Mr McKeown said that he rode out twice a week and if Clive Whiting was there he would speak to him about other horses trained by Mr Blockley but not owned by Mr Whiting. He confirmed his interview statement that he had agreed to comply with Clive Whiting's request to tell him if he thought that a horse trained by Mr Blockley was going to win. In his evidence to the Panel he explicitly confirmed that he would not limit this information to horses owned by Mr Whiting and that he would also give such information to Vinnie Whiting. He said that he let Clive Whiting in on any information including how he felt horses about which Mr Whiting asked had worked or how they were going to run. He did not deny that this was more than he would do for an owner normally and confirmed that most owners did not ask him these questions.

285. Among the kind of information he would give Mr Whiting were how a horse had been exercising in the morning, how it had ridden out, how it had rated against other horses, how the horse felt in itself, whether it was well or not, any other gossip he had picked up from the yard, what Mr Blockley thought its prospects were, how fit it was and, in the case of Hits Only Money whether it was going to be given a confidence run "as in...whether the horse gonna be hardly ridden" and if he had the knowledge whether the horse had been a bleeder.

286. He also said that before a race he would ask other jockeys who had ridden the horse he was going to ride how they had run previously or if they had a ride in the race themselves how they thought their horse was going to run the next day. If such a jockey said he thought he was going to win he would pass that information to Clive Whiting. Mr Lovatt told the Panel that Mr McKeown and Clive Whiting had hit off a great friendship and that Mr McKeown was speaking to Mr Whiting about the prospects of horses within Mr Blockley's yard.

287. Mr McKeown admitted to the Panel that the information he gave Clive Whiting was the type of information that would allow someone to lay a horse.

288. Mr Lovatt told the Panel that he knew that Clive Whiting would talk to Mr Blockley and Mr McKeown and that as a result of that information Clive Whiting was instructing Mr Rook to place bets on the computer at Palmers. Clive Whiting accepted before the Panel that he shared with other people information which he had obtained from Mr Blockley and Mr McKeown about horses at the Blockley yard. He did not deny that that information was good enough to let people lay horses off the back of it commenting that it was a matter of opinion. He confirmed that he would communicate his "honest opinion" on horses' prospects to his friends. In interview Clive Whiting admitted instructing Mr Rook to place lay bets, albeit only for small amounts.

289. In evidence to the Panel Mr Lovatt confirmed that he had heard Clive Whiting saying in response to incoming telephone calls following races in which the horse had lost words to the effect of "job done". He heard such conversations a few times. He did not know if they were with Mr Blockley or Mr McKeown: "I'd guess it was jockeys and trainers."

290. In addition to the oral testimony and interviews, analysis of the betting patterns of Mr Rook and Mr Wright showed that they placed large bets on suspect races out of the pattern of their normal betting. In my view the Panel was entitled to conclude that the pattern was sufficient to raise the inference that they were inspired by inside information in the absence of a good explanation to the contrary. It was also entitled to conclude that no such good explanation was forthcoming. I did not understand either proposition to be disputed by Mr Winter.

291. Analysis of mobile telephone calls on the race days and preceding days showed calls between Mr Blockley and Clive Whiting, and Clive and Vinnie Whiting and the gamblers. In relation to some races they also showed telephone calls between Mr McKeown and Mr Blockley and/or between Mr McKeown and Clive Whiting. The Panel concluded that it is inescapable from the telephone evidence that there was a flow of information down the line starting at least with Mr Blockley which caused the lay bets to be struck.

292. Mr Blockley conceded in interview that Mr Wright might favour laying his horses because "I would imagine maybe that because where he was coming round [to Mr Blockley's yard] and I was being naive and he was saying: 'oh it will today', and I'd say no, no it ain't got a bloody chance."

293. Having concluded that when pressed by Clive Whiting for information about horses whether owned by Clive Whiting or not he freely gave information to the Whitings which was used by Clive Whiting to cause the lay bets to be placed (findings which in my view were perfectly reasonably on the evidence) the Panel posed the critical question whether Mr McKeown knew that this was being done. It concluded that it was convinced that he was fully aware that his input about the chances of the horses he rode in eight of the suspect races was being used for lay betting organised by Clive Whiting.

294. The reasons given for this conclusion were a combination of its findings as to the closeness of their relationship and its conclusion that Clive Whiting was "not the type of character who would have kept those activities secret from Mr McKeown." The former was based on findings that the relationship was much closer than the normal professional relationship of a jockey with an owner for whom he rode regularly. "They were friends and had business dealings. McKeown became in effect Clive Whiting's racing advisor. At the end of 2005 Clive Whiting's horse left Blockley's yard. McKeown said this happened after Whiting and Blockley's relationship deteriorated because results were not good. As he said during interview, "at the end we did take the horses away." His use of "we" in this quotation was not a slip of the tongue as he said in evidence – it was a revealing insight into the role he had come to play as adviser perhaps even as informal manager of Clive Whiting's racing string."

295. Although the matter is not free from doubt it is at least arguable in my view from paragraph 31 of the Reasons that the Panel also relied in support of its conclusions that Mr McKeown knew that his input about the horses was being used for lay betting on its findings about his rides in the four alleged non-trier races. However in my view its conclusion was open to a reasonable Panel to reach even without reliance on those findings.

296. In my judgment the Panel's findings in relation to the relationship between Mr McKeown and Clive Whiting were justified by the evidence and were open to a reasonable tribunal to make. Mr McKeown told the Panel that he became very good friends with Clive Whiting and fairly good friends with Vinnie Whiting. The friendship started in 2003/2004. Towards the end his relationship with Clive Whiting was closer than his relationship with Mr Blockley.

297. Similarly the Panel's finding that Clive Whiting was not the type of character who would have kept his lay betting secret from Mr McKeown derived support from his evidence to the Panel that he did not hide things from his friends. This remark was made in the context of accepting that he passed on to the gamblers information from Mr Blockley and Mr McKeown. Although taken on its own that evidence did not in my view necessarily show that he told Mr McKeown that he was using his information to cause lay bets to be placed, the Panel was in my view entitled to conclude, taken with all the other evidence,that it did. The Panel was entitled to assess this evidence in the context of the fact that Mr McKeown accepted that Clive Whiting was frequently pressing him for information including about horses he did not own, that this was unusual in his experience for an owner and that over twenty years he was normally cautious about passing information to owners. It is also the case that Mr McKeown gave evidence that he sold horses to Clive Whiting and was consulted by the Whitings as to whether to move their horses from Mr Blockley's yard. In my view the Panel was entitled to conclude from his use of the expression: "in the end **we** did take the horses away" (emphasis added) in interview that it was a revealing insight into the role he had come to play as adviser, perhaps even informal manager of Clive Whiting's racing string and was entitled to reject his evidence that it was a slip of the tongue.

298. I have carefully considered Mr Winter's submissions in support of his challenge to the reasonableness of the Panel's finding that Mr McKeown knew that his horse-related information was being used by Clive Whiting for lay betting. In my judgment they do not show that no reasonable tribunal could have made that finding. They do not identify evidence which is inconsistent so as to make such a finding irrational. Nor in my view do they demonstrate that the evidence relied on by the Panel was so weak as to characterise the Panel's reliance on it as speculative as distinct from a reasonable inference. In large part they constituted arguments which might have persuaded a tribunal to reach a different conclusion but fell short of showing that the conclusion actually reached was unreasonable or perverse.

299. In the Details of Claim it was submitted that the following facts are incontrovertible in respect of each of the eleven races; (i) all the horses were trained by Mr Blockley; (ii) the horse was laid irrespective of who was the jockey; (iii) the horses were laid irrespective of whether there was any contact with Mr McKeown; (iv) in every case there was contact pre-race between those involved in laying the horse and Mr Blockley and (v) there was a different reason for laying each horse connected to the horse and unconnected to the jockey.

300. It was submitted that those five facts provide a complete and sufficient explanation for the betting on the races which is that the inside information relied upon related to the horse not the rider and that the sole conduit of such information was Mr Blockley. That submission was said to be supported by close analysis of the evidence. Further the exoneration of Mr Blockley in respect of full participation in the conspiracy by the Panel which was upheld by the Appeal Board flew in the face of the unrebutted presumption of trainer complicity which is incorporated in the Rules of Racing and had the necessary and perverse consequence of making Mr McKeown the provider and moreover the sole provider of inside information to the effect that he was going to ensure his horse would lose. The Panel's conclusions that there were two different conspiracies operating in parallel one involving Mr McKeown passing on "non-trier" information and the other involving Mr Blockley passing on information about the horse to the same set of co-conspirators in circumstances where Mr Blockley remained unaware that Mr McKeown was telling the co-conspirators that he would stop his horse if necessary was a perverse extrapolation from evidence which pointed far more credibly and simply to Mr Blockley being the sole source of information and only passing on information about the horse not the jockey. This was said to constitute apparent bias in favour of Mr Blockley.

301. Of the five allegedly incontrovertible facts, (iii) and (iv) are not inconsistent with there having been direct or indirect contact between Mr McKeown and the Whitings and the gamblers, and (v) is not inconcistent with Mr McKeown as well as Mr Blockley having been a supplier of horse-related information to the Whitings. Further if (v) is intended to submit that the lay bets relied on horse-related information to the exclusion of assurances from Mr Mckeown that he would ride so as to protect the bets that is pure assertion and proceeds on the assumption, which I have held to be wrong, that a reasonable Panel

could not find that Mr McKeown informed the gamblers that he would if necessary ride so as to protect lay bets. It is thus a bootstraps argument.

302. As to the submission that those allegedly incontrovertible facts provide a sufficient explanation for the betting on the races, namely that Mr Blockley was the sole conduit of inside information, that does not prove that the gamblers did not rely on more than one source or conduit of inside information including Mr McKeown or more than one type of inside information including assurances from the jockey that he would protect the lay bets by deliberately not riding horses on their merits. There is no logical reason why the gamblers should not have relied and sought to rely on horse-related information as well as jockey-related information and on Mr McKeown as well as Mr Blockley for the supply of the former.

303. The submission that the exoneration of Mr Blockley flies in the face of an unrebutted presumption of trainer complicity in the Rules of Racing and has the necessary and perverse consequence of making Mr McKeown the provider of insider information to the effect that he is going to ensure his horse will lose is in my view based on two fallacies. The latter proposition assumes that the Panel's conclusion that Mr McKeown provided the gamblers with information that he was going to ensure his horse would lose was dependent on its finding that Mr Blockley was not (save in relation to the last non-trier race) involved in giving the gamblers such assurances or was aware of such assurances being given. That is in my view simply wrong. The finding that Mr McKeown gave assurances that he would ensure his horse would lose was based on the Panel's viewing of the video evidence, its assessment of Mr McKeown's credibility, its finding based on those matters that he failed to ride his horses on their merits in the four non-trier races and the inferences it drew therefrom.

304. Mr Winter's submissions on the contact evidence did not in my view assist him. First he submitted that the lack of evidence that Mr McKeown met or spoke to any of the gamblers not only does not prove the allegation but tends to suggest that he was not involved in a conspiracy with them. Since the case against him was that he passed information to the Whitings knowing that it would be used by them to cause lay bets to be placed by other gamblers this point does not in my view tend to suggest that he was not involved in a conspiracy with them in the manner alleged and found, still less that it would be unreasonable to find that he was.

305. I found the challenge to the Panel's findings on the relationship between Mr McKeown and Clive Whiting wholly unpersuasive. The submission that there is no evidence that the relationship was anything more than a jockey/owner relationship is simply not supported by the evidence to which I have referred. The submission that there was no evidence that they had any business dealings other than as jockey/owner "and in relation to the fact that Mr Whiting may have bought a horse from the claimant" not only acknowledges that there was a business relationship but miss-states the evidence which was that Mr Whiting brought more than one horse from Mr McKeown.

306. Mr Winter was unable to challenge the reasonableness of the Panel's finding that Mr McKeown provided informal managerial services to Clive Whiting in

relation to the decision to remove his horses from Mr Blockley's yard. As to the considerable reliance placed by it on his use of the word "we", Mr Winter's submission that no reasonable Panel could have considered that this was evidence of an inappropriate relationship was in my view aimed at the wrong target. The Panel merely held that it was evidence of a close relationship.

307. The submission that there is no evidence that Mr McKeown had any contact with Vinnie Whiting other than as owner's representative of his brother was not supported by Mr McKeown's evidence. Moreover as with the submission that there is no evidence that he had any contact with Clive Whiting other than as owner of the horses that he rode it does not challenge the reasonableness of the finding that there were contacts between the Whitings and Mr McKeown. Nor does it address the evidence that he gave the Whitings horse-related information including in relation to horses not owed by Clive Whiting.

308. Mr Winter relied on the absence of incriminating pre-race telephone calls by Mr McKeown linking his provision of information to the placing of the lay bets. to the gamble. While it is right that the timelines, which constituted powerful evidence against Mr Blockley, did not show such a pattern in the case of Mr McKeown there was clear evidence from Mr McKeown of frequent face-to-face contact with the Whitings and telephone contact with Mr Whiting and with Mr Blockley, who was found also to have been involved in supplying horse-related information to the Whitings knowing that it would be used for lay betting. There was thus no shortage of opportunity for Mr McKeown to supply horse-related information to the Whitings. The absence of an incriminating pattern of telephone calls from Mr McKeown to the Whitings or the gamblers is not in my view inconsistent with knowledge by Mr McKeown that the information he supplied would be used for lay betting. It is also noteworthy that in relation to Smith N Allen Oils, which was owned by Mrs Hughes, the timeline shows significant telephone contact between Mr McKeown and Mr Whiting before as well as after the lay bets placed by Mr Rook.

309. Mr Winter's submission that the Panel was perverse to find that the evidence of dishonesty was clear and cogent against Mr McKeown while largely exonerating the trainer Mr Blockley of this charge is in my view not supported by the Panel's Reasons for Penalties. It explicitly rejected Mr Blockley's submission that his actions were naive rather than dishonest. "It was the considered passing of inside information to people engaged in a dishonest practice to his knowledge." So far as Mr McKeown is concerned the submission also ignores the Panel's finding which I have held to be reasonable that he gave assurances for substantial reward that he would ride to protect the lay bets. In my view if the Panel relied on its findings on these assurances in concluding that Mr McKeown knew that the horse-related information he supplied would be used for lay betting it was entitled to do so. If it did not in fact rely on those findings in so concluding in my judgment it would have been open to a reasonable Panel to do so.

310. So far as the finding by way of inference that Mr McKeown received substantial reward for supplying horse-related information to the Whitings

knowing that it would be used for lay betting in my view this was a finding open to a reasonable Panel to make. The same considerations apply as in the context of the assurances that he would ride so as to protect the lay bets.

311. For all these reasons I reject the submission that the Panel's findings of fact were perverse or such as no reasonable Panel could have made. Given that the findings which I hold to have been reasonably made as to Mr McKeown's involvement in supplying horse-related information for the purpose of lay betting include a finding that he did so for substantial reward, it follows that even on the restricted construction of Rule 201(v) for which Mr Winter contended the Panel was entitled to find that the breached Rule 201(v) in this regard. Indeed given that the information included information about horses not owned by Mr Whiting and that some of the lay betting in which Clive Whiting was involved was against horses which he did own that would be the case even if the finding as to substantial reward was not open to a reasonable Panel since the conduct would have involved breaches of Rules 243 and 247.

312. Mr Winter submitted that the failure of the Panel and the Appeal Board to scrutinise the evidence so as to make a finding in respect of each race as to what the inside information was amounts to a fundamental error of fact and approach that should of itself result in a declaration that the findings of the defendant are unlawful. This was for two reasons: first that they failed to exclude the possibility that some of the information supplied may have been generally known to the public or information whose supply was not prohibited by the Rules and thus could not constitute a corrupt practice for the purpose of establishing a breach of Rule 201(v); second that it is only when the information has been identified that conclusions can be reached as to who was responsible for passing the information to the gamblers.

313. I deal with the construction of Rule 201(v) below. However in my view on the facts of this case the Panel was entitled to find that the horse-related information supplied to the gamblers was inside information not generally known to the public. This seems to me a reasonable inference from the evidence of the pattern of lay betting. There was no evidence in relation to any of the horses ridden by Mr McKeown that he had no knowledge of the horse such as would have made it impossible for him to be a or the source of information supplied to the gamblers. Moreover there was evidence that Mr McKeown supplied horse-related information to the Whitings of a kind which might lead to a lay bet which information was passed on by them to the gamblers. In the absence of evidence in relation to individual races inconsistent with the possibility of Mr McKeown having been at least one source of inside information it was in my view open to the Panel to conclude that he was by reference to the findings of fact which they made and the inferences which they drew therefrom. I include among those findings the finding that he gave assurances to protect the lay bets in the four non-trier races. Although not by any means conclusive (see for example the Panel's findings that Mr Blockley supplied horse-related information but was not involved in the assurances on the first three races), neither in my view was the Panel precluded from drawing adverse inferences from this finding when assessing the truthfulness of Mr McKeown's evidence on the supply of

information or horse-related information or whether his supply of horse-related information was dishonest.

314. Mr Winter criticised the Panel for failing to distinguish between what he called type 1 conspiracy to supply horse related information and type 2 conspiracy to provide assurance that if necessay the jockey would deliberately fail to ride the horse on its merits so as to protect the lay bets. In my view the criticism is not borne out by the Reasons, in which the Panel considered the allegations and evidence relevant to each of them in relation to each type of conspiracy separately and concluded separately by reference to their findings on each allegation and the inferences they drew therefrom that Mr McKeown and Mr Blockley were both involved in a type 1 conspiracy and Mr McKeown was involved in a type 2 conspiracy on his own until the last race, Hits Only Money at which point Mr Blockley became involved. The important question is whether its findings that Mr McKeown was involved in both can be shown to have been so unreasonable as to be unsustainable. I have already expressed my view that the they can not.

Construction of Rule 201(v)

315. In the Details of Claim it was submitted that Mr McKeown was found to be in breach of Rule 201(v) not on the basis that there is any evidence of his involvement in a corrupt or fraudulent practice but on the basis of the mere passing of information to those who subsequently laid horses, which was said to amount to an error of law. This led to a series of submissions as to what is or is not capable of constituting a corrupt practice and what is the relationship between Rule 201(v) and other Rules.

316. Among the submissions made were the following. Corruptly does not mean dishonestly. The essential element of corruption is that someone does or forebears from doing something in relation to certain activities for which they are responsible as a result of or rewarded by inducement. There can be no breach of Rule 201(v) unless the conduct complained of is also a breach of another specific Rule of Racing. The mere passing of inside information to an owner or his representative is in certain circumstances permitted as an exception to the general prohibition on such a communication in Rule 243. Thus the mere communication of inside information by a jockey to an owner cannot constitute a breach of Rule 201(v). That is the basis on which Mr McKeown was found to be in breach of Rule 201(v). Appendix N permits a trainer or jockey for a fee which reasonably reflects the occasion and his status to give information or express opinions on horses in races by addressing specific groups such as corporate sponsorships groups. To conclude therefore that the mere passing of information outside of a high paying corporate event is a corrupt or fraudulent practice would be a capricious policy.

317. As I have already indicated, in my view it is unnecessary for me to resolve the legal issues concerning the proper construction of Rule 201(v) which were in controversy between the parties. It was conceded in the Details of Claim that it is possible to be guilty of a conspiracy to commit a fraudulent practice contrary to Rule 201(v):

(i) by conspiring to supply information as a result of which an owner of the horse in respect of which the bet is placed is party, whether directly or indirectly, to the lay side of the bet (i.e. a fraudulent breach of Rule 247);

(ii) by conspiring with the person entering into the lay bet that the jockey will commit a breach of Rule 157, if necessary, to ensure that the horse in respect of which the bet was placed loses the race or fails to achieve a place depending upon the nature of the bet (i.e. a fraudulent breach of Rule 157).

(iii) By conspiring to supply information as a result of which the person entering into the lay bet is in possession of information received from a licensed or permitted person or a jockey for which considering was paid to that person of £100 or more or in circumstances where there was a pattern of receipt (i.e. a fraudulent breach of Rule 243).

318. All the conduct of Mr McKeown which the Panel found gave rise to breach of Rule 201(v) fell into one or more of those categories and involved a breach of one or more other Rules. He was found to have failed to ride horses on their merits in breach of Rule 157, to have been complicit in the placing by Mr Whiting or his involvement in the placing of lay bets on horses owned by him in breach of Rule 247, to have supplied for substantial reward information indirectly to the gamblers for the purpose of lay betting in breach of Rule 243, and to have supplied for substantial reward information about horses in races to Mr Whiting who was not their owner again in breach of Rule 243. It is in my view clear from the Panel's Reasons for Decision that its findings that Mr McKeown was in breach of Rule 201(v) were not based on the mere passing of information or even on the passing of information which was in fact but not necessarily known by him subsequently used for lay betting. He was found to have had knowledge of the use to which the information was to be put and knowledge of breaches of the Rules by others as well as himself. Mr Winter conceded that if all the Panel's findings against Mr McKeown were open to a reasonable Panel to make they would constitute findings of breaches of Rule 201(v).

319. In these circumstances I do not propose to lengthen an already long judgment by expressing detailed opinions on issues upon the resolution of which this claim does not depend. I would however in deference to the arguments raised venture the following limited observations.

320. In my view proof of a breach of Rule 201(v) does not require proof of the breach of another Rule. As Mr Warby pointed out the Rule applies to "any person" including those who are not subject to the Rules of Racing. Thus to use his example a ring of gamblers who dazzled race horses with laser pointers by agreement in order to profit by laying them could be in breach of Rule 201(v) and a person subject to the Rules who joined such a conspiracy could be equally in breach of Rule 201(v) irrespective of any other obligation on him under the Rules. Further the fact that in certain circumstances the mere passing of inside information is not a breach of the Rules does not mean that there are

no circumstances in which the passing of such information could not constitute a breach of Rule 201(v). For example knowledge of the purpose for which the information is to be used is capable of rendering what might otherwise be conduct permitted by Rule 243 a breach of Rule 201(v). In my view a corrupt practice is not confined to a transaction involving a bribe. In my judgment Rule 201(v) is widely drawn to encompass conduct which may not constitute a breach of other Rules.

321. Having said that I was struck in the course of argument by two apparent anomalies. Whereas there is an explicit prohibition against a trainer and an owner laying any horse respectively under his care or control or which he owns to lose a race with a betting organisation or to receive the proceeds of such an act (Rule 247), there is no similar explicit prohibition against an owner or trainer placing back bets on other horses in the same race. The rationale of Rule 247 given by the Panel was that if an owner places lay bets on his horse he is taking a stance which is inconsistent with his jockey's and trainer's obligations to see that the horse is ridden on its merits. It is not immediately apparent to me why that rationale would not apply also in the case of an owner who places a back bet on other horses in a race competing with his own.

322. The second anomaly that struck me was the gateway under Appendix N(2) for trainers or jockeys for reasonable fees to give information or express opinions on horses in races to corporate sponsorship groups. If it is intended that the recipients of such information should be free to use it to place bets, in particular lay bets against the jockey's or trainer's horse or back bets on other horses riding against them it is not immediately apparent how that is reconcilable with the rationale behind Rule 247 and 243. If that is not the intention it may be that recipients of such information may be led into a misapprehension. This is of course entirely a matter for the defendant and those responsible for reviewing the Rules. There may be sound reasons for these apparent anomalies. I am, however, sympathetic to Mr Winter's submission that it is undesirable that there should be uncertainty on the part of all those involved in racing, whether as jockeys, trainers owners or gamblers as to the uses to which inside information may lawfully be put.

323. *Allegations of actual and apparent bias*

324. One of the grounds on which the decisions of both the Panel and the Appeal Board are challenged is an allegation of bias. Given the serious nature of such an allegation it is regrettable that there was a lack of clarity in the way in which the allegation was put forward. In the summary of Mr McKeown's grounds in the Details of Claim ground four was described as "bias, **or at least** the appearance of bias." (Emphasis added). The words emphasised were ambiguous as to whether a claim of actual bias was being put forward in the alternative to a claim of apparent bias. There were in the hearing bundles two versions of the Detail of Claim. In one the section setting out Mr McKeown's case on bias was headed "bias or the appearance of bias" and was introduced as follows: "The claimant is reticent about alleging bias and sincerely hopes that the reality of the situation is that there is only apparent bias." In the other the heading was: "the appearance of bias" and the introductory sentence was

removed. The former version appears to have been the one to which the defendant's skeleton responded, the latter was said by the claimant's solicitors to be the one signed off by counsel.

325. The bias alleged in the summary in the Details of Claim was said to be bias in favour of Mr Blockley. In the summary the allegation was directed only against the Panel but in the detailed section it was directed also against the Appeal Board. Included in the Details of Claim were allegations that the Appeal Board only paid "lip service" to the complaint about the missing video footage and tapes of the stewards' inquiries, and that it "was not seeking objectively and independently to resolve the claimant's appeal. It was doing its utmost to uphold the decision." Elsewhere it was submitted that for the Panel to conclude that Mr Blockley was not complicit to the degree that the claimant was until after the tenth race is perverse and tends to indicate bias in his favour." In relation to the alleged mis-shoeing of Skip Of Colour it was submitted that: "The only reasonable conclusion is that when the Appeal Board appreciated the importance of the evidence and that there was no answer to it they resorted to avoiding it by asserting that the evidence had not been before the Panel and no application to adduce it had been made."

326. Similarly it was submitted that the Appeal Board "resorted to refusing to consider [evidence relevant to Mr Whiting having removed his horses from the Blockley yard in 2005] because it is impossible to consider the evidence without concluding that it establishes the claimant's innocence and Mr Blockley's complicity. This is wrong in law and fact, is unreasonable and is evidence of bias **or** the appearance of such" (emphasis added). This appeared to be an allegation of actual bias and a decision taken so as to avoid having to make an adverse finding against Mr Blockley.

327. The Details of Claim quoted the Appeal Board's reason for declining to express any view on the mis-shoeing allegation and the allegation that Mr Blockley lied about the date when Mr Clive Whiting removed his horses from the yard: "Even if the Board had been persuaded by Mr Winter's submissions concerning Paul Blockley's role in this affair, the result would have been to heighten his culpability. It would not have detracted from the clear findings against the appellant in respect of his breaches of Rule 157 which the Panel obviously felt were the clearest indications of his full involvement." It was then submitted: "This is an extraordinary response of the Appeal Board and demonstrates that they were not seeking honestly and objectively to address the claimant's appeal."

328. In his written response to the defendant's skeleton argument Mr Winter submitted that the finding of the Appeal Board that the evidence relied on by Mr McKeown merely heightens Mr Blockley's culpability and does not negate or diminish the culpability of Mr McKeown since the clear findings against him under Rule 157 "were the clearest indications of his full involvement" demonstrates a closed mind because taking refuge in the Rule 157 findings is no answer to the overwhelming evidence pointing to Mr Blockley as the sole driving force behind the gambling. He further submitted that the Appeal Board justification for upholding the Panel's findings cited in paragraphs 86 to 90 of the Details of Claim is indicative of "the Appeal Board

aligning itself too closely with the defendant's regulatory interests at the claimant's expense."

329. At the hearing Mr Winter advanced no arguments in support of the allegation of actual bias. He said that he did not need to go that far. When I asked him if he could identify any reasons why the Panel or the Appeal Board might be biased in favour of Mr Blockley and/or against Mr McKeown or any evidence direct or indirect to support the existence of such reasons he declined to do so. However a written note summarising Mr McKeown's case in relation to the topic of bias which was produced by Mr Winter at the end of his submissions in reply, was headed: "summary in relation to **bias**/appearance of bias" and many of the matters set out in the document were said to be relied on as demonstrative of **bias**/appearance of bias against the claimant and **bias**/appearance of bias in favour of Mr Blockley." (emphasis added).

330. This was in my view an unfortunate approach: "willing to wound and yet afraid to strike." was brought to mind. Allegations of actual bias are very serious and should either be supported by evidence or not made. There was no evidence of which I was aware to support a finding of actual bias against either the Panel or the Appeal Board and I reject the allegations.

331. Before addressing the allegation of apparent bias I should record that Mr Warby told me that the allegation that the Panel had been guilty of actual or apparent bias had not been advanced on behalf of Mr McKeown to the Appeal Board. Mr Winter's response in his summary in relation to bias/appearance of bias was that "the concerns were raised in general before the Appeal Board" but were not resolved by and indeed were compounded by the Appeal Board. Mr Warby's response to that was that complaints about the Panel's reasoning has been made to the Appeal Board but it was not the case that any allegation of bias by the Panel whether actual or apparent had ever been made to the Appeal Board. What was said by Mr Winter in the passage referred to in his response was this: "… when one come to look at the way in which the Panel has dealt with Mr Blockley as opposed to Mr McKeown then there are very real concerns I'm afraid as to how that could have occurred in this case." I am prepared to accept that that was intended to be an allegation of apparent bias, but it does not seem to me that that is how it would be understood on an objective reading of the words and if there was no elaboration or condescension to particulars it is a slender bark upon which to load such an important challenge.

332. The test to be applied in deciding whether an allegation of apparent bias has been established was laid down by Lord Hope of Craighead in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357 at 494 [103]: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." In *Flaherty* Scott Baker LJ held that the test for apparent bias involves a two stage process "First the court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. Secondly it must ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased: see Lord Phillips of Worth Matravers MR in *Medicaments and Related*

Classes Goods (2) re [2001] 1 WLR 700 at 726 [83]….. Lord Phillips in Medicaments at [83] stated the principles as follows: "…(2) where actual bias has not been established the personal impartiality of the judge is to be presumed. (3) The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do the decision of the judge must be set aside. (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court. (5) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice". (paragraph 27).

333. Scott Baker LJ held that bias means "a predisposition or prejudice against one party's case or evidence on an issue for reasons unconnected with the merits of the issue." He cited Simon Brown LJ in *R v HM Coroner Inner West London ex p Dallaglio* [1994] 4 All ER 139 at 151: " Injustice will have occurred as a result of bias if 'the decision maker unfairly regarded with disfavour the case of a party to the issue under consideration by him.' I take 'unfairly regarded with disfavour' to mean 'was pre-disposed or prejudiced against' one party's case for reasons unconnected with the merits of the issue." (paragraph 28).

334. Scott Baker LJ emphasised that it is an important exercise in an "apparent bias" case to identify with some precision those facts on which the suggestion of bias can be based. (para 32).

335. It is instructive to note that in that case the circumstances identified as possibly giving rise to an appearance of bias were the prior relationship between Mr Crittall, a veterinary steward who sat on a disciplinary inquiry with the owners of the Wimbledon greyhound stadium, Mr Crittall's prior professional contacts with the racing manager of the stadium and his immediate superior and the prior views held by Mr Crittall about the adequacy of the stadium's security arrangements.

336. The Court of Appeal held that the judge in that case had fallen into error in concluding that a fair minded observer informed of all the facts of the case would conclude that there was a real possibility that Mr Crittall's consideration of the national greyhound racing club's case against the respondent was biased in favour of finding the case against him proved. In relation to Mr Crittall's expression of views about the security arrangements at the stadium, Scott Baker LJ held: "He was entitled to put questions on the basis of his knowledge and common sense and he was entitled to do so in a robust manner… Mr Crittall acknowledged that he drew on his knowledge of the physical layout of the WGS kennels, the size of the mesh in the grill and the difficultly getting the greyhound to ingest a sufficient quantity of hexamine. But it seems to me that he was doing nothing more than that envisaged by Lord Wilberforce in *Calvin v Carr* [1980] AC 574 at 596. It is not as if there was any other witness at the inquiry to contradict his knowledge. *Calvin v Carr* was a case that concerned a ruling by the committee of the Jockey Club of Australia. Lord Wilberforce, in the context of horseracing, said that stewards are entitled to use the evidence of their eyes

and their experience. He said at 597 that the appeal process he was there considering was an essentially domestic proceeding, "in which experience and opinion as to what is in the interests of racing as a whole play a large part, and in which the standards are those which have come to be accepted over the history of this sporting activity." Much the same could in my view be said about greyhound racing." (para 54).

337. In this case Mr Winter did not rely as the circumstances said to give rise to apparent bias on any relationship between any of the members of the Panel and any other persons, whether associated with the defendant, Mr Blockley, or otherwise. Thus for example as I have mentioned above Mr Hibbert-Foy had seen Mr McKeown race before and was said to have been familiar with aspects of his racing style. This arose in the context of questions he put to Mr McKeown in relation to how he held the whip. There was no suggestion that this gave rise to apparent bias.

338. The reality, in my opinion, is that most of the matters relied on by Mr Winter in support of the allegation of apparent bias amounted to little if anything more than a restatement or repetition of the matters relied on in support of the submission that no reasonable tribunal could have made the findings of fact or reached the conclusions or made by the Panel and Appeal Board. In effect the submission when analysed in my view was that if it can be established that no reasonable tribunal could have made the findings of fact or reached the conclusions made by the Panel and the Appeal Board it follows that there was apparent bias. That is in my view wrong in law. If it were right it would follow that in most if not all cases of judicial review where a decision is set aside on *Wednesbury* grounds as being based on a decision which no reasonable decision maker could have reached the court should or at least would be entitled to make a finding of apparent bias.

339. It does not in my opinion follow from a finding that a tribunal made findings of fact or reached conclusions which no reasonable tribunal could have made or reached that the fair-minded and informed observer would conclude without more that there was a real possibility that the tribunal was biased. Something further in my judgment is required in order to give rise to a legitimate fear that the tribunal of might not have been impartial and unfairly regarded with disfavour the case of one of the parties. Lord Brown's definition in *Dallaglio,* "pre-disposed or prejudiced against' one party's case for **reasons unconnected with the merits of the issue**" (emphasis added) with its focus on reasons unconnected with the merits of the issue would suggest that + additional element is likely to be one which would suggest to the fair-minded and informed observer that there was a real possibility that the decision was taken for reasons unconnected with the merits of the issue. That additional element would in most cases be looked for in such factors as were examined in *Flaherty*. In the absence of any such factors giving rise to an inference of apparent bias, the mere fact of finding that a tribunal has reached an unreasonable conclusion or made an unreasonable finding would be unlikely in most cases to support a finding of apparent bias.

340. In fact for the reasons set out in this judgment I do not consider that the material findings of the Panel were such as no reasonable tribunal could have

made or that the conclusions reached by the Appeal Board (with the sole exception referred to below) were such as no reasonable tribunal could have reached. It follows that in so far as those decisions and conclusions are relied on in support of the allegation of apparent bias they fail at the preliminary hurdle. However even had I been of the view that the findings and/or conclusions were unreasonable in the sense discussed, that would not in my opinion justify a finding of apparent bias.

341. An example will serve to illustrate the reliance placed by Mr Winter on his challenge to the reasonableness of the Panel's and Appeal Board's findings and conclusions in support of the allegation of apparent bias. I have already referred to the submission in the Detail of Claim that the five "incontrovertible facts" in respect of each of the eleven races provide a complete and sufficient explanation for the betting on the races namely that the inside information relied upon related to the horse not the rider and that the sole conduit of such information was Mr Blockley. That assertion was said to be supported by close analysis of the evidence and the exoneration of Mr Blockley in respect of full participation in the conspiracy by the Panel which was upheld by the Appeal Board was said to fly in the face of the unrebutted presumption of trainer complicity which is incorporated in the Rules of Racing and had the necessary and perverse consequence of making Mr McKeown the provider and moreover the sole provider of inside information to the effect that he was going to ensure his horse would lose. The Panel's conclusions that there were two different conspiracies operating in parallel one involving Mr McKeown passing on "non-trier" information and the other involving Mr Blockley passing on information about the horse to the same set of co-conspirators in circumstances where Mr Blockley remained unaware that Mr McKeown was telling the co-conspirators that he would stop his horse if necessary was said to be a perverse extrapolation from evidence which pointed far more credibly and simply to Mr Blockley being the sole source of information and only passing on information about the horse not the jockey. This was said to constitute apparent bias in favour of Mr Blockley.

342. The assertion that the exoneration of Mr Blockley flies in the face of an unrebutted presumption of trainer complicity in the Rules of Racing and has the necessary and perverse consequence of making Mr McKeown the provider of insider information to the effect that he is going to ensure his horse will lose is in my view based on two fallacies. The latter proposition assumes that the Panel's conclusion that Mr McKeown provided the gamblers with information that he was going to ensure his horse would lose was dependent on its finding that Mr Blockley was not (save in relation to the last non-trier race) involved in giving the gamblers such assurances or was aware of such assurances being given. That is in my view simply wrong.The finding that Mr McKeown gave assurances that he would ensure his horse would lose was based on the Panel's viewing of the video evidence, its assessment of Mr McKeown's credibility, its finding based on those matters that he failed to ride his horses on their merits in the four non-trier races and the inferences it drew therefrom.

343. As to the former it is true that Rule 155 (i) imposes a duty on a trainer to give the rider of any horse in his care such instructions as are necessary to ensure

the horse runs on its merits and that Rule 155 (ii) and (iii) provide that a trainer shall be deemed guilty of an offence under sub rule (ii) where a rider is found in breach of Rule 157 either because he conditioned the horse or otherwise, unless the trainer satisfies the stewards that the rider was given such instructions as are necessary to ensure the horse runs on its merits and that the rider failed to comply with them.

344. It was submitted that there was no allegation by Mr Blockley that Mr McKeown had disregarded his riding instruction in any of the eight races in which Mr McKeown was involved. It is also the case that the Panel did not explicitly find that Mr Blockley had given instructions to Mr McKeown on the three non-trier races with which he failed to comply. However I accept Mr Warby's submission that this is an artificial reading of the Panel's Reasons. It is clear from the Reasons that the Panel considered very carefully whether Mr Blockley was complicit in the actions of Mr McKeown to ride if thought necessary to ensure the success of the lay bets. It found that there was evidence pointing both ways on the matter. One bit of evidence which it found pointed to complicity was that his basic position was that all four horses in the non-trier races were ridden to instructions so far as Mr McKeown was able in the circumstances that developed in the races. The Panel expressed surprise that Mr Blockley a capable trainer and an astute man had not seen any of the problems with the rides which the Panel found to indicate the riding of non-triers by Mr McKeown. However, the Panel stated that it is not unknown for trainers to be blind to strange features of rides given to their horses and having reviewed the evidence pointing in the opposite direction and reminded itself of the need to be confident about conclusions of dishonesty it stated that it was not persuaded that Mr Blockley's participation in the conspiracy up to the summer of 2005 included complicity in the full extent of what Mr McKeown and Mr Whiting were up to.

345. It is in my view implicit in its findings that the Panel concluded that up to but not including in race eleven (Hits Only Money) Mr Blockley had viewed Mr McKeown as having ridden to instructions to the best of his limited ability, mistakenly attributing poor riding which it found was in fact deliberate non-trying to poor finishing due to his age. On that view of the facts it was not necessarily unreasonable for the Panel to consider that Mr Blockley had discharged the burden imposed on him by Rule 155 (ii) and (iii).

346. Mr. Blockley gave evidence in chief that in respect of each of the four non-trier rides he did not give instructions to stop. Mr Warby submitted that the logic of that position, which it was not unreasonable of the Panel to accept, was that if the horses were found to be non triers that was because Mr McKeown had stopped the horses other than in accordance with the race instructions. I accept that submission and although Rule 155(ii) requires the trainer to show positively that he gave proper instructions which were not complied with in order to rebut the presumption of complicity it seems to me not unreasonable for the Panel to have treated Mr Blockey's evidence that he did not give instructions to stop the horse, although framed as a negative, as implicitly including evidence that he gave positive instructions which complied with the requirement in Rule155(i) to give such instructions as are

necessary to ensure the horse runs on its merits. Indeed in his response to Mr Warby's skeleton argument Mr Winter positively relied on Mr Blockley's Response to the charges against him which confirmed that inherent in all his pre-race instructions to Mr McKeown was an instruction to achieve the best possible placing

347. As to the submission that the Panel's conclusion that (apart from race eleven) Mr Blockley was involved in supplying horse-related information unaware that Mr McKeown was supplying jockey related information, was perverse and therefore demonstrated apparent bias, in my view it was not perverse. The Panel found that Mr Whiting and Mr McKeown were very close, closer than Mr Whiting was to Mr Blockley and there is nothing inherently implausible in a finding that as well as obtaining horse-related information from Mr Blockley, Clive Whiting also obtained assurances from Mr McKeown that he would if necessary ride so as to protect lay bets. Further and in any event even if such a conclusion were unreasonable it would not in my judgment follow that it was evidence of apparent bias. The latter conclusion would simply not follow from the former.

348. In short even if I had taken a different view as to the reasonableness of the findings of the Panel and the conclusions of the Appeal Board, I would not have been persuaded that a fair minded and informed observer would have concluded that there was a real possibility that the tribunal was biased. The Panel's approach, as appears from the Reasons, was based on a review of the evidence and a bona fide weighing of the evidence and arguments pointing in different directions.

349. There are two particular allegations which I should address. The first is that in respect of Hits Only Money the Panel's conclusion that in the case of Mr Blockley the ride was of a less serious character than the other breaches of Rule 157 but that in the case of Mr McKeown it was another plain breach of Rule 157 is a clear example of the appearance of bias favouring Mr Blockley over Mr McKeown. On its face there is some tension between these two findings. However the Panel also found that even though the breach of Rule 157 was less serious on race eleven it was sufficiently serious to find that Mr Blockley was not only in breach of Rule 157 (ii) but also thereby became party to the full extent of the conspiracy that operated on that occasion when it was known to the lay betters that a tender ride would be given.

350. This is linked to the second allegation namely that the Panel demonstrated apparent bias in deciding to disqualify Mr Blockley for only two and a half years while allowing him to continue to live at the stables which could be operated by his partner while disqualifying Mr McKeown from all racing related activity, his entire livelihood for four years.

351. There are two separate points. As to the disparity between the length of disqualification, there was a critical difference between the Panel's findings as to the two men. It found that Mr McKeown had deliberately cheated in four races by riding so as to protect lay bets as well as, by inference, assuring the gamblers that he would do so in the other seven. Mr Blockley by contrast was found to have been involved in that aspect of the conspiracy on only one

occasion. While it is true that the Panel found that Mr Blockley was also involved from the beginning in the supply of horse-related information,it was in my judgment entitled to take the view that the deliberate failure to ride horses on their merits to protect lay bets was of a more serious character than the supply of horse related information such as to justify as higher penalty. It is clear that the Panel considered Mr Blockley's penalty very carefully and rejected many of his pleas in mitigation. On its face that is not consistent with bias. As to the decision to allow Mr Blockley to continue to live at the stables, it is clear that this was an act of mercy based on his particular personal circumstances. Again this does not seem to me to support a finding of apparent bias. Given that Mr McKeown has not in these proceedings challenged as unreasonable, unfair or tainted by bias the penalty imposed on him this allegation of bias must be viewed as proceeding on the basis that it is alleged not that his penalty was unduly severe but rather that Mr Blockley's penalty was unduly lenient, that lenience giving rise to an inference of apparent bias. It is thus on the Panel's reasons for the penalties imposed on Mr Blockley that attention must principally be focused. As the Appeal Board held, the circumstances leading to the decision to allow Mr Blockley to continue to work in racing and live in a house on the premises were very different from those relating to Mr McKeown. Moreover that decision was the result of a subsequent application by Mr Blockley under Rule 201(v), whereas Mr McKeown made no such application.

352. I do not consider that, in respect of these two matters as with the other matters relied on in support of the allegation of apparent bias, the allegation is not made good.

The two new arguments raised for the first time before the Appeal Board

353. In front of the Appeal Board Mr Winter advanced two arguments which had not been advanced by Mr McKeown in front of the Panel. The first was that after the "Skip of Colour" race it was discovered that the horse had lost both front shoes. As recorded by the Appeal Board this was said by Mr Winter to point strongly to Mr Blockley and not Mr McKeown since the horse must have been mis-shod which would be very dangerous. No jockey would ride such a horse and Mr Blockley and not Mr McKeown must have been the instigator together with a farrier. Mr Weston's reply to this point on behalf of the defendant was that this serious allegation involving Mr Blockley and a farrier had not been advanced before the Panel and thus had not been investigated. Further all the video shows was the horse tiring.

354. The Appeal Board held: "There was no application to adduce fresh evidence before the Board. Since [this] point was not put to Paul Blockley at the Panel hearing and he was given no notice of it and did not seek to appear before the Board it would be wrong for us to proceed on the basis that such a serious allegation was true." (para 36).

355. Mr Winter's second new argument in front of the Appeal Board was that Mr Blockley had lied before the Panel and misled them by saying that Clive Whiting's horses left his yard at the end of 2005 when in fact they left in July 2005 as he must have known. He submitted to the Appeal Board that this was

a calculated deception by Mr Blockley since seven of Clive Whiting's horses, trained by another, ran on many occasions between leaving his yard in July 2005 and his first interview by the defendant in February 2006 and yet there was no lay betting by the conspirators. The reason, Mr Winter submitted, was obviously that the source of the inside information, namely Mr Blockley, no longer existed and this inference, adverse to him, would have been clear. Further Mr McKeown continued to ride the horses on many occasions, further emphasising that Mr Blockley was the real source of the inside information that led to the lay betting.

356. In response for the defendant Mr Weston submitted that this allegation had not been developed before the Panel or put to any of the witnesses. Further the conclusion was contrary to Mr McKeown's admission that he told Clive and Vinnie Whiting that he was giving Hits Only Money a confidence ride. That race was in December 2005. Having recorded that there was no application to adduce fresh evidence before it, the Appeal Board held that again this argument had not been developed before the Panel and further factual investigation had not been pursued. Further Mr McKeown had heard Mr Blockley's evidence of which such strong criticism was now made. He could have raised it with his solicitor, who although not constantly present was available. If he did not it must have been for his own reasons. If he did then a considered decision was taken not to pursue it further. (para 36).

357. The Appeal Board held: "If serious allegations are to made at a Board hearing against a party to a Panel hearing which were not put to the party and who had not persisted in an appeal to the Board, notice should be given to that party. Appendix J may not expressly provide for this, but common fairness demands it. The Board has in mind that this appeal was heard in short time but, whilst intending no criticism on this occasion, hopes that in future note will be taken. The Board is in all the circumstances not inclined to express any view on these two matters. Even if the Board had been persuaded by Mr Winter's submissions concerning Paul Blockley's role in this affair the result would have been to heighten his culpability. It would not have detracted from the clear findings against the appellant in respect of his breaches of Rule 157 which the Panel obviously felt were the clearest indication of his full involvement. The Board therefore concludes there is no basis to upset the Panel's findings of fact." (paras 37-40).

358. In the Details of Claim it was submitted that the evidence proves "beyond doubt" that (i) there was no ostensible reason to lay the horse on its form, (ii) the horse was deliberately mis-shoed; it is very rare indeed for one shoe to come off, let alone both the front shoes; (iii) no jockey would voluntarily race any horse that had been deliberately mis-shoed. (iv) Mr Blockley must have known that the horse had been mis-shoed, Mr Whiting had guaranteed his overdraft at the bank as he had significant financial problems and he was in contact 22 times with Mr Whiting the day before and on race day. Mr McKeown was not in contact with him even once.

359. It was submitted therefore that it was perverse and indicative of bias for the Panel to conclude that Mr Blockley was not complicit to the degree that Mr McKeown was until after the tenth race. The only reasonable inference was

that the inside information was that the horse had been mis-shoed and the only person who on the evidence could have communicated that information was Mr Blockley. If Messrs Blockley and Whiting had to go to the dangerous lengths of mis-shoeing the horse it was because they did not have the jockey as a co-conspirator who was prepared to stop the horse. This evidence positively exonerates Mr McKeown. It does not exonerate the trainer. For the Panel to have concluded vice versa is perverse and unsupported by the evidence. The Appeal Board was wrong to refuse to consider the evidence of the mis-shoeing of the horse on the basis that it was not before the Panel and that there had been no application to adduce fresh evidence. In interview Mr McKeown had said that the horse lost both of its front shoes and was like a car going round with two flat tyres in front. Counsel for Mr McKeown had raised with the defendant whether there was a requirement for an application to be made to adduce fresh evidence in this regard and both the defendant's counsel and the Appeal Board indicated that they did not require any such application to be made.

360. The only reasonable conclusion was that when the Appeal Board appreciated the importance of the evidence and that there was no answer to it they resorted to avoiding it by asserting that the evidence had not been before the Panel and no application to adduce it had been made. No reasonable Appeal Board would have refused to entertain the evidence or to remit the matter so that Mr Blockley if appropriate could be called to answer questions about the mis-shoeing of the horse.

361. I do not consider that the criticism of the Panel on this point is justified. Although Mr McKeown said in evidence to the Panel that it was learnt after the race that the horse had lost two shoes on the front "which would have concurred with probably why he tied up" he made no allegation of deliberate mis-shoeing, still less of a conspiracy between Mr Blockley and an unidentified farrier to mis-shoe the horse so as to protect lay bets. The proposition that the Panel was perverse in not reaching a conclusion that Mr Blockley was complicit in the conspiracy at this stage by deliberately mis-shoeing a horse knowing that it might well lead to serious injury to Mr McKeown and others when that allegation was not even raised seems to me self evidently wrong. Apart from anything else if the fact that the horse was later found to have lost both front shoes pointed so unequivocally to Mr Blockley and a farrier having deliberately mis-shoed it thereby knowingly exposing Mr McKeown and others to serious peril it as to make any other conclusion perverse it is in my view simply not credible that Mr McKeown would not have appreciated this and raised it with the Panel at the hearing and indeed with Mr Blockley after the race. Instead he was content to carry on racing his horses. Nor do I accept that the evidence proves beyond doubt that the horse was deliberately mis-shoed, that Mr Blockley must have known that or that the only reasonable inference is that he communicated this to the gamblers because Mr Whiting had guaranteed his overdraft.

362. As to the Appeal Board the first complaint is that it refused to entertain the evidence of the mis-shoeing of the horse. This was said to be wrong since the evidence was in fact before the Panel and was not new. In my view this mis-

describes what the Appeal Board decided. What the Appeal Board declined to entertain was not the evidence before the Panel that after the race it was discovered that the horse had lost two shoes. Rather it was the allegation which was not made in front of the Panel that the horse had been deliberately mis-shoed by Mr Blockley and a farrier. Although Mr Winter offered if necessary to apply to adduce fresh evidence my understanding is that that offer related to the existing unused material which was available to the Panel in the form of Mr McKeown's interview transcripts. The extracts identified in the Details of Claim add nothing to Mr McKeown's evidence to the Panel that it was learnt that the horse lost two front shoes. In my view that material would not on its own support a finding that Mr Blockley and an unidentified farrier deliberately mis-shoed the horse as part of the conspiracy with Mr Whiting.

363. There had been no notification to Mr Blockley or application to join him to the appeal and in my view even if the Appeal Board had considered the material available to the Panel it could not properly have made such a finding without having offered both Mr Blockley and the defendant the opportunity to adduce evidence on the new allegation. It can certainly not be criticised for not having made such a finding or for concluding as it did that it would be wrong for it to proceed on the basis that such a serious allegation was true. The grounds of appeal were that there was insufficient material on the basis of which a reasonable decision maker could have made the decision in question (regulation 17) and that the decision maker misconstrued or failed to apply or wrongly applied the Rules of Racing…(regulation 18). The ground of appeal provided for in regulation 20, that there is evidence available for the appeal which, had it been available at the original hearing would have caused the decision maker to reach a materially different decision was not relied on

364. Regulation 32A requires the Appeal Board to allow an appeal (a) if satisfied that one or more of the "grounds" in paragraphs 15 to 19 above have been made out and that it would be unfair to allow the decision to stand; or (b) where new evidence has been presented on the appeal and the Appeal Board is satisfied in the light of that evidence that the decision was wrong.

365. Regulation 26 provides that save in exceptional circumstances the Appeal Board shall not grant leave to present new evidence unless satisfied with the reason given as to why it was not or could not reasonably have been obtained and presented at the original hearing and that such evidence is cogent and might reasonably have caused the decision maker to reach a different conclusion. The evidence relied on by Mr Winter before the Appeal Board was not new evidence, it having been available to the Panel. However even had it been treated as such I do not consider that the Appeal Board could be criticised for not having granted leave for it to be presented since I do not consider that it would have been unreasonable for it not to be satisfied that that evidence was cogent and might reasonably have caused the Panel to reach a different conclusion. Nor do I consider that it could not reasonably have refused to allow the appeal under 32A(b) on the basis that it was not satisfied in the light of the material relied on by Mr Winter that the Panel's decision was wrong. At whichever stage one looks at it the obstacle in the path of Mr McKeown in my view is that the evidence that the horse lost two front shoes

does not support the inference for which he contends namely that the horse was deliberately mis-shoed in a dishonest conspiracy between Mr Blockley and a farrier both of whom would have known that they were thereby exposing Mr McKeown and other riders to serious injury.

366. In reality in order for Mr Winter to have been allowed to run this argument it would have been necessary for the Appeal Board to allow Mr McKeown to make a radical change to the nature of his case. The principles to be applied when considering whether a party to civil litigation should be allowed to appeal a trial judge's decision on the basis that a claim which could have been brought before him but was not would have succeeded if it had been so brought were considered by Arden LJ in *Crane T/A Indigital Satellite Services v Sky In-home Limited* [2008] EWCA Civ 978 at paras 18 to 22:

> "Conclusions
>
> CPR 52.8 provides that an appellant's notice may not be amended without the permission of the court. When the court gives its permission, it must take into account the overriding objective in the CPR, which is to deal with cases justly. An application to amend a notice of appeal raises special considerations which do not apply to an application to amend a pleading prior to a trial. In the case of a pleading the court will (subject to any prejudice to the parties or to the administration of justice) readily give permission to amend so that the real dispute between the parties can be adjudicated upon. But on appeal the position is different. The simple fact is that there has already been a trial, and the significance of that is that the parties will have had an opportunity to put forward their cases, and incurred costs, and there will have been a decision. These points were powerfully put by May LJ in *Jones v MBNA:*
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> '52. Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. **Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought.** The justice of this as a general principle is, in my view,

obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and **it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis.** There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view this is not such a case.'

The court must examine each application on its own facts in the light of the guidance to be found in the authorities. On that, the starting point is a passage from the speech of Lord Hershell in *The Tasmania:*

'My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them'.

It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.

Lord Hershell was there dealing with the situation where a party seeks to raise a new case by asserting that an accident happened in a different way from that which was suggested at trial. The passage stresses the importance of ensuring that the other party is not put at

risk of prejudice. In his judgment in *Jones v MBNA* (a case under the CPR: see [27] of the judgment), Peter Gibson LJ helpfully elaborated the point, and expressed the view that **it would be difficult to see how the court could ever, consistently with the overriding objective, allow a new point to be taken on appeal if further evidence might have been produced at trial on it or if the new point requires an evaluation by the appeal court of evidence which might be affected by seeing the witnesses.**

38. It is not in dispute that to withdraw a concession or take a point not argued in the lower court requires the leave of this court. In general the court expects each party to advance his whole case at the trial. **In the interests of fairness to the other party this court should be slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time in this court. That consideration is the weightier if further evidence might have been adduced at the trial, had the point been taken then, or if the decision on the point requires an evaluation of all the evidence and could be affected by the impression which the trial judge receives from seeing and hearing the witnesses. Indeed it is hard to see how, if those circumstances obtained, this court, having regard to the overriding objective of dealing with cases justly, could allow that new point to be taken.**

There is further useful guidance in this passage for the purposes of the present case. Peter Gibson LJ adopted the approach that, before allowing a new case to be raised on appeal, he had to be satisfied that, if the new case had been raised at trial, the other party would not have altered the way it conducted the case. Likewise, in this case, in my judgment the court has to be satisfied that SHS will not be at risk of prejudice if the new point is allowed because it might have adduced other evidence at trial, or otherwise conduct the case differently. It should consider for itself, as best it can, what factual issues are likely to be raised by the new case. Moreover, in circumstances such as the present, where there has been no disclosure relative to the new way in which the appellant seeks to put his case and virtually no opportunity to consider the matter, **I do not consider that the court can reasonably expect the party against whom the amendment is sought to be made to be specific about the evidence he would have**

> **adduced had the point been raised earlier. If there is any area of doubt, the benefit of it must be given to the party against whom the amendment is sought. It is the party who should have raised the point at trial who should bare any risk of prejudice.**
>
> The circumstances in which a party may seek to raise a new point on appeal are no doubt many and various, and the court will no doubt have to consider each case individually. However, **the principle that permission to raise a new point should not be given lightly is likely to apply in every case, save where there is a point of law which does not involve any further evidence and which involves little variation in the case which the party has already had to meet** (see *Pittalis v Grant* [1989] QB 605)." (emphasis added).

367. Although the principles set out in *Crane* were in the context of civil litigation and disciplinary proceedings by reason of their sanctions are in some respects of a different character, it seems to me that the general principles in the highlighted passages are relevant in the present context. Without giving Mr Blockley and the defendant an opportunity to adduce evidence it seems to me that it would have been wrong for the Appeal Board to allow the appeal on the basis that the new allegations against him were correct. No application was made to adjourn the hearing to enable Mr Blockley and/or the defendant to make representations and if so advised to seek to adduce evidence in rebuttal. Nor was any application made to adduce further evidence incriminating Mr Blockley and the farrier.

368. In those circumstances the only remaining question is whether a reasonable Board could have refused to exercise its power under regulation 33(b) to remit the matter for re-hearing on this ground alone. In my view the answer to that is it could. In my view the Appeal Board was reasonably entitled to take the view that there was no realistic prospect of the evidence of the two front shoes having come off leading the Panel to find that Mr Blockley and an unidentified farrier deliberately mis-shoed the horse and that for that reason the adverse findings against Mr McKeown of breaches of Rule 201(v) were wrong.

369. As to Mr Winter's second new argument it is common ground that the Panel proceeded on a mistaken factual basis, namely that Mr Whiting moved his horses from Mr Blockley's yard in December 2005 whereas in fact (with the exception of Hits Only Money, which he owned jointly with Messrs Wright and Blockley) he removed them in July 2005. This resulted from evidence in chief by Mr Blockley in response to a leading question by Mr Macpherson QC..: " Q. Mr Whiting – again I don't think this is in dispute – moved his horses to Jeff Pearce in early 2006, I think, didn't he? A. Yes….Q…do you know how Mr Whiting's horses came to move from you to Jeff Pearce? A. Yes. We sort of fell out. We were having a disagreement about jockeys….I felt ,at the time, that Mr McKeown, when the money was down wasn't strong enough in a finish, which is his style of riding." The incorrect evidence as to

the date of the move was repeated by Mr Blockley in answer to questions from Mr Charlton Q.C. as follows: “Q. Can we get a clear idea of the dates when you had your break up with the “Nottingham crowd”? A. While I was in Newport. Q. All right. Is it very shortly after the last race we are looking at, Hits Only Money, which was 19th--- A. Yes, yes it was shortly after that. Q. Within days? A yes. I think all the horses went then except Hits Only Money. That perhaps didn’t go because I owned a little share of it. Q Right. What is your share? A It was a quarter. In the end I give my share to them. Q.How long had you had that quarter share? A from day one…..Q. As I understand it the trigger for your split with the “Nottingham crowd” was two-fold. (1) You do not like them insisting that Dean McKeown is put up on the horse or horses? A. Yes. Q. But (2) also you had heard a rumour about one of your horses being layed, or a horse being layed? A Yes.”

370. No criticism is made of the Panel in this regard. The complaint is directed at the Appeal Board. Mr Winter relied on evidence that, apart from Hits Only Money which was partly owned by Messrs Blockley and Wright as well as by Mr Whiting and which remained in the BlockleyYard, from the time that Mr Whiting’s horses were removed from Mr Blockley’s yard on 4 July 2005 to the time that Mr Blockley was interviewed by the defendant in 2006 no Whiting horses were laid by any other alleged conspirators with two minor exceptions. It was submitted that Mr Blockley was the only common denominator in relation to all of the races and the bets. When Clive Whiting took his horses away from Mr Blockley Mr McKeown remained his jockey but the lay bets on those horses stopped. Therefore no reasonable Panel could have concluded otherwise than that Mr Blockley was behind the betting in this case. This was said to be very powerful evidence indeed that Mr Blockley was the source of and the reason for the lay bets placed on horses he trained during the period of the alleged conspiracy and that Mr McKeown was not. It was submitted that the Appeal Board resorted to refusing to consider this evidence because it is impossible to consider it without concluding that it establishes Mr McKeown’s innocence and Mr Blockley’s complicity. That is said to be wrong in law and fact, unreasonable and evidence of bias or the appearance of such as well as being profoundly unfair in that Mr McKeown has been deprived of a hearing in which critical evidence establishing his innocence has been considered.

371. In my view it cannot be said that no reasonable Appeal Board could have refused to allow Mr McKeown’s appeal by reference to this point. The Panel’s findings in relation to Mr McKeown and Mr Blockley were based on all the evidence before it including the Panel’s assessment of them as witnesses of truth or otherwise, a benefit not available to the Appeal Board. The fact that there were no lay bets between July and December 2005, while no doubt a relevant piece of evidence, does not in my view carry the weight suggested by Mr Winter. It would certainly not in my view have required the Appeal Board to allow the appeal under regulation 32A(b). It was apart from anything else, as Mr Winter recognised and as Mr Weston appears to have argued in front of the Appeal Board (see paragraph 35 (i) of its Reasons), subject to the counter argument that after the other Whiting horses were moved in July 2005, Hits Only Money, which remained behind in the Blockley yard, was partly owned

by Mr Whiting and was ridden by Mr McKeown in the fourth allegedly non-trier race on 19 December 2005 was the subject of lay betting by Mr Wright. In my view a reasonable Appeal Board could have failed to be satisfied in the light of the evidence relied on by Mr Winter that the Panel's decision was wrong.

372. I have already held that the reasonableness of the Panel's finding that Mr McKeown was involved in a conspiracy by giving assurances that he would ride to protect the lay bets was not dependent on its finding that he was also involved in supplying horse-related information to the gamblers (although that finding gave it further support). The Appeal Board was right in my view to hold that even if it had been persuaded by Mr Winter's submissions concerning Mr Blockley's role in this affair it would not have detracted from the clear findings against Mr McKeown in respect of his breaches of Rule 157 which the Panel obviously felt were the clearest indications of his full involvement. Mr Winter points out that a breach of Rule 157 is not necessarily a breach of Rule 201(v) but it is plain that the Appeal Board was referring to breaches of both Rules.

373. Moreover even in respect of the Panel's finding that Mr McKeown supplied horse-related information knowing it would be used for lay bets, in my view a reasonable Appeal Board could have failed to be satisfied that the information about the date of the moving of the horses, the possibility that Mr Blockley lied about it and the new evidence of the lack of lay betting on MrWhiting's horses between July and December 2005 showed that the Panel's finding was wrong.

374. The Panel's reference to the July removal of the horses was made to emphasise the fact that whereas Mr Whiting's relationship with Mr Blockley had deteriorated by that time Mr McKeown's advice on the move illustrated how close he was to Mr Whiting. The force of this point is unaltered by the timing of the move. Both Mr McKeown and Mr Blockley attested to it in their evidence to the Panel. Moreover, against Mr Winter's forensic point that no lay bets were placed on the horses owned by Mr Whiting after the move from Mr Blockley's yard is the fact that, as I have held, the Panel was reasonably entitled to find that on 19 December 2005 nearly six months after the move, Mr McKeown was in breach of Rule 157 and Rule 201(v) by riding Hits Only Money so as to protect lay bets.

375. A reasonable Appeal Board would not in my view have been bound to conclude that the fact that the horses were moved in July rather than December so outweighed the evidence pointing to Mr McKeown's involvement in the supply of horse-related information that it was satisfied that the Panel's finding that he was so involved was wrong. That is the case even if one assumes in Mr McKeown's favour that Mr Blockley's evidence as to the date of the move was a deliberate lie. It is notable in this context that Mr McKeown heard Mr Blockley's incorrect evidence as to the date and did not challenge it either in his closing submission or in cross examination, although it is right to point out that in his own evidence he said he could not remember the date of the move. Had this been the killer point which Mr Winter

submitted it was one might have expected Mr McKeown, even though he was not legally represented, to have raised it.

376. Without having heard any of the oral testimony the Appeal Board would not have been in a position to weigh Mr Winter's new argument and the evidence relied on in support of it against the evidence heard by the Panel and the assessments made by it of the credibility of the relevant witnesses. That would have been the case even if they had allowed an application to adduce fresh evidence. In a case in which credibility and impressions of the witneses played such an important part the Appeal Board was not the appropriate forum to consider whether the new argument and evidence relied on in support of it had sufficient weight to justify different findings and,if so, penalty.

377. The question remains whether it was unreasonable of the Appeal Board not to remit the matter back to the Panel in the light of the agreed fact that the Panel had proceeded on an incorrect factual basis. This is the aspect of the case which has given me most concern. I do not consider that because of this development there is any realistic prospect that on a rehearing the Panel would change its findings in relation to the non-trier races and the inferences it drew therefrom. The former were based on the Panel's viewing of the video footage and its assessment of the credibility of Mr McKeown and Mr Blockley. The latter were not dependent on the finding that Mr McKeown supplied horse-related information.

378. However in my judgment the position is different in relation to the Panel's finding that Mr McKeown passed horse-related information knowing that it would be used by Mr Whiting for lay betting. There is only limited use to which the new evidence could realistically be put in cross examination of Mr Blockley were he to tender himself for cross examination. Mr Winter's point about the cessation of lay betting after the move (apart from Hits Only Money) largely speaks for itself. Nonetheless the fact that the horses were moved in July and not December, the evidence as to the cessation of lay betting against the moved horses thereafter and the possibility that Mr Blockley may have lied about the date of the move cannot be said to be irrelevant to the issues which the Panel had to decide on this aspect of the case. It does not follow from my conclusion that on the basis of the evidence and arguments placed before it the Panel's finding that Mr McKeown did pass horse-related information knowing that it would be used by Mr Whiting for lay betting was not perverse that the evidence and arguments were so one sided that the Panel might not reach a different view in the light of the agreed correct date, the evidence of the cessation of lay betting,the allegation that Mr Blockley was lying and Mr Winter's submissions as to the significance of those matters. The fact that I am not a tribunal of fact works both ways. Whatever may be my views as to the weight to be attributed to this point, it is not for me to substitute my view for the view that the Panel may take. The question for me is whether in all the circumstances the decision of the Appeal Board not to remit the case to the Panel was outside the ambit of discretion afforded to it by the Regulation or otherwise unfair.

379. Whereas I agree with the Appeal Board that that the mis-shoeing allegation even if accepted would not have detracted from the clear findings against Mr

McKeown in respect of his breaches of Rule 157 and the consequential breaches of Rule 201(v), I cannot say with equal confidence that the evidence of and argument based on the cessation of lay betting against the moved horses following the July move, coupled with any finding that Mr Blockley lied about the date might not have led to different findings in relation to his supply of horse-related information in breach of Rule 201(v) or indeed that there was no realistic prospect that it would.. Mr Winter's point is that the cessation of the lay betting after the move suggests not only that Mr Blockley was supplying information to the lay betters but also that Mr McKeown was not. While the argument and evidence was not in my view of sufficient weight to require the Appeal Board to allow Mr McKeown's appeal, I do not consider that it was of insufficient weight to create a realistic prospect that the Panel might or indeed would make a different finding as to whether Mr McKeown was involved in the conspiracy by supplying information or to require the Appeal Board in the interest of fairness to remit the matter to the Panel.

380. It is of course the case that the date of the move was in Mr McKeown's knowledge and he could have raised the point in front of the Panel. However he was not legally represented and if Mr Blockley's mistaken evidence did not strike him as obviously wrong (as may be inferred from the fact that he said in evidence that he could not remember when the move happened) he might well not have mentioned it to his informal legal adviser. Unlike the lost shoe point, I do not consider that the significance of Mr Blockley's incorrect answer about the date would necessarily have been so blindingly obvious to a non-lawyer that it should be inferred that his failure to challenge it was the result of a deliberate tactical decision or that his failure to deploy the point and seek to rely on the evidence of the cessation of evidence at the Panel hearing was in itself a sufficient reason to hold that the matter should not be remitted to the Panel if the interest of justice would otherwise require it.

381. Mr Warby relied on the decision of the Court of Appeal in *Ealing LBC v Richardson* [2005 EWCA Civ 1798 at [20] in support of the submission that a failure to put a case is not a reason to order a re-hearing. In that case Ward LJ said: "It is, in the end, very difficult to see precisely what injustice the judge did find had occurred or what interests of justice actually required this re-hearing. It is, after all, to be firmly accepted that a re-hearing is an exception to the general rule; that some injustice must have occurred, and a simple failure to put one's case before the first court is not ordinarily to be cured by a re-hearing."

382. In my view the case for remitting the matter to the Panel on this point can not fairly be characterised as a desire to cure a simple failure by Mr McKeown to put his case before the Panel. The case for a rehearing (which Mr Winter canvassed with the Appeal Board) arose out of incorrect evidence given by Mr Blockley for which Mr McKeown was not responsible and which led to the Panel proceeding on a factual basis which both parties now accept was incorrect. The question for the Appeal Board was whether the interests of justice required it to remit the matter and whether a refusal to remit might run the risk of an injustice being allowed to remain undisturbed.

383. In considering the answer to that question it is in my view relevant to consider what might be the impact on the Panel's penalty of a finding at a rehearing that Mr McKeown was not involved in the conspiracy by supplying horse-related information knowing that it would be used for lay betting. In my view the power to remit in regulation 33(b) must be read in the context of the fact that regulation 32A(a) only requires the Appeal Board to allow an appeal if as well as being satisfied that one or more of the grounds in paragraphs 15 to 19 have been made out it would be unfair to allow the decision to stand. I have given this matter much thought. In my view it cannot be said that the Panel in fixing the period of disqualification at four years was not influenced by its finding that Mr McKeown was in breach of Rule 201(v) not just by giving assurances that he would ride to protect the lay bets but also by supplying horse-related information. If the Panel were to change the latter finding but not the former it might decide that the period of disqualification should have been lower. Thus a failure to afford Mr McKeown the opportunity of persuading the Panel to change the latter finding might deprive him of the opportunity of persuading it to reduce the penalty. It is important to remind oneself that the effect of the Panel's findings and penalty was to deprive MrMcKeown of the ability to continue to pursue a career which he has followed for very many years. This in my view is a circumstance to be taken into account in the exercise of the discretion to remit pursuant to regulation 33(b).

384. I am of course conscious that a rehearing is an exceptional course and I am not unmindful of the practical difficulties which might be involved. However given the limited ambit of this point and the evidence flowing from it I would expect that it is a matter that could be dealt with by the members of the Panel who heard the matter reasonably quickly and without the need for a long hearing. The limited question for its consideration would be whether this new argument and evidence cause it to change its findings and/or penalty.

385. In those circumstances, which in my view are exceptional, I consider that the interests of justice and the requirement of fairness required the matter to be remitted the matter to the Panel for the limited purpose of considering this argument and the evidence on which Mr Winter sought to rely in support of it together with any consequential evidence which it considered appropriate to allow any of the interested partied to adduce and then to reconsider its findings and if still relevant its penalty in the light of it. Without question that would have involved affording Mr Blockley and the defendant the opportunity to make submissions and give evidence on this point. It follows that the failure of the Appeal Board to remit it for this purpose was in my view not within the ambit of discretion afforded to it by the regulation or open to a reasonable Appeal Board and led to an unfair result.

386. I will hear submissions from the parties as to what form of order is appropriate in the light of this judgment.

Appendix

No.	Horse	Date	Course
1	SKIP OF COLOUR	19.3.04 – 5.30 p.m	LINGFIELD
2	ONLY IF I LAUGH	16.6.04 – 2.45 p.m	SOUTHWELL
3	TURN AROUND	25.6.04 – 2.20 p.m	SOUTHWELL
4	ROXANNE MILL	13.8.04 – 7.30 p.m	CATTERICK
5	RICHIE BOY	11.10.04 – 3.40 p.m	LEICESTER
6	SMITH N ALLAN OILS	8.2.05 – 2.30 p.m	LINGFIELD
7	HITS ONLY CASH	19.4.05 – 2.00 p.m	SOUTHWELL
8	DUMARAN (IRE)	26.5.05 – 5.00 p.m	AYR
9	TURN AROUND	6.6.05 – 3.40 p.m	FOLKESTONE
10	PRINCE DAY JUR	8.6.05 – 7.20 p.m	HAMILTON
11	HITS ONLY MONEY	19.12.05 – 4.20 p.m	WOLVERHAMPTON