Neutral Citation Number: [2006] EWHC 986 (QB)

Case No: 05/TLQ/1305

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before :

MR JUSTICE STANLEY BURNTON

- -

Between :

WILLIAM P MULLINS	**Claimant**
- and -	
(1) NIGEL MCFARLANE (sued pursuant to CPR 19.6(1) in his capacity as secretary to the Appeal Board of the Jockey Club, representing the members of the Appeal Board which determined the Claimant's appeal on 20 August 2004)	
(2) THE JOCKEY CLUB	**Defendants**

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- -

Tim Kerr QC, **John Gordon SC (**of the Dublin Bar**) and Graeme McPherson** (instructed by **Holman Fenwick & Willan**) for the **Claimant**
The First Defendant represented by Charles Russell LLP, made written submissions but did not appear.
Mark Warby QC and **Iain Christie** (instructed by **Charles Russell LLP**) for the **Second Defendant**

Hearing dates: 30, 31 March 2006

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE STANLEY BURNTON

Mr Justice Stanley Burnton:

Introduction

1. On 30 November 2002, *Be My Royal*, a horse of which the Claimant was the trainer, was first past the post in the Hennessy Gold Cup (Showcase Handicap) (Class A) (Grade 3) at Newbury. *Gingembre* finished second. Following the finding of the presence of morphine in the urine of *Be My Royal*, the Disciplinary Panel of the Jockey Club decided that there had been a breach of Rule 180(ii) of the 2002 Rules of Racing and *Be My Royal* was therefore disqualified. The Appeal Board of the Jockey Club upheld that decision. *Gingembre* was declared the winner and awarded the prize money.

2. In these proceedings, the Claimant seeks declaratory relief in relation to that disqualification, principally a declaration that *Be My Royal* was wrongfully disqualified and that it was the lawful winner of the race.

The facts

3. The Jockey Club is the governing body of horse racing in this country. It is incorporated by Royal Charter. It is governed by its Stewards. Rule 11 of its governing rules is as follows:

> (1) The Stewards shall publish or cause to be published on behalf of the Club such rules (hereinafter called "the Rules of Racing") regulations, orders and directions as they may think necessary for the proper conduct of horseracing, race meetings and racehorse training. (2) The Stewards shall have power on behalf of the club to issue licences and permits in relation to horseracing, race meetings or racehorse training . . .

4. The Rules of Racing are published annually in a booklet containing, in addition to those Rules, the Orders of the British Horseracing Board. The booklet containing the 2002 Rules contains the Rules in force on 1 April 2002, and states that reference must be made to the Racing Calendar for any subsequent modifications to the Rules. The booklet includes Instructions issued by the Stewards; as in the case of the Rules, the instructions are described as those in force on 1 April 2002, and appear with the statement: "For instructions issued after this date reference must be made to the Racing Calendar." Rule 1A of the 2002 Orders and Rules of Racing of the British Horseracing Board and the Jockey Club ("the Rules of Racing") sets out the powers of the Stewards, which they may exercise at their discretion. Paragraph (xix) of rule 1A is as follows:

> Without prejudice to the generality of the foregoing Rule 1A (xiv) and save where any Rule expressly provides otherwise, (the Stewards have power at their discretion) to make such arrangements as they think fit for any one or more of their powers or other functions under these Rules or Instructions to be exercised on their behalf and in their name by any employee of the Jockey club where they are satisfied that it is in the interest of the efficient administration of horseracing and the operation of these Rules and the Regulations to do so. Further, the Stewards of the Jockey Club have the power at any time to ratify the exercise or purported exercise of any power or function on their behalf by any employee of the Jockey Club

> where they think fit notwithstanding that the individual may not have been duly authorised by the Stewards of the Jockey Club at the relevant time.

5. In common with the rules of other sports, the rules of horse racing in this country and elsewhere prohibit drugs that may affect performance, and the presence of prohibited substances in the body of a performer may lead to disqualification or penalty even if their presence is innocent, in the sense that the performer or, in the case of horse racing, those responsible for the training and care of the animal, could not reasonably have prevented its ingestion. These rules serve a number of purposes, including ensuring that competition is fair, between participants competing properly and on their inherent merits, but also the protection of the welfare of participants. The overall aim is to ensure drug-free sport.

6. Morphine is a prohibited substance. Rule 180(ii) of the Rules of Racing is as follows:

> Where a horse has been the subject of an examination under Rule 14(vi) and the result of an analysis of any sample of its tissue, body, fluid or excreta is positive the horse shall be disqualified for the race in question and may at the discretion of the Stewards of the Jockey club, be disqualified for such time and for such races subsequent to the race in question as they shall determine. For the purpose of this Sub-Rule a positive analysis is as defined in Rule 53 (ii).

7. Rule 53(ii) provides, so far as is relevant:

> A result of an Analysis of any Sample is positive if:-
>
> > a Certificate of Analysis reports the presence in the Sample of a substance which is, in the opinion of a Veterinary Officer, unless the contrary is proved to the satisfaction of the Stewards of the Jockey Club, included in the List of Prohibited Substances published from time to time by the Stewards of the Jockey Club and the concentration of such substance is at or above the threshold level for that substance established from time to time by the Stewards of the Jockey Club …

8. Appendix P to the Rules of Racing, so far as is relevant, is as follows:

> LIST OF BANNED SUBSTANCES AND NOTIFIABLE MEDICATIONS
>
> The Stewards of the Jockey Club give notice that the following are Banned Substances and Notifiable Medications under the Rules of Racing …
>
> Part 1 – Banned Substances

> Alcohol – at a threshold in the A sample at or above 54 mg per 100 ml in urine.
>
> …
>
> Part 2 – Banned Substances
>
> Diuretics
>
> Opiates and Opioids …
>
> (Substances in this group include, but are not exclusively restricted to, heroin, methadone, morphine and pethidine).
>
> Note:
>
> 1. In accordance with Paragraph 1.6 of the Protocol, the chosen body fluid for sampling for Banned Substances listed in Part 1 and 2 above will be urine.
>
> 2. Substances without thresholds will be declared positive at the limit of detection using gas chromatography/mass spectrometry.

9. It is not suggested that there is any difference between a Prohibited Substance and a Banned Substance: i.e., it is not disputed that the Banned Substances in Appendix P are Prohibited Substances for the purposes of rule 53(ii).

10. The Instructions issued by the Stewards as published in the 2002 booklet include a list of Prohibited Substances (in part more accurately described as a description of such substances). Under the heading "Threshold Levels", the following appears:

> The Stewards of the Jockey Club give notice that in accordance with Rule 53(ii) of the Rules of Racing they have established the following threshold levels for the substances shown.

There follows a list of substances and applicable quantities. For example, for hydrocortisone it is 1 microgram per millilitre in urine. Morphine is not one of the substances shown in the list.

11. The Rules of Racing provide for two levels of disciplinary hearing of allegations of breach of the Rules of Racing. The first is before the Disciplinary Panel. The Disciplinary Panel is a standing committee of the Jockey Club. Its members are all members of the Jockey Club, and at least one of its members (the Earl of Halifax) was a steward.

12. An appeal from a decision of the Disciplinary Panel lies to the Appeal Board. It consists of a legally qualified chairman and two members from the panel of members of the Jockey Club selected by the Regulatory Stewards. The parties are permitted to make oral submissions to the Board, but an appeal is by way of review, on documents only, of the evidence before the Disciplinary Panel, unless leave is given for new evidence to be adduced: paragraph 25 of Appendix J (headed "Regulations for

Appeals to the Appeal Board") to the Rules of Racing. Paragraph 14 of Appendix J is as follows:

> "14. Save as provided in this paragraph, appeals shall only be made by a person who has been made subject to a penalty. In the case of a decision to disqualify a horse or demote its placing, an appeal may be made by one or more of the trainer, the rider or the owner of the horse. In such a case, and unless the Chairman of the Appeal Board shall decide otherwise, where more than one person wishes to appeal the appeal shall be treated as a joint appeal and the appellants shall choose one representative from amongst their number and shall only be permitted joint legal representation."

13. The Jockey Club employs the Horseracing Forensic Laboratory (universally referred to as "HFL") as the primary laboratory to test for the presence of drugs in the urine of horses. Two samples are taken, and in the event of a positive finding by HFL, the second sample is tested by an approved independent foreign laboratory.

14. At the times material to this case, Dr Peter Webbon was the Jockey Club's chief veterinary officer. Until 28 March 2003, HFL performed its tests and produced its reports on the basis that a level of morphine of 10 ng per ml or more found in the urine of a horse would be treated as a positive sample; a finding of a lower level of morphine would be disregarded by HFL. 10 ng per ml was referred to by Dr Webbon as a cut-off level.

15. Happily, it is rare to find traces of morphine in horses. According to the evidence before the Appeal Board of the Jockey Club, the last sample that tested positive for morphine before December 2002 was in 1994: i.e., during the period of some 8 years before December 2002 there was not one case of morphine found in the urine of a racehorse. During the 12 months preceding December 2002 over 8000 samples were analysed by HFL; none was reported as positive for morphine. However, between 6 December 2002 and 26 March 2003 morphine was found at levels which were treated by HFL as positive in a total of 39 horses which had raced under the Rules of Racing. The horses had been trained at a number of yards in Great Britain and Ireland. The source of the morphine was found to be contaminated foodstuff. The contamination was not deliberate. None of the trainers involved had been complicit in the ingestion of morphine by his horse. *Be My Royal* was one of these horses.

16. By letter dated 8 January 2003, the Disciplinary Panel informed the owner of *Be My Royal* that HFL had certified the sample of urine taken from *Be My Royal* on 30 November 2002 as having tested positive for morphine. By letter dated 6 February 2003, the Disciplinary Panel informed the owner that the counter-analysis of the second sample, which had been sent to the Hong Kong Jockey Club Racing Laboratory, had confirmed the presence of morphine. In consequence, the Claimant, as trainer of the horse, was asked to attend an enquiry by the Panel in respect of the positive sample, to consider his possible breach of rule 53 and the possible disqualification of *Be My Royal* under rule 180.

17. According to the press release issued by the Jockey Club before the Disciplinary Panel hearing, between November 2002 and February 2003 37 horses had produced

positive tests for morphine, of which 16 were winners. 7 cases had been heard by the Disciplinary Panel. All the horses had been disqualified. Fines for trainers had been waived because the Panel was satisfied in each case that (as mentioned above) the source of the substance was a specific batch of foodstuff used in the relevant yards at the material time.

18. The Disciplinary Panel held its enquiry into the case of *Be My Royal* on 29 and 30 January 2004. The Panel consisted of 3 members, Andrew Merriam (chairman), Lord Halifax and Nicholas Wrigley.

19. A number of preliminary issues were taken before the Disciplinary Panel. For present purposes, the only relevant issue was whether there was any minimum amount of morphine required to be found in a horse in order for there to be a breach of Rule 53.

20. During the course of the hearing before the Disciplinary Panel, the Jockey Club disclosed 2 emails from Dr Webbon to HFL dated 28 March 2003, i.e. before the charge was put to the Claimant. The first was as follows:

> Having discussed the morphine "cut off" with Christopher, and on the assumption that the batch of contaminated feed that caused our recent problems has now all been consumed or recalled, we think that we should revise, at least temporarily, our GB morphine cut off. Once the apparent anomalies of quantification have been resolved between laboratories, and we are clearer about the appropriate inter-horse component in safety factors, we may wish to revise the cut off. Until then, please regard this e-mail as a formal instruction not to confirm morphine in samples which, in your opinion are likely to contain more that 50ng/ml of morphine.

21. The second read:

> As you have no doubt noticed, the last sentence in my instruction should read:
>
> > "Until then, please regard this email as a formal instruction not to confirm morphine in post race urine samples which, in your opinion are likely to contain less than 50ng/ml of morphine."

22. On behalf of Mr Mullins it was submitted to the Disciplinary Panel that the emails of 28 March 2003 established a threshold level for morphine within the meaning of rule 53; and that fairness required that it should apply to all cases of alleged contravention of rule 53, including his case, particularly since the allegation of breach had not been made until after the date of the emails. It was accepted that the level of morphine found in *Be My Royal* exceeded 10 ng per ml; but, if this submission was well-founded, it followed that unless it were shown that the morphine level in the urine of *Be My Royal* exceeded 50 ng per ml, there had been no breach of the rule. The issue of fact, whether the level of morphine in the horse's urine exceeded 10 ng per ml, was not addressed

23. The Jockey Club contended that no threshold had been established for morphine. The emails did not establish a threshold; they related to a "reporting level" or "limit of detection".

24. Six questions to be answered by the Disciplinary Panel were formulated and agreed that dealt with the questions of construction of the Rules raised by Mr Mullins and his case on fairness, without the need to hear evidence relating to fairness. According to the reasons given by the Panel:

> Those threshold questions and issues were agreed and Mr Fitzgerald was content that they gave him a proper opportunity to run his case in its various aspects. Depending on the answers to the questions and issues, it would be open to Mr Fitzgerald to advance his case on fairness fully. However, if the answers were adverse to his case, no such need would arise.

25. The Disciplinary Panel found the following facts:

> 29. By way of background to the instruction there had been a meeting of the Regulatory Committee of the Jockey Club on 10 June 2002 in which Mr Foster reported to that committee on recommendations that were being discussed by the European Horserace Scientific Liaison Committee ("EHSLC") in relation to the desirability of establishing agreed "reporting levels" in connection with certain drugs. The minutes of the meetings set out the position.
>
> 30. One issue of fact which we do have to resolve is whether or not there is any difference in substance between a "threshold level" on the one hand and a "reporting level" or "limit of detection" on the other hand.
>
> 31. We find that there is a real difference between the two concepts and agree with the explanations given by Dr Webbon and by Mr Maynard both as to why this is so and as to why the specific instruction was given to HFL in the emails of 28 March 2003. Dr Webbon's evidence was that there are some drugs which are either produced naturally by the horse or, as practical experience has shown, are virtually impossible to exclude from a horse's feed. International (and equivalent national) threshold levels are set for substances which are perceived by the regulatory authorities to fall into one or other of these categories. For all other drugs, no threshold levels are set. Morphine is a drug for which no threshold level has been set. In order to detect the presence of a substance such as morphine, a laboratory will use what is called a limit of detection. Dr Webbon was asked what this meant. He said this,-
>
> > "*In simple terms, …, if we submit to the laboratory a sample of urine, and they say that a given drug either is or is not present in that sample, …, what they really mean is that the drug is either detectable or not detectable in that sample, and whether or not it*

is detectable depends upon the concentration which can be detected. So every analytical method will have, inevitably, a limit of detection."

32. However there have been advances in analytical (testing methods), the consequence of which is to make ever more sensitive findings in relation to samples. As doping becomes more sophisticated, this is desirable for some drugs but not necessary and even undesirable in relation to others. In relation to drugs of the latter type, it is desirable to have an agreed reporting level for screening purposes in order to identify whether or not the substance is present in a horse. Morphine is one such drug. There have been discussions at both the international and European level on the harmonisation of limits of detection, involving the International Federation of Horseracing Authorities and the EHSLC. At the time of the test carried out by HFL for *Be My Royal (IRE)*, the limit of detection which it was using (about 10 ng per ml) was consistent with proposals that had been advanced in the context of the discussion referred to above.

Dr Webbon then told us that there was a perceived lack of uniformity in analytical procedures between different laboratories and these differences lay behind the specific instruction given to HFL to use 50ng per ml rather than 10 ng per ml. He then said:

"*So, in an attempt to try to keep the system within the various laboratories as harmonised as possible until we have an opportunity to go through a formal harmonisation procedure, we decided that it would be more appropriate for the HFL, once* [this] *cluster of cases* [of which the present is one] *were finished."*

It is right to record as a fact that there has indeed been a cluster of cases where contaminated horsefeed appears to be the likely source of the positive samples in those cases. Earlier in his evidence, Dr Webbon had also referred to a meeting of the EHSLC where this had been discussed, with particular reference to the different testing procedures followed in France and Ireland.

33. Furthermore, as Dr Webbon told us, the setting of the limit of detection had nothing to do with any assessment of the capabilities of the morphine in the performance of a horse. He described the setting of a limit of detection as being in effect an instruction to a laboratory no to confirm samples below the limit but, as he put it, "if a sample was confirmed at less than that, it would still be a positive sample".

34. On 6 May 2003 Dr Webbon reported to the Regulatory Board of the Jockey Club. The minutes of that meeting are

> before us. Dr Webbon reported that he was now satisfied that the contaminated feed which produced 39 positives for morphine was no longer in existence and it was unlikely that there would be any more such positive samples. He reported as follows,-
>
> > *"This matter had been discussed at length with representatives from France, Ireland Germany and Italy. There was some concern as to how to deal with morphine as it was inappropriate as a Class I drug for it to have a threshold level. It was therefore important that the five laboratories used the same method to detect the drug.."*
>
> 35. The instruction given on 28 March 2003 was, as we find, a reporting level or limit of detection.

26. The question addressed by the Panel relevant to the present claim was question 3:

> *Is there in fact a de facto threshold of 50 nanograms per millilitre now in operation for morphine such that a sample should not now be found to be positive unless it is reliably shown that the concentration is in excess of 50 nanograms per millilitre?*

27. The Panel answered it as follows:

> 43. Mr Mullins' case is that the amount of morphine in fact present in the horse was less than 50ng per ml and that a de facto threshold was set after the race. The argument that a threshold now exists is based on the two emails of 28 March 2003 referred to above and the instruction which they contain.
>
> 44. However, we do not consider that this instruction amounted to the creation of a "threshold level". As indicated, we find that the instruction was a "limit of detection" or "reporting level".
>
> 45. There is another difficulty in the way of Mr Fitzgerald's submission. It relies on construing the words in Rule 53(ii) *"…established from time to time.."* as including a reference to any time before the relevant enquiry takes place. We do not agree. We consider that the time contemplated by Rule 53(ii) is the time at which the breach of the regulation is alleged to have occurred, and not the date of the enquiry.
>
> 46. We therefore answer question 3 in the negative. Given our conclusions, we did not consider it necessary to reach any view as to whether or not the limit of detection had been "established…by the Stewards of the Jockey Club" within Rule 53(ii).

28. There was a factual issue between the Jockey Club and the Claimant as to what the quantity of morphine in *Be My Royal* had been, but on the basis of the decision of the Committee on the preliminary issue it was unnecessary to resolve it. The Panel rejected the other contentions advanced on behalf of Mr Mullins. It found that there had been a breach of Rule 53 and disqualified *Be My Royal*.

29. Mr Mullins appealed to the Appeal Board. The relevant part of his skeleton argument was as follows:

> (i) The panel wrongly found that the instruction now in force to disregard quantities of fifty nanograms or less merely established a "limit of detection" whereas it plainly does far more than that. The limit referred to in the instruction operates as a threshold level because it means that even through quantities between 10 and fifty nanograms are still detected, they are not now acted upon by the Jockey Club. Moreover, it was confirmed in evidence by Dr Webbon that this was partly because he was confident that quantities below fifty nanograms would have no effect on the performance of the horse.
>
> (ii) As to the operative time at which to determine whether there is a threshold, it is submitted that the operative time is the time of the hearing at which the Panel is being invited to find out that there has been a positive analysis within the meaning if Rule 53 (ii).

30. On 20 August 2004, following a hearing at which both parties were represented by leading counsel, the Appeal Board upheld the decision of the Disciplinary Committee. In its reasons for its decision, it set out the facts on which it based its decision on this point in paragraphs 17 to 23:

> Terminology in Regard to Presence of Prohibited Substance
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> 17. It is helpful, we believe, to clarify at the outset the meaning of the terms used in regard to the different levels of a particular Prohibited Substance which might be present in a sample.
>
> Limits of Detection and Threshold Levels
>
> 18. In screening samples of Prohibited Substances laboratories have Limits of Detection (LODs). There are two types of LOD. First is the 'Method LOD', that is a concentration below which the analyst will not be able to detect the presence of a given substance. Accordingly this level is determined by the scientific method employment (see Reasons para 31). However, as scientific technology has improved, lower and lower concentrations of a particular Prohibited Substance have been detected in samples until a point may be reached below which the Regulator will not wish to go. In such circumstances the LOD may be changed through an executive, unpublished instruction given on behalf of the Stewards of the Jockey Club

to HFL to the effect that HFL's Report concerning a sample should not disclose the presence of a particular drug below a certain level. This fixed LOD, which may be subject to change at some later date, is also called a Reporting (or Cut-Off) Level. However because the system of establishing the presence of a minute quantity of a Prohibited Substance can be a complex, comparative process, different laboratories in different countries may, through their individual scientific tests for the same Prohibited Substance, arrive at somewhat differing LODs/Reporting Levels in respect of the same sample. For this reason the Jockey Club will, in certain circumstances, endeavour to harmonise or seek to harmonise, though international discussions levels of LODs/Reporting Levels (see evidence of Dr Webbon …). This may lead to the introduction or change of an LOD/Reporting Level.

19. Dr Webbon gave evidence that although it can be said with reasonable confidence, on scientific data, that a particular LOD has no measurable effect on the performance of a horse, he nevertheless went on to add "but, to prove that anything at any concentration is ineffective is absolutely impossible" (see his evidence (at 2/435B-D). However, it is a recognised procedure that, in establishing a Reporting (or Cut-Off) Level, the Jockey Club will be confident that the level identified could not have had any measurable effect on the horse's performance. This is usually achieved by taking a level at which the particular drug will be known to impact on a horse's performance and then, through a consensus of international experts in the field (see in particular extracts from the article in the Equine Journal 1/156), dividing such figure by a factor of 500 (the safety factor process). Thus Dr Webbon said in evidence that this is a factor:-

> "which would allow racing administrators, the racing public, the betting public to be confident that the horse was running free of any possible conceivable effect of the drug." ...

In the course of the evidence different phraseology was used in regard to the possible "effect on performance" of a particular substance on a horse. Unless otherwise qualified we take the meaning of "no effect on performance" to indicate that scientific evidence can be expected to demonstrate with confidence that the substance, at the level in question, would not have any measurable effect on the horse's performance.

20. There is, however, one essential qualification which has had to be made in regard to LODs. This concerns a particular group of Prohibited Substances which can, from time to time, be unavoidably present in horses at detectable LODs in normal circumstances. These may be unavoidably present because they are (a) endogenous, that is produced naturally by the

horse, and/or (b) exogenously that is originating externally in circumstances in which it is virtually impossible in practice to exclude the substance from the horse's feed. These particular substances, when present in a horse's system, are liable to be detected at existing LODs. In order to redress the situation, discussion and research at international level have taken place and a number of named Prohibited Substances in this group have, through the International Federation of Horseracing Authorities, been agreed upon and, consequent on such agreement, have been given what are known as Threshold Levels and then incorporated into National Rule Books. Those which have been agreed to date are nine in number and are incorporated as named specific substances, listed under Instruction C1 para 3 of the Rules. Morphine is not among them. In this group the Threshold Level has been set by reference to research and scientific data such that the International and National Threshold Level assigned to the Prohibited Substance will have been raised to a limited extent in order to avoid positive levels being reported in normal circumstances. This methodology does not, of itself, involve an assessment of the level at which the substance will have a measurable effect on the performance of a horse. Furthermore the particular Threshold Level set will be applied uniformly by all laboratories carrying out analyses under the Rules. It is also essential to appreciate that, where a particular Prohibited Substance is not endogenous to the horse and is not expected in normal circumstances to enter a horse exogenously, as applies, for example, to those in the amphetamine class, no Reporting Level will normally be set for such a substance, unless it is thought that the particular method of analysis has become so developed and the quantity of the substance so minute that the cost of further reducing the Method LOD is not justified. Indeed the current testing for almost any drug has reached such acute sensitivity that amounts can now be measured, in layman's terms, in the most miniscule quantities.

21. We consider the Panel correctly summarised the position in regard to these matters in paragraphs 30-33 inclusive of its Reasons.

Morphine

22. Turning to morphine, it is also important to appreciate, as was unchallenged in evidence, that national and international experience shows that, in regard to the horse, morphine might be endogenous – there is debate as to whether morphine can in fact be so produced – and/or exogenous through the "innocent" feeding of morphine in contaminated feedstuff. However any concentration thereby generated is so low that, as was confirmed in discussions at international level, an LOD

> established with HFL for morphine at a level of 10ng/ml has not been expected in normal circumstances to disclose the low amounts of morphine which may be in a horse's system with either endogenously or exogenously by "innocent" feeding (see Dr Webbon 2/530G-531D). By way of support for these propositions, Mr Maynard's evidence (1/104 para 19) was that during the 12 months preceding December 2002 over 8000 samples were analysed for the Jockey Club in like manner to that applied to the Be My Royal sample. During that period not a single sample containing morphine was reported to the Jockey Club. Furthermore, prior to December 2002, the last sample which had been reported to the Jockey Club as containing morphine had been in 1994. Indeed it was Dr Webbon's evidence that he was satisfied, in particular in the light of the absence of the finding of morphine in the many tests above referred to, that it was appropriate to leave the figure at 10ng per ml for morphine as the appropriate LOD. There was also further evidence that the safety factor process (see above) had been applied to morphine and that this had produced a figure also around 10ng per ml. However, following the "cluster" of positives at about the end of 2002, Dr Webbon, after consultation with the National Racing Authorities, reassessed the position after it had become apparent that the contaminated feedstuff was no longer in circulation. He then gave an instruction to HFL on 28 March 2003 not to report as positive an LOD of morphine at less than 50ng per ml in an attempt to harmonise the level with other countries. We indicate later, in more detail (see paragraph 88 below), as to why he took this course. Dr Webbon made clear that the only laboratory to which this change of Cut-Off Level to 50ng per ml was given was HFL. No international agreement on overall harmonisation has as yet been finalised. Indeed as the Panel stated in it Reasons at paragraph 34:-

The Board quoted paragraph 34 of the Disciplinary Panel's reasons, including the citation of the passage from the minutes of the meeting of the Regulatory Board of the Jockey Club of 6 May 2003, and continued:

> 23. As has been pointed out morphine is not listed as a substance for which a Threshold Level has been set. At the time of the race in question the LOD for morphine was at 10 ng per ml and above (see our confirmation of the Panel's finding as to this at paragraphs 86 to 90 below), and it was to this level that the sample in question was tested. Under the Rules there is no duty on the Jockey Club to set Reporting Levels and no reference to Reporting or Cut-Off Levels (excluding the Threshold Levels expressly referred to in Instruction C1 para 3) is made within the Rules. The fixing of such Levels arises through policy decisions made on behalf of the Jockey Club. Furthermore it was only subsequent to the race in question that

> the Reporting Level for morphine was increased from 10ng per ml to 50 ng per ml.

31. At paragraph 88 the Board addressed the reason for the emailed instruction to HFL, which it considered to establish a new LOD rather than a threshold:

> 88. It is important, we consider, to bear in mind why the new LOD of 50ng per ml was introduced. By way of background to the instruction there had been a meeting of the Regulatory Committee of the Jockey Club in 10 June 2002 at which it was reported … that there were discussions within the EHSLC in relation to the desirability of establishing agreed "Reporting Levels" in connection with certain drugs. It was, however, consequent on the abnormal figures thrown up by the batch of morphine cases in late 2002 that Dr Webbon was prompted to reassess the situation as to the LODs for morphine in Europe. Following such reassessment … stating that data from the outbreak of morphine positives suggested that there were "anomalies of Quantification with other laboratories" (see Dr Webbon 2/243Fm 2/439B-440D, 2/531 F-G and Minutes of May 2003 Meeting of the Regulatory Board of the Jockey Club (1/141)). He thought that the HFL test procedure was probably more effective and sensitive than its international counterparts. Accordingly the instruction was, as Dr Webbon put it (see 2/531G-532/B), "to try to keep the system within the various laboratories as harmonised as possible until we have the opportunity to get through a formal harmonisation procedure". As Dr Webbon pointed out in his witness statement this course also allowed a further safety margin to be reflected in the Reporting Level of morphine (see 1/122 para 5). He went on to say that this Cut-Off point may still need to be revised after further research in order to meet the aim of establishing an international harmonisation level. He also made clear in evidence his view that if HFL was to detect morphine at a concentration of less than 50ng per ml such concentration would not have a measurable effect on performance. However, he was clearly not saying, as Mr Fitzgerald was at one stage seeking to imply, that the figure of 50ng per ml was some possible dividing line between morphine having no effect on performance. Dr Webbon, by his instruction of the 28 March 2003, was seeking to achieve harmonisation between HFL and other international laboratories by giving the instruction that levels at 50 ng per ml and over were only to be reported as positive. In so doing Dr Webbon, notwithstanding that the Rules on their face do not permit any Prohibited Substance to be present in a horse, was following the policy of the Jockey Club to make a concession, in certain circumstances, in the LOD or Reporting Level in regard to certain Prohibited Substances. In our view the Panel correctly dealt with these matters in their Reasons at paragraphs 25 and 33 (1/262-263).

32. Accordingly, the Board concluded that at the time of the Hennessy Gold Cup the LOD for morphine was established with HFL at 10 ng per ml and above. It also held that the words in rule 53(ii) "… established from time to time" refer to the time of the race, not the time of a subsequent enquiry by a Disciplinary Panel, and that in any event those words only apply to a substance to which a threshold applied, of which, on their findings, morphine was not one. In paragraph 94, the Board addressed the submissions advanced on behalf of Mr Mullins to the effect that the LOD established by the emails of 28 March 2003 should be applied to the Hennessy Gold Cup run on 30 November 2002. They held that such retrospection would offend the legitimate expectations of the other competitors in the race that it would be run according to the Rules then in place. In addition, they thought that there was no certainty as to the extent of such retrospection: how far would one go? The Board agreed with the decision of the Disciplinary Panel that retrospection was inappropriate.

33. Following the decision of the Appeal Board, the Jockey Club disclosed that between June and October 2004 there had been 17 instances of morphine being found in urine; all were at levels below 50 ng per ml and so were reported as negative.

The present proceedings

34. In these proceedings, the Claimant seeks judicial review of that decision of the Appeal Board of the Jockey Club. They were begun in the Administrative Court under Part 54 of the CPR. On 17 October 2005 I held that the Jockey Club and its Appeal Board were not public authorities for the purposes of proceedings under CPR Part 54 and were therefore not amenable to judicial review under that Part.

35. Following my judgment, I made an order transferring the proceedings to the Queen's Bench Division where they were to be subject to CPR Part 8.

36. Mr Mullins now confines his claim to declarations that the disqualification of *Be My Royal* was unlawful, and that the Appeal Board should have answered "Yes", instead of "No", to question 3 of the questions it addressed, i.e. it should have held that there was in fact a de facto threshold of 50 nanograms per millilitre in operation for morphine.

The issues before me

37. The first issue raised by Mr Mullins' claim is as to the scope and nature of the jurisdiction of the Court on a challenge to a decision such as that of the Appeal Board of the Jockey Club, a domestic disciplinary tribunal of a private organisation that is the governing body of a sport. Mr Kerr QC submitted that the Court will interfere with a decision of a body such as the Appeal Board of the Jockey Club if that decision is arbitrary or capricious or is based on a misinterpretation of the applicable rules of the sporting body in question: here, the Rules of Racing. In his skeleton argument, to which I refer below, he enlarged on the allegation that the Appeal Board's decision was arbitrary and/or capricious. He also submitted that the Appeal Board's arbitrary and/or capricious decision resulted from its misconstruction of the Rules. However, he submitted that a failure by the Appeal Board correctly to interpret and apply the Rules of itself justifies the intervention of the Court.

38. Mr Warby QC on behalf of the Jockey Club accepted that this Court has a supervisory jurisdiction over tribunals such as the Appeal Board, irrespective of the existence of a contract between the claimant and the tribunal or the body appointing it. However, he submitted that the jurisdiction of the Court is more restricted than Mr Kerr suggested: it is limited to cases of restraint of trade (or the claimant's "right to work") and those where the tribunal has acted unfairly. He relied upon the judgment of Richards J in *Bradley v The Jockey Club* [2004] EWHC 2164, a judgment commended by the Court of Appeal on appeal at [2005] EWCA Civ 1056. Mr Warby submitted that the present case was not one affecting Mr Mullins' right to work; it was not a case in which a penalty had been imposed, because the disqualification of a competitor is not a penalty for this purpose; it was not contended that the hearing before the Appeal Board had not been fair; and that accordingly this was not a case in which the Court could, or should, interfere. Mr Warby's submissions led to discussion of the correct interpretation of Paragraph 14 of Appendix J to the Rules of Racing, i.e., whether it treated disqualification as a penalty.

39. I record these submissions in case this case goes further. However, in my judgment, I can decide the present claim on the assumption that Mr Kerr's submissions correctly represent the law. My provisional view is that there is no jurisdictional (in the narrow sense of the word) boundary to the power of the Court to grant declaratory relief in this context: the jurisdiction of the Court under CPR Part 40.20 to grant declaratory relief in unrestricted. The restrictions on the power are discretionary. The discretion will be exercised having regard to the respect and caution appropriate when considering the decision of an impartial qualified tribunal whose knowledge and experience of the subject matter in question is likely to exceed those of the Court. But the power to grant declaratory relief will not necessarily be excluded because, for example, the decision under challenge does not involve payment of a financial penalty. The importance of the challenged decision to the parties is an important factor, and I do not think that the extent or the exercise of the jurisdiction is to be determined (although it may be influenced) by the correct interpretation of Paragraph 14 of Appendix J.

40. I turn therefore to consider the substantive issues raised by Mr Mullins. Sensibly, realistically and commendably, Mr Kerr QC (who did not represent Mr Mullins before the Disciplinary Panel or the Appeal Board) did not pursue before me all of the issues raised before the Appeal Board. Importantly, it is no longer contended, as it was previously, that a rule disqualifying or penalising a competitor if a prohibited substance is found at a level that cannot affect performance is in any way objectionable. Such rules are commonplace in sport. It is not contended that mandatory disqualification is objectionable where the competitor (or in the case of horse racing the trainer) can show that he was faultless: i.e., where liability is strict. It is not suggested, as it was previously, that it is objectionable for sporting bodies to have thresholds for some substances but not others. Some substances, such as testosterone, occur naturally in the body (in which case they are described as endogenous), or are so common that they cannot be wholly prohibited, as in the case of caffeine. In such cases, sporting bodies may penalise the presence of the substance above a specified threshold level in (normally) the blood or urine.

41. The principal question raised by Mr Kerr is whether Dr Webbon's emails to HFL of 28 March 2003 established an actual or "de facto" threshold for the purposes of the

Rules. Mr Kerr contended that their effect was indistinguishable from the establishing of a threshold level of 50 ng per ml. Clearly, if the Hennessy Gold Cup had been run after 28 March 2003, then on the assumption that the level found in *Be My Royal* was between 10 and 50 ng per ml, he would not have been disqualified. If Dr Webbon did not have the Stewards' authority to establish that threshold at the date of his emails, it is clear that they have ratified his action, if only by their acquiescence in it.

42. Mr Warby submitted that the emails did not establish a threshold: they were no more than an administrative or executive instruction, establishing a reporting level of limit of detection, for reasons relating to the relative accuracy and reliability of HFL and other laboratories. It was not an act of the Stewards, as required by the Rules, and in any event did not apply to a race run before 28 March 2003.

43. I have no doubt that Dr Webbon's emails did not establish a threshold for the purposes of the Rules. The establishment of a threshold would have been in the nature of a legislative act, of general application: if a threshold had been established for morphine, the presence of morphine in a lesser quantity in the urine of a racehorse would have been excluded from disqualification or penalty under rule 180(ii). Since a threshold would affect the rules applicable to racing, one would have expected it to be published to those affected by the rules. The emails were not so published. They were sent by an executive officer of the Jockey Club to the laboratory that tested its urine samples.

44. There is a well-recognised difference between an administrative act that affects the detection or reporting of an infringement of a law or regulation, and one that modifies the law or regulation itself. Police officers may be instructed not to report drivers whose speed in a 30 mph zone does not exceed 35 mph. Such an instruction may be motivated by assumptions as to the inaccuracy of speed testing devices or of motorists' speedometers, or by a desire not to prosecute minor infringements. But the instruction does not render driving at 32 mph in a 30 mph zone lawful: it affects the prosecution of the offence, not the offence itself or its commission. That the emails were of this nature is demonstrated by the identity of the person who sent them, the identity of their recipient and their content, which was that of an instruction to the laboratory concerning the testing cut-off point.

45. That the emails did not purport to have been sent with the authority of the Stewards is consistent with my view of the emails as executive acts of an executive officer rather than acts of the Stewards modifying the Rules of Racing. In fact there was no evidence that the instruction they contained had been authorised by them. Since the emails did not purport to establish a threshold for morphine, it was not necessary for them to be "established" by the Stewards as required by rule 53(ii). It is similarly consistent with this view that morphine is exogenous and not widely found in the environment, and is a Class A drug under the Misuse of Drugs Act 1971. There is no need for a threshold level, as the lack of positive findings in the period preceding November 2002 demonstrates.

46. The practical consequences of an instruction such as that contained in the emails and of the establishment of a threshold may be similar. The same may be said of the instruction given to all police officers in the above example. But the similarity of practical consequence does not lead to the conclusion that they are identical. It is for this reason that I do not find it helpful to refer to a "de facto" threshold level, any

more than the instruction to the police in the above example could helpfully be described as establishing a de facto speed limit of 35 mph. Either the emails established a threshold for the purposes of the Rules of Racing or they did not. In my judgment, they did not.

47. I add that it is also consistent with my conclusion that counsel for Mr Mullins did not submit to the Appeal Board that the previous limit of 10 mg per ml had been a threshold for morphine established by the Stewards within the meaning of the Rules of Racing. Mr Kerr did not so submit either. Yet if the emails of 28 March 2003 did establish such a threshold, it is difficult to see why there had not been one previously.

48. It follows that the Appeal Board did not err in answering question three as they did. The Board did not misconstrue the relevant Rules of Racing or make any legal error in applying the Rules to the facts before them.

49. It follows that the only remaining question is whether the instruction contained in the emails of 28 March 2003 should have been applied to the Hennessy Gold Cup run at Newbury on 30 November 2002. To do so would be inconsistent with the terms of the instruction, which related to samples tested from the date of the emails. The terms of the emails show that they were not intended to apply to samples resulting from the "batch of contaminated feed that caused our recent problems" and which led to the presence of morphine in *Be My Royal*. On the one hand, it may be thought unfair that a horse should be disqualified on a finding of morphine at a level which, a few months later, would not have been reported, let alone been the subject of disciplinary proceedings. On the other hand, to apply the instruction to past races and already reported samples would be to change the rules of the race retrospectively, and could be similarly seen to be unfair to other competitors (including *Gingembre*), and to those who had accepted disqualification as a result of findings of morphine in urine of between 10 and 50 ng per ml. Doubtless with a view to limiting the consequences of a decision in favour of Mr Mullins, Mr Kerr accepts the cases of those who accepted disqualification or whose cases were decided by the Disciplinary Panel would not fall to be re-opened if Mr Mullins were to succeed in his challenge.

50. Some of the reasoning of the Board is open to criticism, in particular its references to the presumption against the retrospective effect of legislation. The presumption applies where the question is whether an enactment makes acts committed before its date criminal. However, as *R v Swan* (1849) 4 Cox CC 108 and the Irish case of *Grealis v DPP* [2002] 1 ILRM 241 cited by Mr Kerr show, where the question is whether an act remains criminal where it was committed before the date of an enactment abolishing a crime the presumption is to the contrary: in the absence of a saving provision, an act previously criminal will cease to be so. These principles are not entirely in point, since in this case the Board was concerned not with an amendment to the Rules of Racing (treated by Mr Kerr as analogous to the legislation considered in *Swan* and *Grealis*), but with an executive or administrative act. But they demonstrate that justice and fairness may require retrospective decriminalisation or legalisation.

51. There is, however, a real difference between criminal statutes and the Rules of Racing. The latter are concerned with competitions, which should be run on rules applied when they take place. It was to that element that the Board referred when it discussed the legitimate expectations of other competitors.

52. The criterion for judicial intervention in the decision not to apply the reporting limit established by the emails retrospectively is arbitrariness or capriciousness. Both requirements are concerned with the concept of substantive fairness. In this area the Court should accord particular respect to the judgment of the domestic tribunal established by the governing body of the sport. It may be that it could have decided differently; but that is a very different thing from saying that its decision was arbitrary or capricious. As I have indicated above, a different decision might have been considered to be unfair to others. In my judgment, the decision of the Board does not offend the requirements of fairness.

53. In Mr Mullins' skeleton argument, the basis of the allegations of arbitrariness and capriciousness was put as follows:

> "… the Appeal Board reached a conclusion that was arbitrary and capricious:
>
> (1) it was arbitrary in that the Appeal Board disapplied a threshold set at a level intended to preserve the prevention of performance enhancement and consequently penalised an innocent man whose horse's sample concentration had not been proved to exceed that level;
>
> (2) it was capricious in that the interpretation adopted means that the Jockey Club can make and unmake thresholds in secret and have them applied and disapplied on a whim."

54. So far as paragraph (1) is concerned, it introduces arguments that Mr Kerr elsewhere eschewed, namely the contentions that it would be wrong to disqualify a competitor in whose body a prohibited substance has been found if the amount found could not have affected his performance, and that a competitor should not be disqualified if the prohibited substance was ingested without fault on his part. It is not arbitrary to disqualify a blameless competitor found to have ingested a prohibited exogenous substance, even if the amount ingested could not have affected performance, if the rules of the game so require or permit. Indeed, the rules of sport commonly do authorise or require disqualification in these circumstances. So far as the allegation of capriciousness is concerned, it seems to me that Mr Mullins' complaint is not that a new limit was established by the emails in secret, but that it was not applied to him. In addition, this allegation (and perhaps also that in paragraph (1)) focuses on the emails of 28 March 2003 rather than the decision of the Appeal Board. It is the latter which must be shown to be arbitrary or capricious. In any event, Dr Webbon had good reason, referred to in his first email, to change the reporting level, as the Disciplinary Panel and the Appeal Board accepted: see paragraph 88 of the latter's decision.

55. The determination of a time from when a new reporting level is to operate is liable to be arbitrary, since it will apply from a certain date, and cannot sensibly apply to decisions that have already been made. In this case, however, the date was not fixed arbitrarily. It was fixed on the basis that "the batch of contaminated feed that caused our recent problems has now all been consumed or recalled".

56. The allegations of arbitrariness and capriciousness have not been made out.

Conclusion

57. It follows that Mr Mullins' claim fails and must be dismissed.