IN THE MATTER OF THE APPEAL OF MR. W. P. MULLINS BEFORE THE APPEAL BOARD OF THE JOCKEY CLUB

Sir Edward Cazalet
Mr. Anthony Mildmay-White
Mr. Christopher Hall

MR WILLIAM P MULLINS — Appellant

and

THE JOCKEY CLUB — Respondent

NEWBURY HENNESSY MEETING
THE HENNESSY COGNAC GOLD CUP
(Run on the 30th November 2002)

DECISION AND REASONS ON THE APPEAL

Introduction

1. This is an appeal by Mr. William P Mullins (the Appellant) against each of three decisions made by the Disciplinary Committee of the Jockey Club (the Panel) following a Hearing on the 29 and 30 January 2004 [1/257]. The Panel sat with a Legal Assessor, Mr S. Bate. The Panel's decisions were:

    (1) that the horse BE MY ROYAL (IRE) trained by the Appellant had won the Hennessy Cognac Gold Cup, run at Newbury on the 30th November 2002, in breach of Rule 53 of the Rules of the Jockey Club (the Rules) but that any fine which might thereby have been imposed on the Appellant arising under the same Rule should be waived;

    (2) that the horse BE MY ROYAL should be disqualified under Rule 180(ii), but that there should be no other disqualification; and

    (3) that the Appellant should pay £5,000 towards the costs of the hearing.

2. The Appellant's grounds of appeal fall under three heads:

    (1) that, in breach of Article 6 ECHR, the proceedings below involved (a) apparent bias by reason of alleged defects in the system, and (b) actual bias demonstrated by a statement made by Mr. Maxse (the bias challenge) [2/552-3];

    (2) that each of the Panel's decisions on six agreed preliminary points was wrong in law and/or in principle (the legal challenge) [2/553-557]; and

    (3) that the Panel's decision on costs was "disproportionate and unreasonable" [2/558].

3. Mr. Mullins is represented before us by Mr. Edward Fitzgerald Q.C., Mr. J.J. Gordon S.C. and Mr. S. Lanigan-O'Keefe S.C. The Jockey Club is represented by Mr. Mark Warby Q.C.

Background

4. At all material times Be My Royal was a steeple-chaser owned by Mrs. V. O'Leary and trained by the Appellant at his training stables in Ireland. On Saturday 30 November 2002 Be My Royal won, or was first past the post in the Hennessy Gold Cup at Newbury. This was a major success for the stable and resulted in widespread publicity.

5. After the race a urine sample was taken from Be My Royal in the manner prescribed under the Rules, and was analysed on behalf of the Jockey Club by the Horserace Forensic Laboratory (HFL). This laboratory is the only forensic laboratory used by the Jockey Club in this country. In the event of a positive result, a second analysis (counter analysis) will always be carried out by a recognised laboratory in another country. On 12 December 2002 Ms K Lubbock, a senior scientist at HFL, certified in a Certificate of Analysis issued on that date that the sample contained morphine.

6. In his evidence given to the Panel, Dr. Webbon, the official Jockey Club Veterinary Surgeon, stated that the scientific procedure used by HFL at the time when the test was carried out was able to establish a level of morphine of some 10ng/ml and above. The Certificate of Analysis did not quantify the morphine. It simply stated that morphine was present in the sample. A different method of analysis would have been required had it been necessary to obtain a precise quantification of the actual amount of morphine which was present in the sample.

7. Subsequently the Appellant was interviewed. Following his full co-operation and after enquiries had been made at his stables of those concerned with the horse, samples were taken by agents for the Jockey Club of the daily feedstuff of Be My Royal leading up to the race in question. This feed included Connolly's Red Mills 14% Racehorse Cubes, a well established brand. The particular samples of this feedstuff were subsequently examined by HFL. On 6 January 2003 a sample of that feedstuff proved positive for morphine, this having originated from poppy seeds in the raw materials used in the manufacture of the feed compound. As a result, this case has proceeded on the agreed basis that the morphine found in the sample of urine taken from the horse came from this contaminated feedstuff. Furthermore it was accepted by the Jockey Club that no blame whatsoever, whether by intentional

misconduct or negligence, attached to the Appellant or any of those connected with the horse in regard to the feeding of such contaminated feedstuff to the horse.

8. It subsequently transpired that this contaminated feedstuff had likewise been fed to racehorses in other stables in the UK and in Ireland, and over the period between the end of November 2002 and March 2003 there was, what was called, a "cluster" of 39 cases when morphine, as a result of this contaminated feedstuff, was found in samples taken from horses running in races in the two countries. In a number of these cases questions are still outstanding as to whether there was a breach of the Rules, and any Hearing by the Disciplinary Panel has been adjourned pending the decision in this case.

9. On 19 December 2002 the urine sample taken from Be My Royal was referred by the Counter Analysis Advisory Committee of the Jockey Club to the Hong Kong Jockey Club Racing Laboratory for further testing. This laboratory carried out a further analysis and, on 5 February 2003, confirmed that this sample indicated the presence of morphine.

10. On 28 March 2003 Dr. Webbon sent two e-mails to Mr. Maynard, a Scientific Director of HFL. These e-mails instructed HFL not to confirm morphine in urine samples which, in the opinion of HFL, were likely to contain less than 50ng/ml of morphine. This instruction was given following a discussion between Dr. Webbon and Mr. Christopher Foster, the Chief Executive of the Regulatory Board of the Jockey Club.

11. On 2 May 2003 the Secretary to the Disciplinary Committee wrote to the Appellant to notify him that he would be required to attend an enquiry by the Panel of the Disciplinary Committee as to whether, in the light of the positive urine sample taken from Be My Royal, there had been a breach of Rule 53 of the Rules and whether Be My Royal should be disqualified under Rule 180(ii).

12. On the 28th May 2003, a written opinion of Mr. R B Williams, Jockey Club Veterinary Officer, was issued stating that in his opinion morphine was included in the list of substances prohibited by the Jockey Club.

The Hearing Before the Panel

13. The hearing before the Panel proceeded on the basis that the facts, as above set out, were either agreed or assumed. However one overriding issue between the two parties remained unresolved at the outset of the hearing. The Appellant had instructed Professor Tobin of Kentucky University, who is professionally qualified in the U.S.A. as a Veterinarian Pharmacologist and Toxicologist, and who is an expert in the analysis and assessment of prohibited substances in samples taken from horses. There was filed on behalf of the Appellant a detailed statement of Professor Tobin dated the 31 October 2003. Professor Tobin was subsequently shown the documents recording the analysis by HFL which purported to show that there was not less than 10ng/ml of morphine in the sample. In a further statement dated the 28th January 2004 it was the Professor's view that the documents recording the process of the sample's analysis demonstrated a semi-quantitative total of morphine in the sample of 33ng/ml. On the other hand, it was the view of Mr. Maynard of HFL that the analysis indicated, upon a like semi-quantitative analysis, some 900-1000ng/ml of morphine in the sample. It was agreed on both sides that this evidence as to quantity, as it stood, was not adequate for the purpose of resolving these two conflicting estimates; each expert would have to carry out a specific quantitative test, different from and more sensitive than the test which Ms Lubbock had initially carried out. However, because Professor Tobin's statement of the 28th January 2004 had not been made available to the Jockey Club's advisers until the day of the hearing they objected to its admission because counsel had had insufficient time in which to consider it. After discussion the parties agreed to invite the Panel to proceed without resolving the quantification issue in order to determine the Appellant's preliminary contention on the bias challenge, and, if that contention was rejected, to resolve six further preliminary issues of law. It was further agreed that, were all six such issues resolved against the Appellant, then, subject to his rights of appeal, the substantive hearing before the Panel would be at an end on the basis that there had been a breach of the relevant Rules; but, on the other hand, if the Panel were to decide certain of the issues in favour of the Appellant, the application against him would be either dismissed or adjourned in order that further evidence could be called, in particular evidence which, if at that stage found to be relevant, would establish the precise quantity of morphine in the sample.

The Panel, having agreed that this course should be followed, the Hearing proceeded on the basis that this issue between the two experts should be left unresolved pending the determination of the six preliminary questions since a resolution of these latter might avoid the necessity of a quantitative analysis having to be made.

14. Both the Appellant and the Jockey Club were represented by the same leading counsel before the Panel as have appeared before us. The witness statements and all other documents which were before the Panel are before us. Three witnesses gave oral evidence on behalf of the Jockey Club, Mr Stephen Maynard, Director to the Drugs Surveillance Group of HFL, Ms K. Lubbock, a Senior Scientist at HFL and Dr. Webbon, Chief Veterinary Officer to the Jockey Club. On the way the matter proceeded no oral evidence was called by the Appellant, although certain written Reports of Professor Tobin were put before the Stewards. We also have a full transcript of the evidence and all arguments both written and oral presented by the parties to the Panel.

15. We gave leave to Mr Warby to adduce by way of additional evidence (i) certain International Agreements on Breeding and Racing entered into between the Jockey Club and the Racing Authorities of more than forty other countries annually over the years 1987-2002, and (ii) a written instruction sent by letter by Dr Webbon to the HFL dated the 30th December 2002. As to the International Agreements, Mr Warby had, in fact, referred at the hearing before the Panel to a later corresponding International Agreement of 2003, mentioning also the earlier ones. In the event those earlier agreements were not, at that stage, put in evidence. In the circumstances we considered it appropriate to give Mr. Warby leave to put such agreements in evidence as well as the letter of the 30 December 2002. Mr Fitzgerald did not oppose these Applications.

The Function of this Appeal Board

16. Under the Rules (see para 25 of Appendix J) an appeal to the Appeal Board is not a re-hearing but is by way of a review. Pursuant to paragraphs 15-20 inclusive of Appendix J of the Rules, the Appeal proceeds by reference to the documents and without oral evidence, except where the Appeal Board gives leave to present new evidence. On allowing an appeal, the Appeal Board has powers, inter alia, to exercise any powers which the

Disciplinary Committee could have exercised as well as to refer the matter for re-hearing (see para 35 of Appendix J of the Rules).

Terminology in Regard to Presence of Prohibited Substance

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 employed (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, through international discussions, levels of LODs/Reporting Levels (see evidence of Dr Webbon at 2/429-432). 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 2/435 B-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." (see 2/433 C-F)

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 had any measurable effect on the horse's performance.

20. There is, however, one essential qualification which has 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) exogenous, that is originating externally in circumstances in which it is virtually impossible in practice to exclude the substance from a 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 this 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 the 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 10 ng/ml, has not been expected in normal circumstances to disclose the low amounts of morphine which may be in a horse's system either endogenously and/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 10 ng/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/ml. However, following the "cluster" of positives at about the end of 2002, Dr Webbon, after consultation with other 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/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/ml was given was HFL. No international agreement on overall harmonisation has as yet been finalised. Indeed as the Panel stated in its Reasons at paragraph 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: -
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> > "*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 1 drug for it to have a threshold level. It was therefore important that the five laboratories used the same method to detect the drug..*"

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 10ng/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/ml to 50 ng/ml.

The Preliminary Issue of Bias

24. As he did before the Disciplinary Panel, the Appellant raises arguments that the disciplinary process is affected by bias and is non-compliant with Article 6 of the ECHR. He contends:-

    (1) that the Panel lacks the appearance of independence,
    (2) that actual bias on the part of the Jockey Club is demonstrated by statements made by Mr Maxse, the Jockey Club's press officer, and
    (3) whilst not challenging the independence or impartiality of the Appeal Board, that the limits on the Board's jurisdiction mean that no amount of appeals can cure the deficiencies alleged to have affected the process below.

    However, the Appellant does not ask the Board to rule on these arguments. He wishes to reserve them. That is because he recognises that the Board would apply its own reasoning on these points as set out in *The Jockey Club v Bradley* [2003] ISLR, SLR-71.

25. For its part, the Jockey Club is content for these points to be reserved, but asks the Board to note that in its submission the arguments against the Appellant's contentions are stronger here than those in the *Bradley* case for these reasons:-

    (1) In contrast to those in *Bradley*, the decisions in the present case do not involve any 'determination of civil rights and liabilities' within the meaning of Article 6, which is not engaged. Article 6(1), says Mr Warby, is not engaged in civil proceedings merely because sanctions affecting the right to work are theoretically available, if in practice such sanctions were never a realistic option, and none were in fact imposed.
    (2) Again in contrast to *Bradley*, this appeal is solely concerned with points of law and principle; it does not raise any factual issues. The Board is in as good a position as the Panel to deal with the issues raised, and has full jurisdiction.

26. Accordingly on the terms as above set out we proceed on the basis that no bias is established before us.

The Issues

27. As to the issues, we point out that the Appellant's central submission on appeal is that the Panel failed to hold that a sample should not be reported as "positive" or deemed to be "positive" for the purpose of disqualification of the horse, or otherwise be so acted upon, if it in fact reflected a concentration of morphine of below 50 ng/ml. He points out that such a concentration would not have been reported as positive since the 28th March 2003 – a date well prior to the Hearing before the Panel - for the reason that since then it has been regarded as "irrelevant" in the sense that, when below such level, it can still be said with confidence that morphine can have no measurable effect on the performance of the horse (see Dr Webbon 2/539-540A, 535 D-G). On the basis of these facts the Appellant formulated his case before us under a number of different legal heads and principles, some of which were initially raised by a series of agreed questions put before the Panel. As to the Jockey Club's case, this, shortly stated, does not depend on a specific concentration of morphine being found in the horse. Its case is that, there being no "Threshold Level" set for morphine, the analyses of the sample were positive for morphine within the meaning of the relevant Rules.

28. In presenting his Appeal to us Mr Fitzgerald, appearing with two Senior Counsel from the Irish Bar, has raised further legal arguments and has made submissions additional to those put before the Panel. For this reason we have considered it appropriate to deal with these matters in detail, including setting out what, in our view, is the law applicable. In so doing we trust that our conclusions will be more comprehensible, not only of course to the Appellant but also to all those others who likewise have had the misfortune to have had positive reports arising from having fed the contaminated feedstuff to their horses. We have also thought it appropriate to set out, in these Reasons, the relevant Rules and extracts from cases and other authorities. Consequently, and in the hope that it will be of assistance to all those concerned, this statement of our Reasons has become significantly longer than would normally be expected of a Review.

29. We turn now to the six questions which the Panel were required to answer, seeking to incorporate into our Review of the Panel's answers the further points which Mr Fitzgerald now makes.

The Questions

30. Q1 *As a matter of construction of Rule 53(ii) is it a necessary precondition of a finding that a sample is positive in every case that there be a concentration of the substance that is at or above an established threshold level?*

31(1). Rule 53 of the Jockey Club Rules 2002 states, with its inclusive note:-

> "(i) When any horse has been declared to run under Rule 141(i) and has been the subject of an examination under Rule 14(vi) and an analysis of any sample is positive, the Stewards of the Jockey Club shall impose a fine upon the trainer of the horse in question and may, at their discretion, withdraw his licence or permit. However, the Stewards of the Jockey Club may waive the fine if the trainer satisfies them that the substance was not administered intentionally by him or by any other person whatsoever, whether connected with the Trainer or not and that he had taken all reasonable precautions to avoid a breach of this Rule.
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> Note. The Rule imposes, and is intended to impose, an absolute and strict liability on the Trainer to ensure that prohibited substances are not administered by anyone whether in any way connected with the trainer or not. Thus the Rule imposes a mandatory fine on the simple basis of a positive analysis for a prohibited substance. The second part of Rule 53(i) provides for circumstances where the administration of a prohibited substance is accidental (e.g. theobromine in feed) and where the trainer has taken all reasonable care. This part of the Rule is to be construed as permitting the Stewards to waive the fine where they are satisfied the substance was not administered intentionally by the trainer or by any other person whatsoever whether connected with the trainer or not.
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> (ii) 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 be 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. Unless it is shown that there has been a material departure from the procedures set out in any General Instructions or Instructions relating to the taking, analysis and counter analysis of Samples, in which event the analysis will be invalidated."

(2) Instruction C1 of the Rules states:

"C1 PROHIBITED SUBSTANCES

1. Definition

"Prohibited Substance" means a substance originating externally whether or not it is endogenous to the horse which falls in any of the categories contained in the List of Prohibited Substances published from time to time in the Racing Calendar.

"Substance" includes the metabolites of the substance and the isomers of the substance and metabolites.

2. List of Prohibited Substances

The Stewards of the Jockey Club give notice that the following are Prohibited Substances under the Rules of Racing.

Substances capable at any time of acting on one or more of the following mammalian body systems:

the nervous system
the cardiovascular system
the respiratory system
the digestive system
the urinary system
the reproductive system
the musculoskeletal system
the blood system
the immune system except for licensed vaccines **against infectious agents**
the endocrine system
endocrine secretions and their synthetic counterparts
masking agents

For the purposes of clarity Prohibited Substances include:-
Anti-pyretics, analgesics and anti-inflammatory substances
Cytotoxic substances
Antihistamines
Diuretics
Local anaesthetics
Muscle relaxants
Respiratory stimulants
Sex hormones, anabolic agents and corticosteroids
Substances affecting blood coagulation

3. Threshold Levels
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:- ……"

32. Paragraph 3 then goes on to identify nine drugs, with Threshold levels stated for each. Morphine is not included in them. Sub-paragraph (4) of Instruction C1 refers to matters with which this Hearing is not concerned.

33. Although not relevant in answer to Q1, we set out, for the sake of completeness at this stage, Rule 180(ii) which is concerned with the disqualification of the horse:-

> Rule 180(ii) provides:-
>
> "180(ii) 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)."

34. The Appellant submits that Rule 53(ii), on its plain wording, and thus as a pre-condition to a finding of its breach, requires <u>both</u> that there be the "presence in the sample of a substance that is, in the opinion of a veterinary officer, … included in the List of Prohibited Substances published from time to time by the Stewards of the Jockey Club" (the First Condition) <u>and</u> (emphasis supplied) "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" (the Second Condition).

35. On behalf of the Appellant, Mr Fitzgerald submits that the two conditions are joined by the word "and" without qualification, and that accordingly both must be satisfied in order to establish a breach of the Rule. In those circumstances he points out that morphine is not one of the nine prohibited substances with threshold levels identified in Instruction C1 para 3, and, for that reason, the second condition is not made out. Accordingly, he maintains, the Panel erred in finding that a breach of Rule 53(ii) is established.

36. Both parties accept that this particular issue is one as to the construction of Rule 53(ii). The Appellant's case turns upon ascribing the literal meaning to Rule 53(ii). Mr. Warby submits that such an interpretation must yield to the established rules of construction in that the Panel was required to look at Rule 53(ii) within the overall context of the Orders, Rules and Instructions. In so submitting, he referred us to a passage in "Chitty on Contracts" 29th Edition Volume 1 Chapter 12-055 (Appellant's authorities Tab 9), which states as follows:

> "Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] WLR 896 at 913D*[says]
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> > "The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."
>
> So the rule that words must be construed in their ordinary sense is liable to be departed from where that meaning would involve an absurdity or would create some inconsistency with the rest of the instrument. It may also not be applied where, if the words were construed in their ordinary sense, they would lead to a very unreasonable result or impose

upon the contractor a responsibility which it could not reasonably be supposed he meant to assume. In *Wickman Machine Tools Sales Ltd v. L.G. Schuler AG* (1974) AC 235 Lord Reid, at 251E, said:

> "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make their intention abundantly clear"."

37. Following these authorities and the canons of construction arising therefrom, Mr Warby maintains that the Panel correctly construed Rule 53(ii) in the context of the Rules and Instructions as a whole and against the overall factual matrix. To do otherwise, he maintains, would lead to absurd results.

38. It follows from this, Mr Warby argues, that Rule 53 and Instruction C1 must be read together. He points out that Rule 53 contains no definition of the term "Prohibited Substance"; for that one must go to Instruction C1 which gives at para 2 a list of Prohibited Substances. These substances are not identified as such but their characteristics are defined as being "capable at any time of acting on one or more of the following mammalian body systems…". The body systems are then listed. No specific Prohibited Substances are identified under C1 para 2. The nine prohibited substances under C1 para 3 are identified and do not include morphine. Furthermore Rule 53 does not reveal what thresholds are established or for what substances they are so established. That information is only ascertainable from Instruction C1. So, in any event, it is necessary to look to Instruction C1 in order, at least, to establish the full meaning of Rule 53.

39. Against this, Mr. Fitzgerald submits that the instructions contained in C1 cannot modify the meaning of Rule 53(ii) because they do not address the question of how to define a positive substance. He maintains that Instruction C1, having presupposed the requirement of Rule 53(ii) for the definition of a positive sample, goes no further than to assist in the definition of "Prohibited Substances" and "Threshold Levels". Mr Fitzgerald submits, first, that there is a requirement that if LODs are to be exceeded, the Jockey Club should simply fix threshold levels for all prohibited substances, and secondly, that the

Jockey Club's failure so to do cannot alter the meaning of Rule 53(ii) (we refer to this as the specific definition point).

40. Against this, Mr. Warby submits that applying common sense and common knowledge, the purpose of Rule 53(ii), as construed in conjunction with Instruction C1, is to prohibit a wide range of substances, some identified by name and others not, which could by their nature affect mammalian body systems, whilst at the same time imposing thresholds in respect of a few substances falling within the overall class. This latter limited number of drugs may be in the horse's system endogenously through natural causes or exogenously through external administration by way of contaminated feedstuff. Mr Warby submits that the effect of the literal construction of Rule 53(ii) proposed by the Appellant is that there could only be a positive finding in respect of a substance which is one of the nine for which a threshold is established under C1 para 3, thereby making the List of Prohibited Substances in C1 para 2 redundant. This, submits, Mr Warby, arises from the fact that there are numerous substances falling within Instruction C1 para 2 which are outside the nine identified in para 3, but which, if administered to a horse, are capable of having a significant effect on that horse's system. Morphine comes within this latter category. So, says Mr. Warby, the construction contended for can properly be described as absurd and unreal, and that Rule 53 and Instruction C1 must be read together.

41. In answer to Mr. Fitzgerald's specific definition point (see paragraph 39 above) we consider that the Rules and Instructions have to be read as a whole. If Mr. Fitzgerald's construction is preferred then the definition provisions of Instruction C1 para 2 would become of no effect or relevance for the simple reason that the only relevant Prohibited Substances would be those referred to in C1 para 3.

42. In construing the Rules as a whole, and for the reasons for which Mr Warby contends, we consider that the Panel, as stated at paragraphs 37 and 38 of its Reasons, properly gave Rule 53(ii) its ordinary and natural meaning. That said, there is no denying that Rule 53(ii) would have been better drawn if the Rule had, on its face, stated more clearly its actual meaning.

The Ambiguity and Narrow Construction Point

43. The Appellant further argues that, since Rule 53 is capable of having penal consequences, any ambiguity in its interpretation must require

that the narrow construction be followed. However, whilst taking the point as to the ambiguity of the wording of Rule 53(ii) as it stands alone, we consider that the Panel properly gave the words of Rule 53(ii) their ordinary and natural meaning in the context of the Rules as a whole and that, on that footing, such meaning is not ambiguous. Accordingly the question of a narrow construction arising from a penal provision does not arise.

44. Nevertheless, even if, contrary to this view, it were to be considered that there is ambiguity as to the meaning of Rule 53(ii) such that two constructions are possible, we consider that further support for the Panel's view as to its broad construction can be obtained by applying the dicta in *Pepper v Hart [1993] AC 593.* Lord Browne-Wilkinson said at para 640 b-c:

> "I therefore reach the conclusion, subject to any question of Parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear.
> Further than this, I would not at present go."

45. In Bennion, Statutory Interpretation, at sections 213-214 and 217-231 (2/13 JC Auths) this approach is fully approved.

46. Were it to be necessary to step outside the Rules themselves in order to establish the meaning of Rule 53(ii), then, in our view, a like situation to that envisaged by Lord Browne-Wilkinson (see above) arises here. It was in 1987, following agreement at international level, that the Jockey Club decided to introduce into the Rules threshold levels for a small number of drugs, initially four, which it was recognised might be found naturally in a horse or found in small quantities in normal feedstuffs. This important change of Rules was the subject of a public statement made by Lord Fairhaven, the then Senior Steward of the Jockey Club.

47. In a Jockey Club Press Release of 2 October 1987 (1/76) Lord Fairhaven, in explaining the reasons for amending the Rules in order to introduce the new Threshold Levels for a very few prohibited

substances, stated in terms on behalf of the Jockey Club that the introduction of this limited range of substances should not be interpreted as a move towards a relaxed view on doping. At that stage the Rules provided, quite simply, that any prohibited substance found in a post-race sample and which had entered the horse's system externally constituted a breach of the Rules. The effect of Lord Fairhaven's statement was, in our view, to make clear that this latter provision was to remain in force subject to the Threshold Levels being established for what at that stage were the four identified prohibited substances. In our view the Panel correctly considered that, were it to be necessary to step outside the Rules themselves, it would be appropriate to have regard to this Statement under the established *Pepper v. Hart* (above cited) provisions by way of support for its broad interpretation of the Rules.

48. As we have indicated we gave leave to Mr Warby to introduce by way of additional evidence International Agreements on Breeding and Racing entered into annually between the Jockey Club and the Racing Authorities of more than 40 countries over the years between 1987 and 2002. Mr Warby submits that it is well established that a court will assume that domestic legislation is intended to give effect to its international legal obligations and will construe it accordingly (see *Salomon v Commissioners of Customs & Excise [1967] 2 QB 116*, and Bennion Section 221). The Jockey Club has been a signatory to these International Agreements, and, in particular, to Article 6 of each annual International Agreement since 1997. This is of significance because this Article, as we have already pointed out, was agreed to by Racing Authorities of more than 40 countries, including the Jockey Club. It unequivocally provides that in racing there should be a wide class of Prohibited Substances, with the added stipulation that, within that class, there should be a small group of particular Prohibited Substances for which Threshold Levels were to be allowed. Thus the Jockey Club would consistently have been in breach of its international obligations, submits Mr Warby, had it construed Rule 53(ii) in the narrow context contended for by the Appellant. Mr Warby also makes the point that, had the evidence of these International Agreements been put before the Panel, such would have added weight to the Panel's broad construction of Article 53(ii).

49. We consider that the submissions for the Jockey Club on this point are well made. It is our view that, should additional force be required to add to the construction of Rule 53(ii) as found by the Panel, the International Agreements at the material time provide this.

Conclusion

50. It follows from the above that we consider the Panel properly answered Q1 in the negative and gave Rule 53(ii) the broad construction.

51. Q*2* *"Is it a necessary precondition for a finding that a substance is prohibited on the grounds that it "acts on the nervous system" under Instruction C1… that the substance should be present in sufficient quantity to have a significant effect on the functioning of the nervous system?"*

General

52. As the Panel pointed out, this argument is based on the assumption that a necessary precondition for a positive sample is proof that the amount of prohibited substance in the horse had a significant effect on the horse's performance. The Appellant develops his argument by submitting that, where the quantity of the prohibited substance proven is so small as to be "insignificant", such can be said to be "irrelevant". He relies upon Dr. Webbon's acceptance in evidence that a concentration of less than 50ng/ml of morphine would be "irrelevant" and "insignificant", in the sense that the horse would gain no advantage in its performance from the presence of such a minute quantity of morphine in its system.

53. The Appellant accordingly invites the Appeal Board to do justice in this case by applying the legal principle de minimis non curat lex, meaning that the Law does not concern itself with trifling matters, and to hold that there is no breach of Rule 53(ii) when the actual quantity present, as contended for by Professor Tobin - but not Mr Maynard - on the unresolved issue, is below the level which, by the time of the Hearing before the Panel, had been directed as one insufficient for reporting. There should, says the Appellant, be, at least, an adjournment for a determination of the current unresolved issue between these two experts as to the quantity of morphine actually in the sample. The Appellant advances four alternative arguments in support of this approach.

The Appellant's Four Arguments

54. First, that Rule 53(ii) should be interpreted to require a laboratory only to report the presence of a substance of a sufficiently significant quantity of a drug to merit the description of a positive sample. A certificate which reports the presence of a prohibited substance when such is present in only an irrelevant quantity should be disregarded.

55. Secondly, and alternatively, that the Appellant should be entitled to show that there has been a material departure from a procedure set out in instructions when the certificate reports the presence of an insignificant quantity of morphine which would not have been reported under the instruction in place since the 28 March 2003.

56. Thirdly, and in the further alternative, that paras 1 and 2 of Instruction C1 should be interpreted only to refer to *substances* that are present in sufficient quantities so as to be capable of acting on the mammalian system in *some significant way*. This, he asserts, is what does in fact happen because the quantities which are actually reported are at LODs and Reporting Levels fixed from time to time and are subject to adjustment. In other words, says the Appellant, the system only operates by the application of a certain amount of common sense and reference to proportionality. He submits that the de minimis principle is already in operation.

57. Fourthly, and in the yet further alternative, Mr. Fitzgerald puts his case before us on the basis of Dr. Webbon's evidence to the effect that a given quantity of less than 50ng/ml in a horse's system at the time of a race would have no conceivable effect on the horse's performance and so should, at this level, have been disregarded by the Panel either under the de minimis principle and/or as irrelevant. This alternative argument which Mr Fitzgerald advances before us, has, he submits, the advantage of having a readily ascertainable level, namely that of its relevant LOD or Reporting Level. This level, he says, is accepted as having no conceivable effect on the performance of the horse. Accordingly, when there is in place a Reporting Level or other LOD, such will be the relevant cut off point below which no presence will be reported, and the de minimis provisions will apply.

58. Mr. Fitzgerald makes the point that these arguments are an extension of those developed before the Panel and it is therefore appropriate that we should set out our detailed opinion as to their impact on this Appeal.

59. We start by repeating the important point that the case before the Panel proceeded, as it does before us, upon the basis that no actual quantitative finding was made, it having been agreed by both sides when before the Panel that an adjournment of that hearing would have been necessary if evidence of a reliable quantitative finding was to be made available.

60. Mr. Warby contends that, in whatever form these arguments are presented, the substance of the Appellant's case is that Rules which, on their face, contain an express and unqualified prohibition of the presence in the horse's system of *any* quantity of a prohibited substance should nonetheless be interpreted as being implicitly subject to a quantitative limitation. Indeed two of the alternative construction arguments advanced (the first and second alternatives above) would explicitly cast a burden on the Jockey Club to prove that the actual quantity of prohibited substance present in a sample was significant in the sense that it had or could have had an effect on the horse's performance.

61. The third alternative argument, says Mr Warby, goes further and appears to place the burden of proof in the opposite direction. In practice it would require the Jockey Club to have a system establishing the exact quantity present and for proving its capacity to have an effect.

62. The fourth alternative argument would likewise raise the question as to whether the substance in question could have had "no conceivable effect" on the performance of a horse, whether or not there was no Reporting Level or Cut-Off point in place in regard to the particular substance.

The Approach of Case Law as to effect on performance and the Automatic Sanction of Disqualification of the Athlete or Horse

63. Mr Warby submits that this case is essentially concerned with the disqualification of a horse through having a Prohibited Substance in its system at the time of the race in question. He maintains that any attempt to resolve questions which seek to determine the effect on performance of a Prohibited Substance, in such circumstances, would lead to major practical difficulties and are not either what the Rules say or the evidence permits. Indeed he asserts that to seek to resolve these drug-related issues by paying regard to the effect on

performance of a particular Prohibited Substance when dealing with the question of the *automatic sanction of disqualification* of a horse from a race - after the horse has been shown to have had the Prohibited Substance in its system at the time of the race - flies in the face of a line of cases in the field of sporting competitions. These cases all speak consistently and resolutely against permitting the taking of any such course. He maintains that complex and lengthy disputes arising from such automatic disqualification would inevitably arise if such a course were to be taken. We were referred, first, to Arbitration Case 95/147 FIF 22nd April 1996 (2/6 JC Auths). At paragraph 11 the Arbitration Panel there states:

> *"The proceedings did not permit precise assessment of the effects of cotinine on the horse's performance. However, in accordance with [doctrine/precedent] the Panel considers that such a consideration should not be taken into account, as it would create great legal insecurity and open the door to arbitrary decisions. In fact, one should start from the principle that a performance obtained with the help of a prohibited substance has been artificially improved, even if that is not scientifically demonstrable. It is a question of fairness to other competitors even if the athlete in question acted neither intentionally nor negligently. Such a result may seem severe from the perspective of the innocent athlete and it is true that if it is established that the athlete has not been guilty of any fault it may even be an unjust decision. But not to take this step would create an even greater injustice. One must, in effect, put in the balance the interests of the innocent doped athlete and the interests of all the other competitors who have competed without the prohibited substance in their body". (D. OSWALD, FISA Info No 6, December 1995, page 2; see L DALLEVES, Sport and Law Conference, Court of Arbitration for Sport, 1993, page 26). The appeal is therefore dismissed on this point."*

64. Mr. Fitzgerald emphasises that, in the instant case, if the level of morphine were shown to be below 50ng/ml – as to which the Appellant would call Professor Tobin at an adjourned Hearing – then both experts are already agreed that the horse's performance would not have been affected. Accordingly, says Mr Fitzgerald, no further scientific evidence would be necessary, and thus this case can be distinguished from the Arbitration case previously cited, since here the absence of effect on performance at a level below 50ng/ml is agreed to

by all concerned. The Appellant maintains that any competitor, in these circumstances, would have a legitimate expectation that he would not be disqualified if the quantity detected is so low that it is not regarded as worthy of reporting; and no unfairness to other competitors would arise.

65. Mr. Warby disagrees fundamentally with this premise. He submits, as the Panel emphasised, that it is essential that a clear distinction is maintained between the *presence* of a prohibited substance on the one hand and its *effect* on performance on the other. The vital importance of this distinction, he maintains, is reinforced by the background to the continuing fight against drugs in sport and specifically in racing. He refers us to a number of authorities, both European and English, which emphasise the complexity and danger of trying to assess the *impact* of a prohibited substance on performance. In *Andrea Raducin / International Olympic Committee (IOC),* dated 28 September 2000 (2/5 JC Auths) Miss Raducin was disqualified from winning the gold medal award for Gymnastics in the 2000 Olympic Games as a result of a test on her at the material time which proved positive for Nurofen. This latter drug had been supplied to her by her country's team doctor during the course of the competition in order to relieve symptoms of ill health. Two paragraphs of the Headnote read as follows:-

> "2. The Anti-Doping Code considers doping as a strict liability offence. This means that no intentional element is required to establish a doping offence. The mere presence of a forbidden substance in the urine sample is sufficient. This has been repeatedly confirmed by the CAS.
>
> 3. To establish a doping offence, it is not required to demonstrate that a competitive advantage was reached."

In its finding at paragraph 14, the Panel stated as follows:-

> "14. The Anti-Doping Code considers doping as a strict liability offence. This means that no intentional element is required to establish a doping offence. The mere presence of a forbidden substance in the urine sample is sufficient. This has been repeatedly confirmed by the CAS (see CAS 95/150 *V. v FINA* in

Digest p.271 n13; CAS 96/149 *A.C. v FINA* in Digest, p.257, n14-15; CAS 98/208 *W. v FINA."*

The Panel went on to say:-

> "19. The Applicant raises the defence that she took Nurofen only because she had symptoms of influenza or a cold but not to gain a competitive advantage. She also relied upon expert opinions to confirm the amount of pseudoephedrine found in her urine sample did not have an enhancing effect on her athletic performance but would rather impair her gymnastic skills.
>
> 20. To establish a doping offence, Respondent is not required to demonstrate that a competitive advantage was reached. Chapter 11, Art. 4.4 of the Anti-Doping Code states:
>
> > "The success or failure of the use of a Prohibited Substance is not material. It is sufficient that the Prohibited Substance … was used … for the offence of doping to be considered as consummated."

As can be seen, the specific wording under the Anti-Doping Code (Section 20 above cited) was to the effect that success or failure of the use of a Prohibited Substance was not material, this having been expressly provided for under the Code. Likewise, submits Mr Warby, does Rule 53 also provide.

66. In Baxter v IOC [2003] ISLR, SLR-1, (1/7 JC Auths), Mr. Baxter was disqualified from his bronze third place in the 2002 Winter Olympic Games after testing positive for a prohibited substance contained in a Vicks inhaler. Under the relevant Saltlake City Olympic Movement Anti-Doping Code (OMAC), he was disqualified automatically by the Court of Arbitration for Sport. The Court in hearing Mr. Baxter's evidence as to his wholly unintended taking of this drug found his evidence to be "sincere and compelling". However, despite this, the Court held as follows:-

> "3.28 Finally, Mr Baxter contends that disqualification is a disproportionate remedy in violation of Swiss law, general principles of law and the European

Convention on Human Rights. The Panel rejects this argument.

3.29 Disqualification is the minimum sanction that automatically follows a doping offence, in accordance with Article 3.3 of the OMAC. As noted above, the disqualification of an athlete for the presence of a prohibited substance, whether or not the ingestion of that substance was intentional or negligent and whether or not the substance in fact had any competitive effect, has routinely been upheld by CAS panels. It is reasonable for the IOC to have determined that it may not always be possible to prove or disprove fault or performance-enhancing effect, but that in order to ensure the integrity of results the mere presence of a prohibited substance requires disqualification.

3.30 In summary, therefore, the Panel is of the opinion; (i) that a prohibited substance, the stimulant levmetamfetamine, was present in Mr Baxter's body, (ii) that this presence alone constitutes a case of "doping" within the meaning of the OMAC, and (iii) that pursuant to the OMAC this case of doping "automatically leads to invalidation of the result obtained" by Mr Baxter, whether or not his performance was enhanced.

3.31 The outcome of this arbitration is the necessary consequence of a rule-making decision of the IOC. The Panel is unable to rewrite or to ignore these rules unless they were so overtly wrong that they would run counter to every principle of fairness in sport. As noted above, the Panel cannot find that the automatic disqualification rule violates such principles.

3.32 For all of these reasons, the Panel upholds the decision of the IOC in disqualifying Mr Baxter from the men's alpine skiing slalom event at the Salt Lake City Winter Olympics, thereby stripping him of his bronze medal and withdrawing his diploma."

67. In CAS 94/126, a decision of the International Equestrian Federation (FEI) 9 December 1998, the headnote reads at paragraph 1:-

"1. Pursuant to the FEI regulations, the mere detection of a prohibited substance always entails the disqualification of the horse and competitor from the event and the forfeiture of any prize money won in the same event. The purpose of this provision is to ensure fairness between all competitors, regardless of whether the rider is at fault. The interests of the rider of a doped horse, even if he/she is totally innocent, must be weighed up against those of all the other competitors who entered the event "clean".

In its conclusions the Panel went on to state:

> "The appellant begins by arguing that the laboratory's failure to indicate the level of isoxsuprine detected in the samples, coupled with the technology it used, which can measure the concentration of a substance to the nearest fentogram, suggests that the level of isoxsuprine must have been very low. Such a small amount would not have had any impact on the horse's performance. In support of this argument he submits an article from the "*Equine Veterinary Journal*", 1998, 30, (4) 294-299 published by J.D. Harkins et al., entitled "*Absence of detectable pharmacological effects after oral administration of isoxsuprine*".

The respondent replies that:

> "If the appellant's argument were accepted and a minimum concentration of a Prohibited Substance were required, the fight against doping would be more difficult, if not impossible. Sports federations would not only have to detect the prohibited substance, but also calculate its concentration, which would probably be a highly complex, long and expensive process … and this would encourage the Persons Responsible or athletes in other disciplines to "play" with ingested or injected doses in the hope that they did not exceed the authorised limit".

It also cites an award issued by the CAS on 22 April 1996 and supported by part of the theory that:

> "the horse's performance should not be taken into account, since it would create great legal insecurity and open the door to arbitrary decisions. We should follow the principle that a

> performance achieved with the help of a prohibited substance has been artificially improved, even if that is not scientifically demonstrable. It is a question of fairness towards other competitors, even if the athlete in question did not act with intent, nor even carelessly. Such a consequence may appear severe with regard to an innocent athlete, and it is true that if it is proved that he was not at fault, it is even an unjust decision. But not to take it would be creating an even greater injustice. One has to weigh up the interest of the doped, innocent athlete against all the other competitors who participated in the competition without the incriminating product in their bodies. (Denis Oswald, FISA Info n.6, December 1995, p.2; see Louis Dallèves, Conference droit et sport, Court of Arbitration for Sport, 1993, p.26)".

Therefore, the FEI quite rightly refuses to tread the dangerous path of considering the impact of prohibited substances on the horse's performance."

68. Further, at page 143, one of the experts is reported as saying that the FEI had a policy not to reveal the concentration of a Prohibited Substance required before penalties were applied.

69. In our view these cases fully support the Panel's finding that under the Rules the presence of the Prohibited Substance is the determining factor when Automatic Disqualification of a horse arises. It is important, in our view, also to keep in mind the different objectives of the anti-doping measures which the Rules seek to achieve. The main objective, obviously, is to avoid cheating, but there are others which we think are fairly summarised in the extract from the Rules of the International Equestrian Federation to which reference was made. These are well set out in Section 6 of CAS 94/126,N(2/6 JC Auths) at p141:

> "Horses taking part in a competition must be healthy and compete on their inherent merits. The use of a Prohibited Substance might influence a horse's performance or mask an underlying health problem and could falsely affect the outcome of a competition…"

Accordingly, it follows that the overall purpose through the objectives is to ensure equal terms for competitors, regardless of any intention to cheat, as well as to protect the horse from being damaged, for

example, when over-stretched and thereby injured through drugs masking an existing injury.

70. We make no apology for referring to these cases at length. The citations emphasise in the clearest terms the consistency of *disqualification from the race/competition in question on the grounds of strict liability of either the human or the horse* when performing with a Prohibited Substance within the system. Culpability at this stage is irrelevant. The disqualification of the competitor, be it horse or human, automatically follows. The quite different question of what penalty, if any, should be imposed on those connected with the incident will then raise any questions of culpability. These latter, of course, do not arise here because this case concerns only the disqualification of the horse and not the imposition of a fine or disqualification on an individual. Indeed the Appellant accepts that in regard to an automatic disqualification it is not always necessary to prove culpability or blameworthiness when a sample is proved positive (see paras 5-13 of Appellant's reply – 1/672). What further emerges from these cases is that the process of determining whether a particular Prohibited Substance did in fact affect performance is not only a minefield but is also the wrong question to be asking. It is a minefield because to try to establish whether there has been an effect on performance is liable to give rise to extensive competing expert opinions, with all the delays, uncertainties and costs associated therewith. By way of example, even on the face of the documents before us, there are significant conflicting views between Professor Tobin and Mr. Maynard as to the characteristics, quantity and effect of morphine (see, for example, paragraph 19, 1/104 of Mr Maynard's witness statement). Furthermore different laboratories, as we have indicated, have different techniques of analysis and this factor of itself may raise additional issues. Also the question is the wrong one because with all drugs not on the List of Threshold Prohibited Substances the level at or above which the Prohibited Substance is tested positive is established, usually through the safety process factor, at well below any level which might affect performance. Accordingly to introduce a performance test is neither necessary nor, in the context, relevant.

71. Reverting to the cases which we have cited in paragraphs 63 to 69 above, we find the points made convincing. We consider that the Panel was justified in paying regard to the formidable practical and policy arguments which weigh against establishing the particular effect on performance which a specific drug may have, whether in

regard to a human being, or a horse, when dealing with the question of the disqualification of the athlete or horse from the event in question. For these reasons, sporting regulators in practice adopt strict regimes which operate without the need for proof of effect or possible effect on performance. Furthermore, it is to be observed that Article 6 paragraph 5 of the International Agreements – to which the Jockey Club is a party and which have been referred to above - provides that a horse should be disqualified if a post-race sample contains a prohibited substance (see 2/599). This Article, we emphasise, is not concerned with any question of culpability or whether the particular drug had an effect on the horse in question in the particular race. We take note of this agreement and consider that it reinforces what, in any event, we consider the Panel properly took to be the construction and meaning of the Rules.

The De Minimis Argument and its application to detection levels

72. We turn now to Mr. Fitzgerald's submission that this is a case to which, in law, the concept of de minimis non curat lex applies. Mr. Fitzgerald refers us to section 343 of Bennion's Rules of Statutory Construction which explains the meaning of the words. It is there stated:

> "Section 343 – De minimis principle: de minimis non curat lex
> Unless the contrary intention appears, an enactment by implication imports the principle of the maxim de minimis non curat lex (the law does not concern itself with trifling matters)."

73. The Appellant relies on the established presumption that de minimis matters will be deemed to be excluded from the operation of Rules such as are here under consideration, as though excluded by express proviso. He submits that because the category of reportable positive samples of morphine is now to contain not less than 50ng/ml, any amount below this figure should come within the de minimis exclusion. He maintains that, in so far as there has been no final quantitative analysis, the assertions of Professor Tobin of a tentative finding of 33ng/ml should have justified, at the least, an adjournment of the hearing both by the Panel and by this Appeal Board for precise quantitative evidence to be obtained. The Appellant goes on to emphasise that it cannot be right to disqualify on the basis of a "positive" finding when the methodology which led to the positive

finding was, in the circumstances already referred to, discontinued as a result of the 28 March 2003 instruction.

74. Mr Warby points out that Bennion, at p.962 (2/13 JC Auths), states that, as with all other cannons of construction, the de minimis principle must give way where there is evidence of a contrary intention. In this case, says Mr Warby, the wording of the Rule 53 is clear. Its content pays regard to the recognised justification in existence for maintaining a distinction between the *presence* of certain Prohibited Substances on the one hand and the *effect* of such on the other, in order to combat the threat which drugs may represent towards the integrity of sporting competitions. The words of Rule 53, he maintains, clearly import strict liability for the presence of the Prohibited Substances. The two requirements are, he maintains, that the Certificate of Analysis must report the presence of the Prohibited Substance in the sample and that the Veterinary Surgeon must then state his opinion that the substance present is included in the List of Prohibited Substances. The meaning of the Rules, submits Mr. Warby, is clear, and any attempt to insinuate a pre-condition to the effect that the actual substance might in any way have affected the performance of the animal in question runs entirely counter to them.

75. We have already indicated how LODs, through the method system or through Reporting Levels, may be set at different levels. These levels may be dictated by various criteria. Different drugs will have different LODs. For example, those which should never appear in a horse's system, such as the amphetamines, will have a method LOD which may become lower as testing becomes more sophisticated. Likewise, drugs with increasing potencies, more recently on the market, may come within the same category. On the other hand those Prohibited Substances which may have endogenous or "innocent" exogenous characteristics may, through research or harmonisation, have a Reporting Level raised to reflect this. It is also essential to appreciate that both the safety process factor referred to above and other research ensures that these non-threshold drugs, that is drugs which are not specifically listed at Instruction C1 para 3, can be expected to have as their cut-off point a level well below that at which performance may be affected. This fact of itself emphasises that it is the presence of the Prohibited Substance with which the Rules are concerned, and that positives can be expected to be reported well below any level at which performance itself might be affected. As we have already pointed out, this is to be contrasted with the named Threshold Prohibited Substances of Instruction C1 para 3 which may not be in this latter

category and so have to be separately categorised. In their Reasons at paragraph 41 we consider the Panel properly stated the position.

76. Furthermore, against the strong body of case law cited above, we consider that to refer to any presence of a Prohibited Substance as a "trifling" matter ("trifling" being the word which Bennion incorporates within the de minimis principle) must be misconceived, having regard to the urgent need to protect the integrity of the sport by ensuring an absolute ban on the use of any Prohibited Substance in a sporting competition. Nevertheless, zero tolerance of a drug may mean simply tolerance to the lowest level at which detection takes place with, if such be the case, any lesser trace of the substance being left in the system. That limitation, in our view, is one which is imposed by scientific technology.

77. As can be seen from the above, LODs may be affected by a number of different factors, including improved methods of detection, the safety factor process and harmonisation. Different drugs can give rise to different considerations. In our view these varying factors are not consistent with the overall applicability of the de minimis principle. Accordingly we consider that this is not a case to which this principle applies.

78. We would add that even if, contrary to our view, a de minimis rule had been in place at the time of the race in question, such would have reflected the Reporting Level or LOD in place at that time, with the result that the Applicant would not have been assisted. This is because we consider that the instruction of 28 March 2003 was not retrospective (see paragraphs 94 to 96 below). Accordingly (see further paragraphs 86 to 90 below) we, as did the Panel, find that the LOD/Reporting Level in place at the time of the race was for an amount in excess of 10ng/ml and, as such, it was, in any event, below the level for which Professor Tobin would contend were it to become necessary to resolve the unresolved issue.

Legitimate Expectation

79. Mr. Fitzgerald has raised before us the further point that the Appellant, based on practice, had a legitimate expectation that the de minimis principle would be applied to his case and that the horse would not be disqualified on the basis of an amount now considered to be de minimis. No reliance was placed on this doctrine before the Panel.

The entry in De Smith, Woolf and Jowell "Judicial Review of Administrative Action" (5th ed) at paragraph 8-053 states that:-

> "…such expectation would be derived from either:
>
> (1) an express promise or representation,
> (2) a representation implied from established practice based upon the past actions or the settled conduct of the decision maker".

80. We fail to see how the Jockey Club can be said to have promised, represented or raised through established practice any implication that the 50ng/ml instruction issued on 28 March 2003, nearly three months after the race, could be applied in this case. Leaving aside the fact of non-publication of the instruction it clearly could not be said to give rise to any such expectation as it was expressly forward looking and, in any event, was consistent with harmonisation. Accordingly we do not consider there to have been any legitimate expectation of the application of the de minimis principle.

The Four Arguments of the Appellant

81. We turn now to the four arguments of the Appellant already set out in paragraphs 54 to 57 above. It is the Appellant's further submission that the wording of the Rules themselves should lead us to import a quantitative limitation. Under the first of these submissions, the Appellant argues that Rule 53(ii) should be *interpreted* so as to require a Laboratory Officer only to report the presence of "….a sufficiently significant quantity of a drug to merit the description of a positive sample". However neither the Instruction nor the Rule provides for the quantity of the substance to be reported other than in Instruction C1 para 3 for the listed "Threshold" cases. The Veterinary Officer's function (see Rule 53(ii)) is simply to give an opinion as to whether a substance, the presence of which is reported in the Certificate from HFL, is included in the list of Prohibited Substances. That list is expressly concerned with the *nature* of the substance and its *capacity* to affect mammalian body systems as per Instruction C1 para 2. The Rules do not provide for the Veterinary Officer to be given any evidence which might enable him to make an assessment as to what effect the quantity may have had on the horse. Nor within the Rules, we emphasise again, is it required that an assessment of the drug's effect on the performance of the horse should be made or that, other than in threshold cases, any precise quantification should be

attempted. For these reasons we consider that the system provided for under the Rules is incompatible with the Appellant's submission on his first argument

82. In his second argument the Appellant maintains that a certificate which reports the presence of an "insignificant" quantity of morphine represents a material departure from the procedures set out in Instructions. This submission involves construing the word "Instruction", contained in the concluding words of Rule 53(ii), so as to incorporate the 50ng/ml Reporting Level given to HFL by Dr. Webbon on 28 March 2003, some months after the race. Accordingly, says Mr Fitzgerald, the certificates issued did not comply with that "Instruction". We consider that the Panel correctly rejected this argument. First, "Instructions", with a capital "I", as the word appears in Rule 53(ii), has its own meaning and, in fact, refers to the published Instructions of the Stewards of the Jockey Club, or the Directors of BHB, and does not extend to executive instructions from Dr. Webbon (see in particular Rules 1(v) 1A(xiii) and 221A and 221B). In fact there has been no published Instruction from the Stewards as to the reporting level of 50ng/ml for morphine. But, in any event, Dr. Webbon's e-mails dealing with this matter were sent out on 28th March 2003, some months after the relevant Certificates were issued. So the dates themselves do not permit it to be said that there was any departure even from Dr. Webbon's e-mails; these latter having post-dated the *earlier* issued certificates. Furthermore, the certificates did not report the presence of any specified quantity of morphine; they merely reported that the sample contained morphine. We reject the Appellant's submissions under the second argument.

83. In his third and fourth arguments Mr Fitzgerald maintains that the prohibited substance must either be present in sufficient quantities to be capable of acting on a mammalian system in some *significant* way, or at least be conceivably capable of having an effect on a horse's performance. In our view this submission is untenable as stated by the Panel at paragraph 41 of its Reasons. There the Panel states:-

> "The argument is also based on the assumption, which we do not accept, that a necessary precondition for a positive sample is proof that the amount of the substance present in the horse had a significant effect on its performance. Formidable practical and policy arguments weigh against that approach."

84. Mr Fitzgerald asserts that the LOD for morphine established by the instruction of 28 March 2003 should be backdated to the date of the race. He submits that no one could complain about this because it is accepted that a level of 50ng/ml in the horse could have had no effect on its performance. In our view this latter submission betrays its own falsity. It raises the question of effect on performance as though such was the criterion. In fact the correct issue is presence. In our view, if effect on performance is elevated as Mr Fitzgerald submits, then issues can be expected to arise in regard to Reporting Levels and Cut-Off points as to whether such could, or could conceivably, have affected performance. This would open up litigation of the kind which we consider the Rules do not, either in their wording or following practice in international sport, permit. We accordingly reject the Appellant's submissions.

85. The Appellant goes on to ask us to read the words of Rule 53 so as to import the word "reasonably" or "proportionately" or "with respect to the de minimis principle" in regard to the reporting of the presence in the sample of the particular substance. The Panel rejected such an approach on the basis that this would have the effect of introducing a new threshold, raising questions and issues as to the effect on performance of different prohibited substances. This construction of the Rule would again import an analysis of the actual quantity of the Prohibited Substance present. We agree with the view expressed by the Panel and reject the Appellant's argument under this head.

The Authenticity of the 10ng/ml Test

86. Mr. Fitzgerald seeks to impugn the authenticity of the Jockey Club's LOD of 10ng/ml which, he says, was improperly asserted to have been in place at the time of the race. He says that it was never formally agreed at either national or international level, had not been agreed to by the European Horseracing Scientific Liaison Committee (EHSLC) even though higher Cut-Off levels had been previously discussed, and was no more than an estimate. He refers to Dr. Webbon speaking of a "tentative" agreement with HFL to the effect that "if an instruction were to be given, the likely instruction would be that an appropriate Cut-Off point would be 10ng/ml", and that it had been necessary to investigate whether this informed instruction was appropriate (reference is made to Dr Webbon's evidence at 2/430 A to D and 2/531 F to G). He further submits that the fact that morphine may be endogenous and "innocently" exogenous through feedstuff caused further uncertainty as to the appropriate Cut-Off Level. It follows, he

maintains, that there was no clear instruction to report all quantities in excess of 10ng/ml, and that, in any event, once this figure was examined it was regarded as inappropriate and requiring the reassessment which thereafter was to take place and which gave rise to the 28 March 2003 instruction.

87. Against this, we consider that Mr. Maynard dealt appropriately with this matter. When asked how it came about that the HFL was using an LOD of 10ng/ml he answered (see 2/411F-H of his evidence before the Panel):

> "The 10ng/ml is actually a function of the technical capacity of the method which has remained unchanged for many years. It is also the result of recommendations from a working party as to the likely pharmacological activity of morphine. So, it is deemed to be appropriate for detecting administrations of morphine."

Mr Maynard refers to the figure of 10ng/ml as having been in use for many years. Dr Webbon, in his evidence, also confirmed that this figure was in use. He said that this figure had been confirmed through tentative agreement at international level and, further, that he had had practical support for this through the series of negative morphine results which there had been over the years. In his evidence as to the level of 10ng/ml Dr Webbon repeated what Mr Maynard had said in evidence (see paragraph 22 above) to the effect that there had been more than 8,000 samples tested on race horses over the twelve months prior to the race in question and that none of these had shown positive for morphine at the 10ng/ml level. Furthermore, no positive morphine case had in fact been reported since 1994. All this bore out the reliability of the Reporting Level of 10ng/ml.

88. It is important, we consider, to bear in mind why the new LOD of 50ng/ml was introduced. By way of background to the instruction there had been a meeting of the Regulatory Committee of the Jockey Club on 10 June 2002 at which it was reported (see 1/130) 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 Dr Webbon issued the instruction of 28 March 2003 (see 1/138) stating that data from the

outbreak of morphine positives suggested that there were "anomalies of Quantification with other laboratories" (see Dr Webbon 2/434F, 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 go 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 then 50ng/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/ml was some possible dividing line between morphine having no effect on performance and, may be, having some effect on performance. Dr Webbon, by his instruction of the 28 March 2003, was seeking to achieve harmonisation between the HFL and other international laboratories by giving the instruction that levels at 50ng/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).

89. We also note that, for the purpose of the preliminary rulings before the Panel, it was a fact agreed to by the Appellant that a concentration of morphine of 10ng/ml or more was present in the relevant urine sample (see 2/620). It is further to be noted that in the draft Annex A from the meeting of 10 June 2002, testing levels for morphine are listed at between 10 to 50ng/ml. In fact the 10ng/ml, in place at that time, and still in place at the time of the race, was within the relevant requirement of the draft and confirms the authenticity of the 10ng/ml figure. We should additionally point out that Mr Fitzgerald made references to recommendations concerning 30 to 60ng/ml of morphine glucuronide in regard to testing levels. These levels were, in fact,

relevant only to minimum performance specifications, and so, we consider, take the matter no further.

90. For the reasons we have given we consider that the LOD for morphine at the time of the race was established with HFL at 10ng/ml and above.

The Timing Point

91. We turn now to Mr. Fitzgerald's submission that, in any event, if he is permitted to call Professor Tobin it may be that some 33ng/ml will be established as the quantity of morphine in the sample in question. He maintains that in the event of this quantity being established there should be no disqualification since, by the date of the hearing before the Disciplinary Panel in January 2004, the quantity of 33 ng/ml would have been below the then Reporting Level and would have been irrelevant. Accordingly no disqualification would have occurred. However, in our view, the fundamental point is that the race was run on 30 November 2002 when the LOD for morphine was 10ng/ml.

92. Mr Fitzgerald submits that the words of Rule 53(ii) "… established from time to time" refer to any time before the relevant enquiry takes place. In our view this provision, in this context, applies solely to Threshold Prohibited Substances, and not morphine. Furthermore, and in any event, we agree with the Panel that the time contemplated by the Rule is the time at which the breach is alleged to have occurred, that is the date of the race, not that of the Enquiry.

93. Accordingly, having decided that the Panel properly decided that 10ng/ml was the established LOD for morphine on the date of the race, we turn now to consider the question of retrospectivity and whether the 28 March 2003 instruction should, on this ground, be held to have established the relevant Reporting Level in respect of the race because it was in place at the date of the Hearing before the Panel.

Reprospectivity

94. Mr. Warby has pointed out that, in the absence of clear language to the contrary, the presumption is that legislation should not be construed to operate retrospectively (see *Arnold v Central Electricity Generating Board* (1988) ZAC 228). Bennion, fourth edition at section 151, states:-

"Principle against Retrospectivity
As a further aspect of the principle that law should be just, legal policy requires that, except in relation to procedural matters, changes in the law should not take effect retrospectively. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle.

A person is presumed to know the law, and is required to obey the law. It follows that he should be able to trust the law. Having fulfilled his duty to know the law, he should then be able to act on his knowledge with confidence. The rule of law means nothing else. It follows that to alter the law retrospectively, at least where that is to the disadvantage of the subject, is a betrayal of what the law stands for. Parliament is presumed not to intend such betrayal. As Willes J said, retrospective legislation is:

> …contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past *transactions carried on upon the faith of the then existing law (Phillips v Eyre* (1870) LR 6 QB 1, 23).

Thus in the absence of a clear indication in an amending enactment the substantive rights of the parties to any civil legal proceedings fall to be determined by the law as it existed when the action commenced *(Re Royse(decd)* [1985] Ch 22, 29D)."

95. As is there stated later regulations ought not to change the character of past transactions carried out upon the faith of the then existing law. At the time the race was run on 30 November 2002, the other competitors, in our view, held legitimate expectations that the race would be run according to the Rules then in force. Rule 53(ii) read with Rule 180(ii) provides for the strict liability of disqualification of the horse. It was agreed between the parties that the scientific evidence shows that morphine was present in the sample. The positive report followed from the presence of morphine.

96. In our view, Mr Fitzgerald's submission disregards the legitimate expectations of the other competitors in the race on the day the race was run. Additionally it also fails to take account of the dangers of uncertainty inherent in making later changes to LODs which were in place at the time of an earlier race, and then backdating them to the time of that earlier race. To take such a course could well open the door to disputes and litigation, including, if the Appellant's case is to be accepted, the very disputes and litigation which the Rules seek to avoid in regard to whether a Prohibited Substance could have affected performance. How far back should back-dating run? What race results might be affected? Is it really intended that a sample may be positive when taken and tested, yet cease to be so if there is a change in Level between that time and the time of the Enquiry? In argument on this point Mr Fitzgerald submits that the complexity of such a situation would not arise if, as in this case, the quantity of the Prohibited Substance in the sample did not exceed the Reporting Level or other Cut-Off point in being – a simple and straight forward approach, so he maintains. However Mr Fitzgerald, when pressed on this point, was obliged to accept that, if the performance of the horse became a relevant criterion, a "grey" area could arise in establishing whether a particular horse's performance could have been affected by the particular quantity of the Prohibited Substance in question. In this context it is essential to bear in mind that the essence of the LODs and the Reporting Levels is that they are invariably well below a level at which there could be an effect on performance. Accordingly, in our view, Mr Fitzgerald is seeking again to elevate the question of effect on performance to a status which the Rules manifestly and expressly do not intend to give in regard to the automatic and mandatory disqualification of a horse. Furthermore Mr Fitzgerald's LOD test as a ready yardstick would not, in fact, assist him even if a later Hearing were to establish that the horse had some 33ng/ml in its system at the time of the race since this latter amount is in excess of the 10ng/ml which the Panel considered was in place at the time of the race. We agree with the Panel's finding as to this.

Estoppel

97. Mr. Fitzgerald seeks also to raise an estoppel in support of his case. He maintains that the Jockey Club, in seeking to disqualify the horse, should be estopped from relying on a quantity in the sample of less than 50ng/ml:-

(i) Because of the longstanding practice of disregarding quantities that were de minimis, and the recent recognition that a quantity below 50ng/ml was de minimis, and/or

(ii) Because such quantity was (or might prove to be) irrelevant.

In considering these submissions it is our view that there was no representation made by the Jockey Club to the Appellant in the manner asserted. The Rules, in their construction as found by the Panel and upheld by us, stated in clear terms that the presence of a Prohibited Substance (such as morphine) would result in automatic disqualification of the horse. Furthermore, in our view, there was no reliance by the Appellant on either of the matters alleged or indeed any like matter. Finally and in any event, even if, contrary to our view, the Jockey Club's unpublished policy of requiring the HFL not to report as positive less than a particular amount of morphine in a sample could constitute a representation, we consider that the material time for the making of any such representation was the time of the race (see paragraphs 91 to 93 above) and not, as the Appellant alleges, at the time of the Hearing before the Panel. We repeat the earlier points which we have made as to effect and meaning of retrospectivity in Law and the construction of the Rule. Accordingly because, at the time of the race more than 10ng/ml was the relevant amount, this level, given the appellant's reliance on Professor Tobin's anticipated evidence (which seeks to establish a figure in excess of this amount), does not assist him. We do not consider that any estoppel here arises.

Conclusion

98. For the reasons above set out, including those given by the Panel, we consider that the Panel rightly gave a negative answer to Q2.

99. *Q3. 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?*

100. The Appellant maintains that the Panel wrongly rejected the submission that there is now a de facto threshold of 50 ng/ml for morphine. The Appellant argues that a sample should not now be

found to be positive unless it is in excess of 50ng/ml. The Appellant, under this head, puts his argument on two grounds.

101. First, that the Panel wrongly found that the instruction now in force, requiring samples of less than 50ng/ml not to be reported, only established a "Reporting LOD". The Appellant maintains that such instruction does far more than that. He asserts that the limit referred to in the instruction operates as a de facto Threshold Level because it means that, even though quantities of between 10ng/ml and 50 ng/ml are still detected, they are not now acted upon by the Jockey Club. Moreover, says the Appellant, it was confirmed in evidence by Dr. Webbon that this was also because he was confident that quantities below 50 ng/ml would have no effect on the performance of the horse. Second, the Appellant maintains that the operative time at which to determine whether there is a Threshold is the date of the Hearing before the Panel, namely the end of January 2004.

102. In regard to the asserted de facto setting of a Threshold Level the Panel considered that Dr Webbon's instruction, by the two e-mails dated 28 March 2003, did not establish, within the Rules, a new Threshold Level, whether de facto or otherwise, for morphine. They considered that the effect of his instruction was only to establish a Reporting Level. We agree. We have already referred in detail (see paragraph 20 above) as to how these Levels have to be agreed internationally before being incorporated into Instruction C1 para 3 as Thresholds "established ….by the Stewards of the Jockey Club" pursuant to Rule 53(ii). Morphine had not been so agreed as a Prohibited Substance for the purpose of incorporation into Instruction C1 para 3 and no Threshold Level had been set for morphine either nationally or internationally. Indeed, morphine was not ranked as a Threshold Prohibited Substance because even though, to a limited extent, it might be endogenous and can be exogenous through innocently administered contaminated feedstuff it had not been recognised as being unavoidably present in horses in levels detectable by normal screening methods at 10ng/ml or above (see the evidence of Mr Maynard and Dr Webbon of consistent negative returns at this level over the years in paragraphs 22 and 87 above). Also the level for morphine was set in the context of the safety factor process of 500. This is in contrast to Threshold Levels which are set through a scientific process of tests carried out within the equine population to establish quantities of a particular Prohibited Substance which in normal circumstances can be in a horse's system

endogenously and/or exogenously by 'innocent' feeding and are thereafter agreed and incorporated in Instruction C1 para 3 as above.

103. We consider that the Panel correctly found that the 50ng/ml instruction was neither an Instruction nor a de facto instruction under Rule 53(ii).

104. As to the Appellant's contention that the operative time to determine the level of LOD or threshold is the time of the hearing before the Panel, the Panel, in our view, correctly concluded that the relevant time must have been when the breach of the Rules is alleged to have occurred. We consider that the words do not bear the retrospective construction contended for. Again we bear in mind the legitimate expectations of the others participating in the race. They took part under the Rules then in force (see paragraphs 94 to 96 above).

105. As we have stated it is the Panel's and our view that the 28 March 2003 instruction was not in fact an Instruction (with a capital I) within the meaning of Rule 53(ii). However, if we were to be wrong about this and it was thus necessary to construe the words "…established from time to time" as including a reference to any time before the relevant Enquiry takes place, we agree with the Panel (see para 45 of its Reasons) that the time contemplated by Rule 53(ii) is the time at which the breach of the Rule is alleged to have occurred. That is the time of the race and not the later date of the Enquiry.

Conclusion

106. We consider that the Panel correctly answered Q3 in the negative.

107. *Q4. Can the Panel disapply the mandatory disqualification of the horse if they find that it would be unfair, unreasonable or disproportionate to disqualify the horse in the circumstances of the case?*

108. The Appellant maintains that the Panel wrongly rejected the argument that a regime which provides for the mandatory and routine disqualification of a horse on the basis of a morphine level so low that it can have had no effect on the performance or health of the horse is "*unfair, arbitrary, unreasonable and/or disproportionate*".

109. The Appellant submits that the Rules violate Article 1 of the First Protocol (A1 P1) and/or Article 6 of the European Convention. Furthermore and in any event, says the Appellant, the Rules were unfairly applied under domestic law.

The Application of Article 1 Protocol 1 and/or Article 6

110. In these proceedings the Jockey Club has made clear from the outset both in written and oral argument that it does not accept that it is a public authority within the meaning or for purpose of either A1 P1 or Article 6 of the European Convention. Notwithstanding this, at no stage during the written or oral argument before the Panel or the Board, has Mr Fitzgerald developed any argument to the effect that the Jockey Club is such a public authority. He stated that he did not intend to pursue this question before the Board, reserving the right to raise it should this matter be taken further on appeal. We proceed on this basis. However, Mr Fitzgerald maintains that both the A1 P1 as well as Article 6 are engaged in these proceedings by other routes.

111. As to A1 P1 it was not until his recent Notes served shortly before the Hearing that Mr Fitzgerald formulated a reasoned argument in support of his proposition that A1 P1 is applicable to this case. A1 P1 provides:-

> "PROTECTION OF PROPERTY
>
> P1/1-01 Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Appellant submits that A1 P1 is here engaged because the decision under appeal affected one or both of two alleged proprietary interests of the Appellant's, namely:

(a) his right, as Trainer of the horse, to a share of the prize money, and

(b) the loss in value of the horse through being disqualified.

112. It is not suggested before us that the Appellant had any ownership interest or other like stake in the horse. Accordingly we do not see how any proprietary interest or right held by him in the horse here arises. On the other hand we were told that, at the time of the race, the Rules in force entitled the Appellant to 7% of the actual prize money. This is not in dispute. Nevertheless, whether it be in regard to this sum or to some other alleged proprietary interest in the horse, Mr Warby makes the point that the Appellant held only a contingent right to acquire any such interest or property. No actual right can accrue until a final termination of the process before us has established the identity of the winner of the race. We were referred to authorities showing us that A1 P1 does not guarantee a right to acquire property; expectations of future earnings can only be considered to constitute "a possession" if an enforceable claim exists (see Gudmundsson v Iceland (1996 21 EHRR CD89). Mr Warby also refers us to Puda v Sweden (1987) 20 DR 234 in which case it was recognised that where a person's pursuit of an occupation is subject to a licensing scheme which regulates the conduct of the occupation, the withdrawal or revocation of a licence, in accordance with the conditions or other provisions to which it is subject under the scheme, will not constitute a deprivation because in such circumstances the right is a qualified right. The Licensee has no legitimate expectation other than that the scheme will be operated in accordance with its terms. Accordingly, activating the conditions to which the licence is subject, does not, says Mr Warby, amount to interference. In our view these points were not satisfactorily answered by Mr Fitzgerald through the authorities which he cited to us. It is our view that, for reasons already stated, the Appellant had no more than a contingent right to any of the alleged proprietary interests. Any such contingent right was held pending resolution of these proceedings. Furthermore because the licensing scheme under the Jockey Club Rules provides only qualified rights, A1 P1 is, again, not engaged since it is those very Rules which are here under consideration.

113. For the sake of completeness we add that Mr Warby also makes clear that A1 P1 concerns interference with property by a public authority (see Gustaffson v Sweden – above cited – at 61). He repeats his denial that the Jockey Club is a public authority.

Article 6

114. As to Article 6, Mr Fitzgerald maintains that because, at the Hearing before the Panel, the potential penalty at stake for the Appellant was one of disqualification through withdrawal of his Licence to Train, then his civil right to work as a Trainer was in question within Article 6. Mr Fitzgerald refers us to Ezeh and Connors v UK (2003) App. No: 00039665/98, Apps Auths Tab 11). Mr Warby, on the other hand, maintains that the notion that the theoretical possibility of disqualification should engage Article 6 is inconsistent with R (Wayne Thompson) v The Law Society (2004) EWXA Civ 167 (3/1 JC Auths). In this case it was recognised that a court may look with hindsight to establish whether an individual's civil rights were raised, and if the decision does not impinge on the civil rights of the individual concerned then Article 6 will not be enforced (see (Wayne Thompson, above cited, para 84). To hold otherwise in this case, Mr Warby maintains, would be unreal in any event because this case has proceeded throughout on the footing that the Jockey Club was not suggesting that the Appellant was in any way at fault, or liable to any penalty which could involve him in a loss of his Licence to Train. We agree. We do not consider that Article 6 is here engaged.

Was it unfair, unreasonable and/or disproportionate to disqualify Be My Royal?

115. In its Reasons set out in paragraphs 47 to 51 inclusive, the Panel, in fact, met head on the full impact of the provisions of A1 P1 and Article 6. They held that even if either of these Articles did apply, no breach of either was established. The Panel recognised that, as a matter of construction, Rule 180(ii) makes disqualification of the horse mandatory. Nevertheless the Panel held that, having regard to all the circumstances, it was not unfair, arbitrary, unreasonable or disproportionate to disqualify the horse. We refer expressly to the full content of paragraphs 49 and 50 of the Reasons. The Panel (at paragraph 49), having expressed its view that the automatic disqualification of the horse was "perfectly fair", went on to explain this by saying:-

> "It pursues an entirely legitimate aim, that is of guaranteeing that the sport of racing is free of drugs. It is not practical to have a regime that is based on culpability or actual effect on performance. That would create insuperable practical

> problems. Moreover, the approach taken by Mr Fitzgerald seems to us to ignore the wider issues of fairness at stake and the legitimate interests of other concerned in the outcome of the race. The race was run under certain rules, and those individuals and organisations involved have a legitimate expectation that the rules will be applied."

The Panel continued at paragraph 50:-

> "The objective of the regime is of sufficient importance, the means employed (strict liability) are rationally connected to the objective, are no more than is necessary to accomplish the objective of making racing free of drugs and do not impose an excessive burden on those concerned when weighed against the wider interests of the racing community. Those wider interests are concerned with fairness in competition."

We agree for the Reasons which we have already given that the Panel's approach was, in the circumstances, correct and fully justified.

116. In paragraph 48 of their Reasons the Panel, in our view, rightly distinguished this case from International Transport v Roth Gmbh v Home Secretary (2003) QB 748 at Sections 47-52. We would add a further ground of distinction to the effect that the Roth decision concerned a criminal matter and the need, for this reason, to ensure that the punishment matched the offender's culpability. Such considerations are not applicable to a civil matter concerning fairness in a sporting competition where disqualification of the horse is mandatory. Culpability and/or effect on peformance for the purpose of the automatic sanction of disqualification of the horse are here irrelevant.

117. We consider that the Panel properly formed the view that the scheme operated by the Jockey Club is a rational one, amply justified by the importance of endeavouring to ensure drug-free racing, and following adopted practices in competitive sport.

Domestic Law

118. As to domestic law, the Appellant maintains in general terms that fairness both in procedure and in substance are required in these proceedings. In particular he maintains that, as a matter of general fairness, to disqualify the horse, without, in the circumstances, at least having a quantitative analysis, was unfair having regard to the 28 March 2003 Instruction. In our view the Reasons as advanced by the Panel in paragraphs 48, 49 and 50 emphasise the overall fairness in the automatic disqualification decision which it made in regard to the horse. We agree with the Panel.

Conclusion

119. We consider that the Panel properly answered Q4 in the negative.

120. Q5 *Can the Panel adjourn and invite the Stewards of the Jockey Club to suspend or modify Rule 53, Rule 180 or C1 paragraph 3 so as to ensure that a horse whose concentration or morphine is less than 50 nanograms per millilitre is not disqualified?*

121. In our view, the Panel had power to adjourn the hearing. However, we consider that, overall, the Panel was entitled to form the view that an adjournment would serve no purpose since, had it adjourned the matter, the Stewards would have had no right or power to make the order which the Appellant was seeking. In our view it was not open to the Stewards, after the event, to rewrite the Rules referable to the running of the Hennessy Gold Cup on 30 November 2002 in a way which would affect the legitimate expectations of others who took part in this race and, indeed, the other races where positive tests are still outstanding. The fact that the Rules have yet to be applied by the Panel cannot, in our view, alter that fact. As we have already said (see paragraphs 94 to 96) this course would be a manifest retrospective change of the Rules under which all those competing had, or should have, conducted themselves.

122. For the reasons which we have already set out at length, we consider that the Panel was, in the circumstances, fully justified in holding that it was not unfair for there to be no requirement that the substance produce an actual effect on the performance of the horse.

Conclusion

123. In the circumstances we consider that the Panel correctly answered Q5.

124. Q6 *If the answer to [5] is no, then, if it were established that the concentration of morphine in the sample was between 10 and 50ng/ml and that this concentration would not have a significant effect on the horse's performance, should the Panel adjourn and issue such an invitation to the Stewards of the Jockey Club?*

125. The Appellant submits that, because the Panel had the power to adjourn, it should have taken this course. It would then have been for the Stewards to decide what course of action to take. Furthermore, says the Appellant, the decision as to disqualification under 180(ii) has yet to be taken, so that the modification of the circumstances in which the disqualification was mandatory so as to achieve fairness and justice would not have been retrospective at all.

126. In our view this submission begs the question. Not to impose a disqualification under Rule 180(ii) would, in the circumstances, be to rewrite the Rules retrospectively and, for all the reasons already stated, would be improper.

127. As to the Appellant's public interest argument, we consider that it must be in the public interest and in the interest of all those subject to the Rules of Racing, that they should be applied evenly and consistently without retrospective interference.

Conclusion

128. We uphold the decision of the Panel on Q6.

Costs of the Hearing before the Panel

129. As to costs, the Appellant argues that the decision to award £5000 costs against him was, in all the circumstances, disproportionate and unreasonable. In our view the Panel, in ordering the Appellant to pay 50% of the costs sought, was justified in holding that this was a matter within its general discretion. Although the Jockey Club's costs exceeded £10,000, it nonetheless limited its application to the sum of £10,000. In our view the circumstances in which we would be justified in interfering with such an exercise of discretion are very rare and do not arise here. Even if they did, we would not be minded to do so on the facts of this case.

Conclusion on the Appeal

130. Accordingly, for the reasons which we have given, we dismiss this Appeal. In doing so we wish to say that we do have sympathy for the position of those connected both with this race and other like races. Nevertheless, we hope that we have made clear in our Reasons why, in the circumstances, disqualification of the horse must follow.

Costs of this Hearing

131. On the second day of this Hearing and at the conclusion of argument we reserved the giving of our Decision and Reasons. Accordingly the question of the costs of this Hearing was left undecided. In the hope that the costs of a further Hearing on this issue could be avoided it was agreed between the parties, and we so directed, that following receipt of our Decision and Reasons as herein set out, each party would, in the light of this document, file with the Jockey Club within 14 days its submissions as to the costs of this Hearing. If any alternative course is thought to be necessary then written application to us should be made. Subject to this, the two sets of submissions should be forwarded to the Secretary to the Appeal Board. When the Secretary has received each submission he will forward each party's submission to the other. We further propose that each party should then be entitled to answer the submission of the other Party within 14 days of receipt of the other's submission. Such answers are again to be sent to the Secretary to the Appeal Board. Thereafter, he will forward all such written submissions to us, and we will then give in writing our Ruling as to the costs of this Hearing.

DATED: SIGNED:

EDWARD CAZALET

ANTHONY MILDMAY-WHITE

CHRISTOPHER HALL