

**RACING APPEALS TRIBUNAL**

**NSW**

**Mr D B Armati**

**20 JULY 2020**

**Reserved Decision**

**APPEAL BY RACING NSW AGAINST A  
DECISION BY THE APPEAL PANEL OF  
RACING NSW TO DISMISS 5 CHARGES  
AGAINST DR ADAM MATHEWS**

**ARR175(I), ARR175(k), ARR177B(6),  
ARR175(k), ARR175(a)**

**DECISION:**

- 1. APPEAL UPHELD.**
- 2. THE 5 BREACHES OF THE RULES FOUND ESTABLISHED.**
- 3. DIRECTIONS ISSUED FOR PENALTY SUBMISSIONS**

## **INTRODUCTION**

1. Racing NSW (“RN”) appeals against a decision of the Appeal Panel of 6 May 2016 to dismiss five charges against Dr Adam Matthews (“Matthews”).

### History of Hearings

2. The stewards of RN conducted an inquiry into the conduct of Matthews on 27 and 28 October 2015. Their inquiry was entitled:

“Hearing of charges against Dr Adam Matthews arising from an inquiry into the analyst’s findings of prohibited substances in samples taken from horses and the raceday treatment of horses in the stables of licensed trainer Mr S Kavanagh.”

3. The stewards laid six charges against Matthews and on 19 November 2015 the Stewards found Matthews guilty of the six charges. The reasons for decision are not contained in the brief of evidence before the Tribunal.

4. The Appeal Panel of RN heard Matthews’ appeal against those findings on 8, 9, 10, 11 February 2016, 4 April 2016, 19 May 2016 and issued a liability determination on 6 May 2016, in which they found Matthews guilty of charge 1, but dismissed charges 2-6 inclusive and then imposed penalty on charge 1 on 17 June 2016.

### These Proceedings

5. On 4 July 2016 RN appealed to the Tribunal against the dismissal by the Appeal Panel of charges 2-6 inclusive.

6. The grounds of appeal lodged by RN are:

“1. The Appeal Panel erred in failing to find Dr Adam Matthews guilty of charges 2-6 (inclusive).

2. The Racing Appeals Tribunal should find that Dr Adam Matthews supplied to Dr Tom Brennan two bottles of an injectable substance or preparation labelled “Vitamin Complex”, the contents of which contained cobalt in concentrations of approximately 175 times the concentration of cobalt found in registered veterinary injectable products for horses containing cobalt and vitamin B12, which Dr Tom Brennan on supplied to licensed trainer Mr Sam Kavanagh.

3. The Racing Appeals Tribunal should find that Dr Adam Matthews is guilty of charges 2-6 (inclusive).”

7. After numerous delays because of preparation of this case and for the Tribunal to deal with related charges and for other charges in Victoria to be disposed of, this appeal did not come on for hearing before the Tribunal until February 2020. A final directions hearing was held on 7 February 2020 and then the matter was heard over 19, 20 and 21 February 2020.

8. At the conclusion of the evidence, by agreement, the parties filed written submissions. Prior to the hearing commencing, and in preparation for an earlier hearing date, RN had filed a submission on 16 May 2018. After the conclusion of the hearing before the Tribunal, RN filed submissions on 26 February 2020 and 21 April 2020. The respondent filed submissions on 3 June 2020 and RN filed a reply submission on 15 June 2020. Oral submissions were made on 18 June 2020. The Tribunal subsequently invited RN to file a submission in respect of denied particulars in charge 6 and that submission was filed on 30 June 2020 and Matthews replied on 15 July 2020.

### The Charges

9. Six charges were laid by the stewards and determined by them and these six charges were dealt with by the Appeal Panel. As stated, the Appeal Panel found charge 1 proved and Matthews has not appealed against that finding, nor the penalty imposed for it.

10. As a result of a Supreme Court decision in the related proceedings involving RN and Sam Kavanagh, RN here amended the charges by deleting particulars which relate to AR 175(h)(i). That amendment was effected with the submissions of 26 February 2020 by RN and the respondent has taken no issue with that amendment.

11. The amended charges, as they are now to be dealt with by the Tribunal, are lengthy and, accordingly, are attached to this decision.

### Pleadings

12. Matthews maintained his plea of not guilty before the stewards' inquiry and before the Appeal Panel. In respect of the charges 2-6, which are now before the Tribunal, the respondent, Matthews, has maintained a denial of a breach of the rules.

## Particulars to be Proved

13. By Mathew's submission of 3 June 2020 and in response to the amended particulars, the issues in dispute in those particulars are summarised below. Where there is no dispute in respect of a particular, for brevity purposes, that is not referred in this summary.

14. In respect of the charges the following matters are in dispute:

### Charge 2:

- a. The allegation that Dr Matthews was a junior partner is disputed, he was an employee.
- c. Denied.
- d. Not in dispute save for the word "on".
- k and l. Denied

### Charge 3:

- a. As for charge 2.
- c. Denied.
- d. As for charge 2.
- k and l. Denied.

### Charge 4:

- a. As for charge 2.
- c. Denied.
- d. As for charge 2.
- e. Denied.
- g. Denied.

### Charge 5:

- a. As for charge 2.
- c. Denied.
- d. As for charge 2.
- e. Denied.
- h and i: Denied.

### Charge 6:

- a. As for charge 2.
- c-i. Denied.

## Issues

15. As a result of the above introductory matters, the oral and written submissions and the evidence given, the following are identified as issues for determination. Other denied particulars are essentially dealt with if a finding is made against Mathews on issue 1 below and are specifically dealt with when considered later. The issues are:

1. Both parties agree that the first and primary determination to be made on this appeal is whether RN establishes that the Tribunal should believe Dr Brennan's ("Brennan") evidence and reject the evidence for Mathews. That is the issue is that Mathews supplied Brennan with the Vitamin Complex.
2. Whether Mathews was a party to breaches in respect of charges 2 and 4.
3. Whether Mathews' conduct led to others breaching the rules in relation to charges 3 and 5.
4. Whether Mathews engaged in improper practice as particularised in charge 6.
5. Whether Mathews is bound by the admissions of his solicitor of 21 September 2015 that cobalt is a prohibited substance?
6. If Mathews is not so bound, was cobalt a prohibited substance before 1 January 2015? Issues 5 and 6 only relates to charges 3, 5 and 6.
7. In relation to charge 6 whether particulars (f) to (i), which are denied, have been established.

16. The Tribunal notes that the Appeal Panel did not deal with matters 2 to 7 in detail because the Appeal Panel determined that Mathews' appeal should be upheld in respect of charges 2-6 on the basis, in summary, that the Appeal Panel was not satisfied to the Briginshaw standard that it could accept the evidence of Brennan and others over that of Mathews. It did not have that requisite level of comfortable satisfaction and, accordingly, charges 2-6 were dismissed without considering the particulars and the gravamen of the charges.

## **THE EVIDENCE**

17. By consent RN put in evidence 8 volumes of material of 3216 pages.

18. The volumes comprised: 3 volumes of exhibits before the stewards; 1 volume of exhibits before the Appeal Panel; 2 volumes of transcripts of stewards' hearings in related matters of Sam Kavanagh, Brennan, Aaron Corby, John Camilleri, Mitchell Butterfield and Michael O'Loughin and the submissions on penalty for Sam Kavanagh and Brennan and the transcript of the hearing for Mathews; 1 volume of transcripts of the Appeal Panel hearings for Sam Kavanagh, Brennan and Mathews with submissions on penalty for those three; 1 volume containing the Appeal Panel decisions on liability and penalty; and fresh evidence of downloads of telephone records of Mathews.

19. The new exhibits comprised invoices from Provet and Pharmasave Central Sq, a Communications Report, text extracts from Mathews telephone and the text note of Mrs Medwin.

20. The new oral evidence was from Brennan, Mathews, Mrs Medwin and Ms Spicer.

## **BRIEF FACTS TO PUT THE ISSUES BEFORE THE TRIBUNAL IN CONTEXT**

21. Brennan and Matthews were veterinary surgeons at the relevant times.

22. Sam Kavanagh (NSW), his father, Mark Kavanagh, and Danny O'Brien (both Victoria) were licensed trainers at the relevant times.

23. Matthews had earlier been employed in a practice with Brennan, but was dismissed for conduct.

24. Brennan was a partner in Flemington Equine Clinic ("FE") and by agreement of his partner, Dr Church ("Church"), Matthews was employed by the practice prior to these events.

25. A product known in these proceedings as Vitamin Complex and contained in a bottle was subsequently found to have very high levels of cobalt.

26. It is the case for RN that Matthews was the source of the Vitamin Complex and in a meeting with Brennan he supplied him with the first bottle, after they had discussed the matter, in or about September 2014.

27. In summary terms, it is Brennan's evidence that Matthews told Brennan he had been using the Vitamin Complex extensively in the harness racing industry in recent times and that there were no prohibited substances in it. Matthews is said to have told Brennan he had had success with it. He described it as having concentrated vitamins. Brennan says that Matthews told him how to use it, and that formula will be set out later, and also when to use it and that also will be set out later. Brennan says that when he questioned Matthews as to where it came from he was told it was from Canada. Brennan says Matthews told him that, with the success with harness racing horses, there had been no positive swabs. Brennan agreed to acquire and use the substance and was told by Matthews that he charged \$1,000 per bottle.

28. Because of the lack of proper labelling, to which the Tribunal will return, Brennan was concerned about the contents and spoke to a friend, Nick Bova, a compounding chemist, about testing the bottle, but was told it would cost between \$10,000 to \$100,000. Brennan supplied the Vitamin Complex to and spoke to the trainers, Sam Kavanagh, Mark Kavanagh and Danny O'Brien, and told them, whilst he did not know what was in it, it was safe to use, but they might consider getting their own testing.

29. Mark Kavanagh and Danny O'Brien trained in Victoria where Brennan's FE was located and it is Brennan's evidence that he carried out all injections of the Vitamin Complex into drip bags and then applied it to the horses of Mark Kavanagh and Danny O'Brien.

30. Sam Kavanagh trained in NSW and he administered the drips himself.

31. Evidence establishes that Brennan sent a text on 26 September 2014 to Sam Kavanagh advising him of the formula and when to use it.

32. Brennan had supplied Kavanagh with the Vitamin Complex by posting it to him in Sydney.

33. Various payments were made by Mark Kavanagh and Danny O'Brien to Brennan for the supply of the bottles. It is Brennan's evidence he did not additionally charge those trainers for the bottles, but charged them for his administration of the drips. That is he made no money out of the bottle supply. He charged Sam Kavanagh for the bottles.

34. On 18 November 2014 Matthews sent a text ("the text") to Brennan, which has played a substantial part in these proceedings. It stated:

"Have those bottle Thursday if suits".

35. It is Brennan's evidence that Matthews was chasing him up because there was an outstanding payment for a bottle. Brennan says that he spoke to Danny O'Brien and as a result on 19 November 2014 Danny O'Brien deposited \$3,000 into Brennan's account.

36. Brennan says that on the morning of 20 November he received two further bottles from Matthews and on the night of 20 November Matthews attended his premises and Brennan says he paid Matthews \$3,000, being the monies deposited into his account by Danny O'Brien, and that that was for Vitamin Complex previously supplied.

37. It is RN's further case that Brennan is corroborated by Sam Kavanagh. That arises because Brennan supplied Kavanagh with the Vitamin Complex.

38. It is RN's evidence that Sam Kavanagh spoke to Matthews about a horse having the shakes as a result of administration of the Vitamin Complex. It is Kavanagh's evidence that Matthews told him to increase the dose from 5mls to 10mls.

39. It is also RN's further evidence that Sam Kavanagh subsequently spoke to Matthews and at that time Matthews told him there was no cobalt in the Vitamin Complex and then in the same conversation told him that the Vitamin Complex only had the same amount of cobalt as Coforta.

40. It is RN's further evidence that once the positive results for trainer Moody in Victoria became apparent that Sam Kavanagh immediately texted Matthews and Matthews replied with "???" and then Sam Kavanagh texted Matthews again. The details of the texts will be set out later. Sam Kavanagh later spoke to Matthews on the same day.

41. It is also RN's case that the circumstances surrounding Matthews' departure from and subsequent dismissal from FE, with various discussions and texts, also provides credible evidence for its case to be established. Those details will be set out later.

42. The Tribunal emphasises that it has not sought to exhaustively set out the evidence that is relevant to the charges. The brief of evidence provided to the Tribunal comprises 3,216 pages. The Tribunal indicates that it has read that brief. The Tribunal also notes that it dealt with related charges against Sam Kavanagh. Some of that relevant Sam Kavanagh evidence is before the Tribunal in the brief, but other matters relating to Sam Kavanagh that are not dealt with in these proceedings have not been taken into account. There are



many, many other facts which comprise the narrative involving the various persons identified in these proceedings. It is essential, therefore, that to make this decision as brief as possible only key matters are set out.

43. In these proceedings Matthews carries no burden whatsoever. It is, however, informative to have regard to what his evidence has been and again it is only referred to in very summary terms.

44. Matthews has given evidence that he first saw the Vitamin Complex when shown to him by Victorian stewards on 30 April 2015.

45. Matthews denies he supplied the Vitamin Complex to Brennan and that he says he never spoke to Brennan or Sam Kavanagh about it. He denies the conversations which are alleged against him and which have been summarised above.

46. When confronted with the supposedly corroborative evidence about the text of 18 November 2014 it is his evidence that that reference was to bottles of Toradol.

47. Matthews does not dispute he was a heavy gambler at the time and was under considerable stress. He says that on 15 March 2015 when he was spoken to by the partners of FE that he was suffering from a medical condition and it is noted he went on stress leave and then was subsequently terminated by them.

48. In respect of the Sam Kavanagh text evidence with the response of his “???” Mathews says that was an indication, not of his involvement with Sam Kavanagh with the Vitamin Complex, but a reply indicating he had no idea what Kavanagh was texting about.

49. In other words, it is the case for Matthews that he had nothing to do with the Vitamin Complex.

50. Again noting the breadth of evidence that is before the Tribunal, it comments at this stage in respect to two matters.

51. Brennan was cross-examined before the Tribunal at some length about the relevant trainers’ records on the number of times the Vitamin Complex was administered. The evidence was inconclusive and the Tribunal was not addressed on it. Therefore, it is not further examined.

52. Likewise, there was much cross-examination about the number of bottles said to have been supplied by Matthews to Brennan and to whom Brennan on supplied or used and the question whether those bottles were full or empty. Again the evidence was inconclusive and the Tribunal was not addressed on it. Therefore, it is not further examined.

**THE KEY ISSUE IN THESE PROCEEDINGS IS WHETHER THE TRIBUNAL SHOULD BE COMFORTABLY SATISFIED TO ACCEPT RN'S CASE , THAT IS TO FIND THAT MATHEWS SUPPLIED BRENNAN WITH THE VITAMIN COMPLEX**

53. The Tribunal approaches its examination of these issues by following the sequence of the written submissions and then considering matters raised in oral submissions.

RN Submissions

54. The first submission was that of RN of 16 May 2018.

55. RN opened on the basis of an acceptance that Brennan lied to everybody about his involvement in these matters up until 20 June 2015.

56. That is an agreed fact.

57. RN says that Brennan lied up until that point to protect his own interests, the interests of FE and the interests of the various trainers with whom he engaged.

58. RN says that his evidence and demeanour are such that the Tribunal should accept his evidence.

59. Substantial submissions were made in respect of charge 1 and its use in respect of these proceedings. The Tribunal notes that, prior to the commencement of the hearing, the use of that evidence was opposed by Matthews, but was not further addressed. Charge 1 is attached and is self-explanatory.

60. The adverse finding made against Matthews for charge 1, both by the stewards and the Appeal Panel, was that he engaged in a raceday drenching by being a party to those that did it. It is pointed out he has not appealed against that adverse finding from the Appeal Panel, nor the penalty imposed.

61. It is, therefore, RN's submission that those facts and findings can be taken into account in determining the credit issues here.

62. The key facts that go against Matthews' credit are that the horse Midsummer Sun raced on 9 January 2015 and was trained by Sam Kavanagh. Matthews knew that Sam Kavanagh was desperate for winners and in the course of a conversation it was found that Matthews advised Sam Kavanagh to give the horse a treatment on race day. The findings were that Matthews then arranged for his close friend, Camilleri, to effect that treatment and Camilleri did so.

63. Matthews denied his involvement to the Appeal Panel and the only conclusion that can be reached from the adverse finding against him is that his evidence was not accepted and it was found that he lied.

64. RN submit that the Appeal Panel did not believe Matthews because he engaged in recent invention, creating a story that what he was talking about was giving a saline drench after the race and not before. He had previously told the stewards that the conversation that he had had with Sam Kavanagh was about European horses. He was caught out in that recent invention by the evidence of Camilleri, who Matthews had attempted to use as a corroborative witness.

65. It is further submitted that the Appeal Panel made findings that were consistent with Matthews' knowledge of his wrongdoing. In that regard the Appeal Panel did not accept that his medical diagnosis and his treatment were such that it would explain his changes in version ( for privacy purposes these are not described in more detail).

66. The Appeal Panel found corroboration from Sam Kavanagh and others' evidence that Matthews was involved in that raceday drenching and was trying to protect himself. They were comforted in that conclusion by his serious gambling problem at the time and that he was engaging in erratic and risky behaviour.

67. The fact that Matthews bet on Midsummer Sun was also a fact that they took into account.

68. The Tribunal's conclusion on this material is that it can be used to assess Matthews' credit and his conduct generally. It was serious misconduct by a vet with a gambling problem, who was prepared to lie to the stewards and the Appeal Panel about his involvement and create scenarios to exculpate himself. He was prepared to engage in recent invention. He concealed the truth. His denials, lies and actions were designed to discredit others, including Sam Kavanagh. The effect of that is to cement a belief in Sam Kavanagh's evidence on other issues here.

69. In this submission RN also emphasised its case that Sam Kavanagh provided corroborative evidence of Brennan and of its case.

70. This evidence is to be read in the light that Matthews denied any of it took place.

71. Sam Kavanagh says that he had a conversation with Matthews possibly at the Magic Millions sales on the Gold Coast in early 2015. In his evidence to the Appeal Panel he said:

“I told him - I think I told him about the horse that (sic) the shakes and why I stopped using it and I said I'd seen a difference only in the fact that the horse was recovering and was racing more often but, um, I didn't see any sort of performance difference and I said I'd stop the other horses on it because I didn't think it made a great deal of difference because they were doing well anyway. Um, and he said you got to - you can double the dose and use 10mls instead of 5. You know, if you've got a horse that you don't think it's making a difference to, it's not doing well, you can double the dose and use 10mls.”

72. It is submitted that Sam Kavanagh would not have mistaken that conversation. It was submitted it was not a conversation about other forms of treatment which Matthews was providing to Sam Kavanagh at the time, namely yoghurt drenches. It is noted that in fact there is no issue yoghurt drenches were being provided and that they had been made up by Matthews and that he charged Sam Kavanagh \$75 per drench and was paid cash by Sam Kavanagh into a Matthews' TAB account. It is submitted that Sam Kavanagh should be believed because he sought and received advice concerning improving a horse and when it was given to him paid close attention to it.

73. There was also the RN case that Sam Kavanagh had a further conversation with Matthews in New Zealand in late January 2015 and that in that conversation Matthews said to him:

“He went from saying it had no cobalt in it to saying that it's only got the same amount of cobalt in it a (sic) normal Coforta.”

74. It is said that Sam Kavanagh should be believed on this because of the considerable concerns that it engendered in him because up to then he had a belief the Vitamin Complex had no cobalt in it.

75. There is then the further submission from RN that Sam Kavanagh further corroborates its case by reason of him contacting Matthews after Moody returned a positive in Victoria.

76. The sequence of texts was:

“Sam Kavanagh - Are you sure we are okay.

Matthews - ???.

Sam Kavanagh- Drips moody gone cobalt.”

77. It is submitted that the word “drips” is suggestive of an awareness that Matthews knew Sam Kavanagh was using the Vitamin Complex and, therefore, it was inherently improbable he would have messaged Matthews making that inquiry.

78. It has been Matthews’ evidence that the “???” was a simple reply indicating he had no idea what Sam Kavanagh was talking about.

79. The Tribunal notes that at that time it is Sam Kavanagh’s evidence that he telephoned everybody he could think of, including an attempt to phone Brennan, then the text to Matthews and phone calls to others and later a conversation with Matthews about the subject.

80. The Tribunal notes that Sam Kavanagh did not give evidence before it and, accordingly, there is weight to be given to the determination on his credit by the Appeal Panel.

81. The Tribunal accepts the inroads on Sam Kavanagh’s evidence that were made by his cross-examination before the Appeal Panel and in particular Sam Kavanagh’s belief that Matthews was a supplier was an impression gained from Brennan. But of course this was not the only source of his belief.

82. Sam Kavanagh knew and used Matthews as his vet and, therefore, texting him and phoning him was also consistent with phoning a vet for advice, rather than phoning a supplier. Therefore, the 13 November 2015 text and subsequent call are explicable, especially as Sam Kavanagh phoned everybody he could think of on that date.

83. Likewise, the discussion about his horse having the shakes was consistent with other conversations he had with Matthews, for example, about another horse being a bleeder and the need for the use of yoghurt.

84. However, the Tribunal is satisfied when all of Sam Kavanagh’s evidence is taken together, especially the establishment of his credit, as set out earlier in

relation to the charge 1, is such that, despite the possible innocent explanation and his uncertainty on dates and places and a vagueness and lack of precision and confidence about his evidence, as the Appeal Panel found, that there is a thread of consistency.

85. That is the RN case is that pieces of corroborative evidence, the shakes and the dose increase and the guarantee of no cobalt conversation, are consistent with Sam Kavanagh speaking to Matthews because he believed Matthews was the supplier to Brennan. The explanation of Matthews in respect of the text “???” material is not persuasive to the contrary.

86. The Tribunal again acknowledges that Sam Kavanagh did not give evidence to it and the findings of facts and credibility and the weight of evidence determined by the Appeal Panel must be carefully considered.

87. The Tribunal has had the benefit of additional evidence of Brennan to enable a different conclusion and, accordingly, considering all that additional evidence comes to a different conclusion to that of the Appeal Panel in respect of the weight to be given to the evidence of Sam Kavanagh.

88. The Tribunal finds that Sam Kavanagh’s evidence alone is not sufficient to establish RN’s case, it is merely a limb.

89. The next matters contained in this submission are a summary of why the Tribunal should accept Brennan as a witness of credit.

90. There is the fact that Brennan accepts he lied and the reasons are set out above for those lies. It is submitted he had nothing to gain by changing his evidence, for example, no discount in penalty for the breaches found against him.

91. It is submitted that the relationship of Brennan as a more senior vet to that of Matthews as a more junior vet, the reasons he employed him and the concerns he subsequently showed for him are such that he has no reason to blame Matthews improperly.

92. In oral submissions it is pointed out that Brennan has had to wear the consequences of his wrong conduct and of his lying before numerous tribunals who have examined matters relating to this Midsummer Sun race.

93. It is submitted that Brennan has “manned up”, but Matthews has not.

94. It is submitted that Brennan has given considered and responsive answers to all of the questions asked of him consistently in various fora since his admission of 20 July 2015 of his previous lies.

95. It is submitted that Brennan has been generous and supportive of Matthews. For example, on 18 March 2015 when Matthews went on stress leave from FE he texted to the practice:

“Sorry for what has happened...My life is in a spin and I can’t even be true to myself let alone you and Chirchie.”

It was Brennan’s response:

“Your (sic) right mate, I still love you like a brother. You just need to get well and concentrate on your family. I’m always here for you.”

96. There is the further fact that on 12 June 2015 Brennan wrote a letter which provides support of and seeking to stand by Matthews rather than implicating his wrongdoing. This of course is before Brennan’s admission of 20 July 2015.

97. Accordingly, it is submitted that these matters stand to Brennan’s credit.

98. The submission then advanced further objective support for Brennan’s credibility as against Matthews based upon the issues on the supply of Toradol. This issue will be examined in more detail later.

99. It is submitted that the Tribunal should accept Brennan to the effect that Matthews advised on how to use the Vitamin Complex and the Tribunal will examine this in more detail later.

100. It is said that Brennan should also be accepted in respect of the conversation on 14 January 2015, when the Danny O'Brien and Mark Kavanagh positives became known, to the effect that Brennan spoke with Matthews on several occasions to seek assurance from Matthews about the provenance of the Vitamin Complex and he was told then that it came from a compounding chemist in Canada and he was also advised there was no cobalt in the Vitamin Complex. It is said that this evidence was convincing. The telephone records confirm these conversations.

101. In conclusion in this submission is said that Brennan’s evidence should be accepted when considered as a whole.

102. The next written submission of RN is of 21 April 2020.

103. In this submission emphasis was placed upon the fact that Matthews' evidence should not be accepted because his answers were implausible.

104. The first issue identified was his illness (not disclosed for privacy reasons) in 2015. It is submitted that he was seeking to avoid personal responsibility by his answers. He had at all times maintained that at or about the time of his conduct and when he was specifically put on stress leave and then terminated he was unwell. Indeed, his subsequent treatment confirms that.

105. When cross-examined before the Tribunal he was questioned whether he was ill at the time. He answered, no, he was "burnt out". That is he was overworked. This was repeated over and over again. It was consistent with him therefore having denied, accepted and then denied again his condition in 2015.

106. It is suggested that this is consistent with him seeking to blame others and not accepting personal responsibility for his conduct.

107. The next issue identified was his putting veterinary fees into his wife's TAB account in January 2015. It was suggested that this was both remarkable and incredible.

108. However, it must be seen in the context that the Tribunal accepts that FE engaged in cash transactions and operated a cash tin in the manager's office into which practitioners placed cash.

109. The examination of this evidence must be put in the context that Sam Kavanagh gave evidence that he asked Matthews for a TAB account into which he could put payments for the yoghurt drench.

110. RN's submission is that Matthews was using customer money to fund his gambling at the expense of the practice.

111. This is said to arise because it is Matthews' evidence that he had a conversation with a farrier called Mizzy, who owed the practice money and who had approached Matthews with a desire to pay. Matthews was too busy to go and visit him, was about to go away for a month and that Mizzy was a cash customer. At the time Matthews and his wife had a joint account and the practice had accounts.

112. Matthews gave contradictory evidence as to who raised the issue of the use of that account.



113. Matthews' first version before the Tribunal in cross-examination was:

“He said, ‘What do you want me to do with the money I owe’ and I said - I think I said for him to put it in my wife’s TAB account which I then got it out or I might have betted that, but I definitely put the money that was put in my wife’s account, I definitely put that in the tin office, in Aaron’s office, which - there was no ledger. I just put in there and I told - and I think I told the girls in the office.”

114. And later when questioned as to why he did not give a personal bank account and why he used his wife’s TAB account he said:

“Because he - that was he - he said, ‘Have you got a TAB account?’ Or he would have - something along those lines, ‘Have you got a TAB account to put money in.’”

115. Accordingly, it is said that his answers were contradictory and implausible and he should not be accepted as a witness of truth.

116. The Tribunal concludes that the use by Matthews of his wife’s TAB account itself was not remarkable and had been done before for another person. The money may well have been used for gambling or it may have been placed in the cash tin.

117. There is no evidence to disprove or discredit either of those alternatives.

118. The Tribunal concludes that this issue about the use of the wife’s TAB account at that time is not of itself a credit issue, especially as the practice condoned cash transactions.

119. His inconsistency as to who suggested the use of the wife’s TAB account is but one minor matter on the issue of credit and not of itself conclusive.

120. The next issue in these submissions on Matthews’ credit goes to the text that he sent at the time he was leaving the practice on stress leave.

121. This is the text which starts, as set out above in paragraph 95, “Sorry for what has happened...”.

122. This text is put in the context that the partners of FE had confronted him the day before and accused him in effect of stealing from them.

123. It is submitted that Matthews refused to accept that this text had anything to do with accepting responsibility for his conduct. He said it related to his gambling and going on stress leave. It was submitted this was plainly false evidence.

124. In oral submissions it was submitted that this text on leaving is to be put in the context of a submission that Matthews could have been overworked, but has invented the issue of illness as an explanation for the text and that in fact he was blaming others for his actions. It is noted that RN referred to the fact that he was gambling and under stress.

125. The submission continues that there is a need to compare his evidence before the Appeal Panel that he was ill and was withholding that fact from Brennan. It is also noted that at the time he had had meningitis some 18 months before, as well as his major gambling issue and it is apparent he was in “a dark place”. It is submitted at that time he made no reference to being overworked, whereas before the Tribunal he said not only that he was overworked, but there were “other factors”. This was definitely new evidence to that that was before the Appeal Panel. He was not able to explain what “other factors” were and that cross-examination seemed to in fact go nowhere.

126. The Tribunal concludes that Matthews has now added the issue of being overworked to his list of problems at the time and that it is open for the Tribunal to conclude that he failed to identify before it the other factors to which he made reference.

127. However, the Tribunal cannot conclude by this evidence alone and the slight variations in it or when taken as a whole before the various fora in which he has given this evidence that RN has established by that text that he was apologising for the stealing of which he had been accused.

128. After five years the minor variations in his evidence are not critical on the issue of his credit.

129. The Tribunal is comforted in that finding because, whatever the text was about at the time, there is no doubt that he was not well and subsequently undertook treatment, which will not be set out in this decision for privacy reasons.

#### Matthews' Submission

130. In his written submissions of 3 June 2020 Matthews replied to the opening written submissions of RN.

131. In that submission a sustained attack upon the credibility of Brennan was advanced.

132. It is submitted that he lied to the stewards and only confessed to his lies because he was caught out in his wrongdoing. He has sought to put a favourable veneer upon his evidence and his evidence must be contrasted with the other witnesses. It is still questioned as to whether he is telling distortions and seeking to put himself in a favourable light and spread blame to others.

133. It is pointed out that in his admission of 20 July 2015 he failed to tell the stewards the whole truth in that he had retained some of the Vitamin Complex.

134. It is submitted that Brennan has abrogated his professional responsibilities and that he was a person in the forefront of equine veterinary practice, was a senior partner in an equine veterinary firm and required to maintain the highest standards and basic professional responsibilities yet he had reneged on these.

135. It is submitted that Brennan concealed his own illegality and destroyed evidence and that he lied to his colleagues and the stewards.

136. In this regard he destroyed the postal book.

137. In addition, he told Sam Kavanagh to discard the bottles that he had after matters became known.

138. He concocted a story about a travelling veterinarian being the source of the Vitamin Complex.

139. That Brennan had spoken to his practice manager, Corby, and told him to speak to Sam Kavanagh in the strongest terms about the consequences for Sam Kavanagh if he did not withdraw his allegations against Brennan.

140. He arranged for a friend, Rudolph, to speak to Sam Kavanagh to dissuade him from naming Brennan as the source.

141. It is further submitted he kept secrets from his partner, Church, and that he lied to his partner and endangered the practice and engaged in an egregious breach of trust.

142. It is submitted that he lied in his interview.

143. It is submitted that he said to fellow practitioner, Dr Potter, of FE that she had not seen him add the Vitamin Complex to a drip and she was wrong also about him telling her to wrap the Vitamin Complex bottles.

144. It was further submitted that Brennan lied about the postal book to avoid the tracing of its dispatch by FE of the Vitamin Complex to Sam Kavanagh.

145. It was also submitted that Brennan failed to record the addition of the Vitamin Complex to the drips he was administering in the practice spreadsheets.

146. It was further submitted that Brennan was improbable and expedient. That is his account since 20 July 2015 is expedient, highly improbable and seeks to minimise his own conduct and blame others by exaggerating their roles.

147. It is further submitted that his advice to his partner, Church, to the effect that Brennan maintained to Church that he still believed that the Vitamin Complex contained concentrated vitamin B12 and that, therefore, there was a misstatement of the roles of Matthews and others. It was submitted Brennan was seeking to establish in Church's mind that he, Brennan, was an innocent dupe.

148. It was then submitted that the naming of Canada as the source for Matthews was demonstrative that he should not be accepted.

149. In the 20 July 2015 interview Brennan nominated Matthews as the supplier and Canada as Matthews' source. This conversation was said to have taken place when they first discussed the issue of the Vitamin Complex.

150. This evidence was attacked on the basis that Canada could simply not be accepted as the source. For example, the name of any manufacturer or distributor or the possibility of any website referring to these matters was not given, that Brennan made no inquiries himself of Canada or about Canada.

151. There is the further submission that he should not be accepted, namely Brennan's statement that Matthews told him that the manufacturer would provide a list of ingredients, but did not do so.

152. In oral submissions it was pointed out that Brennan did not ask how Matthews would pay someone in Canada for the product, for example, US dollars or, if not, how cash would be sent to Canada. It was further submitted there was no evidence how Matthews would get it from Canada, for example, in a box or in what quantities and with what packaging.

153. It is noted on this issue of Canada being the source, that it is Brennan's evidence that he did not believe Matthews when Matthews stated that the source was Canada.

154. Therefore, Matthews submits that Brennan's evidence that the source was Canada at various times was farcical.

155. It is submitted that before the RAD Board in Victoria Brennan described Matthews as evasive and a good liar and, accordingly, he did not believe the story about Canada as the source.

156. It is submitted that Sam Kavanagh gave no corroboration about any conversation with Brennan about Matthews telling Brennan Canada was the source.

157. The next source of the challenge was in respect of Brennan's knowledge of the contents of the Vitamin Complex bottle. In respect of Brennan's evidence about doubts he had as to the contents and, therefore, his contacting Nick Bova, it is said that a vet of Brennan's experience should have knowledge about how to have products tested and would have well known that he could have had a specific product tested for less than \$10,000 to \$100,000.

158. It is said that the Tribunal should not accept Brennan's evidence that he had told Danny O'Brien, Mark Kavanagh and Sam Kavanagh of his doubts about the contents and that they should have the product tested.

159. The next attack upon Brennan's credibility is the fact of the number of FE veterinarians and staff and others that Brennan dealt with.

160. It is said that all of their evidence, taken individually and collectively, supports Matthews.

161. Matthews then returned in submissions to the confession of 20 July 2015 and the fact that it only took place when Brennan's evasions and denials became untenable.

162. That type of evidence was that from Drs Potter and Vallance that they had seen Brennan with a bottle.

163. It is said, therefore, that his recanting of his previous lies was not as a result of remorse or repentance, but because of the weight of evidence against him.

164. It was then submitted that Brennan carefully chose his victims because he knew they were persons that had damaged reputations, such as Sam Kavanagh, the travelling vet and Matthews.

165. It was submitted he was prepared to lie to his friends, such as Rudolph, and that that fact led to Rudolph's ruin.

166. In this regard it was suggested that Brennan was fully aware of Matthews' history as an untrustworthy person from his previous employment, that he was able to fool his partner, Church, because he was such a good liar.

167. In addition it was submitted that Brennan had been prepared to implicate his partner, Church, in Brennan's wrongdoing because of a conversation that had been had by Church with Dr Kelly on 26 February 2015 that Brennan had supplied Sam Kavanagh and Brennan's admission of that fact to Church. That was covered up by the partners to protect their practice insurance by telling Dr Kelly to forget it.

168. Therefore, those actions in relation to others flow onto Brennan's credit.

### **MATHEWS SEEKS TO ESTABLISH NICK BOVA ("Bova") WAS THE SUPPLIER**

169. Noting again of course that Matthews does not have to establish anything, it was part of Matthews' case that consideration could be given to the fact that Bova was Brennan's supplier.

170. This is in the context that it is Brennan's evidence that Brennan agrees that Matthews did not make the Vitamin Complex.

171. The submissions follow the lines that Brennan knew Bova as a compounding chemist and they had a long relationship. It is noted that Sam Kavanagh gave evidence before the Appeal Panel that he knew that FE and Brennan used compounding chemists and Sam Kavanagh continued that he always trusted Brennan on the products that he provided partly because of that.

172. It is noted that Brennan's evidence was to the effect that he was concerned about the contents of the bottles because they had no labels or list of ingredients and, therefore, he phoned Bova. Bova did not normally carry out tests. Bova told the RAD Board, Victoria, that he told Brennan it would cost between \$10,000 to \$100,000, but that testing for that reason did not happen. It is at this point the Tribunal again notes that it is Brennan's evidence that he told Mark

Kavanagh and Danny O'Brien, as well as Sam Kavanagh, to get it tested themselves, but they did not do so.

173. There was much cross-examination on this history and a business arrangement between Brennan and Bova or their respective businesses. Brennan denied he had done so. Brennan said Corby, the FE practice manager, had a discussion with Bova on making rehydrated salts which could include multivitamins. Brennan says he rejected that approach by Corby to use Bova for that purpose.

174. Bova had told the RAD Board in Victoria that the discussions he had on this area were with Brennan about ideas on things that "racetrack guys" were after, but those ideas did not proceed.

175. Brennan was prepared to imagine that Bova had the skills to make cobalt chloride.

176. Brennan conceded that Bova was the only person he knew with the skills to make the Vitamin Complex.

177. Later Bova told the RAD Board, Victoria that Corby had asked if he could source cobalt and after inquiries Bova determined it was not something that should be used on a racehorse.

178. Before the Tribunal Brennan insisted that Corby was not acting on his instructions.

179. The Tribunal concludes the available evidence does not establish that Brennan asked Bova to be the source of the cobalt or the Vitamin Complex as Matthews, without any burden, has set out to establish. Nor as submitted here was Bova the source.

180. On the other hand the evidence does establish that Bova had the ability to do so.

181. The evidence also establishes that RN undertook no investigations on this point.

### **BRENNAN'S EVIDENCE THAT MATHEWS TOLD HIM HOW TO USE THE VITAMIN COMPLEX**

182. Matthews denies that he told Brennan the formula or the method of administration of Vitamin Complex.

183. Brennan says Matthews told him the formula, that is, 20mls of VAM, 20mls of Ferrocyll, 20mls vitamin C and 5mls of Vitamin Complex in a Darrow drench bag. Brennan continued that Matthews told him he had used it many times and administered it intravenously and that he had had success with it and there had been no positive swabs.

184. Brennan says he got the bottles from Matthews and paid him for them.

185. Brennan concedes he did not ask Matthews how many clients Matthews used it with, but that they were FE's clients. It is Brennan's evidence that the trainers were paying Matthews \$50 a dose, but that the trainers were paying \$1,000 for the bottle.

186. Brennan agreed that he had not recorded in the FE books these charges and that the trainers were not billed by FE for them.

187. Brennan said before the Tribunal that he took Matthews on trust about this, but that "You can't get a straight answer out of Adam for anything, and everybody knows."

188. Brennan concedes that FE's records did not show Matthews as a regular user of VAM. Brennan then continued that those records would only show such a thing if Matthews put those attendances through the practice recording systems.

189. The next issue is that it is Brennan's evidence that Matthews told him when to use the Complex, that is, seven and two days before a race.

190. Matthews recorded in the FE system his dosing regime. That, he said, demonstrated and his evidence was that he only ever dripped one day before a race.

191. In submissions for Matthews it was stated that if Matthews intravenously dripped one day out with the Vitamin Complex with its cobalt content in it, then the readings that were taken for Midsummer Sun would have been in the thousands. Therefore, he could not have been using the Vitamin Complex. Therefore, it is submitted Brennan could not have had that conversation about the timings of the administration with Matthews.

192. The Tribunal sees an alternative on that issue in that he in fact was using the seven and two day formula and, therefore, there were no positives. This was not put for RN. The Tribunal notes in passing, as set out earlier, that Brennan had texted Kavanagh with the formula and administration times.



## **THE TORADOL ISSUE**

193. This issue has occupied a substantial amount of hearing time and evidence and a factual context in summary forms will put the matter in a clearer light.

194. This issue turns upon the sending by Matthews to Brennan the text, that is,

“Have those bottle Thursday if suits.”

195. RN's case is that Brennan needed two more bottles of Vitamin Complex, told Mathews and that, accordingly, the text of 18 November was sent.

196. It is also RN's case that on 20 November 2014 Matthews attended Brennan's premises and Brennan paid him \$3,000 cash.

197. It is Matthews' evidence that the text was all about Toradol and he supplied two bottles of Toradol to Brennan.

198. Toradol is Schedule 4 drug to be possessed and dispensed only by a veterinarian and it is used as an anti-inflammatory.

199. Toradol comes in a box with five 1 millilitre containers (the Tribunal uses a neutral term).

200. In issue in these proceedings is whether those containers are called vials, ampoules or bottles.

201. It is Brennan's evidence that he only ever referred to Toradol as coming in a vial in a box and denied that there was a common parlance reference to the ampoules as being bottles.

202. It is Brennan's evidence that FE was ordering Toradol from its supplier, Provet.

203. Under objection late evidence was adduced before the Tribunal on behalf of RN on day 1 of the hearing when it introduced invoices and order forms from Provet showing that Toradol was ordered by and supplied to FE at relevant times.

204. Brennan acknowledged that Toradol was sourced by the practice elsewhere as well.

205. Brennan agreed that Matthews was supplying Toradol to FE at the time of the busy Spring Carnival in 2014 and that he did so through his aunt and that that was because Toradol was in short supply.

206. RN put in late evidence an invoice from the pharmacy at which Matthews' aunt worked - Pharmasave Central Square - showing a 31 August 2014 invoice to FE for six boxes of Toradol for \$303.60 and on 12 September 2014 for 20 boxes of Toradol for \$1,323.00.

207. It is Matthews' evidence that FE ordered Toradol from his aunt's pharmacy in Altona, Victoria in August and September. It is Matthews' evidence that Matthews' mother had told him that his aunt had said to his mother that the Toradol had not been collected from the pharmacy and, accordingly, Matthews said to his mother "Can she just bring it down on Thursday when she comes down next?"

208. Matthews' evidence is that his aunt would visit his grandmother every Thursday because that was her day off work.

209. Matthews said there was a delay in him collecting the Toradol because he was busy at the Spring Carnival.

210. Accordingly, it is Matthews' evidence that he then sent the text.

211. Matthews' grandmother is Jessie Allen, who lives around the corner from Matthews and Matthews' evidence is that he would just pop in to see her on his way home from work every now and again.

212. On Thursday, 20 November 2014 Matthews said he would have picked up the Toradol from her in the afternoon. He says it was a Thursday because that is his recollection and that is the day his aunt would have been off work. He otherwise has no other recollection other than the text. It is noted that text was brought to his attention by Brennan in a subsequent hearing.

213. Matthews also said that he recalled that Brennan was chasing him up for the Toradol because FE was short of it.

214. The aunt is Jennifer Medwyn (nee Allen).

215. Matthews says that Mrs Medwyn pharmacy supplied Toradol to FE because it was in short supply. An example was given of a text from Matthews to Mrs Medwyn on 9 September 2014 which stated "Can you please get another 15 boxes please?"

216. It is noted that there were other texts between Matthews and Mrs Medwyn, for example, 12 August 2014 when Mrs Medwyn texted Matthews "I have your injections" and on another occasion "Would you like me to bring them on Thursday or will you get someone to pick them up?" Matthews replied "Just bring them down Thursday."

217. There were other texts about the September supply and then no others. It is a very important fact that no texts or phone calls were exchanged between Matthews and Mrs Medwyn around 18 or 20 November 2014.

218. It was Matthews' evidence that Brennan was chasing, that he had paid for them and they were low on supply. Matthews conceded that this was a reconstruction and he had no exact recall of words.

219. Matthews says Brennan told him to chase up the bottles and that Brennan always referred to Toradol as bottles.

220. On further cross-examination Matthews said the words were "Chase up the bottles of Toradol because we haven't received them yet." That is this evidence was not to the effect that they were short or needed.

221. Matthews could not explain in cross-examination before the Tribunal why he did not speak to his aunt about delivery, but arranged it through his mother.

222. There was one 4 second phone call on 13 November 2014 from Matthews to Mrs Medwyn, but the evidence established it could not have demonstrated that this was a telephone call to arrange a collection or delivery because it was simply too short.

223. Matthews gave evidence that his aunt was being pressured at the pharmacy to remove the Toradol from the shelves because it had been paid for.

224. Matthews in cross-examination said the pressure from Brennan and from his aunt were both correct.

225. After he had collected it from his grandmother, Matthews said he gave Brennan some and kept some and that he effected that delivery the next morning at Flemington and it was very early. In cross-examination he could only remember that he gave it to Brennan, not where, but stated that it was six years ago.

226. Matthews has no recollection of seeing Brennan on the Thursday night at or about 7 o'clock.

227. Matthews denied delivering the Vitamin Complex to Brennan on the Thursday night and denies that the text he had sent related to this.

228. In re-examination Matthews said the text was about attending Brennan's house on the Thursday and it could have been for delivering of Toradol.

229. Matthews agrees that he was there at Brennan's premises on the Thursday night, but not for the purposes of delivering Vitamin Complex, nor for receiving \$3,000 cash.

230. Mrs Medwyn gave evidence to the Tribunal.

231. She described how on 28 October 2015 she was on holidays and received a telephone call that she was required to give evidence to the stewards and that at that time she made notes on her phone, but that she was not prompted what to write.

232. The telephone message or note dated 28 October 2015 reads as follows:-

"ADAM'S DATE TORADOL

24/01/2014

01/08/2014

10/09/2014

bout to 6 to 8 weeks before I dropped them off at cant remember either my mums or there house

was after spring carnival as adam was to busy

dropped off on a Thursday coz thats my day off and I go to my mums

Bottles

endorsement 'last modified 15 February 2020 created 28 October 2015.'

233. Mrs Medwyn gave evidence that it was her pharmacy's practice to order Toradol in if required and did so for FE on three occasions.

234. The third order sat on the shelf for six to eight weeks and her employer asked for it to be removed. Her sister had phoned her and said take it straight to her mother's place and she did that on a Thursday because that was her day off.

235. In cross-examination Mrs Medwyn said the words contained in the phone note were there because of questions asked of her by a lawyer at the time or on the day she made the note.

236. Mrs Medwyn was not completely sure of the time the note was made and could not recall why individual sentences were included.

237. Mrs Medwyn denied that in evidence to the stewards on 28 October 2015 she was reading the note, even though her evidence followed the note and she gave the detail in the note without being asked a specific question that would lead to that answer.

238. In cross-examination as to the use of the word “bottle” at the end of the note she said that is because that is what they are “little glass bottles”.

239. Mrs Medwyn agreed that she used the words “bottles”, “ampoules”, “injections” interchangeably for Toradol.

240. Mrs Medwyn denied the word “bottles” in the note was because she was told it was important.

241. Critically before the stewards, when her evidence was being led from her, she stated that they were “ampoules”.

242. Mrs Medwyn insisted she would not lie to the Tribunal because she was on oath.

243. Again Mrs Medwyn could not recall why it was important for her to write the note with reference to bottles.

244. The solicitor for Matthews, Ms Spicer, was called to give evidence before the Tribunal. She stated that the barrister for Dr Matthews before the stewards, Ms Jardine, had phoned Mrs Medwyn in Ms Spicer’s presence on 28 October 2015 during an adjournment in the stewards’ inquiry. It is noted that Ms Spicer’s evidence was that no suggestions were made by Ms Jardine of the answers that were expected or required of Mrs Medwyn. Ms Spicer did not have her notes of that conversation with her in Sydney at the Tribunal hearing.

245. There is evidence before the Tribunal from the various hearings and this hearing of a sequence of messages and these are relied on by RN as providing a context of Brennan wanting Vitamin Complex and not establishing that it was about a supply of Toradol for FE. The texts are:

“Tuesday 18 November 2014

Dr Kelly FE vet to Brennan:

‘Wed afternoon for Sat ok for toradol’

B replied:

‘Yeah should be, I try and go Tuesday’  
Matthews text Brennan 2.26pm:  
‘Have those bottle Thursday if suits’  
Brennan text M:  
‘Yep’  
Brennan spoke O’Brien at 3.49  
Brennan text O’Brien at 3.46 with bank deposit details  
19 November 2014  
O’Brien deposits \$3,000 to Brennan’s account.  
20 November 2014  
Brennan withdraws \$3,000 cash from his account  
Matthews text Brennan at 6.14:  
‘U home’  
Brennan text Matthews at 6.15pm:  
‘Yeah mate’  
Brennan text Matthews at 6.30pm:  
‘Ok’  
Matthews text Brennan at 6.31pm:  
‘Be there in 15 min’  
Brennan text Matthews at 7pm:  
‘How far away are you mate’”

#### Evidence on the delivery of the Vitamin Complex

246. Brennan told the Appeal Panel he collected two bottles of Vitamin Complex from Matthews at the Flemington Racetrack on the morning of 20 November near Malua Racing out the front.

247. Matthews told the Appeal Panel he was pretty sure he gave Brennan two bottles of Toradol on the Friday morning (that would be the 21st).

248. Matthews has given no explanation as to why he did not give the Toradol on the Thursday night when he saw Brennan.

#### Payment of the \$3,000

249. It is Brennan’s evidence that he paid Matthews \$3,000 in cash at his home on the night of Thursday, 20 November 2014.

250. It is common ground that there is no corroboration proving this payment.

251. As stated, Brennan said he got the two bottles of Vitamin Complex on that morning.

252. Brennan told the Appeal Panel that Matthews had pointed out to Brennan that he owed Matthews \$1,000 for a previous supply. It was Brennan's evidence that at that time O'Brien owed Brennan \$1,000.

253. Therefore, the request of O'Brien to pay Brennan \$3,000 and that payment being made on 19 November was consistent with payment by O'Brien for three bottles of \$1,000 each. That accounts for the reason why Brennan paid Matthews \$3,000 in cash, although at that time he had only received two additional bottles of Vitamin Complex, which of course had a price tag of \$1,000.

## Submissions

### The timing of the delivery

#### RN Submission

254. In respect of the issue of the ordering of Toradol in September, but its delivery in November, RN says that there are three explanations. They are that Mrs Medwyn initiated the delivery because her employer had asked her to get rid of it. Next is Matthews' explanation that it was because Brennan asked for it urgently and, therefore, Matthews explained in the text he would get it on the Thursday. Thirdly, Matthews said because Brennan said he had paid for it and it should be with FE, who were in short supply.

255. The Tribunal set out earlier the different versions before it. That is Matthews said it was because FE had not received them and had paid for them and later that Brennan asked for him to chase it up so he could have it. Matthews said he then had spoken to his mother, even though there had been no previous text or phone calls between him and his aunt about these things.

256. As stated, Matthews later said both versions were correct.

257. Therefore, RN submit that Matthews' evidence that Brennan chased him up is inconsistent with Mrs Medwyn's evidence that her boss told her to move them.

258. Therefore, RN submit that delivery on a Thursday is not consistent with any urgency. Therefore, that visit was consistent with Matthews attending to get paid for the Vitamin Complex he had delivered that morning.

259. It is a further RN submission that the fact that he just dropped into his grandmother on chance it would be there, with no prior contact with her to ensure it was there and no contact with his aunt, is not consistent with any urgency.

260. Therefore, in conclusion, RN submit there is no coherent, acceptable account why Toradol ordered in September was delivered on a Thursday in November. It is submitted that the text has not provided such an explanation, except for Matthews' evidence it was a low supply issue, but that was abandoned. Therefore, it is submitted the text has no explanation for Toradol.

#### Matthews' submission

261. It is submitted there is no inconsistency on the facts and events surrounding the delivery of Toradol. It was delivered because it had not been removed and had been paid for.

262. It is submitted that Matthews has agreed that it was difficult to get Toradol in a very busy Spring Carnival time.

263. It is submitted that there is unchallenged evidence that FE ordered Toradol from the pharmacy and on account because it was needed from the pharmacy as an alternative supplier. Mrs Medwyn had previously delivered Toradol, and other supplies, for Matthews at her sister's house on a Thursday. It is also the fact that Mrs Medwyn had been asked by her employer to remove the Toradol.

#### The place of delivery of Toradol

##### RN Submission

264. Before the Appeal Panel and the Tribunal Matthews was unequivocal in his evidence that he gave the two bottles of Toradol to Brennan at the racetrack on the Friday morning.

265. Yet in cross-examination, after being shown the 6pm text on 20 November 2014 and the fact that he met Brennan on the Thursday night, it was such that Matthews conceded in cross-examination it was "highly probable" he gave the Toradol to Brennan then.

266. Therefore, RN submit this is consistent with Matthews changing his version and adjusting his evidence and he is inconsistent.

267. It is said that he is tailoring his evidence to suit material that becomes apparent to him.

268. Therefore, RN submit that, having accepted that probability, it explains why when Matthews and Brennan work together and see each other at the track he would visit Brennan to drop them off. Therefore, it is submitted that he attended



Brennan's place on the Thursday night to receive his cash in circumstances where no one else would see that transaction taking place and that in all probability he used it for gambling.

269. It is further logical that as Matthews had collected the Toradol by that time that when he attended Brennan's premises on the Thursday night he would give the Toradol to him at that time.

#### Matthews' submission

270. Matthews submitted that what vets do is have drugs in their cars and it is logical to hand it over at the track when both would be there on a Friday morning and at a time when FE's office was closed.

#### Reference to bottles

271. There is no other evidence than that set out in these proceedings as to how Toradol containers are referred to generally, that is, as vials, ampoules or bottles. Dr Suann referred to Toradol as "a solution for injection in 1ml vials"- see exhibit 194.

272. The Toradol box and its contents were produced in evidence before the Tribunal. To a lay eye the containers in the box do not have a bottle appearance.

273. It is Brennan's evidence that the Vitamin Complex was in a bottle.

274. It is Brennan's evidence that Toradol comes in an ampoule and is not referred to as coming in a bottle.

275. Matthews and Mrs Medwyn both say the Toradol containers are bottles and did so repeatedly before the Tribunal.

276. However, as set out, in evidence to the stewards on 28 October 2015 Mrs Medwyn described the Toradol as in a packet of five ampoules. An entirely unexpected answer, it appears, to the question asked of her and not consistent with her note.

#### RN's submission

277. RN submits that vets are not likely to refer to a vial as a bottle. Therefore, Matthews used the word "bottle" as a code for Vitamin Complex rather than refer to Vitamin Complex in his text.

278. Therefore, it is submitted that the use of the text with a reference to bottles is an argumentative invention by Matthews in this case. That is Matthews has created a case to suit and explain away damning evidence against him and this is consistent with he is tailoring his case when new evidence emerges as this text did before the stewards.

#### Mrs Medwyn's corroboration

##### RB Submissions

279. RN attacks her credibility.

280. RN submits her note is a script for evidence for the stewards and must have been made after speaking to someone, that is, a person with knowledge of the issues and the need for helpful evidence.

281. The note was made after Mrs Medwyn had telephoned the pharmacy for the dates of supply because she was on holidays. The contents of the note obviously exceed more than the recording of those dates.

282. It is apparent that Mrs Medwyn made the balance of those notes after she had spoken to Matthews' lawyers and before she gave evidence to the stewards.

283. Therefore, it cannot be concluded, it is submitted, that it was a recollection, but a prompting that led to the recording of the contents of the note.

284. It is also submitted in addition that when Mrs Medwyn gave evidence to the stewards she effectively read from the note and her answer was not to a specific question that was to recall: "about Dr Matthews asking you in 2014 in relation to a drug called Toradol". She denies looking at her note.

285. RN accept in its submissions that reading from the note was an acceptable way to give evidence.

286. RN quite properly accept it has no issue with the conduct of Mrs Medwyn's lawyers at the time on 28 October 2015.

287. RN submit that the rest of the note was created to prove a delivery in November, at a time she would be at her mother's place, after the Spring Carnival and on a Thursday. Critically the reference to bottles is emphasised.

288. RN submit that the use of the word “bottle” is that the truth has leaked out. That is apparent, it is submitted, because she said in her evidence to the stewards they were ampoules.

289. It is further submitted that Mrs Medwyn would only have referred to bottles in her notes if she had been told to.

290. RN submit that there was no reason to use the word “bottles” in the note if Toradol was referred to as bottles. Mrs Medwyn could not explain that reference, it is submitted.

291. Accordingly, RN submit that Mrs Medwyn has been used to corroborate a lie.

#### Matthews’ submissions

292. It is submitted that the attack on Mrs Medwyn is scurrilous.

293. It is submitted that a legitimate phone call was made to her when she was on holidays in Torquay.

294. It is submitted that Mrs Medwyn was an acceptable and very impressive witness.

295. It is submitted that there is no evidence to support the attack on her.

296. It is submitted that the note has not been amended since it was made in the car park on 28 October 2015.

297. It is further submitted that Mrs Medwyn gave evidence that she is not a liar.

#### Conclusion

298. The Tribunal notes that the issue of Toradol was not originally before the stewards. The reference to a text and Toradol arose because of cross-examination of Brennan by Matthews’ counsel at the stewards’ inquiry when he was challenged that the only evidence was his.

299. It is Brennan’s evidence that the text was obtained by looking at a timeline that had been prepared for Victorian proceedings.

300. The Toradol issue has become all consuming since that time. It is advanced by RN to corroborate Brennan and show Matthews is lying.

301. That is that the text shows that Matthews would deliver two bottles of Vitamin Complex to Brennan on Thursday, 20 November 2014. It is Brennan's evidence he did on the Thursday but in the morning.

302. The problem for Matthews is that he cannot explain his visit to Brennan on Thursday night when Brennan says Matthews was paid \$3,000 cash - a payment Matthews denies.

303. It leaves unexplained why, if Matthews had the Toradol on the Thursday afternoon and arranged to visit Brennan soon after, he would not have given the Toradol to him then.

304. There is simply no logical answer to that.

305. RN says Brennan receiving the two bottles of Vitamin Complex on the Thursday morning and being paid by O'Brien on the Wednesday and drawing the cash out on the Thursday and paying Matthews on the Thursday night is a logical sequence. Why would Matthews go to the trouble of looking out Brennan at the track on the Friday morning when both were busy, but simply for the purposes of giving him Toradol?

306. Matthews cannot explain that Thursday night visit in any acceptable way.

307. It is open to accept that the Toradol story does fit in with sequences at the time. That is that FE had ordered and paid for Toradol, it was at the pharmacy, there was a requirement of Mrs Medwyn to remove it and she did. She visited her mother on her day off, which was a Thursday, and dropped the Toradol off, from where Matthews subsequently collected it on that afternoon. The Tribunal notes previous texts about Thursday day of visits and Matthews visiting his grandmother and that his aunt did deliver FE supplies in the way described.

308. The Tribunal is troubled by Mrs Medwyn's reference to bottles in her text. Her otherwise credible evidence is tainted by that reference. There is comfort in that because she said to the stewards' inquiry they were ampoules.

309. However, in view of the conclusions drawn by the Tribunal on the Toradol delivery generally, it is not necessary to further examine that.

310. The Toradol issue becomes secondary. In all probability it was delivered, as suggested, on the Thursday.

311. It leaves the delivery of the Vitamin Complex on the Thursday morning credible.

312. Matthews' credit must suffer as a result of the finding on the night visit and the unexplained non-delivery of the Toradol then.

## THE TRIBUNAL'S CONCLUSIONS ON THE CREDIBILITY ISSUE

### The test

313. The Tribunal must be comfortably satisfied, having regard to the seriousness of the charges. That actual persuasion must not come from inexact proofs, indefinite testimony or indirect inferences.

314. In finding that actual persuasion be satisfied inferences are from a reasonable and probable explanation.

315. RN must establish the case. It is not for Matthews to disprove it.

### The conclusion

316. The Tribunal accepts the case for RN.

317. The Tribunal accepts the evidence of Brennan, with some corroboration from Sam Kavanagh. It is the totality of acceptable evidence not any one fact. There is a finding that there is much acceptable evidence that is not found to be made up, the product of lies or wrongful collaboration or collusion. There are many facts that are credible, detailed and time appropriate and "fit the total picture" rather than cry out as false. Those conclusions are drawn with a comfortable level of satisfaction and actual persuasion on reasonable and acceptable evidence. Inexactitude indefiniteness said to be established by Mathews have been considered. Indirect inferences have been examined.

318. The Tribunal is persuaded by the facts that:

Brennan came clean on 20 July 2015 and admitted his previous and numerous lies.

Brennan has been unmoved in his evidence since, consistent, plausible and not broken down.

Brennan has not been found out in any way since 20 July 2015 with the exception of the fact that he misled the stewards that he had retained some of the Vitamin Complex.

Brennan has been remorseful for his lies.

Brennan is assessed by the Tribunal as a credible witness on his demeanour before it.

Brennan's explanation for his previous lies is plausible and understandable, that is, self-protection, protection of FE and protection of trainers.

Brennan has gained nothing by making the admissions and continues to suffer for his conduct, both professionally and personally. Therefore, he

has waived protections he might otherwise have had if he got away with his lies.

Brennan's evidence has a logical sequence to it.

Brennan's evidence is corroborated for his bank account deposit and withdrawal at the time of payment to Matthews.

Sam Kavanagh corroborates Brennan in a limited way and his evidence is not rejected or discounted by its vagueness, et cetera.

Sam Kavanagh's credit is heightened by the findings on charge 1 against Matthews and the Appeal Panel's acceptance of his evidence there.

319. The Tribunal accepts Sam Kavanagh's version on the discussions with Matthews about increasing the dose after his horse had the shakes.

320. The Tribunal accepts Sam Kavanagh's version on the discussion with Matthews about the Vitamin Complex not having cobalt and later only an amount of cobalt equivalent to Coforta.

321. The Tribunal places little weight on the text about Matthews' concern once the Moody positive was known. However, Sam Kavanagh has given evidence about his impression Matthews was the supplier and that it was formed in December and before that text was sent. There is the further fact that he also phoned Matthews at that time. But that is limited by reason of the fact that Sam Kavanagh phoned everybody he could possibly think of on that date.

322. In reaching the conclusion to accept Brennan, the Tribunal rejects Matthews' submissions that:

Brennan's evidence is absurd.

Brennan as a self-confessed liar cannot be believed.

Brennan has put a veneer over his evidence.

Brennan is still lying despite being caught out on misleading about throwing out the Vitamin Complex bottle.

Brennan cannot be believed because he abrogated his professional responsibilities to his partners, employees and the profession.

Brennan destroyed evidence.

Brennan misled and lied to his colleagues and friends and kept secrets from them.

Brennan lied to the stewards.

Brennan only confessed because he was caught out as a reason to disbelieve his future evidence.

Brennan only played upon vulnerable people.

Brennan is a plausible liar and good at it.

323. In addition, the Tribunal adds:

Brennan was otherwise acting improperly in his professional duties, in awareness of the Rules of Racing, contrary to horse welfare and running a part undeclared cash business.

324. RN satisfies the Tribunal it should not accept Mathews's version or critical evidence because:

Mathews' evidence at its highest only comprised denials and criticism of evidence against him. It provides no acceptable explanation for credible key events that inculpate him.

The Tribunal has considered that his evidence must be assessed on the basis that he could have had nothing to do with any of the allegations against him, but is satisfied by RN that is not the case.

325. Setting aside the conclusions in favour of RN on Brennan and Sam Kavanagh's evidence and/or corroborative matters, the key points for rejecting Mathews' evidence are:

Mathews' loss of credibility on charge 1, therefore, a preparedness to act wrongfully and lie about it.

Mathews' gambling problems at the time.

Mathews being the recipient of cash on 20 November.

Mathews' demeanour before the Tribunal compared to that of Brennan, which did not leave the Tribunal with a sense of acceptance of his evidence for the above reasons.

Mathews has been shown to tailor his evidence to meet damaging evidence against him.

#### Some other key findings in summary

326. Brennan and Mathews had the original discussion, as Brennan described it, with Mathews initiating and explaining and giving the formula and the administration routine and also a bottle of Vitamin Complex.

327. The Tribunal is satisfied that at that time a reference was made to Canada as a source.

328. The Tribunal accepts there is no corroborative evidence on Canada as the source and that no inquiries were made about Canada as the source. Accordingly, the reason why Mathews referred to Canada as a source is not known. It remains an unanswered issue. It is not the only one. If Canada was

the source it leaves unanswered as to how it was manufactured, packaged, posted, received, paid for and the like.

329. The Tribunal is comforted that the issue about Canada as a source is not a key issue on credit and it is noted that in fact Brennan did not believe it to be a true statement anyway and the reasons why.

330. The evidence about Canada as a source is unanswered, but not farcical, as has been submitted on behalf of Matthews.

331. RN satisfies the Tribunal that Brennan did not use Bova as the source. RN satisfies that the evidence for Matthews simply does not establish that.

332. RN comfortably satisfies the Tribunal that Matthews supplied to Brennan and Brennan paid Matthews for bottles of Vitamin Complex.

#### **WAS MATHEWS A PARTY- CHARGES 2 AND 4**

333. The parties agree that RN must prove actual knowledge in Matthews of the essential ingredients of the headline offences.

334. Matthews added in written submissions that RN need also prove Matthews knew that the Vitamin Complex contained a prohibited substance, being cobalt. The charge was subsequently amended and this submission no longer needs to be considered.

335. The headline offences are AR 175(h)(ii) , AR 178 and AR 175(l) and (k).

#### Charge 2

336. The parties agree RN must, therefore, prove:

- (i) Matthews supplied the Vitamin Complex to Brennan.
- (ii) It be inferred Matthews knew the Vitamin Complex would be used by Brennan or supplied by Brennan to trainers.
- (iii) Matthews knew prior to 9 January 2015 that Sam Kavanagh was treating Midsummer Sun with Vitamin Complex as he had spoken to Sam Kavanagh and suggested increasing the dosage.
- (iv) Matthews knew that Midsummer Sun was participating in a race as he bet on the horse in that race and was a party to it being treated with a raceday administration.

337. The Tribunal is satisfied from its previous findings of (i) that Matthews supplied Vitamin Complex to Brennan.



338. The Tribunal is satisfied from its previous findings of (ii) that Matthews knew the Vitamin Complex would be used by Brennan or supplied by Brennan to other trainers for their use. It is the only possible inference on all the facts.

339. The Tribunal is satisfied from its previous findings of (iii) that Matthews spoke to Sam Kavanagh before the Gosford Gold Cup and advised him to increase the dosage, therefore, Matthews knew Sam Kavanagh was treating Midsummer Sun with Vitamin Complex.

340. Matthews accepts (iv) that he knew Midsummer Sun was to race in the Gosford Gold Cup as particularised.

341. Therefore, RN prove actual knowledge in Matthews as required.

342. Therefore, RN prove each of the essential particulars pleaded in charge 2 and proves the ingredients of the rule AR 175(l) (as it was) breach, that is, Matthews was a party to a breach of the rules.

343. The Matthews' written submissions disputed particular (a) that Matthews was a junior partner on the basis he was an employee.

344. The Tribunal is satisfied this is part of the narrative of particulars, is a building block, not an essential ingredient, or fact, required to be proved to establish a breach of AR 175(l).

345. The totality of the evidence shows Matthews was an employee. He had entered a junior partnership agreement to be operative on 1 July 2015 - after the events. He had participated in a valuation of the practice, but not accepted that valuation.

346. Particular 2(a) is not established as to the words "a junior partner in Flemington Equine Clinic".

347. This finding will apply to charges 3 to 6 also.

348. Issue was taken by Matthews with particular (d) in the use of the word "on" as in "on supply".

349. The Tribunal is satisfied that particular (d), as pleaded, is established.

350. Issue was taken by Matthews that a person cannot be a party to someone else being a party to a third person's actions as a matter of law. That bald submission was not expanded upon and not replied to.

351. What has to be proved is that Matthews was a party to Brennan's breach. That is proved. As to whom Brennan was a party with does not arise.

352. Charge 2 is proved.

#### Charge 4

353. Having regard to the above findings, RN establish this breach.

354. In respect of answers to the particulars pleaded by Matthews, the following is determined:

As to (a) noting the above finding in charge 2, not established as to the words "a junior partner in Flemington Equine Clinic".

As to (c) now found

As to (d) as for charge 2.

As for (e) now not in dispute for this charge.

As to (g) as for charge 2.

These findings are based upon the determination that Matthews supplied Brennan with the Vitamin Complex.

355. Charge 4 is proved.

#### **CONDUCT AND/OR NEGLIGENCE- CHARGES 3 AND 5**

356. RN submits it must prove the conduct of Matthews led to the contravention by Sam Kavanagh and Brennan, that is, was an operative cause.

357. RN, therefore, submit that they need only prove the supply by Matthews to Brennan and need not prove knowledge in Matthews of the essential ingredients. It is submitted that that arises because there is a material causal link in the chain of events.

358. Matthews submits "led to" means: "results in"; "lead to"; "operate as a cause of"; "be a factor in bringing about" or it must be substantial, material or a real cause.

359. Matthews also submits there is a difference between legal and factual causation.

360. The Tribunal is satisfied “led to” has, an expression in the context of the rule and the rules generally and giving a purposive construction, its simple meaning. Each of the examples by Matthews provide guidance.

### Charge 3

361. With the exception of particular (e), the findings that Matthews supplied Brennan establishes each of the necessary particulars (a)-(d) and (g)-(j), with the exception of part of (a) as set out before.

362. In respect of particular (k) it is submitted by Mathews that the law does not permit Sam Kavanagh’s deliberate actions to be attributed to Matthews by negligence to a person twice removed. No other submission was made on this.

363. The link pleaded for conduct, et cetera, by Matthews was that Matthews supplied Brennan and Brennan supplied Sam Kavanagh. Sam Kavanagh then presented Midsummer Sun to race with a prohibited substance.

364. The Tribunal is satisfied that it must assess the causal link between Matthews’ actions, supply Brennan, and Brennan’s actions, supply Sam Kavanagh, and Sam Kavanagh’s actions in presenting to race. It is a chain of events. They are linked. The actions of Matthews were causal.

365. Absent any other submission by Matthews, the Tribunal is satisfied that is sufficient to establish particular (k).

366. In respect of particular (l), Matthews submits that Brennan’s actions are negligent and all completely independent of Matthews’ actions.

367. The Tribunal finds the particular does not raise negligence by Brennan, only breaches. Those breaches are not those of negligence, but deliberate acts of supply.

368. Here the conduct of Matthews in supplying Brennan led to breaches by Brennan.

369. The submission addressed other points made redundant by the amendment to the particulars.

370. Particular (l) is established.

371. Particular (e) is addressed below

## Charge 5

372. As with charge 3 particular (a), with the exception identified above, (b)-(d), (f) and (g) are established.

373. Particular (e) on prohibited substance is in dispute.

374. Particular (h) and (i) were dealt with in charge 3 and are found here.

375. Therefore, for charges 3 and 5, particular (e) the issue of whether cobalt was a prohibited substance before 1 January 2015 is in issue on the pleadings.

## Cobalt as a prohibited substance

376. Matthews contends cobalt was not a prohibited substance before 1 January 2015.

377. On 1 January 2015 RN introduced rule AR 178C(1)(l) that cobalt below 200 micrograms per litre in urine or 25 micrograms per litre in plasma is an exception from the prohibited substance rule AR 178B. The urine threshold was subsequently reduced to 100 micrograms per litre in urine in 2016.

378. This was a live issue before the stewards and their decision of 31 August 2015 in matters of Sam Kavanagh and others dealt with that issue and found it was.

379. The Tribunal does not have the stewards' decision in these Mathew proceedings.

380. The Appeal Panel did not address the issue in these proceedings.

381. On 21 September 2015 the solicitor for Matthews, prior to the stewards' hearing of charges against Matthews starting on 27 October 2015, wrote to RN stating in respect of charges 3, 5, 6 (and others) that "Our client does not dispute that cobalt is a prohibited substance".

382. The transcript of the stewards' inquiry makes no reference to the issue. The submissions to the stewards' inquiry are not in evidence.

383. The transcript of the Appeal Panel hearing makes no reference to the issue. The submissions to the Appeal Panel are not in evidence.

384. To the Tribunal's knowledge the first time it has been raised in these proceedings was by counsel for Matthews at the end of the day 1 of the Tribunal's hearing on 19 February 2020.

385. RN did not respond during the hearing and called no evidence on that indication, even though RN was still in its case. No reference was made to the admission of 21 September 2015 until the fourth written submission of RN on 15 June 2020. RN submitted that Matthews should not be permitted to withdraw the admission. There has been no response to that submission.

386. The 16 May 2018 submission of RN naturally did not address this issue.

387. The RN submission of 26 February 2020 did.

388. The submission set out the relevant prohibited substance rules for charges 2 and 3, now only 3 as the issue was not taken for charge 2. For those matters the relevant rules are AR 178B(1) and (2), which at the time relevantly stated:

“AR 178B. The following substances are declared as prohibited substances:-

(1) Substances capable at any time of causing either directly or indirectly an action or effect, or both an action and effect, within one or more of the following mammalian body systems:- the blood system.

(2) Substances falling within, but not limited to the following categories:- hematopoietic agents.”

389. For charges 4 and 5, now relevant to 5 only, the relevant rule is AR 177B. This has subsequently been amended and the rule relevant to these proceedings stated:

“(1) When a sample taken at any time from a horse being trained by a licensed person has detected in it any prohibited substance specified in sub-rule (2):

(2) For the purposes of subrule (1), the following substances are specified as prohibited substances: -

(a) erythropoiesis-stimulating agents...

(l) hypoxia inducible factor (HIF) -1 stabilisers...”

390. In decisions on cobalt the Tribunal has reflected on the changing research, science of, understanding of and expert opinions on cobalt within the rules of the three racing codes. It is a developing regulatory issue. Minds are not as one. Older tribunal decisions, and those in other jurisdictions, must be considered in that light.

391. In the Tribunal decision on the appeal Darren Smith v RN of 22 July 2015 it was found that cobalt was a prohibited substance prior to 1 January 2015 and that did not change with the introduction of the threshold on that date.

392. RN rely on Smith.

393. Matthews says it is plainly wrong and should not be followed.

394. RN rely on the only evidence in this case as that of Dr Suann, who was not called for cross-examination before the Tribunal.

395. Dr Suann said cobalt met each of the tests in the above rules. This evidence was given in August 2015 in related proceedings involving Sam Kavanagh and others which is before the Tribunal. His report is in evidence here. He gave evidence before the Appeal Panel.

396. The Tribunal notes with interest his report is based on the need for finding “excessive quantities” for 178B(1) and (2); “the in excess of normal physiological requirements in mammalian species”; and “excessive levels of HIF-1 stabilisers” for 177B(2). There is no direct evidence adduced in the proceedings to indicate what those excess, et cetera, levels pre 1 January 2015, with the introduction of a threshold, might be. There is no doubt that post the introduction of the threshold the levels here would be in such an excess. It might be inferred from Dr Suann’s report that those descriptors followed the statement that the cobalt readings in Midsummer Sun were 547 and 550 and that in evidence before the Appeal Panel that a normal horse, from studies, had a reading of 5.5. He was there cross examined on high, medium and low levels but not on the descriptors “excessive” etc and the adduced evidence does not take the issue any further.

397. Therefore, the Tribunal is required to infer as to what excessive quantities, excessive physiological requirements and excessive levels of stabilisers might be prior to 1 January 2015. The totality of the evidence enables such an inference to a level sufficient to make the adoption of Dr Suann’s report available.

398. In addition, Dr Suann accepted that the studies concentrated on mammalian species and not horses and, in addition, he was not deterred by a Knych report (Knych and ors “Pharmokinetics and Selected Pharmacodynamics of Cobalt Following A Single Intravenous Administration to Horses”, published in Drug testing and Analysis), which found there was no EPO effect by a single administration of cobalt.

399. Matthews submitted that the Tribunal was bound to follow its decision in Hughes, which was 31 August 2018 in a harness racing case.

400. In summary in Hughes, Matthews relies upon Tribunal findings that in a horse it was not satisfied it was an HIF stabiliser, had no potential to affect performance, no potential to affect performance positively or negatively. It was further found it was not a hematopoietic.

401. RN says Hughes should be distinguished because the evidence there is not in these proceedings, only Dr Suann's evidence.

402. In addition, RN submit Hughes is limited in its application to the facts and law here.

403. The case of Hughes involved a determination whether cobalt was a prohibited substance and where it fell in the harness racing penalty guidelines. There was no issue in fact that it was a prohibited substance because the penalty guideline in issue specifically stated that it was included as a prohibited substance. The Tribunal, having regard to the expert evidence in that matter, then went on to analyse that evidence in respect the drug cobalt and its effect upon a horse, but particularly relevant to the guidelines.

404. In this case RN identified some limits on the application of Hughes:

The Tribunal found the guidelines were limited to the racing horse and, therefore, mammalian systems were not relevant.

The Tribunal noted that there were agreed issues for determination in those proceedings and only one is relevant here and that is the HIF stabiliser.

The Tribunal noted that Hughes did not administer a prohibited substance per se, but here Sam Kavanagh did.

The Tribunal found an HIF stabiliser is demonstrated in mammals.

405. Therefore, RN submits that because of those those limits Hughes is not relevant to determining a matter under the Australian Rules of Racing.

406. The Tribunal finds that the RN reliance on mammalian systems is not specifically relevant to each test here because that is only referred in AR 178B(1), that is, the "capable of effect on the blood system". The mammalian system is not specifically relevant to 178B(2), a hematopoietic. It is not specifically relevant to 177B(2) because the prohibited substance rule there is limited to the horse, as set out in 177B(1).

407. The Tribunal particularly notes in Hughes that it was not required to determine if cobalt was a hematopoietic and did not analyse the evidence because the harness racing expert conceded it was not. Such a concession cannot make that part of the decision binding here, that is, a decision based on an agreed fact. That is particularly so when different code rules are being considered with different parties.

408. Noting hematopoiesis is a process by which red blood cells are developed in bone marrow, it is apparent that an agent affects this process.

409. RN rely on the steward panel's findings in related proceedings of Sam Kavanagh and others on 31 August 2015. These are in evidence here. Interestingly, Matthews took no issues with that reference to related proceedings, nor those findings. They are, however, informative.

410. The stewards' panel found the rules did not require scientific proof of an effect on a horse and that the rules were written that effect in one mammalian species meant effect for all mammalian species.

411. The stewards' panel found it defied logic to permit a substance to be "fair game" until tested on horses. That would undermine integrity.

412. The stewards' panel found a purposive interpretation of the rules meant you did not need to read "equine" in every prohibited substance definition.

413. The stewards' panel determined "capable" in AR 178B(1) means a tendency at any time and durability is not relevant.

414. The stewards' panel accepted Dr Suann's report and evidence, especially that cobalt had the probability of affecting capacity.

415. The stewards' panel found AR 178C(1), as established on 1 January 2015, provided for an exception to a prohibited substance breach. Therefore, it found that the rule itself created a named substance as a prohibited substance.

416. The stewards' panel noted an admission by a party of a fact is capable of proving a matter in issue.

417. RN relies on these findings, especially the integrity reasoning. That is, a new substance can be caught before it is tested on horses.

418. At worst, if Hughes is applied, RN says that would only eliminate the establishment of cobalt as an HIF-1 stabiliser.



## Conclusion

419. The Tribunal agrees that it should apply its decision in Hughes, unless it can be shown to be wrong or not applicable on the relevant facts.

420. Hughes did not deal with an equivalent of 178B(1) on capability at any time to have an effect on mammalian blood systems. The only evidence here is Dr Suann's and he says it does. That rule focuses on the mammalian system and not just horses. It is noted that expert reports referred to in Hughes stated such an effect on mammals.

421. It is not necessary to consider the effect on horses alone, which was the gravamen of Hughes.

422. Therefore, AR 178B(1) is established by RN. That is, cobalt on the facts here meets that test.

423. The next issue for consideration is the 178B(2) test.

424. Hughes dealt with that and, on an agreed fact that it was not a hematopoietic, did not examine it. No such agreed fact exists here. Therefore, the finding in Hughes cannot bind the parties to this appeal.

425. The only evidence is Dr Suann and he says it is.

426. The issue is not otherwise examined to the contrary and there is no evidence to the contrary here.

427. AR 178B(2) is established by RN. That is, cobalt on the facts here meets the test.

428. Next is 177B(2)(a). That is, that cobalt is an erythropoiesis-stimulating agent. That is an "ESA".

429. An ESA is an agent that stimulates the process that makes red blood cells by the kidney reacting to reduced oxygen and causing the secretion of EPO.

430. This rule is directed to horses, not specifically extended to mammals.

431. Dr Suann said because it is shown in mammals it applies to horses. He continued by the fact, as set out above, that he was not deterred by Knych's finding that there was no EPO effect by a single administration of cobalt.

432. That is the only evidence here.

433. Hughes examined the processes that could lead to an ESA, but no formal finding that an ESA was not activated. Hughes' decision skirted around that issue.

434. Therefore, the only evidence is Dr Suann and he says it is. Dr Suann's basis of reliance on mammalian systems is not persuasive for the reasons analysed in Hughes, but it is not contradicted here.

435. On the facts here RN establishes that 177B(2)(a) is met.

436. Lastly, 177B(2)(l), as it was, for HIF-1 stabiliser issues.

437. The rule at 1 January 2015 did not include the specific inclusion as it now exists in the re-written 177B(2)(c) of cobalt.

438. The focus is on the horse and not the mammal.

439. Hughes found cobalt was not an HIF-1 stabiliser.

440. No additional evidence to avoid that finding was given. The Tribunal considers it should follow Hughes in those circumstances. Dr Suann's report predated Hughes and there have been later reports to his examining Hughes.

441. Smith can be distinguished on the findings in Hughes.

442. The nature of the issue examined in Hughes was HIF stabiliser in a horse. The issues otherwise in Hughes do not mean on this case it should be distinguished.

443. Hughes was decided on 31 August 2018 and published and could have been addressed by evidence in these proceedings. It was not because of the 21 September 2015 admission on behalf of Matthews.

444. The Tribunal is not persuaded by the integrity determination of the stewards' panel. That is that fair game might apply. In a regulatory regime with severe consequences there must be greater certainty for participants that use of a particular substance might breach the rules. If there is an issue then the regulator should test on horses. However, the breadth of the rules gives the necessary protection in that substances can be caught, especially by the broad range of matters in 178B.

445. However, the Tribunal must address the admission of 21 September 2015 and its impact. It is binding as an admission of a fact to be proved. It removed the need for a party to ensure formal proofs and evidence are put in.

446. To that extent the only evidence was Dr Suann's, but in Hughes the finding predated this hearing before the Tribunal.

447. The issue was raised at the end of day 1 of the Tribunal hearing - the appeal started on 4 July 2016 and the parties had indicated all evidence was in the bundle, with the exception of witnesses to be called. There was no evidence additionally indicated on this issue.

448. The issue is then canvassed in submissions and RN did not seek to reopen and, indeed, did not seek an adjournment while still in its case.

449. This is a de novo hearing, the evidence below is in, but it is not a continuation of the stewards' inquiry or Appeal Panel hearing.

450. There was no advice from Matthews that the admission was not to be met or maintained and there still has not been such advice.

451. In all the circumstances the Tribunal considers Matthews is bound by the admission.

452. That removes the requirement to apply Hughes to the 177B(2)(l) test. That removes the requirement to more closely examine inferences needed for excessive etc.

453. RN satisfies the Tribunal that 177B(2)(l) test is met.

454. In any event having found 177B(2)(a) established it is not necessary for charge 5 to go beyond that. Particular (e) raises alternatives. One is satisfied therefore the second does not to be proved. Cobalt is a prohibited substance for that charge and the others in this case on these facts.

#### Conclusion on charges 3 and 5

455. Each of the particulars of charges 3 and 5 are now proven as (e) is now established.

456. Charges 3 and 5 are proved.

## **IMPROPER PRACTICES IN CONNECTION WITH RACING - CHARGE 6**

457. The Tribunal notes the supplementary submission of RN on 30 June 2020 in answer to the request of the Tribunal to do so and the reply of Mathews of 15 July 2020.

458. In view of the earlier findings, on the particulars: (a) is established, except for the words relating to partnership; (b) is admitted; (c), (d) and (e) are now established on previous findings.

459. That leaves (f)-(i), which are denied.

460. RN submitted on 16 May 2018 that:

“However, the supply of a bottle (or bottles) by an equine vet of a substance found to have the concentration of cobalt in it that has been established in this case, supplied in the form (including the absence of labelling) in which it was provided, and knowing that it would quite possibly be supplied by Brennan to other participants in the industry, is a matter of objective seriousness. It is submitted that it plainly constitutes improper practice in connection with racing.”

461. In respect of particular (f).

462. RN adopts here in the 30 June 2020 submission the Sam Kavanagh material, (that appeal was originally travelling with the Mathew’s case), in paragraphs 41 and 42 of the submission of 16 May 2018. That is Dr Suann’s evidence that the cause of the elevated level in Midsummer Sun was consistent with the administration of the Vitamin Complex and not just a vitamin supplement, and that would have occurred 3 or 4 days before the presentation.

463. Matthews has submitted on 3 June 2020 that no inference can be drawn of Matthews’ knowledge of the Vitamin Complex with cobalt as a prohibited substance.

464. Mathews submitted on 15 July 2020 that there is no basis to infer Mathew’s knew the circumstances of the administration but conceded his knowledge did not have to be proved. The submission continued that Sam Kavanagh was unaware of the presence of cobalt in the Vitamin Complex and did not use it other than in accordance with Brennan’s instructions and therefore how could anyone else objectively think it is likely it could. Therefore the unknown treatment regime resulting in an excess of cobalt was not an objective likelihood.

465. In respect of particular (f) the Tribunal is satisfied that cobalt was detected at a level which was greater than the level of 200, as particularised. The above findings establish that was caused by an administration of the Vitamin Complex and it is obvious that such an administration would likely lead to an excess of cobalt if you knew what was in it. But the administrators did not know of the cobalt in the Vitamin Complex. Knowledge of Mathews is not required. Brennan is the link and Mathews the link to Brennan by the supply of the Vitamin Complex with its known contents. That provides the likelihood that Mathews says is needed but does not exist.

466. The focus is upon an impropriety from the particulars as a whole and this particular is but one step to be proved.

467. Particular (f) is established.

468. Next is particular (g).

469. In respect of particular (g) the Tribunal notes the admission of 21 September 2015 that "Our client (Dr Matthews) is aware of the concerns about the administration of excessive quantities of cobalt...".

470. In addition, there is the Racing Victoria notice to the industry of 7 April 2014 of a threshold for cobalt.

471. RN's submission says there is no reason to believe Mathews was not aware and there is ample evidence that he was. That evidence is not provided.

472. Mathew's submission of 15 July 2020 says there is no evidence on this and that the Victorian notice is irrelevant. It does not say why it is irrelevant. It continues that the solicitor's letter is not evidence, was nine months after the events and does not evidence a state of mind at the relevant time.

473. It is necessary to infer the requisite knowledge as there is no direct admission.

474. Mathews was a specialist equine vet working 6 days a week for long hours with racehorses and industry participants and often at the racecourses. The Victorian notice is not irrelevant, it is evidence of publication about cobalt to the industry. Mathews worked with the industry. Mathews supplied the Vitamin Complex with, and to his knowledge, the excessive amounts of cobalt in it. He supplied it so it could be used in racehorses for their improvement. It beggars belief that it can be the case in those circumstances that he was not aware of

the concerns of administrators and participants in the industry. The appropriate adverse inference is found. He had the necessary awareness.

475. In any event Mathews cannot now resile from the admission made of 21 September 2015. His case as was discussed before cannot be run on the basis that he is not bound. He has not sought to resile from the admission. It was specifically directed to this particular and not at large. The use of the word “is” is accepted as having a present tense as at 21 September 2015 however what other point was there in making the admission other than to reduce the matters that Mathews was requiring RN to prove against him, especially for a specifically worded particular. He cannot avoid it in 2020 in submissions after the evidence has closed and without putting RN on notice.

476. Particular (g) is established.

477. In respect of particular (h).

478. In respect of particular (h) the Tribunal notes that Matthews was a veterinarian specialising in equine racing treatment.

479. Mathews gave evidence before the Appeal Panel he thought the Vitamin Complex bottle was “dodgy”.

480. Mathew’s admission of 21 September 2015 acknowledged that he did not condone unqualified vets administering by injection or otherwise to a horse.

481. The submission from Mathews of 15 July 2020 says there must be contemporaneity of the knowledge to the time of the seizure of the bottle because the particular says “the finding”. it is submitted there is no evidence of that.

482. There is no doubt that the possession of the Vitamin Complex bottle which was unregistered, unlabelled and not dispensed in accordance with various laws would lead to trainers being in breach of the rules.

483. The admission of 21 September 2015 is of no assistance and appears irrelevant to the particular. This is a finding, that is a possession matter, not an administration particular.

484. The Tribunal does not read the particular as requiring the knowledge, or awareness, to be limited to the moment of finding of the bottle at the stables. The words “the finding’ are to be read as the fact of a finding or the fact that it was found.

485. In any event the above findings that Mathews supplied and knew Sam Kavanagh had the bottle and was using it all add up to the necessary awareness that would be equally applicable to the moment the stewards actually found the bottle.

486. Particular (h) is established.

487. In respect of particular (i).

488. RN submit that Mathews simply denies knowledge of the Vitamin Complex, was aware it contained a prohibited substance and knew his and trainer's professional responsibilities under the rules.

489. Mathews submits there is no evidence to prove this particular.

489. In respect of particular (i) there is no doubt Mathews was aware of the rules applying to a trainer and in the circumstances the Tribunal has found that Mathews knew Sam Kavanagh possessing the Vitamin Complex bottle would be in breach of the rules.

490. Such a conclusion is an irresistible inference on the whole of the evidence and the above findings.

491. Particular (i) is established.

492. Therefore in respect of charge 6 each of the particulars is established and there being no submission to the contrary if such a finding is made nor any submission on improper practices there is only one obvious conclusion available.

493. The conduct particularised was improper in connection with racing and as objectively viewed and as submitted by RN and summarised in paragraph 460 above.

479. Charge 6 is proved.

## **DETERMINATION**

480. The Tribunal finds each of the charges 2 to 6 established.

481. Grounds of appeal 2 and 3 are established. Ground 1 is not found established as this was a de novo hearing and error in the Appeal Panel, if any, is not relevant.

482. The appeal of RN against the findings of the Appeal Panel of 5 May 2016 to dismiss charges 2 to 6 is upheld.

## **DIRECTIONS**

483. Noting the outstanding issue for determination is penalty for each of the charges 2 to 6 the Tribunal directs:

1. The appellant to notify the Tribunal and the respondent within 7 days of receiving this decision whether it wishes to make submissions on penalty.
2. If the appellant wishes to make submissions then in its notification it must set out whether it wishes to have a hearing or make written submissions or both and suggest a timetable.
3. The respondent is invited to reply as necessary within 7 days of that notification.
4. The Tribunal will then fix a hearing date or timetable or both.
5. Liberty to apply on these directions.

**SEE ATTACHED CHARGE SHEETS**



## Charge Sheet

Dr Adam Matthews, you are hereby charged with six breaches of the Rules of Racing:

- Breach 1. AR175(l) (breaches of AR178E(1) by Mr Sam Kavanagh and Mr Mitchell Butterfield and/or breach of AR175(l) by Mr John Camilleri)
- Breach 2. AR175(l) (breaches of ~~AR175(h)(i)~~, AR175(h)(ii) and AR178 by ~~Mr Sam Kavanagh and/or~~ breaches of AR175(k) and (l) by Dr Tom Brennan)
- Breach 3. AR175(k) (breaches of ~~AR175(h)(i)~~, AR175(h)(ii) and AR178 by Mr Sam Kavanagh and/or breaches of AR175(k) and (l) by Dr Tom Brennan)
- Breach 4. AR177B(6)
- Breach 5. AR175(k) (breaches of AR177B(6) by Mr Sam Kavanagh and/or Dr Tom Brennan)
- Breach 6. AR175(a)

### ***Race-day administration charge***

**Breach (1)** The details of the charge under AR175(l) being that you, Dr Adam Matthews, were a party to breaches of the Rules of Racing by Mr Mitchell Butterfield, Mr Sam Kavanagh and/or Mr John Camilleri:

- a. You were at all relevant times, a junior partner in Flemington Equine Clinic, the veterinary practice supplying veterinary services to the Sam Kavanagh Rosehill Gardens stable;
- b. You are and were at all relevant times, a person bound by the Rules of Racing;
- c. You contacted Mr John Camilleri by telephone on the 31<sup>st</sup> December 2014 on behalf of Mr Sam Kavanagh to arrange for a race-day medication to be administered to Midsummer Sun (GB) prior to that horse running in the Gosford Gold Cup on 9<sup>th</sup> January 2015;
- d. Mr John Camilleri then arranged for Mr Mitchell Butterfield to administer a race-day medication to Midsummer Sun (GB) prior to that horse running in the Gosford Gold Cup on 9<sup>th</sup> January 2015 and, in doing so, committed a breach of AR175(l) as he was a party to the breach by Mr Mitchell Butterfield of AR178E(1);
- e. Mr Mitchell Butterfield, without the permission of the Stewards, then supplied and administered medication by way of a drench to the gelding, Midsummer Sun (GB) at or around 2pm on race-day, prior to such horse running in race 6, the Gosford Gold Cup, conducted at Gosford racecourse later that same day and, in doing so, committed a breach of AR178E(1);
- f. Mr Sam Kavanagh committed a breach of AR178E(1) as he caused the administration by Mr Mitchell Butterfield by arrangement with Mr John Camilleri;
- g. You were a party to the above breaches by Mr Sam Kavanagh, Mr John Camilleri and Mr Mitchell Butterfield as you put Mr Sam Kavanagh and Mr John Camilleri in contact for the purposes of the administration of a medication on race day.

**Charges re cobalt on race day – Midsummer Sun (GB) on 9<sup>th</sup> January 2015**

**Breach (2)** The details of the charge under AR175(l) being that you, Dr Adam Matthews, were a party to breaches of the Rules of Racing by Mr Sam Kavanagh and/or Dr Tom Brennan as:

- a. You were at all relevant times, a junior partner in Flemington Equine Clinic, the veterinary practice supplying veterinary services to the Sam Kavanagh Rosehill Gardens stable;
- b. You are and were at all relevant times, a person bound by the Rules of Racing;
- c. Prior to the 9<sup>th</sup> January 2015, you supplied to Dr Tom Brennan, a partner in Flemington Equine Clinic, two bottles of an injectable substance or preparation for veterinary use labelled 'Vitamin Complex' (marked Exhibits 4A and 38), the contents of which was cobalt in concentrations approximately 175 times the concentration of cobalt found in registered veterinary injectable products for horses containing cobalt and vitamin B12, in the knowledge that such substance or preparation would be supplied for the administration of doses to horses in training and/or being presented to race by thoroughbred horse trainers and was for the purposes of affecting the performance of a horse in a race;
- d. Dr Tom Brennan on supplied the said bottles of 'Vitamin Complex' to Mr Sam Kavanagh;
- e. Cobalt is a prohibited substance:
  - i. pursuant to AR178B(1) as it is an agent that is capable of causing either directly or indirectly an action or effect, or both an action and effect, within the blood system and was detected at a level that is not, under AR178C(1)(l), excepted from the provisions of AR178B; and/or
  - ii. pursuant to AR178B(2) as it is an haematopoietic agent and was detected at a level that is not, under AR178C(1)(l), excepted from the provisions of AR178B.
- f. ~~Mr Sam Kavanagh committed a breach of AR175(h)(i) as he administered a prohibited substance, namely cobalt, to Midsummer Sun (GB) for the purposes of affecting the performance of that horse in the Gosford Gold Cup, conducted at Gosford racecourse on the 9<sup>th</sup> January 2015;~~
- g. ~~Mr Sam Kavanagh committed a breach of AR175(h)(ii) as a prohibited substance, namely cobalt, was detected in a sample taken from Midsummer Sun (GB) following that gelding running in and winning race 6, the Gosford Gold Cup, conducted at Gosford racecourse on the 9<sup>th</sup> January 2015;~~
- h. ~~Mr Sam Kavanagh committed a breach of AR178 as he did bring Midsummer Sun (GB) to Gosford racecourse for the purpose of engaging in race 6, the Gosford Gold Cup, on the 9<sup>th</sup> January 2015 and a prohibited substance, namely cobalt, was detected in a sample taken from Midsummer Sun (GB) following it running in that race;~~
- i. ~~Dr Brennan committed breaches of AR175(l) as he was a party to the breaches by Mr Sam Kavanagh of AR175(h)(i), AR175(h)(ii) and AR178 as he supplied the bottles of 'Vitamin Complex' to Mr Sam Kavanagh;~~

- j. Dr Brennan committed breaches of AR175(k) as his conduct and/or negligence led to the breaches by Mr Sam Kavanagh of AR175(h)(i), AR175(h)(ii) and AR178 as he supplied the bottles of 'Vitamin Complex' to Mr Sam Kavanagh;
- k. You were a party to the above breaches by Mr Sam Kavanagh as you supplied the bottles of 'Vitamin Complex' to Dr Tom Brennan who in turn on-supplied them to Mr Sam Kavanagh; and
- l. You were a party to the above breaches by Dr Tom Brennan as you supplied the bottles of 'Vitamin Complex' to him.

**Breach (3)** The details of the charge under AR175(k) being that your conduct and/or negligence led to breaches of the Rules of Racing by Mr Sam Kavanagh and/or Dr Tom Brennan as:

- a. You were at all relevant times, a junior partner in Flemington Equine Clinic, the veterinary practice supplying veterinary services to the Sam Kavanagh Rosehill Gardens stable;
- b. You are and were at all relevant times, a person bound by the Rules of Racing;
- c. Prior to the 9<sup>th</sup> January 2015, you supplied to Dr Tom Brennan, a partner in Flemington Equine Clinic, two bottles of an injectable substance or preparation for veterinary use labelled 'Vitamin Complex' (marked Exhibits 4A and 38), the contents of which was cobalt in concentrations approximately 175 times the concentration of cobalt found in registered veterinary injectable products for horses containing cobalt and vitamin B12, in the knowledge that such substance or preparation would be supplied for the administration of doses to horses in training and/or being presented to race by thoroughbred horse trainers and was for the purposes of affecting the performance of a horse in a race;
- d. Dr Tom Brennan on supplied the said bottles of 'Vitamin Complex' to Mr Sam Kavanagh;
- e. Cobalt is a prohibited substance:
  - i. pursuant to AR178B(1) as it is an agent that is capable of causing either directly or indirectly an action or effect, or both an action and effect, within the blood system and was detected at a level that is not, under AR178C(1)(l), excepted from the provisions of AR178B; and/or
  - ii. pursuant to AR178B(2) as it is an haematopoietic agent and was detected at a level that is not, under AR178C(1)(l), excepted from the provisions of AR178B.
- f. ~~Mr Sam Kavanagh committed a breach of AR175(h)(i) as he administered a prohibited substance, namely cobalt, to Midsummer Sun (GB) for the purposes of affecting the performance of that horse in the Gosford Gold Cup, conducted at Gosford racecourse on the 9<sup>th</sup> January 2015;~~
- g. Mr Sam Kavanagh committed a breach of AR175(h)(ii) as a prohibited substance, namely cobalt, was detected in a sample taken from Midsummer Sun (GB) following that gelding running in and winning race 6, the Gosford Gold Cup, conducted at Gosford racecourse on the 9<sup>th</sup> January 2015;

- h. Mr Sam Kavanagh committed a breach of AR178 as he did bring Midsummer Sun (GB) to Gosford racecourse for the purpose of engaging in race 6, the Gosford Gold Cup, on the 9<sup>th</sup> January 2015 and a prohibited substance, namely cobalt, was detected in a sample taken from Midsummer Sun (GB) following it running in that race;
- i. Dr Brennan committed breaches of AR175(l) as he was a party to the breaches by Mr Sam Kavanagh of AR175(h)(i), AR175(h)(ii) and AR178 as he supplied the bottles of 'Vitamin Complex' to Mr Sam Kavanagh;
- j. Dr Brennan committed breaches of AR175(k) as his conduct and/or negligence led to the breaches by Mr Sam Kavanagh of AR175(h)(i), AR175(h)(ii) and AR178 as he supplied the bottles of 'Vitamin Complex' to Mr Sam Kavanagh;
- k. Your conduct and/or negligence led to the breaches by Mr Sam Kavanagh as you supplied the bottles of 'Vitamin Complex' to Dr Tom Brennan who in turn on-supplied them to Mr Sam Kavanagh; and
- l. Your conduct and/or negligence led to the breaches by Dr Tom Brennan as you supplied the bottles of 'Vitamin Complex' to him.

**Charges re cobalt out-of-competition**

**Breach (4)** The details of the charge under AR177B(6) being that you, Dr Adam Matthews, were a party to licensed trainer, Mr Sam Kavanagh, administering a prohibited substance to horses being trained by him:

- a. You were at all relevant times, a junior partner in Flemington Equine Clinic, the veterinary practice supplying veterinary services to the Sam Kavanagh Rosehill Gardens stable;
- b. You are and were at all relevant times, a person bound by the Rules of Racing;
- c. Prior to the 9<sup>th</sup> January 2015, you supplied to Dr Tom Brennan, a partner in Flemington Equine Clinic, two bottles of an injectable substance or preparation for veterinary use labelled 'Vitamin Complex' (marked Exhibits 4A and 38), the contents of which was cobalt in concentrations approximately 175 times the concentration of cobalt found in registered veterinary injectable products for horses containing cobalt and vitamin B12, in the knowledge that such substance or preparation would be supplied for the administration of doses to horses in training and/or being presented to race by thoroughbred horse trainers and was for the purposes of affecting the performance of a horse in a race;
- d. Dr Tom Brennan on supplied the said bottles of 'Vitamin Complex' to Mr Sam Kavanagh;
- e. Cobalt is a prohibited substance:
  - i. pursuant to AR177B(2)(a) as it is an erythropoiesis stimulating agent; and/or
  - ii. pursuant to AR177B(2)(l) as it is a hypoxia inducible factor (HIF)-1 stabiliser.
- f. Mr Sam Kavanagh administered a prohibited substance, namely cobalt, to horses being trained by him, namely Midsummer Sun (GB), Centre Pivot and Spinning Diamond;

- g. You were a party to the above breaches by Mr Sam Kavanagh as you supplied the bottles of 'Vitamin Complex' to Dr Tom Brennan who in turn on-supplied them to Mr Sam Kavanagh.

**Breach (5)** The details of the charge under AR175(k) being that your conduct and/or negligence led to breaches of the Rules of Racing by Mr Sam Kavanagh and/or Dr Tom Brennan as:

- a. You were at all relevant times, a junior partner in Flemington Equine Clinic, the veterinary practice supplying veterinary services to the Sam Kavanagh Rosehill Gardens stable;
- b. You are and were at all relevant times, a person bound by the Rules of Racing;
- c. Prior to the 9<sup>th</sup> January 2015, you supplied to Dr Tom Brennan, a partner in Flemington Equine Clinic, two bottles of an injectable substance or preparation for veterinary use labelled 'Vitamin Complex' (marked Exhibits 4A and 38), the contents of which was cobalt in concentrations approximately 175 times the concentration of cobalt found in registered veterinary injectable products for horses containing cobalt and vitamin B12, in the knowledge that such substance or preparation would be supplied for the administration of doses to horses in training and/or being presented to race by thoroughbred horse trainers and was for the purposes of affecting the performance of a horse in a race;
- d. Dr Tom Brennan on supplied the said bottles of 'Vitamin Complex' to Mr Sam Kavanagh;
- e. Cobalt is a prohibited substance:
  - i. pursuant to AR177B(2)(a) as it is an erythropoiesis stimulating agent; and/or
  - ii. pursuant to AR177B(2)(l) as it is a hypoxia inducible factor (HIF)-1 stabiliser.
- f. Mr Sam Kavanagh committed breaches of AR177B(6) as he administered a prohibited substance, namely cobalt, to horses being trained by him, namely Midsummer Sun (GB), Centre Pivot and Spinning Diamond; and
- g. Dr Brennan committed breaches of AR177B(6) as he was a party to Mr Sam Kavanagh, administering a prohibited substance to horses being trained by him, namely Midsummer Sun (GB), Centre Pivot and Spinning Diamond, as he supplied the bottles of 'Vitamin Complex' to Mr Sam Kavanagh;
- h. Your conduct and/or negligence led to the breaches by Mr Sam Kavanagh as you supplied the bottles of 'Vitamin Complex' to Dr Tom Brennan who in turn on-supplied them to Mr Sam Kavanagh; and
- i. Your conduct and/or negligence led to the breaches by Dr Tom Brennan as you supplied the bottles of 'Vitamin Complex' to him.

**Charge re supply of cobalt generally**

- Breach (6)** The details of the charge under AR175(a) being that you, Dr Adam Matthews, have engaged in improper practices in connection with racing as:
- a. You were at all relevant times, a junior partner in Flemington Equine Clinic, the veterinary practice supplying veterinary services to the Sam Kavanagh Rosehill Gardens stable;
  - b. You are and were at all relevant times, a person bound by the Rules of Racing;
  - c. Between September 2014 and January 2015, you supplied to Dr Tom Brennan, two bottles of an injectable substance or preparation for veterinary use labelled 'Vitamin Complex' (marked Exhibits 4A and 38), the contents of which was cobalt in concentrations approximately 175 times the concentration of cobalt found in registered veterinary injectable products for horses containing cobalt and vitamin B12;
  - d. You knew Dr Tom Brennan was acquiring the said substance or preparation for the purposes of supply to thoroughbred racehorse trainers for administration of doses to racehorses in training and/or being presented to race and accordingly, Dr Brennan on supplied the said bottles to Mr Sam Kavanagh;
  - e. Cobalt is a prohibited substance
    - i. pursuant to AR178B(1) as it is an agent that is capable of causing either directly or indirectly an action or effect, or both an action and effect on the blood system;
    - ii. pursuant AR178B(2) as it is an haematopoietic agent;
    - iii. pursuant AR177B(2)(a) as it is an erythropoiesis stimulating agent; and
    - iv. pursuant AR177B(2)(l) as it is a hypoxia inducible factor (HIF)-1 stabiliser.
  - f. The administration of the substance or preparation was likely to, and did in the case of a sample taken from Midsummer Sun (GB) following that gelding running in and winning race 6, the Gosford Gold Cup, conducted at Gosford racecourse on the 9th January 2015, result in the presence of cobalt at a mass concentration exceeding 200 micrograms per litre in urine;
  - g. As an equine veterinarian, you were aware that the administration of cobalt to racehorses was a matter of widespread concern to administrators of, and participants in, thoroughbred racing;
  - h. Further, as an equine veterinarian, you were aware that the finding of the injectable substance or preparation for veterinary purposes referred to in particular (c), on the stable premises or in the possession of Mr Sam Kavanagh, would place Mr Sam Kavanagh in breach of AR80E, as the said substance or preparation had not been registered and/or labelled and/or prescribed and/or dispensed and/or obtained in compliance with relevant State and Commonwealth legislation, namely the Agricultural and Veterinary Chemicals Code Act 1994 (Cth) (Agvet Code), Poisons and Therapeutic Goods Act 1966 (NSW) and the Poisons and Therapeutic Goods Regulation 2008 (NSW);

- i. Further, as an equine veterinarian, you were aware that the finding of such unregistered injectable substance or preparation for veterinary purposes referred to in particular (c), on a premises of Mr Sam Kavanagh, used in relation to the training and racing of horses, would deem Mr Sam Kavanagh to have possession of such substance or preparation and would place Mr Kavanagh in breach of AR177B(5)