Common Law Division
Supreme Court
New South Wales

Case Name:	**Matthews v Racing New South Wales**
Medium Neutral Citation:	[2022] NSWSC 182
Hearing Date(s):	9 February 2022
Date of Orders:	2 March 2022
Date of Decision:	2 March 2022
Jurisdiction:	Common Law
Before:	Basten J
Decision:	(1) Extend time for the filing of the summons for judicial review to 7 July 2021. (2) Dismiss the summons. (3) Order that the plaintiff pay the first defendant's costs of the proceeding.
Catchwords:	ADMINISTRATIVE LAW – judicial review – decision Racing Appeals Tribunal – errors of law – construction of Australian Rules of Racing – whether evidence capable of supporting findings of fact HORSE RACING – offences – administration of prohibited substance – preparation supplied by veterinarian – preparation containing excessive quantity of cobalt – whether knowledge of presence of prohibited substance required – whether knowledge of on-supply or administration required – whether plaintiff party to breaches of Rules by others
Legislation Cited:	*Civil Liability Act 2002* (NSW), s 5D *Crimes Act 1901* (NSW), s 351 *Supreme Court Act 1970* (NSW), s 69 *Trade Practices Act 1974* (Cth), ss 52, 75B Australian Rules of Racing, AR 175, 175A, 175B, 175C, 176, 177B, 178, 178B, 178E Uniform Civil Procedure Rules 2005 (NSW), r 59.10

Cases Cited:	*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; [1990] HCA 33 *Bennett v Minister of Community Welfare* (1992) 176 CLR 408; [1992] HCA 27 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389; [1996] HCA 36 *Day v Sanders; Day v Harness Racing New South Wales* (2015) 90 NSWLR 764; [2015] NSWCA 324 *Fitzgerald v Penn* (1954) 91 CLR 268; [1954] HCA 74 *Giorgianni v The Queen* (1985) 156 CLR 473; [1985] HCA 29 *Harper v Racing Penalties Appeal Tribunal of Western Australia* (1995) 12 WAR 337 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 *Racing Victoria Ltd v Kavanagh* [2017] VSCA 334 *Re Canavan* (2017) 263 CLR 284; [2017] HCA 95 *Yorke v Lucas* (1985) 158 CLR 661; [1985] HCA 65
Category:	Principal judgment
Parties:	Adam Matthews (Plaintiff) Racing New South Wales (First Defendant) Racing Appeals Tribunal (Second Defendant)
Representation:	Counsel: Mr D Sheales / Mr T Purdey (Plaintiff) Mr P Braham SC / Mr O Jones (Defendant) Solicitors: Hammond Nguyen Turnbull (Plaintiff) Racing New South Wales (First Defendant) Crown Solicitors Office (Second Defendant)
File Number(s):	2021/194687

JUDGMENT

1 **BASTEN J**: On 9 January 2015 Midsummer Sun, a horse trained by Mr Sam Kavanagh at his Rosehill Gardens stable, won the Gosford Gold Cup at Gosford Racecourse. Samples taken after the race revealed high levels of cobalt. Cobalt is an haematopoietic agent designed to increase blood supply and oxygen transfer to the horse's muscles. Such agents are identified as "prohibited substances" within the Australian Rules of Racing.

2 A search by stewards of Mr Kavanagh's stable discovered a bottle labelled "Vitamin Complex" which, on analysis, revealed cobalt in concentrations some 175 times that of acceptable vitamin products administered to thoroughbred horses. The investigation indicated that the bottle had been supplied by a veterinarian, Dr Tom Brennan, who operated Flemington Equine Clinic ("the Clinic"), a practice which was providing veterinary services to Mr Kavanagh's stable. (The Clinic was located in Victoria; the Rosehill Gardens stable is located in western Sydney.) The plaintiff, Dr Adam Matthews, was an employed veterinarian at the Clinic.

3 As a result of their investigations, the stewards laid charges against Mr Kavanagh, Dr Brennan and the plaintiff. All the charges were upheld by the stewards. The plaintiff appealed to the Racing Appeal Panel ("Appeal Panel") which found him guilty of one charge (which did not involve Vitamin Complex) but dismissed the other five charges (all involving the administration of Vitamin Complex). In July 2016 Racing NSW, the body prosecuting the charges before the Appeal Panel, lodged an appeal with the Racing Appeals Tribunal ("the Tribunal") against the dismissal of the five charges. For reasons which are not presently relevant, the appeal was not heard until February 2020. On 20 July 2020 the Tribunal handed down its decision on liability, upholding the appeals in respect of each of the five charges. On 18 June 2021 the Tribunal imposed a penalty of disqualification for six months.

Proceeding in this Court

4 By summons filed on 7 July 2021 the plaintiff sought judicial review of the decision of the Tribunal as to liability for the five breaches. That decision having been made on 20 July 2020, the summons was some nine months out of time.[1] No doubt because the summons was filed within four weeks of the decision as to penalty, no issue was taken in relation to time and time should be extended. (By consent, a stay of the operation of the penalty has been in place pending determination of this proceeding.) Given the extraordinary lapse of time since the conduct giving rise to the charges, the latest delay is perhaps of less significance than it might otherwise have been.

5 The summons contained 18 grounds, of which the first five, which applied to all the charges the subject of the Tribunal proceedings, were abandoned.[2] Of the those remaining, grounds 6-11 related to charges 2 and 4, grounds 12-16 to charges 3 and 5, and the final grounds 17 and 18 to charge 6.

6 Although labels can conceal imprecision in relation to legal principle, the supervisory jurisdiction of this Court in reviewing a tribunal decision is limited to jurisdictional error and error of law on the face of the record.[3] Pursuant to *Supreme Court* Act, s 69(4), the record of a tribunal extends to the written reasons of the tribunal. The plaintiff's grounds fell within two categories: the first involved allegations that the Tribunal had erred in its construction of the Australian Rules of Racing ("the Rules");[4] the second challenged findings of fact as "not open on the evidence", which, as developed in oral submissions, was more appropriately stated as an allegation that there was "no evidence" to support the finding.

7 With respect to grounds challenging the construction of the Rules, it may be accepted that, although the words used should generally be given their ordinary meaning, their operation in a rule imposing a penalty for prohibited conduct may

---

1 Uniform Civil Procedure Rules 2005 (NSW) ("UCPR"), r 59.10.
2 Ground 3 was abandoned in reply at the hearing in this Court: Tcpt, 09/02/22, p 54(35).
3 *Supreme Court Act 1970* (NSW), s 69.
4 The parties agreed the relevant edition of the Rules was that dated 2014.

raise a question of law, in accordance with the reasoning of the High Court in *Collector of Customs v Agfa-Gevaert Ltd*.[5] In any event, the respondent did not submit that the grounds addressing the construction of the Rules did not give rise to questions of law, nor that, to the extent the issues of construction were either addressed in the reasons of the Tribunal or were implicit in its rulings, they were not reviewable in this proceeding.

8 Given the limitations on this Court's jurisdiction, there is no need to set out the background to the proceedings in the Tribunal in any further detail than is necessary to deal with the arguments with respect to each of the charges. Indeed, to do so might suggest the Court's jurisdiction to be broader than it is.

General matters

9 It is convenient to note at the outset key parts of the Rules which formed the basis of the charges (identified as "breaches" in the charge-sheet). The primary source of liability for the imposition of a penalty was AR175, which relevantly provided:

> **AR.175.**
>
> The Principal Racing Authority or the Stewards may penalise;
>
> (a) Any person who, in their opinion, has been guilty of any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing.
>
> …
>
> (h) Any person who administers, or causes to be administered, to a horse any prohibited substance –
>
> (i) for the purpose of affecting the performance or behaviour of a horse in a race or of preventing its starting in a race; or
>
> (ii) which is detected in any sample taken from such horse prior to or following the running of any race.
>
> …

[5] (1996) 186 CLR 389 at 396-397; [1996] HCA 36.

(k) Any person who has committed any breach of the Rules, or whose conduct or negligence has led or could have led to a breach of the Rules.

(l) Any person who attempts to commit, or conspires with any other person to commit, or any person who connives at or is a party to another committing any breach of the Rules.

…

10 Although nothing turned on it, it is convenient to note the definition in the Australian Rules of Racing of "the Rules", a term which appears in AR175(k). The phrase is defined to mean the Australian Rules of Racing themselves, together with the local Rules of the principal racing authority concerned. The Australian Rules of Racing are some 93 pages long. They contain, under the heading "Offences", AR175, AR175A, AR175B, AR175C and AR176. Other provisions, including AR177B (under the heading "Prohibited Substances"), permit the imposition of a penalty and thus create offences. To give AR175(k) an operation which would impose a penalty for breach of a rule which already creates a penalty, because it applies to any person who has committed any breach of the rules, would be an exercise of supererogation. Whatever the proper construction of the first limb of par (k), there was no suggestion that the second limb ("has led or could have led to") should be read down so as not to apply to a rule which imposed a penalty.

11 For the purposes of AR175, "prohibited substances" are defined in AR178B, relevantly as follows:

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 cardiovascular system
the respiratory system
…
the blood system
….

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

…

haematopoietic agents
….

12 The Tribunal relied on the finding of liability by the Appeal Panel with respect to charge 1. The plaintiff was found to have engaged in a race-day drenching, contrary to AR175(l) in that he was a party to breaches of the rules by others, being Mitchell Butterfield, Sam Kavanagh and John Camilleri. The particulars of charge 1 referred to the plaintiff contacting Mr Camilleri by telephone on 31 December 2014 to arrange for a race-day medication to be administered to Midsummer Sun prior to the horse running in the Gosford Gold Cup on 9 January 2015. Mr Camilleri then arranged for Mr Butterfield to administer the medication, which he did. That conduct constituted a breach of AR178E(1). Mr Kavanagh was also a party to the administration as he had caused Mr Butterfield, by arrangement with Mr Camilleri, to take that step. The plaintiff's role was to "put Mr Sam Kavanagh and Mr John Camilleri in contact for the purposes of the administration of a medication on race-day."

13 The finding upholding charge 1 was relied on by the Tribunal as adversely affecting the plaintiff's credit, he having denied his involvement in the drenching, which evidence had been rejected by the stewards and the Appeal Panel.[6] The Tribunal took into account the plaintiff's loss of credibility and accepted his "preparedness to act wrongfully and lie about it."[7] Further, the upholding of charge 1 evidenced a relationship of veterinarian/client between the plaintiff and Mr Kavanagh in the lead-up to the race on 9 January 2015.

14 In identifying the issues, the Tribunal noted it was common ground that "the first and primary determination to be made on this appeal is whether [the prosecutor] establishes that the Tribunal should believe Dr Brennan's … evidence and reject the evidence of Matthews." Dr Brennan said that the plaintiff was the supplier of the Vitamin Complex. That issue was dealt with in significant detail, the Tribunal concluding that, although he had originally told lies to protect himself, the evidence Dr Brennan had given before it was truthful

6 Tribunal decision at pars 59-61.
7 Tribunal decision at par 325.

and could be accepted.[8] The Tribunal also accepted specific aspects of Mr Kavanagh's evidence, to which it will be necessary to return.[9]

15 Two further key findings made in dealing with the first issue were as follows:

> "326. Brennan and Matthews had the original discussion, as Brennan described it, with Matthews initiating and explaining and giving the formula and the administration routine and also a bottle of Vitamin Complex.
>
> …
>
> 332. RN[10] comfortably satisfies the Tribunal that Matthews supplied to Brennan and Brennan paid Matthews for bottles of Vitamin Complex."

16 It is also convenient to note the other primary penalty provision (which was the subject of charge 4), namely AR177B:

> **AR177B**
>
> (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):
>
> (a) The trainer and any other person who was in charge of such horse at the relevant time may be penalised unless he satisfies the Stewards that he had taken all proper precautions to prevent the administration of such prohibited substance.
>
> (b) The horse may be disqualified from any race in which it has competed subsequent to the taking of such a sample where, in the opinion of the Stewards, the prohibited substance was likely to have had any direct and/or indirect effect on the horse at the time of the race.
>
> (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, including but not limited to ITPP (myo-inositol trispyrophosphate),
>
> …

---

[8] Tribunal decision at pars 89-100 (setting out the prosecution case), 131-168 (the plaintiff's submissions) and 317-318 (conclusions).

[9] Tribunal decision at pars 319-321.

[10] The Tribunal identified the prosecutor, Racing NSW, as "RN" in its reasons.

(6) Any person who, in the opinion of the Stewards, administers, attempts to administer, causes to be administered or is a party to the administration of, any prohibited substance specified in subrule (2) to a horse being trained by a licensed trainer must be penalised in accordance with AR.196(5).

17 The rules have been stated as at the time of the charged contraventions, namely January 2015.

Charges 2 and 4

18 Grounds 6, 10 and 11 in the summons related specifically to charge 2, while grounds 8 and 9 related to both charges 2 and 4. While ground 7 related specifically to charge 4, it is convenient to deal with charges 2 and 4 together.

19 Omitting inconsequential details, the charges read as follows:

"*Charges re cobalt on race day – Midsummer Sun (G8) on 9th 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 9th 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 AR173B; 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.

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 9th 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 9th January 2015 and a prohibited substance, namely cobalt, was detected in a sample taken from Midsummer Sun (G8) 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)(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 ARl75(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

I. You were a party to the above 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 – e, as for charge 2]

f. Mr Sam Kavanagh administered a prohibited substance, namely cobalt, to horses being trained by him, namely Midsummer Sun (GB)

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."

20 It was not in dispute in this Court that cobalt fell within the appropriate definition of a prohibited substance. A major integer of the plaintiff's submissions was that these provisions required "actual knowledge" on the part of the plaintiff as to the presence of excessive quantities of cobalt in the bottles labelled "Vitamin Complex". The Tribunal noted:

> "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 submissions no longer needs to be considered."

21 While each of the charges had been amended, the respondent agreed that the amendments did not affect the question whether it was necessary to prove that the *plaintiff* had "actual knowledge" of the presence of excessive levels of cobalt in the bottles for the purpose of particular charges.[11] The Tribunal's mistake is explicable: the amendments excluded references to breach of AR175(h)(i) on the basis that authority had established that the limb (i), relating to "purpose", required knowledge of the presence of a prohibited substance (though not necessarily that it was a prohibited substance).[12]

22 Accordingly, the respondent accepted there was error on the part of the Tribunal in not determining that question; however, it submitted that the error was immaterial because the particular rules did not require knowledge of the prohibited substance. Further, the respondent noted that (i) the Tribunal had in fact found that the plaintiff had knowledge of there being excess amounts of

---

[11] There was no basis in the submissions to infer that "actual knowledge" meant more than "knowledge".

[12] See *Racing Victoria Ltd v Kavanagh* [2017] VSCA 334 ("*Racing Victoria*") at [121]-[122] (McLeish JA), [152] (Cavanough AJA).

cobalt in the Vitamin Complex and (ii) the plaintiff challenged that finding in ground 18. Arguably, if the challenge to ground 18 is dismissed, it is not necessary to determine the proper construction of the rules. In fact, ground 18 is considered below and dismissed; nevertheless, it is desirable to address the proper construction of the rules, in case the matter goes further.

Ground 6

23 Ground 6 in the summons alleged an error in the construction of AR175(l). Charge 2 alleged that the plaintiff was "a party to" breaches by Mr Kavanagh of AR175(h)(ii) and AR178 and by Dr Brennan of AR175(l) and AR175(k). In those circumstances it was said that the plaintiff must have had "actual knowledge that the substance administered to the horse … by Kavanagh and detected in a sample following the running of a race … was a prohibited substance, being cobalt". In written submissions, the plaintiff accepted that "AR175(h)(ii) and AR178 are strict liability offences, in that it is not necessary to prove that the person who administered a substance to a horse or the trainer who presented the horse to race had knowledge of the prohibited substance which was detected in a sample taken from the horse." That concession accepted the reasoning of the Victorian Court of Appeal in *Racing Victoria*.[13] Nevertheless, the plaintiff submitted that an offence under par (l) required him to have known that the Vitamin Complex contained a prohibited substance, being cobalt.[14] That conclusion was said to follow from the reasoning of the High Court in *Yorke v Lucas*,[15] and *Giorgianni v The Queen*.[16]

24 The two authorities relied upon may be dealt with together. In effect, there were three steps in the judgment of the plurality in *Yorke v Lucas*, a case involving s 75B of the *Trade Practices Act 1974* (Cth), imposing accessorial liability for a breach of the prohibition on misleading or deceptive conduct under s 52, as then in force. The first step in the reasoning was to note the principle established in *Giorgianni* that "a person who aids, abets, counsels, or procures,

[13] [2017] VSCA 334 at [118], [120] (McLeish JA), [152] (Cavanough AJA).
[14] Plaintiff's written submissions, 16 November 2021, pars 26 and 27.
[15] (1985) 158 CLR 661; [1985] HCA 65.
[16] (1985) 156 CLR 473; [1985] HCA 29.

the commission of any misdemeanour"[17] must have knowledge of the facts founding the offence. Mr Giorgianni was charged with the offence of culpable driving on the basis that he had been involved in the (inadequate) maintenance of a vehicle which crashed when its brakes failed.

25 The same language (as for criminal accessorial liability) was used in s 75B(a) of the *Trade Practices Act*. Those words were taken from the general criminal law and, although in a statute imposing civil liability, the High Court was satisfied from the context and history of the legislation that they were intended to have the same operation as in relation to a criminal offence.[18] Paragraph (b) of s 75B referred to inducing, whether by threats or promises, the contravention and paragraphs (c) and (d) were in the following terms:

> "(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
>
> (d) has conspired with others to effect the contravention."

26 The second step in the reasoning of the Court in in *Yorke v Lucas* was that a similar construction should be given to the first limb of par (c), because the term "knowingly" implied knowledge of the essential facts constituting the contravention.[19] With respect to the phrase "party to", the plurality stated:[20]

> "Whilst it is not a contradiction in terms to speak of a person being 'party to' something of which he is unaware, some indication is needed to convey such a meaning. There is nothing in the paragraph itself which would point to any conclusion other than that the words 'party to' are used to refer to a participant in the nature of an accessory. Moreover, the wider context of the whole section leads to the same conclusion. We have already indicated why par (a) requires knowledge. Paragraph (b), which speaks of inducing a contravention by threats, promises or otherwise, and par (d), which speaks of conspiring with others to effect a contravention, both clearly require intent based upon knowledge …."

Accordingly, the Court concluded that par (c) required intentional participation with knowledge of the essential elements of the contravention.

---

17 *Crimes Act 1900* (NSW), s 351.
18 *Yorke v Lucas* at 669.
19 *Yorke v Lucas* at 670.
20 Ibid.

27 The issue in the present case is whether the reasoning adopted in *Yorke v Lucas* applies to the Rules of Racing. There are several reasons for considering that, in accordance with current authority, it does not. First, although par (l) adopts language which reflects criminal law concepts, it is not the language of the criminal law as commonly used. For example, the term "connives at" has no common counterpart in the criminal law. Secondly, the phrases "attempt to commit", and even "conspires…to commit" a contravention do not import any particular state of knowledge as to the nature of the contravention. They are entirely consistent with doing the act which constitutes the contravention in circumstances where the contravention has no mental element. Thirdly, consistently with the reasoning of the Victorian Court of Appeal, the principal offence, par (h), covers both those who directly administer a substance to a horse and those who cause it to be administered; in neither case is knowledge of the nature of the substance required. Fourthly, there is no clear distinction between a person who causes a substance to be administered and one who is "party to" the administration of the substance. The same element of overlap may be identified in par (k) which refers to any person who has "committed" any breach of the Rules, "or whose conduct or negligence has led or could have led to a breach of the Rules." This phraseology reveals an attempt to speak comprehensively of those persons who have acted directly or indirectly in causing a contravention, in terms which could not operate coherently if in one paragraph the person were required to have knowledge, whereas in another, which equally covered the offending conduct, that was not required.

28 This conclusion may be illustrated by the facts involving the plaintiff. The Tribunal accepted that the plaintiff both (i) supplied the bottle of Vitamin Complex to Dr Brennan, who in turn administered a dose to Mr Kavanagh's horse, and (ii) advised Mr Kavanagh with respect to the use and timing of the substance contained in the bottle. This conduct can readily be characterised as conduct which led to the contravention (par (k)), caused him to be "party to another committing [the contravention]" (par (l)) and caused the substance to be administered (par (h)). If, as conceded, the last characterisation required no

knowledge of the substance, it would render the scheme of the provisions incoherent to require knowledge in the other two characterisations.

29 The list of body systems in subr (1) of AR178B covers all the major body systems; the list in subs (2) includes some 60 substances, most being categories of "agents". The combination of length and breadth, detail and complexity of the lists cast doubt on both the requirement for, and the extent of, the proposed knowledge. As to the requirement for knowledge, Cavanough AJA remarked in *Racing Victoria*:[21]

> "There are several long lists of substances which are declared to be prohibited either absolutely or in defined circumstances. Some descriptions and definitions are very broad in their language. Others are highly specific and technical. In some cases, a reader would need a good grasp of chemistry and of animal biology in order to fully understand the import of the relevant provision."

30 As to the extent of the proposed knowledge, Cavanough AJA aptly referred to the observation of the High Court in *Re Canavan*,[22] in relation to provisions of the Constitution dealing with eligibility for election:

> "[T]he state of a person's knowledge can be conceived of as a spectrum that ranges from the faintest inkling through to other states of mind such as suspicion, reasonable belief and moral certainty to absolute certainty. If one seeks to determine the point on this spectrum at which knowledge is sufficient for the purposes of ss 44(i) and 45(i), one finds that those provisions offer no guidance in fixing this point. That is hardly surprising given that these provisions do not mention the knowledge of a person or the person's ability to obtain knowledge as a criterion of their operation."

31 These considerations militate against an implication that the Rules contained a requirement to prove (i) knowledge of the presence of a prohibited substance or (ii) knowledge that the substance was both present and prohibited. Although the plaintiff eschewed the latter proposition, it is not easy to see why knowledge of the presence of a substance should be impliedly required, but not knowledge that the substance was prohibited. Both implications should be rejected.

---

[21] [2017] VSCA 334 at [151].
[22] (2017) 263 CLR 284; [2017] HCA 95 at [53].

32 In these circumstances, ground 6 must be rejected. Although the Tribunal mistakenly considered that the plaintiff did not assert that knowledge was required under (l), because it was no longer required in respect of either of the offences identified in charge 2 (offences committed by Mr Kavanagh and Dr Brennan), nevertheless the result, on the proper construction of the rule, is the same and such knowledge was not required.

33 As noted above, the omission of the Tribunal was immaterial for a different reason, namely the finding of knowledge made in the following paragraph:

> "474. [Matthews] 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. [Matthews] worked with the industry. [Matthews] 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."

The context of that finding was consideration of particular (g) of charge 6 which stated:

> "As an equine veterinarian, you were aware that the administration of cobalt to racehorses was a matter of widespread concern to administration of, and participants in, thoroughbred racing."

However, the evidence (discussed further below) included a conversation with Mr Kavanagh in New Zealand, later in January 2015, suggesting the plaintiff was aware that Vitamin Complex contained cobalt, but was down-playing that fact.

34 Three further observations should be made with respect to the construction of the relevant rules. First, as the Court of Appeal held in *Day v Sanders*,[23] such rules do not create new criminal offences, so that the statutory presumption that their elements should be determined having regard to general principles of

[23] *Day v Sanders; Day v Harness Racing New South Wales* (2015) 90 NSWLR 764; [2015] NSWCA 324 (Basten, Leeming and Simpson JJA).

criminal law (including as to the need for specific intention) do not apply, or apply with greatly weakened force.[24] Rather, as I suggested at [71]:

> "When considering the proper operation of a statutory provision which is silent as to the precise nature of the mental element required for an offence, it may be asked whether it would assist the purpose of the legislative scheme to put a person under strict liability or whether it can be said that, absent some conscious activity which may provoke observance of the Regulations, 'there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim'.[25]"

35 Secondly, the analysis of the structure and purpose of the Australian Harness Racing Rules apply with some force to the present case, both the regulated activity and the language of the respective rules bearing close similarities. In *Day*, a rule requiring that a horse "shall be presented for a race free of prohibited substances", and providing that the trainer of the horse is guilty of an offence if the proscription is breached, was held not to involve a mental element and not to be subject to a defence of honest and reasonable mistake of fact.[26]

36 Thirdly, in *Racing Victoria*, Maxwell P, relevantly in dissent on this issue, drew a distinction between "presentation" offences and "administration' offences.[27] A distinction was also sought to be drawn in that case between administration offences and 'cause to be administered' offences.

37 With respect, such a priori categorisation is likely to be unhelpful. All of the offences require acts on the part of the person involved in the management of the horse; in each case, the purpose is to ensure that the horse is free of prohibited substances on race day. There is no self-evident reason why one kind of activity, rather than another, should impliedly attract a requirement that the person involved have knowledge of the cause of the horse having such a substance in it. If such distinctions are to be made, it is more plausible that they will arise from the formulation of the offence or some specific contextual matter not applicable to other offences.

---

[24] *Day* at [70]-[71].
[25] *Lim Chin Aik v The Queen* [1963] AC 160 at 174.
[26] See also *Harper v Racing Penalties Appeal Tribunal of Western Australia* (1995) 12 WAR 337.
[27] *Racing Victoria* at [29]; see also "detection" offences referred to at [168] (Cavanough AJA).

38 Fourthly, in *Racing Victoria* the President (in dissent) sought to draw some inference as to a variable element of knowledge depending on the prescribed penalty for the offences. That is, an offence bearing a more serious penalty than another was more likely to give rise to an implication of a requirement for actual knowledge. The difficulties with drawing such inferences from the formulation of the particular offences, and the prescription of penalties, were identified by Cavanough AJA. The same reasoning applies with respect to the presumptive penalties applied under AR196(5) in the present case. However, it is sufficient for present purposes for this Court to follow the reasoning of the majority in *Racing Victoria*, which did not derive material assistance from the variable provisions with respect to penalties. It is not appropriate to derive from so uncertain a source implications as to the mental element of particular offences, with potentially anomalous results.

Grounds 10 and 11

39 Ground 10 had two limbs. The first limb alleged an error in the construction of AR175(l). The ground alleged that it was necessary for the prosecutor to establish two matters, namely that Dr Brennan had knowledge of the administration of a prohibited substance to Midsummer Sun, and that the plaintiff knew what Brennan knew. Secondly, using the conjunctive "and", it stated that "such a finding of fact is not open on the evidence".

40 The structure of the ground is confusing: either the Tribunal did not make the finding as ground 10(a) alleged, or it did make the finding but the finding was not open to it. The two limbs can only sensibly be read as disjunctive, providing alternative complaints. (A similar structural problem affects grounds 8, 9 and 13: they too should be read as identifying alternative challenges.)

41 The plaintiff was alleged to have been a party to Dr Brennan's breaches of rules AR175(k) and (l). It will be recalled that par (k) involved conduct that has led, or could have led, to a breach and par (l) related to a person who is "party to" another committing a breach. For the reasons explained above with respect to ground 6, there was no requirement of knowledge for the commission of either

of those offences. That finding included knowledge on the part of the plaintiff, the charge being under AR175(l). Accordingly, the proposition that the plaintiff, not required to know the substance contained high levels of cobalt, must have known that Dr Brennan knew that, is incoherent.

42 It is true that the Tribunal did not make a finding in the terms proposed in ground 10. However, it was not invited to do so. That was a common position resulting from the amendments to the charge which deleted reference to breaches by Mr Kavanagh of AR175(h)(i) which, at the time, was an offence understood to involve knowledge of the presence of cobalt in excessive quantities. The deletion of that matter from the particulars obviated the need to prove knowledge on the part of Dr Brennan or Mr Kavanagh. It follows from the reasoning with respect to ground 6 that ground 10(a) should be rejected; ground 10(b) does not arise.

43 Ground 11 alleged error in the formulation of charge 2 on the basis that AR175(l) did not apply to a person who was party to a breach of the same provision and was thus a "secondary participant". The same reasoning was said to apply to a person who was a secondary participant by way of breach of AR175(k). The ground may properly be understood (despite its formulation) as a challenge to the finding of the Tribunal in upholding the particulars of complaint alleging participation in the breaches by Dr Brennan.

44 The proposition that the rules do not provide for a person to be a secondary participant to another secondary participant is to impose a conceptual framework which is not present in the language of the rules. Rather, the rules create offences by reference to the conduct of individuals at various degrees of removal from (relevantly) the administration of a prohibited substance to a horse. Being a party to a breach by another person may give rise to a question as to the degree of removal from the primary act, which will be a factual matter to be assessed by the Tribunal based on the particulars in the individual case. Charge 2 alleged that the plaintiff supplied Dr Brennan with the bottles containing cobalt in excessive amounts for injection into horses. On the facts found by the Tribunal, his involvement was not so remote as to demonstrate,

as a matter of law, that he could not be a "party" to the offences committed by Dr Brennan or Mr Kavanagh. Ground 11 must be rejected.

Charge 4

Ground 7

45 The only ground relating solely to charge 4 was ground 7, which alleged legal error in the construction of AR177B(6).[28] The challenge was to the finding that it was not necessary to demonstrate that the plaintiff had knowledge that the substance administered to the horse by Mr Kavanagh was cobalt. The terms of AR177B(6) are similar to AR175(h) in that they concern administration of, or causing to be administered, or being a party to the administration of, any prohibited substance. The rule differs from AR175 in several respects. First, it expressly turns upon "the opinion of the Stewards" (which will include the Tribunal on appeal), which precludes the factual elements being matters for determination by a court on judicial review. (It may be that each of the paragraphs of AR175 would be construed in the same way.) Secondly, it specifies particular prohibited substances, being a different list from those identified in AR178B. Thirdly, the rule does not identify an additional requirement by way of the purpose of administration, or the fact of detection. Significantly, there is no equivalent requirement to that contained in (h)(i) of AR175.

46 These differences do not affect the conclusion reached above in relation to the need for knowledge of the presence of excessive amounts of cobalt. Accordingly, the reasoning with respect to ground 6 demonstrates that ground 7 must be rejected.

Grounds 8 and 9

47 Grounds 8 and 9 related to both charges 2 and 4 (thus not distinguishing between the operation of AR175(l) and AR177B(6)). Each related to knowledge, but not as to the contents of Vitamin Complex, but rather knowledge

[28] The terms of AR177B(6) are set out above at [16].

that Dr Brennan had supplied bottles to Mr Kavanagh (ground 8) and knowledge that Kavanagh had administered "a prohibited substance to Midsummer Sun" (ground 9). Each ground contained the alternative challenge to the effect that such a finding of fact was not open on the evidence.

48 Ground 8(a) alleged error in construing the rules as not requiring a finding that the plaintiff knew that Dr Brennan had supplied Vitamin Complex to Mr Kavanagh. Ground 8(b) alleged that there was no evidential support for such a finding.

49 Ground 9(a) raised a similar challenge as to the need for a finding that the plaintiff knew that Mr Kavanagh was administering Vitamin Complex to Midsummer Sun, at the time of the event. Ground 9(b) alleged the absence of evidence to support such a finding. However, if he did know that, it was well open to the Tribunal to infer that he knew Dr Brennan had supplied a bottle of Vitamin Complex to Mr Kavanagh for the purposes of ground 8 , there being no other known source available on the evidence.

50 The findings of the Tribunal started with the observation that it was common ground between the parties that the prosecutor "must prove actual knowledge in Matthews of the essential ingredients of the headline offences." As to the relevant elements, the Tribunal reached findings with respect to charge 2 in the following terms:

> "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 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."

51 The statement as to the elements to be proved entail the rejection of the construction point raised by grounds 8(a) and 9(a). If, as appeared from the plaintiff's submissions, the real complaint was a failure to prove that the plaintiff knew that Mr Kavanagh was one of the trainers to whom Dr Brennan supplied Vitamin Complex, it was not demonstrated that this was an issue involving the construction of the rule raised before the Tribunal, or, indeed, a question of law in any form.

52 In this Court, the focus of the plaintiff's challenge was to the finding that he spoke with Mr Kavanagh "before the Gosford Gold Cup". The evidence, it was submitted, was inadequate to permit the temporal finding. Mr Kavanagh's evidence, accepted by the Tribunal, was that he had a conversation with the plaintiff during the Magic Millions sales on the Gold Coast in early January 2015. Mr Kavanagh said that he told the plaintiff that one horse had "the shakes" after an administration of Vitamin Complex, and that he had not seen "performance difference" in other horses. The plaintiff had told him to double the dose.

53 In opening the case for the plaintiff, counsel noted that Mr Kavanagh had not been called before the Tribunal and continued:[29]

> "But the point [of] this is, in the failure to call Kavanagh, one must not deal with this in a vacuum of what were accepted facts from Kavanagh's evidence, and this was understood by everyone at the time: 1. That Kavanagh had not used the vitamin complex in a drip after 27 December 2014; 2. That Kavanagh had dripped the horse, Midsummer Sun, on 6 January prior to – sorry, prior to going

[29] Tcpt, 09/02/22, p 2(10).

> to Queensland on 6 January to the Magic Million sales; 3. The Magic Million Sales – this is all in the evidence – went from 7 to 13 January, and no-one ever, at any time when Kavanagh gave evidence, either immediately before stewards or before the appeal panel, no-one sought to discriminate in Kavanagh's evidence, by way of question, in relation to the conversation which occurred, as found at the Magic Millions, whether it occurred … on or before the horse Midsummer Sun ran in the Gosford Cup on the 9th."

The substance of the challenge was thus that, if the inference to be drawn from a conversation was that the plaintiff knew that Mr Kavanagh used Vitamin Complex on Midsummer Sun on 9 January, that conversation must have taken place before then; there was, otherwise, no evidence of knowledge on the part of the plaintiff as to the use of the Vitamin Complex on that date. However, it was submitted, the issue was not raised with Mr Kavanagh and therefore the prosecutor had failed to prove the essential element.

54 The challenge in those terms cannot be upheld. First, it must be accepted that the Tribunal understood the significance of timing because the finding it made was in the context of establishing relevant knowledge for the purposes of charge 2. It was not in doubt that any relevant knowledge had to pre-date the running of the race at 2pm on 9 January. Thus, although the particular finding did not identify that the conversation took place before 9 January, that, it should be accepted, was the relevant finding. There were two days over which that conversation could have taken place.

55 Secondly, the conversation itself was consistent with the plaintiff having knowledge that Mr Kavanagh was using the Vitamin Complex. His response was not to query the dosage which Mr Kavanagh was using but to recommend its doubling. Again, if the conversation took place, the plaintiff must have known (if he did not already know) that Dr Brennan had supplied the Vitamin Complex to Mr Kavanagh, or that he had supplied it himself (which was not suggested). He was the only known source of Vitamin Complex.

56 Thirdly, there was contextual support for the finding. The Tribunal accepted that certain inferences could be drawn from the unchallenged findings that the plaintiff was guilty of charge 1. That involved acceptances of a telephone conversation on 31 December 2014 to arrange for the administration of race-

day medication to Midsummer Sun by way of a drench. The Tribunal found, with respect to the findings under charge 1:

> "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 treatment on race day. The findings were that Matthews then arranged for his close friend, Camilleri, to effect that treatment and Camilleri did so.
>
> …
>
> 67. The fact that Matthews bet on Midsummer Sun was also a fact that they took into account."

57 Fourthly, Mr Kavanagh gave evidence that he and the plaintiff met in New Zealand in late January 2015 and, in the course of a conversation, the plaintiff went from saying that Vitamin Complex "had no cobalt in it to saying that it's only got the same amount of cobalt in it [as] normal Coforta".[30] Whether true or false, this statement could be (and was) treated as an admission that the plaintiff knew there was cobalt in the Vitamin Complex, and knew the concentration. When a Victorian horse returned a positive test for cobalt, Mr Kavanagh texted the plaintiff in the following terms:

> "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.
>
> …
>
> 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 [January] 2015 text and subsequent call are explicable, especially as Sam Kavanagh phoned everybody he could think of on that date."[31]

---

[30] Tribunal decision at par 73.

[31] The date in the original was "13 November 2015" but the parties agreed it should read "13 January 2015".

58 It is not necessary to set out the whole of the material relied on by the Tribunal in order to demonstrate there was some logically probative material to support the finding. However, it bears noting that part of the overall picture was concerned with the links between the plaintiff and Dr Brennan. With respect to Dr Brennan's evidence, the Tribunal noted:

> "183. Brennan says Matthews told him the formula, that is, 20mls of VAM, 20mls of Ferrocyl, 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 [the Clinic'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.
>
> …
>
> 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 [Clinic's] system his dosing regime. That, he said, demonstrated and his evidence was that he only ever dripped one day before a race."

59 The findings of the Tribunal included the following:

> "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."

60 This material provided a solid basis for the findings with respect to charges 2 and 4, noted above. It may be noted that particulars (a)-(d) were identical in each charge. Paragraph (e) identified cobalt as a prohibited substance under the relevant provisions. In charge 4, par (f) alleged that Mr Kavanagh administered the prohibited substance to Midsummer Sun and par (g) alleged that the plaintiff was a party to the breaches by Mr Kavanagh, the plaintiff having supplied bottles of Vitamin Complex to Dr Brennan who on-supplied

them to Mr Kavanagh. With respect to the conclusory particulars, the Tribunal noted in respect of charge 2, and adopted with respect to charge 4:

> "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."

61 In conclusion, the Tribunal expressly identified the need for the prosecutor to establish that the plaintiff had knowledge of the elements of the offence. That knowledge might be inferred from later conversations, but the critical conversation, as the plaintiff accepted, was the one which occurred at the time of the Magic Millions sales in Queensland. There was evidence to support the finding that that conversation took place and was relied upon by the Tribunal to satisfy the finding of knowledge that Mr Kavanagh used Vitamin Complex before the race on 9 January 2015. The content of the conversation and the surrounding circumstances, including the established relationships between the plaintiff and Dr Brennan and between each of them and Mr Kavanagh, provided a logically probative basis upon which the relevant finding could be made. Grounds 8 and 9 must be rejected.

Charges 3 and 5

62 Grounds 12-16 related to charges 3 and 5.

63 Charge 3, pleaded as a breach of AR175(k), was that the plaintiff's "conduct and/or negligence led to breaches of the Rules of Racing by Mr Sam Kavanagh and/or Dr Tom Brennan". The charge contained particulars (a)-(e) as for charge 2; there followed:

> "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 9th 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 9th 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)(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)(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;

l. Your conduct and/or negligence led to the breaches by Dr Tom Brennan as you supplied the bottles of 'Vitamin Complex' to him."

Ground 14

64 There is only one ground which relates to charge 3 alone, which was ground 14. That ground should be set out in full as its purport was unclear:

> "14 In relation to charge 3, the Tribunal erred in its construction of AR175(k) of the Rules in finding that the charge did not raise negligence by Brennan, but only breaches of the Rules, when it was stated in the particulars to the charge that, 'Dr Brennan committed breaches of AR175(k) as his conduct and/or negligence led to the breaches by Mr Sam Kavanagh of AR175(ii) and AR178 as he supplied the bottles of 'Vitamin Complex' to Mr Sam Kavanagh': Liability Reasons at [367]."

65 The findings of the Tribunal with respect to the key particulars in charge 3 were as follows:

> "362. In respect of particular (k) it is submitted by Matthews 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."

66 Although the submissions are also somewhat obscure, the complaint appears to be that the statement at par 367 was not correct as a matter of construction of the charge because particular (j) stated that Dr Brennan's breaches led to breaches by Mr Kavanagh. Yet at an earlier stage, the Tribunal had found negligence on the part of Dr Brennan, it having been found by the Appeal Panel (not the Tribunal) that he was clearly negligent. (The Appeal Panel also found that Dr Brennan's conduct "led to" the breaches by Mr Kavanagh.) The Tribunal continued:

> "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."

67 The significance of this conclusion, which appears to have responded to a challenge to Dr Brennan's credibility made by the plaintiff, is beside the point. Yet nothing else was relied upon in support of ground 14.

68 The defendant noted in written submissions that the plaintiff appeared to confuse the Tribunal's findings on particular (l) and (j) of charge 3. The submission continued:

> "The Tribunal was right to say, in relation to particular (l) with which it was dealing at [367] …, that the particular did not concern breaches by Dr Brennan. … [T]he plaintiff quotes particular (j), not particular (l). In any event, even if there was an error here (which there is not), it is difficult to see how any of that would establish jurisdictional error or an error of law on the face of the record."

69 In reply, the plaintiff submitted that particulars (j) and (l) were to be read together. That may well be true, but it fails to explain how, read separately or

together, the Tribunal's dealing with those particulars demonstrated error of law. Ground 14 must be rejected.

Ground 13

70 In relation to the remaining grounds dealing with charges 3 and 5, all but one focus on issues relating to causation. The one that does not is ground 13, which may be dealt with separately. Ground 13(a) alleged that "the Tribunal erred in its construction of AR175(k) … in finding the charges proved without making findings of fact that (i) the plaintiff had knowledge that the bottles of 'Vitamin Complex' contained a prohibited substance; and (ii) the plaintiff's conduct had been wrongful or that he had been negligent". Paragraph (b) alleged that such findings were "not open" on the evidence.

71 Ground 13(a) had two limbs. One was that the Tribunal could not impose a penalty under AR175(k) unless the plaintiff knew that the bottles of Vitamin Complex contained a prohibited substance and, secondly, that his conduct had been "wrongful or negligent". It is true that the Tribunal did not expressly make findings in either respect in upholding charges 3 and 5. However, it was not apparent that the Tribunal was invited to do so. The Tribunal noted that particular (c) of charge 3 was denied.[32] Particular (c) identified the relevant conduct as the supply of two bottles of Vitamin Complex. It alleged that the contents included cobalt in excessive concentrations. However, the element of "knowledge" was that the substance or preparation "would be supplied for the administration of doses to horses … and was for the purpose affecting the performance of a horse in a race." There is no knowledge requirement identified in AR175(k), nor does the pleading of knowledge in the charge relate to the contents of the bottles. Further, the rule does not describe the conduct to which it is directed as "wrongful". The plaintiff's argument was that the specification of "conduct and/or negligence" in the rule contained a necessary implication that the relevant conduct must be wrongful or at least negligent; were innocent conduct sufficient, there would be no need to refer to negligence.

[32] Tribunal decision at [14].

Accepting the plaintiff's implication, it does not follow that he had to be shown to know that the bottles contained a prohibited substance.

72 In addressing charge 2, the Tribunal held that (i) the plaintiff supplied the Vitamin Complex to Dr Brennan, (ii) the plaintiff knew the Vitamin Complex would be supplied by Dr Brennan to trainers, including Mr Kavanagh, who was treating Midsummer Sun with Vitamin Complex, and (iii) Midsummer Sun was competing in a race on 9 January. Charge 2 alleged that the plaintiff had been a party to breaches of the rules by Dr Brennan and Mr Kavanagh. Particular (c) in respect of ground 2 was in the same terms as particular (c) of charges 3 and 5. Charge 2 involved being a party to other offences; the same conduct must, as a matter of law, be capable of supporting a charge of conduct or negligence leading to the commission of the other offences. Although the actual findings of the Tribunal with respect to charges 3 and 5 were set out in brief form, it is clear from the structure of the decision that the reason for taking that course was that the relevant issues had already been addressed and determined in dealing with charge 2.

73 In these circumstances, there was no error of law revealed by the reasoning of the Tribunal.

74 There were further findings in the Tribunal decision which confirm that the Tribunal was in fact satisfied that the plaintiff knew that Vitamin Complex contained excessive amounts of cobalt. The statement in par 474 was made in dealing with charge 6, to which further challenges were raised and which will be addressed below. However, in the same context the Tribunal found:[33]

> "479 Matthews gave evidence before the Appeal Panel he thought the Vitamin Complex bottle was 'dodgy'.
>
> …
>
> 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.

[33] See par 474, set out at [33] above.

…

485 In any event the above findings that Matthews 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."

75 Finally, with respect to charge 3, ground 13 alleged that findings as to knowledge, wrongfulness or negligence were unavailable on the evidence.

76 This challenge may be dealt with in summary terms, given the foregoing discussion. There was a volume of evidence regarding the conduct of Dr Matthews and his dealings with Dr Brennan and Mr Kavanagh. On the primary facts found by the Tribunal, after careful consideration of the evidence given by Dr Brennan and Mr Kavanagh, the evidence that Dr Matthews knew prior to 9 January 2015 that the bottles of Vitamin Complex contained excessive levels of cobalt was overwhelming. It included the following propositions:

"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 the 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.

…

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 about of cobalt as Coforta."

77 The Tribunal also took into account the plaintiff's evidence – (i) that he first saw the Vitamin Complex bottle when it was shown to him by stewards on 30 April 2015;[34] (ii) denying that he supplied Vitamin Complex to Dr Brennan;[35] (iii) denying that he ever spoke to Dr Brennan or Mr Kavanagh about it;[36] (iv) constructing an account, when confronted with the text of 18 November 2014, that it referred to bottles of a substance known as Toradol[37] – all of which the Tribunal found was false. Further, his response to a query from Mr Kavanagh on 13 January 2015 (four days after the race won by Midsummer Sun), seeking a response to knowledge that another trainer had been notified of a swab with cobalt, to which the plaintiff replied "???" did not, as the plaintiff suggested, indicate that the plaintiff did not know what Mr Kavanagh was talking about or worried about. The Tribunal drew the inference, as it was entitled to, that the plaintiff's evidence was an attempt to distance himself from the response.

78 There was further evidence that in the course of a conversation later in January 2015 in New Zealand, Mr Kavanagh had queried again whether Vitamin Complex had cobalt in it and, having first been assured by the plaintiff that it did not, was then told that it did, but at levels equivalent to reputable and acceptable vitamin products. The Tribunal accepted Mr Kavanagh's evidence that he was troubled by this change in the answer given. All of this occurred in a context where, as the Tribunal found, the Vitamin Complex bottle was unregistered,

---

[34] Tribunal decision at par 44.
[35] Tribunal decision at par 45.
[36] Ibid.
[37] Tribunal decision at par 46.

unlabelled and without directions as to its proper use. There was also the inference available from evidence of Dr Brennan, which the Tribunal accepted, that when questioned as to the source of Vitamin Complex, the plaintiff had said it came from Canada.

79 The proposition that there was no evidence logically probative of the conclusion that the plaintiff knew that Vitamin Complex contained cobalt in excessive quantities must be rejected.

80 It follows that ground 13 must be rejected.

Charges 3 and 5 – causation

81 Grounds 12, 14 and 16 relate to charges 3 and 5 and each raised a question as to the relevant causal link between the plaintiff's conduct and the breaches of the rules by Dr Brennan and Mr Kavanagh. Ground 12 alleged an error in construction of AR175(k), ground 15 alleged "an error of law in finding that the plaintiff's conduct caused breaches of the Rules by Dr Brennan and Mr Kavanagh", while ground 16 alleged an error of law "in failing to find that Brennan's conduct and/or negligence broke the chain of causation between the plaintiff's conduct and breaches of the Rules by Kavanagh and Brennan".

82 There is no dispute that the Tribunal addressed submissions as to the meaning of "causation" in charges 3 and 5. They turned on the language of par (k) requiring that the plaintiff's conduct and/or negligence "led to" breaches by Dr Brennan and Mr Kavanagh. In particular, the Tribunal reasoned:

> "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."

The Tribunal then reasoned in terms at pars 362-368, set out at [65] above.

83 The plaintiff's submissions commenced with the proposition that AR175(k) "requires that legal causation, and not merely factual causation" be established.[38] What was meant by this proposition was not explained. If it were intended to introduce the distinction between causation as a necessary condition of the occurrence of another event (factual causation) and the appropriateness of the scope of liability for the other event extending to the established connection (scope of liability), as found in s 5D of the *Civil Liability Act 2002* (NSW), that was neither identified nor, had it been relied upon, should the submission have been accepted. Causation is inherently a factual matter to be determined by the Tribunal.

84 Further, as the plaintiff noted in its written submissions, the term "led to" is not one of precision, nor one bearing any particular legal meaning. Appropriately, the plaintiff referred to the reasoning of the High Court in *Fitzgerald v Penn*.[39] That case involved a head-on collision on a roadway at night. That case was heard by a judge and jury. There was a challenge to the judge's direction with respect to causation, which led to the following observations in the joint reasons in the High Court:

> "The learned judge appears to us to have said quite sufficient to make it plain to the jury that no negligence was relevant except such negligence as could fairly be considered to have been a cause of the accident. That is all that he was required by law to do. It was not, as we think, necessary or even desirable in this case to say more. His Honour used various expressions. He spoke of negligence 'resulting in' the accident, negligence of which the accident was 'a consequence', negligence which 'led to' the accident, negligence which 'operated as one of the factors to bring about' the accident, negligence which was 'a genuine factor in bringing about' the accident. But these expressions, practically speaking, are equivalent and interchangeable, and there was no

[38] Plaintiff's written submissions, par 56.
[39] (1954) 91 CLR 268 at 274 (Dixon CJ, Fullagar and Kitto JJ); [1954] HCA 74.

> likelihood that any or all of them would in any way mislead the jury or leave them without sufficient guidance."

85 After referring to par 364 of the Tribunal's reasons, set out above, the submissions for the plaintiff continued:[40]

> "The Tribunal appears to have simply applied the 'but for' test, which is not the proper approach in this case given the lack of proximity between Dr Matthews and Mr Kavanagh and the subsequence acts of Dr Brennan. Instead, it is necessary to apply the 'common sense' approach to causation, where the question to be asked is 'whether a particular act or omission … can fairly and properly be considered a cause'."

86 The distinctions being drawn in this submission are by no means easy to apply. To seek to elevate them into legal principles finds no basis in the Rules of Racing which are being applied. As a matter of common sense, given the established relationship between the plaintiff and Mr Kavanagh, his close relationship as an employee of Dr Brennan, and the other matters discussed above, the causal link between the plaintiff supplying the bottles to Dr Brennan and Dr Brennan supplying Mr Kavanagh, together with the conversation between the plaintiff and Mr Kavanagh prior to the race, demonstrate clear precise and cogent links between each step in the chain of conduct.

87 Ground 12 is untenable.

88 Ground 15 merely stated that the Tribunal "made an error of law in finding that the plaintiff's conduct caused breaches of the Rules by Kavanagh and Brennan". In its terms, the ground did not attempt to identify what the error of law might be. The plaintiff's written submissions set out the following passage from the judgment of Gaudron J in *Bennett v Minister of Community Welfare*:[41]

> "Notwithstanding that it is a question of fact, causation is an issue which may sometimes attract the intervention of an appellate court … because the question has been determined in a way that involves an error of law."

---

[40] Plaintiff's written submissions, par 60.
[41] (1992) 176 CLR 408 at 419; [1992] HCA 27.

Gaudron J then identified an error of law as being "a failure to have proper regard to" certain circumstances.

89 The submissions purported to rely upon matters raised in respect of ground 12. There was no suggestion in ground 12 that there was a failure to have regard to a mandatory consideration, nor any equivalent error of law. Ground 15 must therefore be rejected as failing to identify any error, let alone an error of law.

90 Ground 16 alleged that the Tribunal had made an error of law "in failing to find that Dr Brennan's conduct and/or negligence broke the chain of causation between Dr Matthews' conduct and breaches of the Rules by Mr Kavanagh and Dr Brennan." The written submissions simply relied upon the submissions made in support of grounds 12 and 15. In the course of oral submissions, the break in the chain was said to be "self-evident".[42] Elsewhere it was said that the chain was broken "because of Dr Brennan's own obligations."[43]

91 One may infer that the submission was not further developed because there was no further development available. The supply of a prohibited substance to a colleague with the intention that it be used in the treatment of horses does not cease to be an offence because the colleague should not have used the substance. Nor does it make any difference that there are two further steps leading to the treatment of the horse, rather than one.

92 Ground 16 is without substance and must be rejected.

Charge 6 – grounds 17 and 18

93 Charge 6 was laid under AR175(a) and alleged that the plaintiff had "engaged in improper practices in connection with racing", as detailed in nine particulars. Particulars (a)-(e) were a repetition of those in charge 2; the remaining particulars were:

[42] Tcpt, p 16(26).
[43] Tcpt, p 12(40).

"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)."

94 Ground 17 alleged that the charge required a finding that the plaintiff "had actual knowledge that the bottles of Vitamin Complex contained a prohibited substance, being cobalt". The plaintiff reasoned that conduct was only "improper" if it involved an element of dishonesty and that required knowledge of the contents of the bottles being a prohibited substance, namely cobalt in excessive quantities. The submissions stated that the Tribunal had held that knowledge of cobalt in the Vitamin Complex was not required.

95 Inconsistently, ground 18 alleged that it was "unreasonable" for the Tribunal to have found that the plaintiff had knowledge of there being excessive amounts of cobalt in the Vitamin Complex. That finding was also said to be "not open on the evidence and is inconsistent with it".

96 Dealing first with ground 17, the reasoning of the Tribunal to which exception was taken was as follows:

> "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 in the Vitamin Complex. Knowledge of Matthews is not required. Brennan is the link and Matthews the link to Brennan by the supply of the Vitamin Complex with its known contents. That provides the likelihood that Matthews says is needed but does not exist."

97 In fact the Tribunal dealt with the various elements of the charge, with some care. This passage dealt with particular (f) and accepted the likelihood of the particularised result. That was an objective question. There is no reason to suppose that the Tribunal was wrong to read the particular in that way. The link back to the plaintiff was established and the known contents of the bottle were established. As the Tribunal continued:

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

98 The Tribunal then moved on to consider particular (g). In dealing with that particular, the Tribunal held that the plaintiff "supplied the Vitamin Complex with, and to his knowledge, the excessive amounts of cobalt in it."[44]

99 The Tribunal was undoubtedly correct to read the particulars as a whole in determining whether the charge was proven. It was also correct to focus on those areas which were the subject of dispute. Minds might differ as to which specific particular required that the plaintiff knew the bottle of Vitamin Complex included cobalt in excessive quantities. However, the precise source of the obligation to prove that factor was irrelevant: the Tribunal accepted that proof was necessary and found that it had been established. It follows that ground 17 was based on a false premise.

100 In fact, a reasonable construction of the particulars of charge 6 did not involve knowing distribution of a product containing excessive quantities of cobalt as the element of impropriety. It is by no means clear that charge 6 would not have been made good on the basis of particulars (h) and (i) alone. There was no challenge to the findings that those particulars were established. Any error

[44] See par 474, set out at [33] above.

of the kind alleged would, on that approach be immaterial. However, it is not necessary to rely on that alternative reasoning for present purposes.

101 Ground 18 alleged that the finding contained in par 474 was "unreasonable". It appears that the concept of "unreasonableness" in this ground derived from the decision relied on by the plaintiff,[45] namely *Minister for Immigration and Citizenship v Li*.[46] However, that case was not concerned with a finding of fact, but the exercise of a discretionary power. As the final sentence in the paragraph relied upon stated:

> "Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification."

Later, in dealing with a submission by the Minister, the joint reasons stated that the submission "misapprehends the nature and purpose of the discretionary power to adjourn and the requirement of reasonableness which attaches to it."[47]

102 Ground 18 also referred to the finding being "not open" on the evidence. Nothing was added to that complaint by stating that the finding was "inconsistent with" the evidence. It was no doubt inconsistent with the plaintiff's evidence, but the Tribunal had disbelieved him. The plaintiff was on stronger ground in placing reliance on the reasoning of Mason CJ in *Australian Broadcasting Tribunal v Bond*[48] to the effect that "the making of findings and the drawing of inferences in the absence of evidence is an error of law: *Sinclair v Maryborough Mining Warden*[49]."[50] Nevertheless, that submission cannot be sustained. The evidence which formed a solid basis for inferring that the supplier of the Vitamin Complex (the plaintiff) knew what it contained has been set out above.[51]

---

45 Written submissions, par 94, fn 61.
46 (2013) 249 CLR 332; [2013] HCA 18 at [76] (Hayne, Kiefel and Bell JJ).
47 Li at [79].
48 (1990) 170 CLR 321; [1990] HCA 33.
49 (1975) 132 CLR 473 at 481, 483; [1975] HCA 17.
50 *Bond* at 355-356.
51 See [76]-[78].

103 It follows that ground 18 must be dismissed.

Conclusion

104 For the reasons set out above, the grounds of review pressed before this Court are all rejected. It follows that the summons must be dismissed. The plaintiff must pay the respondent, Racing New South Wales, its costs of the proceedings in this Court.

105 The Court makes the following orders:

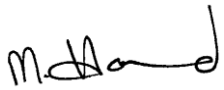
(1) Extend time for the commencement of these proceedings until 7 July 2021.

(2) Dismiss the summons for judicial review filed 7 July 2021.

(3) Order that the plaintiff pay the first defendant's costs of the proceedings.

****

I certify that the preceding 105 paragraphs are a true copy of the reasons for judgment of the Hon Justice Basten



……..
Associate
2 March 2022