IN THE RACING APPEALS TRIBUNAL

AARON GOADSBY
Appellant

v

HARNESS RACING NEW SOUTH WALES
Respondent

REASONS FOR DETERMINATION

Date of hearing:	**12 August 2024**
Date of submissions:	**22 August (Appellant)** **2 September 2024 (Respondent)** **6 September 2024 (Appellant in reply)**
Appearances:	**Mr D Sheales instructed by Hammond Nguyen Turnbull for the Appellant** **Ms S Jeliba instructed by Cadre Moss for the Respondent**
Date of Determination:	**8 October 2024**
Orders:	**1. The substantive appeal is dismissed.** **2. The costs appeal is dismissed.** **3. The appeal deposit in each case is forfeited.**

INTRODUCTION

The substantive appeal

1. By an Amended Notice of Appeal dated 8 February 2024,[1] Aaron Goadsby (the Appellant) appeals against a determination of the Harness Racing Appeals Panel (the Panel) imposing a disqualification of three months for a breach of rr 190(1),(2) and (4) of the *Australian Harness Racing Rules* (the Rules). I will refer to this appeal as the substantive appeal.

2. The Appellant pleaded guilty before the Stewards, and before the Panel, to the offence which is the subject of the substantive appeal. His position has now altered to some degree, as explained in more detail below.

3. The penalty imposed on the Appellant as a consequence of the breach in [1] above has been served in full. In that regard, it should be noted that when the Notice of Appeal was filed, and bearing in mind the period of disqualification and the absence of any application for a stay, the Tribunal proposed a short timetable for the filing of relevant material and in doing so, effectively offered the Appellant an expedited hearing. The Tribunal's offer was declined by the Appellant's Solicitor.[2]

The costs appeal

4. By a further Notice of Appeal filed on 15 March 2024,[3] the Appellant appeals against a determination of the Panel to refuse an application for the costs of two adjournments of the hearing which were granted to the Respondent, over the Appellant's objection.

The evidence in the two appeals

5. I will deal separately with the substantive appeal and the costs appeal. The parties provided a composite Tribunal Book (TB) covering both appeals, totalling 864 pages.

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[1] TB 4.
[2] See the correspondence of 13 February 2024 to the Appeals Co-ordinator.
[3] TB 7.

6. It is obviously necessary for me to read material provided by the parties prior to the hearing. In the present case, there was limited reference to a great deal of that material, be it in the hearing itself or in the written submissions filed by the parties. I would again exhort parties, where possible, to give careful consideration to the material which is provided to the Tribunal, and to do their best to limit it to that which will actually be relied upon, and which is necessary for the issue(s) to be determined. I would also encourage parties appearing before the Tribunal to document their agreement as to undisputed facts wherever it is possible to do so. In the present case, there are a number of matters which could have been addressed by an agreed statement of facts being provided at the outset. Provision of undisputed material in that form will save considerable time, and considerable cost.

THE SUBSTANTIVE APPEAL

The relevant provisions of the Rules

7. Rule 190 of the Rules is in the following terms:

> ***Presentation free of prohibited substances***
> *190 (1) A horse shall be presented for a race free of prohibited substances.*
>
> *(2) If a horse is presented for a race otherwise than in accordance with sub-rule (1) the trainer of the horse is guilty of an offence.*
>
> *(3) If a person is left in charge of a horse and the horse is presented for a race otherwise than in accordance with sub-rule (1), the trainer of the horse and the person left in charge is each guilty of an offence.*
>
> *(4) An offence under sub-rule (2) or sub-rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.*
>
> *(5) A horse is presented for a race during the period commencing at 8.00 a.m. on the day of the race for which the horse is nominated and ending at the time it is removed from the racecourse after the running of that race.*
>
> *(6) Where a trainer intends to leave another person in charge of a horse in the trainer's absence, then prior to doing so, the trainer must notify the Chairman of Stewards, and the notification must be in the manner, within the time, and containing the information determined by the Controlling Body or the Chairman of Stewards.*

(7) A person can only be left in charge of a horse by a trainer with the approval of the Chairman of Stewards.

(8) A trainer who fails to comply with sub-rule (6) or sub-rule (7) is guilty of an offence.

The facts of the offending

8. I draw the following summary of undisputed facts from the submissions of the Respondent.[4]

9. On 26 May 2023, the Appellant presented *Luvareschs* (the horse) to race at a meeting at Newcastle.

10. The horse competed in, and won, race 8 which was conducted at 9.32 pm that evening.[5]

11. The Appellant had another entrant in race 2 which was conducted at 6.37 pm on the evening of that same day.[6]

12. A urine sample was taken from the horse at 9.53 pm.[7] Phenylbutazone, and its metabolites Oxyphenbutazone and Gamma-hydroxyphenylbutazone (collectively, the substance) were found in the sample.[8] The Appellant was then charged with the offence to which I have referred above.

The position of the Appellant on the substantive appeal

13. As I have noted, the Appellant pleaded guilty to the charge, both before the Stewards and before the Panel. Before the Tribunal, the Appellant took a slightly different position, which the Respondent conceded was open.[9] Whilst the

[4] TB 34 and [2] and following.
[5] An agreed fact noted in the submissions of the Respondent at TB 39[21](b); Exhibit 5 before the Stewards Enquiry at TB 801 and following.
[6] An agreed fact noted in the submissions of the Respondent at TB 39[21](a).
[7] An agreed fact noted in the submissions of the Respondent at TB 39[21](c) and see also TB 798.
[8] Exhibit 3 before the Stewards Enquiry at TB 799.
[9] TB 35 at [6].

Appellant did not dispute that the elements of the offence were made out, his case on this appeal is that the presence of the substance in the horse came about as a consequence of contamination which occurred at the racecourse.[10] If that is found to be the case, the Appellant's contention is that any culpability on his part is significantly lowered, to the point where it is properly reflected in the imposition of a fine.

14. Given that the period of disqualification imposed on the Appellant has been served in its entirety, the outcome of this appeal is, in a sense, somewhat academic. However, I acknowledge the submission that it remains important to the Appellant to have the benefit of a considered determination by the Tribunal of the issues which have been raised.[11]

THE EVIDENCE

The Notice to Industry

15. On 6 September 2018, the Respondent issued the following Notice to Industry Participants (the Notice):[12]

> *Contamination from the stable environment can lead to an inadvertent breach of the Prohibited Substance rules.*
>
> *Harness Racing NSW has previously supplied advice regarding possible sources of contamination which may need to be addressed in the stable environment.*
>
> *The following recommendations are intended to complement that advice:*
>
> *1. Horses administered prohibited substances should be treated in a separate stable reserved for that purpose, wherever possible.*
>
> *2. Trainers should ensure that prohibited substances in the form of powders are carefully and appropriately handled to avoid any potential for the powdery residue to contaminate the horse's environment.*
>
> *3. Gloves should always be worn when mixing medicated feeds or when administering medications and discarded before preparing another feed. Gloves should also be worn if medication has been applied to the hands of the person mixing the feed.*

[10] TB 12 at [5].
[11] Transcript 4.15 – 4.16.
[12] Reproduced in the Respondent's submissions at TB 36[12].

4. Prohibited substances administered in the form of gels, pastes or creams all have the potential to accumulate in the hair or skin of the horse and act as a substantial reservoir of the prohibited substance. The prohibited substance may then be slowly absorbed by the horse and be excreted in the urine.

The statement of Darren Reay

16. Initially, the Appellant relied (in part) on the evidence of Darren Reay, a Harness Racing Trainer and Driver who had entered horses in races at the meeting on 26 May 2023. Mr Reay's evidence included the following:[13]

> *I can confirm that I treated horse Spunkys Gotsecrets with 10cc of Bute on the 26/5/2023 before I left for trackwork at Newcastle track.*
>
> *This was due to the horse "jumping out of his gear" and I needed to work out why he was doing this, I had several thoughts on why.*
>
> *Sorness effecting [sic] his gait*
> *Balls [testicles] pinching in his work*
> *Pain due to joints and other limbs*
>
> *We worked the horses at the track, washed them and we were there for approx. 2 hrs during this time horses stood tied up in the race day stalls that are used on race night, I don't know the exact stable number but [sic] was the side of the track where trainers Formosa, Lennox, Goadsby and Thompson stable on race nights.*

17. Ultimately, the Appellant abandoned any reliance on Mr Reay's evidence.[14]

The Appellant's interview of 24 July 2023

18. The Appellant was interviewed by Stewards on 24 July 2023. A transcript of that interview forms part of the evidence before me.[15] The Appellant expressed surprise upon being informed of the results of the analysis of the urine sample taken from the horse.[16] Specifically, he said that:

[13] TB 221.
[14] Submissions in reply at [1].
[15] TB 806 and following.
[16] TB 807.22 – TB 807.37

(i) other horses trained at his property had the substance administered "over the tongue" the day prior to the race;[17] and

(ii) his only explanation for the presence of the substance in the sample taken from the horse was *"cross-contamination"*.[18]

The Appellant's evidence before the Stewards' Inquiry

19. An Inquiry was held by Stewards on 6 December 2023, at which the Appellant appeared and gave evidence, represented by Mr Hammond, Solicitor. The transcript of that Inquiry also forms part of the evidence before me.[19]

20. The Appellant's evidence before the Inquiry included the following:

(i) on 25 May 2023, the day before the race in question, four other horses in the Appellant's stables, namely *Sweet Valeria* (also known as *Val*), *Ignite the fire* (also known as *Pattie*), *Cyclone Millie* also known as *Millie*) and *Kozaczynski* (also known as *Kozzie*) were treated with the substance;[20]

(ii) all of his horses are tied up each morning in cross-ties within a wash bay;[21]

(iii) all horses have their temperatures taken, and their feet cleaned, before a decision is made as to what work program each of them will follow on that day;[22]

(iv) his practice is to satisfy himself, through his knowledge of his own horses, that the correct medication(s) are being administered to the correct horse(s);[23]

(v) all of his staff are trained in how to administer medications;[24]

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[17] TB 814.15; AB 823.
[18] TB 816.14.
[19] Commencing at TB 710.
[20] TB 729.37 – TB 720.40; Exhibit 7.
[21] TB 724.1 – TB 724.2.
[22] TB 724.2 – T 724.4.
[23] TB 726.13 – TB 726.19.
[24] TB 726.39 – TB 726.40.

(vi) he has, since the events giving rise to the present appeal, become the sole controller of all medications, and procedures have been put in place for administration of medications including the use of gloves, washing hands and utilisation of sanitising stations in the wash bays;[25]

(vii) the substance was provided to the other four horses in the six cross-ties within the stables on 25 May 2023;[26]

(viii) the routine practice which was adopted in the stables prior to these events was that the horses were treated with the substance which was taken from a refrigerator located 20 metres away;[27]

(ix) generally speaking, a new syringe was used for the treatment of each horse, although this did not occur all the time;[28]

(x) syringes were modified to cut a "*bigger hole*" so the substance "*squirts through better*";[29]

(xi) the dosage administered was 5 ml in each case;[30]

(xii) following the treatment, the horses returned to their "normal stable environment";[31]

(xiii) he did not know how the horse was exposed to the substance, but had "a number of different theories," including cross-contamination, because in its normal stable environment the horse was located near other horses treated with the substance[32];

(xiv) the horse had shared a wash bay with the other horses treated with the substance;[33]

(xv) it was highly likely that the horse would have been in contact with the other horses treated with the substance;[34]

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[25] TB 726.39 – TB 727.9.
[26] TB 729.41; TB 730.17.
[27] TB 730 .1 – TB 730.10.
[28] TB 731.17 – TB 731.45.
[29] TB 732.5 – TB 732.10.
[30] TB 732,23 – TB 732.24.
[31] TB 732.37 – TB 732.46.
[32] TB 734.28 – TB 728.45.
[33] TB 734.12 – TB 734.23.
[34] TB 736. 24 – TB 735.26.

(xvi) there was a possibility of cross-contamination as a consequence of the sharing of the jogging machine, the walker, the wash bay and the cross-ties, but he thought it unlikely that any contamination had resulted from the horses touching one another;[35]

(xvii) specifically, and by reference to training records, the horse had "*more than likely*" shared the jogging machine with two of the other horses treated,[36] as a consequence of which there was "*possible cross-contamination due to the fact that other horses go on the jogger"*;[37]

(xviii) it had occurred to him that there could be an "i*ssue*" if the jogger was shared;[38]

(xix) it was possible that the horse had been tied in a cross-tie next to one of the other horses treated;[39]

(xx) swim headstalls were shared by the horses;[40]

(xxi) little cleaning was undertaken, and gloves were not worn, when administering the substance, although measures have now been put in place to address both of these. issues;[41]

(xxii) the horse was put back in the same tie-ups in which the other horses had been administered the substance;[42]

(xxiii) it was raining on the day of the race, the floats were parked close together, and the horses remained in the washroom area until they were loaded on to the floats to be transported to the racecourse.[43]

21. In summary, the Appellant asserted that the presence of the substance had come about as a consequence of cross-contamination.[44] He also confirmed having

[35] TB 738.36 – TB 738.41.
[36] TB 747.2 – TB 747,11.
[37] TB 741.37 – TB 742.4.
[38] TB 751.25 – TB 751.34,
[39] TR 741.34 – T 741.37.
[40] TB 749.16.
[41] TB 750.22 – TB 750.36.
[42] TB 755.31 – TB 755.36.
[43] TB 756.7 – TB 756.12.
[44] TB 725.32 – TB 725.37.

administered *"Bute"* (i.e. the substance) to a number of his horses.[45] It is noteworthy that the entirety of the Appellant's evidence before the Inquiry centred upon the conditions at his stables, and the possibility of contamination in that context. Nothing said by the Appellant went specifically to the possibility of the contamination having occurred at the racecourse within a short period before the race, a proposition which forms the basis of the present appeal.

THE APPELLANT'S EXPERT EVIDENCE

22. The Appellant relies solely on the expert evidence adduced in his case.[46] It is appropriate that such evidence be addressed at this point.

The evidence of Professor Tobin

23. Professor Tobin provided two reports, the first of which was dated 7 March 2024.[47] In that report, Professor Tobin expressed the view that the concentration of the substance found in the bloodstream of the horse was *"close to pharmacologically irrelevant trace level detection"*,[48] and described urinary concentrations as *"extraordinarily challenging."*[49]

24. Ultimately, Professor Tobin concluded[50] that having regard to the low concentration of the substance identified in the sample, it was *"most likely that the exposure event occurred close to the time of urinary sample collection, namely within 3 hours or less of the actual sample collection time"*. He agreed with the evidence given by Dr Wainscott before the Inquiry (cited below) that by reference to relevant studies, contamination was a plausible explanation for the presence of the substance.[51]

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[45] TB 725.47.
[46] Submissions in reply at [2].
[47] Commencing at TB 51.
[48] TB 52 at 1.1.
[49] TB 52 at 1.2.
[50] TB 53 at 1.10.
[51] TB 60.3.

25. Professor Tobin also concluded:[52]

> *... [T]here is no scientific or other evidence of any role whatsoever of the trainer of [the horse] being in any way associated with or responsible for the claimed urinary identification of [the substance].*

26. Professor Tobin provided a second report dated 10 May 2024[53] which, was, in effect, a reply to the evidence of Dr Wainscott. In that report, Professor Tobin said that he "*fully agreed*[54] with the opinion of Dr Wainscott that the "*exposure event occurred less than 24 hours prior to the collection of the urine sample,"* but expressed the time point in terms of *"an order of magnitude closer to the time of collection, let us say 2.4 hours, or less, given the unusually low concentration of [the substance] reported present in the urine sample".* He further concluded that the horse's exposure to the substance had occurred "*relatively close"* to the time of sample collection.[55]

27. Professor Tobin was not cross-examined on either of his reports.

The evidence of Dr Major

28. Dr Major provided a report dated 5 December 2024[56] (on which he was not cross-examined) in which he said the following:[57]

> *It is noteworthy that:*
>
> *(i) The metabolite was, as would be expected, on each occasion in greater quantity that [sic] the original substance. This is to be expected as the substance is progressively metabolised in the body.*
>
> *(ii) The trough levels recorded on the first day and a half, where the drug would be expected to be therapeutically active, are many times higher that [sic] the result recorded for this horse [308 ng/ml].*

[52] TB 61 at 10/11.
[53] Commencing at TB 198.
[54] TB 201 at [4].
[55] TB 201 at [4].
[56] Commencing at TB 215.
[57] TB 217(i) – (iii).

(iii) At the time where the test horses' average urine approximates the level of the sample in question (between 38 and 42 hours) their average major metabolite level was 2091.

The fact that [the horse] had an OPB as low as 76 when the phenylbutazone was 308 ng/ml strongly suggests that the horse has been exposed to a small dose very close to the time or racing.

29. Dr Major went on to express the opinion that *"the most likely explanation for the results obtained in this horse's urine is direct oral contact (licking or eating) an imperceptibly small quantity of [the substance] close to the time of testing".*[58]

30. In a supplementary report of 3 May 2024[59] (which was, again, not the subject of cross-examination), Dr Major made reference to the evidence of Dr Wainscott.[60] He questioned why it was that Dr Wainscott had apparently "*overlooked*" relevant data,[61] before stating:[62]

> *The only significant variance between Dr Wainscott's opinion and mine is the timing of the "contamination event". I strongly believe it occurred within 2 hrs of collection, whereas Dr Wainscott prefers to incriminate the trainer's practices sometime within 24 hours of racing.*

31. I should note at this point that Dr Major also expressed the opinion in his second report that it would be "*unwise to challenge the opinion of [Professor Tobin]"* because he is *"the pre-eminent Equine Veterinary Pharmacologist in the world".* Leaving aside other shortcomings in Dr Major's reports which I have addressed in detail below, two particular observations should be made about that statement.

32. The first, is that the wisdom or otherwise of accepting or rejecting any expert opinion is a matter for the Tribunal, not Dr Major (or any other expert). Dr Major's statement does nothing more than seek to usurp the functions of the Tribunal.

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[58] TB 218.
[59] Commencing at TB 219.
[60] TB 219.
[61] TB 219.
[62] TB 220.

33. The second, is that the eminence of an expert, even if it is established, does not lead to the conclusion that his or her opinion is to be accepted without question or scrutiny. The acceptance or rejection of any expert opinion is an evaluation to be made by the Tribunal.

34. A statement of the kind made by Dr Major in relation to the acceptance of Professor Tobin's opinion has no place in an Expert Report, even where rules of evidence do not apply.

THE RESPONDENT'S EXPERT EVIDENCE

The evidence of Dr Wainscott

35. Dr Wainscott, a Regulatory Veterinarian employed by the Respondent, gave evidence before the Inquiry.[63] His evidence included the following:

    (i) Phenylbutazone is anti-inflammatory in nature, widely used in equine medicine, and a large number of products are registered for use in horses in Australia;[64]

    (ii) Oxyphenbutazone and Gamma-hydroxyphenylbutazone are metabolites of Phenylbutazone;[65]

    (iii) the substance is:

        (a) capable of acting on virtually every body system;[66]

        (b) therapeutic in nature, and regulated by screening limit, above which it will be specified as prohibited;[67]

    (iv) a screening limit is only applicable to commonly used therapeutic substances;[68]

    (v) any concentration of a substance below the screening limit can be considered as irrelevant from a regulatory perspective, on the basis

[63] Commencing at TB 753.37.
[64] TB 753.45 – TB 753.47.
[65] TB 754.1 – TB 754.3.
[66] TB 754.6.
[67] TB 754.13 – TB 754.17.
[68] TB 754.18 – TB 754.19.

that it will not be having a clinical effect, nor threaten the welfare of the horse;[69]

(vi) the applicable screening limit in this case was 100 ng/mL in urine;[70]

(vii) the concentration of the substance found in the sample was 308ng/mL, and thus above the screening limit;[71]

(viii) it is possible for a concentration above the screening limit to have an effect on the welfare of a horse;[72]

(ix) the concentration in the present case was at the lower end, and less than a therapeutic dose;[73]

(x) the concentration was inconsistent with mistreatment of the horse;[74]

(xi) there were *"plausible points of contact"* which may explain the horse having the substance as a result of exposure to contaminated sources;[75]

(xii) contamination was, by reference to relevant studies, a *"plausible explanation"* for the presence of the substance in the horse.[76]

36. Dr Wainscott also provided a report for the purposes of the appeal dated 12 April 2024[77] in which he expressed the following opinions which, in the absence of cross-examination, are unchallenged:[78]

> *13. Nothing contained in the reports of Dr Tobin, Dr Major or the letter by Mr Reay change any of my opinions expressed during the Stewards Inquiry. I believe the most likely source of exposure was at Mr Goadsby's property for the following reasons:*
>
> *a. Gloves were not worn when the horses were treated.*

[69] TB 754.21 – TB 754.24; TB 754.29 – TB 754.34.
[70] TB 754.27.
[71] TB 754.27.
[72] TB 754.40.
[73] TB 754.46 – TB 755.12.
[74] TB 755.20 – TB 755.24.
[75] TB 756.13 – TB 756.15.
[76] TB 761.10 – TB 761.14.
[77] Commencing at TB 285.
[78] TB 287 at [13] – [15].

b. *Mr Goadsby used the same cross ties for Luvareschs and the treated horses.*
c. *Oral administration of any paste formulation carries a risk of spillage acting as a source of contamination.*
d. *There were other possible sources of contamination through the sharing of equipment such as the jogger and sharing of swimming head stalls.*
e. *All the above potential sources of contamination were exacerbated by the fact that Mr Goadsby treated a total of 4 horses on or around 25th May 2023 in that shared environment.*

14. *I do not believe that the circumstances described by Mr. Reay are a plausible explanation for the contamination of Mr Goadsby's horse. There is no evidence that Luvareschs was even in the same race day stall as those used by Mr Reay. There is no evidence that any contamination of the race day stall occurred, and there is limited opportunity for any contamination to occur when a horse is cross tied in a race day stall.*

15. *In conclusion:*

- *There is limited published data on which to make assumptions and, what data is available has a high measure of dispersion. Even the effect of urine trapping of phenylbutazone in an alkaline urine is highly variable as shown in Figure 6 on page 6 of Dr Tobin's report.*
- *The study of Kynch et al provides the most comparable data to the Goadsby situation.*
- *Assuming an oral route of ingestion of PBZ, the time of ingestion and amount ingested remain unknown.*
- *The urinary pH is unknown and as Dr Tobin points out in paragraph1.2 of his report, it is "notoriously challenging" to correlate a urinary concentration to a plasma concentration. Therefore, in my view there is no reliable way to estimate whether or not a concentration of 308ng/mL of phenylbutazone in the urine would result in a plasma concentration of "well sub 100ng/mL" as Dr Tobin opines in paragraph 1.9 of his report.*
- *Dr Tobin provides no supporting references or calculations explaining how he arrived at a timeframe for exposure of 3 hours or less.*
- *On this basis, I believe it is only possible to surmise that the exposure event most likely occurred less than 24 hours prior to the collection of the urine sample, and any further refinement of this timeframe is largely speculative.*

The evidence of Mr Keledjian

37. Mr Keledjian, the General Manager of the Australian Racing Forensic Laboratory (ARFL) provided a report dated 16 April 2024.[79] Mr Keledjian explained that the ARFL did not perform a full quantitative analysis of the substance in the sample, and that what was performed was a screening precision analysis which was used

[79] Commencing at TB 277.

to ascertain that the concentration of the substance in the sample was above the screening limit.[80]

38. For the purposes of providing his report, Mr Keledjian was asked a number of questions, one of which was in the following terms:[81]

> *In the Major report, Dr Major relies on the reported levels of 308 ng/ml of phenylbutazone, 76 ng/ml of oxphenbutazone, and 354 ng/ml of gamma hydroxyphenylbutazone to draw certain conclusions about the potential timings of exposure to the horse to the phenylbutazone in this case. Do you agree with the reported levels of ARFL being used for this purpose. If so, why? If not, why not?*

39. In response, Mr Keledjian said:[82]

> *[13] Contrary to phenylbutazone, the analysis for oxyphenbutazone and gamma-hydroxyphenylbutazone was qualitative. The spikes were at arbitrary concentrations at the discretion of the analyst based on available standard solutions and only used to satisfy the AORC minimum requirements for identification by providing a retention time for matching against the test sample and the certified standards. No estimate was calculated from the screening analysis and therefore would not have influenced the quality control concentrations chosen. The estimates for oxyphenbutazone and gamma-hydroxyphenylbutazone are not to be relied on as they are based on comparison with a single spiked control sample. The qualitative confirmation of oxyphenbutazone and gamma-hydroxyphenylbutazone, as urinary metabolites of phenylbutazone, is only to provide corroborative evidence that the horse was exposed to phenylbutazone.*
>
> *[14] ... No estimates were made for the metabolites on screening and the concentrations in the control samples were arbitrary ...*
>
> ...
>
> *[17] As indicated in paragraphs [13] and [14] above, the estimated concentration of phenylbutazone is the only reliable estimate. The estimates given for oxyphenbutazone and gamma-hyrdroxyphenylbutazone are very rough and not suitable for comparison with published literature as they have been used in the claims stated in the Major report.*

[80] TB 279-280 at [12].
[81] TB 283.
[82] TB 280 at [13]; [14]; [17].

40. Mr Keledjian was cross-examined at some length in the course of the hearing. He ultimately agreed that the true reading of Oxyphenbutazone was lower than the reading of 308 ng/ml for phenbutazone.[83]

SUBMISSIONS OF THE PARTIES

41. Each party provided written submissions prior to the hearing[84] and further written submissions were filed following its conclusion. Given that the latter submissions were made with the benefit of the transcript, and incorporate a clear articulation of, and response to, the Appellant's case, they are the more significant, although I have obviously taken into account the entirety of the written submissions which have been filed.

Submissions of the Appellant

42. The Appellant's ultimate submission was that I should conclude that the presence of the substance was the result of contamination that occurred within a short period of the collection of the sample, and thus *after* the horse had arrived at the racecourse on 26 May 2023.[85] The submissions underpinning that position may be distilled into the following propositions:

    (i) the opinions as to the likely time of contamination expressed by:
        (a) Dr Major, namely that it was "close to the time of testing" and "within 2 hours of [sample] collection"; and
        (b) Professor Tobin, namely that it was "most likely around three hours or closer" to the time of sample collection,

    should be accepted;[86]

    (ii) if such a conclusion were reached, it would follow that the Appellant's culpability fell within the third category identified in *McDonough,*[87] namely a set of circumstances where the

[83] T 35.10 – T 35.21.
[84] TB 10 and following; TB 49 and following (Appellant); TB 34 and following (Respondent).
[85] Final submissions at [1].
[86] Final submissions at [1](a) and (b).
[87] [2008] VRAT 6.

explanation provided is accepted, and which demonstrates that the participant has no culpability at all;[88]

(iii) culpability of such a low level would warrant nothing more than the imposition of a fine;[89]

(iv) whilst the risk of spillage of the substance, and the possibility of the contamination having occurred as a consequence of the sharing of stable facilities were accepted, the evidence nevertheless supported the conclusion that the contamination had occurred after the horse's arrival at the racecourse;[90]

(v) the evidence of Mr Keledjian was "pivotal" to the opinions of Dr Major;[91]

(vi) acceptance of Mr Keledjian's evidence led to the inevitable acceptance of the opinions of Dr Major;[92]

(vii) the evidence of Dr Wainscott was of no assistance to my determination.[93]

Submissions of the Respondent

43. The Respondent's submissions may be distilled into the following propositions:

(i) viewed as a whole, the evidence of the Appellant, both when interviewed and at the Inquiry, supported a conclusion that any contamination had occurred at the property where the horses were kept and trained, rather than at the racecourse;[94]

(ii) if I were unable to reach a positive conclusion about the cause of any contamination, the circumstances of the case would nevertheless fall within what is generally recognised as the second category of culpability, where a decision-maker cannot determine

[88] Final submissions at [2].
[89] Final submissions at [2].
[90] Final submissions at [7[.
[91] Final submissions at [9] – [17].
[92] Final submissions at [23].
[93] Final submissions at [24].
[94] Final submissions at [11].

the source of the prohibited substance, or does not accept such explanation as might be advanced;[95]

(iii) the expert evidence relied upon by the Appellant was "flimsy", particularly in that:

(a) Professor Tobin's shift in narrowing the windows for contamination was devoid of reasoning;[96]

(b) Dr Major's opinions were similarly expressed without the exposition of any reasoning process;[97]

(iv) the whole of the evidence would permit me to conclude that contamination occurred within a 24 hour period prior to the race in question, but would not permit a more definitive finding;[98]

(v) even if I were to conclude that the contamination occurred closer in time, it would not follow that the Appellant was blameless;[99]

(vi) the whole of the evidence, particularly that of the Appellant, did not identify a likely source of contamination outside the Appellant's property;[100]

(vii) as a consequence, the penalty imposed should stand.[101]

Submissions of the Appellant in reply

44. The submissions of the Appellant in reply may be distilled into the following propositions:

(i) the Respondent had failed to properly address the evidence;[102]

(ii) the submissions of the Respondent reflected a fundamental misunderstanding of the evidence;[103]

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[95] Final submissions at [12] – [13], and see *McDonough*.
[96] Final submissions at [15] – [18].
[97] Final submissions at [19] – [27].
[98] Final submissions at [28].
[99] Final submissions at [29].
[100] Final submissions at [30].
[101] Final submissions at [31] – [33].
[102] Reply submissions at [3] – [11].
[103] Reply submissions at [12] – [18].

(iii) the Respondent's criticisms of the opinions of Dr Major (and presumably Professor Tobin) offended the rule in *Browne v* Dunn[104] and should be rejected.[105]

CONSIDERATION

45. It will be evident from the submissions of each party that the expert evidence in the present case assumes considerable significance. Indeed, the submissions in reply filed by counsel for the Appellant made clear that the Appellant relies solely on that evidence to support his case. It is therefore appropriate that this evidence be addressed at the outset, as its evaluation will necessarily have a direct effect on my ultimate conclusions.

46. Sitting as the Tribunal, I am not bound by rules of evidence. I may inquire into, or inform myself in respect of, a matter, in any way I think fit, subject to rules of natural justice.[106] It follows that in terms of expert opinion evidence, the provisions of s 79 of the *Evidence Act 1995* (NSW) have no application. Similarly, the authorities which, by reference to s 79, set out preconditions to the admissibility of expert opinion evidence, do not apply.[107]

47. The evaluation of all of the evidence remains a matter for me. It follows that it is for me to determine what evidence to accept, what evidence to reject, and what weight should be attached to the evidence I do accept. In terms of the evaluation of expert evidence, and even though the rules of evidence do not apply, a relevant consideration will necessarily be the extent to which, and the terms in which, an expert explains the path of reasoning which resulted in the opinion expressed. As a matter of common sense, the expression of an opinion without an underlying explanation for its basis is likely to be afforded less weight than an opinion which is supported by the exposition of the reasoning process which led to it.

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[104] [1893] 6 R 67.
[105] Reply submissions at [16].
[106] *Racing Appeals Tribunal Regulation 2024* (NSW) cl 17(1) (the Regulation).
[107] See for example *Makita (Australia) Pty Limited v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705; *Dasreef Pty Limited v Hawchar* [2011] HCA 21; (2011) 243 CLR 588.

48. There is no doubt that both Professor Tobin and Dr Major have the necessary qualifications to express expert opinions relevant to the principal issue in this case. However, for the reasons that follow, I place little weight on their respective opinions

49. In the case of Dr Major, I have already pointed out the inclusion of an inappropriate opinion which goes substantially beyond his area of expertise and intrudes upon the Tribunal's functions. That matter aside, the principal opinions he has expressed are largely, if not wholly, bereft of any identifiable basis, and/or bereft of the exposition of any reasoning process which led to them.

50. To begin with, in the first of his reports Dr Major expressed the following opinion:[108]

> *The fact that [the horse] had a OPB as low as 76 when the phenylbutazone was 308 ng/ml strongly suggests that the horse has been exposed to a small dose very close to the time of racing.*

51. Three observations may be made about that opinion.

52. First, Dr Major has not explained <u>*why*</u> the OPB reading supports his opinion.

53. Secondly, what is meant by a *"small dose"* is inherently vague, and entirely unexplained.

54. Thirdly, what is meant by *"very close"* to the time of racing is equally vague, and similarly unexplained.

55. Dr Major went on to express the following opinion:[109]

> *The most likely explanation for the results obtained in this horse's urine is direct oral contact (licking or eating) an imperceptibly small quantity of phenylbutazone close to the time of testing.*

[108] TB 217.
[109] TB 218.

56. Two observations may be made about that opinion.

57. First, Dr Major provides no basis whatsoever for the proposition that the most likely explanation is "*licking or eating*". What may have been eaten or licked by the horse is not identified, nor is there any reference to when, where, or in what circumstances, that may have taken place. The proposition advanced is entirely speculative.

58. Secondly, Dr Major shifted from expressing his opinion by reference to a time "*very close to the time of racing*" to a time *"close to the time of testing"*. What caused that shift is not explained. More specifically, why the reference point was changed from the time of *racing* to the time of *testing* is also not explained. That is of some significance, given the evidence that there was gap of approximately 21 minutes between the time at which the race took place, and the time at which the urine sample was collected from the horse.

59. In his second report, Dr Major expressed a *"strong belief"* that the contamination occurred *"within 2 hrs of collection"*.[110] Whilst not entirely clear, the reference to "*collection"* is presumably interchangeable with his earlier reference to *"testing"*. What it was that enabled Dr Major to progressively refine the relevant time period from a point *"very close to the time of racing",* to a point *"very close to the time of testing",* to a point *"within 2 hours of collection"*, is wholly unexplained.

60. Further, I infer that Dr Major was not provided with the details of the statements made by the Appellant when interviewed, nor with the transcript of his evidence before the Inquiry. As a consequence, Dr Major has given no consideration to that evidence, in circumstances where almost the entirety of it concentrated on what occurred at the Appellant's stables, as opposed to what occurred at the racecourse. Specifically, Dr Major has not taken into account the Appellant's own acknowledgement of (inter alia) the possibility of contamination arising out of the

[110] TB 220.

circumstances which prevailed at his stables, particularly in respect of the horses sharing facilities.[111] That is a not insignificant omission, and is one which, leaving aside the shortcomings I have identified, goes directly to the veracity of the opinions he has expressed.

61. For all of these reasons, Dr Major's report is of little weight. That conclusion having been reached, the significance attached by the Appellant to the evidence of Mr Keledjian is significantly reduced.

62. I have reached the same conclusion in relation to the principal opinions expressed by Professor Tobin. In the first of his reports, Professor Tobin expressed the view that it was most likely that the "*exposure event*" (which was not otherwise identified) occurred *"close to the time of urinary sample collection, namely within 3 hours or less of the actual sample collection time"*.[112] Whilst Professor Tobin said that this was due to the low urinary concentration of Oxyphenbutazone, he did not explain *why* that was so.

63. In his second report, Professor Tobin narrowed the relevant time frame to *"let us say 2.4 hours"*.[113] Exactly what it was that allowed him to arrive at such a precise refinement is not explained.

64. Moreover, as I have previously noted, Professor Tobin expressed the view that there was "*no scientific or other evidence of any role whatsoever of [the Appellant] being in any way associated with … the claimed urinary identification of the substance"*. Clearly, like Dr Major, Professor Tobin gave no consideration to the Appellant's evidence before the Inquiry.

[111] As to which see the Appellant's evidence summarised at [20] above.
[112] TB 53.
[113] TB 201 at [4].

65. I am also unable to accept the submission advanced by the Appellant that the position taken by the Respondent in relation to the evidence of Dr Major and Professor Tobin contravenes the rule in *Brown v Dunn*. Given that I am not bound by the rules of evidence, there may necessarily be an issue as to whether that rule applies in any event. Even if it does, I do not accept that the position taken by the Respondent constitutes a breach of it.[114]

66. The preponderance of evidence supports the conclusion that the presence of the substance in the horse was caused by contamination. That proposition is founded, in part, in the opinion of Dr Wainscott, which I accept. Unlike Dr Major and Professor Tobin, Dr Wainscott articulated the reasons for his opinions in considerable detail.[115] I accept his opinion that the contamination is likely to have occurred within the 24 hour period prior to the collection of the sample, and that further refinement of the time is not possible. For the reasons I have given, I do not accept the time frames adopted by Professor Tobin and Dr Major. It follows that I am not able to accept the Appellant's fundamental proposition that the contamination occurred after the horse arrived at racecourse to compete in the race. In my view, particularly in light of the Appellant's own evidence before the Inquiry, there is a high likelihood that the contamination occurred at the Appellant's premises. However, I am not satisfied that this is more probable than not.

67. It follows that the Appellant's culpability falls within the second category identified in *McDonough*.

68. The practices adopted at the Appellant's stables at the relevant time about which the Appellant gave evidence, particularly those which allowed facilities to be shared, were at odds with taking proper care against the possibility of contamination. They were also generally at odds with the terms of the Notice

[114] See *Scaysbrook v R* [2022] NSWCCA 69 at [92] and following.
[115] Particularly in those passages of his report extracted at [34] above.

issued to industry participants. Whilst I accept that the Appellant has taken steps with a view to ensuring that the conditions at his stables properly address the danger of contamination, the necessity for both general and personal deterrence leads me to the view that the penalty imposed was appropriate.

69. It follows that the substantive appeal should be dismissed.

THE COSTS APPEAL

The facts

70. The facts giving rise to the costs appeal may be shortly stated.

71. The Appellant's appeal before the Panel was first listed for hearing on 12 January 2024. On that occasion, the Respondent's Solicitor sought an adjournment on the basis that the Respondent had received "*confidential documents overnight in relation to this matter that it needs seven days to deal with*".[116] The application was opposed by counsel for the Appellant[117] but granted by the Panel, with costs being reserved.[118] Ancillary orders were also made requiring the Respondent to made a determination as to whether it proposed to adduce further evidence and, if so, requiring it to advise the Appellant of, and serve, such evidence.

72. The matter then came before the Panel for hearing on 19 January 2024. Evidently, additional evidence had been served by the Respondent in the intervening period.[119] The Respondent again sought an adjournment, making reference to having *"received evidence of the Appellant engaging in serious breaches to the rules since his disqualification period and the Stewards' decision"*.[120] That, it would appear, was the *"confidential"* evidence which grounded the first application that the hearing be adjourned. The Respondent's solicitor submitted that there had been insufficient time in which to finalise the additional evidence

[116] TB 426.
[117] TB 427 – 428.
[118] TB 425.
[119] TB 438.
[120] TB 438.

which was to be relied upon, and that this had been contributed to by the Appellant's absence overseas.[121] The application for an adjournment was again opposed by counsel for the Appellant.[122] The Panel granted the application, although it was *"troubled by the length of time"*.[123] Costs were again reserved.

73. The matter then came before the Panel for hearing on 30 January 2024. The Respondent again made an application for an adjournment, on the basis that it had been unable to progress its investigations against the Appellant due to the Appellant's non-compliance with orders for production.[124] The application was again opposed by the Appellant.[125] The Panel refused the application and ordered that the hearing of the appeal proceed.[126]

The Panel's determination on the question of costs

74. In reasons delivered on 11 March 2024,[127] the Panel determined that the "*merits and justice of the case*" warranted an order that each party pay its own costs. The costs appeal proceeds as a hearing de novo, and its resolution is not dependent upon the identification of error in the Panel's determination. I therefore do not need to canvass the Panel's reasons in respect of costs any further.

The submissions of the parties

75. It is not necessary for me to set out the submissions of the parties in respect of the costs appeal. I have taken them into account. In short, the Appellant seeks that the costs appeal be upheld, that the decision of the Panel be set aside, and that a costs order be made in his favour in respect of the two occasions on which the Panel acceded to applications by the Respondent for an adjournment. That is opposed by the Respondent. If it were the case that I had a broad based discretion (akin to that conferred by a Court) in respect of costs, the Appellant's position may

[121] TB 439.
[122] TB 445 – 450.
[123] TB 452.
[124] TB 454 – 458.
[125] TB 458 – 462.
[126] TB 467.
[127] TB 706 – 709.

have considerable merit. However, such power as I have is regulated (and limited) by legislative provisions to which I now turn.

The relevant legislative provisions

76. Cl 19 of the *Racing Appeals Tribunal Regulation 2015* (the 2015 Regulation) is in the following terms:

> ***19 Costs***
> *(1) On determining an appeal, the Tribunal may order that a party to the appeal pay all or a specified part of the costs of another party to the appeal (including the payment of costs in respect of the hearing or inquiry by the Appeal Panel, Racing NSW, the Greyhound Welfare and Integrity Commission, Greyhound Racing New South Wales, HRNSW, a racing association, a greyhound racing club or a harness racing club in respect of the decision appealed against).*
>
> *(2) The Tribunal must not make an order under subclause (1) unless the Tribunal decides--*
> *(a) the appeal is vexatious or frivolous, or*
> *(b) a party has caused unreasonable delay in the conduct of the appeal, or*
> *(c) a party has caused another party unreasonable cost by the manner in which the appeal has been conducted.*

77. However, the 2015 Regulation has been repealed, and replaced by the *Racing Appeals Tribunal Regulation 2024* (NSW) (the 2024 Regulation) which came into force on 2 September 2024.

78. Cl 22 of the 2024 Regulation is in the following terms:

> ***22 Costs***
> *(1) For the Act, section 18(1)(c), each party to an appeal determined by the Tribunal must pay the party's own costs.*
>
> *(2) The Tribunal may order that a party must pay another party's costs, in whole or in part, if satisfied--*
> *(a) the appeal was frivolous or vexatious, or*
> *(b) the party caused unreasonable delay in the conduct of the appeal, or*
> *(c) the party conducted the appeal in a way that caused the other party to incur unreasonable costs.*

79. Neither party addressed the question of whether the costs appeal should be determined by reference to the 2015 Regulation on the one hand, or the 2024 Regulation on the other. Given that the provisions of cl 19(2) of the 2015 Regulation and those of cl 22(2) of the 2024 Regulation are strikingly similar, not a great deal may turn on the question, but it is nevertheless one which should be addressed, and determination made.

80. The costs appeal was commenced by the filing of a Notice of Appeal on 15 March 2024. At that time, the 2015 Regulation was in force, and it remained in force at the hearing of the costs appeal on 12 August 2024. In those circumstances, I am of the view that cl 19 of the 2015 Regulation applies. I am fortified in that view by the provisions of s 30(1)(b) of the *Interpretation Act 1987* (NSW) which is in the following terms:

> ***30 Effect of amendment or repeal of Acts and statutory rules***
>
> *(1) The amendment or repeal of an Act or statutory rule does not –*
>
> *...*
>
> *(b) affect the previous operation of the Act or statutory rule, or anything duly suffered, done or commenced under the Act or statutory rule ...*

81. Put simply, the costs appeal (to adopt one of the alternatives in s 30(1)(b)), "*commenced"* at a time when the 2015 Regulation was in force. In those circumstances, and for the purposes of this case, the continued operation of the 2015 Regulation is not affected by its repeal. I note that this is the approach I took (albeit in relation to the power of amendment in the respective regulatory provisions) in a matter of *Lee v Greyhound Welfare and Integrity Commission*.[128]

82. The 2015 Regulation confers a discretion on the Tribunal to order that a party to an appeal pay all or part of the costs of another party to an appeal. The costs which the Tribunal may order be paid extend to *"costs in respect of the hearing or inquiry*

[128] A decision of 6 September 2024 at [15] and following.

by the Appeal Panel.....". Those are the costs that the Appellant seeks in the costs appeal.

83. However, the discretion to make an order awarding such costs is fettered by the provisions of cl 19(2) which provides, in effect, that before such discretion can be exercised, I must be satisfied (in the circumstances of the present case) that:

    (i) **the costs appeal** is vexatious or frivolous; or

    (ii) a party has caused unreasonable delay **in the conduct of the costs appeal**; or

    (iii) a party has caused another party unreasonable cost by **the manner in which the costs appeal has been conducted.**

84. In other words, the terms of cl 19 are such that the exercise of the discretionary power to award any costs of the proceedings before the Panel is broadly referable to the conduct of the costs appeal. Unless one of the circumstances in cl 19(2) is made out, no order can be made.

85. The Appellant, who by the costs appeal effectively makes an application for the costs of two adjournments of the proceedings before the Panel, would obviously not suggest that such appeal is vexatious or frivolous. Accordingly, cl 19(2)(a) has no application. There is no suggestion that either party has caused any unreasonable delay in the conduct of the costs appeal and accordingly, c. 19(2)(b) has no application. Finally, there is nothing to support a conclusion that the Respondent has caused the Appellant unreasonable cost by the manner in which the costs appeal has been conducted. Accordingly, cl 19(2)(c) has no application.

86. It follows that none of the alternatives for which cl 19 provides, and which enliven the exercise discretion to make a costs order, are made out. I should also say that even if I am wrong as to the application of cl 19 of the 2015 Regulation, and if the view were taken that cl 22 of the 2024 Regulation is the operative provision, the outcome would be the same.

87. It follows that neither the 2015 Regulation nor the 2024 Regulation support the making of the orders sought by the Appellant in the costs appeal.

88. For all of these reasons, the costs appeal must be dismissed.

ORDERS

89. For the reasons given, I make the following orders:

1. The substantive appeal is dismissed.
2. The costs appeal is dismissed,
3. The appeal deposit in each case is forfeited.

THE HONOURABLE G J BELLEW SC

8 October 2024