RACING APPEALS AND DISCIPLINARY BOARD

400 Epsom Road
Flemington VIC 3031

Telephone: 03 9258 4260
Fax: 03 9258 4848
radboard@racingvictoria.net.au

HEARING RESULT

Distribution:
Chief Executive
Group Integrity Services, Group Racing
Group Racing Development
Credit Controller
ATA
TVN
Office of Racing
T Moxon – National Drug Register
Racing Press

FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 31 January 2013

SUBJECT: **PENALTY HEARING RESULT – TRAINER: CON KARAKATSANIS**

Panel Judge Russell Lewis (Chair), Mr Brian Forrest (Deputy), Mr Josh Bornstein.

Appearances Mr Terry Tobin QC, instructed by Mr John Carmody of John Carmody & Co, appeared as Counsel for Mr Con Karakatsanis.

Dr Cliff Pannam QC, instructed by Racing Victoria's James Ogilvy, appeared as Counsel for the Stewards.

Charge 1 Breach of AR 175(k)

The Committee of any Club or the Stewards may penalise:
Any person, who has committed a breach of the Rules, or whose conduct or negligence has led or could have led to a breach of the Rules.

Charge 2 Breach of AR 175(l)

The Committee of any Club or the Stewards may penalise:
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.

The charges relating to an alleged attempt to stomach tube the horse *Howmuchdoyouloveme* on raceday prior to it running in Race 8 the *Yellowglen Stakes* (Group 2) at Flemington on Saturday, 3 November 2012.

Plea Charges 1 & 2 – not guilty.

Decision On 22 January 2013 the Board found both charges proved.

Penalty On each of the 2 charges Mr Con Karakatsanis disqualified for a period of 9 months – to be served concurrently and to commence at midnight on 14 February 2013.

Application to VCAT for a review of the decision dismissed and the RAD Board's decision and penalty affirmed.

Application for leave to appeal dismissed by the Supreme Court.

Application for leave to appeal on question of law dismissed by the Court of Appeal.

Georgie Gavin
Registrar - Racing Appeals and Disciplinary Board

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FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 31 January 2013

SUBJECT: **PENALTY HEARING RESULT – TRAINER: TONY KARAKATSANIS**

Panel Judge Russell Lewis (Chair), Mr Brian Forrest (Deputy), Mr Josh Bornstein.

Appearances Mr Terry Tobin QC, instructed by Mr John Carmody of John Carmody & Co, appeared as Counsel for Mr Tony Karakatsanis.

Dr Cliff Pannam QC, instructed by Racing Victoria's James Ogilvy, appeared as Counsel for the Stewards.

Charge 1 Breach of AR 175(k)

The Committee of any Club or the Stewards may penalise:
Any person, who has committed a breach of the Rules, or whose conduct or negligence has led or could have led to a breach of the Rules.

Charge 2 & 3 Two breaches of AR 175(l)

The Committee of any Club or the Stewards may penalise:
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.

The charges relating to an alleged attempt to stomach tube the horse *Howmuchdoyouloveme* on raceday prior to it running in Race 8 the *Yellowglen Stakes* (Group 2) at Flemington on Saturday, 3 November 2012.

Plea Charges 1-3 inclusive – not guilty.

Decision On 22 January 2013 the Board found all 3 charges proved.

Penalty On each of the 3 charges Mr Tony Karakatsanis disqualified for a period of 2 years – to be served concurrently and to commence immediately.

Application to VCAT for a review of the decision dismissed and the RAD Board's decision and penalty affirmed.

Application for leave to appeal dismissed by the Supreme Court.

Application for leave to appeal on question of law dismissed by the Court of Appeal.

Georgie Gavin
Registrar - Racing Appeals and Disciplinary Board

TRANSCRIPT OF

PROCEEDINGS

RACING APPEALS AND DISCIPLINARY BOARD

HIS HONOUR JUDGE R.P.L. LEWIS, Chairman
MR B. FORREST, Deputy Chairman
MR J. BORNSTEIN

EXTRACT OF PROCEEDINGS

PENALTY

IN THE MATTER OF HOWMUCHDOYOULOVEME

TRAINER: CON KARAKATSANIS
REGISTERED STABLEHAND: TONY KARAKATSANIS

MELBOURNE

THURSDAY, 31 JANUARY 2013

DR C.L. PANNAM QC, with MR J. OGILVY appeared on behalf of the RVL Stewards

MR T. TOBIN QC, with MR J. CARMODY appeared on behalf of Mr C. Karakatsanis and Mr T. Karakatsanis

---

CHAIRMAN: Tony and Con Karakatsanis, you have each been found guilty of offences relating to the intended stomach-tubing of a horse under your care and control, Howmuchdoyouloveme, on race day, 3 November 2012, prior to leaving for Flemington racecourse where the horse was engaged to race.

This was a premeditated joint enterprise in which each of you were to play important roles. You, Tony, very experienced in stomach tubing, were to undertake the procedure and you, Con, were to ensure the security of the premises whilst the procedure was carried out. As we now know, the implementation of the scheme was thwarted by the arrival of the Compliance Assurance Team.

In this case, the penalties will impact upon the livelihood of both of you. Nevertheless, the penalties to be imposed must reflect the Board's denunciation of your conduct, as well as the damage done to the image of racing, and should act as a deterrence to each of you, as well as to others who may be tempted to engage in such a practice. It would seem that in your case, Tony Karakatsanis, previous penalties which were imposed did not deter you from reoffending.

The Board has given consideration to the submissions of Dr Pannam and Mr Tobin. In the Board's opinion, there are no cogent mitigating factors in this case.

Tony Karakatsanis, on each of the three charges, the Board imposes a penalty of two years' disqualification, each penalty to be served concurrently. The period of two years' disqualification is to commence immediately.

Con Karakatsanis, on each of the two charges, a period of nine months' disqualification is imposed, to be served concurrently. In your case, the period of disqualification is to commence at midnight on 14 February 2013 to enable you to make any necessary arrangements for the removal of horses from your stables.

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FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 22 January 2013

SUBJECT: **HEARING RESULT – TRAINER: CON KARAKATSANIS**

Panel Judge Russell Lewis (Chair), Mr Brian Forrest (Deputy), Mr Josh Bornstein.

Appearances Mr Terry Tobin QC, instructed by Mr John Carmody of John Carmody & Co, appeared as Counsel for Mr Con Karakatsanis.

Dr Cliff Pannam QC, instructed by Racing Victoria's James Ogilvy, appeared as Counsel for the Stewards.

Charge 1 Breach of AR 175(k)

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Charge 2 Breach of AR 175(l)

The Committee of any Club or the Stewards may penalise:
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.

The charges relating to an alleged attempt to stomach tube the horse *Howmuchdoyouloveme* on raceday prior to it running in Race 8 the *Yellowglen Stakes* (Group 2) at Flemington on Saturday, 3 November 2012.

Plea
Charge 1 - not guilty.
Charge 2 - not guilty.

Decision
Charge 1 – the Board finds the charge proved.
Charge 2 – the Board finds the charge proved.

Georgie Gavin
Registrar - Racing Appeals and Disciplinary Board

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FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 22 January 2013

SUBJECT: **HEARING RESULT – TRAINER: TONY KARAKATSANIS**

Panel Judge Russell Lewis (Chair), Mr Brian Forrest (Deputy), Mr Josh Bornstein.

Appearances Mr Terry Tobin QC, instructed by Mr John Carmody of John Carmody & Co, appeared as Counsel for Mr Tony Karakatsanis.

Dr Cliff Pannam QC, instructed by Racing Victoria's James Ogilvy, appeared as Counsel for the Stewards.

Charge 1 Breach of AR 175(k)

The Committee of any Club or the Stewards may penalise:
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Charge 2 & 3 Two breaches of AR 175(l)

The Committee of any Club or the Stewards may penalise:
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.

The charges relating to an alleged attempt to stomach tube the horse *Howmuchdoyouloveme* on raceday prior to it running in Race 8 the *Yellowglen Stakes* (Group 2) at Flemington on Saturday, 3 November 2012.

Plea
Charge 1 - not guilty.
Charge 2 - not guilty.
Charge 3 - not guilty.

Decision
Charge 1 - the Board finds the charge proved.
Charge 2 - the Board finds the charge proved.
Charge 3 - the Board finds the charge proved.

Georgie Gavin
Registrar - Racing Appeals and Disciplinary Board

TRANSCRIPT OF

PROCEEDINGS

RACING APPEALS AND DISCIPLINARY BOARD

HIS HONOUR JUDGE R.P.L. LEWIS, Chairman
MR B. FORREST, Deputy Chairman
MR J. BORNSTEIN

EXTRACT OF PROCEEDINGS

DECISION

IN THE MATTER OF HOWMUCHDOYOULOVEME

TRAINER: CON KARAKATSANIS
REGISTERED STABLEHAND: TONY KARAKATSANIS

MELBOURNE

TUESDAY, 22 JANUARY 2013

DR C.L. PANNAM QC, with MR J. OGILVY appeared on behalf of the RVL Stewards

MR T. TOBIN QC, with MR J. CARMODY appeared on behalf of Mr C. Karakatsanis and Mr T. Karakatsanis

---

CHAIRMAN: Con Karakatsanis, hereinafter referred to as "Con", you are a licensed trainer and have been charged with a breach of Australian Rule of Racing 175(k) and Australian Rule 175(l), and you, Tony Karakatsanis, hereinafter called "Tony", a registered stablehand and father of Con, have been charged with a breach of Australian Rule 175(k) and two breaches of Australian Rule 175(l). The particulars of each charge are set out in the notice of charges and I do not intend to repeat them.

The Stewards bear the onus of satisfying the Board that the charges have been proved. These are serious offences and, accordingly, the standard of proof is that referred to in the well-known case of Briginshaw v Briginshaw, in particular the judgment of Sir Owen Dixon. The Board must consider each charge in the light of the evidence applicable to it and must be comfortably satisfied that each charge has been proved to the requisite degree. The outcome will largely depend on what inferences the Board draws from the facts and circumstances which have been proved to its satisfaction, as well as the credibility of witnesses. In relation to the drawing of inferences, the Board adopts the approach of the Victorian Court of Appeal in the case of Chapman v Cole (2006) 15 VR 150.

THE FACTS

On 3 November 2012, the RVL Compliance Assurance Team, comprised of Mr Dion Villella and Mr Kane Ashby, arrived unannounced at the stables of Mr Steve Richards at Flemington. Mr Richards had made his stables available

to Con. The horse, Howmuchdoyouloveme, was housed in box number 11 and was to run in the eighth race at Flemington on that day. Race time was 4.30. The horse was required to be on course by 1.30.

The Stewards, as a result of information received at approximately 11 am, had positioned themselves at vantage points outside the stables. Mr Pat Cannon, a licensed trainer, who was assisting Con while he was at Flemington, arrived with a horse float at approximately 12.40 pm and parked it with tailgate lowered outside the double front gate and waited for Con to arrive.

At approximately 1 pm, Con, accompanied by his father Tony and a family friend, Chris Wood, arrived in Con's vehicle. The Board is satisfied that Con, who had the keys to the stables, unlocked the gates which were secured by a chain and padlock. Con also unlocked the door to the feedroom which was part of the stable complex but was outside the area contained by the gates; that is, the feedroom could be entered from outside the complex without going through the gates; contrary-wise, if one was inside the stable area, one had to pass through the front gates in order to access the feedroom.

The three men entered the stable area accompanied by Cannon. The Stewards took up positions closer to the stable complex, Villella near the front and Ashby at the rear gates, where he had a view of box number 11 and the adjacent area. It was in that position where Ashby said he overheard part of a conversation between Con and Tony. At that stage, Cannon had entered box number 11 and Con and Tony were either in or close to that box.

Ashby said he heard a disjointed part of what Con said to Tony, "Phone ring. Look after the gate." Con denied that he had had this conversation. Tony had no recollection of hearing it.

Ashby then said he heard Con say, as he began to head towards the front of the stable area, "I'll call you if there's any trouble." Ashby noted this conversation in his racebook about 15 or 20 minutes later. Con disagreed that that was what he said as he was leaving the premises. His version was, "Call me if there's any problems." At all events, Ashby, now alarmed at what he had heard and observed, rang Villella at 1.09 pm to, "Go, go." He said that by now, Con had reached the front gates, just pausing briefly to speak to Wood who was near the washbay. Ashby observed Con to close the open half of the gates.

Villella then took up the story. He said he observed Con standing outside the front gates, holding a chain and padlock; see transcript pages 53 and 54. The chain was looped in such a way that Villella formed the view that Con was in the process of locking the gates. Con denied that he was in the process of locking the gates or intended to do so. He admitted that he was holding the chain and was "playing with the padlock". He said that the closing mechanism of the padlock was stiff and was difficult to snap shut. In this regard, he was supported by Mr Richards; see exhibit 7. Villella said that he had tested the padlock on the following Monday and was able to operate it, albeit with a little effort. Con conceded that he had opened and closed the padlock on other occasions.

Villella entered the premises and after requiring Con, Tony and Wood to empty their pockets, requested Ashby to enter box number 11. Ashby produced the bag containing the items described in the charges and further and better particulars. These were two lengths of plastic hose, a funnel, a small bucket and a sachet of powder. The Stewards, not unsurprisingly, asked Con and Tony to explain what the bag and its contents were doing in the box occupied by the horse. Tony said that he had picked up the wrong bag from the feedroom; see transcript page 150. He said he had meant to carry a bag which he believed to contain a biscuit of hay, together with a bucket of hard feed and put them in box number 11. When it was pointed out during a demonstration he gave on the day to steward Villella that the other bag - that is, the bag containing the biscuit of hay - was in fact empty, he said that he must have omitted to fill it earlier that day, but not being aware of that omission, thought that the bag with the equipment in it was the bag containing the biscuit of hay. He said when he picked up the wrong bag, there was nothing about its shape or weight to alert him to the fact that it was the wrong bag.

During the course of this hearing, the bag containing the equipment and the bag which was supposed to contain the biscuit of hay were produced. The former bag, which was whitish in colour, was easily identified because on one side there were several bold red lines of lettering as well as the manufacturer's logo. The other side was blank. The latter bag, which was also whitish on one side, was substantially green and purple on the other side and was therefore easily identifiable. The former bag was the bag which had been brought to Melbourne by Tony and Con. The equipment had been put into it in Sydney

and the bag had contained the equipment thereafter which was used when Tony had drenched the horse on 23 and 30 October 2012.

Tony denied that he knew he had taken the equipment bag to box number 11. He said that the first time he had become aware of it was when Ashby confronted him with it. Tony gave the Board a colourful demonstration of how he came to pick up the wrong bag. He vehemently denied that he had put the bag containing stomach-tubing equipment in box number 11 so that a pre-race drench could be effected.

During the course of cross-examination of Con, it was put that he and his father intended to stomach-tube the horse pre-race with the substance found in the equipment bag. However, as the evidence proceeded, it became clear that - the sachet of powder, mainly consisting of sodium chloride and less than 5 per cent of bicarbonate - to stomach drench with a saline drench three hours before a race would be the height of folly. Dr Pannam was formed to concede that a saline drench was only appropriate post-race. He then changed tack and put it to Tony, who was familiar with the TCO2 resting levels of the horse, that he intended to stomach-tube the horse in order to top up his bicarbonate levels so that its levels would be closer to 36 millimoles per litre in plasma, thereby enhancing performance. The evidence had established that approximately half a kilogram of bicarbonate was in the feedroom. The evidence also revealed that the horse was fed bicarbonate on a daily basis in its evening feed.

CONCLUSIONS

This is essentially a circumstantial case, where the credit and credibility of witnesses are of paramount importance. There are a number of factual disputes in this case but the two critical issues are (1) did Tony deliberately place a bag in box number 11 knowing that it contained stomach-tubing equipment; (2) when Con was at the front gate with the chain and padlock in his hands, was he in the process of locking the gates?

Re the first issue: Tony was quite familiar with the bag containing the equipment and therefore with its identifying characteristics which were substantially different from the bag which was to contain a biscuit of hay. He was quite familiar with the area in the feedroom where he had left it. It had a shape which was not flat because of the loose items it contained. Indeed, Con, at this hearing, at pages 133 and 134, told the Board that his father was the custodian of the bag, it was his equipment. Tony was familiar with the drenching equipment and was accustomed to drenching the horse. By contrast, Con was unable to drench the horse.

If, as Tony claims, he was carrying a bag containing a biscuit of hay, then there should have been remaining, in the designated area in the feedroom, the bag which contained the drenching equipment, but the evidence reveals that there were only empty bags in his allocated space.

Re the second issue: in his evidence, Con said he was exiting the premises, intending to meet a friend at the racecourse. He knew that the horse had been

fitted with a headstall and agreed, at page 127 of the transcript, that everything was ready for the horse to be loaded. He was asked the obvious question: why then was he holding the chain and playing with the padlock? Why did he not simply leave the front gate open, at the very least unlocked, knowing that the horse was under the control of Mr Cannon, a licensed trainer, and that the horse was ready to be loaded onto the float which was parked with tailgate down just outside the front gate?

Con admitted at this hearing that he had pulled the chain through into a position where it could be padlocked. However, at the Stewards' inquiry on 3 November at the racecourse, he had denied that he did so; see tab 2C, pages 45 and 46. In particular, when challenged in cross-examination, he was unable to explain to the Board why he acted in such a way, that is, pulled the chain through. Moreover, the Board was far from impressed with his explanation that he was playing with the padlock because it was stiff. Contrary to the Board's reservations concerning Con's explanation for holding the chain and padlock, the Board accepts the evidence of Mr Villella who was in an excellent position to observe Con when he was at the front gate.

Another important piece of evidence was the issue of the twitch. Con had said at the Stewards' inquiry that the horse had a fiery temperament and always required a rearing bit and a twitch when being stomach-tubed. On the other hand, Tony confirmed at the Stewards' inquiry that the horse was "very, very easy to drench", and at page 52, see tab 2C, said, "I don't need a twitch."

As the Board has previously noted, Tony was very experienced at stomach-tubing this horse. When challenged about this significant discrepancy, Tony said at this hearing, "I made a mistake when I said to the Stewards that I did not need a twitch;" see transcript page 158.

A further obvious discrepancy appears in the evidence of Con at pages 89 and 90 of the transcript. He gave evidence that he had seen his father intubate the horse 15 to 20 times and on each occasion a rearing bit and a twitch had been applied. Nowhere in the evidence of Tony is there reference to the use of a rearing bit. The evidence further revealed that there was no twitch in the equipment bag, notwithstanding the fact that the tubing equipment had been placed in the bag under Tony's control at Con's New South Wales stables. By way of explanation, both men said that when travelling, they used to borrow a twitch and that there was a twitch at Mr Richards' stables.

Having considered both oral and documentary evidence, the Board has come to the conclusion that the version of events given by Tony and Con as to the critical issues identified should not be accepted. The Board finds that both men were unreliable witnesses.

The Board is comfortably satisfied to draw the following inferences: (1) that Tony was aware that the bag he carried to the horse's box contained tubing equipment; (2) that Con was in the process of locking the front gates of the stables; (3) that Tony and Con intended to tube the horse on race day prior to leaving the stables.

In summary, the Board has arrived at the following conclusions: on 3 November 2012, shortly before the horse, Howmuchdoyouloveme, was to leave for Flemington racecourse, Tony Karakatsanis, with the prior knowledge and acquiescence of his son Con was preparing to stomach-tube the horse and had the time and opportunity to do so. As part of his preparation, Tony had placed the bag containing some of the accoutrements of stomach-tubing equipment in the horse's box. Con, who was an active participant in the arrangements, was in the process of securing the stable premises. Tony was unable to complete the necessary preparations and therefore the intubation of the horse was unable to be achieved because of the arrival of the Compliance Assurance Team.

Having come to these conclusions, the Board is satisfied that each charge against Tony and Con Karakatsanis has been proven. The Board will hear submissions on the question of penalty next week on a day to be announced.

VCAT | victorian civil & administrative tribunal

REVIEW AND REGULATION LIST

RECEIVED 23/4/13

VCAT Reference: B40/2013
Your Reference:

22 April 2013

Racing Victoria Limited
400 Epsom Road
FLEMINGTON VIC 3031

Dear Sir/Madam

Re: Mr Con Karakatsanis, Mr Tony Karakatsanis v Racing Victoria Limited

I enclose a copy of VCAT's Order in this matter.

Please Note:

Most VCAT decisions where VCAT gave written reasons for the decision, are available via our website (www.vcat.vic.gov.au) which has a link to take you to the Australasian Legal Information Institute's website (AustLII) where records of the decisions are stored and may be accessed.

Decisions should appear on AustLII within 14 days after the decision is posted. We suggest you use the "Recent Updates List" function on AustLII to find recently released cases.

Yours faithfully

Melissa Biram
Registrar, Administrative Division

Encl:

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION
REVIEW AND REGULATION LIST **VCAT Reference: B40/2013**

FIRST APPLICANT:	Mr Con Karakatsanis
SECOND APPLICANT:	Mr Tony Karakatsanis
RESPONDENT:	Racing Victoria Limited
WHERE HELD:	Melbourne
BEFORE:	His Honour Senior Sessional Member J Nixon
HEARING TYPE:	Hearing
DATE OF HEARING:	19, 20, 21 and 26 March 2013 and 3 April 2013
DATE OF ORDER:	22 April 2013

ORDERS

Applications re conviction dismissed.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL VCAT

HIS HONOUR SENIOR SESSIONAL MEMBER J NIXON

APPEARANCES:

For the Applicants:	Mr Gavin Burns
For the Respondent:	Dr C L Pannam QC with Mr M Stirling

REASONS

Background

1. Howmuchdoyouloveme ('the horse') was trained by the first applicant, Con Karakatsanis (by agreement referred to as 'Con') in New South Wales. At all relevant times Con was licensed as a visiting trainer with Racing Victoria Limited.

2. The second applicant, Tony Karakatsanis (by agreement referred to as 'Tony') was a stablehand for the first applicant Con. At all relevant times Tony was registered with Racing Victoria Limited as a visiting stablehand.

3. On 3 November 2012, the horse was entered in race 8 at Flemington Racecourse, the Yellowglen Stakes (Group 2) over 1200m.

4. On 3 November 2012, the horse was stabled in Box 11 in the stables of Mr Steve Richards at Flemington.

5. Following a stable inspection on 3 November 2012 by Kane Ashby and Dion Villella, stewards employed by Racing Victoria Limited, who were members of the respondent's compliance assurance team, the respondent charged Con with a breach of AR 175(k) and a breach of AR 175(l) while Tony was charged with a breach of AR 175(k) and two breaches of AR 175(l).

6. The charges laid by the respondent against the first applicant Con were as follows:

> **Con Karakatsanis,** take notice that the Racing Victoria Limited Stewards lay the following charges against you:
>
> **CHARGE ONE: AR 175(k)**
>
> The Stewards charge you with breaching AR 175(k) which reads as follows:
>
> *AR 175 The Committee of any Club or the Stewards may penalise:*
> ...
> *(k) Any person, who has committed a breach of the Rules, or whose conduct or negligence has led or could have led to a breach of the Rules.*
>
> ***Particulars***
>
> 1. You were at all relevant times licensed with Racing Victoria as a visiting trainer.
> 2. On 3 November 2012, *Howmuchdoyouloveme*, which is a horse trained by you, was entered in race 8, the Yellowglen Stakes (Group 2) over 1200m.
> 3. On or before 3 November 2012, you arranged for Tony Karakatsanis to stomach-tube *Howmuchdoyouloveme* prior to race 8.
> 4. your conduct could have led to a contravention of AR 64G(1).
>
> **CHARGE TWO: AR 175(l)**
>
> *AR 175 The Committee of any Club or the Stewards may penalise:*
> ...

(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.

Particulars

1. You were at all relevant times licensed with Racing Victoria as a visiting trainer.
2. On 3 November 2012, the horse, *Howmuchdoyouloveme*, which is trained by you, was entered in race 8, the Yellowglen Stakes (Group 2) over 1200m.
3. In arranging with and/or authorising Tony Karakatsanis to stomach-tube *Howmuchdoyouloveme* prior to race 8.
4. In arranging with and/or authorising Tony Karakatsanis to stomach-tube *Howmuchdoyouloveme* (as set out in particular (3) above), you conspired with him to commit a breach of AR 64G(1).

7. The charges laid by the respondent against the second applicant, Tony, were as follows:

Tony Karakatsanis, take notice that the Racing Victoria Limited Stewards lay the following charges against you:

CHARGE ONE: AR 175(k)

The Stewards charge you with breaching AR 175(k) which reads as follows:

AR 175 The Committee of any Club or the Stewards may penalise:

...

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

Particulars

1. You are, and were at all relevant times, registered with Racing Victoria as a visiting stablehand.
2. On 3 November 2012, you were assisting licensed trainer Con Karakatsanis, with the horse, *Howmuchdoyouloveme*, which was entered in race 8, the Yellowglen Stakes (Group 2) over 1200m.
2. On or before 3 November 2012, you arranged with Con Karakatsanis, and/or agreed, to stomach-tube *Howmuchdoyouloveme* prior to race 8.
3. Prior to race 8 on 3 November 2012, you placed a bag containing two nasogastric tubes, a funnel, a bucket and powder in *Howmuchdoyouloveme's* box for the purpose of stomach-tubing the horse prior to race 8.
4. Your conduct, as set out in particulars 2-4 above, could have led to a breach of AR 64G(1).

CHARGE TWO: AR 175(l)

AR 175 The Committee of any Club or the Stewards may penalise:

...

(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.

Particulars

1. You were, at all relevant times, registered with Racing Victoria as a visiting

stablehand.

2. On 3 November 2012, you were assisting licensed trainer Con Karakatsanis with the horse, *Howmuchdoyouloveme*, which was entered in race 8, the Yellowglen Stakes (Group 2) over 1200m.
3. On or before 3 November 2012, Con Karakatsanis arranged with and/or authorised you to stomach-tube *Howmuchdoyouloveme* prior to race 8.
4. In arranging with and/or being authorised by Con Karakatsanis to stomach-tube *Howmuchdoyouloveme* (as set out in particular (3) above), you conspired with him to commit a breach of AR 64G(1).

CHARGE THREE: AR 175(1)

AR 175 The Committee of any Club or the Stewards may penalise:

...

(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.

Particulars

1. You were, at all relevant times, registered with Racing Victoria as a visiting stablehand.
2. On 3 November 2012, you were assisting licensed trainer Con Karakatsanis with the horse, *Howmuchdoyouloveme*, which was entered in race 8, Yellowglen Stakes (Group 2) over 1200m.
3. Prior to race 8 on 3 November 2012, you placed a bag containing two nasogastric tubes, a funnel, a bucket and powder in *Howmuchdoyouloveme's* box for the purpose of stomach-tubing the horse prior to race 8.
4. In performing the act referred to in particular (3), you attempted to commit a breach of AR 64G(1).

8. AR 65G(1) states:

> No horse engaged to run in a race, official trial or jump-out shall without the permission of the stewards be stomach-tubed within 24 hours of the appointed starting time for such race, official trial or jump-out. For the purposes of this rule 'stomach-tubed' means any application to a horse of a naso-gastric tube.

9. The charges were heard by the Racing Appeals and Disciplinary Board ('the Board') on 7, 8 and 21 January 2013 and on 22 January 2013 the Board found the charges proved against each applicant and the Board imposed penalties on each applicant on 31 January 2013.

10. On 6 February 2013, each applicant filed an application to review the Board's decision to convict the applicants and impose a penalty on each applicant.

11. Section 83 OH(1) of the *Racing Act 1958* provides that a person whose interests are affected by a decision made by a Racing Appeals and Disciplinary Board may apply to the Victorian Civil and Administrative Tribunal ('the Tribunal') for review of that decision.

12. Each applicant is a person whose interests are affected by the decision subject to review. The applications were lodged with the specified time period.

13. The Tribunal's functions in reviewing a decision of the Board are not appellate. On review, the Tribunal stands in the shoes of the original decision-maker and must determine the correct decision on the material before it. The review is conducted without any presumption as to the correctness or otherwise of the decision subject to review. The Tribunal is not confined to the material upon which the original decision was made and may receive evidence or material which was not before the original decision-maker.

14. The Racing Victoria Limited stewards bear the onus of satisfying the Tribunal that the charges have been proved. The applicable standard of proof is that enunciated in *Briginshaw v Briginshaw* 60 CLR 336). I must consider each charge separately in the light of the evidence applicable to that charge but it is sufficient that the affirmative of an allegation is made out to the reasonable satisfaction of the Tribunal. Dixon J stated:

> But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing form a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony or indirect inferences.

These are serious allegations and the applicants do face a sanction which has the potential to affect their livelihood. Applying the *Briginshaw* standard I must be comfortably satisfied that each charge has been proved to the requisite standard.

15. As stated in paragraphs 6 and 7, each applicant faces a charge under AR 175(k). The respondent alleges that the conduct of the particular applicant 'could have led' to a breach of AR 64G(1). I accept the respondent's submission that the stewards are not required to prove the nature of the substance which was intended to be administered by stomach-tubing in order to establish that Con or Tony's conduct could have led to a breach of AR 64G(1). The relevant issue in a charge under AR 175(k) is whether the respondent has proved an intention on the part of the particular applicant to apply a naso-gastric tube to a horse.

16. So far as the charge against Con and the two charges against Tony which allege a breach of AR 175(l) are concerned, as stated by the respondent, the relevant breach in issue against Con and against Tony in the first of his two charges under this rule is also alleged to breach AR 64G(1) – the allegation common to each of these charges is that Con 'arranged with and/or authorised' Tony to stomach0-tube the horse and that constituted a conspiracy to commit a breach of AR 64G(1). The second charge against Tony alleging a breach of AR 175(l) alleges that by placing the bag containing tubing gear in the horse's box for the purpose of stomach-tubing the horse prior to race 8, he attempted to commit a breach of AR 64G(1). The necessary foundation for the arrangement or authority is provided by evidence given by Con that he would not allow Tony to do anything to the horse without his permission and that anything done to the horse by Tony would have been done with his (ie, Con's) consent. Tony, for his part, stated that he would not treat or stomach-tube the horse without first discussing it with Con.

17. As the Board stated in its findings, there are a number of factual disputes in this case. However, the critical issue is whether or not Tony picked up a bag (Ex 9) which contained the tubing equipment in the feed room and took that bag to the horse's box in the mistaken belief that it contained a biscuit of hay. A second important issue is whether Con was in the process of locking the gates when he was at the front gates with the chain and padlock in his hands.

18. The horse was normally stabled and trained by Con at Rosehill. On 13 October 2012, the horse and its gear was transported to Melbourne overnight by a commercial float. Con met the float in Melbourne and the horse was stabled at Caulfield. After the horse raced at Caulfield on 20 October and was then moved to Flemington in order to be on course for its two remaining Victorian runs. At Flemington the horse was in Steve Richards' stables where it was allocated Box 11. As already noted, the horse was to run in race 8 at Flemington on 3 November 2012. The race was scheduled to start at 4.30pm and the horse was due on course at 1.30pm.

19. On 3 November 2012, Con, Tony and Mr Chris Wood arrived at Richards' stables between 6.00am – 6.30am for Con and Tony to attend to the horse. Wood was a close friend of Con and Tony and Con had trained horses for Wood in the past. Con and Tony mixed a saline powder in the feed room and placed it in the chaff bag (Exhibit 9), which contained the stomach-tubing apparatus. A feed mix was also prepared in a white bucket. Tony, Con and Wood left the stables between 7.30am – 8.00am.

20. Between about 8.00am and 8.30am, Kane Ashby and Dion Villella, stewards and members of the RUL compliance assurance team, arrived at Richards' stables where they inspected 3 horses trained by Paul Perry, an interstate trainer. These horses were stabled in Boxes 8, 9 and 10 and were entered for races that day. Ashby and Villella did not inspect Howmuchdoyouloveme at that time.

21. Ashby and Villella received information that the horse was to be stomach-tubed at 11.00am. As a result of hearing that information, Ashby took up a position where he could see the rear entrance to the stables while Villella was in a position where he could see anybody who entered the area adjacent to the front gates, although, from his position, he could not see the front gate itself.

22. Mr Pat Cannon, a licensed trainer, who was assisting Con on this day, arrived at Richards' stables at 12.37pm. He parked the float with its tailgate lowered outside the double front gate of the stables to await Con's arrival.

23. At approximately 1.02pm Con, Tony and Chris Wood arrived at Richards' stables in Con's car. The car was parked near the feed room. Con unlocked the feed room door which, as the Board noted, was part of the stable complex although it was outside the area contained by the gates. Con also unlocked the front gates which were secured by chains and a padlock. Ashby had taken up a position at the rear end of the stables where he was able to look through a gap between a steel upright and the brush fence before moving a few feet to make observations through the triangle of the rear stable door. He alternated between those positions and had a view of the area around Box 11, as well as a view up to the front gates. I accept Ashby's evidence that he saw Con, Tony, Pat Cannon and Wood enter the stables at about the same time. I do not accept evidence to the contrary. Wood stated in evidence that before entering the stable

complex by himself some 5 minutes or more after alighting from Con's car, he had smoked a cigarette. I regarded Wood as a very partisan witness who was prepared to endeavour to assist the applicants' case at all costs and I did not regard Wood as a reliable witness. Ashby, on the other hand, impressed as an observant man who was, as the respondent submitted, a direct and responsive witness who was prepared to make concessions where appropriate. I regarded Villella also as a reliable and accurate witness. From his position, behind the rear gates, Ashby said he heard parts of conversations between Con and Tony who were near Box 11 at a time when Pat Cannon had entered Box 11 to put a head collar on the horse. I accept Ashby's evidence that he hear the words 'phone', 'ring' and 'look after the gate'. Ashby then stated that he heard Con say to Tony as Con was moving towards the front gates, 'I'll call you if there's any trouble'. Ashby made a note in his Racebook (Ex 7) some twenty minutes after he left the stables. In a tape recorded interview conducted in the stables Ashby used the phrase 'I'll ring you if there's any issues' which he attributed to Con. At the stewards inquiry conducted in order to determine whether the horse would be permitted to run in race 8, Ashby said he heard the words 'I'll ring you if there's any trouble'. Con disagreed that that was what he said as he was leaving the stables and stated that he said 'Call me if there's any trouble'. I reject Cannon's evidence which he gave to the inquiry on 9 November to the effect that Con said to Tony 'Call me' or 'Call me if there's any trouble'. Those were the precise words that Con stated he used. However, at the stable interview on 3 November when he was asked whether he heard the conversation, Cannon replied 'Not – no, I didn't. I heard 'em talking but I didn't hear what they were saying'. I accept the respondents' submission that it cannot be right that he did not hear the words allegedly spoken on 3 November, but at the inquiry held 6 days later, he had what might be described as total recall. As Dr Pannam observed, there was a long association between Cannon and Con and Tony. I accept that the words printed and emphasised in Ashby's Racebook were the words spoken by Con, ie, 'I'll call you if there's any trouble'. I am satisfied to the requisite *Briginshaw* standards that the words printed in the Racebook were those spoken by Con. In his evidence, Ashby stated that soon after Con left the stables, he heard 'Significant noise of the chain up against the steel upright of the fence which to my mind thought he may well have been locking the gate'. Con's evidence that he had 'Wrapped the chain around and through the triangle part of the gate' and that he was playing with and jiggling the lock at that time, provides some support for Ashby's statement that he heard significant noise which led to his belief that Con may have been locking the gate. There remains the issue of the hand signal. It is common ground that Con gave a hand signal and in his evidence Con stated that he was signalling to Tony to bring the horse up while Ashby interpreted the signal as a warning to those inside the stables. Before the Board, Con conceded that he had pulled the chain through into a position where it could be padlocked. However, on 9 November, at the stewards inquiry, he denied that had occurred. He told the inquiry that he was trying to work the lock out and was attempting to play with the lock. Con agreed with the proposition put to him at that inquiry that if he was to thread the chain through, he was 'literally closing it up'. Con's explanation for playing with the padlock was because it was stiff. He maintained that the closing mechanism was stiff and was difficult to snap shut. Mr Richards, in a statement, lent some support to Con's claim about the lock. Nonetheless, the evidence established that the same lock remains on the gate. Villella stated on the following Monday he tested the padlock and said 'It just requires a little force but nothing out of the ordinary'. He also said 'It just requires you to put your top hand on it and give it a clasp down. It doesn't just –

you know – you can't do it with your fingers to push it in. It needs a bit of force between the two hands'. Con had acknowledged that he had opened and closed the padlock on other occasions and Con had opened the gates before he and others entered the stable on this occasion. I regard his explanation for playing with the lock, namely, 'I don't want the people leaving and locking up to have any problems with it' as a feeble explanation. Villella having been told on the phone by Ashby at 1.09pm to 'Go! Go!', was in a good position to observe Con's actions at the front gates. Both gates were closed and as Con faced the gates, he held a chain in his left hand and a chain and the padlock in his right hand and in Villella's words 'He appeared to be attempting to lock the gates with the chain and padlock'. Con denied that he was attempting to lock the gate nor, he said, was he intending to lock the gate. Con stated that he was on his way to go to the racecourse to meet a friend where he would hand him a ticket. He knew that the horse was under the control of Pat Cannon and was ready to be loaded onto the float which had been parked with its tailgate down just outside the front gate. There was no logical reason for Con to be holding the chains and playing with the padlock if he was not intending or attempting to lock the gate. I do not accept that he was playing with the padlock because it was stiff. I regard the claimed stiffness of the padlock as exaggerated and I prefer Villella's evidence regarding the condition of the lock. I am satisfied to the required standard that Con was in the process of locking the gates.

24. Villella entered the stables with Con and it is common ground that he searched Con, Tony and Chris Wood outside the wash bay area. At Con's request, Pat Cannon then brought the horse out of Box 11 and up to the wash bay area. In the meantime, Ashby had entered the stables and Villella asked him to inspect Box 11. Ashby walked into Box 11 and observed , on the left hand side of the box, a blue main feeder which was on the ground. Slightly in front of that feeder he saw a chaff bag and a white feeder bucket which was empty. The chaff bag (Ex 9), contained 2 naso-gastric tubes, a funnel, a small bucket and a sachet containing some powder. Ashby produced the bag and the applicants were asked to explain what this bag containing those contents was doing in Box 11. Tony's explanation was 'I've just picked up the wrong bag'. Tony gave that explanation at the outset and he has consistently maintained that is what occurred thereafter. Tony stated that he meant to carry a bag which he believed contained a biscuit of hay as well as a bucket containing hard feed and put them in Box 11. Villella asked Tony to show him the bag containing the hay and the two men went to the feed room. Tony picked up the bag which is Exhibit 7, ie, a bag with a lavender and green printed picture-photo on the front but was otherwise a white bag. The bag was empty. Tony then went over to hay which was on a pallet and put some hay in that bag. Tony, as the Board stated in its Reasons, said that he must have omitted to fill the bag (Ex 17) with a biscuit of hay and as he was unaware of that omission he thought that the bag which contained the equipment was the bag containing the biscuit of hay. There is a very marked and distinct difference between the two bags. The bag (Ex 9) which contained the equipment has distinctive red lettering as well as the manufacturer's logo on the front of the bag while the back of the bag was blank and white. The Board, in its Reasons, referred to several bold red lines of lettering as well as the manufacturer's logo and I accept that is an accurate description of the front of the bag (Ex 9). The two bags are indeed visually distinctive. Tony was singularly unimpressive in his evidence about the bags and he was at pains to attempt to distance himself from the bag (Ex 9) and, as the respondent submitted, Tony attempted to give the impression that the bag had no significance. He

endeavoured to distance himself from that bag (Ex 9). Brian Williams, the stable foreman, also gave evidence that the bag (Ex 9), was 'not from our place'. I reject his evidence about this bag and I accept Con's evidence given to the Board that the bag (Ex 9) had come from his Sydney stables and that the tubing gear was always kept in that bag which had been the bag used at Caulfield and Flemington to hold the tubing gear. The horse had been drenched on 20 and 30 October and the bag (Ex 9), contained the tubing gear on those occasions. Tony denied that he knew that the bag which he had taken to Box 11 contained the tubing gear and he claimed that he only became aware that the gear was in the bag (Ex 9), when Ashby produced and opened the bag. I reject Tony's evidence that he had mistaken the bag (Ex 9) for a bag containing a biscuit of hay. Not only are the two bags visually distinctive but the physical form or shape of the bag which was later made up to contain a biscuit of hay (Ex 17) is markedly different to the bag (Ex 9) which contained the tubing gear. I regarded Tony as an unimpressive and unreliable witness and I adopt the respondent's submission that he was prepared to make up evidence on the run in an endeavour to support his case. His evidence that it was Villella who picked up the chaff bag in the feed room is an example of his preparedness to give evidence which he believed would support his case although, in cross-examination, he accepted that he had no recollection of Villella picking up the chaff bag. It was Tony's usual task to prepare the feed for the horse and, on the evidence, I cannot accept that he believed that he had placed a biscuit of hay in a chaff bag when he was first at the stables between 6.00am to 6.30am. Having considered all the evidence on this critical issue, I reject Tony's explanation 'I've just picked up the wrong bag'. Again, I am satisfied to the requisite standard, that Tony deliberately put the bag (Ex 9) in Box 11 knowing that it contained stomach-tubing equipment.

25. I turn to evidence regarding the issue of the twitch. The evidence was that it was Tony who stomach-tubed the horse and that Con was unable to undertake that task. Tony stated at the stewards inquiry 'Well, I didn't need a twitch, and the horse was very, very easy to drench'. In the hearing before the Board, Tony stated 'I made a mistake when I said to the stewards that I did not need a twitch'. In this review, Con said that he had seen Tony tube horses on a number of occasions and 'every time he has used a twitch'. Tony, on this occasion, painted a different picture about this horse stating that he always used a twitch and needed other people to hep him 'so we need three people'. I consider that much of the later evidence was contrived in an endeavour to show that there was not enough time for the horse to be stomach-tubed before it was taken to the horse gates. A horse that Tony had said was 'very, very east to drench' had become a 'fiery, tough' horse and I am satisfied to the required standard that Tony's original statement accurately presented the true position.

26. I have read and considered all the evidence in this review, including the veterinary evidence given by Dr John van Veenendaal and Dr Faehrmann as well as the scientific evidence given by Dr Batty. In the circumstances, it is unnecessary for me to refer to that evidence although I have not disregarded the relevant parts of that evidence.

27. I have also read and considered the written submissions on behalf of the applicants and the respondent as well as the oral submissions from Dr Pannam and Mr Burns which have also been recorded on the transcript.

28. This is a circumstantial case and the outcome depends on whether certain facts have

been proved to the *Briginshaw* standard and whether those facts, if proved to the requisite standard, go to found the inference for which the respondent contends, namely, that there was an intention on the part of the applicants to stomach-tube the horse on race day before the horse competed in a race on that day.

29. So far as the right to draw inferences from proven facts in a civil case is concerned, I adopt the approach of the Court of Appeal in *Transport Industries Insurance Co Ltd v Longmuir* (1997) 1 VR 125 and *Chapman v Cole* (2006) 1 VR 150. In the former case, Tadgell JA cited a passage from the decision of the High Court in *Bradshaw v McEwans Pty Ltd*:

> The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference.

In the judgment of Callaway JA in *Chapman v Cole* his Honour stated:

> In a civil trial the question is whether to draw an inference on the balance of probabilities and there need only be circumstances raising a more probable inference in favour of what is alleged; but, before it can be drawn, the inference must be something which follows from given premises as being at least probably true.

30. I have already referred to the six issues raised by Dr Pannam which he submitted go to found the inference for which the respondent contended, namely, that the applicants intended to tube the horse prior to the race on race day. The respondent was required to prove the facts alleged in those various issues to the *Briginshaw* standard. Having decided which of those issues has been proved to the required standard I then look at the combination of facts proved to determine whether I should draw the inference for which the respondent contended. I am comfortably satisfied to draw the inference that Con and Tony intended to tube the horse prior to the race on race day. There was time and opportunity to do so. Tony had placed the bag (Ex 9) in Box 11 while Con was endeavouring to lock the front gate. Ashby and Villella then arrived on the scene. I am satisfied that the respondent has proved the charges against each applicant. I will hear submissions as to penalty on a date to be announced.

HIS HONOUR SENIOR SESSIONAL MEMBER J NIXON

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL · VCAT

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

No. SCI 2013 02947

IN THE MATTER of Section 148 of the *Victorian Civil and Administrative Appeal Tribunal Act 1998*

and

IN THE MATTER of an application for leave to appeal the decision of the Tribunal made 22 April 2013 and 14 May 2013

BETWEEN

CON KARAKATSANIS AND TONY KARAKATSANIS — Plaintiffs

and

RACING VICTORIA LIMITED (ACN 096 917 930) — Defendant

JUDGE:	KAYE J
WHERE HELD:	Melbourne
DATE OF HEARING:	12 August 2013
DATE OF JUDGMENT:	21 August 2013
CASE MAY BE CITED AS:	Karakatsanis & Anor v Racing Victoria Limited
MEDIUM NEUTRAL CITATION:	[2013] VSC 434

ADMINISTRATIVE LAW – Appeal from decision of Victorian Civil and Administrative Tribunal affirming decisions of Racing Appeals and Disciplinary Board – Plaintiffs charged with offences of conspiring and attempting to stomach-tube horse contrary to Australian Rules of Racing – Inferences as to plaintiffs' intentions – Whether Tribunal erred in drawing inferences – Whether Tribunal correctly applied *Briginshaw* principles – Whether sufficient evidence to justify findings of conspiracy and attempt – Whether Tribunal disregarded relevant uncontradicted evidence without giving adequate reasons.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Professor P G Nash QC and Mr G J Burns	Wisewould Mahoney Lawyers
For the Defendant	Mr M Stirling	Minter Ellison

HIS HONOUR:

1 The two plaintiffs, Con Karakatsanis and his father Tony Karakatsanis, bring these proceedings by originating motion as an appeal against the orders of the Victorian Civil and Administrative Appeal Tribunal ('the Tribunal') dated 22 April 2013 and 14 May 2013. By those orders, the Tribunal affirmed the decisions to the Racing Appeals and Disciplinary Board made on 22 April 2013 and 31 January 2013.

2 The first plaintiff was at all relevant times a licensed racehorse trainer within the meaning of the Australian Rules of Racing ('the Rules'), and was licensed as a visiting trainer with the defendant, Racing Victoria Limited. The second plaintiff was at all relevant times registered with the defendant as a visiting stable hand, and was employed as a stable hand for the first plaintiff.

3 At the times which are relevant to this appeal, the horse 'Howmuchdoyouloveme' was trained by the first plaintiff. It was normally stabled and trained at Rosehill. On 13 October 2012, the horse and its gear were transported to Melbourne. The horse was initially stabled at Caulfield Racecourse, where it raced on 20 October. It was then moved to Flemington Racecourse, where it was kept in the stables of Mr Steve Richards. The horse was allocated box 11 at those stables.

4 On 3 November 2012, which was Derby Day, the horse was due to run in race 8 at the Flemington Racecourse. The race was scheduled to commence at 4.30 pm, and the horse was due on the racecourse at 1.30 pm.

5 On 3 November 2012, the two plaintiffs and Mr Chris Wood arrived at the Richards stables shortly after 6.00 am, in order that the plaintiffs could attend to the horse. Mr Wood was a close friend of the two plaintiffs. The plaintiffs mixed a saline powder in the feed room, and placed it in a chaff bag, which contained a stomach tubing apparatus. A feed mix was also prepared in a white bucket. The plaintiffs and Mr Wood then departed from the stables between 7.30 am and 8.00 am.

6 Later in the morning, Mr Kane Ashby and Mr Dion Villella, who were stewards and members of the compliance assurance team of Racing Victoria Limited, received information that the horse was to be stomach-tubed. As a result of that information, Mr Ashby and Mr Villella took up concealed positions near box 11.

7 At 12.37 pm, Mr Pat Cannon, a licensed trainer, who was assisting the first plaintiff, arrived at the stables. He parked the float outside the double gate of the stables. At approximately 1.02 pm, the two plaintiffs and Mr Wood arrived at the stables. The first plaintiff unlocked the feed door room and also unlocked the front gates which were secured by chains and a padlock. The plaintiffs, Mr Wood and Mr Cannon then entered the stables. Mr Cannon placed a head collar on the horse.

8 After a short time, the first plaintiff left the box. He placed the chain around the front gate, and he was observed to be manipulating the padlock which had previously been secured to the chain. At about the same time, he gave a hand signal to the persons who had remained in or near the box.

9 At that point, Mr Ashby contacted Mr Villella on his telephone, and told him to enter the stables. When Mr Villella entered the stables, he searched the two plaintiffs and Mr Wood. At the first plaintiff's request, Pat Cannon brought the horse out of box 11 to the wash bay area. Mr Ashby then entered the stables and inspected box 11. On doing so, he observed a chaff bag and a white feeder bucket which was empty. The chaff bag contained two naso-gastric tubes, a funnel, a small bucket and a sachet containing some powder. He asked the plaintiffs to explain why those articles were in a bag in box 11. The second plaintiff's response was, 'I've just picked up the wrong bag'. He said that he meant to carry a bag, which he believed contained a biscuit of hay, as well as a bucket containing hay feed and put them in box 11. Mr Villella asked the second plaintiff to show him the bag containing the hay, and the two men went to the feed room. There, the second plaintiff picked up a bag which was empty. He then took some hay from a pallet and put it in the bag.

The charges

10 Both plaintiffs were charged with breaches of rule 175(k) and r 175(l) of the Australian Rules of Racing. Those rules provide as follows:

> Rule 175 The Committee of any Club or the stewards may penalise:
>
> ...
>
> (k) any person who has committed a 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.

11 In each case, the plaintiffs were charged with conduct which could have led to a breach of rule 64G(1), and with conspiring or attempting to breach that rule. Rule 64G(1) provides:

> No horse engaged to run in a race, official trial or jump out shall without the permission of the stewards be stomach-tubed within 24 hours of the appointed starting time for such race, official trial or jump out. For the purposes of this Rule 'stomach-tubed' means any application to a horse of a naso-gastric tube.

12 Two charges were laid against the first plaintiff. They were:

(1) A charge alleging a breach of r 175(k). The particulars to this charge alleged that on or before 3 November 2012 the first plaintiff arranged for the second plaintiff to stomach-tube the horse before race 8, and that his conduct in doing so could have led to a contravention of r 64G(1).

(2) A charge under r 175(l). The particulars to the second charge were that in arranging and/or authorising the second plaintiff to stomach-tube the horse before race 8, the first plaintiff had conspired with the second plaintiff to commit a breach of AR64G(1).

13 Three charges were laid against the second plaintiff. They were:

(1) A charge under r 175(k). The particulars to that charge were that the second

plaintiff had arranged with the first plaintiff and/or agreed to stomach-tube the horse before race 8, and that, before race 8, he had placed a bag containing two naso-gastric tubes, a funnel, a bucket and powder in the horse's box for the purpose of stomach-tubing the horse before race 8. It was alleged that that conduct could have led to a breach of r 64G(1).

(2) A charge under r 175(1). The particulars of the charge were that on or before 3 November 2012, the first plaintiff had arranged with and/or authorised the second plaintiff to stomach-tube the horse before race 8, and that in return the second plaintiff had thereby conspired with the first plaintiff to breach r 64G(1).

(3) A second charge under r 175(l). The particulars of this charge were that before race 8 on 3 November 2012, the second plaintiff had placed a bag containing two naso-gastric tubes, a funnel, a bucket and powder in the horse's box for the purpose of stomach-tubing the horse before race 8, and that he had thereby attempted to commit a breach of r 64G(1).

14 The Racing Appeals and Disciplinary Board upheld each of the charges against the two plaintiffs. It disqualified the first plaintiff from training for a period of nine months effective from midnight on 31 May 2013. It disqualified the second plaintiff from acting as a registered stable hand for a period of two years. On appeal, the Tribunal affirmed the decisions of the Racing Appeals Tribunal, and confirmed the penalties imposed by it.

The proceedings before the Tribunal

15 The proceedings before the Tribunal were a re-hearing de novo of the charges against each of the two plaintiffs. Mr Ashby and Mr Villella each gave evidence on behalf of the defendant. The two plaintiffs, Mr Wood, Mr Cannon, and two veterinary surgeons, Dr Johannes van Veenendaal and Peter Anthony Faehrmann, gave evidence on behalf of the plaintiffs.

The Tribunal's reasons for decision

16 The Tribunal Member commenced his reasons for decision by noting that the defendant bore the onus of satisfying the Tribunal that the charges had been proved. The Member stated that the applicable standard of proof was that described by the High Court in *Briginshaw v Briginshaw*.[1] He observed that the allegations were serious, and that the applicants faced a sanction which could affect their livelihoods. Thus he stated:

> 'Applying the *Briginshaw* standard I must be comfortably satisfied that each charge has been proved to the requisite standard.'

17 The Member then proceeded to make findings in respect of five issues of fact raised by the evidence of the witnesses.

18 The first, and most important, issue arose from the evidence of the second plaintiff, in which he adhered to the explanation that he gave to Mr Ashby for the presence of the bag containing the naso-gastric tubes in the horse's box. In particular, the second plaintiff stated that he had mistakenly picked up that bag in the feed room, wrongly believing that it contained a biscuit of hay. The Tribunal Member rejected that evidence in unequivocal terms. He noted that the bag containing the tubes, and the bag which the second plaintiff claimed that he had intended to pick up, were visually distinctive. The Member regarded the second plaintiff as an 'unimpressive and unreliable witness' and he adopted the defendant's submission that the second plaintiff 'was prepared to make up evidence on the run in an endeavour to support his case'. He thus rejected the explanation given by the second plaintiff, and stated that he was satisfied 'to the requisite standard' that the second plaintiff had deliberately put the bag, containing the naso-gastric tubes, in box 11, knowing that it contained stomach tubing equipment.

19 The second factual issue concerned evidence by Mr Ashby that, shortly after the first plaintiff left the stable, he heard the first plaintiff state, 'I will call you if there's any trouble'. The first plaintiff and Mr Cannon both disputed that evidence, and claimed

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1 (1938) 60 CLR 336 ('*Briginshaw*').

that the first plaintiff had said to the second plaintiff, 'Call me if there's any trouble.' The Tribunal Member did not accept that evidence, and he was satisfied, to the 'requisite *Briginshaw* standard,' that the evidence of Mr Ashby was correct as to what the first plaintiff had stated to the second plaintiff.

20 The third factual issue concerned the hand signal given by the first plaintiff when he was at the gate. It was common ground that at that point the first plaintiff did give such a signal. In his evidence, Mr Ashby described how the first plaintiff put his hand through the triangle section of the gate, and he demonstrated the signal which he saw the first plaintiff give. Mr Ashby interpreted the signal as a warning to those inside the gates, while the first plaintiff stated that he was signalling to the second plaintiff to bring the horse up. The Tribunal Member did not make any express finding in relation to that difference in the witnesses' evidence.

21 The fourth issue of fact arose from the evidence of Mr Villella, that he had observed the first plaintiff at the gate with the chain and a padlock in his hand, and that Mr Villella believed that he was attempting to lock the gate. The first plaintiff, in his evidence, endeavoured to explain his actions, by stating that he was attempting to play with the padlock because it was stiff. That evidence was contradicted by Mr Villella, who stated that on the following Monday he had tested the padlock, and found that it only required a little force to lock. The Member regarded the explanation given by the first plaintiff, for his actions, as 'feeble'. He said that there was no logical reason for the first plaintiff to be holding the chains and playing with the padlock, if he was not intending or attempting to lock the gate. The Member preferred the evidence of Mr Villella, and was satisfied 'to the required standard' that the first plaintiff was in the process of locking the gate.

22 The fifth issue of fact, determined by the Tribunal Member, arose from the fact that there was no twitch in the horse's box. In his evidence, the second plaintiff stated that he always used a twitch to drench the horse. It was therefore put that, in the absence of such a twitch, it was unlikely that he would have intended to stomach-

tube the horse. The Tribunal Member rejected that evidence of the second plaintiff. In doing so, he relied on inconsistencies in the evidence given by the second plaintiff with evidence which he had given to the steward's inquiry, and to the racing tribunal, on the need to use a twitch when stomach-tubing the horse.

23 Having decided those issues of fact, the Tribunal Member noted that he had considered all the evidence, including the veterinary evidence given by Dr van Veenendaal and Dr Faehrmann. He stated, 'In the circumstances it is unnecessary for me to refer to that evidence although I have not disregarded the relevant parts of that evidence'.

24 The Tribunal Member then stated:

> This is a circumstantial case and the outcome depends on whether certain facts have been proved to the *Briginshaw* standard and whether those facts, if proved to the requisite standard, go to found the inference for which the respondent contends, namely that there was an intention on the part of the applicants to stomach-tube the horse on the race day before the horse competed in a race on that day.

25 The Tribunal Member then referred to the principles which apply to the drawing of inferences in civil cases, as stated by the Court of Appeal in *Transport Industries Insurance Co Ltd v Longmuir*[2] and *Chapman v Cole*,[3] namely, that the inference to be drawn against a defendant must be the more probable inference.

26 Having referred to those principles, the Tribunal Member concluded his reasons as follows:

> I have already referred to the six issues raised by Dr Pannam which he submitted go to found the inference for which the respondent contended, namely, that the applicants intended to tube the horse prior to the race on race day. The respondent was required to prove the facts alleged in those various issues to the *Briginshaw* standard. Having decided which of those issues has been proved to the required standard I then look at the combination of facts proved to determine whether I should draw the inference for which the respondent contended. I am comfortably satisfied to draw the inference that Con

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2 [1997] 1 VR 127.
3 (2006) 15 VR 150.

and Tony intended to tube the horse prior to the race on race day. There was time and opportunity to do so. Tony had placed the bag (exhibit 9) in box 11 while Con was endeavouring to lock the front gate. Ashby and Villella then arrived on the scene. I am satisfied that the respondent has proved the charges against each applicant.

Grounds of appeal

27 The plaintiffs bring this appeal, against the decision of the Tribunal Member, pursuant to s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998*. Pursuant to that section, the plaintiffs are required first to obtain leave to bring the appeal. The application by the plaintiffs for leave was referred by the Associate Justice to the judge determining the appeal. Thus, I have before me both the application for leave to appeal, and the appeal, by the plaintiffs from the decision of the Tribunal Member.

28 The proposed amended Notice of Appeal ('the Notice of Appeal') in this case contains six grounds of appeal, namely:

(1) The Tribunal erred in drawing inferences from the facts found without applying the *Briginshaw* standard of proof to the drawing of such inferences where the nature of the proceedings attracted the *Briginshaw* standard of proof;

(2) The Tribunal misdirected itself as to the law regarding the drawing of inferences where the nature of the proceedings attracted the *Briginshaw* standard of proof;

(3) The Tribunal failed to direct itself in relation to the requirement that to constitute an attempt an act must be 'sufficiently proximate;'

(4) The conclusion drawn by the Tribunal is erroneous in that it could not be drawn in the absence of a finding that the plaintiffs or either of them were in possession of or had access to a substance with the intent of administering such substance to the horse in breach of the Australian Rules of Racing;

(5) There are no findings of fact from which the Tribunal could conclude:

(a) that the first plaintiff arranged with the second plaintiff and/or agreed to administer a substance to the horse Howmuchdoyouloveme in breach of the Australian Rules of Racing;

(b) that the second plaintiff arranged with the first plaintiff and/or agreed to administer a substance to the horse Howmuchdoyouloveme in breach of the Australian Rules of Racing;

(c) that the second plaintiff attempted to administer a substance to the horse Howmuchdoyouloveme in breach of the Australian Rules of Racing;

(6) The Tribunal failed to provide adequate reasons in as much as:

(a) the reasons provided do not adequately explain the reason for the Tribunal disregarding the evidence of Dr van Veenendaal and Dr Peter Faehrmann.

(b) the reasons provided do not contain findings of fact from which the ultimate conclusion reached by the Tribunal can be drawn;

(c) the reasons provided do not sufficiently reveal the logical steps by which the Tribunal proceeded from its findings of fact to its conclusions.

Submissions

29 The parties filed written outlines of submissions, and also made oral submissions. In oral argument, Mr P Nash QC, who appeared with Mr G Burns for the plaintiffs, focused on three principal submissions. However, he did not resile from the other arguments contained in the written outline.

30 The principal submission advanced on behalf of the plaintiffs was that the Tribunal erred in finding that the two plaintiffs intended to have the naso-gastric tube administered to the horse before the race. That fact was a critical element of each of the charges against the two plaintiffs. It was submitted that the Tribunal, properly applying the standard of proof described in *Briginshaw v Briginshaw*,[4] could not reasonably have concluded that the plaintiffs had intended to stomach-tube the horse. In particular, Mr Nash relied on the absence of evidence of any substance which might have been administered to the horse by the naso-gastric tube. He submitted that, in the absence of any such substance, there was no rational purpose to be served in administering the stomach-tube to the horse. Mr Nash also relied on the evidence of the veterinary surgeons, that the administration of a naso-gastric tube involves risks to the health and well being of the horse. In those circumstances, Mr Nash contended that the Tribunal Member, properly applying the *Briginshaw* principles, could not reasonably have concluded that the two plaintiffs intended to apply the naso-gastric tube to the horse.

31 Mr Nash also submitted that the Tribunal Member failed to properly apply the principles stated by the High Court in *Briginshaw*. In particular, Mr Nash submitted that although the Tribunal Member applied those principles in determining intermediate facts which were in issue between the parties, the Member did not apply the same principles in inferring, from those facts, that the plaintiffs intended to stomach-tube the horse. Rather, he submitted, the Member based that inference on what he described as an 'unmodified' balance of probabilities test.

32 The third submission by Mr Nash was that the Tribunal Member disregarded the uncontradicted evidence of two veterinary surgeons called on behalf of the plaintiffs, without giving any reasons for doing so. That evidence, to which I shall later refer, described some of the risks associated with the process of stomach-tubing a horse. It was put before the Tribunal, and on this appeal, that that evidence was relevant to an assessment of the probabilities as to whether the plaintiffs had intended to

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4 (1938) 60 CLR 336.

stomach-tube the horse before the race.

33 In their written outline, the plaintiffs' counsel further submitted that the facts, as found by the Tribunal Member, were an insufficient basis for a conclusion that the third charge against the second plaintiff had been established, namely the charge that the second plaintiff had attempted to commit a breach of r 64G(1). The submissions referred to the principle that, in criminal law, a person is not guilty of attempting to commit an offence unless the accused has performed an act which is more than merely preparatory to the commission of the offence. The act must be 'immediately and not merely remotely connected' with the completed offence, and thus must be 'sufficiently proximate' to the completed offence, to be properly considered to be an attempt to commit that offence.[5] It was submitted that the facts found by the Tribunal Member were insufficient to satisfy that test, because no substance was available in the horse's box to enable the horse to be stomach-tubed. In those circumstances, it was submitted that the findings by the Tribunal, that the second plaintiff had brought the naso-gastric tube to the horse's box with the intention of stomach-tubing the horse, were not sufficiently proximate to constitute an attempt by the second plaintiff to stomach-tube the horse.

34 Finally, in their outline, counsel for the plaintiffs made a similar submission in relation to the findings by the Tribunal Member in respect of the second charge against each plaintiff, namely, the charge of conspiring to breach r 64G(1). In particular, it was submitted that there was no sufficient evidence, of an agreement between the two plaintiffs, for the making of that finding.

35 In response, Mr M Stirling, who appeared on behalf of the defendant, submitted that the plaintiffs had failed to establish any error of law by the Tribunal.

36 He submitted that the Tribunal Member did not err in law in concluding, on the evidence, that the plaintiffs had intended to stomach-tube the horse. Mr Stirling pointed out that the offence created by r 64G(1) is an 'instrument only offence', and

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5 *Haughton v Smith* [1975] AC 476, 492 (Lord Hailsham).

not a 'substance' offence. The conduct, that is prohibited, is the use of stomach-tubing within 24 hours of race time. Thus, he submitted, the defendant was not required to prove the nature of the substance intended to be administered by the stomach-tube. Mr Stirling submitted that the facts, found by the Tribunal Member, were a sufficient basis for a finding that the plaintiffs intended to stomach-tube the horse. In that respect, Mr Stirling relied on the findings by the Tribunal that the second plaintiff had deliberately brought the stomach-tube to the horse's box shortly before the horse was due to race, the finding that the first plaintiff had told the second plaintiff that he would give him a call if there was any trouble, the finding that the first plaintiff had locked, or attempted to lock, the gate to the stable, and the finding concerning the hand signal given by the first plaintiff to the second plaintiff. Mr Stirling submitted that, taken together, those facts were a sufficient circumstantial basis upon which to found an inference that the plaintiffs intended to stomach-tube the horse before the race.

37 In addition, Mr Stirling submitted that there was evidence as to the availability of a bag of bicarbonate powder nearby, in the feed room. He pointed to evidence that bicarbonate of soda was regularly fed to the horse. Both plaintiffs were aware of, and monitored, the resting levels of the bicarbonate in the horse's blood, which were below the maximum level permitted by the rules. He submitted that that evidence was sufficient to negate the argument that there could not have been an intention to stomach-tube the horse, because there was no substance available to administer to the horse through the tube.

38 Mr Stirling further submitted that the Tribunal properly applied the principles, that are relevant to the drawing of inferences. He submitted that where, as in this case, the Tribunal was required to apply the principles stated in *Briginshaw*, those principles only applied to the finding by the Tribunal of the intermediate facts upon which it based its inference as to the intention of the plaintiffs. Mr Stirling submitted that, properly considered, the *Briginshaw* principles did not apply to the drawing of an inference from those facts. He submitted that, in any event, the same inference

would have been validly drawn by the Tribunal, if the *Briginshaw* test applied to the inference as to the intention of the plaintiffs to administer the stomach-tube to the horse.

39 Mr Stirling submitted that the Tribunal was entitled to draw the inference, as to the intention of the plaintiffs to administer the stomach-tube to the horse, notwithstanding the evidence of the veterinary surgeons. In particular, he referred to an observation made by the Tribunal Member, in the course of the evidence of Dr van Veenendaal, querying the relevance of the evidence. Mr Stirling further submitted that, in any event, the fact, that the administration of a naso-gastric tube may involve some risks to the health of a horse, would not preclude the drawing of the inference that the two plaintiffs nevertheless intended to administer the naso-gastric tube to the horse before the race.

40 Finally, Mr Stirling submitted that the findings of fact made by the Tribunal Member were sufficient to support the conclusion by the Tribunal Member as to the existence of a conspiracy for the purposes of the second charge against each plaintiff. In particular, he referred to the evidence of the first plaintiff that he would not permit the second plaintiff to do anything to the horse without his permission, and that anything that was done to the horse by the second plaintiff would have been done with his consent. Similarly, Mr Stirling referred to the evidence of the second plaintiff, that he would not stomach-tube a horse without first discussing it with the first plaintiff. Mr Stirling also submitted that the actions of the second plaintiff, as found by the Tribunal Member, were sufficiently proximate to the commission of a breach of r 64G(1) to constitute an attempt to breach that rule.

The *Briginshaw* test

41 The submissions, and grounds of appeal, raise two questions concerning the principles stated by the High Court in *Briginshaw v Briginshaw*,[6] namely:

(1) Do the *Briginshaw* principles apply to the drawing of inferences?

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6 (1938) 60 CLR 336; see also *Evidence Act 2008* (Vic) s 140(2).

(2) Did the Tribunal misdirect itself as to the application of the *Briginshaw* principles to the drawing of inferences?

42 The first question arises from the submission by the defendant that the *Briginshaw* principles only apply to the finding of specific intermediate facts, but that they do not apply to the drawing of inferences from those facts. In my view, both authority and principle are contrary to that proposition. I consider that it is clear law that where a court, in a civil proceeding, is invited to draw an inference as to serious wrongdoing by a party, the court is obliged to approach the drawing of those inferences with the degree of caution described by the High Court in *Briginshaw v Briginshaw*, and in subsequent authorities, including *Helton v Allen*,[7] *Rejfek v McElroy*,[8] *Murray v Murray*[9] and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*.[10]

43 The classic statement of the principle is contained in the leading judgment of Dixon J in *Briginshaw v Briginshaw*,[11] where his Honour stated:

> But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

44 That statement of principle was clearly directed both to the finding of facts proven by direct evidence, and to the finding of facts by a process of inference. In the succeeding pages of his judgment, Dixon J examined, in detail, the authorities upon which the proposition, stated by him, were based. A number of those authorities were concerned with the drawing of inferences in civil litigation. Dixon J concluded his examination of the authorities in the following terms:

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7 (1940) 63 CLR 691.
8 (1965) 112 CLR 517.
9 (1959) 33 ALJR 521.
10 (1992) 110 ALR 449.
11 (1938) 60 CLR 336, 362.

> Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the Tribunal of fact that the adultery alleged was committed, it should so find.[12]

45 In my view, it is clear, from the passages of the judgment of Dixon J, which I have just quoted, and from the reference by Dixon J to authorities concerning the drawing of inferences in civil litigation, that his Honour directed the principles, which he was stating, not only to the finding of facts based on direct evidence, but also to the finding of facts based on a process of inference.

46 Two years later, the question of the application of the *Briginshaw* principles, to the drawing of inferences, came before the High Court, in *Helton v Allen*.[13] In that case, the principal question concerned the application of the *Briginshaw* principles to a case in which the plaintiff sought to establish an allegation of criminality by the defendant based solely on circumstantial facts.

47 In *Helton v Allen*, a testatrix had died of strychnine poisoning. Proceedings were brought by the plaintiff, who was one of her next of kin, to establish that the defendant, who was named as the executor and a residuary devisee in her will, had unlawfully killed the testatrix, and that he was thus disqualified from acting as executor or taking under the will. The case was tried before a jury. The evidence in support of the plaintiff's case was entirely circumstantial. The judge directed the jury on the burden of proof by explaining the difference between the standard of proof in a criminal charge and the standard of proof applicable in a civil trial. In doing so, the judge placed emphasis on the slightness of the preponderance of probabilities which is necessary to establish a civil claim. When the jury, during its deliberations, sought a further direction about 'the point about probabilities', the

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12 (1938) 60 CLR 336, 368-9; see also at 343 (Latham CJ), 350 (Rich J).

13 (1940) 63 CLR 691.

judge directed the jury that it was sufficient to find in favour of the plaintiff on the issue of homicide if the jury considered there was any greater probability favouring that conclusion.

48 On appeal, the High Court held that the judge had misdirected the jury. In particular, the court held that, in a civil case involving an allegation of a grave crime or fraud, it is a misdirection to charge a jury that a mere preponderance of the probabilities in favour of such an allegation will suffice. Rather, the court unanimously held that the jury should have been directed to approach its task in the manner described by Dixon J in *Briginshaw*.[14]

49 There is no reason in principle why the test, stated by the High Court in *Briginshaw*, should not apply equally to the finding of facts by the drawing of inferences, as it does to the finding of facts based on direct evidence. The drawing of an inference is a process by which a court or tribunal may find a fact to be established on the balance of probabilities (or, in a criminal trial, beyond reasonable doubt). There is no rational reason why a court should adopt less caution in inferring the existence of a fact, than it would be required to exercise in accepting direct evidence as to the existence of the fact. The underlying rationale of the principles stated in *Briginshaw* resides in the seriousness of the particular allegation, and the fact that members of society do not ordinarily engage in fraudulent or criminal conduct[15]. That rationale is equally relevant and applicable to the drawing of inferences as it is to the finding of facts based on direct evidence.

50 For those reasons, I consider that the Tribunal Member was obliged to apply the approach, described by the High Court in *Briginshaw*, in determining whether it was satisfied, on the balance of probabilities, that the plaintiffs intended to stomach-tube the horse before the race on race day.

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14 (1940) 63 CLR 691, 696 (Rich J), 701 (Starke J), 712-13 (Dixon, Evatt and McTiernan JJ); see also *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219, 232-3 (Mahoney JA); *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156, 174.

15 *Rejfek v McElroy* (1965) 112 CLR 517, 521; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 450.

51 The second question is whether the Tribunal Member correctly directed himself in relation to the application of that test. The plaintiffs relied on the concluding paragraphs of the Tribunal Member's reasons in support of the contention that the Member erred by misdirecting himself as to the application of the test. Mr Nash submitted that the Member expressly stated his satisfaction on the *Briginshaw* standard in relation to the various intermediate facts, to which I have earlier referred. However, he submitted that the Member applied a lesser 'standard' in respect of the drawing of inferences. That proposition was based on the section in the Member's reasons which quoted passages from the decisions of the Court of Appeal in *Transport Industries Insurance Co Ltd v Longmuir*[16] and *Chapman v Cole*.[17] In those cases, the court stated the principles relating to the drawing of inferences in civil cases in the usual terms, namely, that the relevant test is whether the inference contended for is the more probable inference.[18]

52 In my view, when read as a whole, it is clear that the Tribunal Member did correctly direct himself as to the *Briginshaw* principles to be applied in drawing the inference as to the intention of the plaintiffs. As I stated, at the outset, the Tribunal Member referred to the *Briginshaw* principles, and stated that, in applying those principles, he must be 'comfortably satisfied' that each charge had been proven to the requisite standard. The Member then examined the five issues of fact, to which I have referred, and in doing so, he expressly applied the *Briginshaw* standard. In that context, the reference by the Member to the principles relating to the drawing of inferences in civil cases, as stated in the two Court of Appeal decisions to which I have referred, was not a departure by the Member from the standard described by the High Court in *Briginshaw*. Rather, in doing so, the Member identified, correctly, the principles relating to the drawing of inferences in a civil case. In the last paragraph of his decision, the Member, having referred to the findings of fact which he had made, concluded that he was 'comfortably satisfied' to draw the inference

16 (1997) 1 VR 215.
17 (2006) 15 VR 150.
18 See also *Holloway v McFeeters* (1956) 94 CLR 470, 480-481 (Williams, Webb, Taylor JJ).

that the plaintiffs intended to stomach-tube the horse before the race. In that context, having earlier correctly directed himself on the application of the *Briginshaw* principles, I am satisfied that the Member applied those principles in drawing the inferences to the intention of the plaintiffs, and in particular in finding that he was 'comfortably satisfied' to draw that inference. I therefore reject the submission that the Tribunal Member misdirected himself concerning the application of the *Briginshaw* principles to the civil standard of proof. It follows that grounds 1 and 2 in the Notice of Appeal fail.

The Tribunal's conclusion as to the plaintiffs' intention to stomach-tube the horse

53 The second, and the principal, issue raised on the appeal concerns the finding by the Tribunal Member that each of the plaintiffs intended to stomach-tube the horse before the race.

54 The submissions made on behalf of the plaintiffs impugn that finding on the basis that it was not reasonably open to the Tribunal Member on the evidence before him. The particular ground of appeal (ground 4) alleges that the conclusion, as to the intentions of the two plaintiffs, could not be drawn in the absence of a finding that the plaintiffs, or one of them, had possession of or access to a substance which might be administered to the horse through the naso-gastric tubes that were found in the horse's box.

55 The conclusion by the Tribunal Member, as to the intentions of the plaintiffs, was, of course, a conclusion of fact based on the evidence. Under s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998*, a party may only appeal to this Court from a decision of the Tribunal on a question of law. There was little discussion, in argument, as to the principles applicable to the question whether the ground of appeal, relied on by the plaintiffs, involves a question of law. Mr Nash submitted that, in order to establish a relevant error of law, the plaintiffs must establish that the finding by the Tribunal, as to the intentions of the plaintiffs, was not reasonably open to the Tribunal on the evidence. The conclusion by the Tribunal Member, as to the

intention of the plaintiffs, was arrived at by process of inference from a number of facts established to the satisfaction of the Tribunal Member. Mr Nash submitted that in order to make out an error of law on appeal, he must, therefore, demonstrate that a reasonable Tribunal Member, correctly applying the *Briginshaw* principles, could not have been satisfied that the more probable inference, from the evidence, was that the plaintiffs intended to stomach-tube the horse.

56 As I stated, the applicable test, on appeal, to the question raised by the plaintiffs, was not the subject of discussion. However, I accept that Mr Nash has stated the test in sufficiently accurate terms for the purposes of the issues raised on this appeal. The question, whether a conclusion of fact by a Tribunal is open to it on the evidence, is a question of law.[19] In such a case, the question is not whether the court would have reached a different conclusion than that reached by the Tribunal. Rather, in order to establish an error of law, it must be demonstrated that the conclusion of fact, by the Tribunal, was not reasonably open to it on the evidence.

57 As I stated, the conclusion by the Tribunal Member, as to the intentions of the plaintiffs to stomach-tube the horse, was based on an inference from the facts established to the satisfaction of the Tribunal Member. The drawing of inferences is, essentially, a matter of fact for the Tribunal. However the question whether, on the evidence, and applying the appropriate balance of proof, the particular inference could be rationally drawn by the Tribunal, is a question of law.[20]

58 Accordingly, the test which I must apply is not whether, on the evidence found by the Tribunal Member, this Court might have reached a different conclusion, as to the intentions of the plaintiffs. Rather the question is whether the inference, drawn by the Tribunal Member, was reasonably open as the more probable inference, taking into account the principles stated by the High Court in *Briginshaw v Briginshaw*, to

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19 *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 89 (Phillips JA); *Savage v Crimes Compensation Tribunal* [1990] VR 96, 99 (McGarvie, Beach and Hampel JJ).

20 *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 91; *Myers v Medical Practitioners' Board* (2007) 18 VR 48, 60 [48] (Warren CJ); *Tracy Sports Village & Social Club v Walker* (1992) 111 FCR 32, 37-8 (Mildren J); *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 355 (Mason CJ); cf *R v Cengiz* [1998] 3 VR 720, 735 (Harper AJA); Case stated by *DPP (No 2 of 1993)* (1993) 70 A Crim R 323, 327 (King CJ).

which I have referred above.

59 The submission on behalf of the plaintiffs, that it was not reasonably open to the Tribunal Member to conclude that the plaintiffs intended to stomach-tube the horse before the race, was based on two principal points. First, Mr Nash submitted that, in the absence of the finding of a prohibited substance in the possession of, or available to, the plaintiffs, there would have been no purpose served by the plaintiffs stomach-tubing the horse before the race. Secondly, Mr Nash referred to the evidence of the two veterinary surgeons, as to the risks associated with administering a stomach-tube to the horse, and also as to the time required to administer that process.

60 In respect of the latter matter, I was not taken, in submissions, to any specific aspect in the evidence of the veterinary surgeons. However, I have read their evidence so before the Tribunal. Dr van Veenendaal estimated that it would take between 10 and 20 minutes to administer a stomach-tube to a horse. He was asked by counsel whether there are any risks associated with administering a stomach-tube. That question was the subject of objection on behalf of the defendant, on the basis of relevance. The Tribunal Member expressed doubts as to the relevance of the question, but permitted the question to be asked. Dr van Veenendaal stated that the administration of a stomach-tube to a horse did involve a risk of nasal bleeding, but that that does not happen commonly.

61 Dr Faehrmann, in his evidence, stated that there was a risk in administering bicarbonate solution to a horse on race day before a race, because that process might unintentionally raise the TCO 2 level of the horse above the permitted threshold. He also expressed the view that the administration of a stomach-tube could involve a risk of drowning the horse, and could also cause bleeding to the nasal passage. He estimated that it would take about six minutes to stomach-tube a horse.

62 The question, then, is whether the absence of any substance to be introduced to the horse through the stomach-tube, and the evidence of the veterinary surgeons, had the effect that it was not reasonably open to the Tribunal Member to infer, from the

evidence, that the plaintiffs intended to stomach-tube the horse before the race. In the concluding paragraph of his reasons, the Member based the inference, as to the intention of the plaintiffs, on the conclusions of fact which he had expressed, and which I have already summarised. Thus, the critical question is whether the combined force of those facts was such that it was open to the Tribunal to conclude, by way of a rational inference, that the plaintiffs intended to stomach-tube the horse, notwithstanding the two matters relied upon by the plaintiffs on this appeal.

63 The two points relied on by the plaintiffs raise a preliminary issue as to whether in fact there was a substance available to the plaintiffs, to administer to the horse via the naso-gastric tube, and as to whether the Tribunal Member made any finding as to that question. The evidence of the second plaintiff was to the effect that bicarbonate of soda was regularly fed to the horse. A one kilogram bag of bicarbonate of soda had been brought with the plaintiffs from Sydney. On the morning of 3 November, there was half a kilogram left in the bag, which was then located in the feed room.

64 There was argument before me as to whether, in those circumstances, the bicarbonate of soda was readily available to the plaintiffs to administer to the horse through the naso-gastric tube. Mr Nash, with some force, contended that, in light of the finding by the Tribunal Member that the first plaintiff was in the process of locking the gate, it could not be concluded that any such substance was available to the plaintiffs in the time leading up to the race.

65 The Tribunal Member did not make any finding of fact in relation to that issue. In the concluding paragraph of his decision, he did state that there was 'time and opportunity' for the plaintiffs to stomach-tube the horse before the race. However, that statement does not, of itself, constitute a finding that there was a substance available, which might be fed to the horse through the tube. In the absence of any such finding, I am prepared to assume, for the purposes of this appeal, that at the relevant time, there was no substance available to the plaintiffs to administer to the

horse through a stomach-tube.

66 I return, then, to the critical question whether the combined force of the factual issues, determined by the Tribunal Member, was such that it was open to the Tribunal Member to reasonably draw the inference as to the intention of the plaintiffs to stomach-tube the horse, bearing in mind the obligation of the Tribunal Member to apply the principles stated by the High Court in *Briginshaw v Briginshaw* concerning the making of such a finding.

67 It must be acknowledged, at the outset, that the two matters, relied on by the plaintiffs, are of some force. In particular, I accept that the absence of any substance, to feed to the horse through the stomach-tube, was a weighty factor in favour of the plaintiffs, which militated against the drawing of the inference that the plaintiffs intended to stomach-tube the horse before the race.

68 Nevertheless, I do not accept the submission by the plaintiffs that it was not open to the Tribunal Member, in any circumstance, to reasonably draw an inference as to an intention to stomach-tube the horse, in the absence of the finding of a substance to introduce to the horse through the stomach-tube. In particular, I do not accept the submission by Mr Nash that a conclusion, as to the existence of such an intention, would not be logical in the absence of the existence of a substance to introduce to the horse through the tube. Ultimately, the question as to whether, notwithstanding the absence of the substance, an inference as to intention is nevertheless established on the balance of probabilities, must depend upon the combined force and weight of the factors relied on by the Tribunal in favour of drawing such an inference. In particular, the question is whether the combined force of those facts is such that, notwithstanding the two points relied on by the plaintiffs, it was open to the Tribunal, by rational inference, to conclude that the plaintiffs did intend to stomach-tube the horse.

69 The first, and most important, fact, found by the Tribunal Member, was that the second plaintiff intentionally took the stomach-tube to the horse's box, 30 minutes

before the horse was due on course. The second plaintiff endeavoured to explain the presence of the stomach-tube in the bag on the basis that he mistakenly picked up the wrong bag. That explanation was rejected by the Tribunal Member. It is important to bear in mind that the second plaintiff did not seek to proffer any other 'innocent' explanation for the presence of the naso-gastric tubes in the bag in the horse's box, shortly before the horse was due on course. For example, neither plaintiff suggested – as was put in submissions before me – that the naso-gastric tubes might have been brought to the box in order to enable the horse to be stomach-tubed with a saline drench after the race, so as to prevent the horse becoming dehydrated. The absence of any such 'innocent' explanation given by the second plaintiff, and accepted by the Tribunal, had the effect that the Tribunal Member was entitled, and indeed obliged, to act on the basis of an established fact that the second plaintiff had deliberately brought a stomach tube to the box containing the horse, shortly before the horse was due to depart for the racecourse, without any appropriate explanation being given for the presence of the stomach-tube in the horse's box.

70 I interpolate at this stage that the grounds of appeal also raised an issue as to whether the Tribunal Member proceeded on the basis of a 'consciousness of guilt' line of reasoning. However, in the end, it was common ground that the Tribunal Member did not seek to draw any inference, adverse to the plaintiffs, from his rejection of the explanation given by the second plaintiff, both to Mr Ashby, and in his evidence, for the presence of the stomach-tube in his box. Rather, for the purpose of analysis, the important point is that the Tribunal Member was satisfied that the second plaintiff had deliberately brought the stomach-tube to the box of the horse, shortly before it was due on course, and that there was no acceptable explanation for the second plaintiff having done so.

71 Pausing there, and standing alone, that fact, of itself, was a powerful circumstance in favour of drawing an inference that the naso-gastric tube had been brought to the horse's stall for the purpose of stomach-tubing the horse. Logically, the purpose of a

naso-gastric tube is to stomach-tube a horse. There was no other reason why the stomach-tube would be brought to the horse's stall. No other explanation was given by the plaintiffs for its presence there. The conveying of a stomach-tube to the box of a horse, prima facie, is a sound starting point for the drawing of an inference in favour of an intention by the second plaintiff to stomach-tube the horse.

72 That fact, of course, was not the sole support for the finding by the Tribunal Member. In addition, the Member found that the first plaintiff said to the second plaintiff, when he was stationed at the gate, that 'I'll call you if there's any trouble'. At about the same time the first plaintiff was proceeding to lock the gate with a padlock. There was no logical reason for the first plaintiff to lock the gate at that point. On the contrary, as the horse was shortly due on the course, it would be illogical to lock the gate, unless there was some other important reason to do so. Further, at about that time, the first plaintiff was observed to give a hand signal to the second plaintiff.

73 The case, in respect of the intention of the two plaintiffs, was essentially a circumstantial case. The task of the Tribunal Member was to consider the combined weight and force of those facts working together, and not in isolation from each other.[21] Taken together, those four facts were a strong basis upon which the Tribunal Member was entitled to infer that the first and second plaintiffs were acting in combination to stomach-tube the horse before the race. The case made on behalf of the defendant, before the Tribunal, was that the two plaintiffs were acting in combination. There was at least a prima facie basis for such a conclusion. Thus, it was not in issue before the Tribunal, or on appeal, that the actions and conduct of each of the plaintiffs, in pursuance of that joint combination, might be used as evidence to prove the participation by the other plaintiff in the joint enterprise.[22] In those circumstances, there was a strong basis upon which the Tribunal Member

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21 *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125, 128; *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 535 (Gibbs CJ, Mason J); *Shepherd v The Queen* (1990) 170 CLR 573, 580-581 (Dawson J).

22 *Tripodi v The Queen* (1961) 104 CLR 1, 7; *Ahern v The Queen* (1988) 165 CLR 87, 94-95.

might reasonably conclude, as a matter of inference, that it was the intention of each of the two plaintiffs that the second plaintiff stomach-tube the horse.

74 As I have already stated, I acknowledge that the absence of a substance to introduce through the naso-gastric tube, was a weighty factor militating against the drawing of such a conclusion. I also acknowledge that the evidence of the two veterinary surgeons, as to the risks associated with stomach-tubing a horse, was relevant as bearing on the probabilities as to the existence of the joint agreement and intention of the plaintiffs to stomach-tube the horse. However, ultimately, those two facts do not logically preclude the drawing of an inference, on the balance of probabilities, as to the existence of an intention by the plaintiffs to stomach-tube the horse, taking into account the principles stated by the High Court in *Briginshaw v Briginshaw*. For those reasons, I do not accept that it was not open to the Tribunal Member to rationally infer, on the balance of probabilities, that the two plaintiffs intended to stomach-tube the horse before the race. Thus, I reject the submission made on behalf of the plaintiffs that the Tribunal Member erred in concluding, by way of inference, that the plaintiffs had an intention to stomach-tube the horse. It follows that ground 4 of the Notice of Appeal should fail.

The evidence of the veterinary surgeons

75 The third principal submission, advanced on behalf of the plaintiffs, was that the Tribunal Member erred in failing to take into account the evidence of the two veterinary surgeons, Dr van Veenendaal and Dr Faehrmann, without giving any adequate reason for doing so. That submission addresses ground 6(a) of the Notice of Appeal, which alleges that the Tribunal erred in failing to provide adequate reasons for the Tribunal 'disregarding' the evidence of Dr van Veenendaal and Dr Faehrmann. In the plaintiffs' written submissions, it was argued that the finding by the Tribunal, of the intention of the plaintiffs to stomach-tube the horse, was reached by the Tribunal contrary to the 'uncontradicted, inherently reasonable evidence' of the two veterinary surgeons.

76 I do not accept the proposition that the conclusion by the Tribunal Member, as to the intention of the two plaintiffs to stomach-tube the horse, was contrary to the evidence of the two veterinary surgeons. The evidence of those two witnesses was relevant, and, as I have already indicated, it bore on an assessment of the probabilities as to whether the plaintiffs intended to stomach-tube the horse. However, that evidence was not, of itself, such as to logically preclude a conclusion by the Tribunal Member as to the existence of an intention by the plaintiffs to stomach-tube the horse.

77 The evidence of the veterinary surgeons was relevant, and it was uncontradicted. As such, if the Tribunal Member disregarded it, he was obliged to give proper reasons for doing so.[23] However, the plaintiffs have not established that the Tribunal Member disregarded the evidence. In his reasons, the Tribunal Member stated that he had read and considered the evidence, including the evidence of the two veterinary surgeons. The Member stated that it was unnecessary for him to refer to that evidence although he had not 'disregarded the relevant parts of that evidence'.

78 As I stated, the evidence of the two veterinary surgeons did not logically preclude the drawing of an inference that the plaintiffs intended to stomach-tube the horse. Thus, the conclusion by the Tribunal Member, to that effect, does not mean that he must have disregarded the two veterinary surgeons' evidence. Rather, as I have stated, the Tribunal Member, in his reasons, recorded that he had not disregarded the relevant parts of that evidence. For those reasons, ground 6(a) of the Notice of Appeal is not made out.

The finding of a conspiracy between the plaintiffs

79 Grounds 5(a) and (b) of the Notice of Appeal alleged that there was no findings of fact from which the Tribunal could conclude that the two plaintiffs agreed with each other to administer a substance to the horse in breach of the Australian Rules of Racing. Those grounds were not addressed by Mr Nash in oral submissions.

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23 *Hardy v Gillette* [1976] VR 392, 395-6.

However, in their written outline, the plaintiffs' counsel submitted that the evidence before the Tribunal was insufficient for a finding that the plaintiffs conspired to stomach-tube the horse. In particular, it was submitted that, in the absence of direct evidence of an agreement between the plaintiffs, and in the absence of any finding that the horse had been stomach-tubed, there was insufficient evidence upon which to find that such a conspiracy had taken place.

80 The Tribunal Member based his finding, as to the existence of the conspiracy, on the evidence of the first plaintiff, in cross-examination, that he would not allow the second plaintiff to do anything to the horse without his permission, and that anything done to the horse by the second plaintiff would have been done with the first plaintiff's consent, and on the like concession by the second plaintiff, in cross-examination, that he would not treat or stomach-tube the horse without first discussing it with the first plaintiff.

81 I agree with the submission by the plaintiffs that those facts, alone, would be insufficient to found a conclusion as to the existence of a conspiracy between the two plaintiffs to stomach-tube the horse. However, those two concessions, in cross-examination, did not stand alone. The Tribunal Member then made the five findings of fact to which I have referred. Based on those findings, the Tribunal Member was satisfied as to the existence of the intention of the two plaintiffs that the horse be stomach-tubed. In that context, the first plaintiff's concession, that the second plaintiff would not proceed to stomach-tube the horse without his permission, was, in my view, a sufficient basis upon which to make a finding against the first plaintiff that he was involved in an agreement with the second plaintiff to stomach-tube the horse. Likewise, the concession by the second plaintiff, that he would not stomach-tube the horse without first discussing it with the first plaintiff, was sufficient to justify a finding that the second plaintiff had conspired with the first plaintiff to stomach-tube the horse.

82 Further, the Tribunal would have been justified in inferring the existence of a

conspiracy from the facts found by it, and in particular, from the combined effect of: the fact that the first plaintiff deliberately took the naso-gastric tubes to the box in which the horse was located; the statement by the first plaintiff that he would 'Call you if there's any trouble'; the actions of the first plaintiff in commencing to padlock the gate to the stables; and the hand signal given by the first plaintiff to the second plaintiff. Those actions, taken together, bespoke the existence of a common purpose between the two plaintiffs. The concessions made by each of the plaintiffs in cross-examination, to which I have just referred, would reinforce a finding as to such a common purpose between the plaintiffs.

83 For those reasons, I reject the submissions made in respect of ground 5(a) and (b) of the Notice of Appeal.

The finding of attempt against the second plaintiff

84 Ground 3 of the Notice of Appeal alleges that the Tribunal failed to direct itself in relation to the requirement that to constitute an attempt an act must be 'sufficiently proximate'. Ground 5(c) of the Notice of Appeal alleges that there were no findings of fact from which the Tribunal could conclude that the second plaintiff attempted to administer a substance to the horse in breach of the Australian Rules of Racing. Those grounds of appeal were not the subject of oral submissions on behalf of the plaintiffs. However, in their written outline, the plaintiffs' counsel submitted that the actions of the second plaintiff were not sufficiently proximate, to the completed offence of stomach-tubing the horse, to constitute an attempt. In particular, it was submitted that those actions did not go beyond steps which were merely preparatory to the commission of that offence.

85 At common law, it is well established that, in order to constitute an attempt to commit an offence, the accused must have carried out acts which were more than merely preparatory to the commission of the offence, and which were immediately and not remotely connected with the commission of that offence.[24] Those principles

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24 *Haughton v Smith* [1975] AC 476, 492 (Lord Hailsham); *Director of Public Prosecutions v Stonehouse* [1978] AC 55, 68 (Lord Diplock); *R v Mai* (1992) 26 NSWLR 371, 381-2 (Hunt CJ at CL); *Park v The*

have been expressly incorporated in s 321N(1) of the *Crimes Act 1958*.

86 The question, whether the actions of an accused person were sufficient to constitute an attempt, and in particular whether those actions were sufficiently proximate to the completion of the offence to constitute an attempt, is a question of fact.[25] Thus, in order to succeed on ground 5(c), the plaintiffs must demonstrate that the Tribunal could not reasonably conclude that the actions of the second plaintiff were sufficiently proximate to the completed offence of stomach-tubing the horse as to constitute an attempt to commit that offence.

87 The actions of the second plaintiff, which were alleged to have been an attempt to commit the offence of stomach-tubing the horse, were constituted by his taking the two naso-gastric tubes, and other equipment, in a bag to the horse's box, a short time before the horse was due on course, with the intention of stomach-tubing him with that equipment. At that time the second plaintiff was acting in combination with the first plaintiff, who was proceeding to lock the gate to the stables. The critical question is whether, in that context, the actions of the second plaintiff could reasonably be characterised as being more than merely preparatory to the commission of the offence of stomach-tubing the horse, and to be immediately and not remotely connected with the commission of that offence.

88 In considering that question, it must be readily acknowledged that the line between actions which are merely preparatory in nature, and actions which might be properly described to be proximately connected with the commission of the offence, is not clear cut. In an often cited passage, Salmond J, in *R v Barker*,[26] stated:

> All that can be definitely gathered from the authorities is that to constitute a criminal attempt, the first step along the way of criminal

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Queen (2010) 202 A Crim R 133, 143 [46] (McClellan CJ at CL).

25 *Director of Public Prosecutions v Stonehouse* [1978] AC 55, 79-80 (Lord Salmon); 87-88 (Lord Edmund-Davies), 94-95 (Lord Keith); See also *Situ v The Queen* [2008] NSWCCA 161, [28] (McClellan CJ at CL); *Susak v The Queen* (1999) 105 A Crim R 592, 595 [13] (Riley J); *Nicholson v The Queen* (1994) 76 A Crim R 187, 194 (Underwood J).

26 (1924) NZGLR 393, 397-398; see also *R v Williams, ex parte The Minister for Justice and Attorney-General* [1965] Qd R 86, 101-102 (Stable J); *R v De Silva* [2007] QCA 301, [20] (Jerrard JA); *Nicholson v The Queen* (1994) 76 A Crim R 187, 191 (Underwood J).

> intent is not necessarily sufficient and the final step is not necessarily required. The dividing line between preparation and attempt is to be found somewhere between these two extremes; but as to the method by which it is to be determined the authorities give no clear guidance.

89 The point made by Salmon J is well borne out by a comparison of cases, in which an attempt to commit a crime has been established,[27] with cases in which an attempt has not been proven.[28]

90 Ultimately, the question whether the actions of the second plaintiff went beyond mere preparation, and were sufficiently proximate to the commission of the completed offence, does involve an exercise of judgment by the Tribunal of fact. It follows that in forming that judgment, the Tribunal would only have made an error of law, if the conclusion reached by it was one not reasonably open on the evidence.

91 Bearing in mind those principles, I am not persuaded that the finding by the Tribunal Member, that the second plaintiff was guilty of attempting to stomach-tube the horse, was a finding which was not open to the Tribunal Member in the circumstances. Certainly, reasonable minds might respectively differ as to whether the actions of the second plaintiff were sufficient to be properly characterised as being so proximate to the commission of the offence as to constitute an attempt to commit it. However, it is not for this Court to substitute its own view for the conclusion reached by the Tribunal. On the Tribunal's findings of fact, the second plaintiff had brought the naso-gastric tubes to the horse's box, shortly before it was due on course, with the specific intention of stomach-tubing it. The first plaintiff was in the process of locking the stable gate, when the stewards intervened. Given those findings of fact, I am not persuaded that the Tribunal Member erred in law in reaching the conclusion that the second plaintiff's actions were sufficient to constitute an attempt to commit the offence of stomach-tubing the horse.

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27 E.g. *R v Page* [1933] VLR 351; *R v Jones* [1990] 1 WLR 1057; *R v Williams; ex parte Minister for Justice (Qld)* [1965] Qd R 86; *Nicholson v The Queen* (1994) 76 A Crim R 187; *Henderson v The Queen* [1948] SCR 226; [1949] 2 DLR 121.

28 E.g. *R v Chellingworth* [1954] QWN 35; *R v Gullefer* [1990] 1 WLR 1063; *R v Robinson* [1915] 2 KB 342.

Conclusion

92 It follows that the plaintiffs have not succeeded in establishing any of the grounds contained in the proposed Notice of Appeal, although I do consider that some of the proposed grounds were sufficiently arguable to justify the grant of leave to appeal, notwithstanding that, after full argument, none of the grounds have succeeded.[29]

93 Accordingly, I shall grant the plaintiffs leave to appeal from the orders of the Victorian Civil and Administrative Tribunal made on 22 April 2013 and 14 May 2013. I shall direct that the appeal be heard instanter. I further order that the appeal be dismissed.

CERTIFICATE

I certify that this and the 30 preceding pages are a true copy of the reasons for Judgment of Kaye J of the Supreme Court of Victoria delivered on 21 August 2013.

DATED this twenty first day of August 2013.

29 *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331, 335 (Phillips JA).

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2013 0130

CON KARAKATSANIS and TONY KARAKATSANIS — Applicants

v

RACING VICTORIA LIMITED ACN 096 917 930 — Respondent

JUDGES	OSBORN and BEACH JJA
WHERE HELD	MELBOURNE
DATE OF HEARING	25 October 2013
DATE OF JUDGMENT	29 October 2013
MEDIUM NEUTRAL CITATION	[2013] VSCA 305
JUDGMENT APPEALED FROM	*Karakatsanis v Racing Victoria Limited* [2013] VSC 434 (Kaye J)

ADMINISTRATIVE LAW – Application for leave to appeal on question of law against decision of judge of Trial Division affirming decision of Victorian Civil and Administrative Tribunal, which in turn affirmed decision of Racing Appeals and Disciplinary Board – Whether breached rules 64G and 175 of the Australian Rules of Racing by attempting or conspiring to stomach-tube horse prior to race, or engaging in conduct that could have led to stomach-tubing – Whether judge of Trial Division erred in concluding it was open to the Tribunal to find the breaches made out – Rule 64G creates an instrument only offence – Whether judge of Trial Division erred in finding the reasons of the Tribunal adequate in respect of expert veterinary evidence – Application for leave to appeal dismissed.

EVIDENCE LAW – Application of *Briginshaw* to Victorian Civil and Administrative Tribunal – *Victorian Civil and Administrative Tribunal Act 1998* ss 97, 98 – *Evidence Act 2008* s 140 – *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 – *Greyhound Racing Authority v Bragg* [2003] NSWCA 388.

APPEARANCES:	Counsel	Solicitors
For the Applicants	Mr P G Nash QC with Mr G J Burns	Wisewould Mahony Lawyers
For the Respondent	Dr C L Pannam QC with Mr M Stirling	Minter Ellison

OSBORN JA:

1 The applicants seek leave to appeal a decision of Kaye J dismissing an appeal on questions of law from a decision of the Victorian Civil and Administrative Tribunal ('the Tribunal') constituted by his Honour Senior Sessional Member John Nixon.[1]

2 The right of appeal from the Tribunal to a single judge is itself conditioned by a requirement for leave.[2]

3 In turn leave to appeal from the decision of a single judge on appeal from the Tribunal is required by s 17A(3A) of the *Supreme Court Act 1986*.

4 The decision forming the subject matter of the appeal before Kaye J was itself one by which the Tribunal affirmed decisions made by the Racing Appeals and Disciplinary Board. The facts in issue between the parties are thus now being sought to be litigated for the fourth time. Nevertheless they are at their heart relatively simple.

5 Rule 175 of the Australian Rules of Racing provides:

> The Committee of any Club or the stewards may penalise:
>
> …
>
> (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.[3]

6 Rule 64G(1) provides:

> No horse engaged to be run in a race, official trial or jump out shall without the permission of the Stewards be stomach-tubed within 24 hours of the

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1 Prior to the hearing of the leave application the Court advised the parties that it would treat the hearing of the leave application as the hearing of the appeal and hear both together insofar as necessary.

2 Section 148(1), *Victorian Civil and Administrative Tribunal Act 1998* ('the *VCAT Act*').

3 Emphasis added.

> appointed starting time for such race, official trial or jump out. For the purposes of this Rule 'stomach-tubed' means any application to a horse of a naso-gastric tube.

7 As a result of events on 3 November 2012 (Victoria Derby Day) the applicants were charged with a series of offences relating to the intended stomach-tubing of a horse known as 'Howmuchdoyouloveme'.

8 Two charges were laid against the first applicant:

(a) a charge alleging a breach of Rule 175(k). The particulars alleged that on or before 3 November 2012 the first applicant arranged for the second applicant to stomach-tube the horse before race 8, and that his conduct in doing so could have led to contravention of Rule 64G(1).

(b) a charge under Rule 175(l). The particulars alleged that in arranging and or/authorising the second applicant to stomach-tube the horse before race 8, the first applicant had conspired with the second applicant to commit a breach of Rule 64G(1).

9 Three charges were laid against the second applicant. They were:

(a) a charge under Rule 175(k). The particulars alleged that the second applicant had arranged with the first applicant and/or agreed to stomach-tube the horse before race 8, and that before race 8, he had placed a bag containing two naso-gastric tubes, a funnel, a bucket and powder in the horse's box for the purposes of stomach-tubing the horse before race 8. It was alleged that the conduct could have led to a breach of Rule 64G(1).

(b) a charge under Rule 175(l). The particulars alleged that on or before 3 November 2012 the first applicant had arranged with and/or authorised the second applicant to stomach-tube the horse before race 8, and that in return the second applicant had thereby conspired with the first applicant to breach Rule 64G(1).

(c) a second charge under Rule 175(l). The particulars of this charge were that before race 8 on 3 November 2012 the second applicant had placed a bag containing two naso-gastric tubes, a funnel, a bucket and powder in the horse's box for the purpose of stomach-tubing the horse before race 8, and that he had thereby attempted to commit a breach of Rule 64G(1).

10 At the relevant time the first applicant was a licensed racehorse trainer within the meaning of the Rules and was licensed as a visiting trainer with Racing Victoria Limited. The second applicant was registered with Racing Victoria Limited as a visiting stablehand and was employed as a stablehand for the first applicant.

11 The Racing Appeals and Disciplinary Board upheld each of the charges against the applicants. It disqualified the first applicant from training for a period of nine months effective from midnight on 31 May 2013. It disqualified the second applicant from acting as a registered stablehand for a period of two years. On review the Tribunal affirmed the decisions of the Racing Appeals and Disciplinary Board and confirmed the penalties imposed by it.

Background facts

12 Kaye J summarised the background facts as follows:[4]

> 3 At the times which are relevant to this appeal, the horse 'Howmuchdoyouloveme' was trained by the first plaintiff. It was normally stabled and trained at Rosehill. On 13 October 2012, the horse and its gear were transported to Melbourne. The horse was initially stabled at Caulfield Racecourse, where it raced on 20 October. It was then moved to Flemington Racecourse, where it was kept in the stables of Mr Steve Richards. The horse was allocated box 11 at those stables.
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> 4 On 3 November 2012, which was Derby Day, the horse was due to run in race 8 at the Flemington Racecourse. The race was scheduled to commence at 4.30 pm, and the horse was due on the racecourse at 1.30 pm.

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4 *Karakatsanis & Anor v Racing Victoria Limited* [2013] VSC 434 ('Reasons'), [3]-[10].

5 On 3 November 2012, the two plaintiffs and Mr Chris Wood arrived at the Richards stables shortly after 6.00 am, in order that the plaintiffs could attend to the horse. Mr Wood was a close friend of the two plaintiffs. The plaintiffs mixed a saline powder in the feed room, and placed it in a chaff bag, which contained a stomach tubing apparatus. A feed mix was also prepared in a white bucket. The plaintiffs and Mr Wood then departed from the stables between 7.30 am and 8.00 am.

6 Later in the morning, Mr Kane Ashby and Mr Dion Villella, who were stewards and members of the compliance assurance team of Racing Victoria Limited, received information that the horse was to be stomach-tubed. As a result of that information, Mr Ashby and Mr Villella took up concealed positions near box 11.

7 At 12.37 pm, Mr Pat Cannon, a licensed trainer, who was assisting the first plaintiff, arrived at the stables. He parked the float outside the double gate of the stables. At approximately 1.02 pm, the two plaintiffs and Mr Wood arrived at the stables. The first plaintiff unlocked the feed door room and also unlocked the front gates which were secured by chains and a padlock. The plaintiffs, Mr Wood and Mr Cannon then entered the stables. Mr Cannon placed a head collar on the horse.

8 After a short time, the first plaintiff left the box. He placed the chain around the front gate, and he was observed to be manipulating the padlock which had previously been secured to the chain. At about the same time, he gave a hand signal to the persons who had remained in or near the box.

9 At that point, Mr Ashby contacted Mr Villella on his telephone, and told him to enter the stables. When Mr Villella entered the stables, he searched the two plaintiffs and Mr Wood. At the first plaintiff's request, Pat Cannon brought the horse out of box 11 to the wash bay area. Mr Ashby then entered the stables and inspected box 11. On doing so, he observed a chaff bag and a white feeder bucket which was empty. The chaff bag contained two naso-gastric tubes, a funnel, a small bucket and a sachet containing some powder. He asked the plaintiffs to explain why those articles were in a bag in box 11. The second plaintiff's response was, 'I've just picked up the wrong bag'. He said that he meant to carry a bag, which he believed contained a biscuit of hay, as well as a bucket containing hay feed and put them in box 11. Mr Villella asked the second plaintiff to show him the bag containing the hay, and the two men went to the feed room. There, the second plaintiff picked up a bag which was empty. He then took some hay from a pallet and put it in the bag.

13 The review proceedings before the Tribunal were a hearing de novo of the charges against the applicants. Mr Ashby and Mr Villella each gave evidence on behalf of the respondent together with an analytical chemist, Mr Battie. The two applicants, Mr Wood, Mr Cannon and two veterinary practitioners, Drs Veenendaal

and Faehrmann, gave evidence on behalf of the applicants. His Honour the appeal judge summarised the Tribunal's reasons for decision as follows:[5]

> 16 The Tribunal Member commenced his reasons for decision by noting that the defendant bore the onus of satisfying the Tribunal that the charges had been proved. The Member stated that the applicable standard of proof was that described by the High Court in *Briginshaw v Briginshaw*.[6] He observed that the allegations were serious, and that the applicants faced a sanction which could affect their livelihoods. Thus he stated:
>
> > Applying the *Briginshaw* standard I must be comfortably satisfied that each charge has been proved to the requisite standard.
>
> 17 The Member then proceeded to make findings in respect of five issues of fact raised by the evidence of the witnesses.
>
> 18 The first, and most important, issue arose from the evidence of the second plaintiff, in which he adhered to the explanation that he gave to Mr Ashby for the presence of the bag containing the naso-gastric tubes in the horse's box. In particular, the second plaintiff stated that he had mistakenly picked up that bag in the feed room, wrongly believing that it contained a biscuit of hay. The Tribunal Member rejected that evidence in unequivocal terms. He noted that the bag containing the tubes, and the bag which the second plaintiff claimed that he had intended to pick up, were visually distinctive. The Member regarded the second plaintiff as an 'unimpressive and unreliable witness' and he adopted the defendant's submission that the second plaintiff 'was prepared to make up evidence on the run in an endeavour to support his case'. He thus rejected the explanation given by the second plaintiff, and stated that he was satisfied 'to the requisite standard' that the second plaintiff had deliberately put the bag, containing the naso-gastric tubes, in box 11, knowing that it contained stomach tubing equipment.
>
> 19 The second factual issue concerned evidence by Mr Ashby that, shortly after the first plaintiff left the stable, he heard the first plaintiff state, 'I will call you if there's any trouble'. The first plaintiff and Mr Cannon both disputed that evidence, and claimed that the first plaintiff had said to the second plaintiff, 'Call me if there's any trouble.' The Tribunal Member did not accept that evidence, and he was satisfied, to the 'requisite *Briginshaw* standard,' that the evidence of Mr Ashby was correct as to what the first plaintiff had stated to the second plaintiff.
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> 20 The third factual issue concerned the hand signal given by the first plaintiff when he was at the gate. It was common ground that at that point the first plaintiff did give such a signal. In his evidence, Mr Ashby described how the first plaintiff put his hand through the

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5 Reasons [16]-[26] (citations in original).

6 (1938) 60 CLR 336 ('*Briginshaw*').

triangle section of the gate, and he demonstrated the signal which he saw the first plaintiff give. Mr Ashby interpreted the signal as a warning to those inside the gates, while the first plaintiff stated that he was signalling to the second plaintiff to bring the horse up. The Tribunal Member did not make any express finding in relation to that difference in the witnesses' evidence.

21 The fourth issue of fact arose from the evidence of Mr Villella, that he had observed the first plaintiff at the gate with the chain and a padlock in his hand, and that Mr Villella believed that he was attempting to lock the gate. The first plaintiff, in his evidence, endeavoured to explain his actions, by stating that he was attempting to play with the padlock because it was stiff. That evidence was contradicted by Mr Villella, who stated that on the following Monday he had tested the padlock, and found that it only required a little force to lock. The Member regarded the explanation given by the first plaintiff, for his actions, as 'feeble'. He said that there was no logical reason for the first plaintiff to be holding the chains and playing with the padlock, if he was not intending or attempting to lock the gate. The Member preferred the evidence of Mr Villella, and was satisfied 'to the required standard' that the first plaintiff was in the process of locking the gate.

22 The fifth issue of fact, determined by the Tribunal Member, arose from the fact that there was no twitch in the horse's box. In his evidence, the second plaintiff stated that he always used a twitch to drench the horse. It was therefore put that, in the absence of such a twitch, it was unlikely that he would have intended to stomach-tube the horse. The Tribunal Member rejected that evidence of the second plaintiff. In doing so, he relied on inconsistencies in the evidence given by the second plaintiff with evidence which he had given to the steward's inquiry, and to the racing tribunal, on the need to use a twitch when stomach-tubing the horse.

23 Having decided those issues of fact, the Tribunal Member noted that he had considered all the evidence, including the veterinary evidence given by Dr van Veenendaal and Dr Faehrmann. He stated, 'In the circumstances it is unnecessary for me to refer to that evidence although I have not disregarded the relevant parts of that evidence'.

24 The Tribunal Member then stated:

> This is a circumstantial case and the outcome depends on whether certain facts have been proved to the *Briginshaw* standard and whether those facts, if proved to the requisite standard, go to found the inference for which the respondent contends, namely that there was an intention on the part of the applicants to stomach-tube the horse on the race day before the horse competed in a race on that day.

25 The Tribunal Member then referred to the principles which apply to the drawing of inferences in civil cases, as stated by the Court of

Appeal in *Transport Industries Insurance Co Ltd v Longmuir*[7] and *Chapman v Cole*,[8] namely, that the inference to be drawn against a defendant must be the more probable inference.

26 Having referred to those principles, the Tribunal Member concluded his reasons as follows:

> I have already referred to the six issues raised by Dr Pannam which he submitted go to found the inference for which the respondent contended, namely, that the applicants intended to tube the horse prior to the race on race day. The respondent was required to prove the facts alleged in those various issues to the *Briginshaw* standard. Having decided which of those issues has been proved to the required standard I then look at the combination of facts proved to determine whether I should draw the inference for which the respondent contended. I am comfortably satisfied to draw the inference that Con and Tony intended to tube the horse prior to the race on race day. There was time and opportunity to do so. Tony had placed the bag (exhibit 9) in box 11 while Con was endeavouring to lock the front gate. Ashby and Villella then arrived on the scene. I am satisfied that the respondent has proved the charges against each applicant.

14 It can be seen that this conclusion emphasises three critical intermediate conclusions of fact:

(a) that there was time and opportunity for the applicants to stomach-tube the horse;

(b) that the second applicant placed the bag containing the naso-gastric tubes in box 11; and

(c) the first applicant sought to lock the gate.

15 The Tribunal had previously rejected the explanation given by the second applicant that he made a mistake in taking the bag to the box.[9] It had also made subsidiary findings of fact that the first applicant's actions were accompanied by the statement, 'I'll call you if there's any trouble';[10] that the second applicant gave a hand signal to those within the stables as he was approached by the Stewards;[11] that

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7 [1997] 1 VR 127.

8 (2006) 15 VR 150.

9 Reasons [17].

10 Ibid [23].

11 Ibid [23].

the second applicant's evidence concerning the twitch was contrived and that he sought to alter it in an attempt to show there was not enough time for the horse to be stomach-tubed[12] and that the bag which the second applicant placed in the stable had been brought from Sydney and used for the duration of the Melbourne trip to contain the stomach-tubing equipment.[13]

The grounds of appeal

16 The amended grounds of appeal argued before Kaye J and in respect of which he granted leave were as follows:[14]

> (1) The Tribunal erred in drawing inferences from the facts found without applying the *Briginshaw* standard of proof to the drawing of such inferences where the nature of the proceedings attracted the *Briginshaw* standard of proof;
>
> (2) The Tribunal misdirected itself as to the law regarding the drawing of inferences where the nature of the proceedings attracted the *Briginshaw* standard of proof;
>
> (3) The Tribunal failed to direct itself in relation to the requirement that to constitute an attempt an act must be 'sufficiently proximate;'
>
> (4) The conclusion drawn by the Tribunal is erroneous in that it could not be drawn in the absence of a finding that the plaintiffs or either of them were in possession of or had access to a substance with the intent of administering such substance to the horse in breach of the Australian Rules of Racing;
>
> (5) There are no findings of fact from which the Tribunal could conclude:
>
> (a) that the first plaintiff arranged with the second plaintiff and/or agreed to administer a substance to the horse Howmuchdoyouloveme in breach of the Australian Rules of Racing;
>
> (b) that the second plaintiff arranged with the first plaintiff and/or agreed to administer a substance to the horse Howmuchdoyouloveme in breach of the Australian Rules of Racing;
>
> (c) that the second plaintiff attempted to administer a substance to the horse Howmuchdoyouloveme in breach of the Australian

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12 Ibid [25].

13 Ibid [24].

14 Ibid [28].

Rules of Racing;

(6) The Tribunal failed to provide adequate reasons in as much as:

(a) the reasons provided do not adequately explain the reason for the Tribunal disregarding the evidence of Dr van Veenendaal and Dr Peter Faehrmann.

(b) the reasons provided do not contain findings of fact from which the ultimate conclusion reached by the Tribunal can be drawn;

(c) the reasons provided do not sufficiently reveal the logical steps by which the Tribunal proceeded from its findings of fact to its conclusions.

17 It was contended before Kaye J that the relevant questions of law raised by the appeal were embodied in the errors identified in these grounds.

18 The current application is sought to be brought on the basis of a different formulation of the relevant questions of law:[15]

(a) In what circumstances can a Tribunal infer from the actions of a person that the person intended to perform an act which, at the relevant time, that person knew to be impossible?

(b) In what circumstances can a Tribunal infer from the actions of a person that the person was attempting to perform an act which the person, at the relevant time, knew to be impossible of performance?

(c) In what circumstances can a Tribunal properly draw an inference, on the Briginshaw standard, which is not consistent with uncontradicted expert evidence?

(d) Are the reasons of a Tribunal adequate where the Tribunal:

(i) states that it has taken into account the evidence of expert witnesses called before it;

(ii) draws an inference which appears to be contra-indicated by that evidence; but

(iii) gives no explanation as to how it took that evidence into account or how it drew the inference in the face of the expert evidence?

19 In my view this formulation of the relevant questions of law is too broad both in the generality of the terms in which it is expressed and because it cannot be

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15 Second affidavit of Chris Stakis sworn 18 September 2013, [25].

seriously arguable that the appeal judge erred in failing to resolve questions that were not put to him and in respect of which no leave to appeal was granted pursuant to s 148 of the *VCAT Act*.

20 Likewise the proposed grounds of appeal to this Court go beyond those argued before Kaye J and the scope of leave to appeal granted by him:

> 1. Having regard to the whole of the evidence, including the evidence of the veterinarians, and having regard to the absence of evidence of any substance to be administered to the horse, the learned Trial Judge, ought to have found that it was not open to the Tribunal reasonably to infer to the *Briginshaw* standard that the Appellants:
>
> (a) intended to stomach tube the horse before the race;
>
> (b) conspired to stomach tube the horse before the race;
>
> (c) attempted to stomach tube the horse before the race.
>
> 2. Both the Tribunal and the learned Trial Judge erred in failing to draw a distinction between the absence of a *reason* and the absence of an *explanation given by the Appellants* for taking the stomach tube to the horse's stall.
>
> 3. In holding that it was open to the Tribunal to draw the inference that the Appellants:
>
> (a) intended to stomach tube the horse before the race;
>
> (b) conspired to stomach tube the horse before the race;
>
> (c) attempted to stomach tube the horse before the race;
>
> the learned Trial Judge erred in that he gave insufficient weight to:
>
> (i) the absence of any substance to administer to the horse;
>
> (ii) the failure of the Tribunal to give any consideration to the absence of any substance to be administered to the horse;
>
> (iii) the uncontradicted and unchallenged expert evidence that to stomach tube the horse before the race would be reckless, dangerous and pointless;
>
> (iv) the impossibility on the facts found (and of which the Appellants were aware) of using the stomach tube to administer any substance to the horse prior to the race;
>
> (v) the fact that there was no practical purpose in using the stomach tube on the horse prior to the race otherwise

than to administer some substance to the horse;

(vi) the uncontradicted and unchallenged evidence that it would possibly be necessary to stomach tube the horse with saline solution after the race;

(vii) the uncontradicted and unchallenged evidence that for this purpose a substance was prepared and placed in the bag found in the horse's box;

(viii) the uncontradicted and unchallenged evidence that the Appellants intended to stomach tube the horse after the race by using the stomach tube and powder in the bag found in the horse's box.

4. The learned Trial Judge erred in concluding (despite the matters set out in paragraph 3(vi), (vii) and (viii)) that the Tribunal, in finding that there was no innocent explanation for bringing the stomach tube to the horse's stall, was *"entitled, and indeed obliged, to act on the basis of an established fact that the Second Plaintiff had deliberately brought a stomach tube to the box containing the horse, shortly before the horse was due to depart for the racecourse, without any appropriate explanation being given for the presence of the stomach-tube in the horse's box"* [Reasons paragraph 69].

5. The learned Trial Judge erred in finding that the statement by the Tribunal [in paragraph 26 of its reasons] *"I have read and considered all the evidence in this review, including the veterinary evidence given by Dr. John van Veenendaal and Dr. Peter Faehrmann as well as the scientific evidence given by Dr. Batty. In the circumstances, it is unnecessary for me to refer to that evidence although I have not disregarded the relevant parts of that evidence"* indicated with sufficient clarity and precision:

(a) that the Tribunal had taken into account the whole of the evidence of the veterinarians, Dr. John van Veenendaal and Dr. Peter Faehrmann;

(b) whether and how the Tribunal had taken into account that evidence of the veterinarians, Dr. John van Veenendaal and Dr. Peter Faehrmann:

(i) that to stomach tube the horse before the race would be reckless, dangerous and pointless;

(ii) that there was no practical purpose in using the stomach tube on the horse prior to the race otherwise than to administer some substance to the horse;

(c) the use which the Tribunal made of that evidence in reaching its conclusion.

6. The learned Trial Judge erred in failing to hold that the reasons provided by the Tribunal were inadequate, particularly as those reasons did not:

(a) adequately explain the way in which the Tribunal used the evidence of Dr. John van Veenendaal and Dr. Peter Faehrmann;

(b) deal with the significance of the absence of any evidence of a substance which was to be administered to the horse;

(c) sufficiently reveal the logical steps by which the Tribunal proceeded from its findings of fact to its conclusions.

7. The learned Trial Judge erred in holding it was open to the Tribunal:

(a) to infer from the failure of the Second Appellant, to give an explanation for the presence of the stomach tubing equipment in the horse's stall, that the stomach tubing equipment had been brought into the horse's stall for the purpose of stomach tubing the horse before the race; and thereby

(b) to reverse the onus of proof.

21 It will be seen that proposed ground 3 (to which in part proposed ground 4 relates) is expressed by reference to the weight of the evidence and in particular alleges that Kaye J 'gave insufficient weight to' various matters. This is not a proper form of ground on an appeal on questions of law.[16] The basic problem facing the applicants is that they have lost at each stage of the proceeding upon the facts. The primary question raised before Kaye J was whether it was open to the Tribunal to conclude as it did on the evidence. If it was so open then the Tribunal did not commit an error of law in reaching the conclusion that it did, albeit that it may (or may not) have erred on the facts. The appeal was not concerned with the weight of the evidence insofar as that bore upon the assessment of the relative weight of competing considerations. It was concerned with the question of whether the Tribunal's conclusion was properly open to it.

22 In *Transport Accident Commission v Hoffman*[17] Young CJ and McGarvie J stated of an appeal 'on a question of law' against a decision of the predecessor to VCAT:

> How then is it to be construed? It is not to be construed as limited to an appeal from a decision of the Tribunal on a question of law. Nor is it to be construed as granting an appeal from any decision which involves a question of law. The *via media* we think is to construe the section as granting a right of

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16 *ISPT Pty Ltd v Melbourne City Council* (2008) 20 VR 447, 464-465[65]-[69].

17 [1989] VR 197.

> appeal from any decision of a Tribunal on a question of law which is involved in the Tribunal's decision. See per Deane J in *Director-General of Social Services v Chaney*.[18] This construction would exclude an appeal upon such questions as whether a particular decision was against the evidence and the weight of evidence: see *Collins v Minister for Immigration and Ethnic Affairs*.[19] It would, however, allow an appeal upon the question whether there was any evidence upon which the Tribunal could have reached the decision which it did reach. In *Blackwood Hodge (Australia) Pty Ltd v Collector of Customs (NSW) (No.2)*[20] the Full Court of the Federal Court held that in order to succeed, an appellant would have to show that there was no basis on which the Tribunal could reach the conclusion which it came to: see especially per Fisher J.[21]

23 The relevant principle with respect to inferences was articulated by Mildren J in *Tracy Sports Village and Social Club v Walker*:[22]

> If there are no primary facts upon which a secondary fact could be inferred, and the secondary fact is crucial to the ultimate finding as to whether or not the case fell within the words of the statute, there is an error of law. If there are primary facts upon which a secondary fact *might* be inferred, there is no error of law. It is not sufficient that this Court would have drawn a different inference from those facts. The question is, whether there were facts upon which the inference *might* be drawn.[23]

24 The question of what was open to the Tribunal is thus to be decided on the basis of the evidence and inferences most favourable to the respondent.[24]

25 In my view the matters agitated by the applicants raise only two proper grounds of appeal, which can be summarily stated:

(a) The appeal judge erred in concluding that it was open to the Tribunal to draw the inference that the applicants:

(i) intended to stomach-tube the horse before the race;

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18 (1980) 3 ALD161, 181.

19 (1981) 4 ALD 198.

20 (1980) 3 ALD 38.

21 [1989] VR 197, 199.

22 (1992) 111 FLR 32, 37-8.

23 Emphasis in original. A passage approved by Phillips JA in *S v Crimes Compensation Tribunal* (1998) 1 VR 83, 91 and by Warren CJ (with whom Chernov JA and Bell AJA agreed) in *Myers v Medical Practitioners Board* (2007) 18 VR 48, 60.

24 *ISPT Pty Ltd v Melbourne City Council* (2008) 20 VR 447, 464-5 [66]-[69].

(ii) conspired to stomach-tube the horse before the race;

(iii) attempted to stomach-tube the horse before the race.

(b) The appeal judge erred in concluding that the reasons provided by the Tribunal were adequate to explain the way it had taken into account the evidence of the two veterinarians.

26 These are the propositions inherent in grounds 3, 4, 5 and 6 argued before Kaye J.

27 They are also embodied in the proposed grounds of appeal to this Court 1 and 5. Moreover, as will be apparent below, the matters asserted in proposed grounds 2, 3, 4, 6 and 7 are in effect argumentative particulars of these fundamental grounds.

28 In assessing whether the Tribunal's conclusions were open to it this Court must bear in mind that it is plainly the intention of the Legislature that the Tribunal not this Court be the tribunal which determines the facts. In addition the Tribunal had the advantage of a view of the stables to assist it to understand the evidence and of seeing the witnesses give their evidence and be cross-examined before it. These matters must also encourage caution when assessing the question whether the Tribunal reached conclusions open to it.[25]

Briginshaw

29 The first two grounds agitated before Kaye J alleged that the Tribunal erred in the manner in which it applied 'the *Briginshaw* standard of proof' to the drawing of inferences. Kaye J concluded that on a proper reading of the Tribunal's reasons this was not the fact and its conclusions were expressed by reference to the relevant standard. This conclusion is not challenged in the present application but, for the sake of completeness and because it informs consideration of the matters which are the subject of the application for leave to appeal, it is desirable to say something

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25 *Fox v Percy* (2003) 214 CLR 118, 125–8 [23]–[29] (Gleeson CJ, Gummow and Kirby JJ).

about the relevant concept.

30 In *Briginshaw v Briginshaw*[26] Dixon J stated:

> Except upon criminal issues to be proved by the Prosecution, it is enough for the affirmative of an allegation to be made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.[27]

31 At common law *Briginshaw* did not create a different standard of proof for serious allegations in civil cases:

> The strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found.' Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a find that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.[28]

32 These considerations are now reflected in s 140 of the *Evidence Act 2008*:

> (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account—
>
> (a) the nature of the cause of action or defence; and
>
> (b) the nature of the subject-matter of the proceeding; and
>
> (c) the gravity of the matters alleged.[29]

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26 (1938) 60 CLR 336, 361.

27 See also per Rich J at 350.

28 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, 171 (Mason CJ, Brennan, Deane and Gaudron JJ).

29 *Evidence Act 2008* s 140.

33 It should be noted however that although the *Evidence Act* applies to all proceedings in a Victorian court[30] the Dictionary to the *Evidence Act* relevantly defines 'Victorian court' to include persons or bodies required to apply the laws of evidence. The *VCAT Act* makes plain that the Tribunal is not bound by the rules of evidence:

> **97 Tribunal must act fairly**
>
> The Tribunal must act fairly and according to the substantial merits of the case in all proceedings.
>
> **98 General procedure**
>
> (1) The Tribunal—
>
> (a) is bound by the rules of natural justice;
>
> (b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;
>
> (c) may inform itself on any matter as it sees fit;
>
> (d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.
>
> (2) Without limiting subsection (1)(b), the Tribunal may admit into evidence the contents of any document despite the non-compliance with any time limit or other requirement specified in the rules in relation to that document or service of it.
>
> (3) Subject to this Act, the regulations and the rules, the Tribunal may regulate its own procedure.
>
> (4) Subsection (1)(a) does not apply to the extent that this Act or an enabling enactment authorises, whether expressly or by implication, a departure from the rules of natural justice.[31]

34 It follows that s 140 did not apply to the proceedings before the Tribunal.

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30 *Evidence Act 2008* s 4.

31 *VCAT Act* ss 97 and 98.

35 Further insofar as the applicants' case proceeds on the basis that the Tribunal was 'bound' by the principles stated in *Briginshaw* in the same way as a court would be this may be doubted.

36 Provided that the Tribunal acted fairly and on the basis of relevant evidence (ie evidence rationally affecting the assessment of the probabilities of the facts in issue), it could not be readily concluded that it acted contrary to the law.

37 This said, it was entirely proper for the Tribunal to take the approach that it did and require that it be 'comfortably satisfied' of the facts in issue. As the High Court made clear in *Neat Holdings*,[32] the relevant principle should be understood as reflecting 'a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct'. The approach that the Tribunal took was a rational and proper one in all the circumstances of the case. Further, it accorded with the approach accepted as proper before other tribunals in disciplinary proceedings not governed by the rules of evidence.[33]

38 In *Greyhound Racing Authority v Bragg*[34] Santow JA expressed in the following way the applicability of the *Briginshaw* concepts to the functions of a tribunal concerned with questions of the type in issue in this case:[35]

> The notion of 'inexact proof, and indefinite testimony or indirect references [scil. inferences]' needs to be translated to a comfortable level of satisfaction, fairly and properly arrived at, commensurate with the gravity of the charge, achieved in accordance with fair processes appropriate to and adopted by such a body.

39 This formulation captures the relevant sense in which the application of the principles stated by Dixon J in *Briginshaw* must be qualified in cases such as the present.

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32 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

33 See, eg, *Australian Football League v Carlton Football Club Limited* (1998) 2 VR 546 (Hayne JA, 569); *Myers v Medical Practitioners Board of Victoria* (2007) 18 VR 48 (Warren CJ, 63 [58]); *Forster v Legal Services Board* [2013] VSCA 73 (Kyrou AJA [179]).

34 [2003] NSWCA 388.

35 Ibid [35] (emphasis omitted).

40 In the present case as I have said the Tribunal expressly directed itself to the need to be 'comfortably satisfied' of its conclusions concerning the matters in issue. The primary question before Kaye J was whether it was open to the Tribunal to be so satisfied. I shall approach the matters in issue on the same basis, although for like reasons to those explained by Phillips JA in *S v Crimes Compensation Tribunal*[36] it must always be borne in mind that ultimately on an appeal on questions of law the correct test is simply whether the Tribunal's findings were 'open':

> The word 'reasonably' is used in this context, I suggest, just to emphasise that, when judging what was open and what was not open below, we are speaking of rational tribunals acting according to law, not irrational ones acting arbitrarily. The danger of using the word 'reasonably' lies in its being taken to suggest that a finding of fact may be overturned, on an appeal which is limited to a question of law, simply because that finding is regarded as 'unreasonable'. That is not the law as I understand it, at least in Australia. A finding of fact will be overturned on an appeal on a question of law only if that finding was not open.[37]

Was it open to the Tribunal to conclude adversely to the applicants in the absence of evidence of the presence of a prohibited substance intended to be administered to the horse?

41 Kaye J accepted that although the Tribunal found that there was time and opportunity for the applicants to stomach-tube the horse before the race in which it was entered, no finding was made that there was a suitable substance available which might be fed to the horse by way of the tube.[38] The respondent did not contend before the Tribunal that the Tribunal should conclude that it was intended to stomach-tube the horse with the sachet of saline drench powder contained in the chaff bag at the time the stomach-tubing apparatus was found. The evidence showed that sodium bicarbonate which potentially could have been used as a drench was located in a bag in the feed room of the stables adjacent to but outside the gate which the first applicant sought to lock. It is submitted that in the absence of evidence of the presence of a suitable substance in or near the relevant stall the

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36 (1998) 1 VR 83.

37 Ibid 91.

38 Reasons [65].

Tribunal could not have been satisfied that there was an intention on the part of the applicants to stomach-tube the horse.

42 It must be noted first that proof of the offences in issue did not require proof of an intention to use a particular substance. As the respondent submits and the Tribunal accepted, Rule 64G creates an 'instrument only' offence. It was sufficient to prove conduct which 'could have led' to the horse being stomach-tubed or a conspiracy or attempt to stomach-tube.

43 The terms of Rule 64G are directed simply to the use of a prohibited procedure during the timeframe of 24 hours prior to the starting time of a race in which the horse is entered. There is an obvious policy reason for a rule in these simple terms. The sole purpose of use of a naso-gastric tube is to introduce some substance into a horse's stomach. It may well be that proof of the procedure or attempted procedure within the relevant 24 hour period is significantly easier than proof of the use or intended use of a prohibited substance. Moreover, theoretically at least, adoption of the procedure might affect the capacity to prove prior administration of a prohibited substance.

44 The respondent points to the fact that other rules relate to the administration of prohibited substances.[39] Even in the absence of these rules however there is no reason why the plain meaning of Rule 64G should not be given its effect.

45 Kaye J reasoned on the facts as follows:[40]

> 67 It must be acknowledged, at the outset, that the two matters, relied on by the plaintiffs, are of some force. In particular, I accept that the absence of any substance, to feed to the horse through the stomach-tube, was a weighty factor in favour of the plaintiffs, which militated against the drawing of the inference that the plaintiffs intended to stomach-tube the horse before the race.
>
> 68 Nevertheless, I do not accept the submission by the plaintiffs that it was not open to the Tribunal Member, in any circumstance, to reasonably draw an inference as to an intention to stomach-tube the

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[39] Rules 178A and 178E.

[40] Reasons [67]-[69], [71]-[74] (citations in original).

horse, in the absence of the finding of a substance to introduce to the horse through the stomach-tube. In particular, I do not accept the submission by Mr Nash that a conclusion, as to the existence of such an intention, would not be logical in the absence of the existence of a substance to introduce to the horse through the tube. Ultimately, the question as to whether, notwithstanding the absence of the substance, an inference as to intention is nevertheless established on the balance of probabilities, must depend upon the combined force and weight of the factors relied on by the Tribunal in favour of drawing such an inference. In particular, the question is whether the combined force of those facts is such that, notwithstanding the two points relied on by the plaintiffs, it was open to the Tribunal, by rational inference, to conclude that the plaintiffs did intend to stomach-tube the horse.

69 The first, and most important, fact, found by the Tribunal Member, was that the second plaintiff intentionally took the stomach-tube to the horse's box, 30 minutes before the horse was due on course. The second plaintiff endeavoured to explain the presence of the stomach-tube in the bag on the basis that he mistakenly picked up the wrong bag. That explanation was rejected by the Tribunal Member. It is important to bear in mind that the second plaintiff did not seek to proffer any other 'innocent' explanation for the presence of the naso-gastric tubes in the bag in the horse's box, shortly before the horse was due on course. For example, neither plaintiff suggested – as was put in submissions before me – that the naso-gastric tubes might have been brought to the box in order to enable the horse to be stomach-tubed with a saline drench after the race, so as to prevent the horse becoming dehydrated. The absence of any such 'innocent' explanation given by the second plaintiff, and accepted by the Tribunal, had the effect that the Tribunal Member was entitled, and indeed obliged, to act on the basis of an established fact that the second plaintiff had deliberately brought a stomach tube to the box containing the horse, shortly before the horse was due to depart for the racecourse, without any appropriate explanation being given for the presence of the stomach-tube in the horse's box.

…

71 Pausing there, and standing alone, that fact, of itself, was a powerful circumstance in favour of drawing an inference that the naso-gastric tube had been brought to the horse's stall for the purpose of stomach-tubing the horse. Logically, the purpose of a naso-gastric tube is to stomach-tube a horse. There was no other reason why the stomach-tube would be brought to the horse's stall. No other explanation was given by the plaintiffs for its presence there. The conveying of a stomach-tube to the box of a horse, prima facie, is a sound starting point for the drawing of an inference in favour of an intention by the second plaintiff to stomach-tube the horse.

72 That fact, of course, was not the sole support for the finding by the Tribunal Member. In addition, the Member found that the first plaintiff said to the second plaintiff, when he was stationed at the gate, that 'I'll call you if there's any trouble'. At about the same time the first plaintiff was proceeding to lock the gate with a padlock. There

was no logical reason for the first plaintiff to lock the gate at that point. On the contrary, as the horse was shortly due on the course, it would be illogical to lock the gate, unless there was some other important reason to do so. Further, at about that time, the first plaintiff was observed to give a hand signal to the second plaintiff.

73 The case, in respect of the intention of the two plaintiffs, was essentially a circumstantial case. The task of the Tribunal Member was to consider the combined weight and force of those facts working together, and not in isolation from each other.[41] Taken together, those four facts were a strong basis upon which the Tribunal Member was entitled to infer that the first and second plaintiffs were acting in combination to stomach-tube the horse before the race. The case made on behalf of the defendant, before the Tribunal, was that the two plaintiffs were acting in combination. There was at least a prima facie basis for such a conclusion. Thus, it was not in issue before the Tribunal, or on appeal, that the actions and conduct of each of the plaintiffs, in pursuance of that joint combination, might be used as evidence to prove the participation by the other plaintiff in the joint enterprise.[42] In those circumstances, there was a strong basis upon which the Tribunal Member might reasonably conclude, as a matter of inference, that it was the intention of each of the two plaintiffs that the second plaintiff stomach-tube the horse.

74 As I have already stated, I acknowledge that the absence of a substance to introduce through the naso-gastric tube, was a weighty factor militating against the drawing of such a conclusion. I also acknowledge that the evidence of the two veterinary surgeons, as to the risks associated with stomach-tubing a horse, was relevant as bearing on the probabilities as to the existence of the joint agreement and intention of the plaintiffs to stomach-tube the horse. However, ultimately, those two facts do not logically preclude the drawing of an inference, on the balance of probabilities, as to the existence of an intention by the plaintiffs to stomach-tube the horse, taking into account the principles stated by the High Court in *Briginshaw v Briginshaw*. For those reasons, I do not accept that it was not open to the Tribunal Member to rationally infer, on the balance of probabilities, that the two plaintiffs intended to stomach-tube the horse before the race. Thus, I reject the submission made on behalf of the plaintiffs that the Tribunal Member erred in concluding, by way of inference, that the plaintiffs had an intention to stomach-tube the horse. It follows that ground 4 of the Notice of Appeal should fail.

46 There is no error in these reasons. On the one hand, proof of the presence of a suitable substance ready for administration to the horse would have strengthened the prosecution case. Likewise proof of collateral circumstances showing the

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41 *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125, 128; *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 535 (Gibbs CJ, Mason J); *Shepherd v The Queen* (1990) 170 CLR 573, 580-581 (Dawson J).

42 *Tripodi v The Queen* (1961) 104 CLR 1, 7; *Ahern v The Queen* (1988) 165 CLR 87, 94-95.

applicants' intent to make the horse run faster or slower would support the respondent's case. On the other hand, the absence of such proof did not prevent an inference being drawn that it was intended to stomach-tube the horse prior to the race when the whole of the circumstantial evidence was added together. It cannot be that proof of a circumstance not required by the offence must be necessary to proof of the offence itself.

47 In written submission counsel for the applicants put the matter this way:

> There is no allegation, and no evidence, that the applicants brought to the horse's box any substance capable of being used for stomach tubing the horse other than the post-race drench, or that they intended to bring any other substance to the box. There is, therefore, no evidence of any capacity to stomach tube the horse with any substance, and consequently no evidence to justify an inference that the applicants intended to stomach tube the horse with any substance before the race.

48 I do not accept that the absence of proof of the presence of a suitable substance necessarily prevented the drawing of the relevant inference of intention. That inference remained open on the basis of the facts of which the Tribunal was positively satisfied.

49 Moreover as counsel for the respondent submitted Kaye J's approach to this issue proceeded on a factual assumption which was generous to the applicants. His Honour found that in the absence of any finding by the Tribunal that there was a substance available which might be fed to the horse through the naso-gastric tube, he was prepared to assume for the purposes of the appeal that at the relevant time there was in fact no substance available to the applicants to administer to the horse.[43] With respect, this overstated the position. As was implicit in his Honour's reasons, the absence of proof of the presence of a suitable substance did not establish the negative fact of such absence. The searches carried out at the time were cursory after the bag with the equipment was found. The Tribunal proceeded in its decision-making by reference to the matters of which it was positively satisfied. There was no

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[43] Reasons [65].

error in this. Either those matters provided a sufficient basis for the inferences drawn or they did not. In my view they did.

Was it open to the Tribunal to conclude adversely to the applicants in the face of veterinary evidence that stomach-tubing before the race would be reckless, dangerous and futile?

50 Likewise, the veterinary opinions that stomach-tubing with bicarbonate prior to the race would be risky did not displace the case against the applicants. The evidence was that administration of bicarbonate would be risky because it was not possible to satisfactorily predict what effect this would have on TCO2 when tested before or after the race. There would also be incidental risks of nose damage and even drowning.

51 Putting aside the evidence as to risk, the veterinary evidence as to context did not materially assist the applicants. It included evidence that:

- TCO2 is a measure of the total carbon dioxide released from plasma taken from a sample of blood and is a good indicator of whether or not the horse has been supplemented with a buffering agent;
- bicarbonate is an important indicator of likely TCO2 levels in competing racehorses. Bicarbonate, which is the predominate acid buffering compound in normal blood, contributes to TCO2. While there is no direct mathematical relationship between bicarbonate level and TCO2 there is a strong correlation between the two;
- it would take between five to 20 minutes to stomach-tube the horse with bicarbonate;[44]
- a practice or 'fashion' which had caused concern over the previous two years was the attempting to top-up bicarbonate levels in horses before races;

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[44] The second applicant conceded in cross-examination that the horse could have been stomach-tubed within 10 minutes.

- some trainers had a view as to how bicarbonate could be administered to keep it under an acceptable level;
- there was anecdotal evidence of some trainers dosing horses with alkalinising or buffering agents close to racing;
- The effect on performance positive or negative of a given dose of bicarbonate cannot be predicted with accuracy;
- anecdotally, the amount of bicarbonate dose given close to a performance varied between 50 and 100 grams. Also anecdotally, a dose of bicarbonate of less than 50 grams was unlikely to be of any benefit.

52 The applicants were not veterinary practitioners and the notion that trainers acting as the applicants are alleged to have acted would necessarily act in accordance with veterinary opinion, seems to me to be entirely speculative. Put another way, human experience readily demonstrates that those engaged in training athletes and animals engaged in competitive races may act contrary to medical and veterinarian opinion from time to time.

53 In my view Kaye J was correct to conclude as follows:[45]

> 76 I do not accept the proposition that the conclusion by the Tribunal Member, as to the intention of the two plaintiffs to stomach-tube the horse, was contrary to the evidence of the two veterinary surgeons. The evidence of those two witnesses was relevant, and, as I have already indicated, it bore on an assessment of the probabilities as to whether the plaintiffs intended to stomach-tube the horse. However, that evidence was not, of itself, such as to logically preclude a conclusion by the Tribunal Member as to the existence of an intention by the plaintiffs to stomach-tube the horse.

54 Looked at in the broad, the evidence of the veterinary practitioners was of contextual but not direct or determinative significance.

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[45] Reasons [76].

Was it open to the Tribunal to conclude adversely to the applicants in the face of the applicants' evidence that it was intended to stomach-tube the horse after the race?

55 Next, it is submitted that because it was reasonably possible that the applicants intended to stomach-tube the horse after the race, the inferences drawn by the Tribunal were not open. Kaye J rightly rejected this submission also. The explanation offered for the presence of the naso-gastric tube in the horse's stall was a subsequent invention entirely inconsistent both with the explanation given at the time by the second applicant and the elaborate charade performed by him demonstrating that he had intended to get a bag containing a biscuit of hay. The Tribunal was not bound to regard the scenario postulated as probable. It may have been reasonable to stomach-tube the horse for the purposes of rehydration after the race but this possibility did not explain away the circumstances as the Tribunal found them.

Was it open to regard the actions of the second applicant as amounting to an attempt to breach Rule 64G(1)?

56 It was submitted before Kaye J that the actions of placing a bag containing two naso-gastric tubes, a funnel, a bucket and powder in the horse's box for the purpose of stomach-tubing could not be regarded as amounting to an attempt. In order to constitute an attempt the actions in issue must be more than preparatory in nature and be immediately and not merely remotely connected with the intended commission of the offence.[46]

57 Kaye J reasoned as follows:[47]

> 87 The actions of the second plaintiff, which were alleged to have been an attempt to commit the offence of stomach-tubing the horse, were constituted by his taking the two naso-gastric tubes, and other

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46 *Haughton v Smith* [1975] AC 476, 492 (Lord Hailsham); *Director of Public Prosecutions v Stonehouse* [1978] AC 55, 68 (Lord Diplock); *R v Mai* (1992) 26 NSWLR 371, 381-2 (Hunt CJ at CL); *Park v The Queen* (2010) 202 A Crim R 133, 143 [46] (McClellan CJ at CL).

47 Reasons [87], [90]-[91].

> equipment, in a bag to the horse's box, a short time before the horse was due on course, with the intention of stomach-tubing him with that equipment. At that time the second plaintiff was acting in combination with the first plaintiff, who was proceeding to lock the gate to the stables. The critical question is whether, in that context, the actions of the second plaintiff could reasonably be characterised as being more than merely preparatory to the commission of the offence of stomach-tubing the horse, and to be immediately and not remotely connected with the commission of that offence.
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> …
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> 90 Ultimately, the question whether the actions of the second plaintiff went beyond mere preparation, and were sufficiently proximate to the commission of the completed offence, does involve an exercise of judgment by the Tribunal of fact. It follows that in forming that judgment, the Tribunal would only have made an error of law, if the conclusion reached by it was one not reasonably open on the evidence.
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> 91 Bearing in mind those principles, I am not persuaded that the finding by the Tribunal Member, that the second plaintiff was guilty of attempting to stomach-tube the horse, was a finding which was not open to the Tribunal Member in the circumstances. Certainly, reasonable minds might respectively differ as to whether the actions of the second plaintiff were sufficient to be properly characterised as being so proximate to the commission of the offence as to constitute an attempt to commit it. However, it is not for this Court to substitute its own view for the conclusion reached by the Tribunal. On the Tribunal's findings of fact, the second plaintiff had brought the naso-gastric tubes to the horse's box, shortly before it was due on course, with the specific intention of stomach-tubing it. The first plaintiff was in the process of locking the stable gate, when the stewards intervened. Given those findings of fact, I am not persuaded that the Tribunal Member erred in law in reaching the conclusion that the second plaintiff's actions were sufficient to constitute an attempt to commit the offence of stomach-tubing the horse.

58 There was no error in this reasoning. Once the Tribunal made the finding which it did as to the second applicant's intention shortly before the horse was due on course then the actions undertaken were sufficiently proximate to the commission of the completed offence to amount to attempt.

Did the Tribunal give adequate reasons with respect to the veterinary evidence called on behalf of the applicants?

59 It was submitted to Kaye J that the Tribunal failed to give adequate reasons for 'dismissing' the evidence of the veterinary experts Drs Veenendaal and

Faehrmann. There is nothing in this point, as his Honour found. Whilst the

evidence was contextually relevant it did not bear directly on the actions of the applicants. The Tribunal stated that it had read and considered the evidence of the two veterinary practitioners and had not 'disregarded the relevant parts of that evidence.' Kaye J was correct to conclude that he could not be satisfied that the Tribunal had failed to have regard to this aspect of the evidence. No further treatment of the evidence was logically necessary because the Tribunal's conclusions rested upon positive findings as to circumstances which sustained its conclusion independently of the veterinary evidence.

60 In my view leave to appeal should be refused. The decision of Kaye J is not attended by any material doubt.

BEACH JA:

61 I agree with Osborn JA that the application for leave to appeal should be dismissed for the reasons stated by his Honour.