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RACING APPEALS AND DISCIPLINARY BOARD

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DECISION

RACING VICTORIA STEWARDS

and

BRIAN COX

Date of Decision: 2 November 2016

Panel: Judge Bowman (Chair), Mr Darren McGee, Mr Shaun Ryan.

Appearances: Mr Jack Rush QC, instructed by Mr Daniel Bolkunowicz, appeared as counsel for the stewards.

Mr Joe Ferwerda, instructed by Ryan Carlisle Thomas Lawyers, appeared as counsel for Mr Cox.

Charges 1-4: **AR 175(h)(i)** - Administered, or caused to be administered, a prohibited substance (Ethylestrenol – via *Nitrotrain*) for the purpose of affecting the performance or behaviour of a horse in a race.

- Charges 1 & 2 - Administration to *Minnie Downs* on 17 August and 21 August 2015.
- Charges 3 & 4 - Administration to *Baby Jack* on 17 August and 21 August 2015.

Charges 5-8: AR 178H (alternatives to **Charges 1-4**) - Administered, or caused to be administered, an anabolic androgenic steroid.

- Charges 5 & 6 - Administration to *Minnie Downs* on 17 August and 21 August 2015.
- Charges 7 & 8 **-** Administration to *Baby Jack* on 17 August and 21 August 2015.

Charge 9: **AR 177B(5)** - Possession of a prohibited substance which could give rise to an offence under AR 177B if administered to a horse at any time.

Charges 10 & 11: **AR 175(a)** - Improper action or practice in connection with racing.

Charge 12: **AR 175(g)** - Give evidence that is false or misleading in any particular.

Charge 13: **AR 175(o)** - Fail to exercise reasonable care to prevent an act of cruelty to an animal. The charge relates to the presentation of the horse *Cochrane's Gap,* trained by Mr Cox, at a jump-out on 9 December 2015 which, it is alleged, was contrary to veterinary advice.

Plea: Charges 9, 10 & 11 – guilty.
Charges 1-8, 12 and 13 – not guilty.

Decision: Charges 1-4 – the Board does not find the charges proved. The charges are dismissed.

Charges 5 – 8 (alternatives to Charges 1-4) – the Board finds the charges proved.

Charges 9, 10 & 11 – pleaded guilty.

Charge 12 – the Board finds the charge proved.

Charge 13 – the Board does not find the charge proved. The charge is dismissed.

Georgie Gavin
Registrar - Racing Appeals and Disciplinary Board

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DECISION

RACING VICTORIA STEWARDS

and

DR ROBERT FIELDING

Date of Decision: 2 November 2016

Panel: Judge Bowman (Chair), Mr Darren McGee, Mr Shaun Ryan.

Appearances: Mr Jack Rush QC, instructed by Mr Daniel Bolkunowicz, appeared as counsel for the stewards.

Mr Chris Winneke QC, instructed by Meridian Lawyers, appeared on behalf of Dr Fielding.

Charge 1: AR 175(a) - Dishonest or improper action or practice in connection with racing.

Charge 2: AR 175(k) - Conduct that could have led to a breach of the Rules.

Charge 3: AR 175(g) - Give evidence that is false or misleading in any particular. The charge relates to evidence given of veterinary advice provided to Mr Cox regarding the horse *Cochrane's Gap*.

Charges 1 and 2 relate to the finding of Nitrotrain during a stewards' race day stable inspection at Mr Cox's stables in Wodonga on 10 March 2016. Nitrotrain is an anabolic androgenic steroid and a prohibited substance under the Rules.

Plea: Not guilty – all charges.

Decision: Charge 1 – the Board finds the charge proved.
Charge 2 – the Board finds the charge proved.
Charge 3 – the Board does not find the charge proved. The charge is dismissed.

Georgie Gavin
Registrar - Racing Appeals and Disciplinary Board

Victoria 2/11/2016

RACING APPEALS AND DISCIPLINARY BOARD

(Original Jurisdiction)

Racing Victoria Stewards

V

Brian Cox and Dr Robert Fielding

DECISION

Judge Bowman	Chair
Mr D McGee	Member
Mr S Ryan	Member

Brian Cox

General Background

1 Licensed trainer, Mr Brian Cox, has pleaded "not guilty" to eight charges, four of them being alternate charges, in relation to the administration of a prohibited substance, namely an anabolic androgenic steroid containing the product called "Nitrotain". Charges 1-4 concern the administration for the purpose of affecting the performance or behaviour of a horse in a race. The four alternate charges, Charges 5-8, concern administration in a general sense. We shall refer to Mr Cox as "Brian Cox" in order to distinguish him from his brother, Nigel Cox, who also gave evidence.

2 Brian Cox has also pleaded "not guilty" to a charge of giving false or misleading evidence to the stewards in regard to the Nitrotain, this being Charge 12.

3 Brian Cox has pleaded "guilty" to Charges 9, 10 and 11. One of these, Charge 9, relates to the Nitrotain and is a charge of having a prohibited substance at his licensed premises. He has also pleaded "guilty", with extenuating circumstances, to two charges of improper action or practice in relation to racing, in that, in essence, he manhandled two stewards. This occurred in the context of a stable inspection by those stewards, being the inspection during which the Nitrotain was discovered. The matters to which Brian Cox has pleaded "guilty" do not require attention in this Decision and shall be discussed further when the issue of penalties is being considered.

4 Brian Cox has also pleaded "not guilty" to a totally separate charge in relation to the horse "Cochrane's Gap", which he trains, and his alleged failure to exercise reasonable care so as to prevent an act of cruelty. This has nothing to do with the Nitrotain or the administration of a prohibited substance. It shall be dealt with separately. As the matter involving Cochrane's Gap concerns licensed veterinarian, Dr Robert Fielding, who is also charged in relation to aspects of the Nitrotain cases, it was convenient to deal with both sets of charges at the one hearing, although they are quite distinct. We will return to the Cochrane's Gap case after dealing with the Nitrotain charges.

The Nitrotain Charges

(a) Background

5 On 10 March 2016, stewards Mr Dion Villella and Mr Rhys Melville, carried out a race day inspection at the stables of Brian Cox at Wodonga. It is no secret that, whilst some aspects of it were routine, this was not a totally random inspection and that the stewards were in possession of certain information.

6 During the course of that inspection, the stewards located two containers marked "Ulcerguard", not a prohibited substance, in a refrigerator ("the fridge") at the stables. One of these, at the back of the fridge, was subsequently analysed and found to contain Nitrotain. We accept that, when the stewards located it and showed interest in the relevant Ulcerguard container, the

demeanour of Brian Cox, who had previously been co-operative, changed dramatically. He became completely unco-operative, manhandled the stewards in an attempt to take possession of the container, threw himself on the ground, threatened self-harm and generally behaved in an agitated fashion. As stated, he tried to get the Ulcerguard container from the stewards.

7 Thereafter, the stewards interviewed Brian Cox on a number of occasions and reference shall be made to excerpts from the transcript of those interviews. Suffice to say that the information conveyed by Brian Cox was not very satisfactory.

8 However, information was later obtained by the stewards from the stable hand employed by Brian Cox, namely Ms Anika Basiak. Ms Basiak gave evidence and was the subject of searching cross-examination. In essence, she alleged that she administered Nitrotain to each of two horses – Minnie Downs and Baby Jack – on two occasions, namely 17 and 21 August 2015. Her evidence was that such administration was with the knowledge of and at the request of Brian Cox.

9 These episodes represent the basis of the eight administration charges against Brian Cox, the four "purpose of affecting performance in a race" charges and the four alternate charges of administration. Essentially, the argument against the evidence of Ms Basiak is that this represents an act of vindictiveness against Brian Cox, with whom she had had her differences, that it is a fabrication, or, at the very least, she is mistaken as to the timing of certain key events.

10 In this regard, it should be pointed out that trainers were warned in advance concerning the fact that Nitrotain was to become a prohibited substance and, on 1 May 2014, that prohibition came into effect.

(b) The Rules Allegedly Breached

11 Each of the alleged offences is a "serious offence" as defined in AR1. Pursuant to AR175(h)(i), the stewards, on behalf of the Principal Racing Authority, may penalise:

> *"Any person who administers, or causes to be administered, to a horse any prohibited substance for the purpose of affecting the performance or behaviour of a horse in a race..."*

12 Alleged breaches of this Rule form the foundation of Charges 1-4. Pursuant to AR196(5), a person found guilty of a breach of this Rule is to be disqualified for a period of not less than 3 years, unless a "special circumstance" as set out in LR73A is found.

13 Pursuant to AR178H(2) any person who:

> *"(a) administers an anabolic androgynous steroid"*

or

> *"(c) causes an anabolic androgynous steroid to be administered"*

must be penalised.

14 Alleged breaches of this Rule form the foundation for alternate Charges 5-8. Pursuant AR196(5), a person found guilty of a breach of this Rule is to be disqualified for a period not less than 2 years, unless a "special circumstance" is found.

15 It can be seen that the purpose of affecting the performance or behaviour of a horse in a race is the distinguishing factor between the two groups of charges.

16 Pursuant to AR175(g), the stewards may also penalise:

> *"Any person who gives at any interview, investigation, inquiry...any evidence which is false or misleading in any particular."*

17 This is the foundation for Charge 12. There is no set or minimum penalty for a person convicted of this offence.

(c) The Standard of Proof or Test to be Applied

18 Bearing in mind the seriousness of the charges and the potential of the consequences that may flow from them, there is no argument but that the standard required for the charges to be established is that referred to in *Brigginshaw v Brigginshaw* (1938) 60 CLR 36. We were also referred to other cases such as *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449. A mental state of comfortable satisfaction or actual persuasion, as it was subsequently described, is required. That comfortable satisfaction can be reached by direct evidence or inference, but there must be clear and cogent proof.

(d) Brian Cox as a Witness

19 We turn now to the principal witnesses and a discussion of their credibility. We will commence with Brian Cox. We say at the outset that we found Brian Cox to be a very unsatisfactory witness. When his behaviour towards, and answers to the questions of, the stewards are borne in mind and then combined with his evidence before this Board, we find that he totally lacks credibility in relation to certain key issues. We shall deal with some of the matters which caused us to come to this conclusion.

(i) We would refer again to the complete change of demeanour on the part of Brian Cox when, on 10 March 2016, the stewards went to his fridge and extracted the container marked "Ulcerguard", but which contained Nitrotain. That is in addition to the fact that the can was so labelled. We have referred above to what occurred.

(ii) There is then the issue of what Brian Cox told the stewards on 10 March 2016 at the time of the stable inspection.

(iii) Brian Cox initially told the stewards that the substance in the Ulcerguard container was "just an oral paste" and that someone could have planted it there.

(iv) On the same day (10 March 2016), he told the stewards over the telephone that he was "not sure what it is", adding somewhat confusingly that "one horse...got it in if it is that thingo. I know I'm getting a kick in the arse over it but I haven't got one horse on it" – perhaps an unusual statement if the substance was "just an oral paste".

(v) On 11 March 2016, Brian Cox wrote to the stewards saying that the crystallised substance which the stewards had removed from his stable was an anabolic steroid purchased in early 2014 from his veterinarian. He apologised for his actions the previous day, also saying that it was an "oversight" that the Nitrotain had not been removed, it having been sitting in the fridge for a significant period of time.

(vi) At Melbourne on 31 March 2016, Brian Cox told the stewards of his health problems and also said he was "very remorseful" for what he had done and that, since the death of his father, "I'm not handling things". He also said that he had done "a stupid thing".

(vii) Brian Cox also asserted that the Nitrotain had been sitting in his fridge for two years.

(viii) It was put to Brian Cox that his records indicated that on 31 January 2014 he had purchased a kilogram of Nitrotain from Dr Fielding's practice for $727.27. On 1 March 2014, another kilogram was purchased, also for $727.27. On 8 April 2015, there was an invoice from Dr Fielding's practice to Brian Cox's stables for Pentosan, not a prohibited substance, also for $727.27, the precisely identical figure as for Nitrotain, and approximately double the normal cost of Pentosan. Further Pentosan was purchased on the following day.

(ix) In this regard, when Mrs Cox, who was also at the interview and looks after the invoices, was asked why she paid double the normal price for

Pentosan supplied on 8 April 2015, effectively she said that she does not check Dr Fielding's prices and had let it "slip through".

(x) In the interview of 31 March 2016, Brian Cox admitted that he knew the substance in question was Nitrotain when the stewards were at his stables on 10 March 2016, and claimed that he panicked. He repeated that the Nitrotain had been in the fridge in the Ulcerguard container for two years.

(xi) It was pointed out to Brian Cox that, in his treatment records, the only time a substance described as "oral muscle substance" appears as being administered to horses is after May 2015. This is of significance because the subsequent evidence of the stable hand, Ms Anika Basiak, was that the phrase "oral muscle supplement" was used to describe the Nitrotain which she administered to Minnie Downs and Baby Jack. Brian Cox stated that the "oral muscle supplement" was something that he had used "for a long time".

(xii) In the interview of 31 March 2016, Brian Cox said that he had dropped and smashed one of the containers of Nitrotain purchased in early 2014, and hence the transfer of the product into the Ulcerguard container. The other tub of Nitrotain was given away to "a show person", presumably a person associated with show horses and not racehorses.

(xiii) In the interview of 31 March 2016, Brian Cox, when asked if he had given away "a $700 container with Nitrotain" replied as follows:

> *"Just give it to one of the staff members, that's all and that's all you need to know."*

When questioned further concerning this, Brian Cox said:

> *"I said I'd give it to one of the staff."*

(xiv) Thus, by the end of March 2016, and well-prior to this hearing, Brian Cox had offered the following explanation as to Nitrotain and its disposal:

(a) he did not know what it was or how it got there;

(b) it could well have been planted;

(c) it was just an oral paste;

(d) it was an anabolic steroid;

(e) it was an oversight that it was in the fridge;

(f) in fact, he knew how it got there, this occurring from the smashing of one container and the transferring of its contents into an Ulcerguard container;

(g) the other container (presumably) had been given to a "show person";

(h) the other container had been given to a staff member whom Brian Cox refused to name;

(i) there was no explanation as to how, on Dr Fielding's invoices, the precise price of Nitrotain happened to coincide with the precise price of Pentosan, despite the fact that Pentosan was normally approximately half the price of Nitrotain.

(xv) On 10 May 2016, the stewards again interviewed Brian Cox. This followed the receipt of a Statutory Declaration of Brian Cox's brother, Nigel Cox (the Statutory Declaration being dated 4 April 2016), in which it was asserted that the Nitrotain, the subject of Dr Fielding's Pentosan invoice, had in fact been purchased by Brian Cox for Nigel Cox and had been collected by Nigel Cox from Dr Fielding's clinic. This was allegedly for use on old, retired racehorses which Nigel Cox looked after. It is not suggested that Nigel Cox is a licensed or relevant person or that the possession of Nitrotain by him would be an offence under the Rules.

(xvi) On 10 May 2016, Brian Cox was reminded that, in the interview of 31 March 2016, he had said that he smashed one container of Nitrotain and had given the other away to a "show person". He also said that he had given it to one of his staff, whom he refused to identify. When asked why he did not then tell the stewards that the Nitrotain was for Nigel Cox, he effectively gave no response. He could not explain the change in his story.

(xvii) When interviewed on 10 May 2016, Nigel Cox maintained that he had paid for the Nitrotain from Dr Fielding by paying cash to his brother, although he (Nigel) was the person who picked it up from Dr Fielding's practice. He could give no reason as to why, if this occurred, Brian Cox had not told the stewards at the outset.

(xviii) Nigel Cox said on 10 May 2016 that he paid for the Nitrotain by "cash to Brian". Brian Cox subsequently said that it was cash paid to Mrs Cox. In oral evidence before us, Brian Cox said he told Nigel Cox to pick up the Nitrotain from Dr Fielding and "just pay me". Brian Cox then put cash in an envelope "because Bob *(Dr Fielding)* always liked sometimes a bit of cash. We done that numerous times for Nigel when he picked up products". Brian Cox was clearly suggesting that Nigel Cox was a regular customer of Dr Fielding's practice.

(xix) In his interview, Nigel Cox maintained that there was still some of the Nitrotain left and that it was kept at his residence. However, he told the stewards that he would not let them into his house to verify this. He gave no reason as to why he would not permit the stewards to enter his house and see the Nitrotain. We have little doubt but that the reason he would not permit the stewards to enter his house was because there was no tub of Nitrotain there. It is hard to think of any other plausible reason why there would be such a refusal. It was not an offence for Nigel Cox to possess Nitrotain.

(xx) In his oral evidence before this Board, Brian Cox stated as follows:

(a) After Nitrotain became illegal, he gave some of it away to "a couple of people", including a lady who had "a couple of old, geriatric horses". He stated that "I did give her probably a small tub of it to get rid of a little bit of it". If Brian Cox was getting rid of the Nitrotain by giving it to someone with old horses, why not simply give it to his brother, Nigel Cox?

(b) In about March 2014, Dr Fielding had warned him of the upcoming ban on Nitrotain and had told him "just make sure you get rid of it".

(c) Brian Cox stated that he kept the fridge clean and went to it about five times a day. However, he just forgot about the Ulcerguard tub filled with Nitrotain for over two years.

(d) Towards the end of cross-examination, Brian Cox stated that he kept the Nitrotain in the fridge because "I give it sometimes to the old pony 'cause I have got a beautiful old lead horse and I was giving him a little bit of it". This is the first time that this explanation was proffered. It does not sit at all with previous explanations that what Brian Cox thought was in the tub was just an oral paste; that he was not sure what it was; that he had forgotten that it was there; that it was an oversight and the like.

20 In summary, we do not find Brian Cox to be a credible witness. We do not accept his evidence in relation to the important matters that form the basis of the "general administration" charges – that is, Charges 5-8. We regard much of his evidence as false and untruthful.

(e) Ms Basiak as a Witness

21 As is evident, Ms Basiak is a central witness in the case against Brian Cox. In relation to her credibility, essentially we regard her as a witness of truth on several important issues.

22 It may be that she could have been mistaken as to the date upon which she saw Brian Cox remove a tub of Nitrotain from Dr Fielding's vehicle. Originally, she put this as being two to three weeks after she commenced her third stint of employment at Brian Cox's stables on 11 July 2015. The evidence that Dr Fielding was overseas from 5 July 2015 until 16 August seems irrefutable. However, he did attend the stables on 17 August.

23 Even if Ms Basiak is mistaken as to precisely when she saw Brian Cox removing the Nitrotain from Dr Fielding's vehicle, there are some vital matters in relation to which her evidence was unshaken and which we accept. She administered "oral muscle supplement" to Minnie Downs and Baby Jack on 17 and 21 August 2015. We accept Ms Basiak's evidence that "oral muscle supplement" was, on these occasions, a pseudonym for Nitrotain. The Nitrotain was administered at the request of, and with the knowledge of, Brian Cox. Despite searching cross-examination, Ms Basiak's evidence did not waver on these key matters.

24 We accept that the relationship between Brian Cox and Ms Basiak was at times far from happy and became "toxic". She made no secret of that. However, we do not accept that she "set up" Brian Cox in relation to the Nitrotain offences. We accept her evidence given in cross-examination by Mr Ferwerda that, at the relevant times, she knew little about Nitrotain (other than having enquired as to any withholding period) and did not know that it was a banned substance until so informed by Mr Melville, one of the stewards. She gave clear evidence that the administration of Nitrotain by her was always discussed with Brian Cox and was given at his direction.

25 Apart from the fact that Ms Basiak impressed us as a witness, there are a couple of other matters that tend to underline her credibility. As pointed out by Mr

Rush, when Ms Basiak first informed the stewards, whilst being interviewed by them, of the location of the Nitrotain in the Ulcerguard container in the fridge, she was unaware that they had already found it precisely there. Ultimately it has not been suggested that this was a "plant" by Ms Basiak or that she had "set up" Brian Cox by so "planting" the Nitrotain. In other words, in the initial interview, Ms Basiak informed the stewards of the precise location of the Nitrotain and of her administration of it without knowledge of the fact that the stewards had already located it.

26 Secondly (and it may seem only a small thing, but is of significance), a workmate, Ms Amber Comb, who still works for Brian Cox, and has since 2010, was called to give evidence by him. This was at least in part in relation to a tub of Nitrotain being dropped and broken in 2014 and the contents being placed in an Ulcerguard container. When asked by Mr Ferwerda, counsel for Brian Cox, as to her view of Ms Basiak as a person, Ms Comb replied "As a person she's a lovely lady". This was an interesting observation, given that at times the two had differences of opinion in relation to "small things" to do with work. It was, effectively, quite a strong, if unsolicited, character reference from someone who has been employed by Brian Cox for six years and remains so employed.

27 In summary, we accept the evidence of Ms Basiak in relation to the key issues of administering Nitrotain to Minnie Downs and Baby Jack on the relevant occasions at the direction of Brian Cox.

(f) Nigel Cox as a Witness and His Evidence Generally

28 We have already referred to Nigel Cox and his explanation of the Nitrotain obtained in April 2015 as being for his use. This was discussed during our analysis of aspects of the presentation and evidence of Brian Cox.

29 The Nigel Cox explanation or story bears this resemblance to alibi evidence. If it is not believed and rejected, all those who have relied upon it or adopted it run the risk of having their evidence in that regard at least significantly tarnished, if not rejected. In other words, if the relevant Nigel Cox evidence is rejected,

the evidence of Brian Cox and Dr Fielding runs an appreciable risk of meeting the same fate or of being significantly damaged.

30 We do reject the key evidence of Nigel Cox. We were not impressed by him as a witness. Further, his statutory declaration and statement to the stewards bear all the appearance of a belated *ex post facto* invention or concoction designed to shift the blame from his brother. As has been stated, it is not suggested that Nigel Cox is a licenced or relevant person subject to the operation of the Rules. If he has old, retired horses on his property, he can administer Nitrotain to them whenever he wants and without fear of being charged with any offence.

31 Given that, and as earlier discussed, if, in April 2015, he had obtained the Nitrotain from Dr Fielding's practice for his own use, why did no one say so earlier? Why did Brian Cox put forward a variety of explanations as to the Nitrotain, his possession of it, and where it went without at that stage saying that the April purchase had been a perfectly legal one for or by his brother? Why did Dr Fielding not say this at the outset?

32 If this had been a perfectly legitimate transaction involving an established customer who was entitled to have Nitrotain, why did Dr Fielding not mention Nigel Cox to the stewards in his telephone interview of 31 March 2016, his further interview of 1 April 2016 or his lengthy interview of 7 April 2016, when his false invoice of 8 April 2015 was receiving very considerable attention?

33 In relation to this late-mentioned interview, the closest Dr Fielding got to the Nigel Cox situation was to express the belief that the Nitrotain "was going to another client". When asked if Brian Cox had named this client on whose behalf he was ordering the product, Dr Fielding said that "He's – yes, he did, and I've forgotten...". There was then some discussion about what "would've" happened. Dr Fielding would not name the client, but described the client as "His friend/acquaintance". If the Nitrotain was going on a perfectly legitimate basis to Nigel Cox, why not say so?

34 Further, if the whole idea of the somewhat elaborate arrangements – Nigel Cox delivering cash to Brian Cox or Mrs Cox, the cash ultimately being used by Brian Cox to purchase the Nitrotain from Dr Fielding, Nigel Cox then collecting the Nitrotain and an invoice (which turned out to be false) forwarded to Brian Cox – was simply so that Nigel Cox could obtain the product at a discount, why would Dr Fielding, if he so desired, not simply sell the Nitrotain to Nigel Cox at the discounted price? Nigel Cox seems to have been an established customer. Even if he was not, why could Dr Fielding not simply have offered him the product for the same amount which he would have received from Brian Cox? Cox Racing was an extremely long-standing client of Dr Fielding's practice. If he chose to sell a product at a discounted price to Nigel Cox, that was his option.

35 Why was it not until 4 April 2016, approximately three and a half weeks after the race day inspection of 10 March, that Nigel Cox completed his statutory declaration? He also lives close to Wodonga. If this obvious and comparatively innocent explanation was the truth, why was it that, not only was it not mentioned at the time, but not mentioned for a further three and a half weeks?

36 We conclude this part of the Ruling by returning to one fundamental question before raising another.

37 If Nigel Cox had obtained the Nitrotain, as he was entitled to do, and, as stated, it was still in his house, why did he refuse to allow the stewards entry in order to see it? Secondly, ultimately Brian Cox admitted that he had known that the Nitrotain was still in the fridge after it was banned and that it remained there until the stewards' inspection. Apart from anything else, this is confirmed by his own witness, Ms Comb. If it was no longer being used because of the ban, and his brother, Nigel Cox, wanted some Nitrotain which he could legitimately have and use, why not simply give it to him? Or sell it to him? It was the perfect opportunity to be rid of the banned substance and either do Nigel Cox a favour or get some money back in relation to what is an expensive product. Why go

through the rigmarole with Dr Fielding (unless, or course, the Nitrotain was still being used by Brian Cox)?

38 Frankly, we find that the whole Nigel Cox story does not make sense. It stretches the bounds of credibility well-beyond the breaking point. Many aspects of the Nigel Cox version of events are simply illogical and unbelievable. We are of the view that it is a concoction. We do not accept it. The end result is that, as a result of its collapse, the evidence and credibility of those who rely upon it are severely damaged.

(g) The Evidence of Amanda Comb

39 We do not regard the evidence of Ms Comb as being crucial. As stated, she was called by Brian Cox, for whom she still works and for whom she has worked for some six years.

40 Apparently, her evidence was called in an attempt to demonstrate the truth of the assertion that a tub of Nitrotain had been dropped and cracked, following which the contents were scooped into an Ulcerguard container, all of this happening before Nitrotain became a banned substance.

41 We are not of the opinion that Ms Comb was a witness who was being untruthful. However, the clarity of her recollection as to what happened and when is open to question. For example, she gave quite clear evidence that the Nitrotain container had a screw top lid. Photographs of the container make it readily apparent that it did not. Apart from her good opinion of Ms Basiak, another matter on which she gave unchallenged evidence was that the Ulcerguard tub containing Nitrotain remained in the fridge until it was removed by the stewards. She saw it there after the Nitrotain ban. It had been used prior to the banning on the instructions of Brian Cox in order to increase the appetite of certain horses. She was not in a position to say whether or not it had been used for some time before she had raised the issue of the loss of appetite of certain horses and Brian Cox had referred to Nitrotain as a solution.

42 Another matter concerning which Ms Comb gave clear evidence was that Brian Cox knew that the Nitrotain was in the fridge after it had been banned and issued instructions that nobody was to ever accidentally draw up a syringe of it to give to a horse. It was in a fridge that everyone could access. Ms Comb could think of no reason as to why a trainer would keep a banned product in a refrigerator after it had been so banned. She agreed that the obvious reason would be that the trainer was still using it. Ms Comb stated that she thought that it was a "silly decision" to leave the Nitrotain in the fridge when it was a banned substance. She did not raise this with Brian Cox and did not know why it was kept in the fridge.

43 In our opinion, the evidence of Ms Comb is of very little assistance to Brian Cox in relation to the charges based upon administration. Even if the account of the dropping and cracking of a tub of Nitrotain and the scooping of the contents into an Ulcerguard container is correct, that does not explain the keeping in the fridge of the Nitrotain after it became a banned substance. The evidence has no direct bearing upon the administration of the Nitrotain. It establishes on the part of Brian Cox both the retention of Nitrotain in the fridge after it had been banned and knowledge of the fact that it had been so banned. Ms Comb could think of no obvious reason why it would be so retained, other than the obvious one – it was still being used.

Finding in Relation to Charges 5-8 – The Administration Charges Pursuant to AR178H

44 That concludes our summary of the evidence of the principal witnesses in relation to the administration charges pursuant to AR178H. We shall be dealing with the evidence of Dr Fielding subsequently, when the charges against him are under consideration. However, leaving to one side the Nigel Cox story, given that there is no doubt but that Brian Cox possessed Nitrotain after the date when it was banned and until it was removed by the stewards, we do not see that the balance of the evidence of Dr Fielding impacts upon the charge of

administration by Brian Cox. We do not see the evidence of Mrs Cox as taking matters much further.

45 We are of the view that the four charges against Brian Cox pursuant AR178H have been made out. Whether the test be described as one of comfortable satisfaction or of actual persuasion, we are firmly of the view that the requirements of such test have been satisfied. For reasons which should be apparent from the above, we find Brian Cox guilty pursuant to AR178H of administering a prohibited substance to Minnie Downs and Baby Jack on 17 August 2015 and 21 August 2015. That prohibited substance was an anabolic androgenic steroid, a matter concerning which there was no dispute. We appreciate that these are the alternate charges, but have dealt with them first for reasons that will become apparent.

Finding in Relation to Charges 1-4 – The Administration for the Purpose of Affecting Performance Charges – AR175(h)(i)

46 An additional argument was advanced by Mr Ferwerda in relation to Charges 1-4, which charges are based upon the administration of a prohibited substance for the purpose of affecting the performance or behaviour of a horse in a race.

47 As stated, we find that Brian Cox administered an anabolic androgenic steroid, so that breaches of AR178H have been established. Whilst the same factual basis applies to the alleged breaches of AR175(h), there is, as argued by Mr Ferwerda, an additional ingredient that must be established if breaches are to be proven. That ingredient is set out in AR175(h)(i) – that is, the administering must be for the purpose of affecting the performance or behaviour of a horse in a race or of preventing it starting a race.

48 The argument of Mr Ferwerda was that there was no evidence that either horse was being set for any particular race. Indeed, it does not seem to be disputed but that both horses had only recently come back into work as at August 2015. One did not race until October and the other until November 2015. It is argued that AR175(h)(i) is a rule specifically directed towards administration for the

purpose of affecting the performance or behaviour of a horse in a specific race or races. There is no evidence in the present case of the existence of such a purpose.

49 The argument of Mr Rush on behalf of the stewards is to the effect that the Rule has a more general application. The purpose of the administration was to increase the appetite of the two horses, make them more robust and generally have an advantageous effect upon their performance in races.

50 We think that there is merit in the argument of Mr Ferwerda. We are of the opinion that AR175(h) is a Rule directed at administration for the purpose of affecting performance or behaviour of a horse in a particular race or in particular races. We have arrived at that conclusion for the following reasons:

(i) The wording of the second limb of AR175(h)(i) is "...or preventing its starting in a race". This wording seems to us to be directed specifically at a race or races. That makes sense. It seems to us to be wording which directs the Rule at the "nobbling" of a horse in a particular race or, at the most, particular races. To give to these words a far broader meaning would give to them a purpose and meaning which, in everyday operational terms, do not make a great deal of sense.

Thus, when AR175(h)(i) is read as a whole, what appears to be intended is the prevention of administration of a prohibited substance for the purpose of affecting the behaviour of a horse in, or preventing it starting in, a particular race or races. We say "race" or "races" because arguably the rule is designed to catch someone who, for example, may have a horse eligible to run in the Caulfield Cup and the Melbourne Cup and administers a prohibited substance for the purpose of affecting its performance in both or either.

Whether or not that last proposition is correct, neither limb of that rule, particularly when it is read as a whole, seems to us to be directed towards "a race", meaning "racing" in its general sense.

(ii) The validity of Mr Ferwerda's argument is underlined even further if AR175(h)(ii), which is obviously a part of the same Rule, is considered. After the word "or" it reads "which is detected in any sample taken from such horse prior to or following the running of any race". Thus, sub-rule (ii) is clearly directed at a particular race or, if it happened more than once, races. It is aimed at such activities as pre or post-race swabs and the like. It underlines the fact that AR175(h) is not some broad or sweeping provision, but is aimed at a particular race or races.

(iii) If any further support for this proposition is needed, it is found in the argument advanced by Mr Ferwerda that, if the first part of AR175(h)(i) is to have a wide or general application, that would leave no work for AR178H to do in a case such as this.

We are dealing with an anabolic androgenic steroid. AR178H specifically deals with that prohibited substance. AR178H(1) states that a horse must not, in any manner, at any time, be administered an anabolic androgenic steroid (our underlining). AR178H(2) prescribes that any person who administers an anabolic androgenic steroid to a horse commits an offence. These are broad provisions, which capture the administration of the substance in question "at any time".

As Mr Ferwerda submitted, if, in a case involving an anabolic androgenic steroid, AR175(h)(i) was given the broad interpretation for which the stewards argue, there would be simply no point in having AR178H(1) and (2).

It seems to us to be a logical interpretation of the operation of the Rules in question that AR178H picks up the operation of the banned substance,

being an anabolic androgenic steroid, at any time, and AR175(h) is directed at administration to affect performance in a particular race or races.

(iv) That the argument advanced by Mr Ferwerda is correct is emphasised by the fact that there are different penalties applying in respect of the two provisions. Pursuant to AR196(5), the penalty for a breach of AR175(h)(i) is a period of disqualification of not less than three years (leaving aside special circumstances). On a similar basis, the period of disqualification in relation to AR178H(2) is two years. One offence is viewed as being considerably more serious than the other. It again makes sense that administration for the purpose of affecting the performance or behaviour of a horse in a particular race attracts a greater penalty than administration of the particular substance at any time and without the requirement of establishing that such administration was for the purpose of affecting the outcome of a particular race.

51 In the present case, as stated, there is no evidence of the administration being related to either horse running in a particular race or races. There is no evidence of any particular program being mapped out. Each was weeks, if not months, away from racing.

52 In short, we prefer and accept the argument advanced by Mr Ferwerda. Charges 1-4 are dismissed.

Finding in Relation to the Charge of Giving False or Misleading Evidence in Breach of AR175(g)

53 We find this charge to be made out. It relates to the information and lack thereof concerning the nature of the white paste found in the Ulcerguard container on 10 March 2016. It may be that Brian Cox panicked. However, the fact remained that Brian Cox originally told stewards that the substance in the Ulcerguard container was "just an oral paste", adding that someone could have planted it

there. That it was "just an oral paste" was a patent lie and within 24 hours Brian Cox had at least admitted that it was an anabolic steroid.

54 The written submissions of Mr Ferwerda point to some extenuating circumstances. The existence or otherwise of such circumstances seems to us to be a matter more related to penalty. We find the charge proven and find Brian Cox guilty of breaching AR175(g).

Dr Robert Fielding

(a) General Background

55 Much of the background can be discerned from what has gone before and need not be repeated. The following are some additional facts relevant by way of background to the particular charges against Dr Fielding.

56 Dr Fielding, a veterinarian of 44 years' experience, is the sole principal of the Hume Equine Centre and has been so for in excess of 20 years. There is another assistant veterinarian in his practice. His equine veterinarian nurse and practice manager is Ms Elissa Koch, who has worked for Dr Fielding since the Hume Equine Centre opened in 1994 and had also worked for him for some six years prior to that.

57 Dr Fielding commenced veterinary work for the late Ollie Cox, father of Brian and Nigel, in 1976 and has been the veterinarian for the Cox family thereafter. The late Ollie Cox had been supplied with Nitrotain, a medication which he preferred, over the years. He would purchase it by the large tub from Dr Fielding and the same approach was adopted by Brian Cox.

58 The background material more specifically related to the two charges against Dr Fielding is centred upon what occurred on 8 April 2015. On that day Dr Fielding, apparently via Ms Koch, invoiced Brian Cox for a substance called Pentosan, which is not a prohibited substance. The price charged was $727.27, the precise amount for which Brian Cox had been invoiced for Nitrotain immediately before that substance became prohibited. That the invoice is false

in that the substance involved was Nitrotain and not Pentosan is freely admitted. The defence of Dr Fielding is essentially that Ms Koch sent this invoice in his absence and without his knowledge.

(b) The Test to be Applied and the Rules Allegedly Breached

59 As would be anticipated, the test in relation to Dr Fielding is exactly the same as that for Brian Cox. This has been previously discussed. It should also be said at the outset that each of the two offences with which Dr Fielding is charged is a "serious offence" within the meaning of the rules, but there is no fixed minimum penalty in relation to either.

60 The first charge against Dr Fielding is brought pursuant to AR175(a). Pursuant to that rule, the stewards may penalise:

> *"Any person who, in their opinion, has been guilty of any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing."*

61 Dr Fielding has also been charged pursuant to AR175(k). Pursuant to that rule, the stewards may penalise:

> *"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."*

62 The behaviour in question in relation to first charge is the false invoicing for Pentosan instead of Nitrotain. The second charge relates to the same behaviour, but with it being asserted that the false invoicing led to the breach (by Brian Cox) of AR178H. It should be said that, prior to the conclusion of the hearing, the stewards specifically abandoned any allegation of negligence.

(c) Dr Fielding as a Witness

63 We have already made several references to Dr Fielding when discussing Brian Cox and the story put forward by Nigel Cox. We also appreciate that character evidence was given by the Honourable Michael Duffy and that Dr Fielding has been a veterinarian specialising in horses for decades without their being a blemish on his character, record or professional capacity. We also accept that he holds two academic positions, donates his expertise to the local branch of

Riding for the Disabled and has provided race day services to racing and harness racing clubs in the Albury/Wodonga area. He has never been the subject of court or disciplinary proceedings.

64 It is therefore with some sadness we say that we do not accept his evidence in relation to what occurred with Brian Cox and the providing of the Nitrotain. We shall now deal with various matters that have led us to this conclusion.

(i) As previously discussed, we do not accept what could be described as the Nigel Cox story. It is a version of events to which, ultimately, Dr Fielding has leant his support. We have commented earlier that there is a real risk that if a version of events such as that provided by Nigel Cox is not accepted and is found to be untrue, in the absence of some persuasive explanation, the credit of others who have adopted or endorsed it could well suffer major damage.

This was raised with Mr Winneke, counsel for Dr Fielding, late in his closing address. He advanced the possibility that Brian Cox may have been using Nigel Cox as a means of obtaining the Nitrotain, but argued that this does not mean that Dr Fielding was aware of or party to what was occurring. He submitted that the Nitrotain ending up with Brian Cox is still consistent with the innocence of Dr Fielding. However, we are still of the view that the somewhat belated adoption of the Nigel Cox story by Dr Fielding has tarnished his credibility.

(ii) We are of that view because it still does not explain why Dr Fielding did not mention Nigel Cox at the outset. In the unlikely event, given what was going on, that he had forgotten this, it still does not explain why he later stated that the Nitrotain had been obtained by a client of his whom he would not name. Nigel Cox was a client of Dr Fielding. He was also a person who was fully entitled to purchase and possess Nitrotain. Why not name him as the person who collected the Nitrotain in question?

(iii) It is an established and admitted fact that in April 2015, Brian Cox asked Dr Fielding for a tub of Nitrotain. It is also an accepted fact that a false invoice was created by Hume Equine Practice, the intention of this obviously being to conceal the fact that Nitrotain had been purchased by, or at the request of, Brian Cox. It is another admitted fact that the Pentosan referred to in the false invoice was in fact Nitrotain.

These simple and accepted facts create a clear *prima facie* case that requires an explanation sufficient to dislodge the state of comfortable satisfaction set up by that *prima facie* case. We are not suggesting that the burden of proof has been reversed. What we are saying is that, in the absence of an explanation which convinces us of its truth to the extent that such comfortable satisfaction does not exist, the essential ingredients of both charges have been established. In our opinion, the Nigel Cox story is not such an explanation.

(iv) As has earlier been discussed, we are of the view that this unnecessarily complicated method of carrying out a simple transaction does not make sense and strains the bounds of credibility. Nigel Cox was a client of the Hume Equine Practice. If he wanted to buy some Nitrotain for use on his old, retired horses, why not simply sell it to him? Why issue an invoice to Cox Racing? Given that it was known to be a banned substance, why accept an order from Brian Cox for it? This whole arrangement of ordering and payment by Brian Cox, collection by Nigel Cox, but invoicing of Cox Racing, simply does not make sense if Nigel Cox was collecting the Nitrotain for his own use.

(v) It is apparent that, by 17 March 2016, Dr Fielding and Ms Koch were both aware of the existence of the enquiry into Brian Cox and were aware that the stewards were seeking invoices from January 2014 "to the present date". Dr Fielding gave evidence before us of the stewards interviewing him on 17 March 2016 in this regard.

(vi) It was obviously made plain to him by the stewards that they were talking to Dr Fielding in relation to the Cox inquiry and were asking for invoices from January 2014 to the present date. It is difficult to imagine that, as of this date, Dr Fielding and Ms Koch were not aware of what the investigation was about and the potentially critical importance of individual invoices. It appears that Dr Fielding immediately contacted Ms Koch and asked her to photocopy the records and make them available to the stewards, who subsequently collected them. It seems to us staggering that, at this time, there was no discussion between Dr Fielding and Ms Koch as to what had occurred and the provision of the false invoice. It also seems unlikely that there was no discussion between them as to what had occurred generally, including the collection of the Nitrotain by Nigel Cox. If there had been discussions concerning these matters, we would have expected Dr Fielding to pass on the information obtained to the stewards.

(vii) Dr Fielding was interviewed over the telephone on 31 March 2016, some two weeks later. Amongst other things, Dr Fielding said that he had spoken to Brian Cox that morning. This is two weeks after the stewards had visited Dr Fielding in relation to the inquiry into Brian Cox and the request for the invoices. Surely by this time there should have been some realisation that the Nitrotain had been for Nigel Cox, if that version of events was correct. It is difficult to accept that, if there had been discussions between Dr Fielding and Brian Cox, including that on the morning of 31 March, there was no reference to Nigel Cox. However, in the telephone interview between the stewards and Dr Fielding and in the interview conducted on the same day with Brian Cox, there is no mention of Nigel Cox. This tends to support the belief that we have formed that the Nigel Cox story was just that and that it was a late invention.

(viii) In the same interview on 31 March 2016, one of the stewards asked whether it could occur that a product, for example Pentosan, could be put down on an invoice if it was a different substance that had been purchased. The answer of Dr Fielding was:

> "Would I – maybe. I don't know. I mean, people will come and get stuff and I might put down something else."

(ix) When it was put to him more specifically that, if Brian Cox had come to him requesting a kilogram of Nitrotain, could he have put that down as Pentosan, ultimately his answer was that:

> "Look, something like that could happen."

He went on to say:

> "Possibly. I dunno. Yeah, I'd have to check."

This was in the context of a situation where Dr Fielding was aware that there was an investigation into Brian Cox involving Nitrotain; that Brian Cox had been the subject of a stable inspection; that it was known that there had been an altercation; and that Brian Cox had some products on his premises, the rumour being that Nitrotain was involved. Dr Fielding gave evidence to the effect that he was aware of all of this on 17 March 2016.

Given Dr Fielding's awareness of the situation, the need to produce all invoices and the fact that he had been at least in touch with Brian Cox, we find it extremely difficult to believe that, if the Nigel Cox explanation was correct, it had not been passed on to the stewards as at 31 March 2016.

(x) On the following day, 1 April 2016, a steward attended at Dr Fielding's surgery. On this occasion, Dr Fielding stated as follows:

> "...I believe it would have been picked up and probably, you know, I've been advised that he, (Brian Cox), was ordering it for someone else because he could get it cheaper."

The steward, Mr Brewer, then asked whether Dr Fielding in fact recalled that Brian Cox ordered the Nitrotain for someone else. The reply of Dr Fielding was:

> "That's what I've been – what I'm lead to believe, yes."

When then questioned as to whether he had any direct recollection, the reply of Dr Fielding was:

> "As I say, I have no recollection of that specific..."

Further, Dr Fielding added that he had no recollection of who actually picked up the Nitrotain.

(xi) By this stage, Dr Fielding was aware that the enquiry had been on foot for some three weeks and was aware of the essential substance of it, including his possible involvement. He was aware that a central issue was the provision of Nitrotain to Brian Cox, a regular client with whom he had been in conversation. However, whilst suggesting in a somewhat guarded fashion that the Nitrotain had been for some other person, he purported to have no recollection of who that person was. Apparently he could not recall that it was Brian Cox who was ordering it for Nigel Cox. It stretches the bounds of credibility that he would have this extremely vague recollection of the circumstances surrounding the ordering of a substantial amount of a banned substance by a licensed trainer who was a regular customer and, in particular, would have no recollection as to for whom the substance had in fact been ordered. It is repeated that this is a family with whom Dr Fielding had been dealing for decades. Further, Dr Fielding had been in conversation with Brian Cox after the commencement of the investigation, an investigation of which he was well aware. This whole scenario supports our belief that the Nigel Cox story was a later invention and one to which Dr Fielding became a party.

(xii) Dr Fielding was interviewed again on 7 April 2016. He was reminded that, when interviewed by Mr Brewer on 1 April 2016, he had agreed that there was an entry in his day sheets on 8 April 2015 which read "Cox Racing; Nitrotain, 1 kilogram". Written at the end of that was "$727.27". It was an entry that would have been billed to Brian Cox. This was a standard price, historically, for which Brian Cox had been obtaining Nitrotain.

It was put to Dr Fielding that Brian Cox had ordered Nitrotain on 8 April 2015 at a price of $727.27, but had been invoiced on that day for Pentosan for the same price. Dr Fielding said it was possible that he had written that invoice. He stated that it was more likely to have been himself than his practice manager (Ms Koch). He also stated that:

> "...my practice manager wouldn't take it on her own bat to do anything."

He also stated that:

> "...I might have been thinking that that shouldn't be on his bloody invoice, so I'll just stick it down as that, could have done that. I don't specifically recall that."

(xiii) However, Dr Fielding thought that it was accurate that it was Nitrotain that was provided. He agreed that the entry in his day diary for 8 April 2015 which read "Pentosan" should have been for Nitrotain. Dr Fielding claimed that all of this was an error of judgment. He agreed that, given the system that was employed in his office, either the wrong name of the product or the wrong price must have been typed in. In the interview of 7 April 2016, Dr Fielding agreed that Brian Cox was an established, long-time client who had put a lot of work through the practice and was a good payer. He had been buying Nitrotain "once every two, three to six months".

(xiv) When asked by a steward how his errors of judgment in relation to his business painted him, Dr Fielding replied that it made him look silly and

that "I should've taken more care". When asked when he had been advised by Brian Cox that he had been ordering the Nitrotain for someone else because he could get it cheaper, Dr Fielding agreed that this had occurred "Since this has happened". He also said that "...the other person would've picked it up, I'm assuming". The steward then asked Dr Fielding whether it was a surprise that Brian Cox would be buying Nitrotain for someone else. His answer was as follow:

"No, but we've probably spoken about it. I don't recall the exact conversation."

(xv) He again indicated that this had been discussed in a recent conversation with Brian Cox and in relation to the present case. Dr Fielding was pressed further in relation to this. His answers were far from convincing. For example, the following exchange took place:

> "MR VILLELLA: When the rule was introduced and it was banned, when you supplied it on 8/4/2015, what conversation did you have with Mr Cox in relation to it being a banned substance?
>
> DR FIELDING: I would've – assumed I would've told him that it's a banned substance. He's probably told me, 'look, it's for so-and-so. I'm buying it because I can get it cheaper' Okay."

There was also the following exchange in the same interview:

> "MR VILLELLA: Did Mr Cox say to you who the person was that he was giving it to?
>
> DR FIELDING: He's – yes he did and I've forgotten – at the time but he said it was going to that. It was going to that, so the reason it would've been, 'Yep, that's okay, it's so-and-so', you know they're clients, so ---."

Dr Fielding also said that "I knew the horses needed it". This answer did not sit particularly well with the uncertainty that had been evident before.

(xvi) When asked who the person was that Dr Fielding believed the Nitrotain was going to, he essentially replied to the effect that he was not allowed to tell the stewards that, having earlier said that he had forgotten who the

person was. When asked again as to who was going to use the product, Dr Fielding replied as follows:

> "His friend/acquaintance. I don't think it was a worker who might've been working at the time. At this stage, I probably – I mean it's up to him to tell you who it went to. But at the time, it was a client of mine."

(xvii) It was pointed out to him that he had effectively gone from not being able to recollect what had occurred to saying that Brian Cox was purchasing Nitrotain from him to give to someone else for the price of $727.27 and that he, Dr Fielding, had knowledge of that. He repeated that the third party to whom it was going was a client of his. He also agreed that his invoice had been altered as an error of judgment. His whole explanation to the stewards as to what had occurred does not read well and we are not of the view that Dr Fielding's oral evidence before us improved the situation.

(xviii) It is also of interest that, throughout each of these interviews, and particularly during the interview of 7 April 2016, there is no suggestion that the erroneous invoice had been prepared by Ms Koch on her own initiative, and unknown to him. The whole impression is that Dr Fielding is saying that the preparation of the invoice was an error of judgment on his part.

(xix) Further, Dr Fielding's explanation to the stewards that this somewhat convoluted process was for "ease of paperwork" is hard to accept. Dr Fielding became quite clear that the recipient of the Nitrotain was a client of his. If that person was a member of the family of such longstanding clients, in addition to being a client himself, and if there was no problem in his having Nitrotain, why not simply bill him for it? Why not charge him exactly the same amount as would be received from Brian Cox in any event? "Ease of paperwork", like the Nigel Cox story itself, simply does not make sense.

(xx) It may be that preparation for giving oral evidence refreshed Dr Fielding's memory, but it is interesting that he went from an original position of having virtually no recollection of conversations with Brian Cox to one of greater certainty. He stated that "I advised Brian that the product was ready to be collected".

(xxi) In evidence-in-chief, Dr Fielding was asked how it was that he had gone from having no recollection of the important conversation between himself and Brian Cox (as at the stewards' interview of 1 April) to having a recollection of having a conversation with a reference to Nigel Cox. His explanation was that subsequently he had spoken with Brian Cox who had told him "It's the stuff for Nigel". He said that his conversation with Brian Cox had jogged his memory. The difficulty with this proposition is that it is clear that, by 31 March 2016, Mr Fielding and Brian Cox had engaged in a conversation. Dr Fielding was aware that a substance had been obtained from Brian Cox's stables and had engaged in a conversation with Brian Cox about it. Dr Fielding had even suspected that the substance involved may have been "something like Nitrotain". It seems strange that Dr Fielding would have no recollection of a relevant conversation on 1 April.

(xxii) The alleged lack of communication between Dr Fielding and Ms Koch concerning the false invoice during this period is something with which we struggle. Even after the interview with the stewards on 7 April 2016, Dr Fielding did not speak to Ms Koch. His explanation for this was, "No, it wasn't on my radar". He does not seem to have contacted Ms Koch or spoken to her about it until following a telephone conversation with Mr Terry Bailey in June, before the Queen's Birthday weekend. Even until this stage, Ms Koch does not seem to have raised the topic of the false invoice which she prepared.

(xxiii) We agree with the submission of Mr Rush on behalf of the stewards that Dr Fielding knew that this was a serious inquiry being conducted by the stewards. He also knew that the false invoice played a major part in the inquiry. The entry of the day sheet of 20 April 2015 reads: "?Nitrotain 1KG ?Cox". However, when questioning his staff, Dr Fielding apparently asked Ms Koch and another employee, who had apparently written the word "Cox", to identify their handwriting, but took the matter no further. It is difficult to believe that, having had the handwriting identified, Dr Fielding did not proceed to ask any further questions about the false invoice which, as stated, was central to the case against him.

(xxiv) As earlier stated, Dr Fielding's detailed recollection of conversations with Brian Cox stands in stark contrast to the vagueness of his answers to the stewards. Specific conversations and the like were recalled by Dr Fielding in his evidence. We also agree with Mr Rush's submission that there is no satisfactory explanation for the refusal of Dr Fielding to name to the stewards Nigel Cox as recipient of the Nitrotain. This is a matter that has been referred to more than once above in our discussion of the case against Brian Cox. Nigel Cox was an established client who was entitled to have Nitrotain.

65 We have gone into considerable detail in relation to the case against Dr Fielding. We feel that the situation warranted it, given that he is a long-serving veterinarian who has never been in trouble and who produced powerful character evidence. Nevertheless, whether it be out of loyalty to the Cox family or for whatever reason, essentially his evidence was not satisfactory in relation to several crucial aspects of the case. We do not accept it.

(d) Ms Elissa Koch

66 Ms Koch, Dr Fielding's practice manager, is another witness whose credibility suffers by reason of our failure to accept the Nigel Cox story. We do not accept her evidence that, at the time of creating the false invoice, she had a discussion

with Dr Fielding to the effect that the product was in fact for Nigel Cox. This is an inevitable result of our not accepting the Nigel Cox story.

67 We also find it difficult to accept that she intended to check with Dr Fielding about whether the false invoice should be issued, but did not. The issuing of a false invoice is surely not something that would happen every day. Indeed, Ms Koch gave evidence that this was the only occasion on which she had made a false invoice. She stated that she had intended to speak to Dr Fielding prior to issuing it, but had not done this. Whether or not she was involved in other activities at the time is not to the point. She was a very long-serving employee of Dr Fielding. She asserted that she had created the false invoice in April 2015 because she was concerned about a registered trainer having Nitrotain invoiced to him. In the circumstances, it seems inconceivable that it was not until 15 June 2016 that she told Dr Fielding that she was responsible for the false invoice. We find it difficult to believe that there was no discussion as to why Dr Fielding was enquiring as to whose handwriting it was on the day sheet. Dr Fielding had admitted on 31 March 2016 that the invoice was false. It belies belief that there was then no discussion between Dr Fielding and Ms Koch as to the false invoice until June, save for some enquiry about the handwriting on the invoice and on the day sheet.

68 Ms Koch gave evidence that Dr Fielding rang her on Thursday, 9 June and told her that he had been charged with supplying Nitrotain. She gave evidence that he had briefly raised the topic of the Nitrotain in April 2016. In any event, she does not seem to have taken the matter further or raised with him any query. This seems unusual, given their long working association and her having sent a false invoice – the only one she had ever sent in her many years of work – to Brian Cox and involving Nitrotain. It is even more peculiar, given that Dr Fielding told her during this telephone conversation that he had also been charged on "an invoicing issue". Apart from the widespread public knowledge,

it must have been known to Ms Koch that this involved Brian Cox because Dr Fielding also told her about Cochrane's Gap.

69 Accordingly, as at 9 June 2016, Ms Koch knew that:

(a) Dr Fielding had been charged with supplying Nitrotain;

(b) Brian Cox was involved;

(c) there was an invoicing issue;

(d) she had prepared a false invoice for Brian Cox in relation to Nitrotain.

70 It is a staggering proposition that she did not discuss with Dr Fielding what she had done.

71 Indeed, she stated that she only realised her involvement on Saturday, 11 June when she read in the Border Mail of the invoicing of Pentosan as opposed to Nitrotain.

72 Her version of events is that even then she did not raise the topic with her long-time employer. She did not do this until Wednesday, 15 June when she returned to work. Frankly, we find her version of events incredible.

73 It was put to Ms Koch in cross-examination that it would have been quite simple to enter on the invoice that it was Nitrotain for Nigel Cox. Instead of doing this, or sending an invoice to Nigel Cox, an established client of the practice, a false invoice describing the product as Pentosan was prepared and despatched.

74 We also agree with the submission of Mr Rush to the effect that what occurred, with Ms Koch sending out an invoice concerning which it was her intention to speak to Dr Fielding, was inconsistent with her evidence of the normal method by which accounts were invoiced. This was normally done at a round table conference and Ms Koch would go through the accounts and proposed invoices and raise any queries which she had with Dr Fielding.

75 In summary, we do not accept the evidence of Ms Koch. We do not regard her evidence concerning the false invoice as being satisfactory and acceptable. Yet again, we do not accept that the manoeuvres which occurred did so for the purpose of enabling Nitrotain to be received by Nigel Cox.

Finding in Relation to Charge 1 Against Dr Fielding – Dishonest and Improper Conduct

76 As is apparent from the above, we find that Charge 1 against Dr Fielding, being that of engaging in dishonest and improper conduct within the meaning of AR175(a), has been proved. We accept that a false invoice, concealing the fact that the banned substance, Nitrotain, was forwarded to Cox Racing. The invoice falsely stated that the product was Pentosan. Dr Fielding was the proprietor of the Hume Equine Centre at the relevant time. He was responsible for the supplying of products to customers. We accept that he supplied Nitrotain to Brian Cox and was then responsible for the issuing of a false invoice in precisely the same amount, but for a different product that was not banned. His adoption of the Nigel Cox story underlines his involvement in this unfortunate affair. We find him guilty.

Finding in Relation to Charge 2 – Conduct Leading to a Breach of the Rules

77 We also find this charge proven. The conduct as we have described above lead to a breach of the rules by Brian Cox. That is evident from what we have set out above. Accordingly, we find that the charge pursuant to AR175(k) has also been proved and Dr Fielding is guilty accordingly.

The Cochrane's Gap Charges

78 A charge has been laid against both Brian Cox and Dr Fielding in relation to the attempted participation of the horse "Cochrane's Gap" in a jump-out at Wangaratta Racecourse on 9 December 2015. The purpose of this jump-out was to obtain a barrier certificate. We understand that Cochrane's Gap was something of a troublesome horse in this regard. It was, at all relevant times, trained by Brian Cox. At the centre of this dispute is a wound that was apparent on the cannon bone of the offside hind leg of Cochrane's Gap. This was a wound that had been sustained in the area of some old scarring, when the use

of a barrier on the sand track at Wodonga Racecourse approximately a week to a fortnight previously was attempted.

79 There is also no argument but that Brian Cox was responsible for the floating of Cochrane's Gap to the Wangaratta Racecourse for the purposes of a jump-out on 9 December 2015. There is also no argument but that Cochrane's Gap did not actually participate in the jump-out, because it refused to load.

80 The charges in relation to Cochrane's Gap are completely separate from the Nitrotain charges but, as earlier stated, were dealt with during the conduct of the Nitrotain cases as charges against the same persons were involved and it was convenient that they be dealt with at the same time. Whilst both Brian Cox and Dr Fielding have been charged in relation to Cochrane's Gap and the jump-out, the charges against them are quite different and we shall deal with them separately.

(i) The Charge Against Brian Cox

81 The charge against Brian Cox is pursuant to AR175(o)(i). That Rule states as follows:

> "Any person in charge of a horse in their *(the stewards)* opinion fails at any time:
>
> (i) to exercise reasonable care, control or supervision of a horse so as to prevent an act of cruelty to the animal;"

82 The actual charge against him is that he breached that Rule in that, after being given veterinarian advice to rest and confine Cochrane's Gap on 8 December 2015, on 9 December 2015 he presented the horse at the Wangaratta Racecourse to get approval for Cochrane's Gap to race. In doing so, he failed to exercise reasonable care so as to prevent an act of cruelty.

83 For the purposes of the charge against Brian Cox, we are leaving to one side the issue of what veterinary advice he in fact received from Dr Fielding. We believe that there is a preliminary point which otherwise disposes of this charge.

84 The fact of the matter is that Cochrane's Gap did not participate in the jump-out because it would not load. There is no evidence to suggest that the act of cruelty as alleged involves anything other than the intended participation in the actual jump-out. For example, there is no evidence to suggest that the floating of the horse to and from Wangaratta Racecourse would represent an act of cruelty. There is no evidence to suggest that having a jockey on its back would represent an act of cruelty and the same could be said for any walking around behind the barrier stalls prior to being loaded. The alleged cruelty is confined to the jumping out and galloping some 600 metres, which would have occurred had Cochrane's Gap loaded.

85 For the charge against Brian Cox to succeed, the "act of cruelty" for the purposes of the Rule must be read as including an intended or attempted act of cruelty, even though the Rule makes no mention of intentions or attempts. In this regard, and when the issue was raised, Mr Rush directed our attention to s9(1)(c) of the *Prevention of Cruelty to Animals Act* 1986. That is to the effect that a person commits an act of cruelty if that person "does or omits to do an act with the result that unreasonable pain or suffering is caused, or is likely to be caused, to an animal".

86 Put in very simple terms, the argument on behalf of the stewards would seem to be that the words "likely to be caused" are sufficiently broad to cover the situation in the present case. We disagree.

87 It seems to us that those words relate to the nature of the act or activity in question, rather than being designed to expand the words "does...an act" so as to extend it to the intention to do or attempts at such an act. We would give the following example.

88 Without wishing to enter into the debate about it, let us assume that fox hunting is cruel. Let us also assume that, say, during a fox hunt, a fox is only actually found on 90 per cent of the hunts. Ten per cent of the time the hunters return

without having located or caught a fox. Let us also assume that, on a specific occasion, the relevant authority obtains knowledge of an illegal fox hunt and inspectors arrive just as the hunters return to their starting point. The hunt has been unsuccessful. No fox has been found. It seems to us that what had occurred would fall within s9(1)(c) of the *Prevention of Cruelty to Animals Act*. Those that participated had participated in an act that was likely (90 per cent of the time) to cause unreasonable pain or suffering to an animal. The fact that, on this occasion, no fox was found may well not save them from prosecution.

89 Now let us imagine that the inspectors arrived at the scene of the hunt to find a considerable number of people on horseback, obviously intent on going on a hunt, but that the hunt had just been called off because of atrocious weather conditions. The act which caused, or was likely to cause, unreasonable pain and suffering to an animal had simply not been done. It seems to us that they would be unlikely to be convicted.

90 Turning to the present situation, let us suppose that Cochrane's Gap had co-operated and been loaded in the barriers. It had then jumped out and galloped 600 metres, but pulled up and returned with absolutely no signs of distress, pain or worsening of the wound. Leaving aside the dispute of the experts in the present case, this sequence of events may not have permitted Brian Cox to avoid conviction. He would have failed to exercise reasonable care so as to prevent an act that was cruel or likely to be cruel (if the expert evidence established this).

91 However, none of this happened. The act which the stewards alleged was likely to be one that caused cruelty simply did not occur. There is no evidence that there is something inherent in the activity associated with barrier trials or jump-outs that makes them cruel or likely to cause cruelty. Failing to prevent Cochrane's Gap from taking part in an activity which never occurred, particularly an activity which is not by its nature cruel, is not a breach of the Rule. As stated, there is nothing in the Rule concerning intentions or attempts. Perhaps our

conclusion is reinforced by the fact that what Brian Cox is charge with is the prevention, as opposed to the commission, of an act that never occurred.

92 We see no need to go into the expert evidence. Suffice to say that there was a dispute as to whether, in the particular circumstances, participation in the jump-out in the nature described would have been cruel. In essence, and to use the vernacular, because Cochrane's Gap did not participate in the jump-out, the charge does not get off the ground. It is dismissed.

(ii) The Charge Against Dr Fielding

93 The charge against Dr Fielding in relation to Cochrane's Gap is brought pursuant to AR175(g). That reads that the stewards may penalise:

> "Any person who gives any interview, investigation, inquiry, hearing and/or appeal any evidence which is false or misleading in any particular."

94 The essence of the charge is that Dr Fielding gave false or misleading evidence to stewards on 29 April 2016 in stating that he had no concern about Cochrane's Gap participating in a jump-out at Wangaratta Racecourse on 9 December 2015, after having advised on 8 December 2015 the horse should be rested and confined.

95 In his evidence, Dr Fielding described an examination of the relevant leg of Cochrane's Gap and the examination that he carried out on 8 December 2015. He confirmed that he believed that Cochrane's Gap would have to be spelled, essentially because the continual movement of the tendon slows healing. The management advised by him was that the horse be rested and confined for two to three months, and that the wound be lightly bandaged with honey, bute and antibiotics as required. The last-mentioned medication might be required if the horse, having an open wound, got an infection. Dr Fielding disagreed with the suggestion that the photographs of the leg of Cochrane's Gap indicated the presence of an infective process.

96 It was the recollection of Dr Fielding that, having examined Cochrane's Gap on this occasion, he had a conversation with Brian Cox. During the course of that

conversation, Brian Cox asked if the horse was "okay" to go for a jump-out to get its ticket. Dr Fielding replied that the leg was bandaged as it should be and that he saw no problem with the jump-out, because it would be no more vigorous than a normal training exercise. In answer to a question of ours, Dr Fielding stated that the potential for injury in the barrier was minimal and he maintained that opinion. He also disagreed with the proposition that there was the potential for injury in the barrier jump-out.

97 Ms Basiak stated that Dr Fielding told her that the horse should not be working. This is consistent with Dr Fielding's notes of 8 December 2015. However, that does not touch upon the issue of whether there was some other communication between Dr Fielding and Brian Cox and whether Dr Fielding provided false or misleading evidence to stewards. In our opinion, the evidence of Brian Cox does not take matters much further. When initially interviewed by the stewards, his answers were not particularly responsive and his evidence before us was scarcely conclusive.

98 The end result is that we cannot be satisfied that the relevant conversation between Dr Fielding and Brian Cox did not take place. We do not regard Dr Fielding's evidence in this aspect of the matter as having been damaged. Accordingly, we do not find it proven that he provided false or misleading evidence to stewards on 29 April 2016 as alleged.

99 There is conflicting expert evidence about the whole question of whether participation in the jump-out by Cochrane's Gap would have been ill-advised or represented no real risk of harm. That is a side issue to the central one of whether Dr Fielding gave false or misleading evidence to the stewards. In the circumstances, we are not satisfied that he did so. It is not necessarily inconsistent that he said that Cochrane's Gap needed a spell, but also told Brian Cox that it was able to participate in a jump-out.

100 In summary, we find this charge not proven and it is dismissed.

Conclusion

101 In conclusion, our findings are as follows:

Brian Cox	
Charges 1-4	Dismissed.
Charges 5-8	Proven and convicted in relation to each of them.
Charge 12	Proven and convicted.
Charges 9, 10 & 11	Pleaded guilty.
Dr Fielding	
Charges 1 & 2	Proven and convicted.
Charge 3	Dismissed.