

RACING APPEALS AND DISCIPLINARY BOARD
(Original Jurisdiction)

RVL Stewards v Danny O'Brien, Mark Kavanagh and Dr Tom Brennan

Reasons for Decision

Judge R Lewis	Executive Member
Mr B Forrest	Deputy
Mr G Ellis	Member

Appearances

MR JJ. GLEESON QC, with MR D.W. BENNETT (instructed by Minter Ellison) appeared on behalf of the RVL Stewards.

MR D. SHEALES, with MR T. PURDEY (instructed by Lander and Rogers) appeared on behalf of Mr M. Kavanagh and Mr D. O'Brien.

MR A. ANDERSON (instructed by Tony Hargreaves and Partners) appeared on behalf of Dr T. Brennan.

Charges

Danny O'Brien has been charged with 16 breaches of the Rules of the Rules of Racing, 4 under AR 175(h)(i) and 12 alternate breaches under AR 175(h)(ii), AR 178 and AR 175(k) in relation to the horses
5 *Caravan Rolls On, Bondeiger, De Little Engine and Bullpit.*

Mark Kavanagh has been charged with 1 breach under AR 175(h)(i) and 3 alternate breaches under AR 175(h)(ii), AR 178 and AR 175(k) in relation to the horse *Magicool.*

Dr Tom Brennan has been charged with 5 breaches under AR 175(h)(i) and 15 alternate breaches under AR 175(h)(ii), AR 175(k) and AR 175(l) in relation to the above horses.

10 **Legislation**

AR 175

The Principal Racing Authority (or the stewards exercising powers delegated to them,) may penalise:

- (h) Any person who administers, or causes to be administered, to a horse any prohibited substance:
- 15 (i) for the purpose of affecting the performance or behaviour of a horse in a race or of preventing its starting in a race; or
- (ii) which is detected in any sample taken from such horse prior to or following the running of any race.
- (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.
- 20 (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

AR 178

25 Subject to AR 178G, when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised.

O'Brien and Kavanagh have pleaded not guilty to all charges.

30 Brennan has pleaded guilty to all charges under AR 175(k) and (l) in so far as those charges concern the trainers' breaches of AR 178 and not guilty to all others.

“Agreed Facts

Relevant Persons

1. Danny O'Brien (O'Brien) is and was at all relevant times a trainer licensed by Racing Victoria and a person bound by the Racing Victoria Rules of Racing (the Rules).
- 35 2. O'Brien was at all relevant times the trainer of the horses *Caravan Rolls On*, *Bondeiger*, *De Little Engine* and *Bullpit*.
3. Mark Kavanagh (Kavanagh) is and was at all relevant times a trainer licensed by Racing Victoria and a person bound by the Rules.
4. Kavanagh was at all relevant times the trainer of the horse *Magicool*.
- 40 5. Dr Tom Brennan (Brennan) was at all relevant times a veterinarian who was:
 - (1) a partner of the Flemington Equine Clinic;

(2) engaged by O'Brien as the primary care veterinarian who attended to, and provided general veterinary advice in respect of, horses trained by O'Brien including *Caravan Rolls On*, *Bondeiger*, *De Little Engine* and *Bullpit*; and

45 (3) engaged by Kavanagh as the primary care veterinarian who attended to, and provided general veterinary advice in respect of, horses trained by Kavanagh including *Magicool*.

Relevant test results

6. On 1 November 2014, *Caravan Rolls On* ran in the Lexus Stakes (Group 3) over 2500 metres
50 at Flemington racecourse. Certificates of analysis of a pre-race urine sample taken from *Caravan Rolls On* were provided by:

(1) ChemCentre, recording a cobalt concentration of 350µg/l with a measurement of uncertainty of 35µg/l;

55 (2) Hong Kong Jockey Club Racing Laboratory (HKJC), recording a concentration of about 380µg/l.

7. On 1 November 2014, *Bondeiger* ran in the AAMI Victoria Derby (Group 1) over 2500 metres at Flemington racecourse. Certificates of analysis of a pre-race urine sample taken from *Bondeiger* were provided by:

60 (1) ChemCentre, recording a cobalt concentration of 330µg/l with a measurement of uncertainty of 33µg/l;

(2) HKJC, recording a concentration of about 370µg/l.

8. On 22 November 2014, *De Little Engine* ran in the People @ Work Handicap (BM70) over 2300 metres at Ballarat racecourse. Certificates of analysis of a post-race urine sample taken from *De Little Engine* were provided by:

65 (1) ChemCentre, recording a cobalt concentration of 550µg/l with a measurement of uncertainty of 55µg/l;

(2) HKJC, recording a concentration of about 580µg/l.

9. On 19 December 2014, *Bullpit* ran in the Jeep 55 Second Challenge Heat 9 (BM70) over 955 metres at Moonee Valley racecourse. Certificates of analysis of a post-race urine sample taken
70 from *Bullpit* were provided by:

- (1) ChemCentre, recording a cobalt concentration of 300µg/l with a measurement of uncertainty of 20µg/l (sic);
- (2) HKJC, recording a concentration of about 320µg/l.
- 75 10. On 4 October 2014, *Magicool* ran in the UCI Stakes (Listed) over 1800 metres at Flemington racecourse. Certificates of analysis of a post-race urine sample taken from *Magicool* were provided by:
- (1) ChemCentre, recording a cobalt concentration of 640µg/l with a measurement of uncertainty of 64µg/l;
- (2) HKJC, recording a concentration of about 670µg/l.
- 80 11. Cobalt, when present in a horse's urine at a concentration greater than 200µg/l, is a prohibited substance within AR 178B.

Administration of cobalt

- 85 12. In the lead up to the race on 1 November 2014, *Caravan Rolls On* was administered the medication and supplements set out in the administration spreadsheet at tab 16(b) of Volume 2 of the stewards' Brief in the O'Brien matter, including an intravenous drip on 23 October 2014, 27 October 2014 and 30 October 2014. With the knowledge of O'Brien, Flemington Equine Clinic invoiced the owners of *Caravan Rolls On* the sum of \$120 for each of these drips.
- 90 13. In the lead up to the race on 1 November 2014, *Bondeiger* was administered the medication and supplements set out in the administration spreadsheet at tab 16(a) of Volume 2 of the stewards' Brief in the O'Brien matter, including an intravenous drip on 18 October 2014, 23 October 2014 and 30 October 2014. With the knowledge of O'Brien, Flemington Equine Clinic invoiced the owners of *Bondeiger* the sum of \$120 for each of these drips.
- 95 14. In the lead up to the race on 22 November 2014, *De Little Engine* was administered the medication and supplements set out in the administration spreadsheet at tab 16(c) of Volume 2 of the stewards' Brief in the O'Brien matter, including an intravenous drip on 13 November 2014, 17 November 2014 and 20 November 2014. With the knowledge of O'Brien, Flemington Equine Clinic invoiced the owners of *De Little Engine* the sum of \$120 for each of these drips.
- 100 15. In the lead up to the race on 19 December 2014, *Bullpit* was administered the medication and supplements set out in the administration spreadsheet at tab 16(d) of Volume 2 of the stewards' Brief in the O'Brien matter, including an intravenous drip on 13 December 2014 and 17

December 2014. With the knowledge of O'Brien, Flemington Equine Clinic invoiced the owners of *Bullpit* the sum of \$120 for each of these drips.

16. In the lead up to the race on 4 October 2014, *Magicool* was administered the medication and supplements set out in the administration spreadsheet at tab 12 of Volume 2 of the stewards' Brief in the Kavanagh matter, including an intravenous drip on 2 October 2014. With the knowledge of Kavanagh, Flemington Equine Clinic invoiced the owners of *Magicool* the sum of \$120 for this drip.

17. Each of the intravenous drips referred to in paragraphs 12 to 16 above was:

(1) prepared by Brennan;

(2) administered by Brennan, or staff members of Flemington Equine Clinic at Brennan's direction;

(3) contained the substances set out in the administration spreadsheets, namely:

(a) 20ml of VAM (containing the equivalent of 1.96mg of cobalt);

(b) 20ml of Ferrocyll (containing no cobalt); and

(c) 20ml of Coforta/Cophos (containing the equivalent of 0.04mg of cobalt), in one litre of Darrow's Solution;

(4) in addition, contained approximately 5ml of a substance described as

"Vitamin Complex"

18. The substance described as "Vitamin Complex":

(1) was not a commercially available product;

(2) was contained in bottles bearing a label which:

(a) is shown in the photographs at tabs 9(a), 9(c) and 9(d) of Volume 2 of the stewards' Brief in the O'Brien matter and tabs 6(a), 6(c) and 6(d) of Volume 2 of the stewards' Brief in the Kavanagh matter;

(b) stated: "For Animal Use ONLY", "Vitamin Complex", and "A complete Vitamin and Mineral mix to be administered orally";

(c) did not contain any statement as to the constituent ingredients of the substance or the manufacturer or source of the substance;

130 (3) contained cobalt at a concentration of approximately 20,100,000µg/l, being 20.1mg/ml;
and

(4) was obtained by Brennan from Dr Adam Matthews (Matthews), who was then an
employee of Flemington Equine Clinic.

19. Having regard to the cobalt concentration of the “Vitamin Complex” substance, a 5ml dose of
that substance contained the equivalent of approximately 100.5mg of cobalt.

135 20. Accordingly, each of the intravenous drips referred to in paragraphs 12 to 16 above contained
approximately 102.5mg of cobalt in total.

21. (Stewards and Trainers only)

140 The above-threshold results referred to in paragraphs 6 to 10 above for each horse were
caused by the cobalt administered to the horse in the intravenous drips referred to in
paragraphs 12 to 16 above respectively.

21A. (Stewards and Brennan only)

The cobalt contained in the intravenous drips referred to in paragraphs 12 to 17 above
respectively caused the urinary cobalt concentration in the race day sample taken from each
horse to exceed 200µg/l.

145 **Other matters**

22. At approximately 4:21pm on 19 November 2014, O’Brien transferred \$3,000 from a personal
bank account to an account nominated to him by Brennan. No invoice has been raised or receipt
issued by Brennan or Flemington Equine Clinic in respect of this payment.”

150 **The standard of proof**

In proof of Charge 1 as it applies to each of the horses of O’Brien and Kavanagh, the stewards rely on
facts proved by direct evidence and circumstantial evidence, that is, facts proved by a process of
inference.

155 The charge is serious and consequences flowing from a conviction are grave, there being a mandatory
minimum penalty of 3 years disqualification in respect of each offence in the absence of a finding that
a special circumstances exists: AR 196(5) and LR 73A.

The standard of proof for all Charges requires the Board to be comfortably satisfied on the balance of probabilities that each element of the charge has been proved either by evidence or by inference consistent with the *Briginshaw*¹ principles.

160 In drawing an inference the approach the Board is required to adopt is to consider the weight of the combination of proven facts and circumstances and to determine whether the combined weight of those facts and circumstances supports an inference as a matter of probability².

Defence of O'Brien and Kavanagh

165 The Trainers admit that cobalt was administered to their horses in an amount which exceeded the prescribed threshold thereby becoming a prohibited substance.

However, they deny that they caused the prohibited substance to be administered and further deny that any administration was for the purpose of affecting the performance of a horse in a race.

Defence of Brennan

170 In relation to Charge 1 he says he was unaware that the Vitamin Complex contained cobalt and that it was never his intention to administer a prohibited substance.

He also denies that he administered the Vitamin Complex drip for the purpose of affecting performance, rather it was to aid recovery.

Background and Evidence of Brennan

175 In September 2014, Brennan was a senior partner in the veterinary practice Flemington Equine Clinic (FEC). Brennan was the veterinarian almost exclusively used by Kavanagh and O'Brien.

For some years earlier the partners in the practice were Dr Van Veenendaal and Dr Church.

180 Matthews had worked in the practice as a junior veterinarian however he left the practice after he was alleged to have performed work in a private capacity, it being clear to him that Dr Van Veenendaal was not impressed.

Subsequently Dr Van Veenendaal left the practice and set up his own practice, Ascot Vale Veterinary Services.

¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362.

² *Transport Industries Insurance Co. Ltd v Longmuir* [1997] 1 VR 125.

185 It was then that Matthews approached Dr Church and Brennan with a view to re-joining
FEC.

Brennan had some reservations about Matthews not only because of his apparent earlier transgression as a junior veterinarian but because he had reason to believe that Matthews had been in the company of people who were referred to as “dodgy blokes.”

190 Eventually Matthews persuaded Dr Church and Brennan to take him on and he joined
the practice as a salaried Veterinarian.

As part of the process which led Matthews to become employed he was questioned about his relations with shady characters. He assured Dr Church and Brennan that he no longer associated with such people and that he had mended his ways.

195 Matthews became an employee in 2011 and impressed the senior partners with his work
ethic and his ability.

In the event the practice accepted him as a salaried partner.

As time went on Brennan and Matthews became good friends.

200 According to Brennan late one afternoon in early September 2014 Matthews arrived at
Brennan’s home to have a beer and there told him that he had come across a new
multivitamin which helped the recovery of horses.

The multivitamin was in liquid form in a brown 100ml bottle which was labelled as described in the Statement of Agreed Facts.

According to Brennan, Matthews assured him that there were no prohibited substances in the bottle, that the cost was \$1,000 for a bottle and that it would deliver twenty (20) 5ml doses.

205 According to Brennan, Matthews told him that he had been using the Vitamin Complex
extensively in harness racing for at least three to four months. He said that he had multiple
winners that had returned clear swabs. He said he had sourced it from Canada.

According to Brennan, he asked Matthews whether the bottle contained cobalt. He said that Matthews replied that the bottle definitely did not contain cobalt.

210 According to Brennan, notwithstanding Matthews’ assertions, he had reservations about
Matthews.

In cross examination he agreed that his niggling doubt was based on the cloud under which Matthews originally left the practice, the rumours about his connections and the small question mark he had about Matthews's honesty.

215 Brennan took possession of a bottle and on 11 September rang Nick Bova, a compounding pharmacist.

According to Brennan he asked Bova how much it would cost to test the contents of the bottle. He was told the costs would be between \$10,000 and \$100,000.

Brennan did not pursue the matter further.

220 Brennan subsequently invited Kavanagh and O'Brien to consider the use of the product Vitamin Complex.

He said that he told both trainers that Matthews had sourced the bottle from Canada. He said that he informed them of what the substance was designed to do, when it was to be administered and that the cost was \$1,000 a bottle.

225 He said that he told them that he did not go ahead with testing the contents because of the prohibitive cost.

In relation to Kavanagh, Brennan said that the bottle was in clear view on the back of his vehicle when the discussion took place.

230 He said that he told both O'Brien and Kavanagh that he could give no guarantees as to the contents of the bottle.

According to Brennan, Kavanagh, despite Brennan's caveat, said "fuck that just do it" and gave him \$3,000 cash in advance a few days later for 3 bottles.

According to Brennan, O'Brien considered his position for a few days before agreeing to purchase the product.

235 Brennan agreed that a bottle of the Vitamin Complex was not produced during their conversation indeed was never seen by O'Brien.

Brennan then went ahead adding a dose of the Vitamin Complex to commercial supplements in a drip to horses trained by Kavanagh and O'Brien.

O'Brien paid \$3000 into Brennan's account on 19 November 2014 for 3 bottles.

240 It is pertinent to note at this stage that Brennan serviced the Kavanagh and O'Brien stables almost exclusively and attended O'Brien's stables six sometimes seven days per week.

He also attended Kavanagh's stables it would appear with similar regularity.

Not long after Brennan began to administer the drips he was contacted by Sam Kavanagh.

Sam Kavanagh was a licensed trainer in Sydney, who had a strained relationship with his father.

245 Sam Kavanagh however had maintained a friendship with O'Brien and from time to time they telephoned each other.

In the event, Sam Kavanagh came to learn about Brennan's Vitamin Complex. Brennan supplied him with 2 bottles of the product for \$1,000 each and two cash payments of \$1,000 were made on Sam Kavanagh's behalf to Brennan.

250 Staff at FEC were unaware of Brennan's arrangements.

Dr Amy Kelly who was a veterinarian and was Sam Kavanagh's primary Veterinarian at FEC's Sydney operation also was not informed of Brennan's arrangements with Sam Kavanagh.

A horse trained by Sam Kavanagh, *Midsummer Sun* (GB) of which Brennan was a part owner returned a positive to cobalt on 9th January 2015.

255 Shortly thereafter Brennan contacted Sam Kavanagh advising him to get rid of the bottle.

He also destroyed the documentary evidence relating to the sending of the bottle to Sam Kavanagh and threw away in a refuse bin a bottle with the remaining contents of Vitamin Complex.

Meanwhile New South Wales stewards had seized a bottle on Sam Kavanagh's premises, had its contents analysed which revealed a heavy concentration of cobalt.

260 The bottle containing cobalt was similarly labelled to the bottles of Vitamin Complex which Brennan said he was using at the O'Brien and Kavanagh stables.

Brennan was eventually called to give evidence at the NSW stewards' inquiry and denied any knowledge of how the bottle came to be in Sam Kavanagh's possession.

265 On 20 July 2015 Brennan admitted to NSW and RVL stewards that he had previously lied and admitted that he had provided bottles of the Vitamin Complex to Sam Kavanagh, O'Brien and Kavanagh.

Evidence of O'Brien

270 In evidence to the Board, O'Brien said that in September 2014, Brennan suggested that he, O'Brien, trial some vitamins and mineral supplements by intravenous drips as an aid to recovery.

O'Brien said he was aware that one or two stables and some footballers were using intravenous fluid supplements and he considered there was merit in getting supplements into his horses after gallops.

He discussed with Brennan when the drips were to be given, seven and two days prior to racing similar to what he believed another successful stable was doing.

275 He had no recollection of discussing with Brennan what the cost of the drips to his owners would be. A few days later he agreed to Brennan's proposal and the drips commenced on 25 September.

O'Brien gave Brennan a list of the horses to be given drips, horses that would be racing during the Spring Carnival.

280 The drips to the selected horses continued until the end of 2014 after the Spring racing was over and also because no horses were then running, that justified the cost.

O'Brien first heard of the Cobalt 'positives' in a telephone call from trainer Peter Moody, on the morning of 14 January 2015, shortly before stewards arrived at his stables with the news that *Bondeiger*, *Caravan Rolls On* and *De Little Engine* had returned above threshold urine samples to cobalt.

In that first interview with stewards (14 January 2015) the following exchange took place:

285 *“MR VILLELLA: Have you changed anything differently in relation to feed, supplements, medications - - -*

MR O'BRIEN: We certainly haven't.

MR VILLELLA: - - - during this period of time?

290 *MR O'BRIEN: Look, I'd have to ask Tom Brennan whether he's changed anything. That's the only thing I can think of as far as why something like this might have happened, whether we've had some sort of medication – you know, we do give them pre-race drips, post-race drips, things like that. I'd have to check with him really. He's the first person after you guys coming in here that I'll be ringing and saying, “Is there anything you can explain?” because everything that happens within the four*
295 *walls of the stables is very much the same as it's always been.*

MR VILLELLA: *So Tom Brennan, if he was going to administer some product, whether, old, new would he consult you or are you only aware of it through the report that you receive every two weeks?*

300 MR O'BRIEN: *Look, there's certain standard things that just happen with runners. They'll give a pre-race drip or a post-race drip and things like that, but they're just protocol.*

MR VILLELLA: *Can you recall any discussions that you had with Tom Brennan in relation these three horses around this time the samples were taken?*

305 MR O'BRIEN: *No, certainly nothing of note. They were all pretty much trouble-free horses, I would have thought.*

Later on:

MR VILLELLA: *So there's been no discussion from Tom Brennan in relation to any new products?*

310 MR O'BRIEN: *No.*

O'Brien said that in this and subsequent interviews he answered all questions truthfully.

On 24 February 2015, stewards had informed O'Brien that the Chem Centre Laboratory had reported a cobalt irregularity in the urine sample taken from *Bullpit* on 19 December 2014 and were awaiting confirmatory analysis from Hong Kong.

315 On 13 May 2015, stewards interviewed O'Brien again. By that date O'Brien had been aware for some time that Sam Kavanagh had nominated Brennan as the supplier of the bottle of 'Vitamin Complex' which had been seized by New South Wales stewards from Sam Kavanagh's Sydney premises which on analysis was found to contain a heavy concentration of cobalt.

320 During the 13 May interview, O'Brien told stewards that he was always trying different things to have the horses in better condition to race, and the drips were introduced on the better horses, racing for bigger prizemoney where the expense of the drips could be justified.

O'Brien was asked by his Counsel about a meeting on 21 July 2015 when Brennan came to see him.

"Tell us about the discussion?"

325 *"- - - Tom came in. He was very emotional. He said, "I met with the stewards last night and there's something I need to tell you. You didn't know the full recipe for your drips. There was an extra five mil that went in there from a Vitamin Complex bottle that you may – obviously*

you had heard about.” I’d shown it on 13 May. He said basically that, “five mil of that Vitamin Complex had been going into your IV drips.”

O’Brien added that he believed Brennan when he (Brennan) said to him at that meeting that he didn’t think there was any cobalt in the drips.

O’Brien said this was the first time that he had heard about the additional 5ml of Vitamin Complex in the drips and of the mention of Adam Matthews’ involvement. O’Brien knew Matthews as he had occasionally attended to his horses in the past.

Later that day (21 July) stewards interviewed O’Brien, Brennan having told stewards the previous evening that O’Brien had paid him \$3,000 in November 2014 for three bottles of the Vitamin Complex.

Asked by his Counsel why he didn’t tell stewards beforehand about the payment to Brennan for the Vitamin Complex, O’Brien replied that he was never asked. He added that he considered he was being unfairly treated by the stewards, who in his mind had it in for him.

In cross examination, O’Brien reluctantly at first but when pressed, finally agreed that he would take every step reasonable to ensure he knew the products that his horses were receiving.

He said that in 2014, his knowledge of cobalt was limited to knowing it was carcinogenic. He knew nothing about the duration of its efficacy. While he knew the drips contained vitamins, minerals and electrolytes, he did not enquire as to the ingredients of the drips.

Questioned about the \$3,000 he paid to Brennan in November for the Vitamin Complex, he didn’t think it was particularly relevant to tell the stewards – “...well, if it was relevant I figured they would have asked me.”

He asserted the \$3,000 was a subsidy he was happy to pay so as to keep the costs to owners in check. He denied that he had planned to keep the payment a secret from stewards.

As to why the payment was made without an invoice and from his personal instead of his business account, this happens for convenience from time to time, half a dozen times a year, maybe more, he said.

He denied that his telephone conversations with Sam Kavanagh on 14 January 2015, the day he was first interviewed by stewards, were in relation to his knowledge that Sam Kavanagh had been administering to his horses the same substance supplied by Brennan, that Brennan was administering to the O’Brien horses.

O’Brien explained that he was aware Mark and Sam Kavanagh had a strained relationship and that he spoke to Sam Kavanagh from time to time.

In answer to Counsel for Brennan, O'Brien repeated his denials that when first approached by Brennan he was told that Matthews was the source of the product, that the cost was \$1,000 per bottle, that there were no guarantees as to its contents and also that he was aware the horses were receiving 5ml of the Vitamin Complex in each drip.

Evidence of Kavanagh

Kavanagh gave evidence that Brennan suggested the introduction in September 2014 of the use of vitamin drips over the Spring Carnival of 2014. The drips were said to aid recovery, and help a horse hold his condition through the preparation.

Kavanagh denied any discussions as to the cost of the vitamin complex, denied ever seeing the bottle, denied any conversation regarding the ingredients in the drips save that they contained vitamins. Kavanagh denied making a payment for the vitamin complex.

Kavanagh in his evidence stated that he (Brennan) gave an undertaking that everything in the drip was well above board.

Kavanagh agreed that it was his practice, at least prior to September 2014, to speak to Brennan about any medications that he was administering to Kavanagh's horses.

In Kavanagh's evidence in the interview with stewards on 13 May 2015 he denied any discussions with Sam Kavanagh as to the reason his horse had returned a positive to cobalt.

In cross examination Kavanagh admitted that he had lied.

*Have you had any discussions with Sam as to the reason why his horse has given a positive to cobalt? You answered, 'nope.' Can you explain to the Board why you lied in that answer?
- - - No.*

In fact there was a meeting in Sydney between Sam Kavanagh, Matt Rudolph and Kavanagh on 2 March 2015.

To the question "Did Tom Brennan recommend the use of any new products (i.e. drips) around this time?" Kavanagh replied "No."

He sought to explain his denial that he did not use a new product by saying that he had simply changed the method of delivery.

Counsel for the stewards suggested that the answer "We didn't even inject vitamins" was a lie. Kavanagh sought to justify this answer by attempting to make a distinction between the insertion of a catheter and the insertion of a syringe to introduce solutions into a horse.

Administer or cause to be administered

390 In the Statement of Agreed Facts, Brennan admits that the intravenous drips he administered caused the urinary cobalt concentration in each horse to exceed 200µg/l, whereas O'Brien and Kavanagh admit that the above threshold results for each horse were caused by the cobalt administered in the drips as set out in the Administration Spreadsheets.

Where Brennan differs from the trainers is that he does not admit that the drips he administered caused the actual above threshold results.

395 The difference is immaterial in the sense that it is not in issue that Brennan administered a substance which included 5ml of the Vitamin Complex to each of the horses.

Both O'Brien and Kavanagh authorised and requested that the intravenous drips be administered. It was not disputed that O'Brien would give Brennan a piece of paper containing the names of the horses to be given the drips whereas Kavanagh gave oral instructions as to which of his horses were to be treated.

400 The Board is satisfied that O'Brien caused the prohibited substance to be administered to the horses *Caravan Rolls On, Bondeiger, De Little Engine* and *Bullpit* and that Kavanagh did likewise with *Magicool*.

The Board is also satisfied that Brennan administered the prohibited substance to each horse.

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For the purpose of affecting the performance of a horse in a race

410 It was argued on behalf of Brennan, O'Brien and Kavanagh that the information contained in the administration spreadsheets and the treatment records supported the claim that the purpose of the drips was for recovery purposes only.

Whilst the Board accepts that the drips may have assisted recovery from strong gallops that was not their only purpose.

When interviewed by stewards on 20 July 2015 the following exchange took place:

MR VILLELLA: "So what was the incentive to use the product?"

415 BRENNAN: "Oh it was - you know, the horses were supposedly – because they were recovering better, they were performing better on the Saturday or whenever they were racing".

Further, Brennan in cross examination by Mr Gleeson said inter alia:

420 “that if you increase recovery you are going to perform better on the day”.

O’Brien in explaining why the drips were introduced, said:

 “- - - you’re always looking to do things better to give the horses a better chance of racing better.”

Kavanagh gave evidence that it was hoped the drips would aid recovery and help the horses retain their
425 condition throughout the preparation.

The Board is satisfied the purpose of the drips was primarily for the purpose of affecting the performance in races of the horses administered the drips.

In addition to the above evidence, the Board draws the inference that having regard to the readings in excess of the threshold in relation to all the named horses and having regard to the fact that the Vitamin
430 Complex contained a heavy concentration of cobalt, the intention for administering the Vitamin Complex or causing the Vitamin Complex to be administered was to affect performance. Whether performance was in fact affected is irrelevant.

Knowledge of Cobalt in ‘Vitamin Complex’

Brennan, O’Brien and Kavanagh all say they did not know that the substance administered to the horses
435 contained cobalt.

It was submitted on their behalf that the proper interpretation of Rule 175(h)(i) requires on the part of the person who administers or who causes to be administered a prohibited substance, knowledge that the prohibited substance, in this case the Vitamin Complex, contained cobalt and that it was intentionally administered.

440 If accepted, this submission would impart the criminal law principle of *mens rea* (guilty knowledge) into the Rules.

In the Board’s view actual knowledge that the substance is cobalt or a prohibited substance is not a requirement of the Rule. If it were otherwise, the stringent controls on those administering substances which the Rule is designed to impose, would be significantly diminished.

445 On this point, the Board refers to the decision in *NSW Stewards and Kavanagh*³ and agrees with the approach taken by the panel in *Kavanagh*, that in disciplinary proceedings of a kind with which the Rules of Racing under consideration here are concerned, criminal law principles are not applicable.

³ *NSW Stewards and Kavanagh*, 31 August 2015, at para 27-33.

In essence the submission is claiming that because they, Brennan, O'Brien and Kavanagh were unaware that the Vitamin Complex contained cobalt and of such concentration as would render 5ml
450 administrations a prohibited substance, that they should not be held to account under AR 175(h)(i).

Cobalt per se is not a prohibited substance.

It is generally found in small amounts in horses as it is a constituent of pastures, ready mixed feeds and a variety of supplements.

Veterinarians and trainers were informed of the cobalt rule at the time the rule was introduced in
455 Victoria on 14 April 2014, that a concentration of above 200µg/l per litre in urine is a prohibited substance. Administration of substances containing cobalt within prescribed time limits prior to racing are permitted providing the race day sample does not exceed the threshold.

Knowledge of the substance administered is not a determinant. Cobalt may be administered whether a person does so knowingly or not. Only when the threshold is exceeded is cobalt a prohibited substance
460 for the purposes of the Rules.

It is irrelevant to guilt whether a person knew the substance was cobalt or not.

The Board does not accept that the submission is a proper interpretation of AR 175(h)(i).

Consideration and Further Findings

While it is the view of the Board that AR 175(h) does not require actual knowledge that the prohibited
465 substance administered was cobalt, the Board considers that the facts and circumstances point strongly to a probable inference that Brennan held a real suspicion that the Vitamin Complex contained cobalt.

In drawing this inference the Board has considered the weight of the combination of the following facts and circumstances including but not limited to:

- Brennan arranged the purchase of bottles of Vitamin Complex from Matthews for \$1,000 cash
470 per bottle
- The substance described as Vitamin Complex was not a commercial product, not properly labelled and lacked any description of the active constituents
- According to Brennan, Matthews told him the Vitamin Complex was sourced in Canada from an unnamed person. Matthews assured him that it contained only vitamins, it did not contain
475 cobalt nor any prohibited substances and returned clear swabs
- Brennan enquired as to the cost of an analysis of the contents of the Vitamin Complex but did not enquire as to the cost of an analysis for cobalt only or otherwise satisfy his doubts about the composition of the substance

He:

- 480 ▪ kept the bottles in his vehicle;
- did not record the purchase or sale of the Vitamin Complex in the books of account at
 FEC;
- kept the transactions secret from colleagues and staff of FEC;
- sold bottles of the Vitamin Complex to O'Brien and Kavanagh and to Sam Kavanagh
485 for \$1,000 each;
- did not inform Dr Amy Kelly, a fellow FEC vet and the primary care vet for Sam
 Kavanagh of the sale of bottles to Sam Kavanagh;
- destroyed the FEC book recording postage of a bottle to Sam Kavanagh;
- requested Sam Kavanagh on 14 January 2015 to get rid of a bottle;
- 490 ▪ dumped the remaining bottle of Vitamin Complex in his possession in a rubbish skip
 on 14 January 2015; the day the O'Brien and Kavanagh positives were announced; and
- admitted to stewards on 20 July 2015 that much of his previous testimony was false.

Presented with a bottle of the appearance and labelled as described earlier, and from an anonymous
overseas source one might expect that it would raise in the mind of an experienced equine veterinarian
495 a real suspicion that the contents were of dubious provenance, especially having regard to the cost,
considerably more than the going rate for a bottle of vitamins which Brennan knew was a fraction of
\$1,000.

Cobalt was apparently in mind, as the substance was said by Matthews not to contain cobalt after
Brennan said he raised the question.

500 Brennan however refrained from having the substance tested for cobalt to confirm his suspicions; a test,
which on the evidence would cost a fraction of the quote from Bova for a test as to what the substance
contained.

Brennan's behaviour as described above is in the Board's view consistent with a strong suspicion that
the Vitamin Complex was cobalt. The Board also considers it highly likely that Brennan conveyed his
505 suspicions to O'Brien and Kavanagh. Denials to the contrary are not accepted as the truth.

The circumstances surrounding the arrangements between Brennan, O'Brien and Kavanagh are
inconsistent with their denials they had knowledge or at the very least a strong suspicion that the
Vitamin Complex contained cobalt.

Quite apart from anything else, human experience would suggest that when Brennan was offering to
510 Kavanagh and O'Brien the Vitamin Complex for \$1,000 a bottle, 'what's in it' would be an integral
topic of their conversations.

In relation to the dealings of Brennan with O'Brien and Kavanagh, the evidence of all three requires close scrutiny as each of them has demonstrated a capacity to tell lies.

515 In view of the fact Brennan, a self-confessed liar, had recanted much of his earlier evidence does not mean that because he has lied on some matters that other aspects of his evidence should be rejected.

O'Brien claimed to be cooperative and truthful with stewards. Yet he sought to deflect stewards from inquiring into the Vitamin Complex by withholding relevant information, his anger with Brennan for informing the stewards that he paid \$3,000 for 3 bottles of Vitamin Complex and his extraordinarily superficial explanation for why he did not tell stewards about the payment, if in fact, as he asserted it was an innocent trial of electrolytes, minerals and vitamins, was the conduct of a person who did not wish for the truth to be revealed.'

520 In the Board's view much of O'Brien's evidence in cross examination was characterised by evasion, prevarication and lacked credibility. The unsatisfactory nature of his evidence was tellingly revealed in an exchange with Counsel for the stewards⁴. –

525 Kavanagh demonstrated a capacity to lie by falsely denying to stewards contact with his son Sam. Further, his evidence that he, unlike O'Brien and Sam Kavanagh, did not pay for the Vitamin Complex, which apparently on his version of events was provided gratuitously by Brennan for his horses, strains credulity.

530 The Board regards that evidence as implausible as was his evidence as to the extent of the discussion with Brennan when first approached to use the Vitamin Complex.

Estoppel

Leaving to one side the question of prejudice by the eleventh hour notification of the claim of an estoppel against the stewards on behalf of O'Brien, the Board is not satisfied on the evidence before it that a claim of estoppel has been established.

535 Irrespective of the merits of the argument surrounding the time when it may be said that a prohibited substance is detected for the purposes of AR 178D, there is a lack of evidence that the alleged inaction by stewards to notify O'Brien earlier of the results of the urine samples taken from his horses, was intentional on the part of the stewards to cause detriment to O'Brien.

Various assertions and assumptions said to support the claim were made to the Board.

540 They do not provide a satisfactory basis for a claim of estoppel.

⁴ See Transcript p449-51.

Abuse of Process

Finally, it was submitted on behalf of O'Brien that the laying of charges against him is an abuse of process and the charges should be dismissed.

The Board considers this submission to be without merit and is rejected

545 **Conclusion**

Having considered all of the evidence and submissions, the Board is comfortably satisfied that Brennan administered to the five named horses a prohibited substance for the purpose of affecting the performance of those horses in a race.

550 O'Brien and Kavanagh caused to be administered to each of the named horses which they trained a prohibited substance for the purpose of affecting the performance of each of those horses in a race.

Accordingly the Board finds that the charges laid under AR 175(h)(i) against O'Brien, Kavanagh and Brennan have been proved.

HEARING RESULT

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

FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 23 December 2015

SUBJECT: **HEARING RESULT - TRAINER: DANNY O'BRIEN**

Panel Judge Russell Lewis (Executive Member), Mr Brian Forrest (Deputy),
Mr Geoff Ellis.

Appearances Mr Damian Sheales and Mr Tim Purdey, instructed by Lander & Rogers,
appeared on behalf of Mr Kavanagh.

Mr Jeff Gleeson QC and Mr David Bennett, instructed by Minter Ellison,
appeared as Counsel for the Racing Victoria stewards.

Charge 1 Breach of AR 175(h)(i)

Any person who administers, or causes to be administered, to a horse any prohibited substance: (i) for the purpose of affecting the performance or behaviour of a horse in a race or of preventing its starting in a race.

Charge 2 Breach of AR 175(h)(ii) [alternative to Charge 1]

The Committee of any Club or the Stewards may penalise: Any person who administers, or causes to be administered, to a horse any prohibited substance which is detected in any sample taken from such horse prior to or following the running of any race.

Charge 3 Breach of AR 178 [alternative to Charges 1 & 2]

Subject to AR 178G, when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised.

Charge 4 Breach of AR 175(k) [alternative to Charges 1 – 3]

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.

Particulars

Each of the 4 charges relating to a prohibited substance, being cobalt at a concentration in excess of 200µg/l in urine, which was detected in pre-race urine samples taken from each of the Four Horses *Caravan Rolls On*, *Bondeiger*, *De Little Engine* and *Bullpit*.

Plea

Charge 1 – not guilty.

Charge 2 [alternative to Charge 1] – not guilty.

Charge 3 [alternative to Charges 2 & 3] – not guilty.

Charge 4 [alternative to Charges 1 – 3] – not guilty.

Decision

In relation to Charge 1 the Board finds the charge proved in relation to each of the Four Horses.

Georgie Gavin
Registrar - Racing Appeals and Disciplinary Board

HEARING RESULT

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

FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 23 December 2015

SUBJECT: **HEARING RESULT - TRAINER: MARK KAVANAGH**

Panel Judge Russell Lewis (Executive Member), Mr Brian Forrest (Deputy),
Mr Geoff Ellis.

Appearances Mr Damian Sheales and Mr Tim Purdey, instructed by Lander & Rogers,
appeared on behalf of Mr Kavanagh.

Mr Jeff Gleeson QC and Mr David Bennett, instructed by Minter Ellison,
appeared as Counsel for the Racing Victoria stewards.

Charge 1 Breach of AR 175(h)(i)

Any person who administers, or causes to be administered, to a horse any prohibited substance: (i) for the purpose of affecting the performance or behaviour of a horse in a race or of preventing its starting in a race.

Charge 2 Breach of AR 175(h)(ii) [alternative to Charge 1]

The Committee of any Club or the Stewards may penalise: Any person who administers, or causes to be administered, to a horse any prohibited substance which is detected in any sample taken from such horse prior to or following the running of any race.

Charge 3 Breach of AR 178 [alternative to Charges 1 & 2]

Subject to AR 178G, when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised.

Charge 4 Breach of AR 175(k) [alternative to Charges 1 – 3]

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.

Particulars

Each of the 4 charges relates to a prohibited substance, being cobalt at a concentration in excess of 200µg/l in urine, which was detected in a pre-race urine sample taken from the horse *Magicool*.

Plea

Charge 1 – not guilty.

Charge 2 [alternative to Charge 1] – not guilty.

Charge 3 [alternative to Charges 2 & 3] – not guilty.

Charge 4 [alternative to Charges 1 – 3] – not guilty.

Decision

In relation to Charge 1 the Board finds the charge proved.

Georgie Gavin
Registrar - Racing Appeals and Disciplinary Board

HEARING RESULT

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

FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 23 December 2015

SUBJECT: **HEARING RESULT – VET: DR TOM BRENNAN**

Panel Judge Russell Lewis (Executive Member), Mr Brian Forrest (Deputy),
Mr Geoff Ellis.

Appearances Mr Adrian Anderson, instructed by Tony Hargreaves and Partners, appeared on
behalf of Dr Brennan.

Mr Jeff Gleeson QC and Mr David Bennett, instructed by Minter Ellison,
appeared as Counsel for the Racing Victoria stewards.

Charge 1 Breach of AR 175(h)(i)

Any person who administers, or causes to be administered, to a horse any prohibited substance: (i) for the purpose of affecting the performance or behaviour of a horse in a race or of preventing its starting in a race.

Charge 2 Breach of AR 175(h)(ii) [alternative to Charge 1]

The Committee of any Club or the Stewards may penalise: Any person who administers, or causes to be administered, to a horse any prohibited substance which is detected in any sample taken from such horse prior to or following the running of any race.

Charge 3 Breach of AR 175(k) [alternative to Charges 1 & 2]

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.

Charge 4 Breach of AR 175(l) [alternative to Charges 1 – 3]

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

Particulars

Each of the 4 charges relates to a prohibited substance, being cobalt at a concentration in excess of 200µg/l in urine, which was detected in pre-race urine samples taken from the Five Horses - *Magicool* (trained by Mark Kavanagh), *Caravan Rolls On*, *Bondeiger*, *De Little Engine* and *Bullpit* (trained by Danny O'Brien).

Plea

Charge 1 – not guilty.

Charge 2 [alternative to Charge 1] – not guilty.

Charge 3 [alternative to Charges 2 & 3] – guilty in so far as those charges concern the trainers' breaches of AR 178. Not guilty to all others.

Charge 4 [alternative to Charges 1 – 3] – guilty in so far as those charges concern the trainers' breaches of AR 178. Not guilty to all others.

Decision

In relation to Charge 1 the Board finds the charges in relation to each of the Five Horses proved.

Georgie Gavin
Registrar - Racing Appeals and Disciplinary Board