IN THE RACING APPEALS TRIBUNAL

JAMES GODDARD
Appellant

v

GREYHOUND WELFARE AND INTEGRITY COMMISSION
Respondent

REASONS FOR DETERMINATION

Date of hearing:	**19 March 2024** **9 April 2024 (Further written submissions)**
Date of determination:	**17 June 2024**
Appearances:	**Mr S De Brennan instructed by Pryor Tzannes and Wallace for the Appellant** **Ms A Summerson-Hingston, Solicitor for the Greyhound Welfare and Integrity Commission, for the Respondent**

Determination:

1. **The charge brought against the Appellant is amended by deleting the date of 7 February 2023, and inserting in lieu thereof, the date of 4 February 2023.**

2. **The appeal is allowed.**

3. **The determination of the Respondent of 17 August 2023 finding the Appellant guilty of an offence contrary to r 141 of the *Greyhound Racing Rules,* and imposing a disqualification of 9 months, is set aside.**

4. **The charge against the Appellant is dismissed.**

5. **The appeal deposit is to be refunded.**

INTRODUCTION

1. By a Notice of Appeal filed with the Appeals Secretary on 20 December 2023, James William Goddard (the Appellant) has appealed from a determination of the Greyhound Welfare and Integrity Commission (the Respondent) made on 17 August 2023, finding him guilty of a breach of r 141 of the *Greyhound Racing Rules* (the Rules) and ordering that that he be disqualified for a period of 9 months commencing on 22 August 2023.

2. An application for a stay of that determination was refused by the Tribunal for reasons delivered on 2 February 2024.

3. At the conclusion of the hearing of the appeal on 19 March 2024, judgment was reserved, and a timetable was set pursuant to which I was provided with written submissions of the parties, which were completed on 9 April 2024.

4. For the purposes of the hearing and determination of the appeal, I was provided with a Tribunal Book (TB) containing the principal evidence.

AN OVERVIEW OF THE CASE AGAINST THE APPELLANT

5. There is no dispute that on 7 February 2023, the Appellant presented *Tom's Mate* (the greyhound) for competition in a race at Wauchope. Following the race, a urine sample was taken from the greyhound, the A and B samples of which, on the Respondent's case, were found to contain a banned prohibited substance, namely 1,4-androstadiene-3, 17-diol (to which I will refer for convenience as Boldione).

6. The Appellant was charged with a breach of r 141(a) of the Rules which is in the following terms:

> ***Greyhound to be free of prohibited substances***
> *(1) The owner, trainer or other person in charge of a greyhound:*
>
> *(a) nominated to compete in an event;*
> .....
> *must present the greyhound free of any prohibited substance.*

7. Proof of that offence, which is one of absolute liability, requires the Respondent to establish that:

    (i) the Appellant was an owner, trainer or other person in charge of a greyhound;
    (ii) the greyhound was nominated to compete in an event;
    (iii) the Appellant presented the greyhound for competition in such event; and
    (iv) the Appellant did so when the greyhound was not free of any prohibited substance.

8. It was confirmed by counsel for the Appellant at the commencement of the hearing that there was no issue that the elements in [7](i), (ii) and (iii) were made out.[1] The sole fact in issue, of which I must be satisfied on the balance of probabilities, is whether the Appellant presented the greyhound for competition when it was not free of a prohibited substance, namely Boldione. The resolution of that issue depends upon a number of factors, including the analysis of expert scientific opinion, which was the subject of lengthy written and oral evidence at the hearing.

THE APPLICATION TO AMEND THE PARTICULARS OF THE CHARGE

9. Before proceeding further it is necessary that I address a preliminary matter arising from the charge brought against the Appellant, which was pleaded in the following terms:[2]

> *That [the Appellant], as a registered Owner, Trainer and Breeder, while in charge of the greyhound Tom's Mate (greyhound) presented the greyhound for the purposes of competing in race 5 at the Wauchope meeting on **7 February 2023** (Event) in circumstances where the greyhound was not free of any prohibited substance.*
>
> *The prohibited substances detected in the sample of urine taken from the greyhound following the Event was [Boldione]; and*

[1] T 2.36.
[2] TB 2.

> *[Boldione] is a permanently banned prohibited substance under Rule 139(1)(f) of the Rules.*

10. At the conclusion of the hearing,[3] counsel for the Appellant drew my attention to the fact that the particulars of the charge made reference to the offending having been committed on 7 February 2023, in circumstances where it is common ground that the meeting at which the greyhound was presented by the Appellant for competition was held (and the offence was thus allegedly committed) on 4 February 2023. In raising that issue, counsel conceded that he could not oppose an application to amend the charge.[4] Implicit in that concession was a further concession that the amendment should be allowed if there was a power to do so.[5]

11. On 3 April 2024, the Respondent made an application to amend the particulars of the charge by deleting the date of 7 February 2023, and by inserting, in lieu thereof, the date of 4 February 2023. It was the Respondent's position that I had the power to make that amendment pursuant to cl 18(1) of the *Racing Appeals Tribunal Regulation 2015* (NSW) (the Regulation) which is in the following terms:

> ***Conduct of Appeal***
> *(1) The Tribunal may, subject to the Act and this Part, direct the manner in which an appeal is to be conducted.*

12. The Respondent submitted that its position was supported by the judgment of Fagan J in *Ross v Harness Racing New South Wales*[6]. In that case, his Honour concluded[7] that this Tribunal does not have power to allow an amendment if it would result in the Tribunal hearing a charge that is, in substance, different from that which was the subject of the decision at first instance. However, his Honour also concluded[8] that subject to that identified jurisdictional boundary, the Tribunal has an implicitly conferred power to allow an amendment of particulars.

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[3] Commencing at T 62.32.
[4] T 64.17.
[5] Written submissions at [4].
[6] [2020] NSWSC 1397.
[7] At [23].
[8] At [36].

In reaching those conclusions, his Honour further observed[9] that a power to allow an amendment of particulars may be an important aspect of the power conferred by cl 18 of the Regulation.

13. In the context of the present case, two matters of significance emerge from his Honour's judgment. The first, is that the Tribunal has the power to make the amendment sought. The second, is that the amendment goes to a particular, and not the substance, of the charge, and would not, if made, bring about the impermissible result to which his Honour referred in *Ross,* namely a change in the substance of the charge.

14. It was expressly conceded by counsel for the Appellant[10] that there would be no prejudice to the Appellant if the amendment were made. In all of these circumstances, the amendment sought is appropriate and I will make an order accordingly.

THE PENALTY IMPOSED UPON THE APPELLANT

15. Before addressing the substantive issue, it should be noted that this matter was originally listed for hearing on 4 March 2024, but did not proceed on that day due to an application by the Appellant that the hearing be vacated, which was not opposed by the Respondent. The hearing proceeded on 19 March following which, in light of the evidence and cross-examination, a timetable was agreed for the provision of written submissions. Those submissions closed on 9 April, by which time the disqualification which had been imposed on the Appellant was only a short time away from its expiry. It has now expired.

THE EVIDENCE

16. Notwithstanding that there is only one issue that I am required to determine, the evidence in relation to it is lengthy and must be canvassed in detail.

[9] At [37].
[10] Written submissions at [4].

The taking and despatch of the urine samples

17. The greyhound competed in, and won, race 4 at Wauchope on 4 February 2023.[11] A urine sample was taken from the greyhound at 3.07 pm on 4 February 2023, and posted to the Respondent from Yamba on 6 February 2023 before being received by the Respondent on 8 February 2023.[12] There is evidence that upon receipt by the Respondent, the sample was placed in a secured refrigerated storage facility at the Respondent's premises[13] and designated by the Respondent as *"V783945 Tom's Mate"*.[14] However, the Respondent expressly conceded that the sample was *"largely unrefrigerated"* between 4 February 2023 and 10 February 2023, a period of six days.[15]

18. The sample was separated into 3 separate samples, namely the control sample, the A sample and the B sample, all of which were separately sealed.[16]

Testing and analysis of the A sample by Racing Analytical Services Limited

19. On 10 February 2023, Racing Analytical Services Limited (RASL) received the samples for testing.[17] On 16 March 2023, RASL wrote to the Respondent attaching a certificate of analysis of the A sample which was in (inter alia) the following terms:[18]

> *Samples arrived in good condition with the seals intact.*
>
> *Results: The urine sample was shown to contain BOLDENONE and [Boldione].*

20. The evidence is silent as to the conditions in which the samples were kept between 10 February 2023 (when they were received by RASL) and 16 March 2023 (when the certificate of analysis was issued).

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[11] TB 14.
[12] TB 5; 7.
[13] TB 7 – 8.
[14] TB 8.
[15] Submissions of the Respondent at [27].
[16] TB 11.
[17] TB 13.
[18] TB 16.

21. Having received that advice from RASL, the Respondent wrote to the Appellant on 17 March 2023, advising him of the contents of the certificate of analysis which had been issued, and further advising him that an enquiry into the matter had been commenced.[19]

Testing and analysis of the B sample by New Zealand Racing Laboratory Services

22. On 23 March 2023, the three samples were received in a sealed condition by New Zealand Racing Laboratory Services (NZRLS).[20] On 30 June 2023, more than three months later, NZRLS wrote to the Respondent in (inter alia) the following terms:[21]

> *New Zealand Racing Laboratory Services has completed its analysis for the reserve urine and control sample number V 783945.*
>
> *New Zealand Racing Laboratory Services has confirmed the presence of [Boldione] in the reserve urine sample number V 783945.*
>
> *Boldenone and [Boldione] were not detected in the control sample number V 783945.*

23. That correspondence was accompanied by a certificate of analysis which expressed the following conclusion:[22]

> *Racing Analytical Services Pty Limited confirmed the presence of boldenone and [Boldione] in … GWIC sample V783945 (A – First Sample).*
>
> *The presence of [Boldione] was confirmed in laboratory sample number RS 23/02825-10-GWIC sample number V783945 (B – reserve sample) by New Zealand Racing Laboratory Services.*
>
> *Boldenone and [Boldione] were not detected in the corresponding control sample.*

24. Bearing in mind that for present purposes the relevant prohibited substance is Boldione, the following should be noted at this point:

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[19] TB 17.
[20] TB 29.
[21] TB 19.
[22] TB 22.

(i) both Boldenone and Boldione were detected in the A sample tested by RASL;

(ii) Boldione was detected in the B sample tested by NZRLS;

(iii) neither Boldenone nor Boldione was detected in the control sample tested by NZRLS.

The correspondence sent to the Appellant by the Respondent on 5 July 2023

25. On 5 July 2023, the Respondent wrote to the Appellant.[23] The correspondence was headed:

NOTICE OF CHARGE AND PROPOSED DISCIPLINARY ACTION – INTERIM SUSPENSION

26. The correspondence advised the Appellant:

(i) of the results of the testing;

(ii) that a decision had been made to suspend the Appellant's registrations on an interim basis, pursuant to r 169(5)(c) of the Rules;

(iii) that this was not a final penalty, but a proposed penalty; and

(iv) that a hearing would be held on 11 July 2023.

27. Although nothing turns on it, the heading "Notice of charge" which appeared at the commencement of that correspondence appears to be something of a misnomer. The correspondence did not particularise, disclose, or have the effect of bringing, any *"charge"* at all.

The interview of the Appellant of 11 July 2023

28. On 11 July 2023, Wade Birch, the Chief Operating Officer of the Respondent, commenced the hearing referred to in the correspondence of 5 July, by interviewing the Appellant. Having been commenced, the interview was

[23] TB 33 – 35.

adjourned for the purposes of attempting to clarify the reason for the inconsistency in the results of the testing.[24]

The notice of charge

29. On 10 August 2023, the Respondent issued a Notice of Charge to the Appellant, alleging a breach of r 141(1)(a) of the Rules, stemming from his presentation of the greyhound on 4 February 2023.[25]

The resumption of the interview on 17 August 2023

30. The interview of the Appellant resumed on 17 August 2023. At the commencement, Mr Birch explained[26] that what was alleged against the Appellant was that he *"brought Tom's Mate to the races at Wauchope that day with a permanently banned prohibited substance in its system"*.[27] Mr Birch then gave the Appellant the opportunity to explain how Boldione came to be in the greyhound's system. The Appellant replied:[28]

> *Wouldn't have a clue mate. Like I said, I don't give my dogs anything. I just – natural feeding and natural this and that and I don't give them anything. I just don't understand how it's bloody possible. So, I've even got a positive swab now, and I never give the dogs anything, and I don't – I just don't understand how this has happened.*

31. Mr Birch then called evidence from Dr Adam Cawley to elicit what he described as *"a possible explanation for the differing findings from the two laboratories"*. Dr Cawley said the following:[29]

> *... There's a couple of potential reasons for this. Of course, I can't explain exactly what's happened but I can give an opinion as to potential scenarios. One is a difference in sensitivity, at least for the detection of – and confirmation of Boldenone in the sample. Having reviewed however, only last year, the New Zealand Racing Laboratory Services – that laboratory, and their accreditation, I believe that the Australian and New Zealand Racing Laboratories all have quite*

[24] Q and A 15 at TB 38; Q and A 3 at TB 41.
[25] TB 60.
[26] Q and A 9 at TB 48.
[27] Q and A 10 at TB 48.
[28] Q and A 12 at TB 48.
[29] Q and A 17 at TB 49.

> *comparable detection capabilities. So while it's possible that a sensitivity difference between laboratories might be the reason for this difference, I think it – my opinion is it's unlikely. What might be more likely, Mr Chairman, is that what we've seen historically – more so in equine samples, where Boldenone not only converts in the body to [Boldione] … the conversion can also occur ex vivo – so in the bottle, due to oxidating processes. So, as the sample might degrade, we can have conversion of the [Boldenone] group of the steroid to form the … Boldione compound. That may also be a reason, in my opinion, more likely for the difference in findings …*

32. Unsurprisingly, in circumstances where he was self-represented and faced with having to deal with highly scientific and complex evidence, the Appellant did not question Dr Cawley.[30] Upon the opportunity being provided to him by Mr Birch,[31] the Appellant entered a plea of not guilty to the charge.[32] After giving the Appellant the opportunity to make submissions, Mr Birch advised him that he had been found guilty.[33] The Appellant was then given the opportunity to make submissions on the question of penalty, following which the Respondent determined to impose a disqualification of 9 months.[34] That decision, which was made on 17 August 2023, was confirmed in correspondence sent to the Appellant on 21 August 2023.[35] The Appellant sought, and was granted, an internal review of the Respondent's decision. Following that review, the decision was confirmed.[36] In circumstances where this appeal proceeds before me as a hearing *de novo,* it is not necessary to address the reasons for that confirmation.

THE EVIDENCE AT THE HEARING OF THE APPEAL

The evidence of the Appellant

33. The Appellant gave evidence before me at the hearing of the appeal[37] which was, generally speaking, uncontroversial, and which amounted to a confirmation of his evidence before Mr Birch, firstly that he simply did not know how any prohibited

[30] Q and A 24 at TB 50.
[31] Q and A 27 at TB 50.
[32] Q and A 28 at TB 50.
[33] Q and A 1 at TB 55.
[34] TB 59.
[35] TB 62 – 63.
[36] TB 75 and following.
[37] Commencing at T 7.18.

substance could have come to be in the greyhound's system,[38] and secondly that he did not knowingly present the greyhound when it was not free of any prohibited substance.[39] It should be emphasised that it is not part of the Respondent's case that the Appellant deliberately administered any prohibited substance to the greyhound, and in these circumstances I do not regard the Appellant's evidence as being significant in terms of the issue I am required to determine.[40]

34. It should also be noted that the Appellant was cross-examined regarding the source of the meat he gave his greyhounds.[41] There is nothing to suggest that this was the source of the prohibited substance and, as I understand it, the Respondent did not ultimately advance that proposition.

The evidence of Dr Major

35. The Appellant qualified Dr Derek Major, who provided a report of 28 February 2024. No issue was raised about Dr Major's qualifications to express an expert opinion. Dr Major's report of 28 February 2024 incorporated two earlier reports dated 12 October 2023 and 8 December 2023.

36. Dr Major expressed the opinion that it was highly likely that the presence of Boldione in the B sample was the consequence of microbial transformation due to what he regarded as the prolonged and uncertain storage temperature to which the samples were subjected.[42] Dr Major had expressed this view in his report of 8 December 2023.[43] He drew support for it from the opinion of Dr Kuipers, to which I have referred further below.

37. Dr Major gave oral evidence at the hearing before me. He confirmed what he saw as the importance of the time that it took for the samples to be tested, saying:[44]

[38] T 9.9 – T 9.24.
[39] T 10.1 – T 10.5.
[40] See the Appellant's submissions at [18] and following.
[41] T 11.15 and following.
[42] Report of 28 February 2024 at p. 5.
[43] At p. 9.
[44] T 17.7 – T 17.14.

I think that's a very important factor in what I believe has occurred in these samples, yes. The time. The time the samples were – not – well, certainly not on ice and no evidence that they were refrigerated. We know these transformations will even occur at refrigerated temperature and these certainly were not in the freezer. And the prevailing wisdom in the scientific literature is that if we want to get the right results for steroid analysis for this type of regulatory testing, samples should be tested immediately or frozen.

38. Dr Major also raised the issue of bacterial transformation of steroids, including the transformation of Testosterone to Boldenone,[45] and expressed the view that even at refrigerator temperatures such transformation could occur, and could have occurred in this case. He viewed this as a factor which supported his opinions about the importance of the temperature of the samples.[46]

39. In answer to questions put by counsel for the Appellant, Dr Major returned to what he saw the importance of refrigeration of the samples:[47]

MR DE BRENNAN: And just if you look at that timeline, Doctor, you refer to Friday, 10 February 2023. And you say there that when the samples are received, there is no mention of the condition/temperature on arrival.

DR MAJOR: That's right.

MR DE BRENNAN: Why do you say that's important?

DR MAJOR: Well, as we've discussed, it is important, or desirable, shall we say, that the samples are very close to zero on arrival. If we're going to interpret these particular findings accurately. So, there are times when I see such documents where they say the samples were partially thawed or they were cool in an Esky. There was just no mention of it this time. So I can't make any deduction that they were cold.

40. Dr Major was taken to the reports of Dr Kuipers, particularly those parts in which Dr Kuipers had made comment about the level of scientific research in this general area.[48] In short, Dr Major took the view that such research supported his position. In his opinion, the fact that much (if not all) of it was referable to humans and horses rather than canines, was of little consequence. Tellingly, in the course

[45] T18.4 and following.
[46] T 18.11 – T 18.41.
[47] T 19.41 – T 20.7.
[48] Commencing at T 21.36.

of this aspect of his oral evidence, Dr Major again returned to what he saw as the importance of the temperature of the samples at the time of testing.[49]

41. When cross-examined, Dr Major accepted that the majority of his professional experience was in the equine, as opposed to the canine, industry.[50] He also accepted that, but for the current case, he knew of no other instance of endogenous Testosterone converting to Boldenone or Boldione in stored urine samples of greyhounds.[51] The cross-examination centred upon these issues, with Dr Major further confirming his understanding that greyhounds have *"not figured at all in any of the research",*[52] and agreeing that other experts had expressed caution as to whether results of research conducted in respect of other animals could be applied to greyhounds.[53]

42. Dr Major accepted that there was evidence that the samples had arrived for testing by NZRLS in "good condition",[54] although I interpolate that there is no evidence of what that term might specifically encompass. Dr Major also agreed that the there was evidence that the samples arrived with the *"seals intact".*[55] He was not specifically questioned about why it was that he regarded the temperature at which the samples were tested as being of significance.

The evidence of Dr Kuipers

43. The Respondent qualified Dr Kuipers, the Chief Veterinary Officer of the Respondent. As was the case with Dr Major, there was no dispute about Dr Kuipers' qualifications.

[49] T 22.26 – T 22.39
[50] T 24. 32 – T 24.41.
[51] T 25.17 – T 25.28.
[52] T 25.40 – T 25.42.
[53] T 31.15 – T 31.23.
[54] T 34.10.
[55] T 33.40.

44. Dr Kuipers provided a report of 28 November 2023[56] in which he agreed with the opinions of Dr Major that Boldenone:

    (i) is an anabolic steroid;[57] and

    (ii) has been documented as having been produced by bacterial enzymatic action in the field of human drug testing.[58]

45. Dr Kuipers also said this:[59]

> *It would be highly unlikely that this charge would be defendable if the maintenance of a cold chain (particularly sample freezing) was applied from specimen collection to testing, ensuring sample preservation. Such a strategy would however be logistically challenging. Alternatively, discussions may be undertaken with relevant testing laboratories to mitigate such defences in cases of positive Anabolic Androgenic Steroid samples.*

46. For the reasons discussed further below, I regard that statement as being of some significance in this case.

47. Having been provided with the reports of Dr Major, Dr Kuipers provided a further report of 11 March 2024 in which he stated that:

    (i) the proposition that Boldione was never in the greyhound *"did not make sense"* because "*a positive finding of Boldione in both A and B samples is indicative of [the presence of a permanently banned substance]"*;[60]

    (ii) there is no peer reviewed literature supporting the proposition that the biotransformation of Testosterone to Boldenone or Boldione might occur via bacterial transformation;[61]

[56] TB 103 and following.
[57] TB 103 at [11].
[58] TB 105 at [14].
[59] TB 107 at [24](d).
[60] At p 1.
[61] At p 1[1].

(iii) the statistical data established that bacterial contamination had not occurred in 71,052 cases, rendering it highly unlikely that it had occurred in this case.[62]

48. When giving evidence in answer to questions put by Ms Summerson-Hingston, Dr Kuipers confirmed his opinion that studies conducted in other animal species were of little assistance, and were in fact problematic.[63]

49. In cross-examination, Dr Kuipers accepted that Boldione has been documented as having been produced by bacterial enzymatic action in the field of human drug testing.[64] However, he expressed the following qualification about those studies:[65]

> *It's clearly recognised that enzymatic reactions can occur in urine under certain circumstances, and that has been reported, as I mentioned, particularly in the human literature. However, we have to be very careful to make broad statements that the formation of boldenone in samples is a likely occurrence from that.*

50. Dr Kuipers agreed that the research in this area was *"developing"*.[66]

51. Dr Kuipers was cross-examined at length in respect of a number of issues. He made what I consider to be a number of important, and entirely appropriate, concessions in his evidence, and for that reason, and in order to put those concessions in their context, a number of passages of the cross-examination should be set out in full.

52. To begin with, Dr Kuipers was asked about his knowledge of the steps taken to refrigerate samples:[67]

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[62] At p 1[2].
[63] T 37.10 and following.
[64] T 39.13.
[65] T 39.31 – T 39.35.
[66] T 41.36 – T 41.39.
[67] Commencing at T 42.44.

MR DE BRENNAN: Yes, thank you your Honour. You would agree that an immediate cooling should be a baseline requirement for testing of this sort?

DR KUIPERS: Um, I – if I – wherever – it would be understood that wherever urine is kept cooler, that it reduces the likelihood of the more rapid growth of bacteria. So I would accept that.

MR DE BRENNAN: And what steps specifically does your organisation take when a horse runs a race in somewhere such as Wauchope -----

TRIBUNAL: You mean a greyhound, not a horse?

MR DE BRENNAN: Sorry, a greyhound.

…

MR DE BRENNAN: A greyhound race at somewhere like Wauchope, what steps does your organisation take to ensure that immediate cooling is incorporated in that chain of custody?

DR KUIPERS: I don't think I can comment and give an accurate answer on that for all the different tracks where swabbing is undertaken. However, I do – I'm aware that they are placed in Eskies and placed in a refrigerator at the earliest possible time. Apart from that, I don't think I'm – I should comment on that, is the accurate response.

MR DE BRENNAN: You'd agree that the ultimate testing that occurred in New Zealand was at variance with the initial testing in Australia?

DR KUIPERS: Um, yes.

MR DE BRENNAN: And I take it from your previous answer that you are not in a position to comment as to the cooling conditions that occurred over the ensuing months before the New Zealand certificate of testing was provided?

DR KUIPERS: No, only from the information that's been presented to me.

53. Dr Kuipers was then taken to the opinions expressed by Dr Cawley when called to give evidence by Mr Birch in the course of the Appellant being interviewed:[68]

TRIBUNAL: All right. So the context is that Dr Cawley was answering questions in the course of an interview between stewards and Mr Goddard, and he was referring, it seems to, or was asked to comment upon the difference in findings between the two analyses that were undertaken. All right, Mr De Brennan?

MR DE BRENNAN: Thank you, Your Honour. Firstly, Dr Kuipers, do you know Dr Cawley?

DR KUIPERS: Um, yes, I do.

[68] Commencing at T 45.1

MR DE BRENNAN: And who is he, to your understanding?

DR KUIPERS: He's an analyst that works at RASL.

MR DE BRENNAN: And he is fairly well-regarded, is he not?

DR KUIPERS: Yes, very well-regarded.

MR DE BRENNAN: He's been in the industry for some time?

DR KUIPERS: I believe so.

MR DE BRENNAN: And in the greyhound industry in particular?

DR KUIPERS: I believe both the greyhound industry and the race horse industry.

MR DE BRENNAN: Thank you. He is asked to effectively provide an explanation as to this discrepancy between the analyses, as His Honour has referred to it, and you'll see there that he says there's a couple of potential reasons for this. And he says, "of course, I can't explain what happened, but I can give an opinion as to potential scenarios".

You'll see there that he puts forward or he postulates this idea of sensitivity, but ultimately he says, look, I've had occasion to visit those labs and I was fairly satisfied with what I saw and I don't think that that is a plausible explanation in the context of this case. You'd agree with the tenor of his evidence in that respect?

DR KUIPERS: Yeah, absolutely.

MR DE BRENNAN: But then he goes on, doesn't he, to effectively talk about the more likely possibility or explanation that the discrepancy could have come about in the context of this matter due to the degradation of the sample?

DR KUIPERS: Correct.

MR DE BRENNAN: And that is really on all fours with the evidence of Dr Major, is it not?

DR KUIPERS: In what manner? I don't -----

MR DE BRENNAN: Well, Dr Major effectively posits that the logical explanation for this is that because of the effluxion of time, the sample has degraded.

DR KUIPERS: Yes, most certainly. So it may have degraded to boldione from boldenone.

MR DE BRENNAN: Yes.

DR KUIPERS: Oxidation.

MR DE BRENNAN: But you would accept, wouldn't you, that Dr Cawley, who himself is a well-recognised identity within both the greyhound and horse racing industry, gives an explanation that is consistent with the explanation that is provided by Dr Major?

DR KUIPERS: It doesn't give an explanation for all of Dr Major's assertions. Simply that the transformation of boldenone to boldione can occur due to oxidation.

MR DE BRENNAN: But you would -----

DR KUIPERS: It doesn't – but what I'm saying is it doesn't relate to the enzymatic biotransformation of testosterone to boldione, simply that the oxidation changed from boldione to boldione.

MR DE BRENNAN: Certainly. But you would also agree with the general proposition that you would expect, or you would have expected that the results, as were conducted in New South Wales, ought to have been consistent with the results in New Zealand?

DR KUIPERS: Not if what Dr Cawley has proposed, which is the oxidation of boldenone to boldione.

MR DE BRENNAN: Yes. And so there is a logical and plausible explanation for the discrepancy between these two results?

DR KUIPERS: Correct.

MR DE BRENNAN: You don't take issue with what Dr Cawley says in any way? Just to your knowledge, do -----

TRIBUNAL: Sorry, Dr Kuipers, I didn't hear your answer. You were asked whether or not you took issue with what Dr Cawley said.

DR KUIPERS: Oh, sorry, no, I take no issue with what Dr Cawley said. I support ----
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TRIBUNAL: Thank you.

DR KUIPERS: I support his comments.

54. The cross-examination of Dr Kuipers then continued:[69]

MR DE BRENNAN: Yes, Your Honour. Doctor, you would agree with these general propositions, would you not? The first is this, that testosterone has been found in the literature to change over time within samples due to the time it takes for the samples to be tested?

[69] Commencing at T 47.34.

DR KUIPERS: I don't know if I can use it in those specific words. But certainly I think the term is simply improper storage.

MR DE BRENNAN: And as a general proposition, it would be better to conduct the testing at the earliest opportunity?

DR KUIPERS: Ideally.

MR DE BRENNAN: And that is because the longer the period between the taking of the sample and the testing, the harder it is to control the temperature? Or maintain the temperature associated with the sample?

DR KUIPERS: Um, I gather so, yeah.

MR DE BRENNAN: And similarly -----

DR KUIPERS: Only if it requires vast transportation.

MR DE BRENNAN: Yes. Just on that, do you know if there's a reason why the testing isn't conducted here in New South Wales as opposed to New Zealand?

DR KUIPERS: Um, I think it – I believe it's so the B sample is done independently of the laboratory.

MR DE BRENNAN: Right. So it's a sort of independence and over-sight thing, is it?

DR KUIPERS: Yep, for confirmation of the findings.

MR DE BRENNAN: Yep. But of course there wasn't – I'm not meaning to be cute here, but there wasn't absolute confirmation of the findings, there was a discrepancy, wasn't there?

DR KUIPERS: Yeah, there was a confirmation of the boldione findings, which is a, you know, permanently banned prohibited substance.

MR DE BRENNAN: Mmm. But initially it was boldenone that was identified in the first instance, was it not?

DR KUIPERS: It was boldenone and boldione in the first instance.

MR DE BRENNAN: Yes. And similarly, just in terms of getting these things done quickly, quite apart from, say, the temperature being liable to be affected, the greater amount of time, that there's also the possibility for further bacteria to develop?

DR KUIPERS: Um, I wouldn't say further bacteria. I think certainly if the temperature, um – yeah, I wouldn't say further bacteria.

MR DE BRENNAN: If I can just put it crudely -----

DR KUIPERS: Sorry, I don't mean to interject. When I say that, what I'm saying is the samples are stored in a sterile urine container, so the possibility of new bacteria being introduced is unlikely.

MR DE BRENNAN: But can't bacteria develop depending on temperature?

DR KUIPERS: Certainly, they can multiply. But I'm just saying you said "further bacteria"?

MR DE BRENNAN: Yes.

DR KUIPERS: Yeah, you can't have further bac – it would be unlikely to have further bacteria, but certainly with the process of time and increased temperature, there is a greater risk of a greater number of bacteria.

MR DE BRENNAN: So I hear what you're saying. It's not so much further, but there is scope for multiplication of bacteria?

DR KUIPERS: That is correct.

MR DE BRENNAN: And just in terms of timing in the context of this case, you understand that the sample was taken following the race on 4 February?

DR KUIPERS: Yes.

MR DE BRENNAN: 2023?

DR KUIPERS: Correct.

MR DE BRENNAN: That was then posted from a post office location at Yamba to the testing facility in New South Wales on 6 February?

DR KUIPERS: Correct.

MR DE BRENNAN: The samples I don't think were received until 8 February?

DR KUIPERS: Correct.

MR DE BRENNAN: And then they were dispatched to the Racing Analytical Services Ltd via courier on 9 February?

DR KUIPERS: That's correct.

MR DE BRENNAN: And it's understood that the samples didn't arrive at the, I'll call it, the RASL until 10 February 2023?

DR KUIPERS: That's correct.

MR DE BRENNAN: And then ultimately the sample is delivered to New Zealand on 23 March 2023?

DR KUIPERS: Yes.

MR DE BRENNAN: And the certificate of analysis pertaining to the actual testing occurs on 30 June 2023?

DR KUIPERS: That's correct.

MR DE BRENNAN: You'd agree that that's a significant delay in terms of testing?

TRIBUNAL: What are you talking about? The delay between 23 March and 30 June?

MR DE BRENNAN: Yes, Your Honour.

DR KUIPERS: I would say that, yes, that is a reasonable period of time. However, the time for the initial sample is – it tested at RASL would not be unreasonably long in the context of what is done across all testing.

MR DE BRENNAN: But you've already accepted that, all things being equal, and for optimal results, the sooner one conducts the testing, the better?

DR KUIPERS: That is correct.

55. Dr Kuipers was then taken to the statistical data to which he referred in his report of 11 March 2024:[70]

MR DE BRENNAN: ... You refer in the course of your report, Dr Kuipers, to some 16,399 racing greyhound urine specimens?

DR KUIPERS: Yep.

MR DE BRENNAN: Tested in New South Wales from 1 July 2021 to 31 July 2023?

DR KUIPERS: Correct.

MR DE BRENNAN: You don't, however, in your report provide any breakdown as to those numbers, do you?

DR KUIPERS: Breakdown in terms of what, male or female, or positive findings or?

[70] Commencing at T50.26.

MR DE BRENNAN: Yes. Anything, really, do you? You don't distinguish between male and female dogs and, therefore, testosterone levels? You don't specify anything as to what substances were found in these dogs?

DR KUIPERS: I did make a comment on the ratio of males to females in that sample in the first.

MR DE BRENNAN: So you do, you do distinguish between -----

DR KUIPERS: I did, yeah. I mentioned that 60 percent of those dogs were – approximately 60 percent of those were male dogs.

MR DE BRENNAN: Thank you. But did you do any analysis as to testosterone levels generally in those dogs?

DR KUIPERS: No.

MR DE BRENNAN: But that's important in the context of a case like this, isn't it?

DR KUIPERS: All – and how would that – how would that matter?

MR DE BRENNAN: Well, I guess the case that Dr Major puts is that illicit substances can actually come about in a non-prohibited way, namely, through the presence of testosterone. And so what I'm suggesting to you, respectfully, is that in looking at these 16,399 cases, it would be good to have some particularity as to the level of testosterone in each of these dogs.

DR KUIPERS: Well, I'm aware that for a positive – for a dog to return a positive test to testosterone, they need a – they need an elevation above 100 nanograms per ml of a metabolite of testosterone. And in those situations, and the literature sort of talks about the greater risk of any biotransformation – and I'm not saying specifically to boldenone or boldione, but any transformation is more likely in highly elevated levels of testosterone.

Now, I'm not aware of that being the case for any of the testosterone positives that we have seen. Well, there have been no – so any positive testosterone cases, so cases of elevated testosterone returning a positive swab, there are no cases of boldenone or boldione as a result – as a consequence of that in a situation where it may be more – proposed to be more likely to occur.

MR DE BRENNAN: And please understand, Doctor, I'm not trying to be difficult here, but you've already accepted, haven't you, that this area, as it relates to greyhounds, is under-researched?

DR KUIPERS: Um, yeah, there is no – there is no question that there is no research in this area.

MR DE BRENNAN: And so citing 16,399 instances without any specific breakdown, it doesn't necessarily discount the possibility that this has occurred. It's just neutral, isn't it? Because this – simply because it hasn't been identified in the past doesn't mean that it couldn't have occurred now?

DR KUIPERS: Yeah, I'm not sure how I can comment on that, sorry.

MR DE BRENNAN: I mean, appreciating that you say there's discrepancies between different species and urine and that – you would accept this has been a real issue in the context of humans in the sporting world?

DR KUIPERS: Um, it's recognised.

MR DE BRENNAN: You would accept that this has been recognised in the context of horse racing?

DR KUIPERS: Look, I would say – look, I would say, again, it has been recognised. But to give some context on likelihood, the studies that have been presented to me, there was one which – and my apologies – so, this was the Tsivou paper that was presented.

In that study, with seven days' incubation at 37 degrees, so trying to really amplify bacterial contamination levels – and I guess this is what probably, you know, we're trying to – what's trying to emulate very extremely poor storage, and at high temperature, which amplifies bacterial growth, and using a wide range of bacteria, they weren't able to demonstrate the production of boldenone.

And in this study, they actually used E. coli, which is one of the more prevalent bacteria that is found in canine urine. I think about 30 percent of cases are E. coli. And even under those extreme conditions they weren't able to demonstrate that biotransformation of testosterone into boldenone.

So I think if we take some context to this by the studies that have been presented, I think on reasonable grounds it is hard to sort of accept that, that in canine urine that would similarly be the case.

MR DE BRENNAN: But we just don't really know, do we, because you've accepted that this a field that has been under-researched? You've accepted that?

DR KUIPERS: Certainly.

MR DE BRENNAN: And you would also accept that Dr Major has assembled the few articles that he regards to be relevant in the context of this case?

DR KUIPERS: I think in broad terms the literature that's presented demonstrates that, you know, certainly bacteria and the production of certain enzymes can affect the profile of metabolites. But there's really no evidence in what has been presented to me to demonstrate that boldenone and boldione together can be recognised as likely to occur through that biotransformation.

MR DE BRENNAN: But, Doctor, you don't put forward a number of academic articles in the context of canines that categorically exclude this as a possibility, do you?

DR KUIPERS: No.

56. Dr Kuipers was then asked about the extent to which he had read the results of equine studies to which Dr Major had made reference:[71]

MR DE BRENNAN: And you go on at 18a., this is over the page, to say that "equine studies support Dr Major's claim that biotransformation of endogenous steroids can occur in stored urine"?

DR KUIPERS: Yes, I will – in regards to that, I had only cited some abstracts. I hadn't read those papers.

MR DE BRENNAN: Right.

DR KUIPERS: I was just in agreeance with the fact that there is research out there that looks into this matter. I haven't reviewed that literature to confirm the findings or to agree.

MR DE BRENNAN: But you do say that -----

DR KUIPERS: I've just made statements regarding that there is papers that investigate this matter.

MR DE BRENNAN: So, sorry, just so I'm clear, is it your position that equine studies do support Dr Major's claim that biotransformation of endogenous steroids can occur in stored urine?

DR KUIPERS: In equine urine, yes.

MR DE BRENNAN: And is it also your evidence that you haven't actually read the academic articles in full, only the abstracts?

DR KUIPERS: In response, yes, 4a.

MR DE BRENNAN: And does the Tribunal take from that that you haven't read these articles in detail as to their implications? Doctor?

DR KUIPERS: Sorry, I missed that. Sorry.

MR DE BRENNAN: I was just saying I think you've given some evidence a moment ago that you've only had occasion to consider the abstracts -----

DR KUIPERS: Yes.

[71] Commencing at T 55.1.

MR DE BRENNAN: ----- of some of these articles. Does the Tribunal take from that that you didn't read the articles in full?

DR KUIPERS: That is correct.

MR DE BRENNAN: And so -----

DR KUIPERS: These particular articles, yes, I did not read those in full.

MR DE BRENNAN: And so to that extent, you didn't look at the detail of the implications of some of this academic research in detail?

DR KUIPERS: That would be correct.

57. Finally, the cross-examination returned to the temperature of the samples:[72]

MR DE BRENNAN: I ask you to have a look at 107 of the agreed tender bundle, and this is your conclusion at paragraph 24d. You say it would be "highly unlikely that this charge would be defendable if the maintenance of a cold chain, particularly sample freezing, was applied from specimen collection to testing, ensuring sample preservation". You go on to say, however, that "such a strategy would be logistically challenging".

DR KUIPERS: That is correct.

MR DE BRENNAN: I just wanted to ask you a few questions about that. Do we take from that that it's generally better to keep these samples cold?

DR KUIPERS: That is correct.

MR DE BRENNAN: During transportation. Can I ask you why you say it would be logistically challenging?

TRIBUNAL: Well – no, go on, I'll allow that. Can you answer that, Doctor?

DR KUIPERS: Um, yeah, I gather whenever there's a period of transportation that goes beyond a certain time, having samples within Eskies with ice bricks that would maintain a, say, refrigerator temperature for adequate time, that's where the issues may lie.

MR DE BRENNAN: But aren't you really saying there that in order to exclude the possibility of a false positive, that that is precisely what is required, a cold chain of continuity?

DR KUIPERS: The comment really simply relates to the fact that by maintaining a cold chain, the probability that bacteria present in the urine, there is a much lower risk that that will elevate in number. That's essentially all. It's more about a matter of degrees.

[72] Commencing at T 57.31.

SUBMISSIONS OF THE PARTIES

58. I have had the benefit of lengthy and detailed written submissions from both parties. The multiplicity of issues raised in the proceedings lends itself to a summary of those submissions in each case.

Submissions of the Appellant

59. The submissions of the Appellant may be distilled into the following propositions:

(i) the Respondent has the onus of establishing, on the balance of probabilities, that the greyhound was not free of a prohibited substance when presented to compete;[73]

(ii) I am not bound to make a finding one way or the other in respect of that alleged fact, and if I reach the conclusion that Respondent has simply failed to discharge the burden of proof that it bears, it would follow that the appeal would be upheld;[74]

(iii) I could not be satisfied, on the whole of the evidence, that the fact in issue, namely that the Appellant presented the greyhound to complete when it was not free of a prohibited substance, had been made out;[75]

(iv) alternatively, if I was so satisfied, I would conclude, in terms of r 154(8), that the relevant testing process was materially flawed (it being accepted that, if I reached this point, this was an issue in respect of which the onus lay on the Appellant);[76]

(v) Dr Kuipers had made a number of important concessions, including that:

(a) there was a possibility that steroid biotransformation had occurred;[77]

[73] Submissions at [6] and [7].
[74] Submissions at [8] – [10].
[75] Submissions at [12].
[76] Submissions at [13] – [15].
[77] Submissions at [24].

(b) it was preferable for sample testing to be conducted at the earliest opportunity;[78] and

(c) the longer the period between the taking of the sample and the testing, the harder it is to control or maintain the temperature of the sample, and the greater the potential for the reliability of the testing to be adversely affected;[79]

(vi) there was evidence that the effluxion of time in the present case had, in all likelihood, contributed to a degredation of the samples, and had resulted in a multiplication of bacteria;[80]

(vii) the opinions of Dr Major were supported by research with which Dr Kuipers had not familiarised himself, and which supported a conclusion that Dr Major's opinions, such that to the extent that they different from those of Dr Kuipers, should be preferred;[81]

(viii) Dr Kuipers accepted that he could not cite any academic research that excluded biotransformation as a possibility;[82]

(ix) Dr Kuipers' reliance on the statistical data was of little weight in light of the lack of particularity surrounding the cases which contributed to that data;[83]

(x) the Respondent had not called any evidence as to the cooling conditions of the samples on and from 10 February, nor the specific temperature or cooling conditions that occurred over the ensuing months before the certificate was provided by NZRLS, in circumstances where Dr Major had placed considerable emphasis on that issue, and where Dr Kuipers' had expressed general agreement with Dr Major's opinions;[84]

[78] Submissions at [25].
[79] Submissions at [25].
[80] Submissions at [29] – [30].
[81] Submissions at [30] – [36].
[82] Submissions at [37].
[83] Submissions at [40].
[84] Submissions at [42] – [44].

(xi) the Appellant had been steadfast in his evidence that he did not administer any prohibited substance, and this was a factor which supported a conclusion that the appeal should be upheld;[85]

(xii) Dr Kuipers had not taken issue with the opinions expressed by Dr Cawley in relation to an explanation for the discrepancy in the test results, with which Dr Major agreed, such that all three opinions were essentially aligned;[86]

(xiii) the very fact of the discrepancy in the test results would cause concern in the context of determining whether the Respondent had discharged its onus of proof;[87] and

(xiv) the effect of Dr Kuipers' concession that it was highly unlikely that the charge would if a cold chain of continuity had been maintained was, of itself, have been "*defendable"* had there been evidence of was, of itself, indicative of the fact that the Respondent had not discharged the onus of proof.[88]

Submissions of the Respondent

60. The submissions of the Respondent can be distilled into the following propositions:

(i) the Respondent has the onus of proof, on the balance of probabilities;[89]

(ii) the Certificates of Analysis were conclusive evidence of the presence of a prohibited substance in the greyhound at the time of presentation;[90]

[85] Submissions at [18] and following.
[86] Submissions at [43] – [44].
[87] Submissions at [45].
[88] Submissions at [46].
[89] Submissions at [10].
[90] Submissions at [11].

(iii) any suggested consensus between Dr Cawley, Dr Major and Dr Kuipers did not support the opinion of Dr Major regarding biotransformation of Testosterone to Boldione;[91]

(iv) the inference that the testing process was materially flawed was unsupported on the evidence;[92]

(v) although there was evidence that samples should be tested as soon as possible, there was no evidence that NZRLS had failed to test the B sample within an appropriate period of time;[93]

(vi) Dr Kuipers' evidence that the period was "*not unreasonably long in the context of what is done across all testing"* supported the conclusion that the testing was undertaken within a reasonable period of time, such that the conclusiveness of the certificates should not be disturbed;[94]

(vii) unless the Appellant could point to evidence displacing the conclusiveness of the certificates of analysis, it would be *"dangerous"* for me to conclude that the process was materially flawed;[95]

(viii) the opinion of Dr Major that the only plausible explanation for the discrepancy in the testing was that Boldenone had oxidised to Boldione failed to take into account the presence of Boldione in the A sample, and failed to address the evidence of Dr Cawley and Dr Kuipers that Boldenone can convert in the body, a conclusion which was consistent with the certificates;[96]

(ix) I should exercise *"caution"* in extrapolating findings of testing in humans or horses, as opposed to greyhounds;[97]

(x) whilst it was conceded that the samples were *"largely unrefrigerated between 4 February 2023 and 10 February 2023",* it

[91] Submissions at [12] – [13].
[92] Submissions at [17].
[93] Submissions at [18].
[94] Submissions at [18].
[95] Submissions at [21].
[96] Submissions at [22].
[97] Submissions at [25].

remained the case that the evidence was *"silent"* as to how the samples were stored by RASL and NZRLS;[98]

(xi) both RASL and NZRLS were accredited laboratories, such that I should not *"second guess"* their processes in the absence of evidence, and that I should treat the submissions of the Appellant in this respect with *"caution"*;

(xii) academic literature in relation to humans or horses had no bearing on the issues I am required to determine;[99]

(xiii) it was not in dispute that the samples had degraded to some extent, but this did not invalidate either the sample, or the process of testing, analysis and certification;[100]

(xiv) the opinion of Dr Kuipers regarding testing across more than 71,000 samples should be accepted;[101] and

(xv) the evidence did not support that there was any material flaw in the process of testing and certification.[102]

61. In reaching my conclusions, I have taken all of the submissions of the parties into account.

CONSIDERATION

62. Before considering the evidence it is appropriate to address some preliminary issues.

63. The parties agree that the onus of establishing the one fact in issue lies on the Respondent, and that the standard of proof is on the balance of probabilities. Put simply, that means, in the context of this case, that I must be satisfied that it is more probable than not that at the time that the Appellant presented the greyhound to compete in the event, the greyhound was not free of any prohibited

[98] Submissions at [27].
[99] Submissions at [30].
[100] Submissions at [31] – [33].
[101] Submissions at [30] – [34].
[102] Submissions at [35] – [38].

substance (in this case, Boldione). In respect of the onus and standard of proof, three matters need to be noted.

64. The first, is that in my view, this is a case to which the standard discussed in *Briginshaw v Briginshaw*[103] should apply. That decision is authority for the general proposition that where a case involves the making of a serious allegation, and where the resolution of that allegation may result in significant consequences for the person against whom it is made, the decision-maker must be reasonably satisfied that the allegation is made out. In determining whether such a state of reasonable satisfaction has been reached, the decision-maker must scrutinise the evidence closely, and must bear in mind that the case brought cannot be established by inexact proof, or the drawing of indirect inferences.[104] There could not possibly be any dispute that the allegation in this case is a serious one, nor could there be any dispute that the consequences to the Appellant are not significant. Indeed, the latter is self-evident from the length of the disqualification which was imposed.

65. The second, is that I am not *bound* to make a finding, one way or the other, in respect of the fact in issue. In other words, I am not bound to make a finding that the fact established, nor am I bound to make a finding that it is not. It is open to me to conclude that Respondent has failed to discharge the burden of proof that it bears, without making a finding about the fact in issue one way or another. An inability to find a fact which is alleged does not establish the truth of the contrary.[105] In the context of this case, if I am unable to be satisfied that the Appellant presented the greyhound when it was not free of a prohibited substance, that does equate to a finding that he did not do so. What it means, is that the Respondent has failed to discharge its onus of proof.

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[103] (1938) 60 CLR 336; [1938] HCA 34.
[104] See *Briginshaw* at 360-362 per Dixon J.
[105] See generally *Kuligowski v Metrobus* (2004) 220 CLR 363; [2004] HCA 34 at [60].

66. The third, is that rr 158(6) and (7) operate to provide that the certificate of the RASL constitutes prima facie evidence of the presence of Boldione in the A sample, and the certificate of NZRLS constitutes conclusive evidence of the presence of that substance in the B sample. Accepting that to be the case, as I must, the issue in the present case is whether I can nevertheless be satisfied that it is more probable than not that the greyhound was presented with Boldione in its system bearing in mind the scientific evidence which is before me. If I am not so satisfied, then the matter ends at that point. If I am so satisfied, the Appellant seeks to invoke the provisions of r 156(8) which is in the following terms:

> *Notwithstanding the provisions of this rule, certificates of analysis do not possess evidentiary value and do not establish an offence if it is proved that the certification, testing or analysis process which preceded the production of a certificate of analysis, was materially flawed*.

67. The fact that the Certificates constitute conclusive evidence of the presence of Boldione in the sample taken from the greyhound does not mean that it is not open to the Appellant to argue that the test results may, for the reasons advanced, constitute what has been described as a *"false positive"*. However, I reiterate that I will be required to consider r 156(8) ***only*** if I am satisfied that the Respondent has discharged its onus, and the fact in issue I have identified is established on the evidence.

68. Having undertaken a careful analysis of the evidence, I am unable to be satisfied that the Respondent has discharged the onus of establishing the fact which is in issue.

69. Essential to my reasons is an understanding of Boldenone on the one hand, and Boldione on the other. In this regard, Dr Major provided an explanation which was not challenged, and which I accept:[106]

[106] Report of 28 February 2024 at p. 6.

Boldenone and Boldione are both closely related in structure to the natural male sex hormone Testosterone.

Boldione is generally considered to be a prohormone, which is said to be converted in the body to the anabolic steroid Boldenone. It is also an oxidation product of Boldenone produced during storage.

70. With this in mind, I turn to the evidence.

71. To begin with, the results of the testing undertaken by RASL on the one hand, and NZRLS on the other, and the certificates of analysis which were issued, are not consistent. Put simply:

    (i) Boldenone was found to be present in the A sample analysed by RASL;
    (ii) Boldione was found to the present in the A sample analysed to RASL;
    (iii) Boldione was found to be present in the B Sample analysed by NZRLS;
    (iv) neither Boldenone nor Boldione were found to be present in the control sample analysed by NZRLS.

72. The significance of that inconsistency cannot be underestimated. From the point of view of the issue in this case, it is obvious cause for concern. With that as a starting point, a number of matters emerge from the evidence.

73. First, Dr Cawley supports the proposition that Boldenone is capable of converting into Boldione *ex-vivo,* i.e. outside the body, by a process of oxidating brought about by the degredation of the sample. In advancing that as a possible explanation for the inconsistent test results, Dr Cawley squarely raised whether Boldenone had converted to Boldione over time, thus explaining the presence of the latter.

74. Secondly, the evidence of Dr Cawley is generally consistent with the opinions of both Dr Major and Dr Kuipers. Importantly, when taken to the evidence of Dr Cawley, Dr Kuipers accepted it without equivocation. The effect of the evidence of Dr Kuipers on this issue was that one would have expected consistent results, and that the inconsistency may be explicable on the basis of what he expressly agreed was the logical and plausible explanation advanced by Dr Cawley. Indeed, Dr Kuipers went so far as to say that he took no issue with the evidence of Dr Cawley in this regard, and that he supported his opinion.

75. Thirdly, and whilst effluxion of time is significant for the reasons expressed by Dr Cawley, it significant for another independent reason. In the present case, a period of more than 3 months elapsed between the analysis by RASL of the A sample, and the analysis of NZRLS of the B sample. Whilst the evidence ***is*** silent on why this was so, it is ***not*** silent on the importance, to the accuracy of results, of the timely testing of samples. Dr Major expressed the view, which was not challenged in cross-examination, that scientific literature supported the proposition that samples should be tested immediately. Not only did Dr Kuipers not demur from that view, he expressly accepted that ideally, and as a general proposition, testing should be conducted at the earliest possible opportunity. It is clear from the terms of the questions put to him in cross-examination, and from his responses to those questions, that Dr Kuipers' opinion is that the longer the period which has elapsed between the taking of the sample and the testing, the more difficult it is to control the temperature. The proposition that emerges from this evidence is that delay is at least capable of having an effect on the results of testing. Whilst Dr Kuipers qualified his opinion in this regard by commenting that this would only be the case if there was "vast transportation" involved, I need only observe that the samples were sent from Australia to New Zealand. That, on any view, constitutes vast transportation of a kind that Dr Kuipers clearly thought had the capacity to impact upon the test results.

76. Fourthly, and again in this particular respect, Dr Kuipers accepted that the effluxion of time allowed bacteria to multiply in the sample. Whilst Dr Kuipers

expressed the view that the effluxion of time in this case was not *"unreasonably long in the context of what it done across all testing",* his yardstick for measuring reasonableness was not established on the evidence. It is not necessary for me, for the purposes of determining this appeal, to express a view, much less reach a definitive conclusion, about the reasonableness or otherwise of the practices adopted by the Respondent and others in relation to testing of samples. Moreover, what might be regarded as reasonable for one purpose, and/or from one perspective, may be regarded as wholly unreasonable for, and/or from, another. What is clear however, is Dr Kuipers' unequivocal acceptance of the proposition that from the point of view of seeking to achieve optimal, or in other words accurate, testing results, the sooner the testing is conducted, the better.

77. Fifthly, Dr Major saw the temperature at which the samples may or may not have been maintained up to the point of testing as a significant issue, and one which, in his view, had the capacity to bear upon the accuracy of the results. I did not understand Dr Kuipers to disagree with that proposition. Dr Kuipers accepted that the cooler the temperature at which a urine sample is kept, the less the capacity for the rapid growth of bacteria, and thus the less capacity for testing results to be affected. He was not in a position, other than in very general terms, to comment upon what steps were taken by the Respondent to refrigerate the samples in this case. I have already noted the concession made by the Respondent in submissions that there was a 6 day period when the samples were not refrigerated. The evidence is completely silent on what, if any, steps, were taken to refrigerate the samples, firstly in transit to New Zealand, and secondly between the time of arrival at NZRLS and the time of testing.

78. Given all of these circumstances, Dr Kuipers' opinion that it was *"highly unlikely that this charge would be defendable if the maintenance of a cold chain, particularly sample freezing, was applied from specimen collection to testing, ensuring sample preservation"* assumes particular significance. Whilst the expertise of Dr Kuipers does not extend to expressing views about whether a charge might be successfully defended, it most certainly does extend to issues

which go to, and may impact upon, the reliability of specimen testing. I have already made reference to the importance that Dr Kuipers attaches to timely testing. It is clear from the terms of the statement set out above that he also attaches importance to the need to properly maintain the condition of samples, and the need to keep them at least cool, if not refrigerated, before they are tested. Although he did not expressly stated it in terms, the only conclusion which can be drawn from this evidence is that Dr Kuipers attaches importance to these factors because he recognises that a failure to implement them may affect the test results.

79. When cross-examined, Dr Kuipers appeared to seek to qualify what he had said, seeking to categorise it amounting to little more than a statement to the effect that, accepting the probability of the presence of bacteria in the sample, there was a much lower risk that bacteria would elevate if the samples were frozen. I am unable to accept that qualification. The terms of Dr Kuipers' statement, without more, can only mean that he views the refrigeration of samples at being, at the very least, highly desirable for accurate testing. The significance of that evidence will be obvious, and the absence of any re-examination of Dr Kuipers fortifies my assessment of it.

80. The Respondent submitted that I should not *"second guess"* the process of either laboratory in the absence of evidence of the processes which were adopted, and that I should treat the submissions of the Appellant in this regard with *"caution"*. It is not a matter of *"second guessing"* anything. The evidentiary position is simply this:

    (i) there is expert opinion, on both sides of the record, which I accept, and which supports the need for timely testing;

    (ii) there is further expert opinion, again on both sides of the record, which I also accept, and which supports the need for temperature control when the samples are stored;

(iii) the only available conclusion to be drawn from that evidence is that such matters may, and I put it no higher than that, have an effect on test results;

(iv) there is a concession by the Respondent that the samples were not refrigerated for a period of 6 days after being taken;

(v) the testing in the present case by NZRLS may have been other than timely;

(vi) there is no evidence at all of the storage conditions to which the samples were subject in New Zealand; and

(vii) against this evidentiary background, there is an undisputed inconsistency in the test results.

81. Further, in circumstances where temperature storage was clearly raised as an issue by the Respondent's own expert, and in circumstances where it bears the onus of proof, the Respondent chose not to call any evidence about the processes adopted by it, or by either laboratory, in respect of the transfer and storage of samples generally, and the issue of temperature control in particular. I should make it clear that I do not draw an inference adverse to the Respondent from the absence of such evidence. In particular, I should make it clear that I have ***not*** reached an affirmative conclusion that the testing process in this case was materially flawed at any level, for the simple reason that the evidence does not permit it. However, given those established facts set out in [80] above, the absence of any evidence of the kind to which I have referred necessarily bears upon the question of whether I can be satisfied that the Respondent has discharged its onus of proof. That is particularly so when such evidence goes to an issue which both Dr Major and Dr Kuipers obviously saw as highly important from the point of view of accurate testing.

82. Finally, I have taken into account the evidence of Dr Kuipers regarding the statistical data. That is, obviously, only one area of the evidence. In a case such as this, the evidence must be assessed as a whole, and not in a piecemeal way. Adopting that approach, and for the reasons that I have expressed, I am not

satisfied that the Respondent has discharged its onus of proving that the Appellant presented the greyhound when it was not free of Boldione. In those circumstances, the appeal must be allowed.

83. Before making the necessary orders, I should make some final observations. The first, is that my determination is obviously one which is confined to the specific facts of ***this*** case which have been established by the evidence to which I have referred. Those facts include the demonstrated inconsistency in the test results.

84. Further, I emphasise that I have made ***no*** finding about the adequacy or otherwise of the processes adopted by the Respondent, and I have made ***no*** finding about the adequacy or otherwise of the processes adopted by RASL and NZRLS. My determination is not to be interpreted as a conclusion that those processes are deficient, much less materially flawed, in any way. I have ***not*** made any such finding.

ORDERS

85. For the reasons I have expressed, I make the following orders:

    1. The charge brought against the Appellant is amended by deleting the date of 7 February 2023 and inserting, in lieu thereof, the date of 4 February 2023.
    2. The appeal is allowed.
    3. The determination of the Respondent of 17 August 2023 finding the Appellant guilty of an offence contrary to r 141 of the *Greyhound Racing Rules,* and imposing a disqualification of 9 months, is set aside.
    4. The charge against the Appellant is dismissed.
    5. The Appeal deposit is to be refunded.

THE HONOURABLE G J BELLEW SC

17 June 2024