20 April 2021

**RULING**

**RACING VICTORIA**

**and**

**ARCHIE ALEXANDER**

**Date of hearing:** 15 March 2021

**Panel:** Judge John Bowman (Chairperson).

**Appearances:** Mr Andrew Bell instructed by Mr Daniel Bolkunowicz appeared on behalf of the Stewards.

Mr Paul Holdenson instructed by Mr Jack O’Connor appeared on behalf of Mr Archie Alexander.

**Charges:** AR 245 states:

(1) A person must not:

1. administer; or
2. cause to be administered,

a prohibited substance on Prohibited List A and/or Prohibited List B to a horse which is detected in a sample taken from the horse prior to or following the running of a race.

AR 240(2) states:

Subject to subrule (3), if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who was in charge of the horse at any relevant time breaches these Australian Rules.

**Particulars of charges: Charge 1**

1. You are, and were at all relevant times, a trainer licensed by Racing Victoria.

2. You were at all relevant times, the trainer of Tom’s Knight.

3. On 2 November 2018, Tom’s Knight ran in the Bet365 Protest Promise Maiden Plate over 1200 metres at Kilmore Racecourse (the race).

4. Prior to the race, you administered or caused to be administered, to Tom’s Knight cobalt, which was detected in a post-race urine sample (above the threshold level) taken from Tom’s Knight following the running of the race.

5. Cobalt is a prohibited substance pursuant to Division 1 of Part 2 of Schedule 1 of the Australian Rules of Racing (Prohibited List B) (subject to the threshold in Item 11 of Division 3 of Part 2 of Schedule 1 of the Australian Rules of Racing).

**Charge 2 (Alternative to Charge 1)**

1. You are, and were at all relevant times, a trainer licensed by Racing Victoria.

2. You were at all relevant times, the trainer of Tom’s Knight.

3. On 2 November 2018, Tom’s Knight was brought to the Kilmore racecourse and ran in the Bet365 Protest Promise Maiden Plate over 1200 metres (the race).

4. A prohibited substance, being cobalt at a concentration in excess of 100 micrograms per litre in urine, was detected in a post-race urine sample taken from Tom’s Knight following the running of the race.

5. Cobalt is a prohibited substance pursuant to Division 1 of Part 2 of Schedule 1 of the Australian Rules of Racing (Prohibited List B) (subject to the threshold in Item 11 of Division 3 of Part 2 of Schedule 1 of the Australian Rules of Racing).

**Plea:** Not Guilty

**RULING**

1. General Background

An important preliminary point has arisen for determination in this matter. As it involves a question of law, pursuant to Section 50X of the Racing Act 1958 (“the Act”), the matter has been heard and determined by me as Chairperson.

Mr Andrew Bell of Counsel appeared on behalf of Racing Victoria Stewards (“the Stewards”). Mr Paul Holdenson QC with Mr Jack O’Connor of Counsel appeared on behalf of Mr Alexander. The respective cases were particularly well argued.

The significance of this preliminary point is that it has the potential to impact upon cases involving the alleged administration of prohibited substances in breach of AR 245 (1) and any potential defence thereto. In particular, it concerns whether a defence of honest and reasonable mistake of fact exists or whether such a defence is excluded.

2. AR 245 (1).

AR 245 (1) reads as follows:

(1) A person must not:

(a) administer; or

(b) cause to be administered

a prohibited substance on Prohibited List A and/or Prohibited List B to a horse which is detected in a sample taken from the horse prior to or following the running of a race.

3. The factual background and the relevant Charge

For the purposes of the present Ruling, the following can be assumed to be the factual background.

A post-race urine sample was taken from *Tom’s Knight,* trained by Mr Alexander, at Kilmore on 2 November 2018. When tested, the sample proved positive to cobalt in excess of the prescribed limit. On 5 June 2020, Mr Alexander was charged with a breach of AR 245 (1) – in essence, the administration of a prohibited substance. Importantly, he was not charged with the more serious offence of having administered a prohibited substance for the purpose of affecting the horse’s performance. He was charged additionally with what could be described as the lesser alternative offence of presentation, which is impacted upon by the present dispute.

The Stewards accept that, about a year before the race at Kilmore, Mr Alexander spoke to a Steward concerning whether a particular feed used in his stables might contain cobalt. This happened shortly after the Ron Quinton case in New South Wales. He was advised to check with the manufacturer. This he did, and was assured that there was insufficient cobalt in the feed to produce a positive return and that there were quality controls in place. Accordingly, Mr Alexander used the feed. *Tom’s Knight* received some of it.

For the purposes of this preliminary point, it is not disputed that Mr Alexander had an honestly held belief that the feed did not contain cobalt in sufficient quantity to exceed the permitted threshold. It is not disputed that the use of the feed caused the elevated reading of 2 November 2018.

I shall now summarise the submissions. It is emphasised that these are brief summaries of what were quite detailed and lengthy presentations, both in writing and oral.

4. The submissions on behalf of the Stewards, including oral and written submissions

The preliminary question is whether the offence of administration contrary to AR 245 (1) excludes the defence of honest and reasonable mistake of fact. The Stewards disagree with this description of the basic question.

Mr Alexander contends that the basic question is whether AR 245 (1) creates an offence of absolute, as opposed to strict, liability. That is not the basic question.

AR 245 (1) is contractual in nature, as are the rest of the Rules. It is not part of a statute. It is to be construed accordingly.

Reference is made to the decision of the majority in *Racing Victoria Ltd. v Kavanagh* [2017] VSCA 334. It was there held that a person may simply know of the existence of a substance and authorise its administration, ignorant of what it is and of its character as a prohibited substance. The mistake in the present case was not whether the feed was authorised or might contain cobalt, but whether the feed contained such a quantity of cobalt as to result in a prohibited concentration. The introduction of a defence of honest and reasonable mistake would be a departure from the settled position in *Kavanagh.*

The presumption of honest and reasonable mistake is a feature of the criminal law and has no application to contractual Rules such as these. Reference is made to *Harper v Racing Penalties Appeal Tribunal of Western Australia & anor* (1995) 12 WAR 227 and *Day v Sanders and Harness Racing New South Wales* (2015) NSWLR 764 and [2015] NSWCA 324. There are risks in attaching labels such as “strict liability” or “absolute liability” to offences.

The criminal presumption of honest and reasonable mistake requires the mistake of fact to result in innocence. If the mistake results in guilt of another offence, it does not apply. In the present case, Mr Alexander is also charged with an alternative lesser charge based on the same facts, and so the defence is unavailable. Reference is made to *CTM V The Queen* (2008) 236 CLR 440.

Mr Alexander is relying upon the decisions in *Harper* and *Day* in support of the classification of offences, but they provide no such support. He also relies upon *Greyhound Racing Victoria Stewards v Anderton* [2018] VSC 64. In that decision the “classification” approach seems to have been accepted by the parties. It concerned rules of racing made by statutory authorisation. Insofar as it purports to stand for any wider proposition pertaining to the Rules, it is wrong and is otherwise inconsistent with *Kavanagh* on the specific issue of AR 245 (1).

In the present case, the alleged mistake made by Mr Alexander relates only to the quantity of cobalt in the feed. There is no mistake in relation to whether the feed was authorised to be administered, whether it was administered, or as to whether it contained, or might contain, some cobalt.

Pursuant to *Kavanagh,* there are mental elements required for a contravention of Rule 245 (1). These are that the trainer was aware of the substance to be administered and had authorised a person to administer it. Knowledge of “the nature” of the substance is not required. To import a defence of honest and reasonable mistake concerning the “nature” of the quantity of an ingredient in a “substance” would involve a substantial rewriting of the reasons of the majority in *Kavanagh.* In *Kavanagh,* the trainer was not even aware of and had not authorised the veterinarian to administer the substance. In the present case, the trainer was aware of the substance, aware that it contained cobalt, and mistaken only as to the quantity of cobalt that it contained.

In relation to the decision in *Anderton*, the parties appear to have presented that case on the basis of classification of the relevant provision – whether strict or absolute liability operated. This type of classification is erroneous – see *Day* and *CTM.* The judgement in *Anderton* refers to and appears to find support in *Day* and *Proudman v Dayman* (1941) 67 CLR 536 in relation to the existence and applicability of a presumption that those charged with a civil disciplinary offence have open to them a defence of honest and reasonable mistake of fact. With respect, this is erroneous. In *Day,* the *Proudman v Dayman* presumption was intentionally not applied.

In addition, in *Anderton* there is no reference to *Harper*. In *Harper,* the Full Court of the Supreme Court of Western Australia directly concluded that the defence in question did not apply because the offence was not a criminal offence.

Further, *Anderton,* which concerned the rules of greyhound racing, is not a binding decision on this Tribunal in regard to the Rules of Racing Victoria. *Harper* should be followed by this Tribunal.

In summary, the Rules are contractual in nature. A defence of honest and reasonable mistake should not be imposed into them. Reference is made to the majority decision in *Kavanagh.* Terms such as “strict” or “absolute” were not used at all. It is unnecessary that there be any knowledge of the nature or quantity of the substance administered. Unlike the situation in *Kavanagh*, where there was no authorisation at all, the claim by Mr Alexander is that he was not fully aware of the nature of the feed. The mistake only concerns the quantity of the cobalt, not its existence. Further, the mistaken facts, if true, would not result in “innocence”.

AR 245 (1) excludes the defence of honest and reasonable mistake of fact.

5. The written submissions, original and in reply, and oral submissions on behalf of Mr Alexander.

(a) The original written submissions.

The issue of whether AR 245 (1) excludes the defence of honest and reasonable mistake of fact is a question of statutory interpretation in context. AR 245 (1) is silent as to whether it creates an offence requiring *mens rea* or an offence of either strict or absolute liability. Relevant considerations in this regard are set out in *He Kaw Teh* v *The Queen* (1985) 157 CLR 523.

As was stated by McLeish JA in *Kavanagh,* the authorities demand caution in applying too strictly principles of criminal responsibility in the context of civil disciplinary matters. However, Maxwell P described them as “pertinent”. Classification of offences as requiring proof of *mens rea,* or as imposing strict or absolute liability, has been consistently applied in the context of offences against the rules of racing. Reference is made to the decisions in *Day, Harper* and *Anderton.*

The majority in *Kavanagh* determined that AR 245 (1) creates an offence which requires proof of *mens rea*, at least in relation to the “cause to be administered” limb of the administration offences under the Rules as then in issue.

It was stated in *Anderton* that, unless rebutted by the relevant statutory instrument, strict liability will be the default position.

The question of whether AR 245 (1) excludes the defence of honest and reasonable mistake has not been determined by any court and the decision of the Court of Appeal in *Kavanagh* does not address it. There is nothing in the text of AR 245 (1) which rebuts the presumption outlined by Zammit J in *Anderton* that strict liability is the “default position” when interpreting a civil disciplinary offence such as a breach of AR 245 (1). It was open to those drafting the Rules to state expressly that it is an offence of absolute liability, but this was not done.

The purpose underlying AR 245 (1) does not lead to the conclusion that the presumption of strict liability has been rebutted. Reference is made to what was said by McLeish J in *Kavanagh* in relation to what was stated by Anderson and Owen JJ in *Harper.* This concerned the maintenance of integrity and, in turn, betting turnover. However, such an opinion does not answer the very different question of whether the purpose of the Rules is furthered where a trainer has been proactive in making enquiries as to the nature of a substance and formed an honestly and reasonably held, but mistaken, belief that the substance is not prohibited. The purpose of such a Rule is to promote the integrity of racing and this is furthered if trainers have an incentive to make enquiries as to the nature of substances which they administer. It is not necessary to impose absolute liability in order for AR 245 (1) to achieve its regulatory purpose. This accords with the reasoning of Zammit J in *Anderton.* There is nothing in the text of AR 245 (1) or its context or purpose which rebuts the presumption that it is an offence of strict, rather than absolute, liability.

(b) The subsequent submissions

The Stewards’ submissions overlook the statutory context of the Australian Rules of Racing and Section 5F (1) and 5E of the Act. Breaches of the Rules are unlawful – see *McLean v Racing Victoria Ltd.* [2020] VSCA 234.

In *Thompson v Racing Victoria Ltd.* [2020] VSC 574, Cavanough J described the Rules as hybrid in nature, being partly contractual and partly statutory. This was adopting with approval what had been said by Garde P in *Kavanagh v Racing Victoria* [2017] VCAT 386. No doubt was cast on this by the Court of Appeal in the subsequent appeal. Accordingly, there is a binding line of authority to the effect that principles of statutory are relevant in the interpretation of AR 245 (1). There is then no basis for distinguishing the decision in *Anderton*, and the Tribunal is bound by the reasoning in it.

*Day* does not stand for the proposition that a defence of honest and reasonable mistake, as developed in the context of the criminal law, could never be available in the context of a civil disciplinary offence.

In *Harper*, the rules were purely contractual. There was no cause to apply principles of statutory interpretation. Further, such an approach is inconsistent with *Day* and Maxwell P’s acceptance in *Kavanagh* that interpretive principles relevant in the criminal law and drawn from *He Kaw Teh v The Queen* (1985) 157 CLR 523 are pertinent in the construction of rules of racing.

In *Day,* the reasoningof Basten JA concerned the strength of the presumption that a defence of honest and reasonable mistake can have no application outside the criminal law. The potential application of the presumption was not dismissed. Further, in *Day* in the relevant rules there was a provision in relation to the presentation offence that does not exist in AR 245 (1).

In relation to *Kavanagh* (in the Court of Appeal), the relevant issue for determination was whether specific knowledge or awareness attached to the element of the prohibited substance. The Court of Appeal did not address the question of whether a positive, but mistaken, belief that the substance was not prohibited could constitute a defence to a charge of administration.

The Stewards have submitted that, if Mr Alexander’s belief that the feed product did not contain sufficient cobalt to render it a prohibited substance was true, that would merely take the case out of one prohibition into another (presentation) – see *CTM*. The answer to this submission is that the administration of cobalt is not an offence. If Mr Alexander’s mistaken belief had been true, he would have administered to the horse a feed product containing cobalt in a quantity insufficient to be a prohibited substance for the purposes of the Rules. He could not have been guilty of an offence of presentation contrary to AR 240 (2).

6. Ruling

In my opinion, the case advanced by the Stewards is to be preferred. I have come to that conclusion for the following reasons, which are not set out in order of importance or significance.

(1) The majority judgements in the Court of Appeal decision of *Kavanagh* seem to me to be clear and are highly persuasive, if not binding, upon this Tribunal. The facts are not identical, but there is sufficient common ground for that to be the case.

(2) If anything, the facts of the present case make the applicability of what was said in *Kavanagh* even more pronounced. In *Kavanagh*, the trainers were found to be completely unaware of the existence of the prohibited substance in the possession of the veterinarian and which brought about the elevated cobalt reading – see, for example, paragraph 152 of the judgement of Cavanough AJA. In the present case, Mr. Alexander effected the administration. He was aware that the feed might contain a prohibited substance (cobalt). The mistaken belief upon which he relies was that the feed did not contain such a quantity of cobalt as would be necessary to result in a prohibited concentration.

(3) Before turning to the judgement of Cavanough AJA in *Kavanagh*, I shall summarise the applicable parts of the judgement of McLeish JA.

McLeish JA disagreed with the relevant reasons expressed by Maxwell P. Essentially these related to the necessity of some knowledge or awareness of what the substance was on the part of the person charged with the administration. McLeish JA was of the opinion that knowledge was neither determinative nor a necessary prerequisite to establishing causation.

If the approach of McLeish JA (with which Cavanough AJA agreed) is followed and knowledge is not a prerequisite, it is difficult to see how honest and reasonable mistake can constitute a defence.

(4) Continuing with the judgement of McLeish JA, having discussed the decision of the High Court in *Miller (*1937) 57 CLR 400, His Honour made the following observation at paragraph 111:

“…AR 175 (h) does not require any kind of knowledge or belief on the part of a person causing a substance to be administered that the substance was a prohibited substance”.

AR 175 (h) was, for present purposes, the predecessor of AR 245 (1).

(5) I would also refer to the following observation by McLeish JA, which is found in paragraph 118:

“… the true question in the present case is not one of knowledge or intention about the nature of the substance in question but authority or direction to perform the act of administering it”.

Applying that to this case, the true question is not Mr Alexander’s knowledge of the nature of the substance in question – whether or not it contained cobalt and if so how much – but whether there was the authority or direction to administer it. Clearly there was.

(6) His Honour also made the following pertinent observation:

“The applicant (Racing Victoria Limited) correctly pointed out that the authorities demand caution in applying too strictly principles of criminal responsibility in the context of civil disciplinary measures.”

In relation to this statement, reference was made by way of a footnote to the decision in *Harper*.

(7) McLeish JA went on to say as follows in paragraph 120:

“…it is not necessary that the person know what the substance is, in order to give the requisite authority, or to give the direction, for its administration and to contemplate that such authority or direction will be acted upon. The person may simply know of the existence of the substance and authorise its administration, ignorant as to what it is and still less aware as to its character as a prohibited substance. Such a person will have ‘caused’ the substance to be administered.”

He went on to say that he rejected the contention that the language of causation imports a mental element into the Rule “requiring the person to be aware what substance is administered” – see paragraph 121.

It seems to me that His Honour’s analysis applies *a fortiori* where the ‘person’ causing the substance to be administered is the trainer himself and the substance is known to at least have the potential of being prohibited.

(8) In *Kavanagh* at paragraph 152 Cavanough AJA also made the following statements:

“In this case, on the unchallenged findings of fact made, causation could not properly be established against the trainers…On the findings that *were* made, the trainers had no awareness or suspicion whatsoever, nor even an inkling..”.

In the present case, Mr Alexander was not only aware of the potential existence of cobalt in the feed in question. He was directly responsible for its administration.

 At paragraph 154, Cavanough AJA said the following:

“It seems to me that the ‘purpose’ provision…expands that basic mental element, with the result that a person cannot be found to have administered a substance, or to have caused it to be administered, *for the purpose of affecting the performance or behaviour of a horse in a race*…unless it be established that the person had knowledge or a belief about the identity of the substance...”.

In the present case, Mr Alexander had the required knowledge or belief. Thus, the fundamental factor referred to by Cavanough AJA that was operative in *Kavanagh* and led to the exculpation of the trainers is absent in the present case.

(9) Perhaps the approach adopted by McLeish JA, with whom Cavanough JA agreed, and its application to the present case, is best summed up in paragraph 123 and 124 as follows:

“It is consistent with these purposes of the disciplinary regime embodied in the Rules of Racing that a person is liable to penalty where he or she has authorised the administration of a substance or exerted a capacity of control or influence to direct that to be done, in either case contemplating or desiring that the substance will be administered but not necessarily knowing what the substance is.

It follows that, insofar as the President and the Tribunal apply a test based on the state of mind of the person alleged to have caused the substance to be administered, rather than one based on the authority, direction or control under which the substance was administered, I respectfully prefer a different approach. Questions of state of mind will bear on the outcome of that approach but are not the principal focus of inquiry”.

The position seems to me to be even clearer if the person carrying out or authorising the administration does know what the substance in question is, as is the situation in the present case.

(10) I return to the judgement of Cavanough AJA.

As with McLeish JA, the whole approach adopted by Cavanough AJA significantly is not based on a distinction between strict and absolute liability, which distinction is founded upon the existence of a defence of honest and reasonable mistake. Whilst there is reference to *Harper*, there is none to *Proudman v Dayman* and like cases, save for a mention of *He Kaw The* in a summary of the relevant part of the judgement of Maxwell P (with which McLeish JA and Cavanough AJA disagreed).

(11) It is significant that, in the judgements of McLeish JA and Cavanough AJA, there is no suggestion that a defence of honest and reasonable belief exists in relation to the operation of the Rule. Indeed, McLeish JA states concisely what is effectively the converse in paragraph 123, as set out in (9) above. Also, the caution required in applying too strictly principles of criminal responsibilities in the context of civil disciplinary measures was emphasised and *Harper* referred to in a footnote.

(12) I turn now to the decision of Zammit J in *Anderton*.

It was argued on behalf of Mr Alexander that this Tribunal is bound by that decision. Whilst as a general proposition, this Tribunal is bound by decisions of the Supreme Court, it is also bound by decisions of the Court of Appeal. If there is inconsistency between the two, the decisions of the Court of Appeal, being the superior court, are to be preferred.

*Anderton* concerns a different set of rules, namely those applicable to greyhound racing. It is apparent that the original submissions in the case were received shortly before the Court of Appeal handed down its decision in *Kavanagh* – see paragraph 54. Leave to file supplementary submissions upon the handing down of *Kavanagh* was granted and apparently performed. Indeed, in her judgement, Her Honour specifically stated that the reasoning of the majority in *Kavanagh* bore directly on the substantive question before her - see paragraph 56.

In paragraphs 60 – 70, Her Honour set out a detailed summary of the judgements of McLeish JA and Cavanough AJA. In paragraphs 71-78 there is a summary of the submissions of the parties in relation to the effects or applicability of them.

Above paragraph 79, there is a heading “Analysis”, and this appears to mark the beginning of the actual decision. In paragraph 79, Her Honour stated as follows:

“Secondly, it is unusual for the same question of statutory interpretation to arise in two analogous cases, the decision of the higher court supplying the answer to the court below. Here, the reasoning of the majority in *Kavanagh* is directly applicable to the construction of LR 18.5 and GAR 86 (af), resolving any uncertainty as to whether these are offences of strict or ordinary liability”.

There is no other reference to *Kavanagh* in the remainder of the decision. However, Her Honour went on to say in paragraph 83 that the drafters of the Rules in question intended to create offences of strict liability, referring to the presumption that a person charged with a civil disciplinary offence will have open to them the defence of honest and reasonable mistake of fact. Her Honour then moved on to a discussion of *Proudman v Dayman, Day* and *Harper.* As stated, there is no further reference to *Kavanagh*.

(13) This is a somewhat awkward situation. It is not for the chairperson of a disciplinary tribunal to fail to follow a decision of a judge of the Supreme Court. Her Honour referred to the decision in *Kavanagh* as resolving any uncertainty as to whether the offences before her were of absolute, strict or ordinary liability. Whilst it is not spelt out, she appears to have reached the conclusion that *Kavanagh* is authority for the proposition that strict liability operates, and so operates along with the possible defence of honest and reasonable mistake of fact.

If that is meant to be a conclusion of general or universal application which embraces rules such as those applicable in the present case (or, for that matter, in *Kavanagh* itself), I am afraid I must disagree and accept the submissions of Mr Bell in this regard.

As stated by Her Honour, the decision in *Kavanagh* is one of a higher court. The majority were dealing with a Rule of Racing similar in wording to that in the present case. Her Honour stated that the majority had resolved any uncertainty as to absolute or strict liability, at least in regard to that that Rule. However, it seems to me that any resolution that occurred in *Kavanagh* is not to the effect set out by Her Honour. If anything, it is to the opposite effect. I agree with Mr Bell.

(14) In addition, *Kavanagh* deals directly with the Rules of Racing – the applicable rules in the present case.

(15) Furthermore, the decision of the majority in *Kavanagh* appears to me to be in accordance with the decision in *Harper*. It is to be remembered that *Harper* is a unanimous decision of the Full Court of the Supreme Court of Western Australia. In that case, it was specifically stated by Malcolm CJ at page 342 as follows:

“So far as the application of the common law doctrines which make the defence of honest and reasonable mistake available within the criminal law are concerned, I agree with Anderson and Owen JJ that these are not applicable because the conduct giving rise to the proceedings against the applicant was not criminal conduct punishable by criminal sanction. I also agree that on the basis that the *Rules of Trotting* comprise terms of a contractual nature as between the applicant and the Association the relevant defence is not available as an implied term of contract”.

I shall not set out at length extracts from the joint judgement of Anderson and Owen JJ, save for the following at page 349:

“We see no incompatibility between (a) the proposition (undoubtedly true) that in administering the *Rules of Trotting* the Association must accord natural justice to those who may be adversely affected by its decisions; and (b) the non-availability of the defence of honest and reasonable mistake”.

Of course, this Tribunal is bound by the rules of natural justice – see Section 50Q (1)(i) of the Act.

(16) I appreciate that there may be some differences in wording between the applicable Rule or Rules in Western Australia and those applicable in the present case. However, the matters set out in *Harper* seem to me to be at least of strong persuasive value. Certainly, observations of Anderson and Owen JJ were referred to with approval in *Kavanagh* by McLeish JA - see paragraphs 91 and 93.

(17) It also seems to me that the decision in *Harper* is supportive of the submission of Mr. Bell that the relationship between Racing Victoria Stewards and licensed persons such as Mr Alexander is contractual in nature. I would refer to the statement of Malcolm CJ set out in (14) above and to the following extract from the joint judgement of Anderson and Owen JJ at page 346:

“ It is apparent from a reading of the Rules themselves, that they are intended to have coercive effect consensually or contractually, not by legislative force”.

Malcolm CJ, along with Kennedy and Franklin JJ, agreed with this statement.

(18) Further, in *Commissioner of Taxation v Racing Queensland Board* [2019] FCAFC 224 the Full Court of the Federal Court stated as follows: “The argument that the relationships between persons who participate in the thoroughbred racing industry are contractual in nature is well-founded in authority”.

(19) If the relationship between licensed persons and the relevant authority is contractual or quasi-contractual in nature, the proposition that a defence of honest and reasonable mistake of fact is available seems to me to be even more doubtful. Put another way, there is no term in the contractual or quasi-contractual relationship that permits a contracting party to rely on an honest and reasonable mistake of fact so as to avoid the operation of such contract. I would refer again to what was said by the Full Court of the Supreme Court of Western Australia as set out in paragraph (15) above.

(20) The bottom line is this:

 (i) Mr Alexander is a licensed person bound by the Rules of Racing.

 (ii) Mr Alexander administered or caused to be administered to a horse trained by him (*Tom’s Knight*) a product containing the potentially prohibited substance, cobalt.

(iii) Not that it is necessarily an essential ingredient of the charge, Mr Alexander knew that the product contained cobalt.

(iv) A post-race swab taken from *Tom’s* Knight revealed the presence of cobalt at a prohibited level.

(v) Mr Alexander’s mistaken belief that the amount of cobalt in the product which he administered would not result in a reading at a prohibited level is a matter which is relevant only in relation to penalty.

6. Conclusion

On the basis of the agreed facts for the purposes of this Ruling, Mr Alexander has breached AR245 (1).

Mark Howard
Registrar, Victorian Racing Tribunal