Arbitration CAS 2009/A/1768 Tony Hansen v. Fédération Equestre Internationale (FEI), award of 4 December 2009

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Mr Kaj Hobér (Sweden); Prof. Michael Geistlinger (Austria)

Equestrian (jumping)
Horse doping (medication control offence - capsaicin)
Status of a prohibited substance not listed
Validity of the strict liability rule regarding the presence of a prohibited substance
Lack of proof of sample contamination rebutting the presumption of regularity of testing process and custody
Non- compulsory nature of a "conjugation test"
CAS power of review
Condition for reduction a disciplinary sanction

1. **The express mention of a substance on the list of prohibited substances is not a *sine qua non* of a substance achieving prohibited status. There would always otherwise be a risk, to the obvious detriment of sport, that science could outstrip the law by discovery or invention of potentially performance-enhancing drugs hitherto not captured in the catalogue of the banned substances. According to the medical evidence, Capsaicin falls within the definitions of prohibited substance and as a pain relieving substance. It is not excepted merely because it is, or is derived from, a natural product. A substance should be prohibited if it satisfies the criteria for prohibition, whether detectable or not.**

2. **Pursuant to the FEI Equine Anti-Doping Medication Control Rules (EADDMC), presence indicates offence. The FEI provisions must be *"generally consistent"* with WADA. Accordingly, the presumption is that what is in the sample (be it from horses or athletes as in other sports) must have been in the body, as will, of course, be the position in all but exceptional cases. The presumption may be rebuttable; but the burden of rebuttal lies on the person charged. The need for a strict liability rule in the interests of fair competition has been constantly reiterated in CAS jurisprudence. Its compatibility with Swiss law has been recognized by the Swiss Federal Supreme Court.**

3. **The presumption of a medication control offence has not been rebutted on the balance of probabilities, or, indeed at all with respect to the presumption of regularity both in the testing process and in the custody/analysis provided by EAMDC, if no proof has been brought in connection with any sample contamination through the collection of urine sample.**

4. **A conjugation test can show whether a prohibited substance entered the urine from the environment and therefore existed in the urine as *"free form"* or whether it did go through the horse body and therefore is *"conjugate or metabolite"*. Although this test**

is permissible under EADMC, there is no basis in the relevant instruments or general law for such a test being compulsory. Moreover, there is no reason to doubt that the substances detected in the urine came from the horse when the official tests realised are both positive.

5. **CAS is an adjudicative, not legislative body. It is not for CAS to write the rules of a federation. As long as those rules are not incompatible with some relevant aspect of *ordre public*, be it competition law, the law of human rights, or Swiss statute, the CAS has to apply them as they stand. For CAS the only *lex lata*, not the *lex ferenda* has relevance. Even approaching the matter on the basis that the European Convention on Human Rights is incorporated into Swiss law or that there is a *lex ludica* which qua international sports tribunal CAS must in any event apply, no aspect of any such law renders *ultra vires* a law which applies strict liability in the public interest of clean sport, or one which allows the presence of *"any quantity"* of a prohibited substance to trigger liability. Moreover, there is no evidence that Capsaicin is an endogenous substance in the horse that would require quantitative threshold.**

6. **As a medication offence the period of ineligibility can be up to one year for a first offence. In order to engage a lesser sanction on grounds of lack of fault the Person Responsible must establish the source of contamination in order that his degree of fault or negligence can be assessed. It is not sufficient for this purpose to provide mere hypothesis. If no explanation at all (as distinct from speculation) for the source of the Capsaicin in the horse's body is provided, there is therefore no basis for reducing the period of suspension as assessed by the FEI Tribunal.**

An Olympic medal is the most precious coin in a sportsman's treasury. In the course of a single day Mr Tony Andre Hansen (the "Appellant"), an equestrian, enjoyed the elation of being a member of a Norwegian team which had won the bronze medal in the Team Jumping at the games of the XXIX Olympiad (the "Beijing Olympics") and suffered the distress at being the cause of disqualification of the team and his own removal from the individual competition and additional suspension on account of a medication control offence resulting from the discovery of Capsaicin in the urine of his horse Camiro ("Camiro") in a test carried out in the laboratory of the Hong Kong jockey club (HKJC').

This explains why the validity of that disqualification and additional sanction has been strenuously and expensively contested for more than a year initially before the Tribunal of the Federation Equestre Internationale ((FEI) or the "Respondent"), and finally before the Court of Arbitration for Sport (CAS). Although the arguments and evidence at both levels has ranged far and wide there is, on analysis, a single-but-crucial issue in the dispute i.e. whether Capsaicin had been in the body of Camiro before being detected in its urine or whether it had found its way into the urine sample during or after the process of collection of the sample.

The Appellant is an experienced rider, ranked high among the world's élite in the sport of show jumping with (hitherto) an impeccable record in relation to compliance with an anti-doping régime. The Respondent is the international governing body for equestrian sports, whose headquarters are located in Lausanne, Switzerland.

The appeal is brought by the Appellant, the person responsible (PR) against a decision of the FEI Tribunal dated 22nd December 2008 (Positive Medication case No.2008/23) ("the Decision").

The decision was that (i) the horse and the PR were disqualified from the Beijing Games; (ii) all medals points and prize money won at the Games were forfeit; (iii) the results of the Norwegian jumping team were recalculated not taking into account the results achieved by the PR and horse combination; (iv) additional sanctions were imposed on the PR, i.e.

> *"As a consequence of the foregoing, the FEI Tribunal decides to impose on the PR the following sanctions, in accordance with GR Art. 174 and EADMCR Art. 10:*
>
> *1) The PR shall be suspended for a period of Four and One-Half (4.5) months (namely, 135 days) which period has commenced on the date of the application of the provisional suspension, 21 August 2008;*
>
> *2) The PR is fined CHF 3,000.-;*
>
> *3) The PR shall contribute CHF 8,000.- towards the legal costs of the judicial procedure"* (para 91).

The Appellant requests that**:**

> *"The decision subject to appeal shall be amended as follows:*
>
> *(1) The decision of the FEI Tribunal dated 22 December 2008 is annulled.*
>
> *(2) The Appellant shall be fully reimbursed all costs and damages resulting from or related to the positive medication case nr. 2008/23.*
>
> *(3) The Respondent shall bear the costs of the arbitration and the legal costs of the Appellant".*

The Respondent resists those requests and invites the CAS to uphold the decision.

Camiro participated at the Games of the XXIX Olympiad, Beijing 2008, from 8 to 21 August 2008 in Hong Kong (the "Event"), in the discipline of Jumping. Camiro was ridden by Mr Tony Andre Hansen (the PR).

On 18 August 2008 Camiro was selected for sampling, following the Team Jumping Final.
Analysis of the urine sample no. FEI-0069350 taken from Camiro, performed by the approved FEI laboratory, the HKJC Racing Laboratory, in Hong Kong, under supervision of Jenny K Y Wong, Chemist, and Dr Terence S M Wan, Chief Racing Chemist and Head of the HKJC Racing Laboratory, revealed the presence of Capsaicin (Test Report dated 21 August 2008).

No request had been made for the use of Capsaicin on Camiro, and no medication form had been supplied for this substance.

On 21 August 2008 the presence of the Prohibited Substance, the possible rule violation and the consequences involved were duly notified to the PR.

The notification of 21 August 2008 included a notice that the PR was provisionally suspended and granted the opportunity to be heard at a preliminary hearing before the FEI Tribunal.

The PR confirmed that he wished the preliminary hearing to be held.

On 21 August 2008 the preliminary hearing took place before Prof. Dr. Jens Adolphsen. The preliminary decision was rendered and communicated to the PR on the same day. The PR was informed that the preliminary panel had decided to maintain the provisional suspension until the final decision of the case by the FEI Tribunal, subject to review depending on the explanations and evidence that might be submitted by the PR.

In its preliminary decision, the preliminary panel stated that the presence of Capsaicin was evidenced to its satisfaction.

The PR provided no explanation at the preliminary hearing for the presence of the Prohibited Substance and gave in the view of the preliminary panel no reasons why the provisional suspension should be lifted.

In light of the above, and considering the FEI policy to impose provisional suspension in doping, and in medication A cases at major events such as the Olympic Games, the preliminary panel refused to lift the provisional suspension.

In the notification of 21 August (Annex IV "B-Sample analysis"), the PR also received notice that the B-Sample analysis would be carried out at the HKJC. The PR was informed of his right to attend or be represented at the identification and opening of the B-sample.

The PR acknowledged that the B-sample analysis would be performed as described in the notice and indicated that he would be represented at the identification and opening of the B-sample by Dr Jonas Tornell, Team Veterinarian.

On 23 August 2008 the B-sample analysis was carried out at HKJC under the supervision of Dr Emmie N M Ho, Racing Chemist, and Mr David K K Leung, Racing Chemist, while the witness, Dr Jonas Tornell, Team Veterinarian for the Swedish Equestrian Federation, representing the PR, was present.

In his witness statement, Dr Tornell certified that the urine B-Sample container *"shows no signs of tampering and that the identifying numbers appearing on the sample to be tested by the Racing Laboratory of the Hong Kong Jockey Club corresponds to that appearing on the collection documentation accompany the sample"* and that he had also witnessed the opening of the sample.

The B-Sample analysis confirmed the presence of Capsaicin (Test Report dated 25 August 2008).

On 27 August 2008 the results of the B-Sample analysis were notified to the PR through his NF.

On 26 September 2008 a Final Hearing was held at the FEI Headquarters in Lausanne.

At the hearing the FEI Tribunal heard preliminary and other arguments of the parties and examined certain evidence. The FEI Tribunal also heard the witnesses for the parties: the PR himself and his groom, on behalf of the PR, and Dr Farrington, on behalf of the FEI. However, both the PR and the FEI argued that they needed additional time to exchange witness documents and to examine the various expert witnesses. The parties agreed that an additional hearing be held for the purpose of providing additional evidence and, in particular, examining and cross examining the expert witness.

On 8 November 2008 the additional hearing was held at the FEI Headquarters in Lausanne. At the additional hearing the FEI Tribunal heard further arguments and witnesses and examined further evidence: A large part of that additional hearing consisted of hearing the expert witnesses of the parties who were enabled to hear each other and to provide comments on each other's expert testimony. The expert witnesses were Dr Tobin (present) and Prof Barker (by teleconference), on behalf of the PR, and Dr Wan (by teleconference) and Dr Vine (by teleconference), on behalf of the FEI.

The relevant legal instruments were:

- The 2003 WADA Code
- FEI Statutes 22nd edition, effective 15 April 2007, Arts. 1.4, 34 and 37.
- FEI General Regulations, 22nd edition, effective 1 June 2007, Arts. 142, 146.1 and 174.
- Internal Regulations of the FEI Tribunal, effective 15 April 2007.
- FEI Equine Anti-Doping and Medication Control Rules, effective 1 June 2006, updated with modifications approved by the General Assembly, effective 1 June 2007 and with modifications approved by the Bureau, effective 10 April 2008.
- FEI Veterinary Regulations, 10th edition, effective 1 June 2006, Art. 1013 and seq. and Annex III (the Equine Prohibited List).
- FEI Code of Conduct for the Welfare of the Horse.
- IOC Anti-Doping Rules applicable to the Games of the XXIX Olympiad, Beijing 2008, Article 15.
- FEI Regulations for Equestrian Events at the Olympic Games (22nd edition), effective for the 2008 Beijing Olympic Games (Hong Kong), Arts 614, 615 and Annex G.

On 19 January 2009 the Appellant filed his statement of appeal.

On 2 February 2009 the Appellant filed his appeal brief.

On 26 February 2009 the Respondent filed its answer.

On 9 March 2009 the Appellant filed an unsolicited four-page reply to the Respondent's answer.

On 10 March 2009 the Respondent raised an issue with the admissibility of the Appellant's letter of 9 March 2009*.

On 15 May 2009 the Appellant filed a five-page submission attaching new evidence regarding a test report from the Hong Kong Jockey Club Racing Laboratory.

On 26 May 2009 the Respondent raised an issue with the admissibility of the Appellant's submission* (but not of the new evidence) and reserved the right to respond to the new submission.

At the hearing the Panel admitted the contested material,* without prejudice to its weight, in the interests of fairness.

The Panel held a hearing on 26th October 2009 at the Court of Arbitration for Sport, Chateau de Béthusy, Avenue de Beaumont 2, 1012, Lausanne, Switzerland.

LAW

CAS Jurisdiction

1. The Appellant relies on Article 170 par. 1.3 of the General Rules of the FEI (22nd edition), Article 165 par. 1.3 of the General Rules (23rd edition) and Article 12.2 of the FEI Equine Anti-Doping and Medication Control Rules, as conferring jurisdiction on the CAS. In its Answer, the Respondent specifically and correctly states that the jurisdiction of the CAS is undisputed by the parties. The jurisdiction of the CAS is further confirmed by the signature of the Procedural Order by the parties.

Applicable law

2. In accordance with Article R58 of the Code of Sports-related Arbitration (the "Code"), the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate.

3. The substantive law which governs this dispute is therefore that contained in the legal instruments set out at para 10 below and Swiss Law, referred to in Article 35.3 of FEI statutes as well as the *lex ludica* which is applicable by the CAS as an international sports tribunal (CAS 98/200).

Procedural matters

4. A variety of complaints were made on the Appellant's behalf about the absence of *"a fair and transparent hearing"* before the FEI Tribunal. We need not dwell on these complaints. Under Article R57 of the Code, the Panel considers both fact and law *de novo*. Accordingly any procedural defects which occurred in the internal proceedings of a federation are cured by arbitration proceedings before CAS (CAS 96/156 p.61; CAS 2001/A/345 at para 8).

Merits

A. Prohibited substances

5. It was only faintly argued that Capsaicin was not a prohibited substance at all. It is true that it was not listed as such at the material time, although we heard and accept evidence that this omission is likely to be corrected for the future, but such express mention is not a *sine qua non* of a substance achieving prohibited status; were it otherwise there would always be a risk, to the obvious detriment of sport, that science could outstrip the law by discovery or invention of potentially performance-enhancing drugs hitherto not captured in the catalogue of the banned substances. We accept the evidence of Dr Farrington (Supplemented by that of Dr Corde and Dr Grogny) that Capsaicin falls within the definitions of prohibited substance Medication Class A in Annex III and as a pain relieving substance and is not excepted merely because it is, or is derived from, a natural product. Since none of the parties requested the Panel to go beyond a discussion of capsaicin as a medication A substance the Panel did not examine whether in parallel to a medication A substance also a doping substance was given and whether in such situation of a double nature of a substance the case needed to be handled as an anti-doping rule violation and not merely as a violation of a medication A rule, see CAS 2008/A/1710 paras. 87 ff.

6. The FEI Tribunal determined that its presence in the urine was evidence of a medication control offence, but not a doping offence on the basis that EADMC 3.1 should be construed as compelling the location of a substance in one or other of the two categories [Decision para 48]. That aspect of their determination has not been the subject of any appeal; we have therefore not heard argument on the matter and do not need to – indeed cannot properly - rule upon it. Suffice it to say that we are not to be taken as endorsing the conclusion that a substance may not fall into both categories, depending of course on its properties and effect, nor indeed that in order to qualify as a doping substance an agent would have to have been likely applied by the person charged *"so as to influence performance"* as distinct from being of a category likely generally to have been so applied (compare Decision para 44 which equally did not require consideration by us in the present appeal).

7. Dr Wan and Dr Vine informed us that the HKJC laboratory had a special capacity to detect Capsaicin - although Professor Barker would dispute that such capacity was unique. Dr Tobin

suggested that in consequence in advance of the Beijing games it would not have been appreciated generally in the equine world that use of such substance was forbidden. Even assuming this to be correct, it seems to us that the only conclusion would be that previously participants in jumping events may have had advantages over their competitors which had not been detected. It cannot mean that the substance, if otherwise satisfying the criteria for prohibition, should as a result be deemed not to do so; if it has the appropriate properties, it is prohibited, whether hitherto detectable or not. Nor can we accept that as Dr Tobin also suggested *"horsemen should be allowed to adopt their practices to what are effectively new and unantiquated rules"*. At most a participant might seek to plead in mitigation his ignorance of the effects of Capsaicin because of the state of knowledge (or rather lack of it) at the time it was administered to his horse. But the Appellant disclaims that Capsaicin was administered in any form to Camiro, and the Coach of the Norwegian team was apparently aware that Equi-Block should not be used.

8. It is equally immaterial as to disqualification that Capsaicin may have found its way into Camiro's body as a result of Camiro's biting wood in a stable impregnated with it, or breathing in airborne particles or eating feed contaminated with it (all without knowledge of the Appellant). The source of the Capsaicin, if it could be established, might go to the balance of the sanction i.e. period of suspension, where questions of intent, care and the like come into focus. It cannot affect the disqualification which depends upon the presence of the substance in the urine (as long as such presence was not the result of the way in which the sample was collected or subsequently dealt with) ("the proviso").

9. The evidence before us demonstrated that 64 horses were tested at the Beijing Olympics and 20 at the subsequent Paralympics. 5 tested positive with Capsaicin or related substances (all in jumping). In three of Capsaicin cases the PRs affirmed that they had used Equi-Block which contains Capsaicin. Only in the present and one other case was the source of the substance not identified. The FEI Tribunal concluded that contamination of only 2 among 84 jumping horses *"is most unlikely"* (Decision para 61). We would more simply say, the proviso apart, it is irrelevant.

10. Finally it is immaterial that in the particular circumstances it cannot be shown that the substance did affect Camiro whether by hypersensitisation or pain relief. It is another aspect of the strict liability rule that the sports' governing body will not have to establish such matters; and it will not avail the sportsman (save again as to additional sanction) to show that it had no such effect. The disqualification of an athlete for the presence of a prohibited substance, whether or not the ingestion of that substance was intentional or negligent and whether or not the substance in fact had any competitive effect, has routinely been upheld by CAS panels. See in particular CAS 2005/A/829 para 12.19: *"to construe the proviso as allowing the FEIJC (or the CAS) to allow an appeal against disqualification on the grounds that it was proven that there was neither intent to gain competitive advantage nor success in so doing would be contrary to those principles"*. See also CAS 2002/A/376 para 3.29: *"The disqualification of an athlete for the presence of a prohibited substance, whether or not the ingestion of that substance was intentional or negligent and whether or not the substance in fact had any competitive effect, has routinely been upheld by CAS panels"*.

B. Presence

11. The presence of Capsaicin in Camiro's urine was shown by the tests on the 'A' and 'B' samples carried out on 22nd and 23rd August 2008 in the HKJC laboratory, one of the four FEI accredited laboratories worldwide. It had to submit to and satisfy strict criteria procedures in order to gain such status: see CAS 2008/A/1569, para 7.9.

11. The cogent supporting analytical material was shown to us.

13. Dr Tornell, the PR's team's veterinarian, was present at the identification and opening of the B sample and confirmed its identity and integrity.

14. Professor Barker concluded *"from the data I reviewed there was a positive identification in both samples"*. (Evidence before FEI Tribunal 26th September 2008 Transcript p.82).

15. Accordingly, presence of a prohibited substance in the sample was established to our comfortable satisfaction.

C. Strict liability

16. The advantage of a uniform code such as provided by WADA is that the interpretation of rules, where in issue, can be authoritatively determined by a court or tribunal with appropriate jurisdiction. However the WADA code itself allowed latitude in drafting to governing bodies of sports involving animals– see Article 16. The legitimate use of this facility by the FEI has encouraged the Appellant to advance an argument, to the effect that it was incumbent upon the FEI in order to inculpate a PR to prove that the substance found in the urine was a substance that came from the horse. The argument fastens on the first sentence of Article 2.1.1: and is to the effect that the second sentence must be construed in the light of the first.

17. We bear in mind, of course, the twin principles that the rules must be constructed *contra proferentem* i.e. the FEI, see e.g. CAS 2001/A/317 para 18, and that any ambiguity in disciplinary rules must be resolved in favour of the individual who may be made liable under them see e.g. CAS 98/222 para 31. We are also conscious of the classic statement in CAS 94/129 at para 34: *"Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders"*. However, with respect to Mr Steenstrup, there is no thicket in the FEI rules, and the pathway through them is clear.

18. It is common ground before the Panel that no offence is committed if a prohibited substance enters the sample as a result of its handling in the process of collection or transport to or treatment in the laboratory thereafter. The very purpose of protocols on collection and proof of chain of custody is to eliminate any possibility of sample contamination.

19. The first sentence of Article 2.1.1 is, however, concerned with the imposition of responsibility on the PR, and gives rise to an obligation independent of the second sentence. The second sentence is in what we may describe as common form, and harks back to Article 2.1 which is unambiguous, and to which Mr Steenstrup's argument gives no weight. Presence indicates offence. The FEI provisions must be *"generally consistent"* with WADA Article 2 and 16. They are: and the comment on WADA Article 2 which explains the rationale of the strict liability rule is itself a powerful pointer against Mr Steenstrup's submission.

20. The presumption is that what is in the sample (be it from horses – as here – or athletes as in other sports) must have been in the body, as will, of course, be the position in all but exceptional cases. The presumption may be rebuttable; but the burden of rebuttal lies on the person charged. We note that the balance of Article 2 (2.1.2 and 2.1.3) with its repeated emphasis of the importance of presence (save in carefully drawn exceptions) is consistent with our construction; and the heading of Article 2, itself distinguishing between substances in their free form or metabolites (or conjugates) points away from the need to test for more than presence of the substance in free form.

21. Finally we remind ourselves that the need for a strict liability rule in the interests of fair competition has been constantly reiterated in CAS jurisprudence (See e.g. CAS 94/129 paras 14-16, CAS 95/41 para 137). Its compatibility with Swiss law has been recognised by the Swiss Federal Supreme Court in 5C 248/2006 (Reported ATF 134 III 193). Nor does the European Convention of Human Rights, Article 6 para 2 stipulate that strict liability cannot be consistent with the right to a fair trial (*Salabiaku v France* Application no.10519/83 paras 28-29, *Janovic v Sweden* Application No.346/9/92 para 101).

C. Sample contamination

22. Can the Appellant show that the Capsaicin did not come from the body of Camiro? The Respondent starts with the advantage of the presumption of regularity both in the testing process and in the custody/analysis, see EAMDC 3.2.2 and 3.2.3. We can discount the relevance of the former presumption since there was not an iota of evidence to suggest any irregularity at any time after the sample collection itself. The volley of questions emanating from the Appellant's experts, Professor Barker and Dr Tobin, if designed to elicit some irregularity, manifestly failed to do so, and the fact that not every request, some of which in our judgment verged on the oppressive, was answered in our view is immaterial. FEI were more responsive than the law required: and no adverse inference can be drawn from the fact that they did not satisfy every demand made on the Appellant's behalf.

23. As to the sample collection the only evidence relied upon was that of Ms Kleppe, the Norwegian team's groom, who claimed that – in what would certainly be a departure from good practice – Mrs Leigh collected the urine sample without wearing gloves, and, for good measure, that the steward Mr Vale vested with the function of supervising the collection, was lax in performance of his duties.

24. There are four points to be made at the outset about Ms Kleppe's evidence.

25. Firstly, she made no complaints about departure from practice at the time. Her candid admission to this effect, explained by her as a consequence of her distraction by joy at Norway's success was confirmed by Mr Tornell.

26. Secondly, she signed on the doping control form that the sample had been collected and sealed without endorsing any reservation as to the way in which the process had been carried out, and without comment on Mr Vale's signature just above hers to the effect that he had supervised a successful collection. The Veterinary regulations stipulate that objections should be made on the form Article 1018-4; although Ms Kleppe denied knowledge of this. For our part we respectfully invite the FEI to adapt the form to reflect that used in other sports of which the Panel has knowledge, to provide that the representative of the rider in signing the form expressly confirms that he has no objection to the way of the collection was carried out. A slight amendment to the form would ensure that subsequent objections were less frequently made and, if made, less likely to be believed.

27. Thirdly, in consequence the first time that Ms Kleppe raised the matter now relied on was in a statement of 17th September 2008.

28. Fourthly, revealingly, the initial way she put it in that document was *"I can't remember her having gloves on …"* which is not the same as an outright denial.

29. As against this firstly, no other person present on that occasion corroborated Ms Kleppe's version; all indeed expressly denied it: Mr Warrick Vale, Dr Miklos Jarny (both veterinarians), Ms Carolyn James, and Mrs Maxine Leigh**.** We are conscious of the fact that persons might not willingly admit to a breach of proper procedure, and might close ranks around a colleague, but we could not conclude this to be so without cogent proof, which was entirely lacking.

30. Secondly, while the majority of statements to which we have referred were in writing, and we did not have the opportunity to hear the authors or see how they reacted to the cross-examination, Mrs Leigh did give evidence to us by telephone from New Zealand (at an unsocial hour) and was adamant that she had taken all appropriate care with use of gloves and otherwise to avoid contamination of the sample during collection. She impressed us with the clarity of her evidence – and we noted that, in so far as we permitted Counsel for the FEI to invite her to retrace steps already covered in her written statement, she was consistent in her testimony, and did not yield any ground in cross-examination.

31. Thirdly, we have to bear in mind Mrs Leigh's considerable experience, not least at Olympic games; the training she and others involved in this vital stage of doping control had received; the absence of any good reason why on this occasion she would have deviated from proper practice of a function she performed on up to twenty occasions during the Beijing Games (Ms Kleppe could only suggest that the collection process was running behind schedule); her natural

appreciation of the importance of the collection process; her intrinsic professional pride and her lack of motivation to distort or misrepresent the true position.

32. Two further matters were the subject of discussion. First, Ms James had taken an unofficial video of the collection process for Camiro (which we considered). It was incomplete in its coverage; and, since it was unofficial and not required by any rule, it cannot be the subject of criticism on that score. It simply did not cast any light on the issue of whether gloves were worn or not by Mrs Leigh in collecting the sample from Camiro.

33. Secondly, Ms Kleppe had a recollection that Mrs Leigh's hands looked 'old'. It may well be that she saw Mrs Leigh's hands. But as Mrs Leigh explained that she would not have shaken hands with Ms Kleppe before performing her tasks as she would have regarded it as inappropriate to do so when wearing surgical gloves. After the process of collection it was our understanding of her evidence that she did take off her gloves and did shake hands (unfortunately the transcript of this passage of her evidence at this point is incomplete). If so, there is no real discrepancy between the testimony of the two main witnesses on this aspect of the case. An alternative possibility is that Ms Kleppe confused Mrs Leigh will Ms James, the video-maker, who was certainly ungloved. But whatever may be the explanation for Ms Kleppe's recollection, we are entirely confident that Mrs Leigh wore gloves at all times material to her duties vis à vis Camiro.

34. For the avoidance of doubt we do not suggest that Ms Kleppe was giving deliberately untruthful evidence: but only that we cannot prefer her evidence to that of Mrs Leigh and the others who corroborated her testimony.

35. Nor, we add, is the Appellant able to rely on the voluntary test on 5th August 2008 at a Post-Arrival Elective Testing (PAET) of the horse since the screening provided did not include the detection of Capsaicin, Nor would the boot/bandage controls administered necessarily detect any hypersensitisation. Accordingly we do not consider that the Appellant has rebutted the presumption on the balance of probabilities, or, indeed at all.

D. A new hypothesis

36. On the 19th November 2009, having been provided with the CD of the hearing, Mr Steenstrup (while accepting that *"it was actually very difficult to hear what Mrs Leigh was telling on the telephone"*) drew attention to a passage in the transcribed evidence of Mrs Leigh where she stated, by reference to her encounter with Ms Kleppe *"I was inside and getting ready with my gloves on and my plastic bag, sealed plastic bag waiting for her to come in"*.

37. On this basis Mr Steenstrup advances the following argument:

"The groom maintains that the steward did not put on gloves at the start of the sampling collection as stated in her statement. However, having gloves on already before the sampling collection is as bad and totally unacceptable. Based on Mrs Leigh's statement during the hearing, we must rely on, if the groom's statement is not taken into account, that she was wearing gloves already before she met the PR's representative. According to the FEI Medication Control Program – Manual for testing veterinarians – the gloves are part of the sampling kit. The

sampling kit must be opened in the presence of the PR or its representative, because otherwise they would not be able to control if the sample taker used old gloves that have already been used in other (e.g. capsaicin) cases. This has to be, based on the steward's own statement, a serious procedural error which has to lead to that according to the FEI Equine Anti-Doping and Medication Control Rules section 3.2.2, the FEI shall have the burden to establish that such departures did not cause the adverse analytical finding or the factual basis for the rule violation.

In our opinion, based on that the steward was handling 20 of the sampling collection cases during the Olympics, and that there were more of them at the same time as the testing of Camiro, the risk for contamination is very high. This procedural error that in fact is admitted by the steward, if the groom is not heard that the steward did not have gloves on at all during the urine sampling collection, is extremely serious. In both instances such a serious procedural error must lead to that it will not be possible for the FEI to prove that such departure did not cause the adverse analytical finding".

38. This new argument elides two separate matters: the propriety of the sampling procedure; and the ability of the PR's representative to witness it. We can find nothing in the Manual (or Article 1018 para 1 of the Veterinary Regulations) to suggest that the PR has to witness the putting on of the gloves.

39. The Manual simply states (so far as material)

"2 Sampling protocol

The utmost care must be taken to avoid any contamination of samples during and after collection. Testing Veterinarians should adhere to the following procedure:

- *Open the kit box and arrange all times on a clean bench.*
- *Put disposable gloves on both hands (gloves should only be removed when the bottles have been closed)".*

40. In our view what the PR must witness is not the putting on of the gloves, but the taking of the urine samples and the handling of the bottles, both before and after, in connection with it.

41. In any event the factual basis for this argument involves the Appellant in discarding the evidence of his own witness, Ms Kleppe. We would also need to ignore the lack of objection to the sampling procedure on the relevant form at the time; and to modify or abandon the view already formed of Mrs Leigh as a conscientious and experienced taker of samples (see paragraph 15.7 above). In short we reject the submission that Mrs Leigh wore other than pristine gloves for the taking of the sample from Camiro.

42. We have dealt with the fresh argument *de bone esse*. We are in any event concerned about the propriety of admitting it (especially since it was available at the time of the hearing being based on evidence given during it) after the proceedings have closed. We do not rule out that in exceptional circumstances such further argument could be admitted: but the present circumstances on no way qualify as exceptional, even if such exception exists. But in the event we do not need (as we otherwise would) to invite the FEI to state their position as to both procedure and substance.

E. Conjugation test

43. As we understood the evidence of all experts, if Capsaicin enters the urine from the environment and does not go through the horse, it exists in the urine as Capsaicin (*"free form"*). If it goes through the horse, it exists in the urine as a sugar linked to Capsaicin (*"conjugate or metabolite"*).

44. The experts agreed that the advantage of a conjugation test without enzyme or hydrolysis – a feature of the conventional test on 'A' and 'B' samples – is that, were it positive, it would establish that the prohibited substance in the urine sample was also in the horse *"an applicable quantity of contingents form of Capsaicin is not commercially or readily available and it is obviously not naturally occurring"*, as Dr Wan pointed out in his Statement of 24 September 2008, although it was not common ground that if such a test was not positive, it would establish the opposite. (The enzymes split any conjugates which might be contained in the sample so as to make it uncertain that only the free form was in the sample: a sample not treated with enzyme hydrolysis will contain it in its original form whether conjugate or free). We can see the attractions of administering such a test if only to foreclose possible defences to a charge of doping or medication control offences: but, we repeat, we can find no basis in the relevant instruments or general law for such a test being compulsory although it is permissible under EADMC art 7.1.8.

45. In this case, however, Dr Wan did carry out tests on the 'A' sample on 31st August 2008 and they proved positive. As Dr Wan put it on 20 November 2008: *"It can be concluded that 'A' Urine Sample 0069350 did not contain any detectable amount of free capsaicin, or else it would have been detected as in the positive control urine sample containing free capsaicin. It can also be deduced that the capsaicin identified, and reported previously in 'A' Urine Sample 0069350 after enzyme hydrolysis, had been present essentially in the conjugated (or metabolised) form"* (See also tests of 5th September 2008 to like result. In other words the unlikely possibility of contamination of urine sample 0063950 with free Capsaicin can be ruled out).

46. Professor Barker made a number of points. First, while he accepted that the fact that such test was carried out later than the official test on 'A' and 'B' samples would not in itself cast doubt upon its results - efflux of this time might indeed make it less rather than more likely that such test would prove positive - he said that the Panel lacked any direct evidence as to chain of custody, conditions under which the 'A' sample had been kept and other safeguards against contamination in the interim. The short answer is that the burden of proof of any irregularity lies on the Appellant, and no such proof was tendered. Secondly, he said that the test should be disregarded because it was on the 'A' sample alone: and not the 'B' sample. Dr Wan explained that since

    (i) the official tests were both positive;

    (ii) there was no reason to doubt that the substances detected in the urine came from the horse;

    (iii) the traces of the substance in the blood suggested it had been in the body of the horse;

    (iv) the conjugation test on the 'A' sample was consistent with, indeed confirmed, the conclusions drawn from other material,

there was no need to probe further. We accept this explanation as cogent.

47. Thirdly, Professor Barker said that not only should the 'B' sample have been retested, but that the Appellant would have had a right to be present by himself or his representative at such test. This point can only be sustained if his second point was good. We do not cast any doubt in the importance of an athlete is right to representation at an official 'B' sample analysis (See CAS 2008/A/1607 at para 123.) Those rights however do not attach to voluntary unofficial tests.

F. Blood test

48. A blood test, as well as a urine test, was carried out on Camiro. It revealed traces of Capsaicin but not in amounts sufficient, according to the HKJC laboratory, to justify a positive finding. Any trace of a substance in the blood is further confirmation that it originated in the horse's body for obvious physiological reasons. Professor Barker said that since it was of an insufficient amount to qualify as proof of a doping offence, it should be discounted for all purposes. We do not agree. He himself accepted that it would not be illogical for a scientist, if asked whether on the basis of such blood test result he considered that Camiro contained Capsaicin to give an affirmative answer, while at the same time saying he would not inculpate the PR on the basis of the evidence of the blood test alone. To ignore it completely seems to us to be an invitation to deny reality.

G. UAE

49. Dr Wan carried out a test after and unconnected with the Beijing Games arising out of an event in the UAE. We quote the full report provided to us at the request of the Appellant and with the concurrence of the HKJC laboratory.

"Dear Mr M,

Sample X from the … Equestrian & Racing Federation

The accompanying page is a copy of the test report for Sample X from a batch of samples (with seal no. Y) delivered to us on 29 January 2009. The original report will be sent by registered post.

The urine 'A' Sample X was found to contain capsaicin and dihydrocapsaicin (both are naturally-occurring capsaicinoids). However, our further analysis showed that both substances were present in the free (rather than conjugated) form in the sample, suggesting that neither had gone through the body of the relevant horse. Furthermore, based on the levels detected in urine, the corresponding blood sample should also have detectable amount of capsaicin and dihydrocapsaicin, but neither was detected in Blood 'A' Sample X. The above findings strongly suggested that the presence of the free form of capsaicinoids in urine had been caused by contamination either during or after urine collection, and consequently Urine Sample X was reported negative. While there are many possible sources of contamination (including the back side of the relevant horse, the sample container, the hand of the collection personnel, etc.), laboratory contamination has been ruled out because all the negative controls analysed together with the urine sample on more than one occasions were negative.

Yours sincerely,

[signature]

Terence S. M. Wan, PhD EurChem CSci CChem FRSC FAORC FFSSoc

Head of Racing Laboratory (Chief Racing Chemist)

…".

50. At first blush this might seem to indicate a *volte* face on Dr Wan's part, an acceptance of the need for a test which had been denied in the Beijing Games, not least because as Dr Wan testified, the legal provisions were in no way materially different.

51. However, Dr Wan also explained salient difference between the two situations. In the urine sample tested above, the amount of Capsaicin was considerable: of the order of 10,000 picrograms to millilitres (as contrasted with 53 picrograms to millilitres in the case of Camiro). By contrast there was no trace at all of Capsaicin in the horse's blood. This strongly suggested to Dr Wan that the urine sample had been contaminated in the collection. Wholly responsibly, in our view, he then carried out a conjugation test which, indeed, verified his hypothesis. Hence his report acquitted the PR in the case above.

H. The grey zone

52. Mr Steenstrup urged us to be creative in recognizing that in respect of Capsaicin there is a grey zone which should disable us from finding that the presence of Capsaicin indicated a medication control offence given its small quantity as revealed in the laboratory tests 53 micrograms per millilitre.

53. There are several objections to this argument.

54. First, CAS is an adjudicative, not legislative body. It is not for CAS to write the rules of the FEI. As long as those rules are not incompatible with some relevant aspect of *ordre public*, be it competition law, the law of human rights, or Swiss statute, we have to apply them as they stand. For us the only *lex lata*, not the *lex ferenda* has relevance.

55. Even approaching the matter on the basis that the European Convention on Human Rights is incorporated into Swiss law or that there is a *lex judica* which qua international sports tribunal CAS must in any event apply (see CAS 98/200, at para 156), we find no aspect of any such law renders *ultra vires* a law which applies strict liability in the public interest of clean sport, or one which allows the presence of *"any quantity"* of a prohibited substance to trigger liability. (See further para 14.6 above)

56. It is moreover the case that EAMDC 2.1.2 and 2.1.3 recognise that provision may be made in the Equine prohibited list quantitative thresholds in cases where the substances can be produced endogenously or ingested from the environment or as a result of contamination. No such

provision has been made for Capsaicin; and there is no indication in the evidence before us that any is contemplated.

57. The case primarily relied on by the Appellant, TAS 98/222, was concerned with a specific substance nandrolone – and the CAS Panel was able to speak of a "grey zone" (paras 13, 14, 35) only because of a coincidence of the fact that the rule under scrutiny specifically required proof of "ingestion" (paras 30-31); coupled with a developing science indicating that nandrolone could be produced endogenously (para 10).

58. Those criteria for recognition of such a grey zone are absent in the case of Capsaicin. Professor Barker's first statement of 28th January 2009 accepts *"There is no evidence that Capsaicin is an endogenous substance in the horse"*.

59. Finally, the small amount of Capsaicin, it was agreed by all experts, could be a function of the time that it entered the horse's body. A large amount administered – or otherwise entering the horse's body – a significant period before detection, could diminish to a small amount by the time of detection as a result of natural forces.

60. Nor does the Appellant gain any purchase for his submission from the fact that Swedish trot and gallop sports have adopted thresholds for 16 prohibited substances if for no other reason than that Capsaicin is not one of them.

61. Accordingly, we must reject this alternative argument, advanced to us, we must acknowledge, more in hope than expectation.

I. Sanction

62. As a medication offence the period of ineligibility can be up to one year for a first offence (see EADMC Article 10.2).

63. The FEI Tribunal said:

> *"In considering the sanctions to be given to the PR in this case, the Tribunal takes into account the following (i) the fact that the PR is an experienced sportsman and that the behaviour of anyone at the top of the sport and particularly at the Olympic Games must be faultless since the eyes of the world focus on performances at such events; (ii) the nature of the substance involved which is not only a potent pain relieving substance, but also an agent that can be used for hypersensitisation purposes; (iii) the fact that the source of the presence of the substance has not been established by the PR; (iv) the fact that the actions taken by the PR to control all possibilities of contamination and actions taken following the positive finding to reveal its source were not at the same level as established by other PRs at the same or similar events; and (v) in regard to costs, the fact that the PR contributed to the prolongation of this case and, in particular, efforts to refuse acceptance of evidence argued by the PR's team during the second hearing to be of vital importance"*.

64. Unlike the position in the three other cases in which Capsaicin was found in samples of horses whose riders were competing in the Beijing Games (CAS 2008/A/1655; CAS 2008/A/1700 &

1710; CAS 2008/A/1654) where it was concluded that the substance came from the administration of Equi-Block, no explanation at all (as distinct from speculation) for the source of the Capsaicin in Camiro was provided. This has implications for sentence.

65. In order to engage a lesser sanction on grounds of lack of fault the PR must establish the source of contamination in order that his degree of fault or negligence can be assessed. It is not sufficient for this purpose to provide mere hypothesis (See CAS 2004/A/602).

66. Paragraph 90 of the FEI Tribunal's decision states:

"On the other hand and in mitigation, the Tribunal also considers: (i) the impeccable record and reputation of the PR; (ii) the hardship already caused to the PR including the loss of an Olympic medal; and (iii) the substance has not been previously detected in the context of FEI events and is often used by riders also for legitimate therapeutic reasons".

67. The relevance of those factors to mitigation to a sanction imposed under the EADMC Article 10 is debatable. However, we do not need to resolve this issue. Suffice it to say on that we see no basis for reducing the period of suspension as assessed by the FEI Tribunal.

The Court of Arbitration for Sport rules:

1. The appeal filed by Tony André Hansen on 19 January 2009 is dismissed.

2. The decision of the FEI Tribunal dated 22 December 2008 is upheld.

3. (…).