# RACING APPEALS TRIBUNAL OF NSW

## TRIBUNAL: Mr D B Armati

## RESERVED DECISION

## 5 JULY 2022

## APPELLANT RACING NSW

## RESPONDENT TREVOR SUTHERLAND

## LR 114(5)(e)

## DECISION:

1. Appeal upheld
2. Breach of rule found
3. Directions for penalty determination issued

## INTRODUCTION

1. On 24 February 2021 Racing NSW ("the Appellant") appealed against a decision of the Appeal Panel of 24 February 2021 to dismiss a charge under LR 114(5)(e) against licensed trainer Trevor Sutherland ("the Respondent").

2. On 8 September 2020 the Stewards of the Appellant concluded an inquiry and found the Respondent had breached LR 114(5)(e) and imposed a period of disqualification upon him of three years. In addition, for a breach of ARR 52, failing to report a death, he was disqualified for a period of six months and for a breach of ARR 229(h), false stable return, disqualified the Respondent for a period of six months. Each of those periods of disqualification to be served concurrently.

3. The Respondent appealed to the Appeal Panel on breach and penalty in respect of the 114(5)(e) matter and on severity on the other two charges.

4. On 24 February 2021 the Appeal Panel upheld the appeal on the 114(5)(e) charge and set aside the disqualification. The Appeal Panel stood over the issue of a penalty determination on the other two charges.

5. By this appeal by the Appellant it seeks the finding of the breach of 114(5)(e) and the imposition of the period of disqualification found appropriate by the Stewards of three years.

6. The Tribunal heard the appeal on 1 and 2 February 2021.

7. By agreement of the parties the Tribunal ordered that submissions be filed and the Appellant filed submissions on 13 December 2021, the Respondent on 29 April 2021 and the Appellant on 20 May 2022.

8. The Tribunal notes that on 11 May 2022 it issued an interlocutory decision finding that the appeal by the Appellant was within the jurisdiction of the Tribunal for determination.

## THE CHARGE

9. LR 114 is set out at the end of this decision and the relevant parts here provide as follows:

> "LR 114 Equine Welfare
> (5) ...where a decision has been made to retire a horse, ...and that horse has been domiciled in New South Wales for the majority of its life:
> (e) the horse is not to be, directly or indirectly, sent to an abattoir, knackery or similarly disposed."

The Appellant particularised the charge as follows:

"...licensed trainer Mr Trevor Sutherland did dispose of the registered thoroughbreds Redfu and Rozzi on or around 8 April 2020, to Mr Donnchadch Brown in the knowledge that Redfu and Rozzi would be slaughtered for the purpose of using the said horses for dog food."

10. The Respondent has at all times maintained a denial of the breach of the rule and is also of the belief that a penalty of three years disqualification is manifestly excessive.

**THE EVIDENCE**

11. As this matter has been the subject of the preparation of evidence, a Stewards' inquiry, an Appeal Panel inquiry and then a Tribunal hearing, there is a substantial volume of evidence. The key points are:

Emails and statements of Dr Garling; text communications; various stable returns and records of the Appellant; interviews with: Respondent, Brown, Menzies, Reardon, Taylor, Menzies and Joseph; numerous references; veterinary reports; statements of Bullock, Watson, Mannell, Brown, Mathieson, Wilson and Mrs Sutherland; the excluded list; statement of Oakley; transcripts of the hearings before the Stewards and the Appeal Panel; the submissions to the Appeal Panel; the reasons for decision of the Stewards and the Appeal Panel.

12. The new evidence before the Tribunal has comprised a statement of Dr Garling; a statement of Dr Sutherland; the Livestock and Slaughtering Establishments Code of Practice; embargo reports for Rozzi and Redfu; notes of Dr Garling; photographs; horse surrender forms; report entitled "A Framework for Thoroughbred Welfare"; bank statements of the Respondent and associated entities.

13. In addition, for the purposes of the jurisdiction application a number of exhibits not listed were in evidence.

14. Before the Tribunal oral evidence was given by Dr Garling, the Respondent, Mrs Sutherland, Dr Sarah Sutherland and Mr Shane Wilson.

**BURDEN OF PROOF**

15. The parties are in agreement that the Appellant bears the onus of proof in this case and it is to the Briginshaw standard and in particular in relation to that standard the fact that proof of serious misconduct requires proof of facts that are not reasonably capable of an innocent construction.

16. The parties are in agreement that the proof of contravention of the rule requires proof of knowledge and intention to engage in conduct which would contravene the rule.

**ISSUES IDENTIFIED BY THE PARTIES**

17. The Appellant submits that there are two issues for determination.

18. The first is a question of fact as to whether the Respondent did give Redfu and Rozzi to Mr Brown ("Brown") in the knowledge that they would be killed by Mr Brown and fed to his dogs.

19. The second is an issue of construction. That is whether, if the knowledge of Mr Sutherland is established, such conduct falls within the scope of the Local Rule.

20. In relation to the second issue the Appellant says that the manner of disposing of horses is similar to sending the horses to an abattoir or a knackery in that the horses have been sent or placed where they have been killed and used as pet food and this falls within the Local Rule.

21. The Respondent says that the primary intent of the Respondent in giving the horses to Mr Brown was for those horses to be used by him as hunters and jumpers.

22. It is said that the Appellant must disprove these facts.

23. The Respondent submitted to the Appeal Panel that in relation to the second issue that the Local Rule does not limit the application of the rule to food uses, but requires not only that the sole purpose of the killing be the creation of a product, but that the general nature and circumstances and processes involved bear a reasonable degree of similarity to an abattoir or a knackery. Therefore, similar will be by an operation at a commercial scale for the purpose of the creation of an animal product intended for resale or where the horse is killed using a method of destruction that results in death by exsanguination.

SUB ISSUES

25. The Appellant noted that the Respondent had previously suggested that the Appellant's case is a circumstantial one.

26. The Appellant rejects this and says it is a direct evidence case and that that relates to a text message, to which the Tribunal will return in detail, and that that text message demonstrates the Respondent knew the horses were to be fed to Brown's dogs.

27. The Respondent says that the Appellant is in legal error in stating that it is direct evidence because it is not, as it is not a confession and its meaning is contested. The Tribunal will return to the fact it is said to have been a joking illusion. It is, therefore, submitted that making sense of the text and deciding whether it was intended to be read literally or figuratively requires an inference to be drawn as to its meaning from the words read in context. It is said that there is then a need to draw a further inference as to his knowledge and intention eight days after sending the text. It is, therefore, said this is indirect or circumstantial evidence.

28. There is also a submission that this type of evidence may be tendency evidence.

29. The Appellant replies that the text is direct evidence and there is not a need to consider tendency evidence.

30. These submissions will be dealt with in more detail later.

31. The next sub issue raised by the Respondent is on the matter of quality of proof.

32. The Respondent says there must be clear and unequivocal satisfaction of the Appellant's case. It is that in applying the Briginshaw standards this may be as high as a criminal standard on the facts and circumstances here.

33. That is said to arise because there can be no more serious allegation than one which leads to a disqualification. It is submitted that the Appellant relies on inference cases and the Respondent quotes Gurnett v Macquarie Stevedoring Co Pty Ltd (1955) 55SR (NSW) 243 at 248, where Street CJ said:

> "...An inference is a reasonable conclusion drawn as a matter of strict logical deduction from known or assumed facts. It must be something that follows from given circumstances as certainly or probably true, and the mere possibility of truth is not sufficient to justify an inference to that effect."

34. The Respondent re-quoted from Briginshaw on this point that circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation.

**FACTS**

GENERALLY

35. The Respondent has been a licensed trainer for approximately 20 years and has no adverse matters recorded on his record. The Respondent described his premises as being about "50 acres" with plenty of feed. He described it as a developed training establishment.

36. The parties are in agreement that the defendant has a reputation, based in this case upon his evidence, his witnesses and his referees, of being an excellent horseman, known to re-educate and retrain difficult horses with particular care and attention and that he demonstrates a substantial love of the horse.

37. The case for the Respondent is that he has re-homed some 50 horses before the subject horses and that when they are given for rehoming they are always well fed and suitable for the particular recipient. A number of referees particularly referred to these facts. He is also known to have followed up the recipients of horses to check on the progress of the rehoming.

38. In addition, he has broken in some 5,000 horses.

39. He is known to support local clubs, especially picnic racing.

40. His wife, Mrs Sutherland, in her statement of 6 November 2020 detailed the re-homing practices of the Respondent, especially the fact of matching the rider to the horse and that whenever a horse is handed over for rehoming it is groomed.

41. There are two horses in issue in these proceedings and they are named in the particulars and they are Redfu and Rozzi.

42. The characteristics of the horses have been described in considerable detail.

43. In respect of Redfu that horse is described as a large retired racehorse that the Respondent bred. It was said to be unpredictable and not safe for an inexperienced rider as it was highly strung. The Respondent conceded that he had a lot of trouble riding him, but at the time of its disposal he had not found him to be difficult to ride.

44. At the time of handing it over the Respondent had formed the view that it could not be handled even by an experienced and reasonably expert professional rider as the horse would bolt and buck.

45. Rozzi had the same characteristics. A champion bronco rider and track rider, Jason Collins, told the Respondent he would not get back on the horse.

46. The Respondent told the Appeal Panel and the Tribunal they were not particularly dangerous and he had no trouble riding Redfu. The Respondent described how he had jumped them and believed they were suitable for a jumping business.

47. Mrs Sutherland said she had been trying to sell Redfu for approximately three months before it was given to Mr Brown.

48. The Respondent's daughter, veterinarian, Dr Sarah Sutherland gave evidence that Redfu, in addition to the above characteristics, was one she did not trust and she would not ride it. She opined that the horse required an extremely experienced and competent rider with a lot of time and, with regular riding by a competent rider, he could become trustworthy, but not for a weekend or nervous rider. It could only be ridden by an extremely competent experienced rider.

49. She did not know much about Rozzi and did not handle that horse.

50. Dr Sutherland was of the opinion that Redfu was a suitable candidate for euthanasia for behavioural reasons.

51. There are two other horses of relevance, being Witchblade and Hanging With Willy.

52. Each of these was given to Mr Brown a number of weeks after Redfu and Rozzi had been given.

53. Each of Witchblade and Hanging With Willy were shot by Mr Brown and fed to his dogs.

54. The Respondent described Witchblade as a lunatic, untrustworthy and a killer, who had put a boy in hospital, and it was not possible to walk behind him and he could not be ridden, except by an experienced person. However, he was a lovely horse to ride. It is noted Dr Sarah Sutherland assessed him as being a suitable horse for euthanasia for behavioural reasons.

55. Less has been said about Hanging With Willy, but it is apparent it had the same issues as Witchblade and the others.

56. Dr Sarah Sutherland said that Hanging With Willy did not have as bad a disposition as the other three horses and did not look good enough for dressage or eventing. He could take off on an inexperienced rider. He would have been difficult to re-home for their clientele.

57. The other horse of relevance to these proceedings is Bless You Toby.

58. This horse had died on and was buried on the Respondent's property in July 2020. The relevance of that horse is that the Appellant lodged a false stable return and failed to tell the Stewards, as required, of the death. The Respondent says that he did not report the death because he thought he would be fined and he would not appreciate a fine because he was struggling financially.

59. The stable return he lodged says the horse was at Brown's property and was spelling.

60. The Tribunal will return to the evidence in more detail, but the Respondent told the Tribunal he was checking the stable return form for that horse and not submitting it and he was not an experienced computer operator and he cannot explain how he completed the form saying the horse was at Brown's property. He says that the insertion of Brown's address happened accidentally and he also accidentally lodged the form. It is noted he had told the Stewards he did that return at the same time as the stable returns for Witchblade and Hanging With Willy and he put their addresses correctly in for those horses, but not so for Bless You Toby and that entry was a mistake.

## THE ARRANGEMENTS FOR REDFU, ROZZI, WITCHBLADE AND HANGING WITH WILLY

61. Graham Mathieson ("Mathieson") used the Respondent as a trainer.

62. Graham Mathieson had known Brown for about ten years before the subject incident and had been told by Brown that Brown had a hunting and jumping business and used hounds.

63. Brown had asked Mathieson about retired horses for use in Brown's business. He had owned horses with brown and re-homed horses with Brown.

64. Mathieson speculated he had told the Respondent about Brown's hunting and jumping business and possibly a horse he had re-homed with Brown as a hunter.

65. Brown had told Mathieson that he had shot a horse for dog food, but Mathieson did not expect that to happen with his retired racehorse.

66. Mathieson does not recall telling the Respondent that fact.

67. On or about 3 April 2020 the Respondent gave Redfu and Rozzi to Brown, who shortly thereafter shot them and fed them to his hounds.

68. The Respondent in his first interview on 20 August 2020 said he had only met Brown a few times at the races, but did not know much about him and thought his income was from fireworks. He knew Brown had been a stable foreman.

69. The Respondent told the Appeal Panel that Mathieson had told him a few times that Brown took Mathieson's old horses and re-homed them in his hunting business and placed them with city people. He was also told that Brown had taken 30 to 40 horses and rented them out.

70. The Respondent told the Appeal Panel the only thing he knew from Brown in a limited amount of conversation was Brown would school them in the mountains, jump them in the forest and then give them a good home. The Respondent said Brown told him he had hounds that chased and if the horses did not make jumpers he would find other places for them.

71. The evidence establishes that the Respondent knew little about how a hunt operates.

72. The Respondent says he had a discussion with Brown at the races and in his first interview said:

> "He just said at the races one day, 'If you have any horses that you think can jump, I'm happy to take them."

And later he said:

> "...and he just asked me, 'If you've got anything that can jump', you know, like jumping horses, and I said, 'We jump and play around with a lot of our horses and get them going, try to get them so people can have them so they've got a life after us, yeah, as I said.'"

73. To the Appeal Panel the Appellant said in respect of Redfu:

> "Yeah. Well, we just had him there. We were riding him and, as I said, Donny just mentioned, he said, 'Oh, have you got any horses', you know, like and I said, 'Well, I might have two or three down there', you know, and that was the conversation, you know, and then this has broke out and if he can do that, what he explained, you know, he'd try, you know, get

him going. I knew he could jump, you know, and he had them sort of facilities in the hills and that. That was perfect for this horse, you know, so then I thought I'd give him every opportunity to have a wonderful life."

74. In cross-examination before the Appeal Panel he said:

"... He just said, 'Have you got any' and I said, 'Yeah, I probably have got a couple', you know, and, as I said, that was all. Whether we were interrupted, I don't know. That was as far as the conversation went and mostly all I said, you know, was, 'They're there. They're not real fast. They're slow. They'll probably end up hound food', you know."

75. Before the Appeal Panel in cross-examination and before the Tribunal in cross-examination the Respondent said he was not sure if this conversation was at the races or on the phone, but confirmed that reference to hounds catching them was a joke.

76. The Respondent says he did not offer the horses at the time of the conversation because they were at the races and interrupted.

77. At the time of that conversation the evidence establishes that the Sutherlands had decided to move the horses on as Mrs Sutherland was trying to sell them.

78. The Respondent told the Tribunal that he wanted to think about Brown's request.

79. In cross-examination before the Tribunal it was put to him that conversation did not take place and he had changed his evidence to justify the text message. This is contrary to the evidence before the Appeal Panel set out above, where he did say he had a few times.

80. The Respondent said to the Tribunal that he had gone home to think about it and realised he had some that could jump.

81. In his interview on 21 August 2020 Brown, in answer to a question about how the arrangements to pick up the two horses from the respondent had occurred, said:

"Q. How did that come about, the arrangement there?

BROWN: He just messaged me and said that he had another two horses for me.

Q. Was there any mention to be used for pet food or hound food?

BROWN: No, but that's what I presumed, that that is why he was giving them to me."

And later:

"BROWN: ...Trevor is very good at rehoming them and maybe for some reason they couldn't be rehomed, you know, that's my assumption.

Q. Have you had conversations with Mr Sutherland in the past about horses coming here, or have you asked for horses if he couldn't rehome them?

BROWN: No, no, not under any circumstance, but he does know that I hunt and I do have dogs and that we do feed flesh from time to time."

And later:

"Q. But you do maintain that Mr Sutherland knew that they were coming here?

BROWN: Yes.

Q. And they were going to be used as hound food?

BROWN: Yes.

Q. Any idea why Mr Sutherland would know that, that they were going to be used as hound food?

BROWN: Since we've had horses with Trevor, he knows what I do and that I have the hounds, and so on and so forth, yeah, so we've had probably unofficial conversations, you know, chats – not probably one-on-one, there's probably been half the stable there, half the stable staff have been there, type of thing, you know?"

And later:

"Q. Had he ever asked if you would take a horse to be used for hound food?

BROWN: No, no."

82. Brown had confirmed that he had horses with Mathieson and Mathieson raced them with the Respondent and had a share in horses trained by the Respondent.

83. Brown said he was not a personal friend of the Respondent, but had a business relationship with him.

84. In her statement of 6 November 2020 Mrs Sutherland said:

"I had a conversation with Mr Brown a few years ago... Mr Brown was pointing out to me a nice horse he liked. I said words to the effect that, 'It might be coming available' and, 'We usually sell them for $1,000.' He said words to the effect, 'I don't pay for them. I just get them and give them a home - I do hunting and jumping with them. If you have any that

are big, scopey jumping types, I would be interested in taking them on and trying them for it'. He said words to the effect that, 'If we had any available [he was] always keeping an eye out for jumping, hunting horses' and that he, 'had a lot of acres, a lot of acreage' and was, 'always trying to find good jumpers', 'bold jumpers that would take on a fence'.

I had understood from Mr Brown's conversation that his hunting involved riding cross country and jumping fences and other obstacles with hounds chasing foxes and that he is from Ireland and that the sport is big there."

85. Former stable foreman Shane Wilson said in his statement of 2 November 2020:

"I was aware of Don asking Trevor for horses. Don asked me for horses too. From time to time he would say to me words to the effect that if we had any horses that I felt would be good for his hunting business to let him know or if we had a horse I thought would suit him as a jumper for eventing. Don said words to the effect that he knew Trevor is a good horseman and his horses are well trained so the majority of his horses would be reasonable for what he needs. I'm aware that he chased horses at the races and with other trainers too and he told me words to the effect that he had contacts in Canberra from whom he could get horses that were good for his business.

Don never said anything to me or in my presence about killing horses or using horse for dog food....

.....

Don said in such a case he would spell them and try them again for riding horses for his business after a while and that he spends time with them to re-educate them. That is what I assumed would happen with Redfu and Rozzi."

86. On 31 March 2020 the Respondent sent a text to Brown:

"If you need some hound food probley got 2 maybe 3 down the back paddock."

Brown replied:

"Super, when do you want them gone?"

87. The Respondent told Dr Sarah Sutherland Brown was to pick up Redfu and Rozzi.

88. On 3 April 2020 Brown collected Redfu and Rozzi from the Respondent.

89. The evidence of the Respondent, Mrs Sutherland, Dr Sarah Sutherland and Shane Wilson establishes that the Respondent, in accordance with his usual

practice on sending a horse for re-homing, groomed the two horses to a show condition and wormed both of them with a 27 day treatment.

90. Brown's transport was assessed by the Respondent, Dr Sarah Sutherland and Shane Wilson as a substantial, well appointed horse transport vehicle of the highest standard.

91. The Respondent told the Stewards:

> "...The horses were both in good order. I give him a rundown, a Mr Brown a quick rundown, what they were like to ride and he loaded them on his truck and away he went."
>
> "Q. So Mr Brown gave you the address and that was then recorded into the stable return as the horse has then officially been retired?
>
> SUTHERLAND: Yes, sir."

92. The Respondent told the Appeal Panel:

> "Q. Did you have a conversation on the day with Mr Brown about the horses?
>
> SUTHERLAND: Yeah, yeah. When we were loading them I just said, 'Now, look' - I just ran through what both their traits were. I said, 'Look, I get along good with them.' You know, I don't get real excited when I'm riding. I just sort of sit there and keep the ears in front of you and a leg each side and I find most times they're pretty right, you know, and I'd explained to him what they could do. Rozzi could just buck. If you jumped on her and revved her right up, she'd come back at you, but if you just got on her and worked away and, you know, she was a nice mare after that, but - so I run through what their traits were and they were drenched, trimmed, (inaudible), so just run through that and said that all their stuff was up to date."

93. Brown has given no evidence on any conversation that took place with anyone when he collected the horses.

94. Dr Sarah Sutherland was present at the handover and in her statement of 22 June 2021 said:

> "18. I could hear the conversation between Mr Brown and my father from where I was working and I walked over and said 'Hello'. Mr Brown was just talking about how good a horseman he was and dad was saying they were a challenge and required a bit of work and Mr Brown seemed quite keen on that idea. Again, I assessed his manner as a bit cocky, but I certainly thought he seemed very confident.
>
> 19. There was no talk of horses being used for dog food. I was not aware of that being a possibility. Mr Brown had said previously that he was part of a hunt club and he said words to the effect 'They are going to

be trained to hunt' and that he, personally, was going to ride them. He also needed a lot of horses - as it appears people pay to come and ride these horses on a hunt.

20. The handover took about 20 minutes or so. Mr Brown parked the truck in open bays. He had a chat while we swapped the headstalls. We put them a truck and had a further chat..."

95. The Respondent gave evidence and documents are in evidence to show he correctly filed a stable return for the transfer of the two horses to Brown.

96. The evidence establishes the Respondent made no inquiry of Brown about the welfare of Redfu and Rozzi after they were collected.

97. Later arrangements were then made for the horses Witchblade and Hangin' With Willy to be rehomed with Brown after Brown requested additional horses.

98. Brown arrived with the same truck on 10 July 2020 and had a brief conversation with the Respondent.

99. The Respondent told the Appeal Panel:

"...I walked out and talked to Don and, once again, just run through, you know, their little habits and quirks and, you know, 'Watch Witchblade. Don't let anyone walk behind him', you know, like on the wash and tie-up, you know, he can really let go'."

100. Brown gave evidence to the Stewards he did not tell the Respondent he had shot Redfu and Rozzi and that the Respondent did not ask about their welfare.

101. The Respondent told the Stewards, the Appeal Panel and the Tribunal that he did not ask because he believed Redfu and Rozzi and then Witchblade and Hangin' With Willy were going to a good home. The Respondent concedes the failure to ask was a mistake.

102. The Respondent had also groomed Witchblade and Hangin' With Willy to the same standard as Redfu and Rozzi.

103. Shane Wilson gave evidence in his statement of 2 November 2020 that at the handover of Witchblade and Hangin' With Willy that he had a conversation with Brown:

"31. Don said to me words to the effect that once he picked them up he would take them home and put them in a paddock for a while and then get them out and try them and give them every opportunity for his business. This was consistent with what he had said to me before. I did not ask further questions because I already knew he did the hunting.

32. There was no suggestion by Don (or Trevor) that horses would be shot for dog food or at all."

104. Chloe Mannell, student and trackwork rider, said in her statement of 2 November 2020:

> "14. Mr Brown did not speak to me directly, but from what I heard him say I understood he had driven quite a distance to pick up the horses and that he had his own farm property to which he was taking the horses. After some discussion about the nature of the two horses, Mr Brown said words to the effect that he was an accomplished horseman and could handle the horses and that he would get them going and they would work for him.
>
> 16. There was no reference in the conversation to any possibility of the horses being killed and no such implication from anything I heard. There was nothing in the conversation that suggested any possibility of the horses being killed at any point and I had no other reason to think so either. Apart from the conversation I witnessed, there was no stable discussion of any such possibility..."

105. The Respondent correctly completed stable returns for the transfer of Witchblade and Hangin' With Willy.

> SOME ADDITIONAL EVIDENCE FLOWING FROM THE ABOVE EVENTS
>
> DR GARLING

106. Dr Carly Garling is the Official Veterinarian and Welfare Officer of Racing NSW.

107. Amongst her functions is the duty of tracing retired racehorses for welfare purposes.

108. She became involved in this matter by following up on the welfare of the retired horses Redfu and Rozzi.

109. On 17 August 2020 she spoke to Brown and her evidence on that conversation is contained in her written report of 17 August 2020. Her evidence also comprises notes she made on 9 April 2021 and a statement of 12 April 2021 and, in addition, she gave evidence to the Tribunal.

110. The Respondent challenges the accuracy of Dr Garling's evidence and it is necessary to examine it in some detail.

111. The critical parts of her report of 17 August 2020 are:

> "7. Mr Brown also stated that he was given those two horses as he had many working dogs.
>
> 8. When I asked Mr Brown if that meant that he used the horse meat to feed his working dogs, he confirmed this was correct.

9. I asked Mr Brown if these horses were shot, and this is how they were euthanised? He confirmed this was correct.

10. I asked Mr Brown if the trainer who had given him these horses (Mr Sutherland) was aware of this. Mr Brown confirmed that Mr Sutherland was aware.

11. Mr Brown also stated that Mr Brown (in later evidence corrected to Mr Sutherland) rehomes the majority of his horses, however, the ones that he couldn't find a home for, he gave to Mr Brown for pet food.

12. Mr Brown stated that over the last few years, he has been given four horses in total (including Rozzi and Redfu), he wasn't sure of the names of the other two horses."

112. Dr Garling had conversations with officers of the Appellant and those conversations led to her statement of 12 April 2021. The relevant parts are:

"BROWN: ....Trevor gave them to me because I have a lot of working dogs.

ME: Do you mean to say that you were given the horses to feed to your working dogs?

BROWN: Yes...

ME: Was Mr Sutherland aware that you were going to feed the horses to your dogs?

BROWN: Yes. That was the reason he gave them to me. Trevor knew I had a lot of working dogs.

ME: Were the horses shot?

BROWN: Yes. Trevor is usually good about rehoming. He will try and rehome a horse if he can. But he just didn't think these horses would get good homes. So he gave them to me to feed to the dogs.

I've got two other thoroughbreds here, but I'm not going to use these for the dogs."

113. Dr Garling was cross-examined before the Tribunal.

114. She stated that prior to 17 August 2020 she had done some 300 checks on retired racehorses and from 17 August 2020 to 1 December 2021 she had done a total of 450. She stated that at the end of each of working day she writes her reports and there could be up to 45 reports on any one day.

115. She confirmed that in preparing her initial report she had used no documents and had made no contemporaneous record of the conversation. She

did not feel it necessary to do so because she was concise and clear in her recollection of her conversation with Mr Brown.

116. She had made the report in the evening after the conversation.

117. Dr Garling stated that she filters out information she thinks is not important.

118. In respect of the subject conversation of 17 August 2020 she stated that she had been driving when she took the call. After the call was concluded she had a conversation with officers of the Appellant.

119. She had made notes on her laptop on 9 April 2020 and these were put in evidence.

120. It is apparent that each of the three versions in writing have differences, in particular, her initial report as compared to her statement, noting of course that her statement is an attempt to put the conversation in a "he said/she said" context.

121. There was substantial cross-examination on the differences between the report, the notes and the statement. The below summary of that cross-examination initially refers to the paragraph number in the report. The differences are said to be:

6 - wasn't sure - didn't know
6 - looked up - checked
7 - as he had - because
7 - many - lot of
8 - used to feed - given to feed to...dogs
9 - shot and euthanised - no reference euthanised
10 - was so aware - Sutherland aware feed to dogs
10 - nil - reason he gave
10 - past tense - future tense
11 - gave to Brown for pet food - fed to dogs
11 - could not find a home for them - didn't think they get good homes

122. The above is a brief and cursory summary and there are points that were made in cross-examination.

123. In particular, it was established by cross-examination that paragraph 6 of the report incorrectly stated that Brown had contacted her, whereas Brown was responding to an email from Dr Garling to him and Brown had rung and left her a message and she had returned his call.

124. At this point the Tribunal notes and will return to the fact that Brown corroborated parts of the evidence of Dr Garling.

BROWN

125. This evidence of the interview of Brown by the stewards on 21 August 2020 is critical to the case for the Appellant and is referred to in detail.

126. The Stewards, after introductions, had conversations with Brown in which they referred to the euthanisation of Redfu and Rozzi and the use of the carcasses for hound food.

127. The interview in detail continues as follows:

> "Q. How did that come about, the arrangement there?
>
> BROWN: He just messaged me and said that he had another two horses for me.
>
> Q. Was there any mention to be used for petfood or hound food?
>
> BROWN: No, but that's what I presumed, that that is why he was giving them to me.
>
> Q. Any idea why you would presume that that was why he was giving them to you? Did he make any comment about the horses or had he had any issues with them that you were aware of?
>
> BROWN: I wasn't aware of any issues, but I do know Trevor is very good at rehoming them and maybe for some reason they couldn't be rehomed, you know, that's my assumption.
>
> Q. Have you had conversations with Mr Sutherland in the past about horses coming here, or have you asked for horses if he couldn't rehome them?
>
> BROWN: No, no, not under any circumstance, but he does know that I hunt and I do have dogs and that we do feed flesh from time to time."

And later

> "BROWN: Yes, like when a horse comes here, I try it, I ride it. If I don't think it's suitable for my job – my job is in hunting or jumping – or if the head isn't right, then I'm not going to put my name to them and sell them on for some other kid to get hurt off. They go to the hounds.
>
> Q. The two that came here, *Redfu* and *Rozzi*, did you ride those at all?
>
> BROWN: Yes, I rode them both and I deemed them not suitable for, we'll say, my job or resale, and consequently they were put to the hounds.
>
> Q. But you say Mr Sutherland was fully aware of that when they came here?
>
> BROWN: As far as I am aware."

And, interestingly, he then went on to say:

"Q. Those being Hangin' With Willy, Bless You Toby—

BROWN: No, nothing to do with me.

Q. And the other one was *Witchblade*.

BROWN: No, not here. Never came through my hands whatsoever."

128. And in relation to what will be set out later in respect of an incorrect stable return by the Respondent he was asked:

"Q. The one to spelling at this property was *Bless You Toby*.

BROWN: No, not spelling here anyway under any circumstance."

And later:

"Q. But you do maintain that Mr Sutherland knew that they were coming here?

BROWN: Yes.

Q. And they were going to be used as hound food?

BROWN: Yes.

Q. Any idea why Mr Sutherland would know that, that they were going to be used as hound food?

BROWN: Since we've had horses with Trevor, he knows what I do and that I have the hounds, and so on and so forth, yeah, so we've had probably unofficial conversations, you know, chats – not probably one-on-one, there's probably been half the stable there, half the stable staff have been there, type of thing, you know?"

And later:

"Q. Had he ever asked if you would take a horse to be used for hound food?

BROWN: No, no."

129. And what will be relevant as to the rules later:

"Q. You weren't aware of that rule at all?

BROWN: I wasn't aware – not that I wasn't aware, it's probably my fault, you know, I don't know the rules. I wasn't aware of those rules. I know the rule about you can't send them to a knackery or an abattoir. I was aware of that rule."

130. Brown attended the Stewards' inquiry on 8 September 2020 jointly with the Respondent and was subject to a charge for breaching LR 114(5)(e), to which he pleaded guilty and received a four year disqualification.

131. The Tribunal notes that the interview of Brown provides corroboration of the accuracy of the initial report of Dr Garling as to her recording of Brown's beliefs.

132. At the Stewards' inquiry Brown's evidence had changed.

133. When questioned at the inquiry as to paragraph 11 of Dr Garling's report, set out above, that:

> "Q. ...Did you say that to Dr Garling?
>
> BROWN: I did, but as a - probably I didn't explain myself probably correctly. As a plan B - there's always a plan A and a plan B.
>
> Q. What was plan A?
>
> BROWN: Plan A was to try them, if they're suitable for my job, and if they weren't suitable for my job, well, then plan B was you can put them down and use them.
>
> Q. So when you picked up these two horses, Redfu and Rozzi, was there any discussion between yourself and Mr Sutherland about these horses going?
>
> BROWN: Yes.
>
> Q. Was there any discussion about if they didn't work out as a jumping horse that they were to be slaughtered and fed to your dogs?
>
> BROWN: No.
>
> Q. You never said that to Mr Sutherland?
>
> BROWN: I did not.
>
> Q. Are you certain about that?
>
> BROWN: I'm certain."

134. The Tribunal notes that Brown in his evidence to the Stewards' inquiry then confirmed the accuracy of paragraphs 12 to 14 of Dr Garling's report which, while not set out above, referred to being given four horses by the Respondent and that Brown himself had two retired racehorses he would not use for pet food and that he was previously a licensed person as a foreman.

135. Brown gave evidence to the Stewards' inquiry about the horses Redfu and Rozzi.

"BROWN: ...I rode them both and I found - to be honest, I found them quite difficult, to be honest, and I deemed them not suitable for my job and I also deemed them not suitable to go onto someone else for the simple reason I'm not going to put my name to horses that someone else is going to take and they get hurt off them, you know, it's not worth it.

Q. So in relation to those horses, you deemed them not suitable for your job. What specifically were you trying them for?

BROWN: To get them to - for jumping horses in the hunting field."

And later:

"Q. So you deemed that Rozzi and Redfu weren't suitable on the basis that they were looking to kick your hounds and you said they were difficult horses to ride at the same time?

BROWN: Correct.

Q.: So as I understand it then, the two horses were then shot?

BROWN: Correct."

136. At the Stewards' inquiry the comment made by Brown in his interview as to the presumption set out above was then questioned as follows:

"Q. When you that's what you presumed, I take it that when you were receiving, you were receiving them on the basis that they were to be used for hound food?

BROWN: Well, if they didn't work for plan A, well, then, yes, for plan B.

Q.: So that was always open to you to do that if they didn't work out?

BROWN: Yes.

Q: Do you say that Mr Sutherland had knowledge of that?

BROWN: No, not to the best of my knowledge he didn't, no.

Q: Not to the best of your knowledge?

BROWN: Correct.

Q: Because I thought when you were spoken to by Dr Garling and also by Mr Shultz, you thought that Mr Sutherland was fully aware.

BROWN: I presume, but presume doesn't - doesn't mean yes or no."

137. Having again confirmed the presumption about the Respondent's knowledge, he was then asked:

> Q. You say that you never had a conversation with Mr Sutherland about horses going to be shot and used for hound food?
>
> BROWN: No.
> ...
>
> Q. Mr Brown, on what basis did you presume?
>
> BROWN: Trevor rehomes a lot of horses, okay, and he knows what I do.
>
> Q. When you say that he knows what you do, in what sense?
>
> BROWN: He knows that I take in horse and I try them and if they don't work for my job, well, I have another job for them.
>
> Q. And that is?
>
> BROWN: And that is they're used for my dogs.
>
> Q. And Mr Sutherland is aware of that?
>
> BROWN: I presumed he was, but he said he...
>
> Q. On what basis do you presume that?
>
> BROWN: I think it's widely known what I do for sport.
>
> Q. And is the text message from Mr Sutherland to you about, 'I have a couple of horses for hound food', is that part of your presumption?
>
> BROWN: Oh, well, yeah, yeah, but there's always - there's always a plan A with me. Look, it doesn't matter if I'm getting anything, there's always a plan A and a plan B, regardless of someone says. If they said, 'This horse can't be ridden', I'll give them a plan A first. They always have a plan A first. I do it personally. Everything has a plan A.
>
> Q. And then there's plan B?
>
> BROWN: And the plan B.
>
> Q. Is Mr Sutherland aware of the plan B or the plan A?
> ...
>
> Q. The plan B potentially if they didn't work out was to shoot them and feed them to your hounds?
>
> BROWN: Correct."

And later:

"Q. Did Mr Sutherland ever know that plan A failed?

BROWN: No."

EVIDENCE OF THE RESPONDENT

138. The Respondent has been interviewed twice by the Stewards, given evidence at the Stewards' inquiry, then before the Appeal Panel and, lastly, before the Tribunal. There is a substantial volume of evidence and it is necessary again to refer to it in detail.

139. The Respondent was interviewed by the Stewards on 20 August 2020:

"Q. Were they gifted to him or did he purchase them off you?

SUTHERLAND: No, I was giving them to him. As I said, he's got a hunt club and he takes them to see if they'll jump."

And later:

"Q. So the hunt club that Mr Brown operates, that is in respect to dogs that he has, is it?

SUTHERLAND: Yeah, hounds or – I don't ask, you know, I've never been there or anything, but he always takes a big team of horses around and rents them out to city people, from what I can gather, and they go chasing the scent, you know, whatever it is, they jump fences and whatever, you know. I don't know what you call it."

And later:

Q. Okay, and how did you come to know Mr Brown?

SUTHERLAND: He's been around, like I think he used to be Nick Olive's foreman.

...

SUTHERLAND: He just said at the races one day, 'If you have any horses that you think can jump, I'm happy to take them.'

...

SUTHERLAND: And he just asked me, 'If you've got anything that can jump.'...

...

Q. You understood that what Mr Brown was going to do with the horse was just use them for jumping and for the dogs to chase around?

SUTHERLAND: Yes.

Q. You were aware that Mr Brown had working dogs or hounds?

SUTHERLAND: I knew he had hounds, yeah.

Q. ...Dr Garling then asked Mr Brown if that meant that he used for meat to feed his working dogs and he confirmed that this was correct. What would you say to that, Mr Sutherland?

SUTHERLAND: I don't know anything about that, sir. As I said, as far as I know, he was taking them to jump them and give them a home, sir.

Q. ...Were you aware whether the horses were dead or alive?

SUTHERLAND: No, sir.

Q. You had no knowledge of it?

SUTHERLAND: No, sir.

Q. So you were of the belief that the horse would have still been in the paddock at Mr Brown's property?

SUTHERLAND: Yes, sir.

...

SUTHERLAND: As I said, sir, I thought he was going to try them and see if they would jump for him.

Q. Mr Brown also stated that Mr Sutherland rehomes the majority of his horses, however, the ones he couldn't find a home for he gave to Mr Brown for pet food.

SUTHERLAND: No, sir, I thought he was taking them to jump. He always said, 'If you've got anything that can jump, I'll take it and try it for jumping' and, as I said, both of them were big, tall, rangy horses and he could jump with them."

And later:

"Q. You were definitely aware that he had dogs there. Did it cross your mind that maybe that is what they might have been used for?

SUTHERLAND: I suppose it did, sir, if they don't make it, but I thought they'd make it.

Q. So you did have some knowledge that there was a chance that they might have been slaughtered—

SUTHERLAND: Well, yeah, fed to the dogs, yeah.

Q. There is a message on 31 March, Mr Sutherland: "If you need some hound food, probably got two, maybe three, down the back paddock'. What do you say to that?

SUTHERLAND: Yes, sir.

Q. So you did know they were—

SUTHERLAND: Well, yeah, I knew there were hounds, sir, yeah, but I thought they'd jump, so—

...

SUTHERLAND: As I said, sir, I thought he jumped them. I suppose if you put two and two together there's a chance that he can do what he likes with them afterward. As I said, I thought they'd both jump, sir, you know, he's got a lot of horses there so--

Q. By that message, the offer had been made to be used for pet food.

SUTHERLAND: Well, I just wanted to get rid of the horses, sir, he gets them for free and, you know, as I said to him, I said they jump, they've jumped at home.

...

SUTHERLAND: I sent them there to try them and jump them, what he does with them after that, well, that was up to him, but I would've thought they both jumped, you know, I knew they both jumped, so--"

And later:

"SUTHERLAND: ....The option was up to him when he has them what he does with them, but—

J. SHULTZ: No, but it was definitely an offer made to Mr Brown for pet food.

SUTHERLAND: Yes, sir, yeah."

140. And later, having been questioned about Brown's statement to Dr Garling that his own two retired horses would not be used for pet food, was asked if there was anything he would disagree with. He then replied:

"SUTHERLAND: No, sir. As I said, he's got the hounds and, you know, that's always an option for him down the track."

And later:

> "Q. No, so I put to you: Is that why, with these two horses Rozzi and Redfu, the option was made to Mr Brown to use them for pet food?
>
> SUTHERLAND: Well, as I said straight away at the start, you know, I thought he was going to try to jump them first and if they didn't make it, after that it was up to him to do what he wanted with them, and I said, well, I'd give them to him because he can take them, try them, see how you go with them, you know? I knew the option was there if they didn't make it, what would happen, but I thought he would try them for a start, sir."

141. The Appellant was re-interviewed by the Stewards on 22 August 2020.

142. The Respondent stated:

> "...Don Brown always said to me that if I had anything could jump he would take them and try and if they didn't work out at that, well, he had hounds and he'd probably place them there as a second option, so you know..."

143. The Respondent gave evidence to the Stewards' inquiry on 8 September 2020 and amongst other things he stated:

> "Q. ...Can you give us some clarification as to what that text message means, 'If you need some hound food.'
>
> SUTHERLAND: ...They're slow, you know. I thought they wouldn't outrace the hounds. That was all it was. It was just a statement that they wouldn't get away from the hounds. They can't keep up with the picnics, you know, and the third horse, as I said ... There was nothing in the statement. I suppose it's a poor choice of words, but all it was was that they were slow and they probably wouldn't be able to outbeat his hounds.
>
> Q. What's the reference to 'food' mean?
>
> SUTHERLAND: Well, they're slow, just slow and the hounds would probably catch them.
>
> ...
>
> SUTHERLAND: ...No, it was just nothing.
>
> Q. I put to you what it means that you've got two, maybe three horses in the back paddock that you're going to send to Mr Brown so that he could use them for dog food.
>
> SUTHERLAND: No, sir, that's not - you know, it's not what I meant anyway. What I mean was what I said. They were slow horses and that

was it. Like I said, it's a bad choice of words and I'm not an educated man, sir, and, you know, as I said, Mr Brown had always asked me for jumping horses. Them horses could jump. I jumped them on the - we've got an arena set up where I do a lot of jumping and we do a lot of rehoming of our horses. We've rehomed so many horses and I do it at my cost, don't even charge the owners to keep them there to do it and then we do a lot of dressage or jumping work and I'd jumped these horses and, you know, they were big brave, big brave jumping sort of horses. So I thought they might have suited and I suppose it's just a bad choice of words, but that's all I meant."

And later:

"SUTHERLAND: Because Mr Brown is a very experienced capable rider, you know, and he's rode all over the world and he said, 'I'd be able to handle it', you know, so. They're the sort of horses that can jump well...

Q. ...You say there was no intention for you to send those horses to Mr Brown on the basis that he was going to shoot them for pet meat?

SUTHERLAND: No, sir.

Q. Did you ever think that was going to happen?

SUTHERLAND: No, sir. The first option was always he was going to try the horses, you know, and that's what I thought.

Q. What was the second option?

SUTHERLAND: I don't know, sir. I just - we only worked on option A.

...

Q. But that doesn't answer my question. Did you think there was a possibility--

SUTHERLAND: I hadn't really thought past that option, sir."

144. It was then put to the Respondent that there had been a definite offer referred to in the first interview that they were for Mr Brown for pet food, to which the Appellant had agreed and in relation to that record of interview statement he said:

"Q. ...When you made that response to Mr Shultz, doesn't that indicate that you knew that those horses were going to be sent for pet food?

SUTHERLAND: No, sir. I misunderstood the question, sir, but, no."

145. It was then put to him again and he responded:

"SUTHERLAND: No. No, an offer - no, the offer was for jumping horses."

And later:

> "SUTHERLAND: No, sir. We never talked about plan B. We talked about, you know, how he'd go through a procedure to give these horses an opportunity for a life.
>
> ...
>
> Q. Were you aware that he fed flesh to his hounds?
>
> SUTHERLAND: Not particularly, sir, no.
>
> Q. Were you or weren't you aware?
>
> SUTHERLAND: No, no.
>
> ...
>
> Q. You weren't aware that Mr Brown--
>
> SUTHERLAND: Not that he feeds horse flesh, no."

And later:

> "Q. Was there any discussion, that 'If the horses don't work out, they can be returned to me, rather than be slaughtered'?
>
> SUTHERLAND: No, sir."

146. The Respondent was questioned at length before the Appeal Panel on 6 November 2020.

147. In examination in chief:

> "Q. What did you understand from as to how horses would be used in his business?
>
> SUTHERLAND: ...The only thing he ever talked to me about was that he had his horses, he had hounds that, you know, that chased or whatever they did with them and he'd take them and rehome them and he said, 'If they don't make jumpers, I would normally find other places for them'....
>
> ...
>
> Q. Has Mr Brown ever discussed with you euthanising horses or killing them, whatever process he might use?
>
> SUTHERLAND: No. We never ever had a conversation about euthanising or killing horses. The only thing we talked about was taking them to retrain them as hunters."

And later:

> "Q. Would either of those horses have been suitable for rehoming in the normal rehoming program?
>
> SUTHERLAND: No.
>
> Q. Why is that?
>
> SUTHERLAND: ...They were both horses that could bolt or buck ... horses that were very dangerous ... hurting someone and Don Brown had told me as a world class rider, if I could ride them, he would have no trouble riding them..."

148. He was then questioned about the text and his evidence of a prior conversation with Brown:

> "SUTHERLAND: ... and he said, 'If you can ride them, son, I can ride them' ... you know, I said, 'Well, they're not real fast. You'll probably end up hound food.'
>
> Q. What did you mean by that?
>
> SUTHERLAND: It was a joke ... I thought he was just mucking around and said, 'You'll probably end up being hound food. They'll catch you', you know, and we giggled and walked away ... I suppose it was a bad choice of words, but it's the tongue in cheek, you know.
>
> Like most Saturday nights after the races, if you look at my texts there, 'I'm going to kill that jockey when I get him Monday. I'm going to rip his head off. You know, like I told him to go back and he led by four.' Unfortunately, everything you say is not meant the way it looks. That was said in jest and it was just a couple of boys having a bit of tongue in cheek and, you know, they weren't fast horses and it was sent that way and, as I said, if I would have thought it was bad, I would have deleted it off my phone. I didn't think it was anything to hide, you know ..."

And later:

> "Q. So had you had an opportunity to see Rozzi and Redfu interact with the working dogs?
>
> SUTHERLAND: Yeah, yeah. They would spend most of the day off with me running around and playing with me and, you know, when I'm shoeing they'd run underneath them and in between their legs and, yeah. No, my horses are pretty good like with that sort of stuff ...
>
> Q. Did you foresee them having any difficulties working with hounds on Mr Brown's property?

SUTHERLAND: None."

149. The Respondent was then cross-examined before the Appeal Panel.

150. The Respondent was cross-examined about a conversation he had with Mr Brown prior to the text message, part of which has just been set out:

> "SUTHERLAND: ... All I said, you know, was, 'They're there. They're not real fast. They're slow. They'll probably end up hound food', you know.
>
> Q. Did you say that?
>
> SUTHERLAND: I said that to him. I said that to him. It was nothing but a joke, 'They're not fast. They're just not fast', you know, and it was just tongue in cheek, 'They're not fast. They'll probably end up hound food', you know, and that was how the text come about and when I did come home and look at it and take into thing that's – as I said, we're not friends, you know, we're not close friends, we're not mates and the text was more to jolt his mind to remember what we talked about."

151. Mr Sutherland was then questioned as to why he used those words and not, for example, words to the effect of he could give the horses to Mr Brown to retrain or to re-home and the Respondent conceded he did not say that. He was then asked:

> "Q. ...but why would you suggest to Mr Brown the words 'hound food' at that point in time?
>
> ...
>
> SUTHERLAND: Donny, they'd catch him. You know, like it was a tongue cheek joke...
>
> Q. Or would it be because you actually knew that Mr Brown fed flesh and horse meat to his hounds? You knew that?
>
> SUTHERLAND: No, sir.
>
> Q. I put it to you that you did know that at that time, after that conversation.
>
> SUTHERLAND: No, not really, no, sir. I didn't know what he fed racehorses or anything, you know, but he said that he fed them meat, you know, like he said he got carcasses and cows and sheep. I never had a conversation with Mr Brown about killing or euthanising any racehorses.
>
> Q. ...The question was that Mr Brown had told you that he in fact was feeding flesh or meat to his dogs and you knew that.
>
> SUTHERLAND: No. Well, he said that he fed them flesh, yeah.

...
SUTHERLAND: ...but I didn't know whether that was cow, sheep, goat.

Q. Horse?

SUTHERLAND: Yeah.

Q. Could it have been--

SUTHERLAND: But I didn't know, sir..."

152. And later the proposition was put to him again:

> "Q. If that was the case and you were in fact giving these horses to Mr Brown for the purpose of them being tried as jumping horses, why wouldn't you said to him, 'I've got two or three horses that will make a nice jumping horse for you' or that, 'By an experienced rider, will make a nice jumping horse'?
>
> SUTHERLAND: No. Well, yeah, I – I should have worded it better. It's poor wording but, as I said, it was basically sent to try and remind him of the conversation we had, you know, what wasn't an in depth conversation at the races. It was basically just to jolt his mind that's what we talked about."

153. The above being of course in relation to the subsequent text message.

154. And later:

> "SUTHERLAND: ...It was a tongue in cheek and that was all it was, sir."

155. The cross-examination continued in respect of the text:

> "Q. You've said to the Panel today that you thought Donny would be the hound food in that conversation. That's what you said.
>
> SUTHERLAND: I just said they'd probably get caught, you know, like that's how it was said. I don't understand the sport a great deal. If you're not going to outrun them, well, they're not going to be fast."

156. It was then put to him the text quite clearly indicated that Brown could have the horses to slaughter and give to the dogs. The difference between his record of interview and his evidence to the Appeal Panel was pointed out to him.

157. In particular, the fact that he told the Stewards in his first interview they would be used for pet food that he responded as follows:

> "SUTHERLAND: ...I think I was responding to that pet food part, you know. As I said, I was mainly offering them for jumping horses."

158. In answer to a question of the Principal Member:

"Q. ... You didn't literally mean the message was, 'Do you want some horses for dog food?' You meant something else?

SUTHERLAND: Yeah. No, it was obviously referring to like, you know, my text about the hound food ... it was a tongue in cheek thing at the races and then, as I said, I just really wanted jig Donny's mind about it..."

And later:

"Q. You've got a memory of this joke regarding hound food and the memory doesn't extend to being certain whether it was a phone call or whether it was at the races?

SUTHERLAND: No. It was a tongue in cheek, stir him up and, you know, I often do it with John."

159. Again he was then cross-examined about his statement in his first interview about being fed to the dogs and he replies:

"SUTHERLAND: ...Don and I never had the conversation about slaughtering racehorses.

...

SUTHERLAND: Once again, I'll answer, we've never had that conversation, never had that conversation with Mr Brown, never, and I think later on you will see that Mr Brown corrects himself there and says he'd assumed that I knew. Assumed and knowing are two different things, sir. I never ever had a conversation with Mr Don Brown about slaughtering racehorses?"

160. He was then questioned about option A and option B and he said:

"SUTHERLAND: Well, it wasn't an option B to me. It was an option, you know, A – the only conversations we've had, you know, and what Donny does with the horses after that is Donny's thing ... well, I hadn't ever thought about option B because we've only ever talked about option A...

...

SUTHERLAND: ...I had no option B..."

161. The Respondent was cross-examined before the Tribunal at some length. He was asked:

"Q. If you had known that there was a real possibility ... that if they didn't work out ... he would shoot them and feed them to the dogs, you don't seriously say that you would consider that a safe and good home to send them to, do you?

SUTHERLAND: As I said, we would take them back, we would take the horses back. If he would have just rung up and asked me would I take the horses back because they weren't working, I would have been happy to bring the horses back, sir.

...

Q. You knew that when you gave Rozzi and Redfu to Mr Brown that there was a chance that at least they would be killed and fed to his dogs, didn't you?

SUTHERLAND: No, sir.

...

SUTHERLAND: It crosses your mind, it does cross your mind then, but I didn't think about it prior."

And later:

"Q. You knew that feeding the horses to Mr Brown's hounds was always an option for him down the track, didn't you?

SUTHERLAND: No, sir."

And later:

"Q. You knew that option was there, at least, for Mr Brown using the horses for pet food if they didn't make it as jumpers, didn't you?

SUTHERLAND: (Inaudible). We never talked about that. The only conversations I had with Mr Don Brown, he'd take the horses, he would give them every possible opportunity to be placed in the right home in the future which in the interview with ... which Mr Brown had, he had the same conversation with him that he can place the horses in all different levels.

...

Q. ...Now is that you recognising, contrary to the your denials now that you knew that this was an option, correct?

SUTHERLAND: I didn't know it was an option he was going to do that, no, sir.

Q. Do you have any sensible explanation for why you have said this to the Stewards?

SUTHERLAND: As I said, sir, our options were he was going to jump the horses, you know.

Q. The truth is that you did know that he fed or might feed these horses to his dogs, that's right, isn't it?

SUTHERLAND: No, sir.

...

SUTHERLAND: We never had a conversation about euthanising any horses. Our conversations were he would jump them.

...

Q. You remember this conversation with him, do you, at the races when you were talking about what he fed to his dogs?

SUTHERLAND: Not clearly, sir, not clearly, but I know we had a conversation. He said, 'I just get all the cows and sheep around. Feed them kibble.'

...

SUTHERLAND: He said he'd get all the fallen stock around the area.

Q. Fallen stock which you interpreted as including horses, correct?

SUTHERLAND: I imagine it would, sir, you know a lot of ponies and stuff."

And later:

"Q. To be clear, you had a conversation with Mr Brown about what he fed to his dogs?

SUTHERLAND: Yes, sir.

Q. As far as you recall that was at the races?

SUTHERLAND: Yes, sir.

...

Q. And is it the case during that conversation with Mr Brown, he referred to the fact that if he deemed a horse unsuitable for his business, he may kill it and feed it to his dogs?

SUTHERLAND: No, sir."

And later:

"Q. And I assume by 'city people', you mean people who are not professional riders.

SUTHERLAND: Not professional riders. Didn't house their own horses. As I said, Shane Wilson probably had more conversation with Donny about this than me because he told me more about this side of it than I did through Donny.

Q. And I take it by 'city people' that you mean generally pretty inexperienced?

SUTHERLAND: No, you must be an experienced rider to ride in the hunts. It just means you don't keep your own horse, you know."

162. He was then questioned about his earlier comments about the dangers of the two horses and was then asked:

"Q. They were both difficult horses to ride, weren't they?

SUTHERLAND: They were a challenge.

Q. Do you deny they were difficult to ride?

SUTHERLAND: They were a challenge.

Q. So you do deny they were difficult, is that right?

SUTHERLAND: That's right, I do. They were just a challenge. You had to concentrate. If you concentrated on what you were doing, they were all a walk in the park, but that's for an experienced rider.

...

SUTHERLAND: If there was an expert horseman, no worries in the world, but I wouldn't have sold him to anybody inexperienced. Once again, Don Brown is world class jump rider ... Yeah, I felt comfortable where he went. I thought he was very well placed."

163. He was then questioned on the fact that he did not tell the Stewards in his interview of 20 August that the text was a joke. He said:

"SUTHERLAND: I wasn't asked about it on 20 August...

Q. They were asking you for an explanation of the text message and you didn't say anything it being a joke, did you?

SUTHERLAND: It was a joke. It was just mucking around.

Q. And you didn't say anything about it in the subsequent interview on 22 August, did you?

SUTHERLAND: It being a joke?

Q. Yes.

SUTHERLAND: I don't think so.

...

Q. You can't say it's a joke if it doesn't make sense, you've at least got to be able to explain what the joke is, Mr Sutherland.

SUTHERLAND: Well, a lot of jokes don't take (sic) sense, sir. I just said the horses are slow, you know. It's a joke."

164. He was then asked about the subsequent text:

"Q. I'm just asking about timing now, because there's a few weeks between when you say this conversation occurred and when the text was sent.

SUTHERLAND: That's right, jolting his memory. A joke."

And later:

"Q. And the reason why you were so unwilling to admit that you knew there was at least a risk that Mr Brown would shoot these horses and feed them to his hounds, your reason you deny that is because you know if you did know this, you wouldn't make a joke like that, that's true, isn't it?

SUTHERLAND: No, it's not.

Q. This text message demonstrates you knew that this was something he did from time to time, you knew this might happen to Redfu and Rozzi and that is why you were sending them to Mr Brown to use as hound food?

SUTHERLAND: No.

165. And in relation to both the horses being show jumpers he was asked:

"Q. Neither Redfu nor Rozzi could do show jumping, could they?

SUTHERLAND: Yes.

...

SUTHERLAND: I jumped them at home, sir. I know they could jump.

Q. Or three day eventing?

SUTHERLAND: They would make three day eventers."

166. As set out above, Shane Wilson in his statement corroborated the Respondent that he would not sell horses to anyone for the sake of selling and always matched a horse with a rider. Shane Wilson also said that Brown never said anything to him about killing horses and using them for pet food.

167. Shane Wilson also stated that Redfu and Rozzi were used to dogs and would not kick hounds.

168. In cross-examination before the Tribunal he said:

> "Q. Mr Brown didn't tell you that if he deemed the horses unsuitable for his business, those horses would be shot and fed to the dogs?
>
> WILSON: No, he never mentioned that at all.
>
> Q. If you had known that Mr Brown might that, that would have changed your view of Mr Brown, wouldn't it?
>
> WILSON: Yes, probably. Most likely.
>
> Q. And it would not have been appropriate to give him the horses in those circumstances, would it?
>
> WILSON: Well, possibly not, no. Well, he told me he would use them in his business."

169. Dr Sarah Sutherland in her statement of 22 June 21 said:

> "30. Since the case I became aware of the text message that was sent by my father. My father is well known for his jokey personality and to my observation men around stables make jokes all the time, including in bad taste. The dynamic I observed between him and my father was that Mr Brown was rather cocky, as I have said, and he said to my father to the effect that he could 'ride anything' and my father responded somewhat dryly to the effect that 'Mate, you're probably not that good'. I would understand the text message was a tongue in cheek joke in the same vein.
>
> 31. Had the question arisen and the opportunity for retraining and employment offered by Mr Brown had not been available, I would, (had I known this was an option) have certified Redfu and Witchblade as requiring euthanasia as their only end of life option for both humane, health and benefit of the animals."

170. Dr Sutherland was cross-examined before the Tribunal. She was asked:

> "Q. If you had known when the horses were handed over to Mr Brown they would have them shot and fed to his hounds, would you have approved of the horses being given to Mr Brown?
>
> DR SUTHERLAND: Absolutely not.

...

Q. So there was at least a risk, wasn't there, when these horses were handed over to Mr Brown, that he wouldn't be able to retrain them for use in his hunting business?

DR SUTHERLAND: It might have been appropriate for him to ride. Like, I guess I was more thinking that was going to be his, you know, one of his horses. I assume he rides and competes."

And later:

"Q. ...There was a risk that they won't work out in Mr Brown's business and therefore there would be a risk that they would be shot and fed to his hounds which would be inappropriate, do you agree with that?

DR SUTHERLAND: That would be inappropriate, yes."

And later:

"Q. And your father hadn't told you, had he, that he had perceived even any risk that these horses would be shot and fed to Mr Brown's dogs?

DR SUTHERLAND: No."

171. Mrs Stephanie Sutherland was interviewed by the Stewards on 21 August 2020. She said:

"Q. Did Mr Brown ever say to you that he would like some retired horses for the purpose of pet meat?

S SUTHERLAND: No, he never said to me about any of that, no.

...

Q. Were you aware that Don Brown used horses for pet meat?

S SUTHERLAND: No, no."

172. In relation to the horses she stated:

"S SUTHERLAND: Yes, Don Brown took him. He's got a heap of hunting dogs and he was going to try them to do jumping, and hopefully they were suitable..."

And later:

"S SUTHERLAND: ...Once the horses left our place, like we just don't have any control of that really.

...

S SUTHERLAND: The horse was given every opportunity. I probably tried for - even while he was racing, probably the last three months that we had him I kept trying to find him homes, but there just wasn't experienced enough people to be able to handle him..."

173. Those arrangements for Rozzi were confirmed as being the same for Redfu. In her statement of 6 November 2020 Mrs Sutherland stated:

"26. I thought that giving Redfu and Rozzi to an experienced horseman like Mr Brown for a try at hunting and jumping would be their best chance for a successful career after racing. I expected that he would be giving them the training necessary to be a jumper and ride with the hunt.

27. ...Mr Brown's evidence to Stewards ... kicked or bit his hounds and that's why he deemed them unsuitable for hunting. If the horses had been bitten or threatened by the hounds I expected they may have reacted, but otherwise Redfu and Rozzi were used to dogs and animals running around the stables and there was never a problem at our stables...

28. I had no knowledge or suspicion of Mr Brown intending to use Redfu and Rozzi for dog meat."

174. Mrs Sutherland was cross-examined before the Appeal Panel on 6 November 2020. She said:

"S SUTHERLAND: Yes, I said that. I said that when my – my husband said that he had found a suitable home (inaudible).

Q. When he said he'd found a suitable home, did he tell you where that home was?

S SUTHERLAND: I think he said with Donny to hunt and do the jumping over fences."

175. Mrs Sutherland also confirmed that she had attempted to sell Redfu.

176. Mrs Sutherland was questioned before the Tribunal on 2 December 2021. The evidence was

"Q. And what if he couldn't get them going, what do you think would happen to them?

S SUTHERLAND: He could sell them on.

...

S SUTHERLAND: With any of horse that leaves our place you don't know if it's going to work out with the new owner.

...

Q. If you had known Mr Brown was going to shoot the horses and feed them to his hounds, you wouldn't have approved of giving him the horse, would you?

S SUTHERLAND: No.

...

Q. And so you really didn't have a solid basis on which say whether these horses would or would not work out with Mr Brown, did you?

S SUTHERLAND: No."

THE RESPONDENT'S FINANCES

177. The Tribunal notes that the Respondent could not sell the horse Redfu and the numerous pieces of evidence that the Respondent gave both Redfu and Rozzi to Brown.

178. In her interview on 21 August 2020 Mrs Sutherland said:

> "...If we had secondary TAB meetings a lot more around, we definitely would have been racing them still. They weren't good enough to be racing full TAB meetings, and there have been a lot of races cut off lately, and just nowhere – we don't have paddocks ourselves, so we can't afford to be agisting all of these horses. Ones we own ourselves, we can't afford to do it, no races--"

179. The Respondent in his second interview on 22 August 2020 stated:

> "...but with no non-TABs and no picnics, and then COVID, we're struggling. We're dying out here, unfortunately, racing in the country, we're dying."

And later:

> "...but once again money was tight and things, doing it tough ... I'm going to get fined again, you know, and I can't afford it, I just can't afford it.
>
> I've got ten staff and eight children and, you know, we're doing it tough..."

And later:

> "SUTHERLAND: ...but I just find it so hard with no non-TABs and picnics. They're the sort of race meetings where we normally can get a bit of money to live on, you know, because we own a lot of horses ourselves, I think, we're good supporters of the community...

....

SUTHERLAND: And I'm quite attached to my staff, I didn't want to put them off, you know, through the COVID, and I've kept them all going. It's been tough, you know, I'm just mentally tired. I'm worn out."

180. As noted in the above quote, the reference to inability to pay a fine related to his incorrect return for Bless You Toby, to which the Tribunal will return.

181. The Respondent was questioned on his finances at the Stewards' inquiry and, having again been questioned in respect of the stable return for Bless You Toby, said:

> "...That was there. We're going to get fined again, you know, struggling to make a living as it is and keep all my staff employed and I've been working hard and I've been 18 days trying to keep everyone there. Kept them together, you know, sort of the last thing - there was the bushfires early in the year and..."

And later:

> "...We've got no opportunities. We're dying. We are just dying, you know.

182. The Respondent gave evidence on his finances to the Appeal Panel. The Appellant, consistent with other evidence given in his favour, referred to his assistance to owners and others and, for example, said:

> "It's just some people I've trained for, our owners, and I might have them for two or three months and I don't charge them a cent."

183. The questions continued in respect of his general financial situation and he said in his evidence in chief:

> "Well, of course with COVID, you know, in the bush it's been a very tough yeah. You know, we've lost so many races, you know. Not only that, this year we lost, in our area with the fires, we lost so many meetings right through from Christmas to March, fires, you know, and then we got off that and we get into COVID, you know ... and there's no picnics and there's non-TABers and, you know, we've been through a very, very difficult time and the world is going through a very difficult time now and we understand that but, you know, the country trainers and owners still deserve a right have to try to make a living as well."

184. In relation to the horse Bless You Toby the Respondent gave evidence that an owner owed him a substantial amount of money in respect of fees for that horse and did not pay it.

185. In evidence in chief he was asked about the impact of the proceedings upon him and the financial impact being not good. He stated:

"...running out of chippies pretty quickly and I'd say we'll lose our house in a few weeks. Maybe we'll just go back to living in the stables with the kids..."

186. He then described how he put all his money back into racing and the fact that he doesn't charge much as a trainer.

187. He was cross-examined before the Appeal Panel:

"Q. ... you've given an explanation to the Panel about the circumstances surrounding your stable and your business in general during COVID and you also mentioned that the fires had also played a part in your business struggling at that point in time. Is that correct?

SUTHERLAND: Yes, sir, yeah.

Q. Is it fair to say that, as a consequence of that, your business was financially struggling at that point in time?

SUTHERLAND: No, sir.

Q. What were the effects then on your business in terms of COVID? You said words to the effect of you were doing it tough...

SUTHERLAND: Well, at best we were breaking even, you know, we were breaking even. We were able to operate and we were able to continue to keep all my boys and girls employed, you know ... I'm not really in the game to make money. I just want to survive at the end of the day. I want to put back into the industry. I think I've done that to the best of my ability ... the 12 months before this year with the COVID, we were $45,000 down...

Q. The very fact you were $45,000 down must have meant that there was some financial impact that these things had on your business?

SUTHERLAND: They certainly had an impact ... we were a lot luckier in that we were able to keep training and keeping my boys and girls employed ... sacrificed a lot to keep them ... and the floods were very, very bad. We had three weeks under water...

Q. Feeding horses is not a cheap exercise. Feed is costly.

SUTHERLAND: Yes, sir. Like I've spent hundreds and hundreds and thousands of dollars feeding them last year and I'll go without a feed before they will go without a feed."

188. The Respondent gave oral evidence to the Tribunal on his finances and put in evidence financial records.

189. In his evidence in chief to the Tribunal he was taken to various financial records and the evidence that they demonstrated in respect of three accounts.

190. In respect of prize money his account itself showed on 3 April 2020 a credit of $8,000 and between April and December that year it increased to $45,000. Between April and June there was $75,000 in that account.

191. In the same periods for the sales account there was $33,500 and then $68,000 and then $11,000. And, finally, $92,000 in additional sales.

192. For the same period for training fees the figures were $63,000, $245,000 and then $48,000. And, therefore, in the period from December 2019 to June 2020 it demonstrates he had received about $500,000 in training fees.

193. In cross-examination before the Tribunal the loss of non-TAB and picnic races was conceded and that they provided good turnover money to him and he then said:

> "SUTHERLAND: Well, I didn't need the money. We had money in our bank accounts. It was probably the best we had been, but we were running a business so that was what we had at that time. We were probably the most financial we had been for a long time. For most racing people, they wouldn't have that much money sitting there in their bank account.
>
> Q. You were the most financial you had been for a long time?
>
> SUTHERLAND: Yes, sir.
>
> Q. So would you agree that these races normally gave you a bit of money to live on or not?
>
> SUTHERLAND: Or give me a nice top up, sir.
>
> Q. Would you agree these races normally gave you a bit of money to live on or not?
>
> SUTHERLAND: It would help. It would certainly help putting up fences, sir. At any time we go to the races, it would help us.
>
> Q. Now you were struggling to make a living as a result of the cancellation of these races, weren't you?
>
> SUTHERLAND: I wouldn't say struggling, but like every business in this country and probably the whole world, we had to work very hard to break even. I think if you're breaking even these times, you've done sensationally well..."

194. It was then put to him that he had previously said he was struggling because of a loss of meetings and COVID and that that is what he had said to the Stewards in his interview. He replied

"SUTHERLAND: That is an accurate position of every country trainer at the moment, sir, but my financial position at that stage was quite good really, but we had been restricted from our trade, you know. Our trade had been heavily restricted through COVID. But I'm very lucky, I do a lot of breaking in as well. A good part of my income is from breaking in horses. Don't go to the races, so that's what sets us aside from most of the other trainers that we have multiple legs in our business to keep us going.

...

SUTHERLAND: Money was - all our bills were paid, sir, all our wages were paid, so I would say okay.

Q. Was money tight?

SUTHERLAND: I always had money to pay our bills. Never borrowed any. Never owed a bill.

Q. What's the answer to my question, Mr Sutherland, was money tight?

SUTHERLAND: When you are in the racing trade, money is always tight, sir, but we were in a very self-sufficient place now like at that stage to pay our bills and, you know, you can go and ask anyone I dealt with, did I owe them money and everyone will say I paid my bills.

Q. So you're saying money was tight, but it was always tight?

SUTHERLAND: It always is tight, sir, has been for 20 years. We've always only just rubbed our line and that's all we needed to do in life to survive."

195. He was then questioned about his evidence on Bless You Toby and the fact he could not pay a fine:

"SUTHERLAND: I could, sir, because as the bank accounts explain, you know I could have covered that.

...

Q. ...So the evidence that you gave just now that could afford it was untrue, wasn't it?

SUTHERLAND: It's like anything, sir. We were struggling. We were making ends meet, but it was hard work to make ends meet, you know. I certainly, you know, don't like just giving money away for the sake of giving it away. As I said, it was an honest mistake. I was very upset when I, you know, found him passed away..."

And later:

"SUTHERLAND: You don't have to pay your fines anyway, it comes out of the racing ... They take your fines out of your racing prize money...

Q. What explanation do you have for saying to the Stewards that you couldn't afford it?

SUTHERLAND: Well, it was very tough times. The world was in place we've never been before...

Q. What explanation do you have for telling the Stewards that you couldn't afford it?

SUTHERLAND: As I said, it would have been tough to find more money again, but it was there if I had to pay it.

Q. One of your daughters is Georgia Rose Sutherland?

SUTHERLAND: Yes, sir.

Q. She said that during 2020 you were very stressed with the financial stress of COVID and the loss of racing meetings, do you agree with that?

SUTHERLAND: Yes, sir.

Q. So when you told the Appeal Panel, and the video that we've just seen, that you weren't worried about money, that was untrue?

SUTHERLAND: Well, I stress about everything, sir..."

And later:

"Q. The reason you're so reluctant to accept that you couldn't afford a fine and that you were financially stressed and that you were doing it tough and money was tight is because you realised that could be seen as a reason to get rid of Redfu and Rozzi, that's right, isn't it?

SUTHERLAND: No, sir. Never had any problem buying feed; hay shed is always full of feed.

...

Q. Feeding horses is costly, isn't it?

SUTHERLAND: Yes, sir.

...

Q. One of the reasons for that was the cost of keeping them?

SUTHERLAND: No, sir. I've got 50 acres on the river. I don't even need to feed them. I've got sufficient feed to feed them in the pastures.

Q. So you say the cost had nothing to do with you looking to rehome them?

SUTHERLAND: If there would have been costs, I would have sold them.

Q. You didn't have anyone to sell them to, did you?

SUTHERLAND: Well, I would have tried to sell them, but I was happy to give them to Donny because I thought they were a perfect match.

...

SUTHERLAND: ...There was no hassle, if they stayed in the paddock or didn't stay in the paddock. I've got plenty of feed. I've got 50 acres for them to run around. There's room and options, and feed has never been a problem. I've got horses I've had there for 34 years and they're still running around.

...

Q. The true position is that the cost of keeping the horses was one reason why you wanted to rehome them, that's true, isn't it?

SUTHERLAND: No, sir.

Q. And the true position is you couldn't afford them?

SUTHERLAND: That wasn't an issue. I had no trouble keeping them. As I said, I've got oodles of feed. Always had hay sheds full of hay. It was not a problem."

And later:

"Q. ...You've been under a lot of pressure with the reduction of racing...

...

SUTHERLAND: I was under stress...

...

SUTHERLAND: It put a lot of extra pressure on everybody in the industry, sir.

Q. Including you?

SUTHERLAND: Yes, sir.

Q. And you talked yesterday about losing your house, do you remember that?

SUTHERLAND: Well, yeah, I was worried about losing the house. I've got concerns about that now."

196. He then gave evidence that he had a mortgage on the house where he was making mortgage repayments, was meeting hundreds of thousands dollars a year in feeding the horses and had ten to 15 staff and casuals and he is driven by a good reputation for paying his staff and treating them well and he did not cut anyone's wages during the troubles.

197. The Tribunal notes that the bank statements put in evidence corroborate the Respondent's evidence as to the balances in his various accounts at the time stated.

THE STABLE RETURNS

198. The Respondent's stable return for Bless You Toby led to a charge by the Stewards for a breach of AR 229(h) of making a false declaration to the effect that Bless You Toby was spelling at Yass when in fact it was deceased. A disqualification of six months was imposed, to be served concurrently with other penalties, including the three year disqualification for the breach of the rule the subject of this appeal.

199. The Appellant says that the Respondent's evidence on this issue goes to his credit.

200. The returns for Redfu and Rozzi, Witchblade and Hangin' With Willy and other horses have been referred to and are in evidence.

201. Before the Respondent was interviewed by the Stewards, they had looked at the stable return for that horse.

202. The stable return for Bless You Toby is number 17, dated 13 July 2020 and lodged by "online trainer" and states that the reason the horse has left the stable was for "spelling" and gives an address for the horse's location as being Yass.

203. The Respondent was interviewed on 22 August 2020 in respect of this.

204. When questioned about it by the Stewards the Respondent said:

"Yes, sir, that was a mistake on my part. Bless You Toby was spelling at my place. He passed away on 7 July, just natural causes ... I should've rung you and now I'm going to get fined again..."

205. The Respondent continued in relation to the financial issues surrounding this return which was set out above.

206. At their inquiry on 8 September 2020 the Stewards asked a number of questions about this issue. The Respondent said:

"SUTHERLAND: As I've always said and I've said everyone, this horse, I must have accidentally bumped it. He was spelling at Donny's when I was doing it on the computer and I said Donny knows nothing about this horse or I didn't realise that I had him down. He was spelling at home and when I put the other horses for me I must have bumped it. I'm not a real rock star on these computers and that and I've been trying to do a bit ... So we've been doing the office work ourselves and I was trying to do a little bit of what I could with the stable returns and that and somehow - I did one the other night with all these horses that have been leaving my stables and somehow I come up with Donny's address again on two of them and I had to take it off and I don't know if's the top one on the thing that I'm bumping. I'm not quite sure, but that's my fault there and that's nothing at all to do with Donny."

And later:

"SUTHERLAND: ... I made a mistake there, like I said, you know. I might have said - I don't know how I ended up with Donny's. Like I said, I done the stable returns for them other horses and I must have bumped it because he was spelling at my place and he never had nothing to do with Mr Brown.

...

Q. So that lodgement of the return, I put to you, then is not an accurate reflection of what took place and it's a declaration to say that the horse is spelling when in fact it's a false statement and it was dead.

SUTHERLAND: Yes, sir, and I don't know how I come up with Mr Brown's, you know, like and, yeah, that - I've made a mistake there on it, I've said, you know, and I should have told the Stewards..."

And later:

"SUTHERLAND: I'll put my hand and I apologise for that and I pride myself on being honest ... and I made a mistake there and I - you know, I'm definitely sorry and I'm not quite sure how I got Donny's address on it, you know. Like Donny knows nothing of it.

Q. The address of Mr Brown wasn't intended, but it just came up as--

SUTHERLAND: Accidental and, as I said, the other night somehow I ended up there..."

207. Before the Appeal Panel on 6 November 2020 the evidence is:

"SUTHERLAND: ... I'm not proud of myself for lying because I don't lie and, yeah, that was how that come about and I put my hand and take responsibility for that all day long, take a kick in the arse, you know, and didn't think about the stable return.

When I done Donny's I remember looking the same day to make sure Toby was at home and he was and, as I said, I shouldn't be allowed to touch computers and I remember getting him up, but I also remember pushing the buttons to come out. I probably pushed the same button because I only work on memory. Unfortunately, I'm not - I don't know what all them buttons do, but I remember I pushed this one, that one and that one and pushed that one and come out of it and that's what I've done with Toby and that's how it must have place him. I admit doing it, but I admit that the other address was just a total accident on that day and, as I said, I'll put my hand up all day long and say I didn't put the stable return in and I'll take a kick in the arse for that and I'm very sorry, but I done that and, you know, there was nothing to hide. It was just an unfortunate thing that went on, as I said, I'm disappointed in myself for doing that.

...

SUTHERLAND: ...Now I have Donny's address in there again a few times and Steph ended up, 'Just keep it out. Just don't do it. You'll just get us in more trouble.'

Q. Do you know how Mr Brown's address was getting in there?

SUTHERLAND: I think it's the top one on our computer. It sort of half goes on memory when you had the horses going to stud...

208. On 1 December 2021 the Respondent was cross-examined before the Tribunal and the evidence is:

"Q. And so you then subsequently lodged a stable return saying Bless You Toby was at Brown's property?

SUTHERLAND: I agree that was accident, sir.

Q. Just to be clear about that, you told the Stewards' inquiry you don't know how Mr Brown's address ended up on that stable return, correct?

SUTHERLAND: Yes.

Q. When you gave evidence before the Appeal Panel, which we've seen, you say it was an accident. What were you intending to do in relation to that form you were filling out for Bless You Toby, you were filling out at that time?

SUTHERLAND: Nothing. I thought he was down as spelling at my place, sir.

Q. You were putting in a stable return for Bless You Toby?

SUTHERLAND: I don't - I transferred the two of Donny's over and then I thought I'll just check where Toby is. He was at my place. I thought he

was spelling. That's right. I thought he was there and, as I said, I know I shouldn't have done it...

...

Q. So you were trying to fill out a stable return to say he was--

SUTHERLAND: I was checking where he was on the thing. You know, I thought he was and I had him down as spelling and then I didn't know how I got him into Don Brown's thing. I don't know.

Q. Were you putting a stable return or were you intending to put in a stable return for Bless You Toby.

SUTHERLAND: I was checking what the stable return...

Q. Is the answer for that "No"?

SUTHERLAND: Whether it was active or whether it was spelling at my place.

Q. So you weren't intending to put in a stable return?

SUTHERLAND: I was checking what it was.

Q. So you weren't intending to put in a stable return, you were attempting to check, is that right?

SUTHERLAND: I was checking it, yes.

Q. And you say you accidentally put in Mr Brown's address, correct, and then you accidentally lodged the stable return for Bless You Toby, is that what you're saying?

SUTHERLAND: Well, that's how it's come, sir, but I don't even know how. As I said, I don't do a lot on computers. I'm not very sharp, I'll admit that. As I said, I done Don's and I was checking and Don's thing is the top of our computer.

Q. Mr Sutherland--

SUTHERLAND: And I put me hand up, admitted it was a mistake. I've got no problem with that, but I don't know how I done it, sir.

...

Q. You're saying the address accidentally came up and then you accidentally lodged it?

SUTHERLAND: Yes. I don't know how I done it, sir. I don't even know how I got his address there..."

And later:

> "Q. Mr Sutherland, what explanation can you give for telling the Stewards something that is completely at odds with the explanation you have subsequently given throughout proceedings?
>
> SUTHERLAND: It was just a simple mistake. That's what it was. Unfortunately, I made a mistake.
>
> Q. You made a mistake?
>
> SUTHERLAND: I can't read and I can't write very good and there is no excuse, but I made a mistake."

And later:

> "Q. No, you understand my question, I'm asking you how you came to say this to the Stewards, when you are now saying what you said to the Stewards is untrue?
>
> SUTHERLAND: No (inaudible). It was a mistake at the time that I done it. I was as horrified to see it was in there as anyone else when I found out and then I put my hand up. I took it on the chin. I said I made a mistake there; I will wear that all day long."

209. The Tribunal notes a number of other occasions when he was questioned and he repeatedly said he had made a mistake.

210. In her statement of 6 November 2020 Mrs Sutherland said:

> "37. Trevor is not good with administration or using the computer. I usually do stable returns and paperwork for the stables, but stood back from that when I had my second baby in January...
>
> 38. After the disqualification, I assisted Trevor with the stable returns - I saw ones that he had started to fill in and found that on some he mistakenly had the wrong address and I corrected before they were submitted."

211. In very brief terms the Tribunal notes that the stable returns, which are exhibits in evidence, show:

> Redfu - return number 14, 8 April 2020, lodged by Respondent and the reason it had left was as a retired equestrian.
>
> Rozzi - return number 11, otherwise the same particulars for Redfu.
>
> Witchblade - return number 17, 13 July 2020, same particulars again as for Redfu, but in addition the reason is that it has gone as a jumping horse.

Hangin' With Willy - return number 12, 13 July 2020, same particulars as for Witchblade.

KNOWLEDGE OF LOCAL RULE 114(5)(e) AND THE RULES GENERALLY

212. Neither the Respondent nor Brown knew of the subject rule.

213. In his interview of 20 August 2020 Local Rule 114(4) was read to the Respondent and he replied:

"SUTHERLAND: Well, I didn't know that, sir, I didn't know that rule."

214. Before the Appeal Panel on 6 November 2020 the Appellant repeated that the two subject horses were not suitable for rehoming in the normal rehoming program.

215. In cross-examination before the Appeal Panel he was asked:

"Q. In terms of your understanding of the Rules of Racing, you've given evidence to say that you were aware that horses couldn't be taken to a knackery or abattoir. You were aware of that rule?

SUTHERLAND: Yes, sir.

Q. How did you become aware of that rule, Mr Sutherland?

SUTHERLAND: Just, you know, from talking around the track. You know, like I had heard that you can't send a horse to a knackery and, you know, I haven't sent any horses to the knackery, you know.

Q. And you're aware also that a horse couldn't be disposed of in a similar manner to a knackery or an abattoir?

SUTHERLAND: No, sir, I was not aware. I wasn't aware of the finer details. I knew that you could not send a horse to the knackery or abattoir and I didn't send these horses there. I sent these horses as jumping horses...

Q. Is it, Mr Sutherland, that you didn't think that you were breaching the rules by giving them to Mr Brown to slaughter?

SUTHERLAND: Sir, I didn't give them to him to slaughter. I give them to him for jumping horses.

Q. Was it your understanding of the rule that if you gave to a person out there, rather than a knackery or an abattoir, and that person then slaughtered the horse, that you would be breaching the rule? Was that your understanding?

SUTHERLAND: No, sir. I didn't know that part of the rule but, as I said, I didn't give horses to Mr Brown to slaughter. I never had that conversation..."

And later:

"Q. In relation to Local Rule 114 you say that you heard around the track that you couldn't send a horse to a knackery or an abattoir. What did you do then, as a licensed trainer, to inform yourself as to what the rules required? Did you go and look at the rule and see what the requirements of that rule state?

SUTHERLAND: No, sir. As I said, the rule was you can't send it to a knackery. I didn't send it to a knackery...

...

SUTHERLAND: I thought that was the rule, you weren't allowed to go a knackery.

...

Q. Do you recall perhaps seeing the rule advertised in the Racing Magazine or--

SUTHERLAND: I would have seen it in the Racing Magazine and that, you know, and like I didn't understand the finer points of it, but I didn't breach the rule."

216. The Appellant gave evidence before the Tribunal on this issue and the evidence is:

"Q. When you gave the horses to Mr Brown you were aware of the rule, weren't you, that you weren't allowed to send horses to an abattoir?

SUTHERLAND: Yes, sir."

217. He was then read rule 114(4) and asked:

"Q. ...Now you didn't know about that rule as at 20 August 2020, correct?

SUTHERLAND: I had a good idea of the rule, yeah, you weren't allowed to send them to knackeries.

Q. The bit I just read out isn't about knackeries."

218. The question was put again and he answered:

"SUTHERLAND: Probably not the finer points, sir.

...

Q. You didn't know about it at all, did you?

SUTHERLAND: I knew you weren't allowed to send them to a knackery and I knew you had to Racing NSW if something died, had to, you know, had vets, you know, yeah.

...

SUTHERLAND: I could have rang the Stewards and asked them permission to put these horses down. You're allowed to do that.

Q. You just said you didn't know about that.

SUTHERLAND: No, I didn't. As I said, I knew them parts of the rules.

...

Q. And gave the horses to Mr Brown to use as hound food because you didn't think there was a way to euthanise difficult horses through the industry, correct?

SUTHERLAND: No, I gave the horses to Mr Brown to become jumping horses and give them every opportunity of furthering their lives."

REFERENCES

219. Twenty three references were put before the stewards.

220. They are relevant on credit as well as penalty, if needed to be considered.

221. All speak very highly of him.

222. In general summary it is stated by some licensed persons, long standing acquaintances and customers that he is: trustworthy, honest, reliable, genuine; a hard worker; excellent horseman; an asset to racing; a supporter of the industry; a helper to others; a provider of excellent stables; a lover of horses and ensures their well being; treats his horses like family; has a reputation for spending hours retraining horses, especially difficult ones; known as a caring re-homer of horses and ensures their subsequent progress.

OTHER EVIDENCE

223. The Tribunal has at considerable length set out quotations from various sources. The Tribunal has not sought to be exhaustive in respect of all of the evidence that touches upon each of the particular issues about which those above summaries have been given.

224. The Tribunal emphasises that the quoted evidence is to provide key material, context and examples, but that the Tribunal has taken into account the

totality of the evidence by all of the witnesses on every occasion on which they have spoken by statements, interviews or at hearings.

**THE SUBMISSIONS**

225. The Tribunal summarised the two issues of fact and applicable law at the outset.

FACTUAL ISSUES

OPENING

Appellant

226. The Appellant submits the Tribunal can be comfortably satisfied that the Respondent was aware when he gave the horses to Brown that they were likely to be killed and fed to his dogs. Reliance is placed upon the text message which refers to the horses being used as hound food.

Respondent

227. It is the Respondent's case that the Respondent gave the four horses to Brown with the wish and intention that Brown re-educate them as hunting and jumping horses. It is said the Appellant must affirmatively disprove this.

228. The Respondent submits that the circumstances of the case support the Respondent, who is a superior horseman, prioritising the welfare of horses and engaging in rehoming programs, who has an unchallenged reputation for being careful about matching horses and riders for safety purposes. The Respondent submits that the Appellant accepts that the subject horses were deprived of their usual racing opportunities and they were ones that would be difficult to re-home, except with a rider of superior skill.

229. The Respondent's submission continues that Brown made it known he operated a hunting to hounds business and wished to retrain retired racehorses. The Respondent submits the Appellant accepts that the gift of Redfu and Rozzi was on Mathieson's recommendation. It is said the Appellant has not challenged witnesses' evidence of Brown's request for hunting and jumping horses and of what happened when the four subject horses were handed over to him. That is they were handed over to be given a second chance for a career after racing.

230. There is no dispute that the onus of proof is on the Appellant to the Briginshaw standard, which here will have regard to the gravity of the consequences of an adverse finding and follow from the presumption of innocence. It is, therefore, said the Tribunal needs to proceed cautiously. Again, it is emphasised that proof of serious misconduct requires proof of facts that are not reasonably capable of an innocent construction.

231. The parties agree, so the Tribunal does not analyse, the need for the Appellant to prove knowledge and specific intent to act contrary to the Local Rule.

232. The Respondent lists a substantial volume of evidence, which he says is unchallenged, with 40 references, but the Respondent did not see fit to summarise that evidence. The list is noted. The Respondent does not reply to that submission. As the Respondent has not summarised that evidence for the assessment of the Tribunal, the Tribunal simply notes it, but takes it all into account.

233. The Respondent relies upon his 55 paragraph summary of the facts given to the Appeal Panel.

234. The Tribunal notes those 40 references and 55 paragraphs and is satisfied that its summary of the facts above adequately captures each of the points sought to be made, although in respect of some of those points greater detail is given. The Tribunal does not see that those greater details advance any of the factual issues for determination, but are taken into account.

IS IT A CIRCUMSTANTIAL EVIDENCE OR TENDENCY EVIDENCE CASE

Appellant

235. The Appellant rejects the Respondent's submissions to the Appeal Panel that this is a circumstantial evidence case.

236. The Appellant says it is a direct evidence case substantially based upon the text message.

Respondent

237. The Respondent says this would be a legal error and the text message is not direct evidence. It is submitted that making sense of the text and deciding whether it was intended to be read literally or figuratively requires an inference to be drawn as to its meaning from the words read in context. That is it can only be of service to the Appellant's case if it permits the drawing of a further inference as to the Respondent's knowledge and intention eight days later.

238. The Respondent's submission continues by stating that authority is divided as to whether this type of evidence is properly considered tendency evidence or evidence of a state of mind. A number of examples are given. It is then said to draw a relevant inference from such evidence requires consideration of all the circumstances and not a piecemeal approach.

239. In respect of this submission as to whether it is tendency evidence or not and in relation to whether it is circumstantial evidence or not the Tribunal notes and takes in to account the numerous case references and the various examples flowing from the case law.

240. This is a Racing Appeals Tribunal and not a superior court and the Tribunal is strongly of the opinion that, whilst it has to apply correct principles, a detailed analysis of the substantial volume of cases is not required. As long as the principles enunciated by those cases are applied, and they are, then that in the Tribunal's opinion is a sufficient expression of the approach to be adopted in the determination of the issues here.

241. The Respondent's bundle of 19 cases have been read and taken in to account.

242. The Respondent continues that the Appellant must negative realistic possibilities consistent with innocence, particularly where a more probable inference in favour of the Respondent is given. It is said where there are competing possibilities of equal likelihood or choice which can only be resolved by conjecture, then the allegation is not proved.

243. It is also submitted that pieces of circumstantial evidence, such as the text message, must be weighed with all other direct and circumstantial evidence, including the competing inferences to be drawn.

Appellant's reply

244. The Appellant replies on the issue of the direct evidence, quoting Festa v The Queen (2001) 208 CLR 593 and says it establishes that direct evidence is evidence that, if accepted, tends to prove a fact in issue and that the text message does precisely that. The submission continues that the fact that the Tribunal must interpret the meaning of the text message does not convert it into circumstantial evidence.

245. In further reply on the issue of tendency evidence the Appellant says this is not a tendency evidence case.

246. The submission continues in reply that if it is the Respondent's submission that the knowledge and intention was that the horses would be used as hound food when the text message was sent, but not when the horses were collected is an implausible submission.

SUBMISSIONS ON THE RESPONDENT'S EVIDENCE

Appellant

247. The Appellant submits that the Tribunal should not accept the Respondent's evidence, except where it was against his interests or supported by contemporaneous documentation. That is because it is submitted he was not a candid witness and one reluctant to agree to propositions that he perceived to be unhelpful to his case.

248. It is submitted that the Respondent gave evidence that was inconsistent with previous statements, in particular in relation to his financial position and his knowledge that Mr Brown may have the horses shot and fed to his dogs and also as to the dangerous and unsafe mannerisms of the two horses.

249. It is submitted that where there were inconsistencies the Respondent was unable to offer any or any plausible explanation.

250. It is said that the Respondent's credit is significantly impacted by what happened with Bless You Toby.

251. It is submitted that the Respondent accepts he did not inform the Stewards of the burying of the horse because he wanted to avoid sanction and this was confirmed by the false stable return.

252. The Appellant notes there is a dispute as to how the incorrect stable return was lodged.

253. In his interview of 22 August 2020 he admitted that he had lodged it with Brown's address deliberately in an effort to avoid detection by the Stewards. Then at the Stewards' inquiry and before the Appeal Panel the Respondent changed his position and said he did not know how the address came to be entered and it must have been an accident. It is noted that the submission continues that he maintained this evidence before the Tribunal.

254. The submission continues that before the Tribunal the Respondent said he accidentally put Brown's address on the stable return, then accidentally lodged the stable return in circumstances where he claimed to have only been checking whether Bless You Toby was identified as spelling or not. The submission is that this was the first time that the Respondent had claimed that he had not only accidentally put Brown's address in the stable return, but had also accidentally lodged it.

255. It is submitted, therefore, that this evidence is implausible and contrived and is unable to offer a satisfactory explanation as to the different versions he has given. It is, therefore, submitted that the true position is that he deliberately entered the incorrect address into the stable return and then deliberately submitted it in an effort to conceal his failure to report the death of the horse and to avoid a fine. It is then submitted that he lied about what had occurred before the Stewards, the Appeal Panel and the Tribunal.

256. Therefore, it is said his credit is adversely affected and he is a witness unwilling to tell the truth.

257. The submission continues that the Tribunal should conclude the Respondent has not told the truth to the Stewards, the Appeal Panel and this Tribunal on a number of important topics and his credibility is affected. It is submitted that a lie told by a defendant may be treated as an admission of guilt and this is the probable inference that should be drawn against the Respondent. Therefore, his failure to give complete and honest evidence to the Tribunal is indicative of his guilt.

Respondent

258. The Respondent in reply says that this assessment of the Appellant is not a fair assessment of the total evidence.

259. Reliance is placed upon the fact that the Respondent underwent two interviews and three inquisitorial hearings over a period of 18 months and that he need not have exposed himself to additional cross-examination before the Tribunal, but did his best to answer the questions. It is submitted that a number of the questions were at times disrespectful and tendentious. It is submitted the fact that the Appellant's cross-examination did not always obtain the answers that were wanted was not evidence of a lack of candour in the witness.

260. The submission that the Respondent has given inconsistent versions about the stable return is incorrect.

261. The Respondent submits that the Appellant did not disagree on the evidence that the online form system uses predictive text or that clicking on a page when viewing a stable return can cause a change in an entry. The nature of errors in using predictive text was referred to.

262. The submission continues that various stable returns relating to horses going to Brown were submitted on more than one occasion and with different dates and the Appellant does not complain about that. The submission continues that, as a result of his suspension he was required to make stable returns and that this is the second occasion on which he unintentionally submitted a return when trying to look at an historical return. These additional returns were superfluous. It is submitted that these additional records are consistent with the Respondent's explanation and negatives the Appellant's suggestion that the unintentionally filing of a return for Bless You Toby was some new invention before the Tribunal.

263. The submission continues that there are three relevant returns for Bless You Toby and that they are correct. The details of why they are correct are set out. It is said that the only change in the incorrect form was an auto-address entry. It is said that those matters are consistent with the use of predictive text.

264. In respect of this issue the Respondent submits that he concedes he did not report the death of Bless You Toby and made a wrong entry, which he failed to correct and that is a blemish on his character, but he has admitted the error and accepted the Steward and Appeal Panel punishment for his wrong conduct. This it is said is a better reflection of his credit.

Appellant's reply

265. The Appellant's reply on the Bless You Toby entry is that the Respondent's submissions have no relationship to the evidence and do not explain the inconsistencies in his evidence and should be disregarded.

THE APPELLANT'S SUBMISSIONS ON THE EVIDENCE OF MRS SUTHERLAND, DR SUTHERLAND AND SHANE WILSON

266. The Appellant accepts that Mrs Sutherland's evidence was genuine and honestly given, but downplayed the financial difficulties and dangerous mannerisms of the two horses.

267. The Appellant accepts the evidence of Dr Sutherland and Shane Wilson was honestly given.

DR GARLING'S EVIDENCE

Appellant

268. The Appellant opened by submitting her evidence was honestly given and any inconsistencies were not significant.

269. The Appellant relies upon the contemporaneous report and her statement merely clarified suggested ambiguities in her report.

270. The Appellant submitted that Brown contradicted his interview statement by saying the Respondent had no knowledge that he fed horses to his hounds.

271. It is submitted that the Tribunal should prefer his spontaneous account to a reconstruction as especially there is corroboration of the interview statement in the text message.

272. It is submitted by the Appellant that Dr Garling said Brown's statement to her was black and white and demonstrated knowledge in the Respondent.

273. The Appellant submits that the differences between the report and the statement are of limited importance and matters of semantics. That Dr Garling attempted to give her best recollection. That mere slight differences in recorded notes are not more than semantics. That, as expected, the differences would reflect the difference between a narrative and concise full conversation.

274. The Appellant finds comfort in the fact that Dr Garling, with all her experience of retired racehorses, was shocked and saddened by Brown's words and this gives reinforcement to her recollection of them.

Respondent

275. The Respondent submits that Brown's evidence to Dr Garling was hearsay and that Brown qualified it to say it was a presumption only and not a direct conversation with the Respondent.

276. The Respondent submits that Dr Garling's report was thin, imprecise and unclear and had core deficiencies.

277. The Respondent submits that the call was not recorded as she was driving at the time and that she made no notes until she typed the report up some hours later.

278. The Respondent submits that her discussions with officers of Racing NSW contaminated her report and her later statement.

279. The Respondent submits that the significant differences between the report, the notes and the statement are evident.

280. The Respondent submits that the statement was made months later from memory only.

281. The Respondent submits that Dr Garling was unable to distinguish, even as a matter of present reconsideration of her evidence, between action and purpose, cause and effect, full knowledge and hindsight. It was submitted her focus was on what happened to the horses, not on who knew what and how they knew it, which she considered were matters for investigation by others.

282. Accordingly, it is submitted her evidence should be disregarded.

Appellant's reply

283. In reply the Appellant says her evidence was clear and cogent and entirely consistent with the text message. Therefore, the text message means exactly what it appears to mean.

284. The suggested challenges to her evidence because she did not pull over and there were inconsistencies in her recollection, it is submitted, must be balanced by the fact she had no motive to lie and gave clear evidence.

285. The Appellant relies on the fact that Brown corrected and changed his evidence, but that his initial statements to Dr Garling were the truth and should be accepted.

THE TEXT MESSAGE

286. As set out above, the Respondent sent a text message about Redfu and Rozzi to Brown and it is so critical that it is important to set it out again. It states:

> "If you need some hound food probley got two maybe three down the back paddock."

Appellant

287. The Appellant submits that this must be read literally and, therefore, it is accepted by the Respondent that it has the appearance of an offer of horses to be used as dog food.

288. It is submitted that the text message is a key contemporaneous document and where there are different accounts on critical matters in dispute it is important to focus on contemporaneous materials in the first instance.

289. The submission continues noting that the issue for determination is whether the text should have its ordinary meaning or be treated as a joke.

290. The submission of the Appellant continues that the decision as to whether the Tribunal accepts the Respondent's explanations for what he said in the text message is a critical matter.

291. The submission continues that the Respondent has not provided any sensible explanation as to why the text should not be read with its ordinary meaning. This flows, it is submitted, because when first questioned by the Stewards on 20 August 2020 the Respondent did not suggest this was a joke of any kind and made no such comment when re-interviewed on 22 August 2020. It is submitted, therefore, that if it was a joke he would have offered that explanation to the Stewards and it is unlikely that he would only have remembered the supposed jokes some weeks after being first presented with the text message.

292. The submission continues to note that it was at the Stewards' inquiry on 8 September 2020 when the Respondent first advanced the proposition it was a joke or a bad choice of words and that that flowed because the joke was that the horses were so slow they would be caught by Brown's hounds.

293. The submission is that the joke makes no sense at all because the Respondent was well aware that Brown's business did not involve hounds chasing horses. It is submitted that the Respondent knew that it would be people on horseback following the hounds.

294. It is submitted that the proposition it was a joke had developed again before the Appeal Panel on 6 November 2020 where it was contended that it was not only a joke, but was part of a much longer running exchange between him and Brown, but that he had never previously referred to any such interchange.

295. The submission continues that the Respondent initially contended before the Appeal Panel that the conversation was at the races, but then could not remember whether it was at the races or over the phone. By the time he reached the Tribunal he thought it was at the races.

296. The submission continues that it was before the Appeal Panel that the joke was that the hounds would catch Mr Brown was first advised, but again this makes no sense, it is submitted.

297. The Appellant submits that this recollection of the supposed conversation with Brown was suspect because, as quoted above, he had said to Brown in this conversation, "Well, they're not real fast. You'll probably end up hound food."

298. The submission continues that this was said to have occurred a few weeks before the text message, but surely, it is submitted, that if this conversation had

occurred, then the horses would have been handed over straight away rather than weeks later. It is said that the Respondent's explanation for that delay was that he wanted to go home and think about it is implausible.

299. His subsequent evidence to the Tribunal that he had had the conversation about a few horses when at the races and was asked whether he had anything that could jump was fundamentally inconsistent with the account he gave to the Appeal Panel. It is submitted at that time the Respondent had already identified the two horses as possible horses for Mr Brown and, therefore, there was an unexplained inconsistency in his evidence.

300. The submission continues that the Respondent suggested to the Appeal Panel that he might not have offered the two horses during that conversation because they were interrupted. It is submitted this is inconsistent with his alternative explanation to the Tribunal that he did not make that offer because he had not identified them as suitable at that time. It is submitted, however, he could not even recall whether that conversation was at the races or over the phone, therefore, he could not have any recollection of whether he was interrupted or not. It is submitted this was a further contrivance.

301. It is also submitted that the terms of the text message are not consistent with any such previous conversation or joke between them because the text does not refer to any such previous conversation, but is consistent with the Respondent knowing that Brown used horse flesh to feed his dogs and, therefore, he offered them to Brown with that purpose.

302. It is also submitted that Brown's response to Sutherland: "Super, when do you want them gone?" is not consistent with any prior joke.

303. The submission continues that Brown did feed the two horses to his dogs and he had a general practice of doing that. Therefore, it is suggested that to treat the text as a joke would be a remarkable coincidence because the Respondent denies knowing anything about Brown even possibly feeding horses to his dogs.

304. The submission then continues on the evidence set out above in relation to Brown's statement about plans A and B and B being to shoot them and feed them to the dogs was correct. Therefore, it is submitted that to treat the text as a joke could not support the Respondent's evidence that he knew nothing about the fact that the horses would be used as hound food is unreal.

305. The examples given by the Respondent to support the fact this was a joke, such as the quoted desire to take action against a jockey, make no sense.

306. The submission continues that the Respondent did not advance any evidence that would corroborate his contention the alleged joke was made. For example, other text messages with similar jokes to Brown or anyone else. It is submitted the Respondent did not lead evidence from Brown that alleged jokes were made and did not lead evidence that might demonstrate there was a phone call between him and Brown during which the joke was supposedly made.

307. Therefore, it is said there is nothing to substantiate the Respondent's own evidence.

308. It is, therefore, submitted that the Respondent was not a credible witness and he did not give complete and truthful evidence and his purported explanation of the text message is so unconvincing that the Tribunal should not safely accept it.

Respondent

309. In reply the Respondent says that if the text is read literally it has the appearance of an offer of horses to be used for dog food, but that the text is capable of more than one meaning. It is submitted that the answer to the question to be found requires considering the text in the context of all the relevant circumstances.

310. Those circumstances are summarised as: the Respondent's knowledge and intentions and his explanation of the meaning of the text; Brown's evidence of his intention, his practices and what he actually did and why; the unchallenged evidence of the eye witnesses; the unchallenged evidence of all the context and character witnesses; the fact that the Respondent's evidence was largely not challenged as to what he actually did and why.

311. The submission continues that the Respondent has consistently said his purpose in giving the horses to Brown was to give them their best chance for a career after racing by giving them an opportunity to work as jumping horses or hunters in Brown's hunting and equine sports business. The Tribunal notes that in support of that submission some 60 references are given for that evidence.

312. The submission continues that it is for the Appellant to prove that the Respondent's explanation of the text is not reasonably available when viewed in the context of all the other evidence which negatives a literal meaning.

313. It is submitted that the suggestion that the Respondent's failure to refer to the joke in his interviews is an unfair representation of the evidence because the Respondent had handed his phone to the Stewards immediately on their request and then the text was read to him in the context of various questions. It is said that his responses to the questions about the text were guided by the Stewards and he made immediate responses to repeatedly reiterate the true intention of the transaction and his answers contrast to the words of the message with his previous conversation with Brown in which it was said, "I think they'll both jump." It is said that the Respondent never accepted the message was intended literally.

314. In relation to that first interview emphasis is placed upon parts of the answers in which he was asked whether it had crossed his mind they might have been used for the dogs that, "I suppose it did ... if they don't make it, but I thought they'd make it" and "I knew there were hounds ... but I thought they'd jump..." It is submitted that his answers in the second interview were in the context he had just been told he was going to be suspended and his stable closed, but he was not asked a single question about the text message.

315. The submission then continues with considerable evidential detail about what was said by the Respondent on the text message before the Stewards' inquiry. The submission sets out numerous occasions on which the Respondent said the horses were slow and would not get away from the hounds and he had used a poor choice of words in the use of the word "food". The Tribunal determines it is not necessary to further summarise that evidence, which has been referred to earlier. It is accepted that that is the evidence.

316. The submission continues that the Respondent explained the meaning of the references about the horses being slow and that should not be taken seriously or literally. It is submitted that slow horses are often referred to in the industry as dog food, et cetera.

317. The submission continues that the Appellant placed too much reliance upon a passing joking reference and the significance to be placed upon it some months later, particularly as he had not been asked in his interviews about past conversations he had had with Brown.

318. It is submitted that the Respondent has consistently agreed that his memory of the conversations is a gist of it and is imperfect, which is understandable given the passage of time.

319. It is then submitted that the terms of the text message are not incompatible with the joking illusion contended. This in the context that it is the uncontested evidence of Mrs Sutherland and Mr Wilson that Brown had asked for horses for hunting and jumping and this was corroborated by other witnesses. In the context of those matters and the preparation of the horses at handover and the conversations at handover would not be consistent with the horses being offered for slaughter.

320. It is then submitted that to interpret the message as the Appellant submits it would be required to discount the Respondent's evidence about what he said it meant and the Tribunal would have to disbelieve him and believe that he acted seemingly irrationally in training horses to jump and grooming and preparing them in circumstances where witnesses confirmed his conversations that they were for hunting and jumping.

321. It is submitted that there would be a need to find that Mr Sutherland and Brown cooked up a secret conspiracy to fool and misdirect everyone. It is then submitted that the Appellant has not provided any sensible explanation of why the Respondent and Brown would act out a charade over months to fool other people.

322. The submission continues that it is impermissible to put a burden on the Respondent to prove his state of mind. It is further submitted that there are strong countervailing inferences to be drawn from uncontested evidence.

323. The submission on the text continues that the Appellant's submission that accepting the text was a joke requires acceptance of a remarkable coincidence

involves an error of reasoning known as "fallacy of rarity", otherwise known as the prosecutor's fallacy.

324. It is submitted that to establish this there would need to be evidence about jokes and disposal of horses generally. It would also need consideration of trench humour and Australian vernacular. It is then submitted that the facts do not support the Appellant's assertions as to rarity and adopting that reasoning would lead the Tribunal into error.

325. The submission continues that the Appellant's case suffers from a failure to consider the express point of the transaction from the perspective of the parties, that is, to give the horses an opportunity of a second career after racing in a business to which working dogs were essential and, therefore, present.

326. The submission continues that the Appellant's case ignores the prevalent rural ethic to use carcasses of fallen stock for food.

Appellant's reply

327. In reply the Appellant concedes that the text message remains the key piece of evidence. It is submitted that the Respondent has never offered any plausible explanation for the supposed joke and his evidence is untruthful.

328. As to the Respondent's submissions about the reference in the industry to dog food or glue the Appellant submits it has no basis in evidence and is not consistent with the Respondent's explanation in any event. That is because it is submitted the Respondent did not say he was using Australian vernacular. It is, therefore, submitted that these submissions are an attempt to contrive an innocent explanation for the text message when no such innocent explanation exists.

329. The submission continues that it would be a remarkable coincidence if the text message had been a joke when precisely what it literally conveyed subsequently occurred.

330. It is said, therefore, that this is not an example of the fallacy of rarity because the Tribunal is entitled to make a realistic assessment of whether what the Respondent said occurred really did occur. However, it is submitted contrary to that position the Tribunal is not required to undertake a statistical assessment of the prevalence of jokes in the racing industry.

RESPONDENT'S KNOWLEDGE OF THE RISKS THE HORSES WOULD BE FED TO BROWN'S DOGS

Appellant

331. The Appellant notes the Respondent's denials that he had any knowledge that Brown ever told him that he fed horse flesh to his dogs or that the Respondent knew there was any risk of the two horses being fed to Brown's dogs.

332. It is submitted that the evidence is to the contrary and that the Respondent was well aware when he gave the horses to Brown that Brown fed horse flesh to his dogs from time to time and that the Respondent was aware that Brown would do that if the two horses were deemed unsuitable in his business.

333. It is said that this evidence is established in no less than five statements made by the Respondent.

334. The Appellant then sets out extracts of evidence, which might be summarised as containing words from the Respondent, set out in detail above, to the effect that "Yeah, fed to the dogs"; "an option to go to the dogs later on"; "That's always an option for him down the track"; "If they didn't make it after that it was up to him to do what he wanted with them"; "I knew the option was there if they didn't make it what would happen"; "Well, he had hounds and he'd probably place them there as a second option". It is submitted that before the Tribunal the Respondent did not attempt to justify his statements as being assessed as "anything was possible".

335. The submission continues that subsequent to the interviews that the Respondent before the Stewards' inquiry, Appeal Panel and Tribunal denied that he had any such knowledge.

336. It is submitted that in his cross-examination before the Tribunal the Respondent was unable to offer any plausible or proper explanation for his reversal of position and was not telling the Tribunal the truth.

337. The submission continues that the Appellant relies on admissions by the Respondent that the horses would be killed and fed to Brown's dogs. It is, therefore, submitted that these admissions fundamentally undermine the Respondent's case because, once the Respondent knew that Brown fed horse flesh to his dogs and that he may use the two horses in that way, it underscores the obvious conclusion that the text message was intended to mean precisely what it said. It is submitted that it was inconceivable that he would joke about such a matter if he had this knowledge. The submission continues that the Respondent had knowledge that the horses would be killed and fed to his dogs so it is not important to use the evidence from family, staff and others that they had no such conversation or such knowledge.

338. It is then submitted that the suggestion by the Respondent that he thought he was sending the horses to really good home lacks any credible basis and is consistent with him being less than truthful with the Tribunal.

Respondent

339. The Respondent says that the Appellant's submissions have not been made out.

340. The submission is that the Stewards in their interview invited the Respondent to speculate with hindsight and that he fairly acknowledged that anything was possible, that is, that he had no legal control over a horse after parting with ownership. It is submitted, however, that his intention and

expectation was that the horses would be tried for hunting and jumping and the evidence does not rise above the Respondent accepting the reality that it was a possibility that the horses could eventually be killed. It is submitted that does not amount to knowledge or intention or a wish that that should occur.

341. It is also submitted that the Appellant's case requires acceptance that both the Respondent and Brown had more knowledge than either man said the Respondent had.

342. The submission continues that the Respondent has not reversed his position and has maintained consistently and from the outset that his intention and expectation was that the horses would be tried by Brown for hunting and jumping. It is said that the Respondent did not know that Brown fed horse flesh to his dogs, still less racehorses, or that Brown had ever slaughtered a horse for that purpose. It is submitted that the highest the evidence can go is a knowledge of the use of fallen stock. It is submitted that to the extent that the Respondent's evidence before the Tribunal differs from his previous evidence that it is best understood as an innocent conflation of what the Respondent heard at the Stewards' inquiry.

343. The submission continues and emphasises the Respondent's evidence that he never talked about slaughtering racehorses with Brown.

344. It is submitted that the Appellant did not cross-examine Mr Mathieson, who knew Brown had fed horse flesh (not racehorses) to his hounds, but still gave him valuable racehorses for hunting and jumping. Therefore, it should be accepted that the Respondent could be considered to have given the horses to Brown as a homing option.

345. It is also submitted that there is a prevalent rural ethic to use the carcasses of fallen stock or stock killed for other reasons rather than simply waste it.

Appellant's reply

346. The Appellant in reply maintains that there is still no reasonable explanation for the Respondent changing his evidence on his knowledge of what Brown did.

UNSUITABILITY OF REDFU AND ROZZI FOR BROWN'S BUSINESS

Appellant

347. It is submitted by the Appellant that there was no reasonable and sensible basis on which the Respondent could have concluded that the two horses would be suitable for Brown's business. It is submitted that the Respondent is an expert rider and trainer, has broken in approximately 5,000 horses and has a particular reputation for retraining and rehoming.

348. It is submitted that, despite the fact these horses were particularly dangerous, he said he was able to retrain them. In that regard the Respondent bred them and trained them and raced them and knew the horses very well and put a lot of time into training them. Despite that it was his evidence he was

unable to make either horse safe. His evidence to the Stewards was that Redfu was dangerous, very unsafe and unpredictable and the Respondent had trouble riding him. He told the Stewards' inquiry that jockeys feared for their life when they rode the horse. Rozzi was described as one that could really buck and there was no way that Jason Collins would get back on the horse and that it might kill someone and, therefore, was difficult to ride.

349. It is submitted that, despite all this evidence before the Tribunal, the Respondent attempted to convey the impression that the horses were in fact not particularly dangerous and that he had no trouble, for example, in riding Redfu. The submission continues that Brown's business, as understood by the Respondent, was renting out horses to city people. It is also submitted that the Respondent was ignorant in relation to Brown's business. It is submitted that the Respondent meant city people were not professional riders. Therefore, it is submitted that the Respondent's evidence about Brown renting out horses to city people, coupled with his lack of detailed knowledge about Brown, makes it unbelievable for the Respondent to assert that he genuinely believed Redfu and Rozzi would succeed in Brown's business.

350. The submission continues that, whilst Brown may have been a world class rider, he made his money from renting his horses to city people and these two horses could not be used in that way because they were unsafe and dangerous and, therefore, there was no prospect of them making any money for Brown.

351. Therefore, it is submitted it was implausible to suggest that the Respondent believed that Brown would spend many years retraining the horses, not make any money out of them, succeed where the Respondent had failed and, therefore, it was implausible that he would take all those four horses with the intention only riding them himself.

352. It is submitted that the witnesses for the Respondent had no foundation to determine whether the two horses would work out in Brown's business.

353. Therefore, the Appellant submits it was obvious that the two horses could not be used in Brown's business, the Respondent was most well placed to know this and that is why he referred to his horses in the text message as hound food.

Respondent

354. The Respondent's submission says that the Appellant's submissions beg the question as to what the horses were to be safe for. It is said, however, they could be ridden by an experienced rider with appropriate skill and confidence.

355. The submission is that the Appellant did not call any expert evidence to counter the Respondent's opinions about ability to ride the horses.

356. The submission then touched upon the reference to city people, which it is said are to be taken as non-professionals. This in the context that the horses would receive re-education for the purpose of Brown's business.

357. The submission is that the Respondent had the appropriate expertise and this was uncontested and, therefore, the proposition that these horses could never be suitable having not been put to Brown was a baseless submission. The submission continues that the reason Brown gave for destroying horses was that they kicked out at the hounds, not that they could not jump.

358. The submission continues that horses take years to grow and train and there is no quick profit to be returned in retraining horses, therefore, for Brown's business it would take some years to do so. It is also submitted that the evidence is such that no one claimed to know in advance whether the horses would work out in Brown's business or have suitable temperaments.

Appellant's reply

359. In reply the Appellant says that the Brown's business was clear in that he rented out horses to city people and city people are not professional riders.

360. It is submitted that the Respondent's position is that neither of those two horses could be handled even by an experienced, reasonably expert professional rider, let alone someone below that standard and, therefore, the Respondent could not plausibly have thought that the horses could be used in Brown's business.

361. The Appellant does not challenge the Respondent's superior horsemanship and rehoming of horses.

362. The submission continues that the issue is not whether the Respondent did matters in or out of character or whether he had done them previously, but what he did on his particular occasion.

THE RESPONDENT AND BROWN'S CONVERSATIONS ABOUT WHAT BROWN FED HIS DOGS

Appellant

363. It is submitted by the Appellant that the Respondent and Brown had a conversation before the horses were handed over about what Brown fed to his dogs. It is submitted that the reference to fallen livestock was interpreted by the Respondent to include horses.

364. The Appellant's submission continues that the Respondent denied that Brown told him he might feed a horse to his dogs if he deemed it unsuitable for his business. The Appellant relies upon the fact that Brown's evidence to the Stewards' inquiry was that he would feed horses to his dogs if they did not work out in his business and, therefore, the reference to hound food in the text message was such that it was very likely that Brown had disclosed to the Respondent that he disposed of horses in this way from time to time.

Respondent

365. The Respondent submits that this may well be a conflation of evidence about what the Respondent heard at the Stewards' inquiry and thus the references to fallen livestock, but this does not suggest that Brown had disclosed to the Respondent a practice of taking live racehorses for such a purpose.

366. The submission continues that the Appellant's speculation about the possibility does not make it very likely, especially when it has been denied by witnesses.

367. The submission continues that the Appellant accepts that the primary reason for the giving and receipt of the horses was for Brown to try them in his business.

THE PREPARATION OF THE HORSES BEFORE THEY WERE GIVEN TO BROWN

Appellant

368. The Appellant notes the trouble taken by the Respondent to prepare the horses by grooming and worming them before they were handed over, but says this was simply his normal practice, corroborated by Dr Sarah Sutherland. Therefore, it is said it is unsurprising he did not depart from that usual practice.

Respondent

369. The Respondent replies that his evidence was not to the effect that he engaged in his normal practice of grooming and drenching these horses. It is submitted that it would defy commonsense to groom and worm the horses with all that extra work and expense if it was known or intended they would be slaughtered and fed to the dogs. It is further submitted it would make no sense that he would engage in additional prettying work for horses that he intended to consign for slaughter and that such a submission was far-fetched and inconsistent with the evidence of all the witnesses.

RESPONDENT'S EVIDENCE THAT HE WOULD TAKE THE HORSES BACK

Appellant

370. The Appellant noted the Respondent's evidence to the Appeal Panel that it was his general practice to tell anyone that he gave a horse that if it did not work out he would take the horse back. The Appellant points out that the Respondent did not tell Brown this.

371. It is submitted, therefore, that the Respondent's failure to follow his usual practice is consistent with him having knowledge that the horses would be fed to Brown's dogs.

Respondent

372. The Respondent says that the Appellant's submission misstates the evidence.

373. The Respondent says that it was not his usual practice to always tell new owners that he would take the horse back, but it was his evidence that he would take the horse back if he was told there was a problem. It is also submitted that he would take the horses back for their welfare.

374. Therefore, it was submitted that there could be no expectation of a horse needing to be returned and no call for the Respondent to suggest that to Brown .

THE RESPONDENT'S FAILURE TO INQUIRE INTO THE WELFARE OF REDFU AND ROZZI

375. This arises because subsequent to giving Redfu and Rozzi the Respondent gave to Brown Witchblade and Hangin' With Willy which, it is noted, were also shot and fed to Brown's dogs.

376. The evidence establishes, and is not disputed, that the Respondent made no inquiry at all about the welfare of Redfu and Rozzi when he handed over Witchblade and Hangin' With Willy.

Appellant

377. The submission is that the Respondent became attached to these horses, they were the love of his life and he had cared for them more than he would for people and that these had been bred and raised by him and trained by him and, therefore, it would be inconceivable that he would not ask after those two horses when he handed them over if he did not have the appropriate adverse knowledge. And that knowledge is that they were to be used as hound food.

Respondent

378. The Respondent relies upon the fact the Respondent himself was busy when Brown arrived to take these two later horses, but did take time to impart important safety information and drench details. It is also submitted that Brown spoke of his intention to ride these two horses.

RESPONDENT'S FINANCIAL POSITION

Appellant

379. The Appellant submits that the Respondent had every reason to dispose of the horses to Brown knowing they would be used as dog food.

380. The submission notes the evidence about bushfires, COVID, loss of lower grade race meetings and picnics and the evidence is that the Respondent was in a very difficult emotional and financial position in April 2020. This was confirmed

by his daughter, Georgia Sutherland. The submission continues that Dr Sarah Sutherland also referred to those pressures from those matters.

381. Reliance is placed upon the evidence detailed above when the Respondent said to the Stewards he was struggling, the industry was dying out, "We're not getting a bit of money to live on." Reliance is also placed upon the comments at the Stewards' inquiry that money was tight and he was doing it tough and he couldn't afford to pay another fine. Reliance is placed upon his evidence to the Tribunal that he had to work very hard to break even and was struggling to make a living in very tough times.

382. Contrasted with that the submission before the Tribunal the Respondent said that his financial position in April 2020 was really quite good, they were then the most financial they had been for a long time.

383. It is submitted that the Tribunal should not accept the position advanced by the Respondent before the Tribunal. This was said to be another example of his willingness to change his evidence.

384. As to the bank statements and his other evidence, it is submitted that there is no evidence of his expenses against which that income and financial holdings would need to be applied.

385. Accordingly, it is submitted that the Tribunal cannot conclude that the bank account balances did represent a good financial position.

386. As to the Respondent's evidence that the cost of keeping the horses played no part at all in his decision to re-home them, it is submitted the Tribunal would not accept this evidence.

387. This would be because the Respondent initially contended he could have sold the horses, but then admitted that he had no one to sell them to and there is Mrs Sutherland's evidence that they could not afford to keep the horses.

388. Therefore, it is demonstrably unlikely, it is submitted, that the cost of keeping the horses did not play at least some part in the Respondent's decision to move them on.

Respondent

389. The Respondent submits that the Appellant's case on the Respondent's financial position is weak and goes nowhere.

390. It is submitted that the Respondent was always upfront, that he was having a tough year and the reasons for it and that it was a downturn and at best he was breaking even.

391. It is submitted that the Respondent agreed that his financial position was a context for his decision to re-home the horses, but not that it was determinative of it.

392. It is said that the Respondent's evidence as to his ability to feed and care for his horses was not successfully challenged. Reference was made to the evidence about plenty of feed and room for the horses and his ability to afford them and one of the options to move them on was to progress their life, not the cost of keeping them. It was emphasised that he gave evidence that they were not re-homed because he could not afford them and he had no trouble keeping them as he had oodles of feed.

393. The submission continues that the horses themselves had never generated any substantial income in any event and that there is no evidence that there was any urgency or a financial situation that required the horses being removed from the back paddock where there were abundant stores of food and at a time when the Respondent had no trouble paying his suppliers.

394. It is, therefore, submitted that the Respondent's position in those circumstances was entirely consistent with stress when money was tight and there was an apprehension about the future.

395. As to the Respondent's failure to explain his expenses, it is said that he was never asked to do so. As to his bank records, it is submitted that the accounts show cash on hand of more than $100,000 and income up to that point of $360,000 and, whatever the breakdown of his business and private expenditure, he had resources adequate to meet his expenses.

396. The submission also continues that the Respondent kept other people's horses at times at no cost and could afford to do so.

397. The submission continues that if the Respondent had some urgent financial motive, he could have sold the horses for cash to the adjoining knackery.

398. There is then a submission which does not require consideration as to whether the Appellant's position on finances and what trainers should or should not do is a confused one.

THE POSSIBILITY OF EUTHANISING REDFU AND ROZZI

Appellant

399. The Appellant notes that it is the Respondent's case he had no motive to dispose of the horses through Brown because he could simply have handed them over to the Appellant or have approval obtained for their euthanasia.

400.The submission for the Appellant is, however, that the Respondent was not aware of the rules that permitted him to do that. Also it is submitted that it was the Respondent's position that the Appellant's rehoming programs were not suitable for the two horses. It is also submitted that Dr Sarah Sutherland confirmed that euthanasia was never discussed in the stables.

401. It is, therefore, submitted the Respondent did not know of any way in which to dispose of the horses, otherwise than by giving them to Brown with an offer for them as hound food.

Respondent

402. The Respondent submits that euthanasia did not have to be considered or discussed because the Respondent offered them a suitable second career.

403. The submission for the Respondent also is that the Respondent was aware that he could obtain permission from the Stewards to euthanise difficult to place horses if necessary, but it was not necessary in this case as he had a good offer for the horses.

SOME GENERAL SUBMISSIONS ON BEHALF OF THE RESPONDENT

404. The Respondent commences by posing the question that it is a useful guide when assessing the effect of all the evidence taken together to ask what is the Appellant's case theory and does it make sense.

405. It is said that before the Appeal Panel the Appellant had two alternative case theories, the first that the Respondent deliberately and intentionally breached the rule by sending the horses to be slaughtered by Brown, knowing it was a contravention of the rule and the second case theory was he intended to send the horses to slaughter, but did not know or believe it was a contravention of the rule.

406. It is said that before the Tribunal the Appellant has dropped this second case theory. It is said that in respect of the second theory, if the Respondent had such an intention as alleged, but believed it was consistent with the rule, he would have had no reason to give the Stewards any other explanation of the facts.

407. As to the first theory, it is said that this would require a conspiracy between the Respondent and Brown, who were at best slight business acquaintances, with no identified obligation to each other to create such an elaborate pantomime. It is submitted that there was no reason to keep secret from all the others any true intention of the horses going for dog food when it appeared that they were going for hunters and jumpers. It is said there is no sense to this, as far easier options were open to both the Respondent and Brown.

408. Next the submission is that the Appellant has expressly abandoned reliance on alleged admissions before the Stewards.

409. Finally, the Respondent sets out seven points, which are said to be propositions which are not borne out on the evidence.

410. These are: A joking, bad taste in a text should make literal and logical sense and be perfectly remembered and explained sometime later; Brown should be disbelieved that he took the horses as potential hunters and he took them in the usual way in his business and they were then euthanised because they were unsuitable for that purpose; that Dr Garling could give probative evidence of the Respondent's state of knowledge and intention in preference to the evidence of the Respondent and Brown; that the Respondent had a

compelling financial motive; that an adverse inference should be drawn from the fact that the Respondent did not ask Brown about the progress of Redfu and Rozzi at the subsequent handover when there are more compelling inferences in the circumstances of the meticulous grooming, et cetera, briefing, et cetera, and plans for rehoming of the horses; the eventual outcome of the disposal of the horses after a poor-taste illusion was so remarkable a coincidence that it is not reasonably explicable otherwise than as the Appellant contends; the horses were so dangerous that the Respondent could not plausibly have considered they be re-educated and retrained when there was no contrary evidence and this would ignore the option of veterinary euthanasia in any event.

Appellant

411. In reply the Appellant says that it is to overstate the position to suggest there was a conspiracy or a charade between the Respondent and Brown as the Appellant does not contend that they told anyone about the true purpose of the handing over of the horses. This is particularly so as others have indicated they would be appalled and oppose any such conduct.

412. It is then submitted that the fact that Brown had a hunting and jumping business does not mean that the Respondent's text message was not intended literally, nor does it mean that Brown would not have tried the horses at jumping before killing them.

413. It remains the Appellant's position that the Respondent gave Brown the horses for an obvious purpose, as the Appellant alleges and as recorded in the text message.

414. The Appellant submits that the Tribunal should reject the Respondent's seven characterisations of case theory.

415. It is submitted that the Appellant is not required to demonstrate that the Respondent did or did not know that his conduct would be in breach of the relevant rule.

416. It is also submitted that the suggestion that the Appellant had dropped the alternative case theory that he intended to send the horses for slaughter, but did not know or believe it was a contravention of the rule has not been abandoned. It is submitted that it is quite plausible that the Respondent was not aware of the relevant rule and, on becoming aware of his breach of the rule, has contrived an explanation to avoid punishment.

**DETERMINATION**

417. The Tribunal finds, as agreed by the parties, that the Appellant bears the onus of proof to the appropriate level of comfortable satisfaction, as required by the Briginshaw test, having particular regard to the serious misconduct alleged and the need to find that the Appellant satisfies factual matters in its favour and those which are otherwise capable of innocent construction are eliminated.

418. The Tribunal is satisfied also, as agreed by the parties, that proof of contravention of the rule requires knowledge and intention to engage in the conduct specified in the rule.

KNOWLEDGE

419. As set out in the introduction, the first issue for determination is whether the rule has been breached.

420. This case involves a party having been the subject of two records of interview and then giving evidence at three hearings. Not surprisingly, the evidence has varied from the original record of interview until the final hearing before the Tribunal.

421. The Respondent is strongly criticised by the Appellant because he has changed his versions in relation to a number of factual matters on a number of occasions and has given no clear explanation of his reasons for doing so.

422. The Tribunal is satisfied that a witness's version of events can change from an initial expression of facts to subsequently expressions of different facts. This might arise for a number of reasons. For example, a witness's memory after a first expression of facts can be refreshed by having regard to other sources or materials or by discussing the matter with other people. A question may have been misunderstood or misheard. There are many other reasons. The simple fact that a version has changed does not mean that the witness should be disbelieved.

423. In this matter the Tribunal finds that it should give substantial weight to the first expressions of fact uttered by the Respondent.

424. When first confronted by the Stewards at the first interview with a series of questions the Appellant gave evidence which is most damaging to him. He did so at a time when he did not appreciate the ambit of the rule he is said to have contravened. He was unguarded as it were.

425. Likewise, when he underwent the second interview by the Stewards, he was in no different position as to being unguarded as to the issues on foot.

426. His handing over of his phone and the discovery of the critical text message is reflected by that unguarded conduct by the Appellant. If he was on notice about the gravity of the issues it was well open to him to delete the text. However, his ready co-operation with the Stewards in making the text available is to his credit.

427. As set out in detail in the earlier factual findings and based on the detailed submissions, it is apparent that by the time of the Stewards' inquiry the Appellant was on notice of the gravity of the issues and his versions commenced to change. They continued to change up until the time he gave his final version before the Tribunal.

428. The Tribunal is of the opinion that those variances cannot be discounted on the basis of the conflation of evidence as submitted on the Respondent's behalf.

429. The Tribunal finds that the differing versions advanced after the initial interviews are a reflection of attempts by the Respondent to exculpate himself from the damaging factual admissions he made to the Stewards in those interviews.

430. Regardless of those damaging findings, the Tribunal is satisfied that a great deal of the Respondent's evidence is in his favour.

431. By way of introductory finding, the Tribunal is comfortably satisfied to the appropriate high standard that when the Respondent gave the horses to Brown he knew it was likely they would be killed and fed to Brown's dogs.

432. The Tribunal is also satisfied that one of the reasons that the Respondent gave the horses to Brown was with the wish and intention that Brown re-educate them as hunting and jumping horses. But that was not the only reason.

433. The Tribunal is satisfied that from the Respondent's evidence, that of his family members and of his numerous referees that he has the reputation set out under the heading of "References" earlier. That is in particular that the Respondent is a superior horseman, who prioritises the welfare of horses and engages in re-homing programs, with an unchallenged reputation for being careful about matching horses and riders for safety purposes.

434. The Tribunal is satisfied, and the parties are at one on this, that the two subject horses had been deprived of their usual racing opportunities, would be difficult to re-home and could only be ridden by a rider of superior skill.

435. The Tribunal is also satisfied that Brown's business did involve hunting with hounds and the riding of retrained horses by city people. There is no doubt that Brown was a superior horseman, well able to re-educate and retrain horses to be jumpers and hunters.

436. The key facts, however, are the Respondent's knowledge of the fact that Brown fed horses to his hounds.

437. Those damning conclusions come from an assessment principally of the initial interviews of the Respondent with the Stewards and to which the text message provides a context.

438. The Tribunal accepts the Appellant's submissions that it should not accept the Respondent's evidence, except where it was against his interests or supported by other evidence. That is the Tribunal is satisfied that his inconsistent statements in a number of areas, which are insufficiently explained by him, affect his credit.

439. That determination is made despite the reputation that he has established by the evidence of his witnesses, referees and supporters. His prior character is taken in to account on the issue of breach of the rule. That conclusion is reached

and the Tribunal accepts his prior reputation, but his conduct on this occasion has not lived up to the expectations of others.

440. An example of that failure is his evidence in respect of the Bless You Toby incident, where the Tribunal is satisfied that he has subsequently set out to concoct a version of his failure with the computer to try and explain his misleading actions in, the Tribunal's opinion, falsely returning the horse as being at Brown's address.

441. That example in respect of Bless You Toby is in the Tribunal's finding that on the Respondent's own evidence, supported by Mrs Sutherland and Dr Sutherland, that he was a very poor of operator of computers.

442. Therefore, the Tribunal finds that in a number of respects his evidence after the first interviews to the Stewards, the Appeal Panel and the Tribunal was untruthful and those findings affect his credit.

443. In particular his failure to give plausible explanations of why his evidence has changed is critical in that determination.

444. The Tribunal rejects the submission on his behalf that such a conclusion is neither fair nor reasonable. The Tribunal has regard to the totality of the evidence it has set out and otherwise referred to in coming to the conclusion.

445. Whilst the Respondent gave every impression of a witness attempting to answer questions truthfully, the simple fact is that the variations without explanation and constant change from one forum to another, unexplained, is critical.

446. The Respondent's submission that consistent versions have been given about stable returns has some merit in some areas, but not the critical aspect of his return for Bless You Toby. References to predictive texts and auto address entry methods are accepted, but it was not that which he did in respect of the Bless You Toby entry. It was not a simple mistake by computer ineptitude.

447. The horses Redfu and Rozzi had been bred by the Respondent, ridden by him and were prepared for racing and did some racing- it appears without much success.

448. It is apparent that Redfu was unpredictable and not safe for an inexperienced rider and this was confirmed by Dr Sutherland. Dr Sutherland was of the opinion that the horse was suitable for euthanasia because of behavioural reasons. The Respondent was of the view that it could not be handled even by an experienced and reasonably expert professional rider because of its propensity to bolt and buck. Notwithstanding that it is noted that by the time of his evidence before the Tribunal he said he could comfortably ride it.

449. Rozzi had the same characteristics and even the champion bronco rider and track rider, Jason Collins, would not get back on the horse.

450. The Respondent just wanted to get rid of them.

451. Mrs Sutherland had been attempting to sell Redfu for some time without success.

452. The evidence must be assessed on the basis that the horses were to be used in Brown's business and, once they left the Respondent's possession, his capacity to ride them became irrelevant. Therefore, whether he was correct in his evidence before the Tribunal that he could safely ride them or not does not matter. The totality of the evidence is that they were not safe, except for extremely experienced riders, such as the Respondent and Brown.

453. It is apparent that Brown could ride the horses because the reason he shot them was that they kicked out at the hounds, not because they would not jump or hunt or were not safe to ride.

454. The Tribunal is satisfied that neither horse was capable of being ridden by city people in Brown's business or otherwise.

455. The Tribunal is satisfied that the Respondent has a reputation for excellence in re-homing retired racehorses. That expertise includes the retraining of horses to a level where they are suitable for re-homing and then an appropriate evaluation of those seeking to take a horse by re-homing that they are suitable to do so and that the horse will match the rider. The Tribunal is also satisfied that in appropriate cases, if asked to do so, the Respondent would take back from a person a horse that had been re-homed if the re-homing did not work to the satisfaction of that person.

456. That is that the Tribunal is satisfied that the Respondent in transferring Redfu and Rozzi was engaging in a continuation of his re-homing programs. That is critical, but not determinative of the ultimate issue.

457. The critical evidence of the Respondent's knowledge of Brown's business is found in his first interview.

458. That interview establishes that the Respondent knew that Brown had a big team of horses, which he rented out to city people and they would be used as jumpers. That is he understood that Brown would use the horses for jumping and for the dogs to chase around. That establishes that the Respondent knew that Brown had working dogs.

459. The evidence clearly establishes the Respondent's belief that Brown would take the two horses as jumpers.

460. The first interview establishes that there was a conversation between the Respondent and Brown about the Respondent providing jumpers to Brown on the basis that he said if the Respondent had any jumpers he would take them.

461. The first interview took place in circumstances where the Stewards were aware of the conversation between Dr Garling and Brown.

462. The Tribunal does not set out the number of occasions in that interview in which the Respondent stated his belief that Brown would take them and try them as jumpers.

463. That interview established that the Respondent's knowledge of Brown's business was very limited and they only had limited conversations, for example, at the races.

464. When the original proposition that Dr Garling had gleaned from Brown that he would feed meat to his working dogs was put to him the Respondent said he did not know anything about that and he was only giving the two horses as jumpers. It was at that point that the Respondent indicated he did not know whether the horses were dead or alive and believed they would still be at Brown's property at the time of the interview.

465. Then critically the following evidence was given:

> "Q. You were definitely aware that he had dogs there. Did it cross your mind that maybe that is what they might have been used for?
>
> SUTHERLAND: I suppose it did, sir, if they didn't make it, but I thought they'd make it.
>
> Q. So you did have some knowledge that there was a chance that they might have been slaughtered--
>
> SUTHERLAND: Well, yeah, fed to the dogs, yeah."

And later:

> "SUTHERLAND: ...I thought he jumped them. I suppose if you put two and two together there's a chance that he can do what he likes with them afterward. As I said, I thought they'd both jump, sir, you know, he's got a lot of horses there so...
>
> Q. By that message; the offer had been made to be used for pet food.
>
> SUTHERLAND: Well, I just wanted to get rid of the horses, sir, he gets them for free and, you know, as I said to him, I said they jump, they've jumped at home.
>
> ...
>
> SUTHERLAND: I sent them there to try them and jump them, what he does with them after that, well, that's up to him, but I would have thought they both jumped, you know, I knew they'd both jump, so."

And later:

> "SUTHERLAND: The option was up to him when he has them what he does with them but--

Q. No, but it was definitely an offer made to Brown for pet food?

SUTHERLAND: Yes, sir, yeah."

And later:

"SUTHERLAND: ...As I said, he's got hounds and, you know, there's always an option for him down the track."

And later:

"Q. ...option was made to Mr Brown to use them for pet food?

SUTHERLAND: ...thought he was going to jump them first and if they didn't make it after that it was up to him to do what he wanted with them ... I knew the option was there if they didn't make it, what would happen, but I thought he would try them for a start, sir."

466. The Tribunal notes the submission to the Appeal Panel that listening to the tape indicates pauses, possibly incomplete answers, speakers talking over each other, the possibility that words were not transcribed and interruptions.

467. However the Tribunal is satisfied that the key pieces of evidence set out in this decision occurred.

468. It is important to note the continuation of this type of evidence from the Respondent when interviewed two days later on 22 August 2020 when he stated:

"SUTHERLAND: ... and if they didn't work at that, well, he had hounds and he'd probably place them there as a second option..."

469. The Tribunal notes from the Stewards' inquiry on 8 September 2020 onwards the Appellant's stated knowledge became more limited.

470. By the time of the inquiry the Appellant was seeking to explain the text message, to which the Tribunal will return, as being a joke and giving reasons for the wording that he used. In particular there was a denial that he gave the horses to Brown for dog food. The explanation being that he was only referring to the horses as being slow and would be caught by the hounds.

480. Before the Stewards the Respondent was at pains to emphasise that there was only ever an option A considered and that was for the use of the horses as jumpers. He sought to establish that he hadn't thought past option A, that is, that they would be used as jumpers.

481. To the extent that his answers in the earlier interviews might support his knowledge of them being sent for pet food he explained that he misunderstood the question asked of him.

482. Before the Stewards he also pointed out that he and Brown never discussed plan B. At that point he was also stating in evidence that he didn't know that Brown fed flesh to his hounds.

483. Before the Appeal Panel he maintained a denial of knowledge that Brown fed flesh and horse meat to his hounds. It was then that the Respondent was able to refer to a knowledge of carcasses, but not racehorses being fed to the hounds.

484. Also before the Appeal Panel the Respondent stated that there was no option B for him, only an option A.

485. Before the Tribunal the Respondent said that he would take the horses back, not that there was an option to shoot them and feed them to the dogs. He also denied any knowledge that Brown would kill the horses and feed them to his dogs.

486. Before the Tribunal the Respondent rejected option B as being within his Respondent's knowledge.

487. In submissions the Appellant says that the damning words from the Respondent were: "Yeah, fed to the dogs"; "An option to go to the dogs later on"; "That's always an option for him down the track"; "If they didn't make it after that it was up to him to do what he wanted with them"; "I knew the option was there if they didn't make it, what would happen"; "Well, he had hounds and he'd probably place them there as a second option".

488. Again noting that on this particular evidence there was a change in position in the subsequent hearings that it is the Appellant's submission that the Respondent has given no plausible or proper explanation for his change in evidence. It is, therefore, submitted that the Respondent knew that Brown fed horse flesh to his dogs and he may use the two horses in that way.

489. The Respondent submits that the Respondent was merely speculating in those interviews about what might happen to his horses, particularly as he had no legal control over them after he had parted with them. That is, it is submitted, that this evidence does not rise above the Respondent accepting the reality that it was a possibility that the horses could eventually be killed and this does not amount to knowledge or intention or wish that that would occur.

490. The submission of the Respondent continues that he has been consistent throughout his evidence that the horses went to Brown for jumping.

491. The Respondent also submits that his references to the use of carcasses of fallen stock, or stock killed for other reasons, does not mean that he had knowledge that would happen to his two horses.

492. The Tribunal accepts that Mrs Sutherland, Dr Sutherland and Shane Wilson were not privy to any conversations, either at the time of the handover or earlier, to the effect that Brown was taking the horses, shooting them and feeding them to his dogs, rather that it was purely for the purposes of taking them for use in

his business as jumpers. This evidence was unchallenged and the Tribunal accepts that that was the belief of each of those three witnesses.

493. The Tribunal finds the Respondent's subsequent evidence on the conversation that he said took place with Brown prior to the text message to be unconvincing. Whilst there was a passage of time from when the conversation was said to have taken place to the time he was asked about it, he nevertheless was not able to give clear evidence about it. He, for example, could not remember whether the conversation was at the races or by telephone. He had not referred to that telephone conversation earlier.

494. However, it is apparent from the totality of the evidence that there had been a conversation, or conversations, between the Respondent and Brown, either at the races or by telephone, in respect of Brown's desire to take horses from the Respondent.

495. The Tribunal is also troubled by the fact of the Respondent's subsequent evidence to the effect that when he had the conversation about the handing over of the horses he did not nominate the two subject horses at that time. All of the evidence is to the effect that he knew that both Redfu and Rozzi were to be re-homed and were suitable, in the Respondent's opinion, to go to Brown's business. It is hard to imagine why he needed to think about what horses he may or may not provide to Brown when Brown asked him for horses. He stated in the first interview that he just wanted to get rid of them

496. The Tribunal is satisfied that the Respondent is a person prone to joking. That is established by the totality of the evidence of the witnesses.

497. The Tribunal is also satisfied and does not need evidence to the effect that the horse racing industry is one in which its participants engage in "jokey behaviour". In that regard this particular sport is no different to many other sports or activities.

498. The Tribunal also notes that Mathison gave evidence that he may have told the Respondent about Brown's hunting and jumping business and also possibly told him that he Mathison had re-homed horses with Brown.

499. Mathison was aware that the Respondent shot horses for dog food, but the evidence does not establish whether he told the Respondent of that knowledge.

500. There is no doubt that the Respondent's knowledge of Brown's business in part came from conversations with Mathison and that was to the effect that Brown took horses for re-homing and then used them in his hunting and jumping business with city people.

501. As set out above, the Tribunal is satisfied that Brown and the Respondent had a conversation where Brown asked the Respondent for horses for jumping in his business.

502. That conversation led to the subsequent text.

503. Brown's evidence establishes that he had no direct conversation with the Respondent about using the two horses for pet food.

504. Brown gave evidence that the arrangements for the transfer of the horses took place because the Respondent messaged him to that effect.

505. Again the text is critical and it states in full:

> "If you need some hound food probley got two maybe three down the back paddock."

Brown's response:

> "Super, when do you want them gone?"

506. The arrangements were then made for the pickup.

507. In respect of that evidence Brown was interviewed and he stated that there was no mention they were to be used for pet food or hound food, but he Brown presumed that that was why the Respondent was giving them to him.

508. Brown in that interview also stated that the Respondent knew he hunts and has dogs and that "We do feed flesh from time to time." Then critically Brown said in his interview:

> "Q. And they were going to be used as hound food?
>
> BROWN: Yes.
>
> Q. Any idea why Mr Sutherland would know that, that they were going to be used as hound food?
>
> BROWN: Since we've had horses with Trevor, he knows what I do and that I have the hounds, and so on and so forth, yeah, so we've had probably unofficial conversations, you know, chats - not probably one on one, there's probably been half the stable there..."

But critically:

> "Q. Had he ever asked if you would take a horse to be used for hound food?
>
> BROWN: No, no."

509. The Appellant relies upon the evidence of Dr Garling to provide support for knowledge imputed to the Respondent through Brown.

510. The Tribunal accepts the evidence of Dr Garling.

511. The Tribunal rejects the challenges made to her evidence and set out in detail in the submissions earlier.

512. The Tribunal is satisfied that the conversation that Dr Garling had with Brown was of such an impact upon her that she was able to recall it a few hours after it took place when she made her report.

513. The fact that there are some differences between her report and her statement, the narrative, does not lead the Tribunal to conclude that it should read her evidence down.

514. Dr Garling's evidence was clear and concise and sufficiently similar between the report, the notes and the statement that the gravamen of it as to the critical points uttered by Brown is accepted.

515. To the extent that there are some differences between the two the Tribunal accepts the Appellant's submission that those differences go to semantics and not the gravamen of the evidence.

516. The Tribunal is comforted in that conclusion not only by reason of the impact of the statements by Brown to her, but that it was made reasonably contemporaneously to the event.

517. The Tribunal does not find that the conversations that Dr Garling had with the officers of the Appellant have caused her to give unacceptable, incorrect or false evidence.

518. The fact that in the Respondent's opinion Dr Garling was unable to distinguish between action and purpose, cause and effect, full knowledge and hindsight does not mean that her evidence should not be accepted, assuming such conclusions are able to be made and they are not.

519. Comfort is found in those conclusions by the limited extent to which Brown corroborated her evidence.

520. The critical parts of the narrative evidence of Dr Garling are:

> "ME: Do you mean to say that you were given the horses to feed to your working dogs?
>
> BROWN: Yes.
>
> ME: Was Mr Sutherland aware that you were going to feed the horses to your dogs?
>
> BROWN: Yes. That was the reason he gave them to me. Trevor knew I had a lot of working dogs.
>
> ME: Were the horses shot?
>
> BROWN: Yes. ...so he gave them to me to feed to the dogs."

521. As stated when interviewed by the Stewards, Brown was asked:

"Q. But you say Mr Sutherland was fully aware of that when they came here?

BROWN: As far as I'm aware."

And later:

"Q. But you do maintain that Mr Sutherland knew they were coming here?

BROWN: Yes.

Q. And they were going to be used as hound food?

BROWN: Yes.

Q. Any idea why Mr Sutherland would know that, that they were going to be used as hound food?

BROWN: Since we've had horses with Trevor, he knows what I do and that I have hounds..."

522. But it must be acknowledged he later went on to say that Brown had never asked him if they were to be used as hound food.

523. It is noted that by the time Brown gave evidence at the Stewards' inquiry that his position had changed.

524. He was now endeavouring to say that he did not explain himself properly and that there was no discussion between him and the Respondent as to the horses being slaughtered and fed to the dogs. About that he was now certain.

525. The Tribunal notes also that Brown gave evidence at the Stewards' inquiry about the unsuitability of the two horses for his jumping business.

526. He did, however, confirm to the Stewards that there was a plan A and a plan B and that plan B would apply if plan A did not work out. However, he did state that the Respondent had no knowledge of that.

527. In respect of his earlier stated presumption that the Respondent had knowledge he now emphasised it was a presumption, which did not mean yes or no as to knowledge in the Respondent.

528. Also before the Stewards he now denied having any conversation with Respondent about the horses going to be shot and used for hound food.

529. However, he did confirm that plan B was to shoot them and feed them to the hounds. However, he went on to state that the Respondent did not know that plan A had failed.

530. Brown did not give further evidence to the Appeal Panel or the Tribunal.

531. Of course the critical evidence is the knowledge of the Respondent and not that of Brown, but the evidence of Brown is sufficient to establish that the Respondent's expressed understanding of plan B does have a foundation in Brown's evidence as well. That is found in the statements by Brown to the effect of the Respondent's knowledge of what he did in his business and the fact that the Respondent's evidence is not dissimilar.

532. All this, as stated, is supported by the evidence of Dr Garling.

533. Again the fact that Brown's evidence changed from the time of his conversation with Dr Garling and interview by the Stewards to the time he appeared at the Stewards' inquiry means that in the Tribunal's opinion, absent a really plausible explanation, that his original evidence is to be preferred as to knowledge in the Respondent.

534. All of these findings put the text message in context.

535. That contemporaneous document provides in the Appellant's submissions support for the proposition that the Respondent knew that the two horses could be used as hound food.

536. The Respondent was not questioned directly by the Stewards in the first interview or second interview in respect of the text message because of the context of various questions.

537. However, the Tribunal is satisfied that it was fully open to the Respondent, who was driven by a knowledge that he was prone to jokes, and well known for it, that when questioned by the Stewards about the text he could have said it was a joke. He did not do so. He did not seek to do so until the Stewards' inquiry when he raised that for the first time.

538. The text does not stand alone, but is in the context of all of the evidence up to the point at which it was sent and which, incidentally, reflects what actually happened to the two horses.

539. The Tribunal is also troubled by the Respondent's attempt to explain the joke when the joke does not make sense. The Respondent well knew that hounds do not chase horses, but that the hounds chase the fox or scent, followed by the horses. Therefore, to suggest that the horses would be caught by the hounds does not make sense.

540. The Tribunal also notes the Appellant's submission that the attempt to explain the text as a joke developed from proceeding to proceeding. For example, the Respondent's evidence that the text followed a conversation in which an initial joke and discussions took place and was merely confirmatory of that joke is not accepted by the Tribunal.

541. The Tribunal does not accept the Respondent's attempt to explain the text on the basis he was giving a joke that the horses were not "real fast" and would be caught by the hounds and thus become hound food.

542. In the context of this text the Tribunal does not accept the submission for the Appellant that the earlier conversation did not take place. The totality of the evidence set out above establishes that it must have to lead to the subsequent text having taken place. Whether the conversation was interrupted, as the Respondent recalled as a possibility, does not need to be determined.

543. The Tribunal does, however, accept the Appellant's submission that Brown's response "When do you want them gone" is not consistent with him accepting the text as a joke.

544. The Tribunal, as stated above, is particularly persuaded by the fact that that which was set out in the text actually took place, that is, that two horses ended up as hound food.

545. The text is also to be found in the context that the Tribunal is satisfied that the Respondent was of the opinion that there was a plan A and a plan B and that plan B would be that the horses would be shot and fed to the dogs if plan A, the attempted jumping in the business, was not successful.

546. The Tribunal accepts the Appellant's submission that the subsequent attempts to explain the text as a joke are not made good and the Appellant establishes that the evidence is such that that approach by the Respondent should be rejected.

547. Accordingly, the Tribunal does not accept the Respondent's submissions that the text is capable of more than one meaning.

548. The various contextual matters to which the Respondent has made submissions do not change the Tribunal's conclusion. Those circumstances were set out in the submissions and do not need repeating and in particular the fact that the Respondent was known as a person to make jokes and all of the circumstances surrounding the handover do not cause the Tribunal to come to a different conclusion.

549. The fact that the Respondent had a plan A to give the horses to Brown for jumping purposes does not mean that the literal meaning of the text should be rejected.

550. Further, the Respondent's belief that he thought the horses would make jumpers in Brown's business does not change the literal meaning of the text.

551. Further, the submissions that the horses might be slow and would not get away from the hounds does not change the literal meaning of the text.

552. The fact that Brown had asked for jumping horses and that jumping horses were to be given does not change the literal meaning of the text.

553. The fact that the Respondent subsequently groomed the horses, and the Tribunal will return to this, does not change the literal meaning of the text. There was nothing irrational, to which the Tribunal will return, in the grooming of the horses in the circumstances in which they were being, as part of plan A, given for jumping in Brown's business.

554. The fact that the horses were being given as a chance for a second career after racing, which was part of the plan A, does not mean that the literal meaning of the text should be rejected.

555. The Tribunal does not have to examine the evidence, or lack thereof, and submissions that touch upon vernacular, jokes in the racing industry and the like. No statistical assessment of probabilities of events happening is required.

556. There is, therefore, the interview admissions made by the Appellant, which are now confirmed, as to his knowledge by the text.

557. The fact that the Respondent groomed the horses as per his usual custom is, in the Tribunal's opinion, merely consistent with his intention in the first instance that the horses go to Brown as jumpers and for use in his business and that, as the Appellant always did, he would ensure that the horses were handed across looking their best and appropriately treated. That does not mean that the Respondent did not have knowledge of what might happen to the two horses if they eventually did not work out in the hunting and jumping side of the business.

558. As stated earlier, the Tribunal notes the detailed facts given by the various witnesses at the handing over of both Redfu and Rozzi and subsequently Witchblade and Hangin' With Willy and the conversations that took place.

559. The Tribunal accepts that at both of those handovers there was no conversation to the effect that any of the horses would be shot and fed to the dogs. The Tribunal also accepts that it was open to each of those witnesses to believe from their observations of Brown and his equipment and what Brown said that he was an experienced rider, who would take the horses for the purposes of retraining and use in his business.

560. The Tribunal accepts the Appellant's submissions as to the surprise to be formed by the failure to enquire into the welfare of Redfu and Rozzi at the time that Witchblade and Hangin' With Willy were handed over.

561. This is particularly so by reason of the effort the Respondent and his business had put into each of those two horses before they were re-homed to Brown. The explanation that the Respondent was very busy on the second occasion is unconvincing.

562. However, the fact that he did not make that enquiry is not demonstrative of knowledge in him that at the time he handed over Redfu and Rozzi he was doing so for the purpose of them being shot and fed to the dogs.

563. There has been much evidence about the Respondent's financial position and his statements in respect of it.

564. The Tribunal notes in particular the various occasions in the first interview where the Respondent expressed financial difficulties at the time of the handover and the reasons for those financial difficulties.

565. The Respondent's financial concerns and stresses were corroborated by Mrs Sutherland and Georgia Sutherland. Dr Sutherland has also provided a form of corroborative evidence of those difficulties.

566. The Tribunal is quite satisfied that at the time of the handover the Respondent was under financial stress and money was tight. That was the belief he clearly and unequivocally expressed in his interview.

567. That was his belief at the time.

568. His belief as expressed at the time of the Tribunal hearing, supported by his evidence and bank statements as to the credit standing to him, is of course not consistent with his earlier expressed beliefs.

569. The Respondent's submissions that he was having a tough year are accepted. The Respondent's other evidence and now evidence before the Tribunal, which does not change his actual financial position at the time of the handover, establishes that he was in funds. His total expenses are not known.

570. Also the Respondent establishes in the totality of his evidence that his property was of such a size that he was able to feed and care for the four horses, not just the two subject horses, and others, without financial stress or difficulty.

571. Accordingly, as a single fact his financial circumstances at the time of the handover were not such as to provide a motive, to the extent that such matters are relevant, for him to seek to re-home the horses for the purposes of being shot and fed as dog food.

572. The Tribunal does not accept the Respondent's submissions that if at the time he was under financial difficulties he could have sold them to the adjoining knackery because the Respondent's other evidence is his knowledge that he could not do so.

573. The Tribunal again notes that the Respondent's evidence was that he just wanted to get rid of the horses and this does not mean because of financial stress.

574. The other evidence that touches upon whether the Respondent could have had the two horses euthanised does not take the determination any further.

575. His ignorance of what he could and could not do within the rules does not assist his situation. It is sufficient that he had knowledge that he could have the horses euthanised under the auspices of the Appellant.

576. The above findings do not require the Tribunal to determine that there was some type of charade or conspiracy between the Respondent and Brown. That is a charade to engage in the wrongful conduct and a conspiracy to ensure that others did not know about it.

577. The evidence and the Tribunal's determinations in respect of it can stand quite alone from any considerations of conspiracy and charades and the Tribunal is not satisfied that there were such activities in any event. The actions of the Respondent could well take place without him having to engage in a charade or a conspiracy.

578. The Tribunal does not accept the seven points set out in detail in the submissions under general submissions earlier -see paragraph 410. The conclusions drawn to date explain each of the reasons why.

579. The conclusion the Tribunal reaches is that it is necessary to focus upon the Respondent's knowledge at the time he handed the horses over.

580. That knowledge is based upon the Tribunal's findings of what he said in the first interview in respect of his understanding of what Brown's business was and what Brown did with horses if they did not succeed in Brown's business. The Respondent had the specific knowledge that they would be slaughtered for pet food.

581. As stated, the Respondent's attempts to read down that evidence by his subsequent evidence is not accepted.

582. The aspects of knowledge and intent do not require the Appellant to establish that the Respondent acted in the knowledge that he would be in breach of the relevant rule. It is only necessary to establish the factual ingredients of the rule with the appropriate knowledge and intent.

583. Despite the Tribunal's finding that one of the reasons for the handover was plan A, that is, for Brown to use the horses in his jumping business, that the Respondent knew full well that if that did not succeed that the horses would be slaughtered and fed to the dogs.

584. Accordingly, the Appellant had the appropriate knowledge that the horses would, or could, be slaughtered for dog food.

INTENTION

Respondent

585. The Respondent's submission to the Tribunal invited it to have regard to the submission made to the Appeal Panel on the issue of intention to be proved.

586. It is common ground in the proceedings, as set out above, that the Appellant must prove that the Respondent had the knowledge and intention to engage in the acts in contravention of the sub-rule.

587. The Respondent says that the word "sent" in the sub-rule requires a conscious activity and that the word imports an intention on the part of sender.

588. It is submitted that intention is more than just knowledge, although intention might be inferred from knowledge if an outcome is known, inevitable or natural and probable consequence of an act. But it is submitted that more is required to prove intention than evidence of knowledge.

589. It is then submitted that intention here requires proof that the horses be similarly disposed of and that that mental element is not simply limited to knowledge.

590. It is said that the purpose of the rule would not be advanced if the rule could be breached by the actions of a second or third party, which a subject owner or trainer did not intend. That is there must be some conscious activity and not a mere luckless victim.

591. Again it is submitted that when more than one outcome is reasonably possible more is required to prove intention than evidence of knowledge.

592. Further, it is submitted that knowledge of a fact requires more than mere belief, suspicion or appreciation of a realistic chance or theoretical possibility.

593. It is said the constructive knowledge or mere suspicion are not sufficient.

594. Here it is said that the Stewards had merely asked the Respondent to speculate on possibilities, chances or suspicions and required him to have the benefit of hindsight knowledge. It is said that that could not satisfy the criterion of knowledge, much less be the basis for inferring intent.

596. In a limited additional submission to the Tribunal the Respondent submits that the Appellant's submissions invite consideration of lesser standard of mens rea and require the use of an impermissible hindsight reasoning.

Appellant

597. The Appellant's submissions have not directly dealt with the submissions on intention made to the Appeal Panel, either in the reply submission to the Appeal Panel or in the two submissions made to the Tribunal.

Determination on intent

598. The Tribunal is comfortably satisfied that the aspect of intent cannot be separated from the aspect of knowledge.

599. The Tribunal is comfortably satisfied that intention is inferred from that knowledge because the outcome is known, is reasonably possible and is not just mere suspicion or suspicion or theoretical - it was a realistic outcome.

600. The circumstances in which the critical evidence unfolded were during a stewards' interviews and the Tribunal is comfortably satisfied that in reading the

interviews as a whole that the respondent was not merely speculating or acting with hindsight but expressing facts that he knew.

601. This does not create an impermissible hindsight reasoning or need a lesser standard of mens rea.

602. That is the Respondent acted in the knowledge and intent that the horses would be handed to the business of Brown for the purposes of jumping and in the knowledge and with the intent that if they did not succeed in that business that they would be slaughtered and fed to the dogs, as was the Respondent's knowledge of Brown's practices.

603. That conclusion is drawn not just based upon the text, but upon the totality of each item of the evidence when considered individually and collectively.

CONCLUSION ON FACTS

604. The Tribunal rejects the Respondent's evidence, except where stated above, where it seeks to establish innocent constructions.The evidence found in favour of the Appellant is direct evidence on critical facts.

605. The more probable inferences found in favour of the Appellant have been set out.

606. The Appellant has negatived inferences and possibilities consistent with innocence and negatived possibilities in favour of the respondent- none were of sufficient equal likelihood in favour of the respondent .

607. The Appellant does not have to rely on conjecture. The whole of the evidence has been considered and not piecemeal parts of it.

608. Consideration of the text as tendency evidence does not arise as the text has been found to reflect the Respondent's knowledge and intent. It only has one meaning. It is evidence of a fact in issue.

609. Accordingly, the Appellant clearly and unequivocally satisfies the Tribunal that each ingredient of the particulars to the charge is found established and that therefore the particular to the charge is established.

610. The question of fact to be determined is found in favour of the Appellant.

611. In respect of the charge itself as to the ingredients the Tribunal is satisfied that "a decision has been made to retire a horse" and that is in respect of both horses and, further, that "that horse has been domiciled in New South Wales for the majority of its life" is established in respect of each horse.

612. It is necessary to decide as a matter of legal interpretation whether sub-rule (e) is established - the similarly disposed of question.

## THE CONSTRUCTION OF SUB-RULE LR 114(5)(e)

Appellant

613. It was the position of the Appellant before the Stewards and the Appeal Panel that a breach of the "or similarly disposed of" aspect of the rule will be established if it is proved that a retired horse is sent to a person or place in the knowledge that the horse would be killed for the purpose of use as human or animal food.

614. In it's opening submission to the Tribunal it said that if it establishes that the Respondent had knowledge that they would be killed by Brown and fed to his dogs that such conduct will fall within the sub-rule. This will arise because this manner of disposing of the horses is similar to sending the horses to an abattoir or knackery, in that the horses have been sent to a place where they have been killed and used as pet food and such conduct falls within the sub-rule.

615. While the Appellant's submission to the Tribunal was made before the Respondent's submission to the Tribunal, on this issue the Appellant approached the submissions on the basis of an initial reply to the submissions made by the Respondent to the Appeal Panel.

Respondent

616. The submission by the Respondent to the Tribunal on the construction issue was very brief and stated that the sub-rule does not require or empower a trainer to insure against possible, but unintended outcomes, nor to predict the chances of a horse being successful in a second career or of a new owner maintaining the stated commitment of retraining or re-education.

617. The submission to the Tribunal then continued by adopting the submission by the Respondent to the Appeal Panel.

618. That Respondent's submission opens by rejecting the construction advanced by the Appellant.

619. The submission is that the sub-rule takes its meaning from its context and the Rules of Racing overall.

620. It is submitted that the sub-rule does not require identity, but a degree of likeness and it is necessary to ascertain the essential features of sending to an abattoir or knackery and then of making a comparison to find the meaning of "similarly disposed of".

621. It is submitted the rule does not give any express indication of its features.

622. The parties are in agreement, and the Respondent submits, that the stated purpose of LR 114 is to ensure the welfare of thoroughbred horses from birth, during their racing careers and on retirement. It is submitted that this stated purpose must be given effect.

623. It is submitted that a breach of the rules is serious and, therefore, the rule should not be interpreted to find features or degrees of similarity which are uncertain or unclear.

624. The Respondent then submitted on the application of Day v Harness Racing NSW (2014) 88 NSWLR 594. This arose because the Appellant had called it in aid in its submissions.

625. The relevant parts of Day relate to the way in which Rules of Racing should be interpreted and that not being on the basis that they were drawn by parliamentary draftsmen or lawyers, et cetera.

626. The submission is that Day should not be followed because the case can be distinguished. In addition, it is said that there is no factual basis to find that Day is applicable because there is no evidence of who drafted the subject rule, nor that it contained apparent errors.

627. The submission continues that Day is not necessary because the conduct here is directed to people learned in horses and not in the law.

628. The submission continues that the parties have three points in common and that a breach rule requires more than merely: an animal sent to a person or place and then killed; an animal is sent for the purpose of being killed; an animal is killed and thereafter its carcass used for food.

629. It is said that it would have been a simple matter to draft the rule to clearly prohibit that conduct.

630. The submission then addresses the Respondent's construction on the need for a commercial purpose or scale of abattoir or knackery operations, their methods and processes, all in the context of welfare concerns that prompted the rule.

631. The submission then is that the Appellant's approach is result driven backwards to try and fit in to the facts of this case, rather than finding what the sub-rule is required to address.

632. And the Appellant submits that the purpose of the rule was to address public concerns on animal welfare and the mistreatment of animals in abattoirs and knackeries with substantial abuse and thereafter wastage of horses.

633. The submission then is that the words "abattoir" or "knackery" need to encompass matters such as: a building; a commercial operation at an industrial scale; an operation for the purpose of sale of meat or processed food; consideration of the processes of killing in those facilities being housing, killing en masse, driven to their deaths along a race, placed into a stunning box or knocking box and restrained, stunned or disabled and then stuck up and shackled by a hind leg; and then the submission addresses potential exposure to welfare concerns or inhumane conditions where animals may be: kept in unsuitable conditions, injured, witness the deaths of others, and experience anxiety, fear, et cetera.

634. References to slaughter by the Appellant are rejected because here there was no slaughter, but a humane killing. Therefore, there is no similarity in the method of destruction to that in an abattoir or knackery. In addition, it is submitted that there were no features of the welfare concerns as just outlined.

635. It is said on the facts here that the purpose of the killing of the horses was for welfare and safety reasons and the fact that the carcasses were afterwards used was not a reason for their killing. That was merely what happened after they had been killed because they were not suitable.

636. Further, it is submitted that the Appellant's construction does not explain the operation of the rule if there are multiple purposes or a killing for one purpose, but use of the remains for another.

637. It is submitted that the Appellant's construction does not prohibit sending horses en masse to kill lots, et cetera.

638. Therefore, it is submitted it would not be a reasonable or purposive construction to find that the rule prohibits the humane killing of a horse for welfare or safety reasons simply because the carcass is intended to be used thereafter for human or animal food.

639. It is said the better construction does not limit the application of the rule to food uses, but requires not only that the sole purpose of the killing be the creation of a product, but that the general nature and circumstances and processes involved bear a reasonable degree of similarity to an abattoir or knackery. Therefore, disposal will be similar if it is by an operation at a commercial scale for the purpose of creation of an animal product intended for resale or where the horse is killed using a method of destruction that results in death by exsanguination.

Appellant

640. In its reply submission to the Appeal Panel the Appellant submitted that a purposive approach is to prohibit a horse that has been domiciled in New South Wales for the majority of its life being sent to a knackery or abattoir or similarly disposed of.

641. Definitions are provided and the Tribunal will be return to those.

642. It is then said that the definitions of an abattoir and a knackery are premises used to slaughter a horse. Therefore, sending to an abattoir or a knackery leads to slaughter. Therefore, similarly disposing of a horse is sending it to a place where it will be slaughtered.

643. Reliance was placed on the definition of "slaughter" as killing animals for food or skins. It is said that is what happened here.

644. The submission to the Appeal Panel continued that there is not a requirement to focus upon the mistreatment of horse aspects addressed by the summaries given by the Respondent.

645. As to Day it was pointed out that at 77 Leeming JA referred to the need to restrain against a construction which would give no work to do to legal language. Therefore, here each part of the rule must be given some operation and if the Respondent's interpretation is found then the words "or similarly disposed of" will have no operation.

Respondent

646. It is noted that in the reply to the Appeal Panel it was said that reference to the word "slaughter" should not arise because it was not used in the sub-rule. Therefore, use of dictionary definitions are not substitutes for the functional comparison required by considering the meaning of the expression "or similarly disposed of".

Appellant

647. The Appellant's opening submission to the Tribunal again relied upon Day and in particular that a reasonable interpretation must be found from what the Tribunal believes the expression must have been intended to mean.

648. The submission places substantial reliance on the whole of the Local Rule 114. In particular that there are two distinct obligations cast by the rule. The first is in positive terms as to what can be done with a retired horse set out in sub-rules (c) and (d). This to be compared to the negative terms expressing what cannot be done which is found in the subject sub- rule (e). This positive obligation under (c) and (d) arises because an owner must take reasonable endeavours to find a home for a horse that meets certain minimal standards and provides options for breeding, equestrian work, pleasure or companions or other approved options. If such a home cannot be found, then permissible options are official retirement or retraining program or any other options that ensure the ongoing welfare of the horse and which are approved. This is to be compared to the subject sub-rule which prevents destruction.

649. Accordingly, the sub-rule has an intention which must be broadly construed and find common characteristics between the methods of identified disposal. That is because the sub-rule is intended to address circumstances where a horse was not being disposed of in one of the ways permitted by (c) and in (d).

650. The submission then turns to definitions and finds comfort in Balk v Ulmarra Shire Council (1985) 55 LGRA 130 at 134:

> "The word 'abattoir' in its ordinary and natural meaning is, in my opinion, a place where animals are slaughtered in order to provide food for human consumption. A knackery is commonly regarded as being something different from an abattoir and as being a place where old or diseased animals, and particularly horses, are slaughtered. ... The basic

difference between the two concepts is that an abattoir provides food for human consumption whereas a knackery does not."

651. It is said, therefore, a manner similar to an abattoir or knackery involves killing for the purposes of food.

652. The submission continues that there is no reason to find a purposive interpretation which would require that abattoirs and knackeries means that there is a necessity for commercial operations on an industrial scale, et cetera. That is said to arise because the vice of killing for food is the same whether it is done by a person or on an industrial scale.

653. In addition, it is said that the expression "similarly disposed of" can mean disposal in many ways that are not the same as a knackery or abattoir. For example, sending a horse to someone who will kill it and use the meat for dog food is disposing of a horse in a manner similar to sending it to a knackery or abattoir, so too, it is submitted, sending a horse to the sort of industrial operation described by the Respondent.

654. The submission continues that the Respondent's submission as to a need to address inhumane conditions at various abattoirs and knackeries does not arise because the rule is not so limited.

655. The submission is that the use of the words "abattoir" and "knackery" indicate an intention that horses are not to be killed to be used as food. Therefore, it is submitted that the common sense construction of the sub-rule encompasses a situation where a person gives a horse to another in the knowledge that the horse will be killed and used as food for another animal.

656. Macquarie definitions for "abattoir", "slaughter" and "knacker" are given, but do not take the submissions a great deal further. There is no doubt that an abattoir is a building or place where animals are slaughtered for food. There is no doubt that slaughter is the killing or butchering of animals, especially for food. There is no doubt that a knackery is a place where old or useless horses are taken for slaughter.

DETERMINATION

657. The Tribunal is satisfied that the sub-rule does not require finding that "or similarly disposed of" means that the method must be that which would otherwise be applied in an abattoir or a knackery.

658. The contrast between sub-rules (c) and (d) as against (e) clearly demonstrates first a need to ensure that horses' welfare is addressed by placing them in appropriate places, but that the alternative of destroying them is not acceptable.

659. The whole of LR114 gives context for deciding the purpose of (e) and that is, if not placed do not destroy.

660. There are of course permissible ways under the rules by which retired racehorses, and others, can be humanely euthanised. That, however, is not the specific issue that the sub-rule addresses. Therefore, there is not a need to find that the similarities of the similarly disposal methods require consideration of commercial or industrial scale operations, but can be effected by an individual.

661. The purpose of the rule to address welfare and the reasons for its introduction do not require that the expression "similarly disposed of" elevates the need for buildings, commercial operations, commercial sale of meat or processed food and that there be a facility for the destruction of the animal in a method similar to that in an abattoir or a knackery. It is not necessary for there to be a finding that there will be inhumane conditions which would cause the sub-rule to require that that be addressed by properly operating abattoirs or knackeries. The humane disposal of a horse is required for many other reasons and not to cause some reading down of the sub-rule here. Again the context of LR114 as a whole provides that guidance.

662. The Tribunal does accept the Appellant's submission that the word "slaughter" is appropriate for consideration, as outlined in the submissions.

663. The purpose of the rule is not assisted by addressing what in fact occurred here and the accepted humane destruction of the two horses.

664. The various other arguments do not lead to any other conclusion such as multiple purposes for killing or sending horses en masse to kill lots, exsanguination et cetera.

665. There is no doubt that the rule does not prohibit the humane killing of a horse for welfare or safety reasons when otherwise done in accordance with the rules, but not in breach of this rule.

666. Therefore, the submissions for the Respondent are not accepted and the limitations said to be imposed upon a purposive interpretation of the rule are not adopted.

667. In particular the suggested requirements on a trainer to address possible outcomes, predict success in a second career or whether the new owner will continue a commitment do not advance a purposive interpretation.

668. Therefore, the rule when considered purposively and broadly construed was intended by the drafters to plainly encompasses the killing of a horse for the purpose of using it as food.

669. The rule applies where a person gives a horse to another in the knowledge that the horse will be killed and used as food for another animal.

670. There is nothing unclear or uncertain about that interpretation.

671. There is no need to consider Day principles on these findings.

672. It is not necessary to read in to the words of the sub-rule other words such as “slaughter”.

673. The Tribunal agrees with the conclusion reached by the Appeal Panel that:

> "42. ... In our view, the words 'similarly disposed of' relate more to an end result - that is, a horse is disposed of (killed) for the purpose of its meat being used as food.”

674. The Respondent's conduct falls within that construction of the sub-rule.

CONCLUSION.

675. The Tribunal finds that the remaining ingredient of the breach, that the respondent has similarly disposed of the horses is established.

**ORDERS**

676. The respondent has breached LR114(5)(e) as pleaded.

677. The appeal by the appellant is upheld.

678. The issue of penalty remains for determination.

679. The parties are each requested to make written submissions within 14 days of receipt of these reasons on whether a hearing is required on the issue of penalty or whether it is to be dealt with on written submissions. If a hearing, dates will be given. If written submissions, then a timetable will be fixed with the appellant submitting first , then the respondent then the appellant in reply. A time needed for preparation of written submissions should be given by each party when advising if written submissions are preferred.

**LOCAL RULE 114**
EQUINE WELFARE (Effective 1.10.17)
LR 114.
(1) The purpose and objective of this Local Rule 114 is to ensure the welfare of thoroughbred horses from birth, during their racing careers and on retirement.
(2) A registered owner, trainer or any person that is in charge of or has in his or her possession, control or custody of any horses (Eligible Horses, Unnamed Horses and Named
Horses) must ensure that any such horses are provided at all times with: 291
(a) proper and sufficient nutrition and water;
(b) proper exercise;
(c) stabling and paddocks of a standard approved by Racing NSW, which are adequate in size, which are adequately maintained and kept in a clean and sanitary condition;
(d) veterinary treatment where such treatment is necessary or directed by Racing NSW.
(3) A registered owner, trainer or any person that is in charge of or has in his or her possession, control or custody of any horses (Eligible Horses, Unnamed Horses and Named Horses) must exercise reasonable care, control and supervision as may be necessary to prevent any such horse from being subject to cruelty or unnecessary pain or suffering.
(4) A registered owner, trainer or any person that is in charge of or has in his or her possession, control or custody of any horses (Eligible Horses, Unnamed Horses and Named Horses) is not to euthanize or destroy a horse (or permit a horse to be euthanized or destroyed) unless a registered veterinary surgeon has certified in writing that it necessary on welfare or safety grounds or for reasons approved in writing by Racing NSW or unless under extreme circumstances where it is necessary for a horse to be euthanized immediately and the decision is subsequently confirmed by a veterinary surgeon. In the event that a registered veterinary surgeon has certified in writing that it necessary for a horse to be euthanized on welfare or safety grounds or for reasons approved in writing by Racing NSW, then the horse can only be euthanized by a registered veterinary surgeon and is not to be sent to an abattoir or knackery or similarly disposed of. [sub-rule amended 1.2.21]
(5) Further to AR64JA(1), where a decision has been made to retire a horse, or not to commence racing an Eligible Horse, and that horse has been domiciled in New South Wales for the majority of its life:
(a) the Manager, in addition to any forms to be lodged with Racing Australia pursuant to AR64JA(1), is to lodge with Racing NSW the Retirement Notification form prescribed by Racing NSW, such form to includes details of the retirement option, where that horse will be located and contact details of the new owner (if that horse is being transferred to a new owner)
(b)
(i) that horse is not to be transferred to a location which does not meet minimum standards prescribed by Racing NSW to ensure the ongoing welfare of that horse and the owners are required to provide Racing NSW with all information and assistance (including access to the proposed location) in order to enable Racing NSW to assess that those minimums standards are met; [sub- paragraph added 1.10.17 & re-numbered 1.5.20]

(ii) that horse is not to be transferred, sold or gifted upon retirement or thereafter, to a person who is placed on the Racing NSW Excluded List for rehoming of thoroughbreds. [sub- paragraph added 1.5.20]
(c) the owners are to make all reasonable endeavours to find a home for that horse that meets Racing NSW's minimum standards in any of the following options:
(i) breeding purposes;
(ii) equestrian, working, pleasure or companion horse; (iii) any other option approved by Racing NSW
(d) in the event that the owners are unable to find a home for that horse, having used all reasonable endeavours, then the remaining options for that horse are:
(i) an official retirement or retraining program (either operated by Racing NSW or approved by Racing NSW in writing);
(ii) any other option that ensures the ongoing welfare of the horse approved by Racing NSW in writing;
(e) the horse is not to be, directly or indirectly, sent to an abattoir, knackery or similarly disposed of;
(f) the horse is not to be sold/gifted at a livestock auction not approved by Racing NSW; and
(g) if that horse is in need of veterinary treatment (including ongoing veterinary treatment), it is not to be transferred to a new home until that veterinary treatment has been provided or Racing NSW is satisfied that it will receive that veterinary treatment.
(6) Any person who fails to comply with LR114(1)-(5) commits a breach of these Rules and may be penalised.

# RACING APPEALS TRIBUNAL OF NSW

## TRIBUNAL: Mr D B Armati

## PENALTY DECISION

## 15 AUGUST 2022

## APPELLANT RACING NSW

## RESPONDENT TREVOR SUTHERLAND

## LR 114(5)(e)

## DECISION:

1. The penalty is a period of disqualification of 2 years, 11 months, to be served concurrently with the penalties for breach of AR52 and AR229(h) of six months disqualification. After taking into account the six month period of disqualification served and a further period of 17 months when Mr Sutherland was not licensed (which the parties have jointly submitted should be taken into consideration), the Tribunal orders that the remaining period of disqualification to apply is a period of 12 months commencing on 15 August 2022 and expiring on 15 August 2023.

1. The issue for determination is penalty for a breach of AR114(5)(e) following from a decision of the Tribunal of 5 July 2022 to find the appeal of Racing NSW established and the respondent in breach of the rule.

2. The penalty hearing was listed for 15 August 2022.

3. The parties have come to an agreement on the appropriate penalty and corresponded with the Tribunal on its agreement to that settlement and the wording to reflect an appropriate precedent.

4. The stewards had imposed a penalty of three years disqualification, concurrent on penalties for breaches of AR52 and AR229(h) which were each 6 months disqualification concurrent. An appeal by the respondent here to the Appeal Panel on breach of AR114(5)(e) was successful. That success has been overturned by the Tribunal decision of 5 July 2022.

5. It is now necessary for the Tribunal to impose a penalty it considers warranted by the facts and circumstances.

6 The parties invited the Tribunal to effectively impose the penalty the stewards found appropriate with a slight reduction to 2years and 11 months with consideration of time served under disqualification and unlicensed.

7. The Tribunal determines to accept the agreement of the parties on penalty notwithstanding it does not have to do so and must determine penalty for itself

8. As the Tribunal is, on its own assessment of the facts and circumstances, satisfied that a penalty of disqualification of approximately three years is also appropriate does not examine the facts and circumstances of the breach or the applicable law in this decision.

9. The Tribunal congratulates the parties on coming to an agreement and notes the savings in costs thereby made.

10. The finding on penalty is a period of disqualification of 2 years, 11 months, to be served concurrently with the penalties for breach of AR52 and AR229(h) of six months disqualification. After taking into account the six month period of disqualification served and a further period of 17 months when Mr Sutherland was not licensed (which the parties have jointly submitted should be taken into consideration), the Tribunal orders that the remaining period of disqualification to apply is a period of 12 months commencing on 15 August 2022 and expiring on 15 August 2023.