SPORT RESOLUTIONS (UK)

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SR/0000120209

IN THE MATTER OF AN APPEAL UNDER THE ANTI-DOPING RULES OF THE BRITISH EQUESTRIAN FEDERATION

B E T W E E N :

LUCINDA TURNER

Applicant

-and-

THE BRITISH EQUESTRIAN FEDERATION

Respondent

DECISION OF THE ANTI-DOPING TRIBUNAL

Date of Hearing: **Thursday 24th July 2014**
Date of Decision: **Friday 1st August 2014**
Summary of Decision: **Appeal allowed**
Costs Order: **No order for costs**

INTRODUCTION AND SUMMARY

1. Lucinda Turner is a professional show jumper who had been involved with horses all her life and has been a member of the British Show Jumping Association (BS) since 1996. She started competing seriously some 6 years ago having worked for many years as a groom and second jockey to her brother.

2. She is now aged 31, having been born on 30th September 1982.

3. On 9th October 2013, the Appellant competed in a BS event at Vale View Equestrian Centre in Melton Mowbray. She rode three horses in the Discovery

class. Two of them were in competition livery with her (one belonged to her mother, the other to a different owner) and she agreed to take what she calls a "catch ride" for a Mr Nunn. By a "catch ride" she means what in horse racing circles might be called a 'spare' ride: that is, she agreed to ride a horse in which she had no involvement other than to ride it in the competition in question in return for a modest (£20) fee.

4. In fact, as we heard[1], it is not quite correct to characterise the ride as a true, one-off, catch ride since she was first contacted by Mr Nunn at the instigation of his groom in September 2013 when Mr Nunn was looking for a replacement rider to ride Jockey Hall Red Alert ("the Horse") in a number of events. The first of them took place that same month. It was the second occasion on which she rode the Horse that the incident in question happened. The Appellant also rode the same horse for Mr Nunn at subsequent events.

5. On 9th October 2013, Mr Nunn brought the Horse to Vale View in his trailer. His groom took the Horse to the collecting area already tacked up. The Appellant mounted and competed as the last rider to go in the British Novice Class and then on the same horse as the first rider to go in the Discovery Class.

6. It was as she left the arena, having competed in the Discovery Class and whilst she was still riding the Horse, that the Appellant was approached by two women who informed her[2] that the Horse had been "*randomly selected for a drugs test*".

7. There is a significant difference of recollection as to the events that followed. The first such dispute concerns whether or not the two women, Zoe Feeney and Caterina Termine, who were authorised officials operating under the British Equestrian Federation National Equine Anti-Doping and Controlled Medication Rules (BEFAR), properly identified themselves.

8. We find as a fact that whatever they may have been wearing in the form of jackets, the two officials did have ID even if the Appellant did not see it. We also

[1] From Mr Tim Stockdale, an international showjumper whose statement is at 1/39
[2] This is the Appellant's version of events – see paragraph 12 of her Witness Statement at 1/31.

accept that they identified themselves as officials and there is no question that they were authorised to require the rider (in this case the Appellant) to submit the Horse for a drugs test.

9. According to the Appellant, she told the two officials that she was "fine" with that but pointed out that the owner of the Horse (Mr Nunn) was walking behind and said that they should speak to him. Again, according to the Appellant, she was told that as the rider she was "in charge" and that drugs testing was her responsibility. She says she tried to explain that this was only a "catch ride", that Mr Nunn was the owner and that she had other horses to ride so that it was Mr Nunn and his groom who would have to take the Horse for testing. The Appellant adds that she understood that is what had happened after she had ridden the Horse back to Mr Nunn's trailer and dismounted to go off and ride her second horse.

10. On her account, the last the Appellant saw of this part of the sequence was as she was getting legged up onto her second horse at which point she saw Mr Nunn's groom with the two officials taking the Horse towards the stables where (she assumed) it would be tested.

11. It was, she says, only as she exited the arena with her second horse that she was again approached and told that Mr Nunn had not gone through with the testing and, indeed, had left with the Horse.

12. There is a significant difference of recollection as to how the first conversation went (that is, when first she was asked to submit the horse for testing). There is also a difference between the officials and the Appellant as to the later conversation after she returned from the arena having jumped her second horse. The difference in relation to the second conversation matters less since it is accepted on both sides that, by that stage, Mr Nunn had refused to submit the Horse for a sample and had left the event. It is nevertheless apparent that the officials did tell the Appellant that she might be guilty of a serious offence and the Appellant says that she did her best to get Mr Nunn's groom to bring the Horse back to be tested. But Mr Nunn did not oblige.

13. On 13th November 2013 (2/279), the Appellant was notified of an alleged violation of the British Equestrian Federation (BEF) Equine Anti-Doping and Controlled Medication ("BEFAR") Rules. Particularly, she was notified that a violation of Article 2.3 BEFAR had allegedly been committed.

14. Article 2.3 states as follows:

> *"2.3 Refusing, or failing without compelling justification, to submit to Sample collection after Notification, or to comply with all sampling procedures required including signing the sampling for or otherwise evading sample collection."*

THE CHARGE AND FIRST INSTANCE HEARING

15. The Appellant wrote an account of events in a letter received on 25th November 2013 (2/255-6) and sent a further account of events in a letter received on 22nd January 2014 (2/257-8). A hearing was held on 14th March 2014, and the details of the decision of the "BEFAR Hearing Body" (as it is called) are to be found at 2/317ff.

16. The Appellant did not attend that hearing in person having elected to deal with the matter on paper. Mr Nunn, who was also the subject of disciplinary proceedings, represented himself.

17. The Hearing Body decided that the Appellant as the "*Person Responsible*" was guilty of a Rules violation. It is convenient to explain that term of art at this juncture.

18. It appears in the definitions section (internal page 80-1/120) of BEFAR in these terms:

> *"Person Responsible* The competitor who rides, drives or vaults the *Horse* during an *Event* except in the case that such competitor is a *Minor* in which case the *Person Responsible* shall be the person who takes primary responsibility for the *Horse* and is named as such on application for

membership/renewal of membership of a *Sporting Discipline*; and the owner of the *Horse* and support personnel, including but not limited to grooms and veterinarians, may be regarded as additional *Persons Responsible* if they are present at the *Event* and have made a relevant decision about the *Horse*. In vaulting the lunger shall always be an additional *Person Responsible*."

19. The first (and main) issue of interpretation on the present appeal is whether the relevant Article 2 Doping Violation of BEFAR attaches to the Appellant as the "*Person Responsible*" so as to impose strict liability under Article 2.3. We shall return to the competing arguments later in this Decision. It suffices at this stage to note that the Hearing Body decided that the Appellant was indeed such a "*Person Responsible*" and as such had "*refus(ed) or fail(ed) without compelling justification to submit to Sample collection after notification, or to comply with all sampling procedure requirements*".

20. She was therefore disqualified from the Competition and the Hearing Body imposed a period ineligibility of one year upon her from the date of the decision[3].

21. The Panel also found Mr Nunn guilty of a doping violation in his capacity as "*additional PR*" within the definition that we have already identified. He too received a sanction of one year's ineligibility, but he was also fined £1,500 and ordered to pay 85% of the assessed costs, that is, £850. Mr Nunn was not a witness on this appeal and his evidence to the Hearing Body was not relied on by either side and is therefore not relevant to us.

THE ISSUES ON APPEAL

22. The appeal has evolved over time. The original Notice of Appeal is at 1/1-4 and the Amended Statement of Appeal is at 1/5-16.

23. We do not intend to dwell too long upon this part of the history. The most significant change in the way in which the appeal was presented is that, relatively

[3] Together with an order for costs of £150.

late[4] the Appellant and her advisers changed their position from an acknowledgement that she was liable under Article 2.3 for an anti-doping violation (subject to a submission that what she did had "*compelling justification*" or was committed without fault or negligence[5]) to a submission that she was in fact guilty of no offence under Article 2.3 because she had effectively delegated her responsibility to Mr Nunn and had done that with the consent of, or at least without opposition from, the officials.

24. As we have already observed, the circumstances and legal effect of what the Appellant contends was an effective delegation (and discharge) of her responsibilities became the central issue at the hearing before this Panel. Essentially, it is her case that, whilst she was told that she was the rider "*in charge*" and that the testing process was her responsibility, those same officials also told her they had no objection to her delegating that responsibility to the owner. She argues that is what she did and thereby discharged her obligations under Article 2.3.

25. The Appellant goes on to point out that this made practical sense. Mr Nunn was walking immediately behind and not only owned the horse but had brought it to the event. She had another horse to ride in the competition and time and her responsibilities to the next horse and owner were pressing. In effect, she says, she handed matters over to him to deal with.

26. Much of that factual account is not in dispute. Particularly, Zoe Feeney accepted at paragraph 4 of her Witness Statement at 1/44 that she;

> *"Informed the PR that as she was the rider she was responsible but could designate another to assist with the Horse".*

Following which, Ms Feeney says, she approached Mr Nunn.

[4] That is, only by the Amended Statement of Appeal.
[5] Under Art.10.4.1 of BEFAR.

27. The terms of their exchange with Mr Nunn and, particularly, whether the Appellant heard it was in issue between the parties. It is apparent that Mr Nunn proved to be rather difficult and obstructive and that, at some stage, he declined to allow the Horse to be tested. The main question of fact is whether or not the Appellant should reasonably have foreseen (or even been directly aware) of the fact that Mr Nunn was objecting and/or had objected to continuing with the testing process to the point that, eventually, the Horse was not in fact tested.

28. The Appellant says she was not so aware and had no reason to doubt that Mr Nunn was taking the horse to be tested. Ms Feeney and Ms Termine insisted (in their written and oral evidence on appeal) that she must have been aware of and able to hear that he was refusing to allow it to be tested or at least threatening to refuse.

THE FORM OF THE APPEAL

29. In advance of the appeal there was a certain amount of discussion between the parties as to whether or not it would be appropriate to treat this as a *de novo* hearing in which we would be prepared to hear oral evidence and to allow the Appellant to enter a plea of not guilty to the alleged doping violation notwithstanding what had, in effect, been her earlier admissions.

30. The arguments and counter-arguments and the relevance (or otherwise) of Article 6 ECHR are sufficiently analysed in the parties' written submissions. We shall say no more about them because, in the event, the parties agreed that we should treat this matter as a *de novo* hearing and that we should not find the Appellant guilty of an anti-doping violation if in fact we were satisfied that none was proved on the facts found.

31. We comment that, save in exceptional cases, we would regard it as unfair to prevent a party from putting forward an arguably legitimate defence in circumstances where the earlier admission was because she and/or those then advising her took a different view of the effect of the Rules from those who act for her at the present hearing.

32. It seemed to us that fairness dictated we should approach the issue of guilt or innocence with a fresh and open mind and we commend the parties for agreeing that that we should do so.

REPRESENTATION AND EVIDENCE AT THE HEARING

33. The Appellant was represented by Wright Hassall and Co. (Solicitors) and by Adam Lewis QC, both of whom acting (we were told) more or less *pro bono*. The BEF was represented by Daniel Saoul of counsel.

34. We would like to commend the representatives of both sides for the industry and effort with which the hearing was conducted. It made our job much easier.

35. In terms of evidence, apart from the two files to which we have already referred, the Appellant herself gave oral evidence and was cross-examined. We heard some evidence by telephone from Mr Tim Stockdale, an international show jumper, who explained his understanding of the term "*catch ride*".

36. None of the Respondents' witnesses was able to give oral evidence in person, but Zoe Feeney gave evidence by telephone[6] and was cross-examined. We took a similar course with Caterina Termine who is presently based in Switzerland. Both of them provided witness statements for this hearing (at 1/43ff and 1/48ff respectively). Each had, in fact, also given statements at the earlier stage of the process and some important differences of expression and omissions arose which were the subject of cross-examination.

37. The Respondents also presented witness statements from Ms Morton, Ms Eaton and Mikael Rentsch. Those statements are in our bundle at 1/55-67. We have read and take account of that evidence but we acknowledge that the pressures of time meant that it was simply not practical for them to be examined or cross-examined

[6] As a comment, we did not find that entirely satisfactory given the fundamental issues of fact between the parties. We do understand that people have other commitments and that taking a day off from whatever one is doing is expensive and time consuming. But it is often the case that a witness's evidence is never as good down a phone line as it is given face to face.

by telephone. To that extent their evidence does not have the same weight as it would have done had that been possible. Nevertheless, we do not think that the parties nor our decision making process are disadvantaged by those facts.

THE FACTS IN ISSUE

38. We return to the key factual issue as regards what was said during the first exchange between the Appellant and the officials and what the Appellant knew or ought to have known of Mr Nunn's attitude to the request that he present the horse for testing.

39. As we have said, there are conflicting accounts. The Appellant says that:

- She was approached by two women while still riding the Horse, having exited the arena, and was told that the Horse had been "*randomly selected for a drugs test*".

- Neither official made a proper introduction or had any obvious identification.

- She replied that she was "*fine*" with that but pointed out that they should ask the owner (Mr Nunn) who was walking behind with the Appellant's mother, a groom and the owner of the next horse that Ms Turner was to ride.

- The officials told her that she was "*in charge*" so that the Horse was her responsibility but then they appeared to accept that they should speak to the owner.

- She saw the two officials go to speak to Mr Nunn and his groom; and

- She therefore continued to ride the Horse back to Mr Nunn's trailer, dismounted and handed the Horse back to the groom.

- At that stage, the owner took charge of the Horse and, as far as she (the Appellant) was concerned, she thought that the Horse was going to be tested and, indeed, as she was getting legged up onto her second horse, she saw Mr Nunn's groom take the Horse off towards the stables to be tested.

- It was only after she had completed a round on the second horse that she was told that Mr Nunn had, in fact, not allowed the Horse to be tested and, instead, had left. She adds that this information was given to her rather aggressively by the officials who told her she was going to "*get fined up to £1,500*".

40. The Appellant gave evidence orally and adopted the account in her Witness Statement at 1/28. It was, unsurprisingly, put to her that this account was not consistent with – or was, at least, much fuller than – the written account made much earlier in the process, namely the letter written to and received by the Secretariat on 25th November 2013 (2/255) and a later letter received on 22nd January 2014 at 2/257.

41. The suggested discrepancy (or least significant omission) concerns the absence of any reference in either of those two letters to Ms Turner saying she was "*fine*" with the whole testing process at a very early stage.

42. The Appellant did not attend the hearing before the BEF Hearing Body, the details of which are at 2/317ff. She made Written Submissions in the form of the two letters to which we have referred and which are summarised at paragraph 2 of that body's decision (2/319). Mr Nunn made Written Submissions (summarised at paragraph 4 of the decision) and he gave evidence personally.

43. We attach no significance to the fact that Mr Nunn was not called as a witness by either party to the present hearing. We do, however, note that the Appellant did not call any one of three possible witnesses who might have been able to confirm her account of events – namely, her mother (most obviously); Mr Nunn's groom; and the owner of the second horse.

44. The account of the two officials, Ms Feeney and Ms Termine are contained in Witness Statements at 1/43ff and 1/48ff respectively. Those Statements are not in exactly the same terms as those given to the BEF Hearing Body. The most significant difference between them is that the earlier statements did not state explicitly or, indeed, imply that the Appellant must have overheard the conversation between the officials and Mr Nunn. Nor do they explain that they thought at the time she was – or must have been - aware of his refusal or at least of his unwillingness to co-operate in the sense of realising that he was being potentially awkward and speaking in terms that made it foreseeable that he would not, in fact, allow the Horse to be tested.

45. We consider that the fact that the earlier statements contain nothing to suggest that, when the Appellant was initially approached and before she dismounted, she should have heard or been aware of what Mr Nunn was saying is striking. We find it difficult to accept that, if they both felt that the Appellant was or should have been aware of exactly how difficult he was being, they did not include that part of the history in the statements that were presented to the Hearing Body.

46. We observe that it was obviously a relevant factor. Even though the Appellant was not then arguing that Article 2.3 had no application to her in the circumstances, it was relevant, of course, to the issue of whether the Appellant fell within the provisions of Articles 10.4.1 or 10.4.2 of BEFAR[7].

47. Even more significantly, we note that both Ms Feeney and Ms Termine gave oral evidence to the Hearing Body. The summary of what they said is to be found at paragraph 7 of the Hearing Body's Decision (2/322-324). Again, they said nothing then to suggest that the Appellant overheard what Mr Nunn said or should have realised that he was obstructing the taking of a sample.

48. The other factual issues between the Appellant and Ms Feeney / Termine are not, we find, of major importance.

[7] See below: these are the provisions concerning 'No Fault or Negligence' and 'No Significant Fault or Negligence' which the Hearing Body considered – see paragraph 8 of the Decision 2/325.

OUR FINDINGS OF FACT

49. As a general comment, we prefer the evidence of Ms Feeney and Ms Termine to that of the Appellant as regards her general demeanour and attitude. If it mattered to make a finding in this respect (and it does not), we would find that she was rather less compliant and polite than she claims, both when she was initially approached and when she returned and was told that the owner had refused to allow the Horse to be tested and that she had to face the consequences.

50. We also find that both officials did introduce themselves appropriately and that, as they said in answer to questions in cross-examination, they were wearing appropriate identification had the Appellant looked carefully enough.

51. We find that whilst the Appellant did not use the words "*that's fine*" or show signs of active or cheerful co-operation with the officials, she nevertheless expressed no personal objection to the testing process when she was approached. We accept, as she said in evidence, that she regarded it as really a matter for the owner or at least one that should be dealt with by the owner because she was preoccupied with getting ready to ride the next horse. And the owner was, of course, present, with his groom and did in fact take over practical control of the Horse as soon as the competition ride had been concluded.

52. We are not satisfied that the Appellant overheard Mr Nunn's refusal nor do we find that she was or should have been aware that he was being difficult. We have already commented that it is very difficult to accept that this important part of the history was simply omitted inadvertently from Ms Feeney's and Ms Termine's original accounts as presented to the Hearing Body.

53. In the light of such omission, we find that the Respondent has failed to establish that the Appellant was or should have been aware of such refusal.

54. In short, we accept that when Ms Feeney originally approached the Appellant, Ms Feeney told her that although she, as the rider, was the Person Responsible, she could "*designate another to assist with the Horse*"[8]. This we shall refer to as "*permitted delegation*". We do so because in the "*Athlete's Guide*" to the rules the BEF (at 2/407)[9] acknowledges that "*many athletes delegate the duty of the horse testing to their grooms or other representatives*".

55. Ms Feeney's account of what, we find, amounted to such delegation appears at paragraph 4 of her witness statement (1/44). She says she informed the "*PR that as she was the rider she was responsible but could designate another to assist with the horse*".

56. The parties accepted, for the purposes of this hearing – and we would otherwise have found – that this amounted to an act of delegation in the sense that it was acknowledged that the rider could legitimately delegate some part of the responsibility for the testing process to another.

57. The remaining issue, then, is whether a rider can absolve himself or herself from *all* responsibility by such delegation: putting it another way, the key issue of interpretation for this Panel is to what extent, if any, the rider (as delegator) is responsible for the person to whom he or she delegates. We return to that discussion later in this Decision.

58. Before we leave the discussion of fact, we should consider the differences of recollection as to what happened after the officials had agreed to treat Mr Nunn as the Appellant's delegate and before and after she dismounted from the horse in question.

59. Ms Feeney agrees[10] that the Appellant rode the Horse back to Mr Nunn's trailer where Mr Nunn and his groom took over the handling of the Horse. Ms Feeney says that thereafter "*the PR did not engage with us any further… and showed no interest*

[8] Ms Feeney's words at paragraph 4 of her Witness Statement at 1/44
[9] In a section to which we will return
[10] See paragraphs 7-1/45

in the testing process or Mr Nunn's reaction to it… she had disappeared into her lorry which was parked next door to Mr Nunn's trailer… did not see her have any conversation with Mr Nunn or his groom". And then, at paragraph 9, she says that it was at that stage that "*the PR left the scene altogether… to go and ride her next horse*".

60. In her Witness Statement, Ms Feeney also explained the circumstances in which Mr Nunn then refused to present the horse for testing and, eventually, drove it away in his trailer. Ms Termine's account, particularly in cross-examination, was slightly different but since Ms Feeney's account is broadly consistent with what the Appellant told us, we accept the Appellant's account of events in this respect.

61. As a comment, just as we were frankly unimpressed that the Appellant was not able to call any supporting evidence, at least from her mother, we must say that we did not find the process of taking evidence by telephone entirely satisfactory. In the case of Ms Termine, it is understandable because she is presently in Switzerland and we would not have expected her to have returned to give evidence in person. We are not quite so sanguine about Ms Feeney's absence (she explained that it would be expensive to come and that she had better things to do[11]).

62. In reaching our decision on whether or not the Appellant contravened Article 2.3, the most important exchange in the evidence of Ms Feeney was as follows:

Question: *Did Ms Turner at any stage refuse to submit the Horse for testing?*

Answer: *No.*

Question: *Did Ms Turner, at any stage, refuse to do anything that you, as the officials, asked her to do?*

Answer: *No.*

Question: *Did Ms Turner at any stage seek to prevent the Horse being tested?*

[11] On being pressed about this, it appeared that she was occupied with her VAT returns. Of course, these are important but so are one's responsibility as a Drug Testing Official

Answer: *No.*

63. There was a further question and answer that we should record. She was asked whether she accepted that Ms Turner was "*happy for the Horse to be tested*". She replied that was "*not my impression*". To be frank, we think that that answer was an elaboration which is inconsistent with the previous three answers that we have recorded. We also note that there is absolutely nothing in Ms Feeney's Witness Statement for us to suggest that Ms Turner was not 'happy' for the Horse to be tested in the sense of being willing that it should be tested. Put at its highest on the officials' evidence, the Appellant overheard Mr Nunn being difficult and did nothing to interfere. That is not the same as being "*unhappy*" that the Horse was to be tested. In any case, we have already held that we accept the Appellant's evidence that she did not overhear what was being said.

THE RELEVANT RULES

64. Thus far, we have referred to the Rules without setting them out in a single comprehensive section and we shall do so here, even though it will result in some repetition.

65. The BEF Equine Anti-Doping & Controlled Medication Rules ("BEFAR"), which are to be found at 1/73ff in our papers, were introduced on 1st January 2011 and are based on the FEI Equine Anti-Doping & Controlled Medication Regulations ("the FEI Regulations") – 1/125ff.

66. It is common ground that the BEF is the national governing body for all FEI sports in the UK and that the FEI requires all national federations to adopt a system of ant-doping and controlled medication which incorporates these rules. BS is the governing body responsible for the FEI discipline of showjumping and all Members of BS competing in national affiliated competition are governed by BEFAR. This is a condition of membership of BS and the BS Rulebook specifically incorporates BEFAR.

67. For completeness, we shall set out the relevant section of the Membership document which we have at 2/423 and which the Appellant agrees she will have signed.

> "EQUINE ANTI-DOPING AND CONTROLLED MEDICATION RULES
>
> (Mandatory – application will not be processed if not completed)
>
> I agree to be bound by the BEF Equine Anti-Doping and Controlled Medication Rules and the BEF Anti-Doping Rules for Human Athletes as amended from time to time copies of which can be found on the British Equestrian Federation Website at www.bef.co.uk and will be supplied to me in paper format on request.
>
> In the event that the person applying for membership is under 18 the parent or legal guardian signing on behalf of that person specifically agrees to accept primary responsibility for that person's compliance with the BEF Equine Anti-Doping and Controlled Medication Rules and that parent or guardian will be the Person Responsible for any Horse ridden vaulted or driven by that person for the purposes of those Rules."

68. The relevant rules for our purposes are set out in Article 2 – Doping Violations. The introduction to Article 2 contains the following words:

> "*Persons Responsible*[12] shall be responsible for knowing what constitutes a *Doping Violation* and the substances which have been included on the *Equine Prohibited Substances List* and identified as *Banned Substances*

[12] The definition/interpretation of this term appears in paragraph 18 above

Where *Banned Substances* are involved, the following constitute *Doping Violations*"

69. Article 2.1 does not arise directly, but the text is relevant for the purposes of interpretation of Article 2.3. We shall therefore set out Articles 2.1 and 2.1.1 as they appear in the Rules:

> "**2.1 The presence of a *Banned Substance* or its *Metabolites* or *Markers* in a *Horse's Sample***
>
> 2.1.1 It is each *Person Responsible's* personal duty to ensure that no *Banned Substance* is present in the *Horse's* body. *Person's Responsible* are responsible for any *Banned Substance* found to be present in their *Horse's Samples*. Accordingly, it is not necessary that intent, fault, negligence or knowing *Use* be demonstrated in order to establish a *Doping Violation* under Article 2.1."

70. Article 2.2 is relevant for the same reason. Again it expressly identifies the responsibilities of "*Person Responsible*".

> **"2.2 *Use or Attempted Use* of a *Banned Substance***
>
> 2.2.1 It is each *Person Responsible's* personal duty to ensure that no *Banned Substance* enters into the *Horse's* body. Accordingly it is not necessary that intent, fault, negligence or knowing *Use* on the part of the *Person Responsible* be demonstrated in order to establish a *Doping Violation* for *Use* of a *Banned Substance*. However, in accordance with the definition of *Attempt*, it is necessary to show intent in order to establish an *EAD Rule* violation for *Attempted Use* of a *Banned Substance*."

71. Article 2.3 is the one which arises directly in the present case. It will be seen that it contains no explicit reference to *Persons Responsible.* Rather, it deals with

> "**2.3 Refusing, or failing without compelling justification, to submit to *Sample* collection after *Notification*, or to comply with all sampling procedure requirements including signing the sampling form, or otherwise evading *Sample* collection.**"

GUIDANCE ON THE RULES

72. Absolutely fundamental to the issue with which this Tribunal is concerned is the omission of the words "*Persons Responsible*" from Article 2.3. Equally significantly, Article 2.3 as drafted does not directly or indirectly address the factual circumstances arising in a case such as the present in which the officials have permitted the rider to "*delegate*" her / his responsibilities to another person or where the rider has "*nominated*" such other person to take over responsibility for the testing process.

73. Nor is the Guidance as helpful as one might have expected. We have already referred to it in file 2/404. We fully appreciate that the underlying policy of the Rules is to place responsibility upon the "*rider, driver, or vaulter of the Horse*". In that event (see 2/405), "*you are the person responsible for the Horse and will be held accountable for an [sic] BEFAR Regulation violation*". We understand why this responsibility is imposed upon the rider. It is partly because a rider is often, but not always, the owner or trainer of the Horse and the rider will <u>necessarily</u> be a member of BS whereas the owner or trainer may not be. Other equine sports – such as horseracing – take a different approach in that they place the primary responsibility on the trainer. But, as we say, these issues of the underlying policy are none of our business, at least if we regard them as inherently reasonable as, in this case, we do.

74. It is because of the "*Person Responsible approach*" that the Guidance goes on to explain, at 2/406, what is meant by the "*strict liability principle*". We will quote the relevant section

> "*Under BEFAR, the Person Responsible is strictly liable whenever a Prohibited Substance is found in a horse's sample. This means that it is a violation whether or not the Person Responsible intentionally or unintentionally, knowingly or unknowingly, used a Prohibited Substance or was negligent or otherwise at fault. It is also irrelevant whether the Prohibited Substance actually had a performance-enhancing effect. It is very important therefore for the Person Responsible to understand not only what is prohibited, but also what might potentially cause an inadvertent violation. Even though this strict liability principle exists, the Person Responsible will always have the opportunity to explain why he or she is not at fault and the circumstances surrounding what happened will always be taken into consideration when determining sanctions (suspension and/or fine). The strict liability principle means that disqualification of the horse/rider combination from the competition in which the Horse tested positive is automatic even if you can prove, and everyone agrees, that you were not at fault*.

75. This explanation of the Strict Liability Principle is, as the text makes clear, directed to finding the presence of a *Prohibited Substance* in a sample. But that is not the factual situation that arises here. In the present case, we are concerned with Article 2.3 and with an alleged refusal of failing without compelling justification to submit to the collection of a sample.

76. As we have already commented, the Guidance on this situation is very much less comprehensive than we think it should be. The only section that comes close to addressing it is at 2/407.

"***What are my rights during testing?***

You have a right to observe the process and to make any complaints or objections if they are warranted. You or your representative will be given a form to sign after the Testing Veterinarian completes the process. If you have any complaints or concerns, you should record them on the form. The Testing Veterinarian will give you a copy of the form. If the sample from your horse later tests positive for a Prohibited Substance, that form, with your concerns recorded, may become an important part of the case. Many Athletes delegate the duty for horse testing to their grooms or other representatives. Please be aware that the taking of the sample is an important part of the Anti-Doping and Medication Control procedure. Only the person who is there to witness the sample collection will be able to testify later about the procedures and whether they were conducted according to the rules. So if you send your groom or another representative, you will be relying entirely on that groom or representative to explain what transpired if your horse tests positive for a Prohibited Substance. Testing is an important part of your obligation as an Athlete and testing positive can have serious consequences. You are therefore encouraged to be present for the testing whenever possible."

77. There is no real assistance to be found in the further guidance offered at 2/408. Paragraph 2 of that section contains the following:

> "**2) Refusing to submit to Sample Collection after Notification or otherwise Evading Sample Collection**. If you refuse to have your horse sampled, do not present your horse for testing after notification, or you hide from the testing representatives, a case may be brought against you".

78. True enough, but as we have already found, there can be no question here that the Appellant refused to allow the horse to be 'sampled' or failed to comply with the sampling procedure. She was told she could, in effect at least, delegate to/nominate Mr Nunn. That is what she did.

79. Since we have rejected the suggestion that the Appellant was in any way aware of – still less complicit in – Mr Nunn's refusal, the only real issue is whether we can and should interpret Article 2.3 in such a way as to make the Appellant responsible for Mr Nunn's refusal, even if she had no reason to foresee or expect it.

THE PARTIES' SUBMISSIONS

80. The Respondent argues that we should interpret Article 2.3 to incorporate the concept of "*Person Responsible*" within the language of the provision so as to make the rider responsible for her or his delegate in all circumstances. The Appellant rejects that construction, arguing that the provision means no more than it says and that she is not in breach.

81. If the Respondent's approach is correct as to the interpretation of Article 2.3, the next issue would be whether the circumstances are such that the Appellant has shown that there was a "*compelling justification*" for her conduct.

82. In the further alternative, the third issue would arise under Article 10.4[13]. Under Article 10.4.1, in the event that we find "*no fault or negligence*" we would be able to eliminate any period of ineligibility. If we found "*no significant fault or negligence*" then, under Article 10.4.2, it would be open to us to take the same approach as did the Hearing Panel (2/326) and reduce the period of ineligibility to that of one year.

[13] A concept regularly considered in cases concerned with the WADA Code.

83. Mr Saoul in written opening supplemented by oral submissions, developed his argument that Article 2.3 clearly incorporates the concept of "*Person Responsible*" by obvious and necessary implication. He said that, since the whole purpose of the Rules is to impose primary responsibility on the rider, the Appellant was in breach of the Rules because she, as the rider, did not submit the Horse to sample collection nor did anyone else do so on her behalf.

84. He reminds us that the Rule derives from the WADA Code for human athletes and that the interpretation that he advances is, he submits, consistent with the way in which that Code has been interpreted in many other cases including, for example, CAS2004/A/714, FPIOC. He rejects the Appellant's arguments based on the *'Contra Proferentem'* principle as being a doctrine of last resort where issues of construction cannot be resolved by reference to the ordinary meaning of the provision – see *Cornish v. Accident Insurance Co.* (1889) 23 QB 453 and (rather more recently) *Tektrol v. International Insurance Co. of Hannover Limited* [2005] EWCA 845.

85. Adam Lewis QC, acting for the Appellant[14] began his oral submissions and focused his written submissions not so much on the maxim *Contra Proferentem* as on the principle discussed in many sports law (and other) cases that there cannot be an offence (such as an anti-doping offence) unless the Rules clearly and unequivocally provide for it.

86. A good example of a case in which that principle is articulated is *USA Shooting and Quigley v. Union Internationale de Tir,* CAS 94/129 where (at paragraph 50) the panel held as follows:

> "*The Panel nevertheless point out that if the UIT adopts a strict liability test, it becomes even more important that the rules for the testing procedure are crystal clear, that they are designed for reliability and that they may be shown that they have been*

[14] We recognise that both Mr Lewis QC and his Instructing Solicitors, Wright Hassell are acting, we are told, more of less *pro bono* because Ms Turner is to a large extent impecunious. We applaud this and we greatly acknowledge the help that Mr Lewis QC, and his solicitors have been able to provide us. In saying that, we would also wish to compliment Mr Saoul and the BEF for the thoroughly constructive way in which they approached the difficult case.

followed. Otherwise, the door will be opened to a surfeit of litigation".

And at para.55

"The fight against doping is arduous, and it may require strict rules. But the rule makers and the rule-appliers must begin by being strict with themselves."

87. This principle is derived from jurisprudence old and new. As another Latin maxim, it is best expressed as "*nullum crimen, nulla poena sine lege*"[15].

DISCUSSION

88. The introduction to Article 2 specifically identifies that these are doping violations which concern "*Persons Responsible*", (which definition we have already given).

> "*Person Responsible* shall be responsible for knowing what constitutes a *Doping Violation* and the substances which have been included on the *Equine Prohibited Substances List* and identified as *Banned Substances.*
>
> Where *Banned Substances* are involved, the following constitute *Doping Violations*

89. It is striking that whereas Articles 2.1 and 2.2 specifically incorporate express reference to "*Person Responsible*", Article 2.3 does not.

90. The support that Mr Saoul seeks to draw from the fact that Article 2.3 derives from the WADA Code which is entirely concerned with personal responsibility is, in our

[15] There should be neither crime nor punishment without clear legal basis – see Bennion on Statutory Interpretation (6th edition) at Section 271 and "Sports Law" (2nd edition) by Beloff, Kerr, Demetriou and Beloff at para.1.52. See also the CAS Panel in Devyatovsky and Tsikhanvioc, CAS 2009/A/1752 and CAS 2009/A/1753 and *WTC v. Moats*, AAA Panel decision dated 10th October 2012.

judgment, no support at all. The WADA Code does not comfortably translate to a situation in which there is not just an athlete, who has strict responsibility for what is present in his or her own system, but where there is the athlete and an animal and it is the animal in this situation which is to be tested.

91. Now, one could perfectly well draft the rules so that a rider is not permitted to delegate. Or, alternatively, one could draft the rules so that the rider is made strictly liable for the acts of his delegate, however irrationally or unpredictably such delegate has behaved. Such clear drafting might be defensible for policy reasons.

92. Equally, one could draft a provision which allows for delegation and where, in circumstances in which delegation was permitted by the testing officials, the whole responsibility is transferred to that of the delegate so that the rider is exonerated. Delegation in such circumstances might, presumably, only be permitted where the delegate was also (or agreed to be) subject to the same Rules.

93. In our view, if there are circumstances where delegation is permitted, they should be clearly identified in the Rules, properly explained in the guidelines, documented and properly governed by a clear documentary record. That is a complete answer to Mr Saoul's argument that the interpretation which we now favour would render the system unworkable and be susceptible of or 'open the floodgates' to abuse. All the regulatory authorities have to do is write the Rules clearly. Nevertheless, we recognise that it is not for us to rewrite the Rules but, rather, to interpret the Rules as they are.

94. The situation here is that the relevant provision, Article 2.3, is silent as to its application to the "*Person Responsible*". It makes no explicit reference to delegation, yet delegation is allowed. The guidelines on the Rule do not expressly state that the delegator is automatically liable for the behaviour of the delegate, irrational or otherwise. We do not see that the provision must necessarily be rewritten or interpreted so as to impose strict liability on the '*Person Responsible*' even in the event of *Permitted Delegation*.

95. In short, we ask ourselves this simple question, as Article 2.3 requires. Did the Appellant, on her own account, either refuse to submit to sample collection after notification or fail to submit to sample collection or fail to comply with the sampling procedure requirements? And the answer is that she did not. Mr Nunn did. Only if she is directly and inevitably responsible for Mr Nunn's misdeeds can she be liable under this Rule. The Rule does not say that nor do we accept that any such meaning must be implied to make sense of it.

96. We therefore allow the appeal on that basis.

COMPELLING JUSTIFICATION AND NO FAULT/NEGLIGENCE

97. Strictly speaking, we need make no findings on Mr Lewis QC's alternative arguments as regards "*compelling justification*" on the one hand or "*no fault/negligence*" on the other. Nevertheless, it may be of assistance if we provide our conclusions in the following terms.

98. In each case, we assume for the sake of argument that the Appellant finds herself in breach of Article 2.3 on the basis that she is responsible for what Mr Nunn did. But we have already found that she did not overhear him refusing and therefore cannot be criticised for not attempting to encourage him to send the Horse for sampling and we also accept that she had no reason to expect that he would not go through with the process.

99. Against that background, Mr Lewis QC puts forward the following circumstances as amounting to "*compelling justification*". First, Ms Turner was "only the rider". Second, she did not obstruct the process in any way. Third, it was the owner who was placed in charge of the Horse after she got off it. Fourth, she had other commitments in the sense that she had to go and ride another horse.

100. Taking the last first, if the rider is to have a personal and non-delegable responsibility for ensuring that the horse is tested, we do not think that the fact that

he or she has another horse to ride could possibly amount to compelling justification.

101. The other (that is, the first three) considerations identified by Mr Lewis QC add nothing on the question of 'compelling justification' if it remains the rider's non-delegable responsibility to ensure that the horse is tested come what may. If relevant at all, they would be facts or circumstances which might be relied on in an argument as to a finding of no fault/negligence. Given all the factual circumstances present here, we would have accepted, had it have been necessary for us to decide the issue, that the Appellant was without fault or negligence and so able to rely on the elimination of the sanction under Article 10.4.1. But we need make no formal finding to that effect and recognise that the analysis of 'fault or negligence' depends very much on the precise interpretation of the rider's personal responsibility under Article 2.3 and on the facts found.

102. One other point concerns the Appellant's apparent lack of familiarity with the Rules. As Mr Saoul rightly submits, unfamiliarity with the Rules is no excuse. But we hope we may be permitted this further comment. We appreciate that the Rules are available on the internet. We were unimpressed by the Appellant's rather feeble attempts to get copies of them. On the other hand, we do think that the BEF/BS could do a great deal more to draw all of these rules and guidelines to the attention of its competitors. We are not making any particular comment about how that might be achieved, other than to say that we think that simply posting them on a website is not good enough. What we would like to see is some proper system of drugs education such as is made available to human athletes. Whether that takes the form of explanatory literature sent to every member of BS or by way of seminars is a different matter and we offer no further comment upon it.

CONSEQUENCES OF OUR FINDING

103. It follows that the Appellant's appeal is allowed. The Orders of the Panel below under the heading "Sanction" at 2/325 as regards disqualification, ineligibility and orders for costs are set aside.

104. As regards the costs of the present appeal, we offer what is presently a provisional conclusion, allowing the parties to make further submissions in writing if they wish to persuade us to take a different view.

105. Our provisional view is that we should award the Appellant her costs of the appeal, given the modest amount that we understand to have been incurred[16]. Had they been more than 'modest[17]', we would not, otherwise, have been inclined to have awarded more extensive costs given that there has been a substantial change in the direction of the appeal so late in the day.

WILLIAM NORRIS Q.C.
DR KITRINA DOUGLAS
DR NEIL TOWNSHEND

SPORT RESOLUTIONS

[16] Paragraph 5.1 of Mr Lewis QC's Skeleton says that "*those representing her now are doing so next to pro bono and have come into matters late*".
[17] What amounts to 'modest' in context remains to be seen

IN THE MATTER OF AN APPEAL UNDER THE ANTI-DOPING RULES OF THE BRITISH EQUESTRIAN FEDERATION

B E T W E E N :

LUCINDA TURNER

Applicant

-and-

THE BRITISH EQUESTRIAN FEDERATION

Respondent

DECISION OF THE ANTI-DOPING TRIBUNAL

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