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CAS FINDS ESSENDON PLAYERS USED THYMOSIN BETA 4 ON PROPER LEGAL PRINCIPLE

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Date: 14 January, 2016

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CAS APPLIED CORRECT LEGAL PRINCIPLE IN FINDING ESSENDON PLAYERS USED THYMOSIN BETA 4

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Jan 14, 2016

The Court of Arbitration for Sport (“CAS”) made findings of fact that 34 Essendon players used Thymosin Beta 4 (“TB4”), a prohibited substance, based on the application of principles concerning circumstantial evidence that are accepted by the High Court of Australia and applied in Australian courts of law.

WADA’s case had “two pillars” being circumstantial evidence, and analytical information. CAS cited[i] the decision of *Attorney-General for Jersey v Edmond-O-Brien* (2006) 1 WLR 1485, in which the Privy Council stated:

Although they said that they had reviewed the evidence "separately and together", there is little indication that they had regard to the cumulative weight of the various items of evidence, to each of which they had, sometimes not altogether plausibly, assigned a possible innocent explanation. It is in the nature of circumstantial evidence that single items of evidence may each be capable of an innocent explanation but, taken together, establish guilt beyond reasonable doubt.

CAS approached the task before it, by “evaluating all relevant and credible items of evidence and asking itself whether, **considered cumulatively**, they satisfied the test of comfortable satisfaction”.^[ii]

The High Court of Australia recognises the exact same process of reasoning as the appropriate process in making findings of fact in circumstantial cases in both criminal and civil cases.^[iii] The Full Federal Court of Australia, has articulated the principle as follows:^[iv]

*“The need to keep in mind **the cumulative effect** of the evidence is apparent, too, in the principles which govern the approach in cases concerned with circumstantial evidence, that is, where proof of a primary fact is pursued through the demonstration of a range of intermediate facts. It has been stressed often enough in that context that the fact-finding process is directed at the totality of the evidence and not to its individual strands”.*

Links in a chain, strands in a cable

CAS proceeded to analyse all of the evidence as strands in a cable rather than focusing on whether there was an unbroken chain of links. Sixteen pieces of evidence were identified as strands in the cable supporting WADA’s case that the players had used TB4. Some of those strands related to Mr Dank’s past use of TB4, his conversations with Mr Robinson about “Thymosin”, and the fact players admitted receiving injections by Mr Dank, of “Thymosin”.

Other strands related to the purpose of TB4 being to aid recovery and repair tissue, that the consent forms signed by the players stated that the intervention was recommended because it would “enhance the rate of recovery” and result in “an expected reduction of time required for performance recovery”. That Mr Dank’s job with Essendon and his reputation depended on improvement in the team’s results, and that he sent a text message to James Hird stating “I.V start next week. And Thymosin...We will start to see some real effects” were further strands. That vials labelled “Thymosin” were seen by some players was another.

That there was no other explanation identified for the blood tests (recommended prior to use of peptides like TB4) of the players, that had occurred prior to the commencement of the injecting regime, left only a sinister explanation.

Other sinister strands included: Mr Dank’s efforts to divert attention away from the substances and downplay their true nature, in text messages; the “closed circle of

officials within the club privy to Mr Dank's regime, and exclusion of the club doctor from knowledge of it; the instruction to the players to "keep it secret"; the players collective failure to record the injections on the doping control forms; one player's disclosure to Dr Reid that he had been advised to take some "vitamin supplements".

The absence of records within the club was a strand suggesting a desire to shroud the regime in a veil of secrecy. Finally, the fact that Essendon had "conspicuous success at the start of 2012 winning eight of its first nine games before being destabilized by a series of injuries, was a thread, although acknowledged to be a "barely visible thread" rather than a strand that was "at least not inconsistent with their overall conclusion".

Proper principles of fact finding – circumstantial cases

In *The Director, Office of the Fair Work Building Industry Inspectorate v Construction, Forestry Mining and Energy Union*^[v] the Full Court of the Federal Court of Australia confirmed that in circumstantial evidence cases, "the evidence has a probative value beyond merely the direct fact which it is elicited to prove".^[vi] Besanko and Perram JJ said:

"The point is that a trial court must consider the evidence as a whole including, where relevant, how that evidence internally relates to itself".

In any Court, if a trial judge fails to stand back and take a global view of all of the evidence in support of a finding of fact, including witness evidence and documents, and inference that can be properly drawn, before deciding whether to find the facts asserted, the trial process may have miscarried. An injustice may have been done.

Football supporters, administrators, commentators, club officials, sponsors and players, Essendon included, should be assured, and comforted by one thing. CAS got it right, according to the laws of this land.

[i] CAS 2015/A/4059 World Anti-Doping Agency v Thomas Bellchambers et al, Australian Football League, Australian Sports Anti-Doping Authority Arbitral Award, 11 January 2016, at [107].

[ii] Ibid at [113].

[iii] See *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd* (1999) 160 ALR 588.

[iv] *The Director, Office of the Fair Work Building Industry Inspectorate v Construction, Forestry Mining and Energy Union* [2013] FCAFC 8.

[v] Ibid.

[vi] Ibid at [75].