Neutral Citation Number: [2023] EWHC 45 (Admin)

Case No: CO/1453/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITING IN MANCHESTER

Monday, 16th January 2023

Before:
MR JUSTICE FORDHAM

- -

Between:

DR RICHARD FREEMAN	**Appellant**
- and -	
GENERAL MEDICAL COUNCIL	**Respondent**

- -

- -

Mary O'Rourke KC (instructed by JMW Solicitors LLP) for the **Appellant**
Ivan Hare KC (instructed by GMC Legal) for the **Respondent**

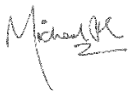
- -

Hearing dates: 5 & 6/12/22

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

INTRODUCTION

1. At the heart of this case are questions about what the Medical Practitioners Tribunal ("the Tribunal") ought to have done when a witness called by the Respondent walked out of a fitness to practise hearing during cross-examination. The Appellant's position is that the Tribunal (i) should have excluded the evidence which the witness had given or (ii) should have given it no or little weight or (iii) should not have relied on this as evidence of "a credible and consistent witness". This case is an appeal pursuant to s.40 of the Medical Act 1983, by which the Appellant seeks to overturn the Tribunal's decision on 19 March 2021 giving a direction that his name be erased from the Register. The appeal is against the sanction of erasure. But the grounds of appeal relate to the Tribunal's "Determination Not to Exclude Evidence" dated 6 December 2019 (the "Non-Exclusion Determination") and the Tribunal's "Determination on the Facts" dated 12 March 2021 (the "DOTF"). Having made the DOTF, the Tribunal proceeded to make its determination on "Impairment" (18 March 2021) which found the Appellant's fitness to practise to be impaired; and then its determination on sanction (19 March 2021) which directed erasure.

2. There is no dispute as to the approach to be taken by this Court. The appeal is governed by CPR 52.21(3), which provides that the "appeal court will allow an appeal where the decision of the [Tribunal] was – (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the [Tribunal]". The correct approach to s.40 appeals against sanction is found in Sastry v GMC [2021] EWCA Civ 623 [2021] 1 WLR 5029 at §§101-105: "the jurisdiction of the court is appellate, not supervisory"; "the appeal is by way of a rehearing in which the court is fully entitled to substitute its own decision for that of the Tribunal"; "the appellate court will not defer to the judgment of the Tribunal more than is warranted by the circumstances"; "the appellate court must decide whether the sanction imposed was appropriate and necessary in the public interest or was excessive and disproportionate"; "the test" is "whether the sanction was 'wrong'"; "the approach at the hearing", which is "appellate and not supervisory", is "whether the sanction imposed was appropriate and necessary in the public interest or was excessive and disproportionate". Insofar as a s.40 appeal against sanction impugns the Tribunal's fact-finding – as this appeal does – these observations from GMC v Jagjivan [2017] EWHC 1247 (Admin) [2017] 1 WLR 4438 at §40(iii) and (iv) apply:

> ***The court will correct material errors of fact and of law … Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing… When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence …***

3. The Appellant was, from 2010, team doctor for British Cycling (the national governing body for cycling) and lead team doctor for Team Sky (a professional cycling team). The Respondent is the statutory regulator of the profession of doctor in the UK. On 7 April

2017, the Respondent received a formal referral from the UK Anti-Doping Agency ("UKAD") alleging, among other things, that the Appellant had ordered Testogel in May 2011. Testogel was and is a commercially available testosterone supplement banned in sport under the rules of the World Anti-Doping Authority. As is accepted by the Appellant, he had given dishonest accounts as to the origin and fate of the Testogel, including to UKAD during its investigation. During the Respondent's own investigation, on 8 December 2017, the Appellant – through his representatives – identified Shane Sutton as the intended recipient of the Testogel. Mr Sutton was head coach of British Cycling and Team Sky at the time the Testogel was ordered in May 2011. The Appellant's case before the Tribunal was that the Testogel ordered by the Appellant was to treat Mr Sutton for erectile dysfunction. Mr Sutton was the witness called by the Respondent who walked out of the fitness to practise hearing during cross-examination.

Clinical and Record-Management Concerns

4. During the course of the Respondent's investigation, evidence of wide-ranging clinical concerns about the Appellant emerged, including: persistent non-emergency treatment for members of staff without contacting their GPs or checking their full medical history; failing to maintain adequate hard copy or electronic medical records; and failing to ensure adequate protocols for storage of prescription-only medication. Of the 22 Allegations against the Appellant, 9 related to these Clinical and Record Management Concerns. All of these were admitted by the Appellant when the Tribunal hearing began on 29 October 2019, and thus found proved. They were:

> ***Clinical concerns. 14. When Team Doctor for athletes at British Cycling Federation ('BC') and Tour Racing / Team Sky ('Team Sky'), you provided medical treatment that did not constitute first aid to non –athlete members of staff: (a) without access to the medical records for those members of staff you treated; Admitted and found proved (b) when they should instead have been referred to their general practitioner. 15. You failed to inform Patient A's GP of: (a) what medication you had prescribed to Patient A; (b) the reasons for prescribing medication to Patient A. 16. You failed to inform Patient B's GP of: (a) what medication you had prescribed to Patient B; (b) the reasons for prescribing medication to Patient B. 17. You failed to inform Patient C's GP of: (a) what medication you had prescribed Patient C; (b) the reasons for prescribing the medication to Patient C.***
>
> ***Record management. 18. Your role as team doctor at BC and Team Sky required you to use electronic medical record keeping software (namely Performance Data Management System at BC and Drop Box at Team Sky) so that treating physicians always had access to relevant medical information of Team Sky and BC athletes anywhere in the world. 19. You failed to maintain an adequate record management system in that you failed to: (a) implement an adequate medicine management policy, in that you did not adequately record details of stored drugs, including: (i) stock checks; (ii) medicine use; (iii) expiry dates; (iv) dosages; (v) quantity; (vi) batch numbers; (b) record details of drugs once prescribed, including: (i) start date of treatment; (ii) dose; (iii) quantity; (iv) batch number; (c) consistently record patient records on: (i) the Performance Data Management System at BC; (ii) in the alternative to 19(c)(i), in hard copy form; (d) record on patient records or elsewhere medication you had: (i) ordered; (ii) stored; (iii) prescribed; (e) maintain a consistent and organised approach to the storage of medical records in that when you did create records you stored them: (i) on a number of different laptops; (ii) in hard copy form in piles of loose paper. 20. Your management of prescription-only medication ('POM') was inappropriate in that you failed to: (a) issue a prescription for relevant medication; (b) keep an adequate record of stored POM; (c) keep an adequate record of dispensed POM. 21. On the evening of 27 / 28 August***

> ***2014, a British Cycling laptop containing records of a professional cyclist ('the Laptop') was stolen from you. 22. You failed to ensure that the records on the Laptop could be retrieved in that you: (a) did not back up the records: (i) electronically; (ii) in hard copy form; (b) stored the records in a manner only accessible to you.***

Allegations About Testogel

5. The remaining 13 Allegations related to "Order of a banned substance", namely the Testogel. The Appellant admitted substantial parts of those 13 Allegations. In particular, the Appellant admitted: ordering the Testogel; procuring fabricated evidence of its return and destruction; and lying about it to Dr Stephen Peters (then Head of Medicine and Team Psychiatrist at British Cycling) and Phil Burt (then Head of Physiotherapy at British Cycling). These, then, were the Allegations relating to the Testogel which the Appellant admitted and which were thus "found proved" by the Tribunal at the outset of the fitness to practise hearing:

> ***1. On 16 May 2011, you ordered for delivery from Fit4Sport Limited to the Manchester Velodrome 30 sachets of Testogel ('the Order'). 2. At the time of Order referred to in paragraph 1 above, Testogel was (and remains) prohibited on the World Anti-Doping Agency List of Prohibited Substances and Methods. 3. On 18 May 2011, when the Order had been received at Manchester Velodrome, you advised Dr Peters and Mr Burt that: (a) you had not made the Order; (b) the Order had been sent in error. 4. The statements you made as outlined at paragraph 3 above: (a) were untrue; (b) you knew to be untrue. 5. On a date in October 2011 you contacted Ms Meats at Fit4Sport Limited and asked her to send you written confirmation ("the Email') which stated that the Order: (a) had been sent in error by Fit4Sport Ltd; (b) had been returned to Fit4Sport Ltd; (c) will be destroyed by Fit4Sport Ltd. 6. When you asked Ms Meats to send the Email, you knew that the Order had not been: (a) sent in error by Fit4Sport Ltd; (b) returned to Fit4Sport Ltd; (c) destroyed by Fit4Sport Ltd. 7. On a date in October 2011, you showed the Email to Dr Peters and Mr Burt to evidence that the Order had been: (a) sent in error by Fit4Sport Ltd; (b) returned to Fit4Sport Ltd; (c) (or would be) destroyed by Fit4Sport Ltd. 8. When you showed the Email to Dr Peters and Mr Burt you knew that the content of the Emails untrue. 9. During an interview with UKAD on 17 February 2017, you stated that the Testogel had been: (a) ordered for a non-athlete member of staff; (b) returned to Fit4Sport Ltd. 10. The comment as outlined at paragraph 9(b) above: (a) was untrue; (b) you knew to be untrue. 11. Your conduct as outlined at paragraphs 3, 5, 7 and 9(b) above was dishonest by reasons of paragraphs 4, 6, 8 and 10.***

6. That left the following disputed Allegations, all relating to the Testogel, which the Appellant denied:

> ***10. The comment as outlined at paragraph 9(a) above: (a) was untrue; (b) you knew to be untrue. 11. Your conduct as outlined at paragraph 9(a) above was dishonest by reasons of paragraph 10. 12. You placed the Order and obtained the Testogel: (a) when you knew it was not clinically indicated for the non-athlete member of staff as described at paragraph 9(a) above; (b) knowing or believing it was to be administered to athletes to improve their athletic performance. 13. The motive for your actions as outlined at paragraphs 3 to 11 (inclusive) above was to conceal your conduct as outlined at paragraph 12 above.***

It is common ground that the Tribunal – under a heading "Facts to be Determined" – correctly identified the disputed questions which it needed to determine on the facts, as follows (DOTF §§28-31):

> ***In light of Dr Freeman's response to the Allegation[s] made against him, the Tribunal is required to determine whether, during an interview with UKAD on 17 February 2017, Dr***

> ***Freeman made an untrue statement about the Testogel being ordered for a non-athlete member of staff. It will also determine whether he knew it to be untrue, and whether his conduct in this regard was dishonest. It will determine whether, when Dr Freeman placed the order and obtained the Testogel, he knew at the time of placing the order that it was not clinically indicated for the non-athlete member of staff. Further, it will determine whether he placed the order and obtained the Testogel knowing or believing that it was to be administered to an athlete to improve their athletic performance. It will also determine whether the motive for Dr Freeman's actions in paragraphs 3-11 of the Allegation was to conceal his conduct in paragraph 12.***

The DOTF

7. In the DOTF (12.3.21) the Tribunal found all of the disputed Allegations about the Testogel (§6 above) proved. The DOTF was a 47-page, 247-paragraph document (leaving aside Annexes). Its anatomy was as follows. The Tribunal first set out: the Background (§§1-8); the Outcome of Applications Made during the Facts Stage (§§9-25); the Allegation and the Appellant's Response (§26); the Admitted Facts (§27); the Facts to be Determined (§§28-31); the Factual Witness Evidence (§§32-35); Expert Witness Evidence (§§36-40); Independent Psychiatric Reports (§§41-43); Documentary Evidence (§§44-45). The Tribunal then set out: its Approach (§§46-48); its Analysis of the Evidence and Findings (§§49-246) and its Overall Determination on the Facts (§247). The Analysis of the Evidence and Findings (§§49-246) addressed the Allegations at Paragraph 10 (§§50-203), Paragraph 11 (§§204-208), Paragraph 12a (§§209-213), Paragraph 12b (§§214-244) and finally Paragraph 13 (§§245-246). The Analysis of the Evidence and Findings in respect of Paragraph 10 (§§50-203) included the following sections: introductory paragraphs (§§50-54); Preamble (§55); Mr Sutton (§§56-62); Mr Sutton and Erectile Dysfunction (§§63-70); Mr Sutton's Credibility and Probity (§§71-101); Dr Freeman's Account – Overview (§§102-113); Analysis of Dr Freeman's Evidence (§§114-120); Rationale for Ordering Testogel (§§121-135); Threats and Bullying (§§136-169); How the original exchange about Testogel is said to have occurred, and the issue of patches v gels (§§170-181); Dr Freeman's reason for lying when confronted with the Testogel (§§182-197); conclusions (§§198-203).

8. The Tribunal arrived at its conclusions on the facts having, by then, sat for a total of 72 days. It did so in several parts: initially from 29 October 2019 to 17 December 2019 (for 18 days); then from 6 October 2020 to 26 November 2020 (25 days); and finally from 22 January to 12 February 2021 (for 6 days). The Tribunal heard live evidence (DOTF §§32, 34-35, 37-38, 41-42) from: Mr Sutton (until his walk-out on 12.11.19); Dr Peters; Mr Burt; Professor David Cowan (an expert Pharmaceutical Toxicologist); Dr Richard Quinton (an expert Endocrinologist); Professor Don Grubin (a Forensic Psychiatrist on behalf of the Respondent); the Appellant; Anthony Cooke (father of a former professional cyclist); Kvetoslav Palov (a retired cyclist); and Dr Max Henderson (a Consultant Psychiatrist on behalf of the Appellant). There was written evidence from a substantial number of other witnesses (DOTF §§33, 39-40).

"Vulnerable Witness" Direction

9. A number of applications were made on both sides in the course of the Tribunal's fact-finding stage, the outcomes of which were recorded in a series of Annexes A-O to the DOTF. These included a determination on 7 November 2019 granting an application

on behalf of the Appellant, unopposed by the Respondent, that the Appellant be treated as a "vulnerable witness" and be granted "reasonable adjustments" at the hearing. Those arrangements included that "when Mr Sutton gives evidence, screens would be required between Dr Freeman and Mr Sutton".

Issues

10. The Appellant originally appealed on fifteen grounds. These were reduced to twelve in Ms O'Rourke KC's skeleton argument for the hearing before me. They were then grouped into these five Agreed Issues in the parties' Agreed List of Issues:

> ***(1) The Tribunal's treatment of the evidence of Mr Sutton after he absented himself – (i) whether it ought to have been excluded and/or (ii) whether the Tribunal mischaracterised it as credible and consistent and/or whether the Tribunal was wrong to find there was no credible evidence to the contrary; (2) Whether the Tribunal in finding proved Allegation 12(a) erred in its construction of a penal/ disciplinary charge and effectively reversed the burden of proof; (3) Whether the Tribunal wrongly failed to appreciate the impact on the Appellant of Shane Sutton's evidence and link it to the events of 2011; (4) Whether the Tribunal failed to protect the Appellant (a vulnerable witness) by controlling the behaviour of Shane Sutton when he was giving evidence; (5) Whether the Tribunal's treatment of "bullying" was perverse.***

Agreed Issues (1), (3) and (4) all arise out of the evidence of Mr Sutton, and that is the topic with which I will start.

REGARDING MR SUTTON'S EVIDENCE

11. As the Tribunal recorded in the Non-Exclusion Determination (§1):

> ***On 12 November 2019, Mr Shane Sutton attended the hearing and commenced giving evidence at around 14:00. After his examination-in-chief by Mr Jackson, he was then cross-examined by Ms O'Rourke on behalf of Dr Freeman. Later that afternoon, and prior to the conclusion of Ms O'Rourke's cross-examination, Mr Sutton left the hearing, indicating that he would not be returning to complete his evidence. He confirmed in an email to the GMC the following day that his decision remained that he would not return to complete his evidence.***

In this section of this Judgment, I will describe some of the key circumstances relating to these events.

Before Mr Sutton gave evidence

12. Tuesday 12 November 2019 was Day 8 of the hearing. In the morning session there was an application by the Respondent for Mr Sutton's evidence to be in private. There was also a discussion about whether, when and how Mr Sutton would be able to return for a second day of cross-examination. That discussion included whether video-link could be appropriate. During the course of the discussion, Ms O'Rourke KC had made submissions about the 1.5 days which she had previously confirmed would be needed, and why cross-examination by video link could not be appropriate. She emphasised that Mr Sutton's credibility was going to be tested. During all of this, Mr Sutton was not in the hearing room but in a separate room waiting to be called to give his evidence. The hearing was being "tweeted" on social media. There was – I was told – no restriction

on Mr Sutton accessing those Twitter or social media feeds. The "press" were present: an exchange between the advocates (see §14 below) referred to that presence.

13. On the question of the length of the cross-examination which was needed, Ms O'Rourke KC submitted ("Sir" is the Tribunal Chair):

> ***Sir, in terms of how long I will be, I stand by my day-and-a-half. In terms of, "We have lost time and this poor gentleman has been here waiting", the GMC should have thought of that before making the application…***
>
> ***Sir, in terms of his argument that you can start and get a feel for someone on the basis that you get a couple of hours of their cross-examination, I am experienced counsel and I can get you a flavour, sir, you will know from your many years in the law that good counsel tee-up their cross-examination and set their case up in a certain way. I have written all of mine out, and it is 27-plus pages; it is in a sequence and it is broken into sections, some of what I think are my most important questions, the most crucial and may evoke a certain response are strategically placed throughout that. To say I have got to now go and revise them and get them all into the relevant two hours would be to take them out of sequence, to lose me the ability to tee-up a topic and to follow it through. So, sir, I say you won't get the right impression in [the] two hours that we might have available to us this afternoon.***
>
> ***The next point, sir, is I am not willing to start unless he can finish and arrangements are made for him to finish…***

On the question of cross-examination by video-link, Ms O'Rourke KC submitted:

> ***I am not agreeable to cross-examining the most important witness in the case, other than Dr Freeman himself, by video link. Sir, you know we know yes, it is commonly done in these proceedings, and normally the defence agrees to it where the witness is not a witness whose credibility, integrity and honesty are involved. The video link inevitably has a delay; inevitably you lose the immediacy of it; you lose the full body language; you lose whether the individual is squirming in his seat, moving his feet, wringing his hands, moving from side-to-side. Video doesn't give you any of that and whether the individual, in fact, as happens in some cases, is sweating and/or is losing it.***

14. After summarising the Appellant's position, Ms O'Rourke KC then added this as a "final point" (at 12:15):

> ***Sir, just a final point, and I think you know this from all the arguments so far: our case about this gentleman and why we say it is not suitable for video link is he is a habitual and serial liar. He is a doper with a doping history...***

Ms O'Rourke KC's "final point" precipitated the following exchange:

> ***MR JACKSON: I am concerned that we are now raising matters – and I notice that my learned friend is looking to the Press as she says these things... MISS O'ROURKE: I am not, I can't see them. I am behind a screen. THE CHAIR: I am not certain, in any event, that we need to settle the issue of a video link at this stage. I think the primary issue for me, and for the tribunal, is whether we can begin at all today with Mr Sutton's evidence …***

15. As the Tribunal went on to find in the Non-Exclusion Determination, Ms O'Rourke KC's "final point" was picked up at the time, in "tweets" of the hearing. In the bundle for the appeal are two contemporaneous tweets. One said:

> ***[Mary] O'Rourke urges the chair to say no to video link for Shane Sutton if he goes back to Spain, before suddenly changing tack. 'He is a habitual and serial liar. He is a doper, with a doping history…' Chair then interrupts.***

The other said:

> ***Absolutely staggering development at Dr Richard Freeman tribunal. During argument over when Shane Sutton can appear to give evidence, Mary O'Rourke alleges he (Sutton) is 'a habitual and serial liar, he is a doper with a doping history'.***

16. There was a short adjournment so that Mr Sutton's availability could be investigated further. The upshot was that it was agreed that he would make himself available to continue with cross-examination on Thursday 14 November 2019. Mr Jackson KC told the Tribunal:

> ***MR JACKSON: Thank you, Chair, for the time. Mr Sutton has been spoken to and the situations have been explained to him. The position is that although he would have wished – and I don't want to go into detail – to be with the member of the family, he is going to alter those arrangements and make himself available on Thursday. So we have got half a day today and we have got Thursday. I suggest that we start with the evidence of Mr Sutton as soon as possible. THE CHAIR: Indeed, we will do that. MISS O'ROURKE: I am delighted to hear, sir.***

Examination in Chief

17. Mr Sutton's oral evidence commenced at about 14:10. The Appellant and Mr Sutton were separated by a screen, in accordance with the Vulnerable Witness direction (§9 above). Mr Sutton adopted his witness statements as his evidence in chief. As the Tribunal recorded (Non-Exclusion Determination §28), this evidence in chief specifically included that:

> ***Mr Sutton …***
>
> - ***Denies the claim (attributed by GMC to Dr Freeman) that the Testogel delivered to the Velodrome in May 2011 was for him;***
> - ***Claims he has limited (and only relatively recent) knowledge of Testogel and its uses;***
> - ***Denies ever discussing it with Dr Freeman; and***
> - ***Claims he could see no reason why he would need it in light of his medical history.***

Cross-Examination

18. Ms O'Rourke KC's cross-examination then began. It continued to around 15:30 (with a 15 minute break midway). It occupies 40 pages of the "open" transcript (pages 18-58). There were also some brief additional passages which continued in "private" session. I will identify some of the features of the cross-examination thematically, with some examples being gathered together by theme. In order to give some indication of sequence, I will include the page references in the transcript.

19. Mr Sutton repeatedly expressed his views about his having spent time ("two days") in a separate room ("downstairs") waiting to give his evidence. For example:

> ***A Me winning a gold medal is... you are telling me that is relevant to me coming over here and spending two days sat in a room downstairs--- [p.18]***
>
> ***A Could I address the Chair, please? Can I just say, personally, I was asked a question by the GMC to come here and I... Can I just finish, please? I have spent two days in a room downstairs. I have come here and I am being asked questions about my cycling career … [p.21]***
>
> ***A I am sorry, Chairman, but I am getting quite frustrated with... The fact is that I am still telling you, and I am telling you and the panel, that you have brought me over here, you have sat me in a room for two days, the question you want to know is whether I ordered something and I am prepared to go and take a lie detector test, whatever you want, to prove that I never ordered this stuff … [p.30]***
>
> ***A … Right, I have spent two days down there waiting to come up here… [p.56]***

20. Mr Sutton repeatedly expressed his views about the relevance of the topics in Ms O'Rourke KC's questioning, and his views about what the only relevant issue was. This was notwithstanding that the Tribunal Chair explained to Mr Sutton that he should answer the questions and that relevance was a matter for the Tribunal to decide. Examples are:

> ***A It is irrelevant. [p.18]***
>
> ***A It is irrelevant to this hearing. [p.18]***
>
> ***A I am sorry. I am sorry, Chairman, but that is all irrelevant… [p.18]***
>
> ***A My answer is it is irrelevant. [p.18]***
>
> ***A … I am being asked questions about my cycling career, which is totally irrelevant to what I was brought here for, to give evidence on whether or not I ordered a package, and I am sorry but it is quite frustrating that we are talking about some old dilapidated bike rider from 40-odd years ago and a waste of time. [p.21]***
>
> ***A … I still think it is irrelevant … I mean, I don't understand the questioning on that front. [p.27]***
>
> ***A What does that have to do with this case? [p.27]***
>
> ***A Well... I... You know, you have asked me to stay on another day to listen to you criticise someone that you don't even know, when I am here to answer the simple question whether I ordered patches or not. You have sat here, you have criticised people, you have brought names in that are irrelevant to the case, and I just don't know where you are going with it. [p.31]***
>
> ***A … All I am trying to say to you and the panel is that this whole line of questioning about stuff in my fridge and bullying and bringing my kids into this, Chair, is totally wrong. We are here to answer a simple question … [p.40]***
>
> ***A … I was asked by the GMC to come here and give you an answer. Did I, or did I not, order gels? I did not order gels, okay? [p.57]***

This was notwithstanding (by way of examples):

> ***THE CHAIR: The tribunal will determine what is relevant. [p.18]***

> ***THE CHAIR: Could you just answer--- [p.18]***
>
> ***THE CHAIR: Could you please just answer the question. [p.19]***
>
> ***THE CHAIR: Can you answer the question, please? [p.19]***
>
> ***THE CHAIR: These are initial contextual questions and I would ask that you answer them, please. [p.21]***
>
> ***THE CHAIR: … I am quite content for [the question] you have just asked, to be put again, so he can answer it. [p.22]***
>
> ***THE CHAIR: The purpose of this stage is for Miss O'Rourke to ask you questions and for you to answer them. Can I ask that we return to that, please? [p.31]***
>
> ***THE CHAIR: You are a witness answering questions in relation to the things that we want to see covered. [p.37]***

21. Mr Sutton was repeatedly addressing topics of his own and asking his own questions of Ms O'Rourke KC. This was pointed out by the Tribunal Chair. For example:

> ***THE CHAIR: There should not be a debate at the moment. This is questions being asked of you and answers given to the tribunal. [p.29]***
>
> ***THE CHAIR: Mr Sutton, you are answering the questions, not asking them, so please can you wait for the questions. [p.29]***
>
> ***THE CHAIR: Please, Mr Sutton, can you wait for the question to be asked. [p.30]***
>
> ***THE CHAIR: The purpose of this stage is for Miss O'Rourke to ask you questions and for you to answer them. Can I ask that we return to that, please? [p.31]***

22. One topic which Mr Sutton identified – as what he said was the "relevant" question unlike what he said were the "irrelevant" topics and questions being put by Ms O'Rourke KC – was his denial that the Testogel had been ordered for him (Mr Sutton). These are illustrations:

> ***A … the question you want to know is whether I ordered something and I am prepared to go and take a lie detector test, whatever you want, to prove that I never ordered this stuff … [p.30]***
>
> ***A Miss O'Rourke, my response is plain and simple. I can look you in the eye and swear on my three-year-old daughter's death, I have never ordered any Testogels from Richard … [p.50]***
>
> ***I was asked by the GMC to come here and give you an answer. Did I, or did I not, order gels? I did not order gels, okay? [p.57]***

There was also this, when the evidence had continued in private, but which was subsequently quoted in the DOTF at §62:

> ***I would have no problem coming here telling you, Miss O'Rourke, "Yes, it was for me". I am a non-athlete. It is neither here nor there. It is not like any big secret, but as far as I am concerned, if I had ordered it, I have got no problem telling you I ordered it, and you are saying I can't get a hard-on in the Press. My wife wants to come here and testify that you a***

> ***bloody liar. As far as I am concerned, I have no problem coming and telling the GMC if it was for me. I have no problem at all. It wasn't for me and I never ordered it. It is as simple as that.***

The Tribunal recorded (Non-Exclusion Determination §70) that: "During the course of cross-examination, [Mr Sutton] denied more than a dozen times that the Testogel was for him and asked Ms O'Rourke to produce evidence to the contrary."

23. A topic which Ms O'Rourke KC put to Mr Sutton was about whether Mr Sutton had read the Appellant's book and whether Mr Sutton had told Mr Stubbs (the Respondent's legal representative) that he had done so. Mr Sutton denied having read the book. He denied telling Mr Stubbs that he had done so. Ms O'Rourke KC indicated to Mr Sutton that she had a document written by Mr Stubbs which undermined Mr Sutton's evidence on this topic. These exchanges are illustrative:

> ***Q You told Mr Stubbs that you had read Dr Freeman's book. A I have never read Dr Freeman's book. Q You told it to Mr Stubbs. A No. Q He has got it recorded. A I have never read Dr Freeman's book and, wherever that has come from, it is incorrect. Q If Mr Stubbs has written that in an email or interview with you, Mr Stubbs has made it up, has he? A No, I have never... He might have asked me have I seen the book and I might have replied yes. I have seen the cover of the book but I have never read Dr Freeman's book. I have no interest in reading whatsoever. Q I am going to put to you in due course what Mr Stubbs recorded that he said to you, and we will decide at that stage--- A Yes. Q -- whether Mr Stubbs has made something up. A You want the truth. I am telling you the truth. I have never read Dr Freeman's book… [pp.24-25]***

> ***Q Mr Stubbs records you as telling him this and so that we get the whole of it and understand: "SS said he had read parts of Dr Freeman's book and found that Dr Freeman had suggested the Testogel and other medicines were for patients in his "private practice". Lewis Stubbs stated that it was the subject of the Testogel, which is why he wanted to contact SS directly rather than via email." Firstly, you have told us that you have never read his book, so presumably you deny you said what is recorded there? A No, I have never, ever read Richard's book. Q Right, are you denying that you say what Mr Stubbs has recorded there? In other words, Mr Stubbs has made that up? A Whether he has misinterpreted whether I have seen the book as to reading it, I can't answer that question for Mr Stubbs... [p.51]***

24. Another topic which Ms O'Rourke KC put to Mr Sutton was about whether in 2011 Mr Sutton knew of Testogel and its use for doping in cycling. Mr Sutton denied having such knowledge in 2011. This exchange is illustrative:

> ***Q … Lance Armstrong ultimately admitted to testosterone patches and Testogel. Floyd Landis admitted to testosterone patches and Testogel and, indeed, accused Lance Armstrong of the same drugs. A Thank you for bringing my encyclopaedia of cycling up to knowledge because I wasn't aware of that. Q You really didn't know. You are in--- A I didn't know--- Q -- professional cycling--- A I didn't know the product. I did not know the product that they were... I did not know that they were using gels, as it were. Q Or patches. A Or patches, and I had no knowledge of testosterone gels in that period anyway, so... Q We disagree with that. We say it is impossible for someone at your level, with your knowledge of the sport, going the rounds of the world and meeting people, to say that you didn't know. A Yes. Okay. MR JACKSON: My learned friend is making comments. If she could focus on asking Mr Sutton questions. MISS O'ROURKE: I will. THE WITNESS: I understand the question. No, that... I am happy. Can you just repeat what you just... MISS O'ROURKE: Let me get more specific. Floyd Landis gave an interview to a journalist called Paul Kimmage in January 2011. It was in the Sunday Times and it was considered at the time to be explosive because he talked about testosterone and Testogel patches in that interview and that that is what he had used. A***

> ***Okay. Q Were you totally unaware of that being discussed in cycling on the circuit and that that information came out? You were totally unaware of that. A Much to your amazement, yes. I was totally unaware of the product... the product used, but you will know a lot more than me because I think you have already accused me of being a doper previously in this hearing. Q We will come on to that. A But you don't know me. [pp.27-28]***

25. A further topic which Ms O'Rourke KC put to Mr Sutton was that he (Mr Sutton) had sent the Appellant a text, at the end of 2018, whose contents she described:

> ***MISS O'ROURKE: A friend wouldn't send to a friend a text that says, "Be careful what you say. Don't drag me in. You won't be the only person I can hurt." That is the text you sent Dr Freeman at the back end of last year. A Huh. Show me all your texts. Q We are going to come to texts in a minute because we are going to see what--- A Show me all your texts. Look, I have said what I am going to say… [pp.30-31]***

26. Another topic which Ms O'Rourke KC put to Mr Sutton was that people had come forward providing information that Mr Sutton was a liar and had a doping history:

> ***MISS O'ROURKE: Let me tell you where I am going. As a result of information that you gave to the DCMS inquiry, which you did openly and in public, and it was there on the web for everyone to live stream and see, a number of individuals came forward to call you a liar. A Okay. Q And to provide information about your doping history. A Have you got their statements there? Q Indeed, I do. A Okay. Q Those individuals, the same individuals or a selection--- A I think what... How many are you talking? Q About five. A Okay. Q I will give you the names in due course. A Okay. Yes. [pp.31-32]***

27. A further topic which Ms O'Rourke KC put to Mr Sutton was that a witness had come forward describing testosterone vials in Mr Sutton's fridge at his home in Rowley Regis. These passages are illustrative:

> ***Q So that you understand where I am coming from, we say that is not true. We have had a witness come forward to tell us about testosterone vials in your fridge in your home in Rowley Regis --- A In Rowley Regis? In my home in Rowley Regis? That is interesting. Q Yes. A And who would that witness be? Q I am simply telling you we have had that--- A No, no, no, produce the name and the evidence, please. MR JACKSON: The witness ought to be given the chance to put this into context. THE WITNESS: Can I have the name and the evidence. I want to see the name and the evidence. Everything is meant to be evidence-based here, okay, so can you give me the name and the evidence. MISS O'ROURKE: The individual in question at the moment wishes to remain anonymous. A Huh. Q But he has provided his name and his details. A Yes. Q To UKAD and UK Sport and to Damian at the DCMS… [pp.34-35]***

> ***THE CHAIR: Can I be clear about your answer to the specific question, which was I think to the effect that Testogel was said by a witness to have been seen in Mr Sutton's fridge. MISS O'ROURKE: Testosterone. THE CHAIR: Testosterone. MISS O'ROURKE: Seen in his house in vials in his fridge followed--- A Laughable. MISS O'ROURKE: -- followed by... Laughable. Followed by seeing him, in his kitchen, inject it. That information was provided to the DCMS. THE CHAIR: Are you able to provide any date parameters for that or is that not something you feel able to share at the moment. MR JACKSON: When and where. MISS O'ROURKE: In his house in Rowley Regis, probably back end of the 1990s/early noughties. Mr Sutton knows when he lived in Rowley Regis. A And can I just... Can I take--- THE CHAIR: Just on that--- THE WITNESS: No, I want to answer. THE CHAIR: On that question, please. THE WITNESS: This particular individual was a guy who was arrested and given a two-year sentence for growing dope in his loft. He has never been in my house in Rowley Regis. I used to pick this individual up from Walsall, okay. He has been bitter about my success and he was... As I said, he went through a newspaper, made all these allegations. They were going to write an article, et cetera, et cetera, and then he was arrested in Bridgend***

> ***in Wales and given a two year sentence for growing dope. He then subsequently went on this mission to blacken my name through our social media and everything, because I knew him and his wife very well. He was a team mate and I met him in Manchester, it was the World Cup, and I said, "How are you doing Darren.... Daryl?" blah, blah, blah, and at the end of the day I said, "And how's such and such?" "Oh, she left me." I said, "Oh, she's finally come to her senses," and he has been on a mission to destroy my name ever since. Q It is not the same person. A Yes, it is. Q No, it is not. A Yes, it is. THE CHAIR: Your answer to the question, though, is that nobody would have seen you doing what is described. THE WITNESS: Never. THE CHAIR: You didn't do that. THE WITNESS: Never. THE CHAIR: Thank you. MISS O'ROURKE: Sir, we will make a decision as to whether we adduce that evidence. THE CHAIR: I understand. MISS O'ROURKE: At the moment I am putting it to him and giving him an opportunity, but, so that you understand, Mr Sutton, it is not Daryl Webster. A Whoever. Q It is not someone who is a rider. A Huh. Q We will move on. [pp.37-39]***

28. Linked to the various topics being put by Ms O'Rourke KC, there were exchanges between Counsel about Ms O'Rourke KC putting matters to Mr Sutton on which she stated that she had evidence, but without putting forward this evidence. A first exchange followed the description of "statements", of which Ms O'Rourke KC said she had "about five", from people had come forward providing information that Mr Sutton was a liar and had a doping history (§26 above). The exchange between Counsel was this:

> ***MR JACKSON: I should make the point that none of this has been disclosed to the GMC. MISS O'ROURKE: No, sir, and it does not need to be. At this stage I am entitled to cross-examine on it, I am entitled to wait on his answers and I am entitled to thereafter decide how to deploy the information. MR JACKSON: His answers are final. MISS O'ROURKE: Until I deploy the information, but I haven't put the detail and I would be grateful if Mr Jackson would--- THE WITNESS: Excuse me, Chair. MISS O'ROURKE: --be patient and let me finish. I was in the middle of stating. The point, Mr Sutton, is this. A number of those same individuals have come forward in the last two weeks since this case has started, again to say the same things, to tell us that you are a liar. A Huh. Q You are a doper and you are a bully. A Okay. Q Now, what I am doing is I am getting to the liar bit first, in terms of your knowledge of drugs… [p.32]***

Another exchange between Counsel concerned the anonymous witness said to have come forward describing testosterone vials in Mr Sutton's fridge at his home in Rowley Regis (§27 above). The exchange was as follows:

> ***MR JACKSON: Chair, with respect, the fact that an anonymous witness has given details to other inquiries is no answer to the fact that, in fairness to this witness, for him to be able to deal with an allegation that drugs are said to have been in his fridge, he ought to have the opportunity--- THE WITNESS: It is laughable. MR JACKSON: -- of being able to say, "I do not know that person" or "That person has never visited me at that address." That has got to be fair to the witness, to allow him to deal with this machine-gun accusation that is being put to him, otherwise he is not in a position to be able to deal with it. THE CHAIR: Are you in a position to provide any more context? MISS O'ROURKE: Sir, I don't agree because I have given him the context and I have given him--- THE WITNESS: Can you answer the question that the Chair has asked. MISS O'ROURKE: Sir, if I could finish. THE CHAIR: Please. MISS O'ROURKE: I don't agree. I am entitled to put it. If he denies it and says it is not true and it is all made up, then it is going to be a decision for me in due course as to whether I manage to persuade the individual in question to come forward… [p.36]***

29. Mr Sutton challenged Ms O'Rourke KC for "previously" having "accused" him of being a "doper" and a "serial liar":

> ***A Much to your amazement, yes. I was totally unaware of the product... the product used, but you will know a lot more than me because I think you have already accused me of being a doper previously in this hearing. Q We will come on to that. A But you don't know me. Q How do you know that I accused you of a doper? Has a member of the press been in contact with you today? A No, but I--- Q Where did you hear that from? A I know that you... I know what you have said and I think that--- Q I said it this morning at 12--- A You have called me a serial liar and, what, you don't even know me, and yet you can make these assumptions and then you can say these things but I have no defence to it. Q Mr Sutton, I am just--- A I just think that you are totally out of order. Q I am fascinated that you know that because I said it at 12.15 today and I don't know who told you because I understand you were downstairs. A So you did say it? Q I did indeed. A An apology would be nice. Q No, I--- A Considering you don't even know me. MISS O'ROURKE: I will be developing it--- THE CHAIR: There should not be a debate at the moment. This is questions being asked of you and answers given to the tribunal. [pp.28-29]***

30. Mr Sutton referred to reporting (in the "papers" and "press"), and its effect on his family. He described Ms O'Rourke KC as responsible for the reporting. He also described Ms O'Rourke KC as telling lies, along with her client the Appellant, and described Ms O'Rourke KC's conduct as bullying. These are illustrative:

> ***A I am sorry, Chairman, but … she can go round the houses and my 12-year old son can read the crap that you have written in the papers about bullying, et cetera. You are the bully. You are the one who is bringing that up. You are the one bullying my children. And, as far as I am concerned, I am here to answer your questions, your questions, on these patches. [p.30]***
>
> ***A As far as I am concerned... As far as I am concerned, you are a bully and what you have put my family through--- THE CHAIR: That is inappropriate language, Mr Sutton. Please. MISS O'ROURKE: Let me tell you--- A I am sorry, Chair, but she can say that about me. She's -- THE CHAIR: The purpose of this stage is for Miss O'Rourke to ask you questions and for you to answer them. Can I ask that we return to that, please? [p.31]***
>
> ***MISS O'ROURKE: Mr Sutton, so that you understand our position, we say that your two witness statements to the GMC are lies. A Well, you know, you have got your opinion and obviously I am here to tell the truth. Q Yes, and therefore I have to test your credibility by saying why we say they are lies. A You have made an opinion already on my credibility in what you have said to people and what you have said to the press, which has affected me and my family, which is totally wrong, and I am very, very upset about that. [p.37]***
>
> ***A … All I am trying to say to you and the panel is that this whole line of questioning about stuff in my fridge and bullying and bringing my kids into this, Chair, is totally wrong… [p.40]***
>
> ***Q I am going to suggest to you why you were concerned you were going to get caught up in it, because you knew you were the one who instructed Dr Freeman to get the Testogel. A Now who is lying? You. Q That is a question... A No, no, no, no, no. You are... Q You were the one who instructed him. That is why you were afraid you were going to get caught up in it. A I am sorry, Miss O'Rourke, but you are lying through your back teeth and so is your client. Q Okay. A It is as simple as that. [pp.45-46]***
>
> ***A … I have come here, I have told the truth. I have answered your questions. I have taken your bullying. My children have taken your gutter press, the gutter tactics that you have put in the Press and everything else… [p.56]***
>
> ***… I am not going to be dragged through this mindless little individual who has got to live in her own little sad world and defend someone who has already admitted openly to telling a million lies to you and the rest of the world, okay? [p.57]***

31. On one occasion Ms O'Rourke KC told Mr Sutton that she (Ms O'Rourke KC) did not believe him (Mr Sutton).

> ***A I classed him as a friend. He did a lot for me. I have no issues with Dr Freeman whatsoever. All I am trying to say to you and the panel is that this whole line of questioning about stuff in my fridge and bullying and bringing my kids into this, Chair, is totally wrong. We are here to answer a simple question and I had no knowledge of that, Miss O'Rourke. You have to believe me because--- Q I don't believe you, Mr Sutton. [p.40]***

This was the subject of the following subsequent exchange:

> ***MR JACKSON: Chair, I am concerned because time and again Miss O'Rourke makes statements. She is entitled to put questions--- MISS O'ROURKE: Yes, I am. MR JACKSON: -- based upon what is said to be evidence. It is not for her to say, "I don't believe you" or to make statements about Mr Sutton. With respect, she should simply ask him questions and then--- THE WITNESS: I hope you are getting all this. MISS O'ROURKE: Sir, I am. I am entitled to put my client's case, which is that we do not believe him. THE WITNESS: Chair? THE CHAIR: Can we now move to the next question. I think there was another passage that you wanted to refer to. [pp.41-42]***

32. At one point, Mr Sutton told Ms O'Rourke KC that, if she proceeded in the "line" she was "going down", he would "do her for defamation". This was the exchange:

> ***Q We are going to look next – I don't think you will have it in front of you--- A I am not really interested in what you have got in front of you. I am really not. I am really not interested because I have told the truth and I have told you--- Q No, you are not interested in getting caught out in a lie. A In what sort of lie? Q About the Testogel, a lie about your doping history--- A Miss--- Q -- a lie about your bully--- A -- can I just stop you there? And be very careful in the line you are going down there because I will do you for defamation because you have no evidence and you can't stand there and call me a liar and you can't accuse me being a doper and I want that retracted. Q I am sorry I am not retracting it. A I want that bloody retracted. [p.41]***

33. Mr Sutton repeatedly raised his voice and banged the table in the hearing room. This was identified at points including the following, after the Tribunal had heard the tape back in an open hearing. Among the examples, of the several points at which Mr Sutton could be heard by the Tribunal listening back on the tape to be banging the table, are these:

> ***A … You have sat here, you have criticised people, you have brought names in that are irrelevant to the case, and I just don't know where you are going with it. Q Let me tell you. A As far as I am concerned... As far as I am concerned, you are a bully and what you have put my family through--- THE CHAIR: That is inappropriate language, Mr Sutton. Please. [p.31]***

> ***A Tell Dr Freeman to take his screen down and man up a bit and look me in the eye and tell me... tell me to my face that I ordered it. He won't because he knows that I didn't order it and, as I said, the first I heard of it was when it all came up five/six years later. [p.39]***

34. Mr Sutton repeatedly described the Appellant as "hiding" behind the "screen" in the hearing. These are illustrative:

> ***A … Who is lying? The guy who is hiding behind the screen and can't look his friend in the eye or me? [p.30]***

> ***A … Dr Freeman can hide behind his screen, yeah … [p.31]***
>
> ***A Tell Dr Freeman to take his screen down and man up a bit and look me in the eye and tell me... tell me to my face that I ordered it. He won't because he knows that I didn't order it and, as I said, the first I heard of it was when it all came up five/six years later. [p.40]***
>
> ***A … I am sat here taking all these accusations from someone who doesn't even know me and who is making me out to be this, I think, serial liar or whatever. It is not the case. Miss O'Rourke, you are wrong. You are totally wrong. You are totally wrong. You need to ask Doc...you need to ask Richard behind the screen there to stand up, be a man and tell the truth. Q Richard behind the screen here says that you instructed him to get the Testogel and you first become aware of that, and so you have not just been dragged in as a boss... A Richard, take the screen down, look me in the eye and tell me… Miss O'Rourke, my response is plain and simple. I can look you in the eye and swear on my three-year-old daughter's death, I have never ordered any Testogels from Richard, and if Richard wants to take the screen down and look me in the eye and tell me I did then come on. THE CHAIR: You are going to be asked a question in a moment... [p.50]***
>
> ***… The person lying to you is the man behind the screen… [p.57]***
>
> ***… he can't come out and tell the truth and confront the person he is accusing, because he has got to hide behind a screen, because you are spineless, Richard. You are a spineless individual. [p.57]***

35. Mr Sutton's evidence finished with this. Ms O'Rourke KC was cross-examining Mr Sutton about what Mr Sutton had told the Respondent's Mr Stubbs and Mr Malloy:

> ***Q Let us look at what you tell the GMC when you meet them, because I think you meet for the first time, Mr Stubbs and Mr Malloy, both of whom are sitting over there, on 13 December 2018. We see the attendance note at page 134. They come and see you at your home in Wilmslow, Cheshire. Do you remember that? A Carry on. Q Firstly, I am asking do you remember that? Do you remember them coming to see you? A Vaguely, yes. Q Mr Stubbs, in the top half of the page, explains what the purpose of the meeting was, to discuss MPT hearings. Then in the very last paragraph, if you see it, it says: "SS said he still couldn't figure out why Dr Freeman would have named him in relation to the Testogel order. Lewis Stubbs said the GMC had received no further information other than Dr Freeman not responding to the allegations, but had not given any indication why he named Shane Sutton, and that if he had had this information, he would have put it to Shane Sutton." You responded it definitely wasn't you, you found out about it later. Then if we turn to page 136, I want to ask you a couple of things. Firstly, at the bottom of 135 and the top of 136: "Shane Sutton asked LJS how much Testogel was delivered. LJS confirmed that as described in the media it was one box in May 2011. SS said that was strange when he and [I presume that is David Brailsford] learned about it years later they assumed it was more than that." Why did you and David Brailsford assume it was more than one box? That is what you tell Mr Stubbs and Mr Malloy, unless they have got it wrong. A (No audible response). Q Why did you tell them that when you learned about it years later, you assumed it was more than one box? No idea? [p.56]***

Then came Mr Sutton's walk-out:

> ***A No, I have no idea really why. I don't know, but anyway, excuse me, Chairman. Right, I have spent two days down there waiting to come up here. I have come here, I have told the truth. I have answered your questions. I have taken your bullying. My children have taken your gutter press, the gutter tactics that you have put in the Press and everything else. I want to look the panel in the eye and tell you now, I am not lying. I have never lied. She has accused me of all kinds of things here today, cheating and everything else. I am going to leave the***

> ***hearing now, because this is not life-changing for me. I don't need to be dragged through this shit fight that this individual is trying to bring up on me personally. I was asked by the GMC to come here and give you an answer. Did I, or did I not, order gels? I did not order gels, okay? As far as I am concerned, I am going to go back to my little hole in Spain, I am going to enjoy my retirement and I can sleep of a night knowing full well that I didn't order any patches. I have not lied to you. I have been under oath. The person lying to you is the man behind the screen. Hopefully, one day, he will come clean and tell me why, because as I said he is a good bloke, he was a good friend. I have no argument with him, or anybody else. I want to live my time out peacefully. I am happy with what I achieved in my career and I wish Richard all the best going forward. There was no one better bedside than him. This is a guy that the Head of Cycling at the time, the joint Head of Cycling wanted him out the door from the day he came in there, because Richard went through a messy divorce. He turned up to work drunk on several occasions, unshaven, looking a mess, was sent home. He was like the Scarlet Pimpernel. I covered his backside when he wasn't there. I had two critical cases of athletes in hospital over the weekend when we couldn't get hold of him, when we called in the Team Sky doctor, Dr Richard Usher to come in and cover, because Richard couldn't be found. I think if you were to bring Steve Peters in before this panel, he would verify everything I have got to say. I want to thank you for letting me have my say. I want to thank you guys, okay? I have not lied to you. I have told the truth, and as far as I am concerned, don't ask my any more questions because... THE CHAIR: We would really appreciate it if you could just stick with us for a bit longer. It is so helpful to the tribunal if you could continue to give evidence in this case... THE WITNESS: No, I am sorry, but I am not going to be dragged through this mindless little individual who has got to live in her own little sad world and defend someone who has already admitted openly to telling a million lies to you and the rest of the world, okay? Yet he can't come out and tell the truth and confront the person he is accusing, because he has got to hide behind a screen, because you are spineless, Richard. You are a spineless individual. THE CHAIR: No, remain where you are, please. THE WITNESS: I don't need to be part of this anymore. This has become an absolute circus... MISS O'ROURKE: Sir, I am willing for Mr Stubbs and Mr Jackson to have an opportunity to discuss the matter with the witness, even though he is in the middle of giving his evidence. THE WITNESS: No, and if the Press, if you want to come and talk to me, no problem. You can sit down, because I am not coming back in here. MISS O'ROURKE: Sir, otherwise, I will have to address you on the consequences. THE WITNESS: No, that is it. I am done. (The witness left the hearing room) [pp.56-58]***

After Mr Sutton's Walk-Out

36. As the Tribunal recorded (Non-Exclusion Determination §43):

> ***Shortly after leaving the hearing room, Mr Sutton spoke to the news media. Answering questions, he said he considered he had been singled out and felt 'like I'm on trial'. He described the process as 'quite upsetting' and said 'you will be aware there was nothing evidence-based in there and it's quite sad to think … my 12-year old son picks up the paper and sees dad being accused of being a bully when actually … this lady's become the bully.'***

37. Mr Jackson KC went out to speak, with the Tribunal's permission, to Mr Sutton. When the hearing resumed, Mr Jackson KC reported back to the Tribunal as follows:

> ***MR JACKSON: Thank you, Chair, for the time and I am sorry it has been a bit longer than the initially envisaged 15 minutes. In the course of that time Mr Sutton asked to speak to me and I indicated to him that I was unable to talk to him about the case in terms of anything said about the evidence. I told him that it was important – that he was a witness on behalf of the GMC before this tribunal and it was important for him to complete his evidence in the interests of this investigation and inquiry. I told him in the end that it must be his decision as to whether or not he came back at this stage. He indicated that after two long days he had reflected upon issues about – anxieties about impact on his family, that he wanted – the time***

> ***had got to about twenty to five then – and it was unrealistic that we would make any further progress today. He indicated that he would like to reflect overnight and tomorrow morning and he would then let the GMC know as to whether or not he was prepared, against the background of the importance. I pointed out that the questions that were being put by Miss O'Rourke were those that were being put on instruction and that that was part of the process. I therefore encouraged him to return and complete his evidence on Thursday. We hope to find out in good time tomorrow so that we can plan whether or not he is willing to do that. That really sums up the exchange. [p.58]***

38. What happened the next day (13 November 2019) was recorded as follows by the Tribunal (Non-Exclusion Determination §§44-45):

> ***44. In correspondence the following day between Mr Sutton and a lawyer for the GMC, the latter indicates that it is a matter for Mr Sutton whether he decides to return to the hearing. 45. He declined to do so, saying: "I have answered the question you ask of me and assured the panel I didn't request the order. There is no evidence via prescription or text or email to suggest otherwise. My statutory rights were invaded and I'm seeking legal advice on that front as we speak … I don't know law but I felt [Mr Jackson KC] should have been much stronger than allow her to accuse me of lies and doping. UKAD cleared me on all counts of these allegations many years ago but nobody stood up for me and objected to this line of questions. Having heard my children say dad you[re] retired now just go home. You made your point so leave it at that. This helped make my decision easier. As you put it, there would be more of the same that has nothing to do with this case. … I want you to appreciate my family come first and having my good name dragged through the mud is not nice for friends and family to have to endure."***

The Non-Exclusion Determination

39. It was in these circumstances that the Tribunal had to decide what to do about Mr Sutton's evidence. First, there was the application by Ms O'Rourke KC to exclude the evidence given by Mr Sutton. That meant the witness statements which he had adopted has his evidence in chief, and the evidence he had given orally under cross-examination. The Tribunal heard submissions from both parties. The Tribunal reserved its determination and deliberated. At the hearing the Chair had read out his legal advice (the "Non-Exclusion Legal Advice") which was 8 pages long and comprised 50 paragraphs. It was reproduced in full within the Non-Exclusion Determination (at §24). By the Non-Exclusion Determination (Friday 6 December 2019), the Tribunal refused the application on behalf of the Appellant for Mr Sutton's evidence to be excluded.

40. The Non-Exclusion Determination is a 22-page determination with 75 numbered paragraphs. Its anatomy is as follows. It begins by identifying (at §2) the essence of the application to exclude the evidence: that there was "no justification in all the circumstances to retain" Mr Sutton's evidence and "no good reason for his absence". It then summarises Ms O'Rourke KC's submissions for the Appellant (§3-15) and Mr Jackson KC's submissions for the Respondent (§§16-22). Next, the Tribunal describes its "approach" (at §23) of "taking into account all the written and oral submissions from the parties and the [Non-Exclusion Legal Advice] from the legally qualified chair given in public session upon which the parties were invited to comment", which Advice it reproduced in full (at §24). Next, under a heading "Discussion" the Tribunal "began by reminding itself of the evidence provided by Mr Sutton, and the circumstances surrounding his departure during his cross-examination by Ms O'Rourke (§25). This was followed by a section headed "Mr Sutton's evidence" (§§26-30), a further section

headed "the circumstances surrounding Mr Sutton's departure during his cross-examination by Ms O'Rourke" (§§31-45), and finally a section headed "analysis and determination" (§§46-75).

Request for Clarification

41. During a resumed hearing on Monday 9 December 2019 – the Non-Exclusion Determination having been delivered – the Tribunal was asked for clarification by Ms O'Rourke KC, of what the Tribunal had meant in the Non-Exclusion Determination. She told the Tribunal that this which she said:

> ***… needs clarification in circumstances where it is being interpreted out there that you are saying I bullied, and that would then amount to professional misconduct and would have implications for Dr Freeman's continued instruction of me, my continued involvement in the case, etcetera.***

There was then this exchange:

> ***THE CHAIR: Thank you very much, Miss O'Rourke. Perhaps I can just ... You may have some comments to make, but just on the question of bullying, we are not saying that you bullied Mr Sutton, we are not saying that. What we are saying is that was the perception, in our view, that Mr Sutton held. I mean I used the word, or when we used the word "objective", we are talking about the evidence that was given, the exchanges that we have captured, earlier in the determination.***
>
> ***MISS O'ROURKE: Well, sir, with the greatest of respect, that doesn't make any sense.***
>
> ***THE CHAIR: Well, that is the tribunal position. I appreciate that you may in due course make a judicial review. I don't intend to set this out in any more …***

The Unasked-Questions Determination

42. Ms O'Rourke KC next made an application on Monday 9 December 2019 that she be allowed "to identify the remaining questions she would have asked [Mr] Sutton and … to provide sufficient context to make those questions intelligible to the Tribunal". Ms O'Rourke KC had identified a list of "58 items" in a document (known as "D7") used by her at the earlier hearing on 25 November 2019. As she put it at the hearing on 9 December 2019:

> ***if Mr Sutton had stayed, all of these matters would have been dealt with within the GMC case. So therefore I have been deprived of the opportunity of doing that because Mr Sutton should have stayed, and all of these issues would have been raised and aired before the half-time submission, so I am afraid I think they are relevant and they are relevant to counterbalancing.***

43. By a Determination on Tuesday 10 December 2019 ("the Unasked-Questions Determination") the Tribunal granted Ms O'Rourke KC's application. Ms O'Rourke KC went through the list of 58 items with the Tribunal, also on 10 December 2019. The explanation occupies 6 pages in the transcript. To give the flavour, Ms O'Rourke KC said this about the first and last items:

> ***Point No. 1, I would have been asking Mr Sutton about the circumstances of his resignation from British Cycling; that it happened in April 2016, did he agree, and that that arose in the context that an investigation had begun in respect of allegations that he had bullied riders.***

> ***In particular he had bullied a female rider called Jess Varnish who had got dropped from the elite rider squad and had made allegations against him in respect of that and that it happened in advance of the Rio Olympics, so the significance for her was the loss of that. I would be putting to Mr Sutton that rather than sitting through and awaiting the outcome of that investigation he jumped before he was pushed. I would have been putting the relevance of that to him, to him being a bully.***
>
> …
>
> ***I then would have been asking him about No. 58, Sir Bradley Wiggins, who in his well publicised book after he won the Tour de France and a huge number of Olympic medals wrote of Shane Sutton that "if you make an enemy of him you make an enemy for life", and I would have been putting that particular passage to him.***

No Case to Answer/Adjournment

44. As the Tribunal records in the DOTF (§18): at the end of the Respondent's case, an application was made by Ms O'Rourke KC, of "no case to answer", pursuant to rule 17(2)(g) of the Rules. By a ruling – not challenged on this appeal – the Tribunal rejected that application. As the Tribunal also records (DOTF §19), on 17 December 2019 Ms O'Rourke applied for an adjournment on the basis that Dr Freeman's health had declined. That application was granted and the hearing was adjourned on health grounds, resuming in October 2020.

ISSUE (1)(i)

45. This is a first and distinct part of Agreed Issue (1), concerning the Tribunal's treatment of the evidence of Mr Sutton after he absented himself. The issue is whether the evidence of Mr Sutton ought to have been excluded. This issue therefore impugns the Non-Exclusion Determination, whose anatomy I have summarised (§40 above). Two points are worth making at the outset. First, Ms O'Rourke KC accepts that her arguments were fully and accurately set out by the Tribunal in the Non-Exclusion Determination (at §§3-15). She says the Tribunal was wrong to reject those arguments. Secondly, this. The Tribunal had seen and heard and experienced, first-hand, the hearing at which the cross-examination had taken place. It was the front-line specialist Tribunal before whom evidence was being placed and considered. It was very well placed to conduct an evaluative exercise.

46. As to the applicable law, Ms O'Rourke KC also accepts that the 8-page Non-Exclusion Legal Advice read out by the Chair prior to the Tribunal deliberating, and incorporated into the Non-Exclusion Determination (at §24), involved no error or material omission. She accepts that the Tribunal identified, from the two key authorities which she had emphasised in her own submissions – namely Al Khawaja v UK (2009) 49 EHRR 1 and R (Bonhoeffer) v GMC [2011] EWHC 1585 (Admin) – these Three Key Questions for consideration:

> ***The Court must examine: (1) First, whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence; (2) Second, whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction; (3) Third, whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the***

> ***handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair.***

As to the interrelationship between these Key Questions, Ms O'Rourke KC accepts that the idea of a "good reason" (Key Question (1)) "does not have the same primacy" in a case where the contentious evidence is not the "sole or decisive evidence" (Key Question (2)).

47. Ms O'Rourke KC accepts the relevance of the following propositions from Bonhoeffer at §109 (set out by the Chair in the Non-Exclusion Legal Advice):

> ***(i) Even in criminal proceedings the right conferred by Article 6(3)(d) to cross-examine is not absolute. It is subject to exceptions referable to the absence of the witness sought to be cross-examined, whether by reason of death, absence abroad or the impracticability of securing his attendance. (ii) In criminal proceedings there is no "sole or decisive" rule prohibiting in all circumstances the admissibility of hearsay evidence where the evidence sought to be admitted is the sole or decisive evidence relied on against the defendant. (iii) In proceedings other than criminal proceedings there is no absolute entitlement to the right to cross-examine pursuant to Article 6(3)(d). (iv) However disciplinary proceedings against a professional man or woman, although not classified as criminal, may still bring into play some of the requirements of a fair trial spelt out in Article 6(2) and (3) including in particular the right to cross-examine witnesses whose evidence is relied on against them. (v) The issue of what is entailed by the requirement of a fair trial in disciplinary proceedings is one that must be considered in the round having regard to all relevant factors. (vi) Relevant factors to which particular weight should be attached in the ordinary course include the seriousness and nature of the allegations and the gravity of the adverse consequences to the accused party in the event of the allegations being found to be true. The principal driver of the reach of the rights which Article 6 confers is the gravity of the issue in the case rather than the case's classification as civil or criminal. (vii) The ultimate question is what protections are required for a fair trial. Broadly speaking, the more serious the allegation or charge, the more astute should the courts be to ensure that the trial process is a fair one. (viii) In disciplinary proceedings which raise serious charges amounting in effect to criminal offences which, if proved, are likely to have grave adverse effects on the career and reputation of the accused party, if reliance is sought to be placed on the evidence of an accuser between whom and the accused party there is an important conflict of evidence as to whether the misconduct alleged took place, there would, if that evidence constituted a critical part of the evidence against the accused party and if there were no problems associated with securing the attendance of the accuser, need to be compelling reasons why the requirement of fairness and the right to a fair hearing did not entitle the accused party to cross-examine the accuser.***

48. Ms O'Rourke KC also accepts the correctness and applicability of the passage, from Bonhoeffer at §40, which states that the answer:

> ***… is not dictated by any absolute rule whether of common law or under Article 6 … There is … no absolute rule whether under Article 6 or in common law entitling a person facing disciplinary proceedings to cross-examine witnesses on whose evidence the allegations against him are based. Nor does such an entitlement arise automatically by reason of the fact that the evidence of the witness in question is the sole or decisive basis of the evidence against him.***

"Skewed" Background

49. On this part of Issue (1), Ms O'Rourke KC's first key line of argument is this. The Non-Exclusion Determination was wrong because at its heart was an "unbalanced" and "skewed" description (at §§31-45) of the "circumstances surrounding Mr Sutton's

departure during his cross-examination by Ms O'Rourke". The Tribunal's later Analysis was expressly reasoned to be "set against this fact-specific background" (§46). But the Tribunal's "fact-specific background" did not fairly, or accurately, set the scene. In particular:

i) The Tribunal's "background" referred to Ms O'Rourke KC's "final point", made at 12:15 (§14 above), as "an assertion" made by her "in public session". But it failed to record that this was a legitimate submission addressed to an issue under consideration, namely whether it could be appropriate for Mr Sutton to give evidence by video link. The Tribunal's "background" also referred to that "final point" assertion as having been immediately reported in social media on Twitter, and to Mr Sutton as having become aware of it then. But it failed to record that Ms O'Rourke KC would have had no reason to anticipate that consequence.

ii) The Tribunal's "background" recorded Mr Sutton as repeatedly asking to be informed of the evidence which Ms O'Rourke KC possessed, in relation to various matters that she was raising. But it failed to record that Ms O'Rourke KC was adopting a legitimate approach, that she was not required to provide that information, and that it was for Mr Sutton to answer questions and not ask them.

iii) The Tribunal's "background" referred to the descriptions by Mr Sutton during the cross examination of his "perception" that he and his family were being "bullied" by Ms O'Rourke KC's approach and the impact this was having upon them. But that was without recording the following: that there was no bullying by Ms O'Rourke KC during the cross-examination (as the Tribunal had specifically clarified); that there was nothing inappropriate or unprofessional in her manner or tone, or in her questioning; that there was no hostility; that she was simply putting her client's case on instructions; that neither the Tribunal nor Mr Jackson KC for the Respondent had considered it necessary or appropriate to step in or suggest any impropriety at any time; that Mr Jackson KC's reporting back to the Tribunal (§37 above) had expressly recorded his recognition that "the questions that were being put by Ms O'Rourke with those that were being put on instruction and that that was part of the process"; and that the Tribunal Chair at the later hearing on 9 December 2019, when asked for clarification, had stated "we are not saying that you bullied Mr Sutton" (§41 above).

iv) In all these ways, and by failing to include all these matters – and other similar matters – within the description of the "fact-specific background", an imbalanced and skewed picture was presented, identified and relied upon. That fatally undermines the Tribunal's analysis.

50. I cannot accept those submissions. Mr Hare KC's key submission in response was that the "fact-specific background" that the Tribunal was setting out was a fair and legitimate summary "in light of the exercise that the Tribunal was undertaking". I agree. The Tribunal was not seeking to provide a full description of all aspects of the cross-

examination of Mr Sutton and the circumstances in which it took place. Rather, the Tribunal was identifying features which were relevant to the first Key Question (the question of "good reason"), viewed from the perspective of "perception". That consideration of "perception" arose from what the Tribunal had earlier recorded as one of the key submissions of Mr Jackson KC for the Respondent (Non-Exclusion Determination at §21):

> ***Mr Jackson submitted that it is important that the Tribunal take full account of Mr Sutton's stated reasons for leaving and to Mr Sutton's perception of how he was treated before he came to give evidence and whilst giving evidence. Mr Sutton claimed that he was treated unfairly and 'bullied' in his view, which appears to have materially contributed to his leaving. Mr Jackson submitted that it is clear from the transcript of Mr Sutton's evidence and his email to the GMC that Mr Sutton felt that his treatment before and during his questioning by Ms O'Rourke was unfair, and appears to have caused him to stop answering further questions in cross-examination.***

51. What the Tribunal was doing in the "fact-specific background" was identifying those key points arising out of the circumstances which it assessed as having particular relevance to the question of Mr Sutton's perception. It was examining the position from Mr Sutton's perspective. The Tribunal's core conclusions on this aspect of the Analysis, picking up on the points which it had set out, were (Non-Exclusion Determination §§49-51):

> ***49. … [T]he Tribunal looked first at the reason provided by Mr Sutton for not completing his evidence. 50. The Tribunal determined that Mr Sutton's unwillingness to continue to be cross-examined arose directly out of his perception of unfairness and bullying engendered by Ms O'Rourke's approach to him, an approach he perceived to have begun even before he had entered the hearing room. 51. As set out above, he made it plain repeatedly that his character and reputation was being publicly impugned in relation to denied matters in circumstances where, despite asking his accuser – Ms O'Rourke – for the evidential basis for the accusations, he was not being provided with sufficient information to defend himself. This process was, he said, having an impact upon his family.***

52. The Tribunal then added this important paragraph (at §52):

> ***52. When considered as a whole, the Tribunal found that – taking together Ms O'Rourke's comments before he entered the hearing room, the Tweets publicising those comments, and the unwillingness of Dr Freeman's legal team during more than an hour of cross-examination to provide information underpinning potentially important accusations – there was an objective and understandable basis to warrant Mr Sutton forming the said perception.***

As Mr Hare KC emphasised, this paragraph is carefully expressed. The Tribunal was careful to identify three points, and only three, at §52: (i) Ms O'Rourke KC's "final point" comments before Mr Sutton entered the hearing room; (ii) the Tweets publicising those comments; and (iii) the unwillingness of Dr Freeman's legal team during more than an hour of cross-examination to provide information underpinning potentially important accusations. These were the three features which – in combination – supported the conclusion that there was "an objective and understandable basis to warrant" the forming by Mr Sutton of the "perception" of "unfairness and bullying engendered by Ms O'Rourke KC's approach to him, an approach he perceived to have begun even before he had entered the hearing room" (§50), out of which Mr Sutton's unwillingness to continue was assessed by the Tribunal directly to have arisen. All of

this was supported by points identified within the "fact-specific background" which the Tribunal had set out. It was because the Tribunal was focusing on perception that it used the language of "publicly impugned", "accuser" and "accusations" as well as "defend himself" (at §51).

53. The three features identified by the Tribunal (at §52) were present. They supported the view – carefully expressed by the Tribunal – that there was "an objective and understandable basis to warrant" the forming by Mr Sutton of the "perception" of "unfairness and bullying engendered by Ms O'Rourke's approach to him, an approach he perceived to have begun even before he had entered the hearing room". The Tribunal did not say that Ms O'Rourke KC's "final point" was an illegitimate submission; nor that it was being addressed other than to an issue under consideration; nor that Ms O'Rourke KC should have anticipated that it would immediately be reported in social media on Twitter, and Mr Sutton would become aware of it; nor that Ms O'Rourke KC was adopting an illegitimate approach of declining to inform Mr Sutton of the evidence which Ms O'Rourke KC possessed; nor that there was bullying by Ms O'Rourke KC; nor that her cross-examination was conducted with an inappropriate or unprofessional or hostile manner, tone or questioning; nor that she had been doing other than putting her client's case on instructions as part of the process.

54. The Tribunal went on (at §53) specifically to address whether Mr Sutton's early departure could instead be viewed as a manifestation of a predisposition not to cooperate; then (at §54) whether, as Ms O'Rourke KC had argued (set out by the Tribunal at §6), the Respondent had been dilatory in not having obtained a witness summons; and then whether (§55), as Ms O'Rourke KC also argued (also set out at §6) the Respondent's letter to Mr Sutton asking him to return to the hearing to resume giving his evidence had contributed to his refusal. The Tribunal rejected each of these.

55. The Tribunal did not lose sight of all the points which Ms O'Rourke KC had made – and which it had earlier faithfully summarised, as she accepts – about the cross-examination and Mr Sutton's departure. It had set out the submissions of Ms O'Rourke KC, fully and fairly, including these points (Non-Exclusion Determination at §§4-8, 13):

> ***4. She submitted that … Mr Sutton turned up (briefly) and deliberately (without good reason) walked out so as to deny the defence the right to challenge his credibility, truthfulness, reliability and probity. 5. Ms O'Rourke indicated that Mr Sutton stayed for less than two hours and was cross-examined for approximately one hour and 20 minutes; less than a quarter of his anticipated cross-examination was therefore completed. Ms O'Rourke submitted that, despite her questions being legitimate, Mr Sutton then voluntarily absented himself because he did not like the questions. She noted that he then proceeded to conduct a televised press conference with the media for about ten minutes outside the hearing building, during which he discussed his evidence and questioning. 6. Ms O'Rourke submitted … that the manner and tone of her cross-examination was not a contributing factor; Mr Sutton made no complaint of it, nor did Mr Jackson during the course of her cross-examination. 7. Ms O'Rourke submitted that, upon leaving, Mr Sutton did not cite illness or incapacity or provide any pressing family or personal reason for not returning the next day. She stated that the fleeing of a witness cannot be excused unless the mode/method of questioning gave rise to bullying and harassment of a 'vulnerable' witness. Mr Sutton did not assert bullying or harassment or anything legally improper, as is suggested by Mr Jackson. Nor was he a 'vulnerable' witness; he thumped the table several times, raised his voice, was obstructive and***

> ***threatening to her and threatening and intimidating towards Dr Freeman. Ms O'Rourke stated that she had a duty to put Dr Freeman's case (that Mr Sutton is a doper, a liar and a bully) to the witness fearlessly. 8. She went on to submit that Mr Jackson did not at any stage interrupt to allege that she was bullying or harassing, nor did the LQC interrupt to express any concern of inappropriateness of the defence questions or ask for a change in tone, content or timing. Further, Mr Sutton, in his email to the GMC and statements to the press, did not say that he was bullied or harassed... 13. Ms O'Rourke submitted that there were no good reasons for Mr Sutton's failure to return and complete his evidence…***

In its Analysis the Tribunal said, in terms (at §46), that it was considering not only "this fact-specific background" but also "all the submissions made".

56. In my judgment, there was nothing in the way in which the "background" was summarised which undermines the Tribunal's ruling. Earlier in this Judgment I have set out my own description of key circumstances (§§11-38 above) which, in any event, I have considered in relation to whether the Non-Exclusion Determination was wrong or constituted a serious procedural or other irregularity in the proceedings, a question to which I will return.

Misapplication of the Key Questions

57. Ms O'Rourke KC's second key line of argument, on this first part of Issue (1), challenges the Tribunal's substantive reasoning, viewed against the three Key Questions which it had identified (see §46 above). So far as concerns the First Key Question ("good reason for the non-attendance of the witness"), Ms O'Rourke KC says that the Tribunal was finding a "good reason" at Non-Exclusion Determination §§50-52 (§§51-52 above), but that its conclusion was unsustainable. She argues as follows:

    i) "Perception" cannot, in principle, constitute a "good reason". The test must be an objective one. In finding an "objective and understandable basis" to "warrant" the forming of the "perception", the Tribunal was saying, and needed to be saying, that the perception matched the objective reality. To find that there was an "objective … basis" for a "perception" of "unfairness and bullying" is – and needed to be – to find that there was, objectively, "unfairness and bullying". But the Tribunal did not find, objectively, that there was "unfairness and bullying". Indeed the Tribunal subsequently provided the express clarification (§41 above) that it was not saying that Ms O'Rourke KC had "bullied" Mr Sutton. In those circumstances, any "objective" underpinning falls away.

    ii) Although – as the Tribunal recorded (at §20) – the Respondent had submitted to the Tribunal that there had been "inappropriate, protracted and hostile questioning" of Mr Sutton by her, and (at §19) that the "manner and tone" of the cross-examination had "materially contributed" to Mr Sutton's departure, the Tribunal did not uphold those submissions. Although the Respondent now says, on this appeal, that Ms O'Rourke KC's conduct, or aspects of it, were "unprofessional", that was also not a finding made by the Tribunal, nor is it or would it be justified. What is more, the Respondent should not be entitled to raise points about the "manner and tone" of cross-examination, in circumstances where it resisted this Court hearing the tapes of the cross-examination. Although there is a line to be drawn as to whether a cross-examiner needs, in fairness, to

provide a sufficient explanation for a question fairly to be put, that line was not crossed in this case nor did the Tribunal say that it was.

iii) So far as concerns the "final point" comment before Mr Sutton entered the hearing room, and the tweets publicising this, none of that can justify a conclusion that there was a "good reason". The reference to the Appellant's case being that Mr Sutton was a "liar" was linked to a point about the inappropriateness of video link. The reference to him being a doper was "highly relevant" because one of the things that would or could have been put to him in cross-examination is that Mr Sutton was obtaining the Testogel from the Appellant in order to supply it to athletes for doping purposes.

58. In my judgment, there was no error in the Tribunal's approach, reasoning or conclusion relating to the first Key Question (the "good reason").

i) The Tribunal's assessment of the first Key Question was a nuanced one. In a section in the Determination (§§49-55) the Tribunal "looked first at the reason provided by Mr Sutton for not completing his evidence" (§49). As has been seen (§50), the Tribunal "determined" that his "unwillingness to continue to be cross-examined arose directly out of his perception of unfairness and bullying". The Tribunal explained that this linked to what it had "set out above" (§51). The Tribunal then "found" that there was an "objective and understandable basis" to "warrant" his forming the perception (§52). In circumstances where it had well in mind the relevant law (§§46-48 above), the Tribunal evaluated "the reason provided by Mr Sutton", determined what the perception was which constituted the reason, and it then found by reference to three carefully identified points an "objective and understandable basis" (§52).

ii) The Tribunal did not stop there. As I have mentioned, it addressed (at §53) whether Mr Sutton's early departure could instead be viewed as a manifestation of a predisposition not to cooperate; whether (at §54) the Respondent had been dilatory in not having obtained a witness summons; and whether (at §55) the Respondent's letter to Mr Sutton asking him to return to the hearing to resume giving his evidence had contributed to his refusal. It also considered whether the Respondent should have sought a witness summons (at §55). It rejected these.

iii) This, in my judgment, was a legally permissible approach, to one Key Question, as part of an overall evaluative exercise. The Tribunal was entitled to consider "perception" and the question of whether there was an "objective and understandable basis" for it. A tribunal (or for that matter court) can, in my judgment, properly start with "perception" and whether it is genuinely held and constitutes the subjective reality. Having done so, the tribunal (or for that matter court) will, in my judgment, always do well then to consider – as what may be a matter of degree – whether there is a sufficient, objective, reference-point and underpinning. The same would be true of a fearful witness. I was shown no authority to the contrary and do not accept Ms O'Rourke KC's submission that "common sense" makes "perception" legally irrelevant.

iv) As I have explained, the Tribunal's three carefully identified points (at §52) did not include "bullying" or "harassment" or "hostility" or "tone". The Tribunal did not say that Ms O'Rourke KC's conduct or cross-examination was "unprofessional" or "illegitimate". The Tribunal was careful not to say that the cross-examination was an "unfair" and "bullying" cross-examination. The point was a more nuanced one. Mr Sutton's unwillingness to continue arose, in the Tribunal's assessment, from his "perception" of unfairness and bullying engendered by the approach taken, as to which "perception" there was an "objective and understandable basis" to "warrant". That is not the same as saying that there was unfairness and bullying, as the Tribunal later emphasised in the clarification when requested. In my judgment, it did and does "make … sense" (§41 above).

59. I add the following observations on this aspect of the case:

i) Mr Sutton should have answered questions put to him. He should have respected, and trusted, the process.

ii) So far as concerns Ms O'Rourke KC putting matters to Mr Sutton for an answer, indicating that she had evidence but without providing that evidence, that was a clear strategy on her part. It was the subject of exchanges between Counsel (§28 above). In its defence of this appeal the Respondent submitted in writing that it was "troubling and unprofessional" for Mr Sutton to have been "publicly maligned before and during the hearing by Ms O'Rourke KC without producing a shred of documentary evidence in support". In his oral submissions Mr Hare KC clarified that he was not submitting that that there was anything improper or unprofessional in the following scenario: a cross-examiner, consistently with their client's instructions, puts to a witness a question of fact, indicating that it may later prove possible to undermine the witness's answer by producing other evidence, without first producing that other evidence. An example of this is the question about the text (§25 above). Mr Hare KC maintained, however, that "unprofessionalism" did arise from the "repeated" use of that tactic in the circumstances of the present case. I repeat: the Tribunal did not describe the cross-examination as unprofessional; and nor do I. But it is not unfair to say that the strategy had the consequence of triggering a description, by the witness, of an injustice from his perspective: that he was not being given any basis for points that were being put to him. Nor is it unfair to say that, from his perspective, he was facing an "accuser" who was publicly impugning him.

iii) As Ms O'Rourke KC rightly recognised, she should not have told Mr Sutton "I don't believe you Mr Sutton" (§31 above).

iv) I was unpersuaded by the submission made by Ms O'Rourke KC about the phrase "a doper" in her "final point" (§14 above). As I have explained (§57iii above) she submitted that this was highly relevant because it would, or could, be put in cross-examination that the Testogel was intended by Mr Sutton to be used for doping purposes with athletes. I am not persuaded by that, given that

the Appellant's own position – which he was maintaining – was that as a doctor he had provided the Testogel specifically as a treatment for Mr Sutton.

60. So far as concerns the Second Key Question ("whether the evidence of the absent witness" constitutes "the sole or decisive basis" for "conviction"), the Tribunal addressed this topic in the next section of the Non-Exclusion Determination (§§49-55). The Tribunal asked itself (§56) what was "the potential relevance and impact of Mr Sutton's testimony", if it were "retained in evidence", in relation to the disputed Allegations (§6 above). In addressing this topic, the Tribunal identified other features of the evidence. It started (§§57-58) with the relevance of those Allegations which had already been admitted and found proved (§5 above). As the Tribunal explained (§58, paragraph numbering added, emphasis in the original):

> ***Among other things, those facts admitted and found proved establish <u>of themselves</u> that: [i] On 16 May 2011 Dr Freeman ordered for delivery to the Velodrome the drug Testogel; [ii] This was a drug prohibited under the World Anti-Doping Agency List of Prohibited Substances and Methods; [iii] When confronted, Dr Freeman lied to two colleagues about having ordered the drug, claiming it had been sent in error; [iv] He then entreated a third party (Ms C) to write an email relating to the drug, claiming the drug had been sent to him in error, had been returned, and that it would be destroyed – when he knew none of this was true; [v] Five months later, Dr Freeman showed the resultant email to his said two colleagues as evidence that the drug had been sent to him in error, had been returned and that it would be destroyed – knowing that none of this was true; [vi] Then, when interviewed by UK Anti-Doping approximately six years later, on 17 February 2017, Dr Freeman lied again, stating the Testogel had been returned to Fit4Sport when he knew this was untrue.***

The Tribunal then identified other material introduced into evidence (§59, paragraph numbering added):

> ***Coupled with the admitted matters, other material introduced into evidence by the GMC is capable of establishing (and the Tribunal puts it no higher than that at present; it has not reached the stage of assessing the evidence) that: [i] According to expert witness, Pharmaceutical Toxicologist Professor Cowan OBE, Testogel was a drug which could be, and in the past had been, used to increase the athletic performance of elite professional cyclists. [ii] At the time Dr Freeman obtained that drug, and lied about having done so, he was team doctor for the elite professional cyclists of British Cycling and Team Sky.***

61. The Tribunal rightly reminded itself (§§59, 61) that it was not yet at the stage of assessing the evidence and considering the question whether it could draw an inference of the Appellant's culpability from the evidence. The question "at this stage" was whether Mr Sutton's evidence could "presently be assessed to be the 'sole or decisive' evidence" in relation to the contested Allegations (§62). The Tribunal bore in mind that Mr Sutton was "not a complainant", or "accuser", in the sense used in the case-law (§63) but the impact of Mr Sutton's evidence was "its potential capacity to rebut Dr Freeman's claim … that the Testogel was for … Mr Sutton" (§64), when it would stand alongside "other potentially relevant evidence on this theme – from sources such as (for example) the witnesses Dr Peters and Mr Burt, and the transcript of the interview with Dan Roan" (§65).

62. In this context, the Tribunal concluded (§§60, 62, 71)

> ***60. In the absence of any explanation in evidence to the contrary from Dr Freeman, it will therefore be open to the Tribunal – on [the admitted and proved] facts alone – to consider whether it can draw an inference of his culpability in relation to the remaining paragraphs of the Allegation (none of which refer to Mr Sutton).***
>
> ***62. … when considering Mr Sutton's evidence, the Tribunal's determination is that it cannot presently be assessed to be the 'sole or decisive' evidence in relation to the remaining paragraphs of the Allegation, as framed.***
>
> ***71. … the Tribunal's view [is] that Mr Sutton's evidence is not 'sole or decisive' regarding the outstanding matters …***

In my judgment, that conclusion was unassailable.

63. The next section of the Non-Exclusion Determination (§§66-71) addressed the question whether the continued inclusion of Mr Sutton's evidence would result in the Appellant not having a "fair hearing". The Tribunal, unassailably, reasoned as follows:

> ***66. Reflecting upon all these matters, the Tribunal went on to consider whether Dr Freeman's right to a fair trial would be denied to him if the evidence of Mr Sutton was not excluded. In doing so, it bore in mind all the caselaw and submissions before it. 67. The Tribunal reminded itself, per Ogbonna, that resolving the issue of "fairness" will necessarily be fact-sensitive; and therefore when considering whether Mr Sutton's evidence should be retained at all, it was necessary to examine the issue of fairness "in the context of the particular facts, including the efforts made to secure the attendance of a witness and the particular implications, including the previous ill-feeling between her and the appellant, of her [the witness's] unavailability for cross-examination." 68. It also bore in mind, per Bonhoeffer, the indication that the issue of what is entailed by the requirement of a fair trial in disciplinary proceedings is one that must be considered in the round having regard to all 'relevant factors'. 69. It noted that 'relevant factors' to which particular weight should be attached in the ordinary course include the seriousness and nature of the allegations, and the gravity of the adverse consequences to the accused party in the event of the allegations being found to be true. In this regard, it noted that the allegation Dr Freeman faces is indeed serious. 70. The particular facts here were that Mr Sutton did attend the hearing, gave his evidence-in-chief, and then was cross-examined for more than an hour. Mr Sutton's evidence is not therefore hearsay evidence, unlike the cited Strasbourg cases. During the course of cross-examination, he denied more than a dozen times that the Testogel was for him and asked Ms O'Rourke to produce evidence to the contrary. As the Tribunal has noted, Mr Sutton also denied directly, and while under affirmation, a number of other matters going both to his character and his credibility. 71. Bearing these factors in mind, together with the reason why he left, and importantly the Tribunal's view that Mr Sutton's evidence is not 'sole or decisive' regarding the outstanding matters; the Tribunal has determined that, considering matters 'in the round' (per Bonhoeffer), the continued inclusion of Mr Sutton's evidence would not result in Dr Freeman not having a fair hearing.***

64. Finally, the Tribunal directly addressed (at §§72-74) Key Question (3) ("sufficient counterbalancing factors"). It reasoned, again unassailably, as follows:

> ***72. Going forward, the Tribunal considers that – with the doctor's legal representatives having had an opportunity to put aspects of Mr Sutton's alleged past behaviour to him, and having received denials on a number of matters – Dr Freeman now has the opportunity (through Ms O'Rourke) to seek to admit evidence to gainsay Mr Sutton's account, both regarding the Testogel and the character and credibility issues, thereby potentially affecting the weight (if any) that might otherwise attach to that account. 73. While the Tribunal acknowledges that Ms O'Rourke had other areas she wished to cross-examine Mr Sutton upon, and in relation to which she may in due course wish to seek to adduce evidence; those***

> ***matters already put to Mr Sutton in cross-examination are capable (and, again, the Tribunal puts it no higher than that) of undermining Mr Sutton's evidence, if supported by admissible evidence. 74. In the circumstances, the Tribunal is satisfied that such factors, combined with appropriate legal advice that can and will be given by the Chair in due course before the Tribunal retires to decide on its facts determination, will provide sufficient counterbalance to place the Tribunal in a position to reach a fair and proper assessment of the reliability of Mr Sutton's evidence, and thereby to ensure Dr Freeman's hearing remains fair.***

65. In my judgment, there was no error in the Tribunal's approach, reasoning or conclusion in the application of the legal principles including the Key Questions. In my judgment, the Non-Exclusion Determination was not "wrong"; nor was it unjust because of a serious procedural or other irregularity in the proceedings.

ISSUE (1)(ii)

66. This is a second and distinct part of Agreed Issue (1), concerning the Tribunal's treatment of the evidence of Mr Sutton after he absented himself. The issue is whether the Tribunal mischaracterised Mr Sutton's evidence as credible and consistent and/or whether the Tribunal was wrong to find there was no credible evidence to the contrary. These arguments impugn the DOTF, whose anatomy I described at the outset (§7 above). As I there explained, the Analysis of the Evidence and Findings in respect of the Allegation at Paragraph 10 (DOTF §§50-203) included sections concerning Mr Sutton (§§56-62); Mr Sutton and Erectile Dysfunction (§§63-70); and Mr Sutton's Credibility and Probity (§§71-101). In the latter section on Mr Sutton's Credibility and Probity, the Tribunal identified features of Mr Sutton's evidence, topics put in cross-examination by Ms O'Rourke KC, topics which Ms O'Rourke KC was unable to put in cross-examination (identified in the Unasked-Questions Determination: §43 above), and evidence which was subsequently sought to be adduced by Ms O'Rourke KC. Within that analysis the Tribunal concluded (DOTF §100):

> ***Taking all those matters together, the Tribunal found there was no properly formed evidential basis to call into question Mr Sutton's account, nor to challenge his probity. Put shortly, the Tribunal found Mr Sutton to be a credible and consistent witness.***

The Agreed Issue asks whether "credible and consistent" was a mischaracterisation and/or whether "no properly formed evidential basis to call into question Mr Sutton's account" was wrong.

67. Ms O'Rourke KC's key submissions on this part of the case are as follows. She challenges that assessment of Mr Sutton as a "credible and consistent witness". She submits that Mr Sutton had been belligerent, argumentative, evasive and obstructive. She emphasises the circumstances (§§19-36 above), including: that he raised his voice and thumped the table several times; that he was abusive and threatening to her and to her client the Appellant who, for good reason as a Vulnerable Witness pursuant to a Direction of the Tribunal (§9 above), was behind a screen. She submits that, in light of all the circumstances of the cross-examination and of Mr Sutton's walk-out during giving evidence, it was wrong for the Tribunal to characterise him as "credible and consistent". Ms O'Rourke KC further submits that the Tribunal was wrong in not revisiting its analysis in the Non-Exclusion Determination, and in particular the provisional finding that Mr Sutton's evidence was not "sole and decisive". She submits

that there was no other credible contrary evidence, and so Mr Sutton's was indeed "sole and decisive" evidence as to the disputed allegations against the Appellant. Ms O'Rourke KC further submits that the "counterbalance" which the Tribunal was supposedly going to afford the Appellant was, in the event, denied to him. That is because in the DOTF the Tribunal referred (at §§88-89) to documents which had been put forward seeking to undermine the credibility and probity of Mr Sutton, but then concluded (at §89) that "no weight could properly and safely attach" to these, as hearsay documents to whose contents there was no witness statement to speak.

68. I cannot accept these submissions. The starting point is that the Tribunal was very well aware, and had observed first-hand, the way in which Mr Sutton had given his evidence and had left the hearing, back on 12 November 2019. It had afforded the counterbalance of the Unasked-Question Determination. It had considered the topics which Ms O'Rourke KC had wanted to, but been unable to, put to Mr Sutton in cross-examination, together with her accompanying contextual description. It had heard detailed submissions. The Tribunal described Mr Sutton's walk-out as "most unwelcome" (DOTF §98) but recorded that it "considered (having now received all the evidence) that the reason for Mr Sutton's departure remained as set out in" the Non-Exclusion Determination. The Tribunal recorded (DOTF §99): "To be clear, Mr Sutton's behaviour during the hearing was intemperate". The Tribunal reasoned (§99) that it "had no basis to determine" that Mr Sutton's evidence was "untruthful on its face, nor when set against the other matters above". It then reasoned (§100) that "there was no properly formed evidential basis to call into question Mr Sutton's account, nor to challenge his probity" and that "Put shortly, the Tribunal found Mr Sutton to be a credible and consistent witness". I do not accept that this was, in any respect, wrong or a mischaracterisation.

69. In order to assess the Tribunal's reasoned conclusions fairly it is important to have in mind what the Tribunal described as the "other matters above" (DOTF §99), to appreciate the range of considerations to which the Tribunal was addressing its mind in using that phrase. This is by way of a brief summary of the Tribunal's detailed and extensive earlier reasoned exposition of "other matters":

    i) Mr Sutton's witness statements, adopted as his evidence in chief, contained the "clear denial that the Testogel was for him" (DOTF §§56, 60), as did his oral evidence in cross-examination (DOTF §62; see §22 above).

    ii) Mr Sutton gave evidence about medical treatment received from the Appellant (§57), including in the context of his medical records (§58). There were no medical records or other evidence that by 2011 Mr Sutton had sought or received any drug for recreational sex or erectile dysfunction (§§62-63). Dr Quinton's clear and compelling (§70) evidence was that Mr Sutton's available medical history – being sufficient to make an assessment – disclosed no clinical justification for ordering Testogel in 2011 (§66); and that Testogel would not have helped facilitate a recreational sex life unless Mr Sutton had hypogonadism, of which there was no evidence (§67).

iii) Mr Sutton gave evidence that he first heard of Testogel in October 2016 (§§59, 60, 62, 85), which nothing in the background documentation between the Respondent and Mr Sutton called into doubt (§61) nor did any witness (§§85-86).

iv) It had been put to Mr Sutton in cross-examination that his history was of "bullying, lying and doping" (§71), but no "documentary materials were produced to Mr Sutton to support these assertions" although Ms O'Rourke KC had indicated that the Appellant "already held supporting material" (§74). There was the suggestion of "an incriminating text" (§74) but "that text was not produced" to the Tribunal (§75) and those texts which were produced were "friendly and solicitous" (§75).

v) Mr Cooke (§77) was called by the Appellant with "evidence bearing upon Mr Sutton's character" (§76), but "in every respect" Mr Cooke's evidence was contentious (§80) and "hearsay" (§79), with no other witness who could have spoken to those matters being called (§80), so the Tribunal did not feel it could fairly or safely attach weight to this evidence (§80).

vi) Mr Palov (§82) was also called by the Appellant with "evidence bearing upon Mr Sutton's character" (§76), but Mr Palov's evidence recounted the prevalence of doping in professional cycling in 1987 (§82) and did not allege that Mr Sutton had used drugs (§84) or had been aware of Testogel before 2016 (§§84-86).

vii) Added to this was the Appellant's own evidence of his impression at the time, in 2011, that Mr Sutton was not involved in doping (§87).

viii) There were a number of allegations relating to Mr Sutton contained in the "documentary material" submitted by the Appellant (§88): a selection of telephone notes, emails, extracts from reports and journalistic 'source notes', and a statement from Darryl Webster (an ex-team mate of Mr Sutton in 1988) prepared for a Department for Digital, Culture, Media and Sport ("DCMS") Select Committee. The Webster DCMS statement had "made a serious allegation against Mr Sutton" (§88) but in these Tribunal proceedings "Mr Webster did not make a statement" nor "attend to speak on the[se] issues"; nor (apart from Mr Cooke) did anyone else named in the documents do so. The documentary material was contentious (§88). The Tribunal's view was (§89) that "bearing in mind the form of these documents, coupled with the absence of witnesses or witness statements to speak to their contents … no weight could properly and safely attach to the material in such circumstances".

ix) The Tribunal considered Ms O'Rourke KC's submission that Mr Sutton "had lied about not having read Dr Freeman's book" (§90i) (see §23 above) but the telephone note relied on did not demonstrate this (§91).

x) The Tribunal considered Ms O'Rourke KC's submission that Mr Sutton had "claimed to have limited knowledge of the so-called doping abuse scandals involving Lance Armstrong and Floyd Landis and the use of testosterone patches and Testogel" (§90ii) (see §24 above) but "no persuasive evidence was

placed before the Tribunal to contradict Mr Sutton's claim … about his level of awareness" (§92).

xi) The Tribunal considered Ms O'Rourke KC's submission that Mr Sutton "denied having erectile dysfunction, despite having prescriptions for Cialis in 2014-15" (§90iii) as to which – based on evidence from Dr Quinton (§93) and the Appellant (§94) – the Tribunal "found that Mr Sutton was taking Cialis, most likely, for a recreational unmet sexual need in 2014-15 rather than having a true erectile problem" and "reminded itself that there was no evidence in documents or medical records that Mr Sutton needed or received Cialis in 2011 – whether for that or any other purpose" (§95).

xii) The Tribunal considered "a 'MailOnline' article, published in October 2016 by Matt Lawton, a sports journalist, concerning Team Sky/British Cycling and an 'anti-doping drugs probe'" (§96), explaining why the invited "inference" that Mr Sutton was "the intended recipient of the Testogel" did not follow from Mr Lawton's refusal to answer a subpoena and give evidence, and the 'MailOnline's' refusal to comply with a request under Rule 35A.

xiii) Finally, the Tribunal assessed as "unlikely" that, as Ms O'Rourke KC submitted, Mr Sutton's walk-out had been "occasioned by his unwillingness to be caught out in a lie", knowing "what was coming next" (§97), maintaining (§98) that the reason for the walk-out was as determined in the Non-Exclusion Determination.

70. As to the Tribunal's description of Mr Sutton's walk-out as "most unwelcome" and his "behaviour during the hearing" as "intemperate" these, in my judgment, were measured judicial observations, but not intended as benign or benevolent descriptions. Mr Hare KC described aspects of Mr Sutton's conduct, when giving his evidence in the Tribunal, proceedings as "regrettable". My own word would be "unacceptable". I have set out in some detail, earlier in this Judgment, features of Mr Sutton's approach: to the Tribunal, to the proceedings, to the questions, to the Claimant, and to the screen. The Tribunal had, and considered, all the matters relating to Mr Sutton's conduct and his presentation as a witness. It also had his repeated denial of the central allegation the case: that the Testogel had been for him. The Tribunal's phrase – "clear and consistent" – was open to it; and entirely apt.

71. The Tribunal had the fact that none of the points that had been raised during more than an hour of cross-examination to "tee up" the impugning of Mr Sutton's truthfulness and probity were matters on which Ms O'Rourke KC had been able to deliver. As the Tribunal recorded, she did not even produce the email which she had put to him and from which she had quoted. Nor was she able to deliver in relation to the "58 items" in her document "D7" (§42 above). She was entitled to put forward documents, but the "counterbalance" of doing so did not require that weight should be put – in the final analysis – on documents recording or making allegations against a witness, unsupported by any direct evidence. The evidence of the two witnesses who were called went nowhere, for the reasons given by the Tribunal. On this appeal, I was not shown a single example of a document which was said to have undermined the veracity or truthfulness of something said by the Mr Sutton in his evidence in chief or in his cross-examination.

Nor can I accept that the Tribunal lost sight of the caution appropriate given the severely curtailed opportunity to test Mr Sutton through the 1½ days of cross-examination that had been envisaged. Indeed, of the three points which Ms O'Rourke KC particularly emphasised (§90i-90iii), one involved a topic which she had not been able to put in cross-examination, and the Tribunal expressly reminded itself that "Ms O'Rourke did not … have the opportunity to cross-examine Mr Sutton about the reason why he was having Cialis prescribed to him in 2014-15" (§93).

72. There is nothing in the complaint that the Tribunal failed to revisit the question of whether Mr Sutton's evidence was "sole or decisive". Although Mr Sutton's evidence in chief and cross-examination featured (at §§56-62) in the Tribunal's Analysis of the Evidence and Findings in respect of the Allegations at Paragraph 10 (§§50-203), this was alongside matters such as the following: a Preamble (§55) which emphasised the "number of significant facts in relation to the order of this banned substance" which had "already been admitted and found proved", which stood as "established facts" and could "properly bear upon the Tribunal's consideration"; Mr Sutton's medical records (§63); Dr Quinton's expert evidence (§§55-70, 129); then the evidence of the Appellant (§§102-113, 170-196). The Appellant's evidence was evaluated and tested against the "unconvincing" rationale he had put forward (§§121-135), the "medically incoherent nature" of the Appellant's actions, lack of supporting paperwork and lack of engagement or discussion with colleagues (§136), the evidence about threats and bullying by Mr Sutton (§§136-169), including the evidence of Mr Burt and Dr Peters (§144-151), the evidence about patches and gels (§174) and the nature of the reason given for lying (§§182-196). In my judgment, it is impossible to say that the evidence given by Mr Sutton in chief and under cross-examination was, or had become, the "sole" or "decisive" evidence against the Appellant. There was, in my judgment, no error in approach taken by the Tribunal to the evidence of Mr Sutton.

73. It is relevant that at the DOTF stage there was further "legal advice" ("the DOTF Advice") given to the Tribunal by its Legally Qualified Chair, which was shared with Counsel and to which Ms O'Rourke KC raised no objection. The DOTF Advice emphasised the limitations of the evidence in Mr Sutton, whose evidence stood in contrast with the other witnesses who attended the hearing, in the sense that it was not possible for him to be tested fully by way of cross-examination given that he left the hearing before Ms O'Rourke KC had been given the opportunity to complete her cross-examination. The DOTF Advice also emphasised that this had deprived the Tribunal and the Appellant of the opportunity to see the consequences of the evidence being tested in full in the cross-examination. The DOTF Advice went on to explain that the Tribunal should exercise caution as it went about deciding extent to which it could place reliance upon Mr Sutton's evidence. It identified the list of topics which Ms O'Rourke KC had identified that she would have wished to put to Mr Sutton, as topics relevant to credibility and probity. The Advice referred to the evidence received on behalf the Appellant including documentary materials and oral evidence from other witnesses raising issues relevant to Mr Sutton's credibility and, emphasising that the Tribunal should address all of these matters fairly and with the utmost care. Ms O'Rourke KC did not complain about that DOTF Advice or suggest that there was some material error or omission in the approach identified by it.

74. In all these circumstances and for all these reasons, there was no error in the Tribunal's assessment of Mr Sutton's evidence. On the contrary, in my judgment, it was plainly open to the Tribunal to accept that evidence and make of it what it did, in light of the evidence as a whole.

OTHER ISSUES

Impact on the Appellant of Mr Sutton's evidence and link to the events of 2011

75. Issues (3) and (4) are further issues which concern the evidence of Mr Sutton, and so I will deal with them next. Agreed Issue (3) is whether the Tribunal wrongly failed (i) to appreciate the impact on the Appellant of Mr Sutton's evidence and (ii) to link it to the events of 2011.

i) As to (i) failing to appreciate the impact on the Appellant of Mr Sutton's evidence, the Tribunal plainly gave careful consideration to this issue. As it recorded (DOTF §19) on 17 December 2019 it had granted Ms O'Rourke KC's application for the adjournment on the basis that Dr Freeman's health had declined. In doing so, reliance was placed on a report (14.12.19) of Dr Henderson. Dr Henderson confirmed that Dr Freeman "is not currently fit to give evidence" and was "likely not to be fit for several weeks at the very least" but that his "mental health is likely to return to its pre-tribunal state in due course". Dr Henderson's Report (14.12.19) recorded that the Appellant had been "greatly distressed by events surrounding Mr Sutton's evidence" being "behind a screen" and "only 3-4 metres from Mr Sutton", being "verbally abused by Mr Sutton" and feeling "physically" and "psychologically trapped", and that "in the weeks after Mr Sutton gave evidence he developed a number of psychiatric symptoms". The proceedings only resumed once there was relevant evidence which identified the Appellant as being fit to give evidence. He then did so, and the Tribunal was able to assess his credibility and truthfulness. It did so, giving cogent and careful reasons.

ii) As to (ii) failing to link this to the events of 2011, the Tribunal dealt with the topic of "Threats and Bullying" in a section of the DOTF at §§136-169. The Tribunal heard the live, oral evidence of the Appellant about what had happened in 2011 and why. The Tribunal found that the evidence of both Mr Burt and Dr Peters was that Mr Sutton, "when under pressure … would indeed engage in bullying behaviour" (§145). The Tribunal explained that the evidence of Mr Burt and Dr Peters which was directly relevant on the question of bullying, did not extend to the circumstances in 2011. The Tribunal explained that nor was there any evidence that the Appellant had ever reported any such contact at that time. The Tribunal explained that, on the balance of the evidence, it was not persuaded that undisclosed incidents of bullying and threats had already taken place and were taking place such as to form the context to events in April and May 2011. The Tribunal had observed Mr Sutton's behaviour at the hearing. It is heard submissions in relation to Mr Sutton's behaviour. It had made the Vulnerable Witness direction (§9 above). It had also adjourned the proceedings given the deterioration in the Appellant's health. The Tribunal was very well

aware of all relevant topics. In no sense did it lose sight of them. But what the Tribunal had to consider was the events of 2011. The Tribunal recorded that the Appellant's evidence – given after the lengthy adjournment – was "that he was intimidated and frightened by Mr Sutton's violent, threatening/ bullying character, and by his power to influence decisively whether he could retain his job" (DOTF §137). It recorded that the Appellant "asserted that Mr Sutton's threatening and bullying behaviour has continued to the hearing itself" (DOTF §140). The Tribunal did not think that Mr Sutton's evidence, and the way in which he had given it, supported the conclusion that Mr Sutton had bullied the Appellant in 2011. The Tribunal unassailably found (DOTF §155) that: "On the balance of the evidence" it was "not persuaded that undisclosed incidents of bullying and threats had already taken place, and were taking place, such as to form the context to events in April/ May 2011".

Failure to protect a vulnerable witness

76. Agreed Issue (4) is whether the Tribunal failed to protect the Appellant (a vulnerable witness) by controlling the behaviour of Mr Sutton when he was giving evidence. The background was that Ms O'Rourke KC had made the application for the Vulnerable Witness direction, which the Respondent had not opposed, and which the Tribunal had then made. The screen was in place, and nobody can have forgotten that the arrangement was in place or why it was in place. It was not acceptable for Mr Sutton to bang the table; nor to describe the Appellant as hiding behind a screen. Reading the transcript, it is possible to identify points in the evidence at which more could have been done: by the Tribunal; by Ms O'Rourke KC (whose client was the Vulnerable Witness) and by Mr Jackson KC (whose witness was conducting himself in that way). It may be that, had there been an intervention, the Appellant would not have experienced the deterioration in his health; and the hearing would not have needed to be adjourned or not for such a lengthy period. But there is another dimension. Part of Ms O'Rourke KC's strategy, on behalf of the Appellant, involved being able to portray Mr Sutton as "a bully", whose bullying behaviour extended to the Appellant. If the Tribunal Chair had – and without any indication or invitation from Ms O'Rourke KC – chosen to jump in to curtail Mr Sutton's conduct in the witness box, that could have prevented the Tribunal from seeing what Ms O'Rourke KC would have wished the Tribunal to see. When Ms O'Rourke KC considered that Vulnerable Witness protection was needed, she had asked for it. And when Ms O'Rourke KC had portrayed to the Tribunal – earlier the same day – the importance of her being able to cross-examine Mr Sutton at length and in person, she had emphasised the Tribunal being in a position to observe, at close quarters, whether the witness was "losing it" (§13 above). In conclusion, the way in which the Tribunal handled the hearing at which Mr Sutton gave his evidence does not, in my judgment, render its substantive decisions in the Non-Exclusion Determination or in the DOTF "wrong"; nor "unjust" by reason of a "serious procedural or other irregularity".

Treatment of "bullying"

77. Agreed Issue (5) is whether the Tribunal's treatment of "bullying" was perverse. The Tribunal dealt with the topic of "Threats and Bullying" in a section of the DOTF at

§§136-169. That section occupies 6 pages and 33-paragraphs of closely reasoned analysis. The point emphasised by Ms O'Rourke KC at the hearing of this appeal was that the Tribunal twice said (at §§143 and 156) that the expert evidence of Dr Henderson and Professor Grubin was "predicated" on the Tribunal "first finding, as a fact, that bullying had occurred". Ms O'Rourke KC said this was wrong, and that Dr Henderson was in fact expressing an "opinion" of his own, that bullying had in fact taken place. The answer to this point is that whether bullying had taken place in 2011 was, as Dr Henderson and Professor Grubin recognised, an issue for the Tribunal to decide. Dr Henderson had (as he wrote on 24 September 2019) sought to "assist the Tribunal in understanding the psychosocial and emotional landscape [in] which Dr Freeman found himself in 2011". Dr Henderson wrote this (13 November 2020, emphasis added)

> ***There are important things on which Professor Grubin and I agree. We agree that Dr Freeman has a severe long term mental illness. We agree that he has struggled to get effective treatment. We agree that, if the panel accepts Dr Freeman's account, then the behaviour of Mr Sutton towards Dr Freeman over the course of their time working together would be consistent with bullying, although whether Dr Freeman was in fact bullied is a matter for the Tribunal. We agree that certain workplace cultures are conducive to bullying.***

In his oral evidence (20 November 2020) Dr Henderson told the Tribunal (emphasis added):

> ***A … I have suggested that, in my opinion – though I accept it is a matter for the Tribunal – he was bullied by Mr Sutton, and in the supplementary reports I've suggested that there were a range of factors which made him more vulnerable to that bullying as I've described, and in that relationship where bullying existed, which depends substantially on there being an imbalance of power between the person doing the bullying and the person being bullied, within that particular dynamic relationship between Dr Freeman and Mr Sutton there were forces at play which, from what Dr Freeman told me, he found it difficult to resist Mr Sutton's desire to have testosterone supplied to him…***

The DOTF shows that the expert evidence, alongside all of the other evidence, was conscientiously considered and appraised. The Tribunal gave convincing reasons for its conclusion on the issue of bullying in 2011, having regard to that evidence and the other evidence in the case, viewed in the round. I can find no error – still less 'perversity' – in the approach or conclusion.

Construction/reversal of the burden of proof

78. Agreed Issue (2) is whether the Tribunal, in finding Allegation 12(a) proved, erred in its construction of a penal/disciplinary charge and effectively reversed the burden of proof. As has been seen, Allegations 9(a) and 12(a) were:

> ***9. During an interview with UKAD on 17 February 2017, you stated that the Testogel had been: (a) ordered for a non-athlete member of staff …;***
>
> ***12. You placed the Order and obtained the Testogel: (a) when you knew it was not clinically indicated for the non-athlete member of staff as described at paragraph 9(a) above …;***

This issue arises out of DOTF §§51-53:

> ***51. Although, in his interview with UKAD on 17 February 2017, Dr Freeman did not identify the particular person in respect of whom the Testogel had been ordered; he went on formally to confirm, via his legal representative, that the person was Mr Shane Sutton. In correspondence to the GMC dated 8 December 2017, this confirmation was unequivocal: "I now have instructions to identify that the name of the relevant patient is Mr Shane Sutton …" 52. That correspondence forms an unchallenged part of the GMC case. Since then, Dr Freeman has never departed from his stated position. More, he has given evidence on oath to this hearing that he obtained the Testogel specifically for Mr Sutton and no-one else. 53. Against that background, the Tribunal was not persuaded by Ms O'Rourke's closing facts submission that, because of the way the Allegation had been framed, strict construction required the GMC to prove not merely that the Testogel was not ordered for Mr Sutton, but also that it was not ordered for any other non-athlete member of staff, too.***

In my judgment, this reasoning is impeccable and says all that needed to be said. The defence had specifically identified "the non-athlete member of staff". The burden of proof remained on the Respondent was to prove that the Appellant ordered and obtained the Testogel knowing it was not clinically indicated for that member of staff. The approach simply involved focusing on the issues in the case in light of the positions adopted by the parties. There was no reversal of the burden, or dilution of the standard, of proof. There was no error of construction. The Respondent did not need to identify a named athlete for whom the Testogel had been ordered; nor to disprove that it had been ordered for each and every one of the multitude of "non-athlete members of staff". This was a classic case where the focus arose from the contested issues given the clear adopted positions of the parties.

Other Points

79. In the course of her oral submissions Ms O'Rourke KC introduced some further points which, as it seemed to me, did not fall within the Agreed Issues. First, she submitted orally that the Tribunal failed to deal with the following key point: the Appellant had ordered the Testogel through a mechanism involving a "paper trail"; whereas an alternative which would have been open to him was simply to write a prescription himself. The answer to that is that at DOTF §39 the Tribunal carefully addressed precisely this point.

80. Secondly, Ms O'Rourke KC submitted orally that the Tribunal said (DOTF §114) that it "kept in mind" the possibility that "any taint to the Appellant's credibility arose out of one narrow issue, occasioned under duress, and that therefore he could otherwise be assumed to be a witness who told the truth", but that the Tribunal did not explain "how" that had been "kept in mind". She made the same point about the Tribunal's statement (DOFT §115) that it "bore in mind" the impact the Appellant's "health condition … might have had upon his actions, taking into account expert evidence which addressed those issues", but without explaining "how" that had been "bor[n]e in mind". There is nothing in those points. The Tribunal said (§118): "while bearing all those matters very carefully in mind throughout its deliberations, the Tribunal determined that Dr Freeman's evidence was implausible. It did not believe he ordered the Testogel for Mr Sutton". Nothing more needed to be said. To 'keep' or 'bear' something 'in mind' was to think about it while conducting the evaluation. The reference to a "taint" on "one narrow issue" was a reference to the Appellant's admissions of alleged dishonesty, but the Tribunal did not proceed from that admitted dishonesty to an adverse finding on truthfulness more generally. The reference to the "health condition" was to the

Appellant's "Bipolar Affective Disorder Type II", and the Tribunal considered the possibility that this health condition impacted on the ordering of Testogel. The Tribunal gave cogent and convincing reasons for its conclusions. There was no unexplained "how", no error of approach, and no inadequacy of reasoning.

81. Thirdly, Ms O'Rourke KC submitted orally that the Tribunal drew an inference which was "unsupported" and "unevidenced" when it said at DOTF §241:

> ***241. Overall, then, taking all those factors into account, and bearing in mind the breadth of Dr Freeman's dishonesty and the number of people he had pulled into it (Ms Meats, Dr Peters and Mr Sutton), the Tribunal found his conduct incapable of innocent explanation. It was clear that, on the balance of probabilities, the inference could properly be drawn that when Dr Freeman placed the order and obtained the Testogel, he knew or believed it was to be administered to an athlete to improve their athletic performance.***

This was an expression of a clear inference, properly drawn on the balance of probabilities, taking into account all of the factors which had earlier been described. It was both supported and evidenced, as explained in the clear and cogent reasons which preceded it.

CONCLUSION

82. In my judgment, there is nothing within the Tribunal's approach, reasoning or conclusions – whether in the Non-Exclusion Determination or in the DOTF – which was "wrong"; still less any respect which would undermine as "wrong" the overall conclusion; nor rendering any finding or the outcome "unjust because of a serious procedural or other irregularity in the proceedings". In all the circumstances and for all these reasons, the appeal is dismissed. Having circulated this judgment as a confidential draft, consequential matters were agreed: the appeal is dismissed; and the Appellant is to pay the Respondent's costs summarily assessed in the sum claimed as £23,000.