



## **RACING APPEALS TRIBUNAL of New South Wales**

Case Title: Appeal of Jack O'Shea

Hearing Date(s): 29 September 2011

Ex tempore Decision Date: 5 October 2011

Jurisdiction: Racing Appeals Tribunal

Before: Kavanagh J

Decision: The orders of the Tribunal are as follows:

1. The offence by Mr O'Shea under r 190 of the Australian Harness Racing Rules is proven.
2. The penalty of 14 months disqualification imposed by the Stewards against Mr O'Shea is set aside and in lieu thereof a penalty of 12 months disqualification is imposed.
3. The appeal bond is to be retained.

Legislation Cited: Australian Harness Racing Rules  
Racing Appeals Tribunal Act 1983

Cases Cited: Kondis v State Transport Authority [1984] 154 CLR 672  
Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs) [2010] HCA 1; (2010) 239 CLR 531

Category: Principal Decision

Parties: Jack O'Shea (Appellant)  
Harness Racing NSW (Respondent)

Representation  
Mr Jack O'Shea (Appellant)  
Mr Reid Sanders (Respondent)

## EX TEMPORE DECISION

- 1 On 29 August 2011, Harness Racing New South Wales ("HRNSW"), through its Stewards, opened an inquiry into the presentation of a racehorse, *Bremansa*, by registered trainer, Mr Jack O'Shea. The inquiry concerned the presence of a prohibited substance, namely, a total plasma carbon dioxide ("TCO2") level greater than the permitted threshold, which was detected in a blood sample taken from *Bremansa* prior to its competing in Race No 7 at Bathurst on 17 August 2011.
  
- 2 Mr O'Shea was charged under rr 190(1), 190(2) and 190(4) of the Australian Harness Racing Rules ("the Rules") as adopted by HRNSW which relevantly state:

### **Presentation free of prohibited substances**

190. (1) A horse shall be presented for a race free of prohibited substances.
- (2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.
- (3) ...
- (4) An offence under sub rule (2) or sub rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.
- ...

- 3 The particulars of the charge against Mr O'Shea are as follows:

... Mr O'Shea, that as the trainer of *Bremansa*, you did present that mare to race at Bathurst on 17 August 2011 in race 7 when a blood sample taken prior to the race, upon analysis at two laboratories, has revealed the presence of total carbon dioxide in plasma in excess of the 36 mmol/L. threshold as defined by the Harness Rule of Racing. ...

- 4 On the appeal, Mr O'Shea appeared for himself. He accepted the positive findings but submitted he did not know how the substance entered the horse. He speculated it must have been a substance contained in the feed given to the horse.

5 Mr Reid Sanders appeared for HRNSW. He tendered the transcript of the Stewards' Inquiry, the particular laboratory finding and confirmation, and correspondence between HRNSW and Mr O'Shea.

6 *Bremansa* was the subject of a pre-race random drug testing regime and, accordingly, a blood sample was taken from the mare. She subsequently placed sixth in the particular race. The Australian Racing Forensic Laboratory tested the blood sample taken from *Bremansa* on 19 August 2011 and detected a TCO<sub>2</sub> level of 37.8 mmol/L. This is above the 36.0 mmol/L threshold as defined in r 188A(2)(a) of the Rules which read:

**Determination of prohibited substance**

188. ...

...

188A. (1) The following are prohibited substances:

...

(2) The following substances when present at or below the levels set out are excepted from the provisions of sub rule 1:

(a) Alkalinising Agents, when evidenced by total carbon dioxide (TCO<sub>2</sub>) present at a concentration of 36.0 millimoles per litre in plasma.

...

...

7 As a result of this positive finding, the sample was further tested by the Queensland Government Racing Science Centre for confirmatory analysis on 22 August 2011. It was analysed on the same day and a TCO<sub>2</sub> level of 37.7 mmol/L was detected. Therefore, on analysis, there were two positive findings.

8 Before the Stewards' Inquiry, the appellant was unable to provide an explanation of how the TCO<sub>2</sub> level in *Bremansa* exceeded that which is acceptable under the Rules. Mr O'Shea surmised that perhaps it had been in a feeding product called "AcidBuf Pure Rumen Conditioning". This product is not a registered product for the feeding of horses. The product does contain various substances and minerals.

- 9 An offence under r 190 of the Rules carries the burden of absolute liability. The obligation imposed under r 190 is expressed in terms personal to the trainer. The obligation is in the nature of the kind of non-delegable duty as spoken of by Mason J (with whom Deane and Dawson JJ) agreed in *Kondis v State Transport Authority* [1984] 154 CLR 672 (at 687-688) and as adopted in *Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1; (2010) 239 CLR 531.
- 10 A trainer must present a horse free of any prohibited substance for a race. An offence is committed regardless of the circumstances in which the horse came to present with a positive finding. The rule is not expressed in terms of the standard recognised by the common law - to take reasonable care. It is a much higher standard. So much is evidenced by the use of the word "shall". That places upon the trainer the exclusive responsibility for the integrity of the harness race in which he presents his horse. The public relies upon the fact that the harness racing industry is one of integrity. The public relies upon the integrity of any race conducted by HRNSW. All horses competing shall be free of the prohibited substances. The responsibility is carried individually by the trainer of each horse in a race. The public can reasonably expect that reasonable care has been taken by the trainer. There is no unfairness in imposing upon the trainer (of the horse presented for a race) such a non-delegable obligation.
- 11 Therefore, the obligation imposed on a trainer under r 190 is: the duty to ensure the horse he/she trains shall be free of prohibited substances when presented for a race; the obligation is higher than the common law duty to take reasonable care; the obligation is non-delegable; the obligation can be characterised as a duty to ensure the integrity of the harness racing in which in each race all horses are race free of prohibited substances.
- 12 I, therefore, find on the evidence the offence is proven. There has been a breach of under r 190 of the Rules.

## **Penalty**

- 13 The appellant has been disqualified by the Stewards for a period of 14 months. Reliance is placed by HRNSW on a document headed "Penalty Guidelines for Therapeutic Substances and TCO2 Positives". However, it needs to be stated that such a guideline is one that can properly be used to guide the Stewards in giving penalty but the Tribunal is not bound by such guidelines.
- 14 Under the s 17 of the *Racing Appeals Tribunal Act 1983*:

### **17 Determination of appeals relating to thoroughbred racing**

- (1) The Tribunal may do any of the following in respect of an appeal under section 15:
- (a) dismiss the appeal,
  - (b) confirm the decision appealed against or vary the decision by substituting any decision that could have been made by the Appeal Panel, the racing association or Racing NSW (as the case requires),
  - (c) refer any matter relating to the decision appeal against to the Appeal Panel, the racing association or Racing NSW for rehearing (in accordance with the directions given by the Tribunal),
  - (d) make such other order in relation to the disposal of the appeal as the Tribunal thinks fit.
- (2) The decision of the Tribunal is final and is taken (except for the purposes of an appeal against the decision under this Act or the *Thoroughbred Racing Act 1996*) to be the decision of the Appeal Panel, the racing association or Racing NSW (as the case requires).

- 15 Mr O'Shea pleads his personal circumstances. He put a number of propositions to the Tribunal:

- His son is a trainer at Bathurst.
- His son is away quite a lot at the trots. He would like to be able to fill in for his son when his son is away. He would like to do the morning cleaning of the stables and the afternoon feeds.

However, as Mr O'Shea explained, his son trains at the Bathurst Showground. This is a place where other trainers in the district also train. While I can accept his sentiments in wishing to assist his son, if one allows

an exemption to the disqualification to permit Mr O'Shea to perform the morning clean up or the afternoon feed, Mr O'Shea will be seen at the Bathurst Showground. He will, therefore, be automatically mixing with persons within the harness racing industry who also use the showground facilities.

- 16 A disqualification is a serious penalty. Under r 259 of the Rules the restrictions placed on a disqualified person are listed:

**Restrictions**

**259.** (1) A disqualified person or a person whose name appears in the current list of disqualifications published or adopted by a recognised harness racing authority or a person warned off cannot do any of the following -

- (a) associate with persons connected with the harness racing industry for purposes relating to that industry;
- (b) be a member or employee of the Controlling Body;
- (c) be an office holder, official, member or employee of a club;
- (d) enter a racecourse or any place under the control of a club or Controlling Body;
- (e) race, lease, train, drive or nominate a horse;
- (f) conduct breeding activities;
- (g) enter any premises used for the purposes of the harness racing industry;
- (h) participate in any manner in the harness racing industry.
- (i) Permit or authorise any person to conduct any activity associated with the harness racing industry at his/her registered training establishment.

...

- 17 Whilst sympathetic to Mr O'Shea's pleading to allow him to provide some partial assistance to his son's harness racing business, to allow such an exception through a variation of the Order by the Stewards would require an exemption of almost everyone of the limitations placed upon a disqualified person under r 259 (1)(a) - (i).

- 18 Mr O'Shea has been in the industry for some 50 years. However, this is also his second offence. Disqualification is the only penalty that must be given in the circumstances. While acknowledging Mr O'Shea makes a

partial living through the harness racing industry, the integrity of harness racing in New South Wales must also be considered. Penalty is not punitive but preventative.

- 19 I allow a disqualification for a period of 12 months commencing from 29 August 2011. The disqualification begins on 29 August 2011 as no stay has been granted on the Stewards' decision.

**Orders**

- 20 The orders of the Tribunal are as follows:

- (1) The offence by Mr O'Shea under r 190 of the Australian Harness Racing Rules is proven.
- (2) The penalty of 14 months disqualification imposed by the Stewards against Mr O'Shea is set aside and in lieu thereof a penalty of 12 months disqualification is imposed.
- (3) The appeal bond is to be retained.