

**RACING APPEALS  
TRIBUNAL**

**NEW SOUTH WALES**

**MR D B ARMATI**

**EX TEMPORE  
DECISION**

**TUESDAY, 17 JANUARY 2012**

***Licensee Mr D. KENNEDY***

***AUSTRALIAN HARNESS RACING RULE 190***

HIS HONOUR: The case before the Tribunal is an appeal by licensed person, being a trainer and driver, Mr Kennedy, against the decision of the Stewards to disqualify him for a period of three months and to impose upon him a monetary penalty of \$2000. The breach of the Australian Harness Racing Rules is in  
5 respect of Rule 190. That Rule requires a trainer, such as Mr Kennedy, to present a horse for a race free of prohibited substances. Here the Stewards, at their inquiry, particularised the breach of that Rule in these terms:

10 “That you as a licensed trainer did present Littlechrissydios to pace in Race 5 at Griffith on 1 November 2011 when a post-race urine sample taken from that horse upon analysis by two laboratories has detected the prohibited substance namely ibuprofen in its system.”

15 They continued:

“And for the record, Littlechrissydios won Race 5 at the meeting in question.”

20 Before the Stewards, and before this Tribunal, Mr Kennedy admitted the breach of that Rule and the breach of its particulars. The issue for determination is what penalty, if any, should be imposed upon him by this Tribunal for the breach of that Rule.

25 As the Tribunal said in Thomas on 7 December 2011:

“It is for this Tribunal to determine what is the appropriate penalty, if any, not to determine whether the Stewards should be supported in the conclusion that they reached.”

30 The facts have not been disputed as they unfolded before the Stewards, nor is there any contest to the evidence to establish those facts. Oral evidence was given before this Tribunal by Mr Kennedy and he was cross-examined.

35 Mr Kennedy has been a professional trainer for some little over three years. He has been associated with the industry since 1985, when he first was licensed. He has, between 1985 and 1991, not come under notice in respect of any non-compliance matters. From September 1991 he commenced to drive horses, it appears, as best he can recall, those which he himself probably owned and trained – or certainly trained. There is a period between 1995 and 2001 when  
40 he did not come under notice. He then, as a driver, has essentially come under notice on a number of occasions since and as a full-time trainer.

45 The majority of horses are owned by those not associated with him or his family. Some eight or nine of those horses may be ones in which he or his family have an interest. Of those 28 horses, on the day in question, two are of relevance, one the subject horse which returned the positive reading, and the second a horse which had been treated with ibuprofen, namely, the horse Saint Esprit.

Saint Esprit had bowed a tendon a little time prior to the subject race, was taken to a vet, the vet prescribed that treatment, and it is an anti-inflammatory that has numerous other benefits as well for horses, that is its primary use. At the time Mr Kennedy had two full-time employees and one part-time employee. 5 Essentially he and Mr Payne, one of those full-time employees, have responsibility for administering to the horses. Neither of them knows precisely who administered ibuprofen on the last occasion to Saint Esprit. It is noted that Mr Payne was not called to give evidence, either before the Stewards or this Tribunal.

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The procedure was to make a paste, using a syringe to squirt it over the tongue. At the time of those treatments, the horse was tied up outside the feed room, at a rail. All horses were tied up at that rail at or about the time of either feeding or post-exercise. The horse Saint Esprit was known to spit out or spill 15 from its mouth the subject substance. It was known to Mr Kennedy that it was necessary, as it was done on occasions, to clean down the rail and the area because of that substance and others being possibly present. The description was given in the transcript before the Stewards of how that was done.

20 On the day in question, and it appears at or about the time of this substance getting into the subject horse – Littlechrissydios, that is – that, in Mr Kennedy's words, they were too busy. In essence, at the time, the 28 horses, the need to take them, and the preparation for race day being as hectic as it can be with a number of horses to race, was such that, he concedes, as he 25 was responsible for the husbandry practices at the property, that it being his duty to ensure the horses were properly treated, and only the horses to be given treatment received it, that they didn't attempt to be careful enough, to paraphrase the evidence, as they were not paying attention – a bit rushed with too many horses – that essentially he allowed, or it might be said in fairness to 30 him, they allowed, the contamination to occur.

The effect of that was that there was no evidence – and it was not the subject of the more serious administered charge – that they actually administered this substance to this particular horse Littlechrissydios. One possibility was 35 thought about before the Stewards, but on questioning by the Tribunal abandoned. And that was the possibility that as Saint Esprit had broken loose and run through various paddocks, one of which was occupied by Littlechrissydios before the race, that Littlechrissydios may, as a result of that, or at some other time, have eaten the faeces passed by Saint Esprit and 40 thus ingested the substance and therefore presented at the race with it in its system was not pursued. It need not be further examined.

45 What that then leaves for the determination is a conclusion by admission in evidence, firstly of responsibility, but secondly of husbandry practices being practised by the trainer leading up to this race of a type for which he did not pay attention, such that they allowed for contamination to occur. The horse raced; it won the subject race. The financial benefit to Mr Kennedy was \$150, being his five percent of the \$3000 winner's prize. He had no ownership in the horse. He

stood to gain no other benefit. His reputation as a trainer did not depend upon this horse winning.

5 He gave evidence before the Stewards of the success that he was enjoying. It appears that he is the largest trainer in the South-West Riverina area. His success rate had been that he had won 42 races – to be more precise, as referred to at page 23 point 20 – “I had 128 winners last year. I had 37 individual winners.” He is aware of his standing as a professional trainer and the necessity for him to be better than hobbyists and he says he is good at it.

10 There was other evidence about the success he was then enjoying. In essence, therefore, there was no personal benefit to this appellant, Mr Kennedy, to present the horse with ibuprofen. As the Tribunal has said, it is not an administer case, is a presentation case.

15 Those are the facts about the commission of the breach of this Rule which are relevant.

20 The further matters of a subjective nature which are here, the Tribunal shall turn to. The first matter for determination is, having regard to the facts of that breach, what is the appropriate penalty for that breach and then the necessity to consider his personal circumstances. In answering that question, the Tribunal, in the decision of Thomas, set out a number of principles, being the first occasion on which the Tribunal, constituted as it is today, was called upon to assess breaches of Rule 190. In essence the Tribunal stated a number of matters which will not be repeated in detail – the decision of Thomas contains them in detail – it is this: that firstly, the offence is an absolute one. It does not require any establishment of how, when, where or indeed why the substance came to be in the horse, and if the horse is presented, and contrary to the Rule, with the substance, the offence is committed.

30 It therefore places an onus upon a trainer not to present a horse which has present in it a prohibited substance. Here there is some attempt, by reconstruction, to explain why the substance may have come to be in the horse. It is often the case that those the subject of this particular breach indicate to the Stewards and, if necessary, a Tribunal, they have no idea how it happened. This Tribunal accepts that the possibility advanced by Mr Kennedy as to the reasons for the presence of the substance in the horse are as he has reconstructed.

40 It is to be noted that the industry, of which Mr Kennedy is part, has been on notice for many years that this particular Rule carries with it, when it is breached, substantial sanctions and Stewards and Tribunals have been sending a clear message to the industry for many years, by the penalties imposed, the consequences for non-compliance. The reasons for those are not to punish but to protect the industry. It is there, as the Tribunal set out in Thomas, and which it does not repeat in detail, to ensure that all horses compete equally, that the industry, regulated as it is, enables each horse, so far as the public and others associated with the industry, such as owners and other

trainers, drivers, etc, can expect that each horse is competing equally against the other. It is there to enable the betting public, the public at large, to be satisfied that the industry is one for which the highest integrity applies.

5 It is therefore the function of the Tribunal in determining what orders should be made that it must send a clear message to the individual who appears before it and to others in the industry that non-compliance with this Rule will carry with it substantial sanctions. That message must be sent to this individual trainer who appears before it and to others, and that is to ensure that all who participate  
10 meet the integrity test, meet the rationale for the existence of that Rule to which brief reference has now been made.

The next matter is this: what imprimatur should this Tribunal give to this particular trainer as a result of his breach of the Rule, that is, what imprimatur  
15 should it give for non-compliance and the circumstances in which they occur? And what imprimatur is appropriate for a person entrusted with the privilege of a licence, with which this trainer has been entrusted? So far as the guidelines are concerned, as has been said on many occasions and shall not be repeated in detail, they are just that, guidelines. But they do provide some measure of an  
20 indication to those who may be tempted to breach them, or may be involved in their breach, of what is likely to happen and in addition to have regard to orders that Tribunals have made.

The Tribunal, as it is constituted, has formed the opinion that those who come  
25 before it making ready admissions of their non-compliance should be entitled to a discount of 25 percent on any appropriate orders that it makes of a disciplinary nature. That is to reflect their ready acceptance of wrongdoing and the utility that goes with a reduction in the use of resources for a Tribunal and the industry to conclude this particular function.

30 As the late Judge McGuire said in Russo, and as applies to this trainer, this:

“The trainer has been associated with the presentation of horses for racing for a sufficient period to have a full awareness of the seriousness  
35 of presenting a horse that is not drug-free. There is widespread publicity about the administration of prohibited substances and the seriousness with which that is viewed by the authority, the Tribunal and the public. The connections of those horses and the punters who supported them would have been rightly indignant to learn that a rival horse was  
40 receiving assistance to their detriment.”

And later:

“He must see, as must all other trainers, that there is a real penalty to pay in the event of presenting a horse that is not drug-free. The industry  
45 is entitled to see that this Tribunal takes its obligation seriously and that it will confirm the imposition by Stewards of penalties that send a message that the industry is to remain clear of drugs.”

The Tribunal has determined that, this offence having been admitted, its starting point must be a period of disqualification. It has formed that view for three reasons. Firstly, it is not inconsistent with the guidelines. Secondly, it is not inconsistent with the previous determinations made by Stewards and  
5 Tribunals. And, thirdly, it is not inconsistent with a failure of this trainer to properly apply husbandry practices at his property in the presentation of this horse.

Having regard to the rather sketchy information available from the offences for  
10 Rule 190 breach determinations, it is difficult to use them as a precise precedent. Noting what has happened here, the starting point must be a period of disqualification of 12 months. That is appropriately reduced by 25 percent because of the ready admissions. The issue is whether any other discounts should be applied to that period of disqualification. The guidelines provide, not  
15 inconsistent with the criminal law, it might be said, that a long period of satisfactory conduct entitles there to be a further discount.

In this case, his history has been referred to. He has appeared for numerous driving-related matters. He has no prior breaches of the subject Rule. He does  
20 not lose the entitlement to that consideration by reason of the fact of how this substance came to be in this horse, by reason of a failure of husbandry practices. It is to be noted that in that regard there was no outside agency involved in the administration of this particular substance on the property, it was by this particular trainer to another horse, or by those associated with him to  
25 another horse, and thus in all probability a transmission occurred. It was indeed an anti-inflammatory.

But those matters do not disentitle him to the further reduction in the appropriate disciplinary response that flows from his good past history. That  
30 past history is not entirely, to quote the addressors, impeccable, because he has come under notice as a trainer and various more formal type matters noted. The word impeccable is not adopted. It is described as a good record, acknowledging that it does not contain breaches of Rule 190 and recognising that in his other life within this industry he has come under notice as a driver,  
35 but they can be distinguished.

The Tribunal has referred to the fact he gained no financial benefit from this matter except \$150 and had no other reason to stand to gain benefit. It takes  
40 into account, in addition to the fact that he admitted this particular matter, his full and open cooperation with the Stewards when they visited his property and the proper and frank way in which he has asked that this case be presented both to this Tribunal and how he himself presented it to the Stewards.

The Tribunal has regard to the size of his business reflected in the success that  
45 he has enjoyed because, firstly, of that size and, secondly, no doubt because of his ability. That extends over a substantial period of time. As the Tribunal has said, he is a full-time professional. It is quite apparent, consistent with orders made to any full-time professional, as it is to a lesser extent to hobbyists or those who stand between professional trainers and hobbyists, that any loss of

any privilege under this licence will cause financial hardship. That is recognised in any approach that a Tribunal should adopt for any person.

5 There is this further and very important factor. Since the husbandry practices were found to be defective, he has taken steps to address them. He has set up treatment yards, he has put in place a protocol. The diagram showing that, the method of operation of the treatment yards has been explained and the treatment protocols expanded upon. Whilst they are fairly basic – and that is not a criticism – they certainly appear adequate to address the failure that has occurred in the past. The need therefore to indicate to this individual that this type of failure of husbandry practices should not be repeated is such that in a disciplinary response that message has already been received and acted upon.

15 The Tribunal does give substantial weight to the fact that he has been associated with this industry since 1985 and has not breached this Rule, he having been associated to some extent in training as a licensed person, although apparently in earlier times not presenting horses, but that does not take him outside the 20-year Rule. Whether the guideline adopted by Harness Racing New South Wales is applied in this formula, which is five years for a clean record gives one month discount, or otherwise, a substantial discount is appropriate for the subjective factors in his favour.

25 That discount is considered to be within the terms outlined in the guidelines and within the formulation of the Stewards to have been appropriately assessed by them, reducing as it does what is the balance of nine months previously referred to, to a period of some three and a half months. The first issue is this: is that an appropriate disciplinary response or should it be more appropriate that a suspension be imposed and, in addition to considering that as alternative, is a fine in addition appropriate and if so in what amount. Before finalising those matters, the Tribunal indicates it does not consider it necessary, it not having been asked to do so, nor does it consider it appropriate on these facts to do so, to consider the range of other orders that it might make all the way down to taking effectively no action at all.

35 The Tribunal indicated three reasons why it considered a disqualification to be appropriate. Is a suspension appropriate notwithstanding that finding? A suspension is obviously a less onerous penalty than a disqualification. It is anxiously sought by this appellant. It is recognised as being available because he has had a Rule 190-free history of 20-plus years. The guideline recognises that as appropriate. But the guideline does not go beyond that as a bald fact.

45 This Tribunal's view is that the starting point for the determination of this matter is the facts themselves. What is appropriate having regard to the facts on the issue of whether disqualification should be reduced to a suspension or not? In that regard, the Tribunal has referred to the messages that have been sent to the industry, reflected in the cases to which this Tribunal has touched today, the knowledge within this trainer of the requirement to comply with husbandry practices, and a now recognition of the inadequacy of those practices, and the

consequence that those failures of themselves have led to the presentation of this horse in breach of the Rule.

5 Those are the matters which this Tribunal considers to be of greater weight. In  
the circumstances, the Tribunal does not consider, and it does not, in coming to  
that conclusion, analyse in greater detail the proximity of the home to the  
training area, the likelihood of gossip or the likelihood of reporting, accurately or  
otherwise, of non-compliance with the Rules of a suspension or otherwise, or  
10 whether there has been compliance or whether there has been a recognition in  
transferring the horses prior to this Tribunal's determination on the appeal,  
factors which would cause it to otherwise not have considered a suspension.

15 But it is on the facts, as the Tribunal has outlined, that it considers a  
disqualification to be appropriate. Whilst there is a slight variation between the  
three and a half months the Tribunal considers appropriate – and that slight  
variation was recognised by the Stewards in their determination – that as the  
Tribunal did not at the outset indicate, nor did it during the course of the hearing  
indicate, to the appellant a possibility that a higher penalty would be imposed  
upon him, consider it proper to do so in the circumstances.

20 The next issue is whether this should travel with a fine or not. In considering  
that issue, the Tribunal, as it has said, recognises monetary detriment that  
flows from any period of loss of a licence privilege, but also notes in this  
particular matter the appellant was not the owner of the subject horse, his  
25 personal benefit was \$150, he gained no other personal benefit, and in addition  
the Tribunal now takes into account the fact that he has on many occasions  
presented additional horses, where he is able to do so, to race meetings to  
ensure that meetings took place at a TAB level sufficient to warrant the giving  
of TAB-type benefits to the betting public and in addition to ensure that races  
30 were able to be run, or able to be run such that there were sufficient fields.

35 Having taken that into account and accepting the outlays he has made in  
respect of those matters over the years, the Tribunal has determined that it will  
not impose a fine in addition. In the circumstances, there is a period of  
disqualification of three months which, in view of the fact that a stay was  
granted, shall, subject to any short period of deferral of the commencement of  
that, commence immediately.

40 In the circumstances, I note that aspect of the Rule and the automatic  
disqualification of the placing.

In the circumstances, I order that 50 percent of the appeal deposit be refunded  
to the appellant.