

## RACING APPEALS TRIBUNAL OF NEW SOUTH WALES

**Tribunal: The Hon Justice Haylen**  
**Advisor: Mr A Mullins**

**Appeal by Peter Russo against the Stewards' decision on 22 November 2010 to disqualify him for a period of ten months pursuant to Harness Racing Rules 190(1), (2) & (4).**

### DECISION

- 1 In July 2010 at Bathurst "Lilly's Lively Lad" won Race 3. The horse was trained by Mr Peter Russo. Following the success of "Lilly's Lively Lad" a swab was taken and in due course the Stewards received a report from the Australian Racing Forensic Laboratory that the post-race urine sample taken from "Lilly's Lively Lad" was shown to contain caffeine, a prohibited substance.
- 2 Upon receipt of this report Stewards opened an Inquiry and initially evidence was taken from Mr Peter Russo and also from Mr Liam Seijka, a stable attendant. At the resumed Inquiry the Stewards received evidence from Dr Craig Suann, Senior Veterinarian assisting the Australian Racing Forensic Laboratory, Dr Andrew McKinney, the Scientific Director of the Laboratory and also from Ms Demilza Bradshaw, the swabbing attendant who took the urine sample from "Lilly's Lively Lad" after the Bathurst race. After taking this further evidence and taking submissions from Mr Russo, the Stewards charged Mr Russo with a breach of Harness Racing Rule 190, (1), (2) and (4), being provisions that are in the following terms:
  - (1) *A horse shall be presented for a race free of a prohibited substance.*
  - (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.*
  - (4) *An offence under sub-rule (2) ... is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.*

The particulars of the charge were as follows:

*That (Mr P Russo) as the trainer of "Lilly's Lively Lad" did present that horse to race at Bathurst in the Riverina Stockfeeds Pace when a urine sample collected from that horse after it won on 21 July 2010 was found, upon analysis, to contain the prohibited substance caffeine.*

- 3 Mr Russo pleaded not guilty to the charge. After finding Mr Russo guilty of the charge as particularised, the Stewards stated that a breach of the Rule was normally dealt with by way of disqualification and that for a first offence the disqualification would usually be for a period of twelve months with the availability of some discounts. In Mr Russo's case there was a not guilty plea and so no discount was available for an early plea. Because of his previous clear record he received a discount of two months and thus the Stewards imposed a disqualification for a period of ten months.
- 4 Mr Russo has appealed against the finding that he was in breach of the Rule as particularised in the charge and has also appealed against the severity of the penalty.

At all times during the Inquiry Mr Russo denied that the horse had been brought to the races with a prohibited drug in its system and asserted that none had been administered to the horse at the races. The Stewards did not conduct an inspection of the stables operated by Mr Russo and thus there was no evidence of the presence of any caffeine or substance containing caffeine being kept in or around the stabling area. Mr Russo did not call any evidence about security at his stables in order to establish the taking of all reasonable care to ensure that unauthorised persons could not interfere with the horses or administer any prohibited substance to them. In the same vein there was no evidence of any veterinary treatment or substance given to the horse during the course of its normal training that might have, either knowingly or unknowingly, contained caffeine.

- 5 During the Inquiry no challenge was made to the accuracy of the Veterinary Certificate and finding that caffeine was found in the system of "Lilly's Lively Lad". Mr Russo had expressed a concern about the samples leaking slightly but he accepted the veterinary advice that the seals were intact and that slight leaking occasionally occurred but did so without affecting the quality of the specimen and did not, by itself, thereby indicate that there had been some form of contamination. The main issue ultimately raised by Mr Russo was that, on the way to the stall where the urine sample was to be taken, the swabbing attendant, Ms Bradshaw, had dropped the collecting pan onto straw in the stabling area and that a piece of the straw had fallen into the pan and although the straw was no longer in the pan when the urine sample was taken, the pan had not been rinsed again. On the opening of the appeal, Mr Orlizki for the Stewards stated that the appeal involved a limited factual issue and accepted that, if the Tribunal found that the sampling pan had been dropped and that straw had come into contact with the inside of the pan and the pan had not then been washed, then the appeal must succeed. The Stewards urged upon the Tribunal, however, that those findings should not be made and the appeal should therefore be dismissed.

- 6 On the hearing of the appeal, the transcript of the Inquiry, conducted over two days before the Stewards, was tendered together with the Exhibits that were before that Inquiry. Both parties were content to proceed on the basis of that material and apart from the tendering of a copy of the Stewards' report summarising the course and findings of the Inquiry, no additional evidence was called on appeal. The unsatisfactory nature of that evidence will be dealt with later in this Decision.
- 7 Before the Stewards Mr Russo stated that he did not know how caffeine was administered to "Lilly's Lively Lad" and that he had presented his horse drug free for the race as he did with the rest of his horses. He spoke of running a professional stable and noted that the horse started favourite at \$1.40. The horse had previously run against better company and he expected the horse to win and because it was \$1.40 favourite, he did not bet on the horse and effectively, it was running for the prize money. The prize money was \$3,000 and his percentage return was \$150. He pointed out to the Stewards that it made no sense for him, being the leader of the Trainers' Premiership, to place his stable and professionalism in jeopardy for the sake of securing such a paltry sum of money.
- 8 Mr Russo then spoke of the events of the night and the circumstances in which the sampling pan came to be dropped in stable straw. After winning the race he was informed by Stewards that the horse was to be swabbed. An unidentified person from the Club followed his horse while the gear was removed, when it was washed and when it was taken to the swab stall. It was not clarified before the Stewards or on appeal whether this person was present when the horse was in the control of the swabbing attendant, Ms Bradshaw.
- 9 In the swabbing stall Ms Bradshaw washed out the pan but the horse was not urinating and so the horse was taken to a public stall. The public stall was directly across from the stabling area used by Mr Russo on track and Mr Liam Seijka was present at those stables. As Ms Bradshaw walked into the stall she dropped the pan and it landed on its side. Mr Russo picked it up and handed the pan back to her. They proceeded with the swabbing procedure and shortly after that the horse urinated. Mr Russo asked Mr Seijka to go back with Ms Bradshaw to sign the necessary documentation regarding the sample. Mr Russo remembered this incident clearly because it did not happen often that someone dropped a sampling pan and he remembered picking it up for Ms Bradshaw. Ms Bradshaw did not wash out the pan but it was not Mr Russo's job to tell her what to do - he was the trainer and not a veterinarian. She did not wash out the pan after it was dropped but he did not take much notice of the occurrence. It was only when he was informed that the horse had returned a positive swab that he realised the significance of the incident.

10 When questioned by the Stewards, Mr Russo said that Ms Bradshaw dropped the pan and it landed on its side in the middle of the straw. He said that, as he lifted it up, he saw a bit of straw fall out but nothing was left in there while the swab was taken but he was "not sure if Ms Bradshaw knows". It was not clear precisely what Mr Russo was referring to in making this statement. When walking into the public stall, Mr Russo said he started chatting with Mr Seijka and Mr Seijka was talking to them and leaning on the side of the swab bay. Mr Russo told the Stewards that Mr Seijka "witnessed all this." Mr Seijka then went back with Ms Bradshaw to deal with the swab paper work. Mr Russo and Mr Seijka witnessed the horse urinate into the pan.

11 The Stewards then asked Mr Seijka about his involvement on the night. He confirmed that he had returned to the swab stall with Ms Bradshaw after the sample was taken and had remained in her company at all times. He saw Ms Bradshaw pour the sample into three small bottles and she read out the numbers for the samples and Mr Seijka checked them and Ms Bradshaw then sealed them and placed them in a bag. It all appeared to be appropriate and then he stated:

*I did not read any of the fine print like if the pan had to be washed or anything because I didn't know the rules so I sort of just checked the numbers and she said just sign and I signed then. That was about it.*

Mr Russo again clarified that Ms Bradshaw had not washed the pan with the control solution after it was dropped and prior to taking the swab.

12 In further evidence, Mr Russo stated that it was a very cold night at Bathurst and there was a tearoom close to the swabbing stalls where anybody could attend and help themselves to tea or coffee. It was not restricted to trainers or owners and in the middle of winter, anyone could go into the tearoom and use it. He knew from his experience that the straw could be in that area for a week and he was in the habit of urinating his horses there before track work if they had to go into town to be worked. He did not know how long the straw had been sitting there and it was Race 3 by the time he had seen people go in there and urinate their horse between races. Mr Russo said he had trained ninety-eight winners last season and approximately eighty of them had been swabbed (apparently without incident) when suddenly he returned a caffeine swab. He pointed out that this was his livelihood and he was not stupid enough to risk it all for a \$150 share of the prize money. Caffeine was something that he definitely did not use and he emphasised that he was a "professional trainer". At the time he was leading the Premiership and he did not administer substances to his horses.

- 13 Mr Russo said that, although the pan had been dropped and he had picked it up and handed it back to Ms Bradshaw, he did not at the time raise that as an issue with the swab attendant. He said he did not think anything of it at the time and that it was just an accident - was aware that people made mistakes but he did not actually take much notice of it. He thought he had done the right thing when the pan fell right in front of him and he picked it up and handed it back to her and they had gone through the normal swab procedure. He accepted that Mr Siejka had signed on his behalf accepting that, in taking the urine sample, the proper procedures had taken place. He did not go to the Stewards with any concerns because he did not think anything of it. He had a very busy night and there was plenty to do and he already had another runner out on the track for the next race when this occurred. His job was to be a trainer and he did not think it was for him to tell the swabbing attendant to wash out the pan or what she should do. It was something that just happened. He accepted that, on the night, he was not concerned about the incident.
- 14 The Inquiry was adjourned to conduct further investigations. At the resumed Inquiry, Dr McKinney was present. Dr McKinney confirmed that the laboratory report showed the sample to contain the prohibited substance caffeine. The Stewards had no further questions and it was left to Mr Russo to question Dr McKinney.
- 15 Mr Russo informed Dr McKinney that, on the night, the swab pan was dropped into straw and some straw got into the pan and was lifted up as they went along. He said that, otherwise, he had absolutely no idea how the caffeine got into the swab and it had definitely not been in the horse's system. Dr McKinney confirmed that if there was foreign material in the pan "then that was potentially a source of contamination". When asked by the Stewards about the possibility of caffeine contamination, Dr McKinney stated:

*Well, I guess the sample in this case is somewhat curious in that only caffeine was detected.*

*In the horse CAFFEINE is metabolised to a number of substances most notably Theobromine, Theophylline and Paraxanthine and it will be normal in the case if a CAFFEINE administration to a horse to see some evidence of those substances in the urine sample as well.*

*However, in this case there was no trace of those caffeine metabolites in the urine sample, which essentially leaves us with two possible scenarios to explain the caffeine. One scenario you've already hinted at is that there is some source of contamination after the control rinse because there was nothing detected in the control but before the sample was split because it was detected in both A and B samples.*

...

*The other scenario I believe is that a dose of CAFFEINE given very close to the time of swabbing could also potentially result in the finding of CAFFEINE without detectable levels of caffeine metabolites. In other words, if the CAFFEINE had not had time to be metabolised by the horse it's possible I believe that you could find CAFFEINE in the urine without the corresponding metabolites.*

...

*... Well, if the contamination occurred after the control rinse of the pan but before the urine was split into the A and B bottles, it was in that then if there was, if there was a source of contamination there, then potentially that is one possible explanation for the findings.*

- 16 The Stewards then asked Dr McKinney if he had any previous experience with swab samples that were proved to be contaminated with caffeine. Dr McKinney related an incident that occurred earlier in the year concerning thoroughbreds where two samples had been received both showing high levels of caffeine without caffeine metabolites and how that made the laboratory "suspicious". On a follow-up investigation it was found that the caffeine in that case was also present in the control sample and that was a clear case of contamination with caffeine. The control sample was contaminated and so the whole analysis was the result of contamination. In that case there were high levels of caffeine.
- 17 In answer to a Steward's later question, Dr McKinney confirmed that in the thoroughbred case he had referred to, the caffeine levels were high and higher than the caffeine levels found in "Lilly's Lively Lad". In this case the caffeine levels were lower. Dr McKinney was asked if a person or horse had urinated on the straw prior to "Lilly's Lively Lad" going into that stall and should the pan be dropped and pick up some of the contaminated straw, whether metabolites might be detected. Dr McKinney replied that an analysis could only expect to detect metabolites if the caffeine had actually been through the horse but metabolites might be found depending on the relative quantities of the various substances. If there was very much more caffeine than the metabolites then it was possible that there could be a contamination and only show caffeine without metabolites. If they were dealing with contamination with a urine sample, there was a fairly good possibility that there would be metabolites as well from the same source of contamination. There were food stuffs such as coffee, tea, coca cola, Red Bull soft drinks and the like that all had large amounts of caffeine in them with very small amounts of other Xanthines so that if the contamination was one of those substances, he would expect to see predominantly caffeine in the urine sample taken.
- 18 Ms Bradshaw gave evidence to the Inquiry by telephone hook-up. She confirmed that she was the swabbing attendant at the Bathurst track on 21 July 2010. The Stewards informed her that, on that night, a positive return had been received and the trainer of the horse was Mr Russo.

The Stewards did not ask any further questions and left it to Mr Russo to question Ms Bradshaw. Ms Bradshaw said that she did not recall who went back with her to sign the swab and complete the details, saying that it was either Mr Russo or "Mick Seijka" but she was not sure which one of those two had performed that task. She was asked if she recalled dropping the pan and Mr Russo handing it back to her but she said she did not recall that. Mr Russo informed her that he had "witnesses to prove that actually happened" to which Ms Bradshaw replied "Okay", but she still did not recall dropping the pan. She said that if it did happen she would have rinsed it out anyway with a control sample once again in fresh water. She then asked if Mr Russo was not happy with the sample why was the form signed saying that the procedure was appropriate. Mr Russo told her that he did not actually sign the swab on the night. The pan was dropped and it all happened very quickly and he thought it was an accident on her behalf. After the sample was taken, Mr Seijka went back with her to complete the sample details. Ms Bradshaw repeated that she did not recall dropping the sampling pan and again said that, if it had happened before the swab stall, she would have rinsed the pan in the control. She did not recall that it actually happened in the swab stall. When Mr Russo said that he had witnesses who had seen that happen Ms Bradshaw replied, "No worries". There were no further questions asked of Ms Bradshaw.

19 After Ms Bradshaw had completed her evidence, the Stewards had a further discussion with Mr Russo. It was put to him that, considering that it was his livelihood, it was curious that he had not raised this irregularity on the night so as to protect himself. Mr Russo again explained that it all happened very quickly and he just did not think anything about it. On the night he was very busy with other commitments and it only occurred to him after the positive swab had been returned. Immediately after this exchange the Stewards asked Dr McKinney what was to be made of the fact that the thoroughbred contamination he had spoken about had very high levels of caffeine and in this case, the caffeine level was "quite low". Dr McKinney did not accept that the sample in this case was quite low but stated that it was lower than the level found in the thoroughbred contamination.

20 After considering the evidence and in announcing their findings, the Chief Steward stated:

*Mr Russo, the Stewards have given consideration to what you have said and we do, as we have said earlier, we do not believe contamination took place and we do find you to be in breach of the Rule as charged and as a consequence of that LILLY'S LIVELY LAD will be disqualified from the race and the placing amended accordingly.*

It is to be noted that the Stewards gave no reasons for rejecting Mr Russo's version of events or why they preferred what was said by Ms Bradshaw, if in fact, that is what they did.

## CONSIDERATION

21 Rule 190 is drawn in terms that create a strict liability offence (*Wonson v Greyhound and Harness Racing Regulatory Authority* [2005] NSWSC 585). The consequences of a finding of the presence of a prohibited substance are likely to be a severe penalty with lengthy disqualifications being the norm. Those penalties have the effect of completely removing licensed persons from their livelihood in the harness racing industry. It is in this context, therefore, that the Stewards are required to establish all the steps taken that result in a positive swab being returned.

22 The operation of Rule 190 was considered in the appeal of Binskin (18 September 2007) and in particular consideration was given to the effect of Rule 191:

22. *A potentially significant issue in this appeal, having regard to the issues raised, is the operation and effect of Rule 191. Rule 191 is in the following terms:*

- (1) *A certificate from a person or drug testing laboratory approved by the Controlling Body which certifies the presence of a prohibited substance in or on a horse at, or approximately at, a particular time, or in blood, urine, saliva or other matter or sample or specimen tested, or that a prohibited substance had at some time been administered to a horse is prima facie evidence of the matters certified.*
- (2) *If another person or drug testing laboratory approved by the Controlling Body analyses a portion of the sample or specimen referred to in sub rule (1) and certifies the presence of a prohibited substance in the sample or specimen that certification together with the certification referred to in sub rule (1) is conclusive evidence of the presence of a prohibited substance.*
- (3) *A certificate furnished under this rule which relates to blood, urine, saliva, or other matter or sample or specimen taken from a horse at a meeting shall be prima facie evidence if sub rule (1) only applies, and conclusive evidence if both sub rules (1) and (2) apply, that the horse was presented for a race not free of prohibited substances.*
- (4) *A certificate furnished under this rule which relates to blood, urine, saliva, or other matter or sample or specimen taken from a horse shall be prima facie evidence if sub rule (1) only applies, and conclusive evidence if both sub rules (1) and (2) apply, that the prohibited substance was present in or on the horse at the time the blood, urine, saliva, or other matter or sample or specimen was taken from the horse.*
- (5) *Sub rules (1) and (2) do not preclude the presence of a prohibited substance in or on a horse, or in blood, urine, saliva, or other matter or sample or specimen, or the fact that a prohibited substance had at some time been administered to a horse, being established in other ways.*

- (6) *Sub rule (3) does not preclude the fact that a horse was presented for a race not free of prohibited substances being established in other ways.*
- (7) *Notwithstanding the provisions of this rule, certificates do not possess evidentiary value nor establish an offence, where it is proved that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issues of a certificate, was materially flawed.*

23. *The effect of Rule 191(3) is that where a certificate is furnished under the Rule relating to a urine specimen taken from a horse at a meeting, that certificate is to be prima facie evidence where an approved testing laboratory has issued a certificate that the specimen contains a prohibited substance and where another authorised laboratory has confirmed the presence of a prohibited substance then those certificates act as conclusive evidence that the horse was presented for a race not free of prohibited substances. In the present appeal, it was not contested that the certificates of the AFRS and the RSC were issued by bodies authorised under the Rules and they both confirmed the presence of the prohibited substances Phenylbutazone and Oxyphenbutazone in the specimen tested. However, the conclusiveness of those certificates is set aside under Rule 191(7) where it is "proved" that the certification process or any act or omission forming part of or relevant to the process resulting in the issue of a certificate was materially flawed. Put shortly, the Rule read as a whole regards the certificates as conclusive but Rule 191(7) allows for that presumption of conclusiveness to be rebutted: however, there needs to be evidence to rebut the presumption.*

24. *The application of Rule 191 in the present case was questioned by the appellant. It was submitted that Rule 191 was concerned only with the process of analysis conducted by an authorised laboratory and did not extend to the process whereby a specimen was obtained by the swabbing steward and the procedure in handling such a specimen until it was passed into the hands of the authorised laboratory. The terms of Rule 191(7), however, are broad and adopt language covering "any act or omission forming part of or relevant to the process resulting in the issue of a certificate". The very act of taking a specimen may be regarded as a necessary part of the process of scientific analysis of that specimen and is certainly relevant to that process. It is not unusual to find strict liability offences created where the onus is placed on the defendant to establish grounds of a defence and this often occurs where issues of public health or safety are concerned. The Rules of Harness Racing, in common with Thoroughbred and Greyhound Racing, have adopted a strict liability approach to the presence of prohibited substances in order to secure public confidence in*

*the industry. As already observed, Rule 190(4) makes it clear that an offence is still committed under Rule 190(2) regardless of the circumstances in which the prohibited substances came to be present in or on the horse. Rule 191(7), within the overall context of the Rules, is consistent with that approach and effectively requires proof that the certification process (or any act or omission forming part of or relevant to the process resulting in the issuing of a certificate) was "materially flawed". There would need to be, nevertheless, acceptable evidence that the horse was swabbed and that specimen taken from the horse was submitted to the authorised laboratory for analysis. There would then need to be evidence to prove that the process or any part of it was materially flawed. It is not necessary, however, to reach a final view on this construction of Rule 191(7), especially as there has been no detailed analysis of the operation and scope of the Rule in the submissions received on appeal. The Tribunal has reached the view, consistent with the requirements of Briginshaw, that the specimen taken from Bailed Up on the night of the race was in fact the specimen handed over to and analysed by the two authorised laboratories. The appellant does not call into the question the result of that analysis or the fact that it showed the presence of a prohibited substance contrary to the Rules of Harness Racing.*

- 23 The evidence concerning this matter, on any level, cannot be considered to be satisfactory.
- first, there is the unclarified position of the unnamed member of the Racing Club that accompanied the horse to the swabbing stalls and may have been in a position to comment on Mr Russo's version of events. It is entirely unknown whether or not that person was present at the relevant time, on some earlier occasion or what the person may have seen;
  - second, it is decidedly odd that, as a self-described professional, Mr Russo did not ask the swabbing attendant to wash out the sample pan before taking the urine sample from his horse or that even later, having thought about it, request the Stewards to make a note of the event. It may well have been that he was very busy on the night with other horses that distracted him but this was obviously an important point in the process of determining whether a winner he had trained might return a positive swab;
  - third, Mr Russo, in a general way, spoke of there being witnesses but in fact the only witness identified was an employee of his stable, namely, Mr Seijka. The Tribunal has been told that Mr Seijka is a school student who works for the stable as time permits and that was the case at the time of this incident and at the time of the hearing of the appeal. Reliance is placed on the fact that Mr Russo claimed that these matters were all witnessed by Mr Seijka when Mr Seijka was also present before the Stewards - it was submitted that his silence or failure to contradict Mr Russo's story was strongly indicative of his

acceptance of that story. One difficulty with this approach is that Mr Russo spoke generally about a number of matters that he had observed and not simply the critical incidence of the alleged dropping of the pan and the straw being seen in the sampling pan. In fact, nobody, including the Stewards, directly asked Mr Seijka what he had seen at the public stalls and he was not asked to verify that part of Mr Russo's story that involved the pan falling, being picked up by Mr Russo and containing straw from the floor of the stalls and then being used unwashed to take the sample from the horse. As can be seen, there are three or four elements that needed to be clarified, not just one.

- fourth, when the matter was dealt with on appeal, Mr Seijka was not called to give evidence and while there might have been some concern not to interrupt his schooling, there was no attempt to place his evidence before the Tribunal by way of affidavit or statutory declaration. Indeed, Mr Russo did not give evidence on oath although he was present during the appeal. Ms Bradshaw was brought to the Tribunal hearing by the Stewards to make her available to be examined by Mr Coode, solicitor acting for Mr Russo, but he declined that opportunity;
- fifth, Ms Bradshaw's evidence itself was left in an unsatisfactory state because she said no more than what her usual practice would be if the pan had dropped after it had earlier been cleaned and that is, she would rinse it out again before taking a sample. At all times Ms Bradshaw appeared to be firm in her evidence that she did not recall the incident but it was never directly put to her that she could not discount the possibility that it had occurred because she had no real memory of the event. It may be unfair to expect Mr Russo to have realised the significance of having that evidence called but the Stewards should have seen the importance of having a clear statement from her about the possibility that it did occur or whether or not she totally rejected the fact that it could have occurred. While questioning Ms Bradshaw, Mr Russo told her that there were persons who had witnessed the dropping of the pan but not specifically that there was straw in the pan. Ms Bradshaw, for instance, was not told that it was in fact a stable hand employed by Mr Russo who was present and nobody at that Inquiry took steps to inform her of that fact. It may have been Ms Bradshaw's position if she had been probed more closely that, if both Mr Russo and Mr Seijka had seen the pan dropped and had seen straw in the pan and that the pan was not rinsed out before the sample was taken from the horse, then she would not disagree with their observations. Alternatively, she may not have been able to agree or disagree or she could have rejected the whole proposition;
- sixth, it was never clarified with Ms Bradshaw who it was that she had identified as "Mick Seijka";
- seventh, Dr McKinney made some observations about a case in thoroughbred racing that was being compared with the present case because the caffeine had not metabolised. Of some significance in

that comparison was the high level of caffeine found in the thoroughbred but a lower level of caffeine being found in the present case. Dr McKinney was not questioned whether this was significant or not and whether it might bear on the question of the likelihood of contamination as put forward by Mr Russo. Further, Dr McKinney was not questioned on one of his scenarios, that is, the administration of caffeine having taken place "very close to the time of swabbing". He was not asked to place that action within an actual timeframe;

- eighth, there is no evidence of a check being made of the Bathurst facilities, the use of the tea room near the stalls and the propensity for persons and horses to urinate on the straw in this area;
- ninth, at no stage was it directly put to Mr Russo that the pan had not been dropped, or, that it had been dropped but washed out again before the swab was taken.

24 Having regard to these numerous deficiencies and difficulties what then is to be made of the evidence before the Tribunal on appeal? It appears to the Tribunal that, amongst all this uncertainty, there is one clear point not in contest - that is the evidence of Dr McKinney that, if the pan had been dropped and straw got into the pan and the pan had not been rinsed before the urine sample was taken from the horse, it was "possible" that the sample could have been contaminated. He was not asked, however, whether the mere presence of a piece of straw in the pan would be enough to return the levels of caffeine found in the sample. Nevertheless, Mr Orlizki accepted that there was a serious chance of contamination if it was found that the pan was dropped and not washed out.

25 The second significant matter, urged by Mr Coode for the appellant, was that the seriousness of the offence called into operation the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336. The Tribunal has long accepted that proposition in relation to serious racing offences. Here, Mr Russo has been a licensed trainer for only a short time, on the evidence for some two years, but at the time of the alleged breach was leading the Premiership, and importantly, had no prior record regarding prohibited substances. In evidence before the Tribunal it was submitted that being the trainer of some forty to fifty horses and being in a leadership position in the trainers' premiership, it was highly unlikely that he would have risked his professional position by being involved in the administration of a prohibited substance in order to obtain a \$150 benefit, being his percentage share of the prize money. There is no suggestion in the evidence that he had secured any other benefit and there was no other investigation during the Inquiry or any indication during the Inquiry that the betting had been subject to investigation to ascertain if there were unusual betting activities. The Stewards accepted that he had numerous winners during his career but had a clean record regarding prohibited substances. In the context of this case where much of the evidence is slight or equivocal, these are significant matters.

26 The Tribunal has expressed concern at the state of the evidence and that concern applies to both sides of the record. It is, however, of some significance that the Stewards gave no indication during the Inquiry why they did not accept Mr Russo's evidence and it can only be assumed that they preferred the evidence of Ms Bradshaw but it is not known whether they accepted the practice was likely to have been followed on the night or whether they concluded, and on what evidence, that she in fact had not dropped the pan that night and it did not have straw in it. It is to be remembered that Ms Bradshaw initially did not recall who signed the swab documentation and it is an open inference that she accepted that witnesses saw her drop the pan but she simply did not recall that event. She later identified Mr Russo and "Mick Seijka" as having performed the swab documentation but neither of these people did so, assuming that Mr Mick Seijka is not in fact Liam Seijka. Understandably, her memory of these events was not strong. As earlier indicated, the Stewards bear the onus of establishing all of the steps in the return of a positive swab in order to make out a breach of Rule 190. As in the *Binskin* appeal, it is not necessary to reach a final view as to the construction of Rule 191(7). On one construction the Stewards have not been able to establish that the necessary steps were taken to obtain a proper contamination-free sample. On the other suggested construction, the appellant has demonstrated that the process of obtaining the sample was materially flawed. It follows that, on the material placed before it, the Tribunal is unable to come to the view that the pan was not dropped and as a result, that it did not have straw in it. On the evidence before it, on the balance probabilities, the Tribunal would accept Mr Russo's version of events and would do so without regarding it as being necessarily corroborated by Mr Seijka. Mr Russo's evidence was firm about the matter and the occurrence and at best Ms Bradshaw's evidence was equivocal. Her evidence about her practice was predicated upon the pan being dropped and was a response to the suggestion that witnesses had seen her drop the pan. Having regard to the importance of maintaining the integrity of the industry, the Tribunal is concerned that the decision in this matter has to be reached on such a paucity of evidence.

- 27 The orders of the Tribunal are:
- (1) The appeal is upheld and the disqualification of Mr Russo for ten months is set aside.
  - (2) The Stay order made by the Tribunal is dissolved.
  - (3) The appeal deposit is returned to the appellant.

**The Hon Justice W R Haylen**

**9 February 2011**