

**RACING APPEALS
TRIBUNAL**

NEW SOUTH WALES

Mr D B Armati

DECISION

**WEDNESDAY, 7 DECEMBER
2011**

Appellant: Licensee Mr D. THOMAS

Respondent: Harness Racing NSW

Harness Racing Rule 190(1)

Ex Tempore Decision

5 TRIBUNAL: The Tribunal has before it an appeal by the trainer Mr Thomas against a decision of the Stewards to disqualify him for a period of 14 months in respect of offences which are said to have occurred at the Menangle meeting on Saturday, 6 August 2011. The appellant has been represented by Mr Hammond who himself is instructed by a Mr Hammond; New South Wales Harness Racing, the Respondent to the appeal, was represented by Mr Sanders.

10 The two offences themselves are set out in the transcript of evidence and are not in dispute in these matters and need to be read into this decision. Each of them relates to breaches of Australian Harness Racing Rule 190(1), which is that a horse shall be presented for a race free of prohibited substances.

15 The particulars of the first of those breaches is that, as the trainer of Points North, Mr Thomas did present that horse to a race at Menangle on Saturday, 6 August 2011, Race 3, when a pre-race blood sample taken from that horse upon analysis was reported to have a total carbon dioxide level in excess of the threshold as set out in Australian Harness Racing Rule 188A(2)(a) in the sense that it had an alkalinising agent, when evidenced by total carbon dioxide, TCO₂, present at a concentration of 36 millimoles per litre in plasma. In respect of that horse, Points North, the undisputed evidence is that the reading for that horse was 38.4.

25 In respect of the second of the breaches, it is in the same terms, with the exception that the horse is Zoro and was presented at Race 4 and had a reading of 37.2.

30 The inquiry was commenced before the Stewards, presided over by the Regulatory Manager, Mr Sanders, on 24 August and at that hearing the appellant Mr Thomas requested that the horses be subject to DNA testing. There was an adjournment for that to take place. The inquiry resumed on 10 October 2011. At that inquiry, after further material was taken by the inquiry, 35 Mr Thomas admitted or, in the terms used before that inquiry, pleaded guilty to each of the two breaches particularised to him. He was then the subject of the imposition of penalties after submissions and other material in relation to character evidence and the like was taken from him. The penalties, as this Tribunal has said, comprised disqualifications of 14 months on each matter, to 40 be served, as the terms were then used, concurrently.

In respect of those matters, the Tribunal notes that the appeal itself was conducted on the basis of a severity appeal only. The evidence before the Tribunal comprised the transcript and the exhibits before the Stewards, oral 45 evidence by Mr Thomas and a document containing recent decisions of penalties imposed for breaches of Rule 190.

In addition, written submissions were made in support of the Notice of Appeal and the response thereto on behalf of the respondent. The cases cited in

respect of this matter principally have involved recent appeal decisions involving people by the name of Russo and Butterfield, relied upon by the respondent, and Waite, relied upon by the appellant.

5 The two alleged breaches, as read into these Reasons for Decision, contain in
a sense the facts relevant to this appeal. In summary, they are these: that Mr
| Thomas, a trainer at the time of some 10 years' standing, presented the two
horses to the subject race meeting at Menangle on the day in question. There
appears to be no contest he presented three horses for racing that day, two of
10 which were tested, the two horses, Points North and Zoro, returning on
subsequent analysis, the two readings contrary to the TCO2 levels fixed for
horses presented.

There is evidence before the Stewards by Mr Thomas, maintained by him after
15 being sworn today, that he does not know how the horses came to be
presented at the subject meeting with the TCO2 levels which were
subsequently found in them. This is not an alleged breach of Rules on the basis
of administering. This is a Rule that prevents a trainer from presenting a horse
with readings above the permissible limit. It is, as recent Tribunal decisions
20 have confirmed, and with which I concur, consistent with the decision in Jerrick
by Acting Justice Smart, and contrary to other Tribunal decisions, as Tribunals
have been constituted by other members, and contrary to the decision of
Justice Bell in Wonson, that this is an absolute offence, not a strict liability
offence.

25 The effect of that is this: that the Rules of Racing place an onus upon a trainer
not to present a horse which has present in it a prohibited substance. As to his
inability to explain or otherwise has, consistent with his acceptance of the
inevitability of the penalty that would be imposed upon him by the inquiry, with
30 the penalty imposed upon him in fact by the inquiry and inevitably a penalty to
flow from that, that he cannot answer that offence as to the commission of it,
but only seek to lessen his culpability by an explanation of his conduct, or lack
of conduct, as he would advance it.

35 This Tribunal cannot lose sight of the fact that, uncontested in this matter, the
recent history of this particular Rule and its breach has been that it is now the
subject of increased detection. The reasons for that are very much in the public
domain at the present. Whilst this non-compliance of 6 August occurred soon
after a greater aspect of consideration of the integrity of this industry came to
40 be in the public domain, that the conduct engaged in by this appellant and by
others who are now being detected in the commission of a breach of this
requirement, occurs in circumstances not inconsistent with what has been said
by Racing Appeals Tribunal in recent years, reflected, as it was, in Russo, to
the effect that the industry has been on notice for some time that the breach of
45 this Rule carries with it serious consequences.

The rationale for the existence of this Rule, the rationale for the existence of
Rules generally, is of wide range. It is a protective regime. A breach of this Rule
does not carry with it punishment, notwithstanding that any orders made are

the equivalent of punishment. But the function of this Tribunal and of the Stewards is to consider the facts and to consider then what must be an outcome that will provide the appropriate protection of the industry.

5 The rationales are simple. They are there to ensure that all horses compete
equally. That it is an industry which provides, in a regulatory sense, certainty to
owners and trainers and those with interests in the industry generally, beyond
those – and there are many – that are involved in the presentation of any horse
10 at a meeting, that they are competing against each other and doing so on an
equal basis. It is importantly a regime which requires a clear and positive belief
in the racing public who attend meetings and whether they wager or not – and
most importantly for those who do wager – that if they do outlay funds they can
do so in the sure knowledge that horses will be competing equally.

15 To make those remarks relevant to this particular Rule, it is one which, if a
horse is presented with the substances above what has been assessed as a
satisfactory level, that the horse will not compete equally.

20 For many years Tribunals have used the words “general and specific
deterrence”. For my part, I consider those expressions to be relevant to the
criminal law. These proceedings do not involve criminal charges; they do not
introduce the sanctions of the criminal law; they do not therefore introduce the
various sentencing principles enshrined by the common law and by statute
25 which require that those convicted of crimes be the subject, and amongst other
and a range of considerations, of being deterred from their conduct.

In this Tribunal's opinion, the need is to send a message to the individual who
is the subject of the particular non-compliance, and a message to the public at
large, both those in the industry and others, that non-compliance with Rules
30 such as these will carry with it substantial sanctions. To rephrase that in
criminal law terms, that is address a specific and general deterrence.

It is necessary for this Tribunal, in exercising its functions, to send a clear
signal to the individual trainer, if it be a trainer before it, and to the industry at
35 large, that the Rules themselves and the rationale for them will be enforced to
reinforce those rationales and to ensure that others are not minded to breach
the Rules, whatever Rule it may be, and that any individual who might be
minded to breach it will be encouraged not to do so again.

40 This Tribunal, as it is constituted today, is of the opinion that an outcome in
respect of these matters requires the Tribunal to consider, where there is the
finding of non-compliance with the Rule, whether it should give its imprimatur to
that particular individual, such that that person can be held out to the
community at large, and the racing community in particular, as a person who is
45 an appropriate person to be entrusted with the privilege of a licence under this
industry.

The next issue is, in respect of this individual, a trainer and appellant, what if
anything is necessary within those tests, restated as they have been. In dealing

with those matters, issues have arisen as to the guidelines which have been promulgated and made clearly available to all in the industry as to the consequences of breaches of certain Rules. As has been said by other and differently constituted Tribunals, as has been said by the Stewards themselves, those Rules are matters of guidance for the Stewards. They do not bind this Tribunal. In essence, in the absence of any specific Rule containing a fixed penalty, penalties are at large. However, for the benefit of the industry, there must be some form of understanding of what consequences are likely to follow.

Those guidelines are not a starting point but are informative of what those who are charged with the day-to-day administration of the integrity of this industry consider is an appropriate signal to be sent to the industry itself as to the consequences of not complying with individual Rules. Here, relevantly, the guideline provides for a first offence a penalty of 12 months' disqualification, with a discount of two months and a consideration of a licensee's other record.

It is apposite, despite the fact that these are not criminal proceedings, to consider whether in this Tribunal's opinion, a two month or one-sixth aspect of discount on a first offence is appropriate. In the criminal law, an early plea of guilty, carrying as it does the benefits to the criminal justice system at large, carries with it a 25 percent discount. The Tribunal emphasises these are not criminal proceedings. But whether, in respect of a disciplinary regime, considering what message should be sent to the community, and balancing the individual facts of any person that appears before it, this Tribunal as it is constituted considers, with great respect to the authors of those guidelines, that a two-month discount on a 12-month disqualification is less than would encourage those who are caught out in the commission of non-compliance with the Rules to readily admit their failures. It is acknowledged that in respect of certain absolute breaches, such as the one covered by Rule 190, an admission of non-compliance is, and should be, an inevitable consequence, and it is that, if there is otherwise satisfaction of the tests, an inevitable conclusion of an admission.

As to this appellant's personal circumstances, as the Tribunal has said, he is a trainer of 10 years' standing. He had, at the relevant time, built up his business to the extent that he had 20 horses in training, that he now, of course, has had to surrender those prior to the determination of the Stewards, and from 15 September he determined, after having advised the individual owners – and the number of them he has not given; it appears that four of those horses were owned by his mother – they conveyed to him that the training contract would be terminated, and it was.

Effectively he has been suffering from 15 September in a financial sense, although he did continue to care for the horses and for some of them continued to assist until they were actually removed.

He apparently has no formal qualifications of any type. His educational level is not known but he certainly has no tertiary qualifications. He, at the moment, has no income. He did have, at the time that the Stewards conducted the

inquiry, part-time work with a heavy vehicle transporting horses for other owners and trainers, and from which he was making an income, and in addition further part-time work with a local produce store. The effect of the disqualification imposed upon him was that he could not use the transport. The effect of the disqualification was, apparently in the mind of the owner or others responsible for the produce store, that he would no longer be employed on a casual basis. He therefore has no income. He is about to apply for a Newstart allowance.

He has continued to incur expenses of a personal nature. In that sense he is no different to anyone else in the community. He continued for a period of time to incur bills in respect of such things as feed and the like. In essence, however, his personal circumstances do not make him any different to anyone for whom a disqualification is found to be appropriate in their individual circumstances and in the circumstances of the breach.

In that regard, it is not unusual for Tribunals to be told, and for the facts to be recorded, that the imposition of any period of disqualification will have substantial hardship upon the individual the subject of the particular hearing. In that sense – and Tribunals have said on numerous occasions – if that was to be the way in which these non-compliances were to be dealt with, in fact nobody would lose their right to train by reason of a disqualification.

The Tribunal turns to his past history. He has been a trainer for 10 years. His driving history is before the Tribunal. With the exception of one matter on it, no other submissions were made in respect of the nature of his particular driving and record history. In that sense, it is that it can be concluded that it is not a poor driving history. If it was, that would have been brought to the attention of the Tribunal.

He has come under notice for a range of regulatory-type non-compliance matters since 2003. Those matters have, in the main, comprised relatively nominal penalties consistent with the new guidelines, some of which have been slightly higher.

The main matter of concern relates to one prior non-compliance with Rule 190. On 5 December 2008 a penalty of \$10,000 was imposed upon him. No transcript of that hearing is before this Tribunal. It appears to be common ground, and consistent with what was recorded in the transcript of the inquiry before the Stewards, and on the submissions made, that that particular non-compliance related to a matter which occurred in relation to a different substance, not the same substance for which he is before this tribunal today, that at the time that the horse was presented at the races in non-compliance with the Rule, he was in the Australian Capital Territory, that at that time his mother, who was engaged with the stable as a stablehand, had the responsibility for the presentation of the horse – and she herself was the subject of a period of disqualification as a result of her actions and her subsequent conduct in presenting the horse at the time –contrary to the Rule.

She apparently was the subject, as the Tribunal has said, to a period of disqualification.

5 In that sense, his further non-compliance can be viewed as less serious when the issue of what message must be sent to him and, in those circumstances, to the industry generally, as to a person who fails to comply with this Rule for a second time.

10 In that regard it is also to be noted that the Stewards on that occasion did not consider it necessary to impose a period of disqualification. As to what guidelines if any, what Rules if any, were generally promulgated to the industry as to the consequences of a breach is not known. However, as long ago as November 2008, Judge McGuire, the then Tribunal, in the case of Russo, had indicated the nature of penalties that would follow when there were previous
15 matters.

A number of precedents have been placed before the Tribunal in respect of the decision of Waite, relied upon by the appellant, on the basis that that particular trainer had two prior matters before he was given a 12-month disqualification.
20 The Tribunal notes two things. Firstly, that that was prior to the promulgation of the present guidelines, and the Tribunal is uninformed as to what, if any, were equivalent guidelines or otherwise at the time. And secondly, there is a change in the necessity for this Tribunal, constituted as it is now, to deal with issues that have arisen on the basis of integrity, that older decisions should not have the weight or force, to be more precise, that they might have had particularly
25 some six years ago.

The Respondent relies upon the decision of Judge McGuire in Russo and also the decision of Justice Kavanagh in Butterfield. In respect of the decision of
30 November 2008, noting again, as it was, that it occurred prior to each of those two matters to which the matter of Waite was the subject of comment, that Judge McGuire had a number of things to say. In particular – and these matters apply equally forcefully to this appellant:

35 “The trainer has been associated with the presentation of horses for racing for a sufficient period to have a full awareness of the seriousness 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.”
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And later:

45 “The connections of those horses and the punters who supported them would have been rightly indignant to learn that a rival horse was receiving assistance to their detriment.”

He then went on to say – and this Tribunal has indicated its disagreement with it in terms of deterrence and has expressed its reasons for that – this:

5 “The element of deterrence, both personal and general, looms large in a matter such as this. Mr Russo must be turned away permanently from such misconduct. 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 is entitled to see that this Tribunal takes its obligations 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.”

10 Subject to one further comment, to be a second qualification to His Honour's then decision, I endorse those remarks. The second qualification is this – and it has been expressed in Russo and been expressed in a number of recent decisions of the Tribunal – that there is to be implied from some of those decisions a suggestion that it is the function of this Tribunal to determine whether the Stewards have erred in the penalty that they have determined.

15 This Tribunal, as it is constituted today, is of the opinion that that is not the test with which it is to be engaged. This Tribunal has the function of determining on its own behalf, consistent with a legislative regime that binds it, what it considers to be the appropriate penalty. If that corresponds with the Stewards, so be it. If it does not, then also so be it, and the Tribunal will impose the penalty it considers to be appropriate. It is not a question of determining whether, for example, the Stewards were in the appropriate range of penalty as might be again the equivalent often dealt with in criminal appeals. Those then are the authorities relied upon and this Tribunal's remarks in respect of them.

25 Importantly, this Tribunal is, consistent with the submissions made on the appellant's behalf, of the strong view that the circumstances of this individual case are those upon which penalty must be determined and then having determined what is an appropriate penalty within the tests the Tribunal has propounded, consider what, having regard to the personal circumstances of this particular appellant, is the appropriate penalty for him.

30 This Tribunal is of the opinion that in respect of second offences of breaches of Rule 190, that a period of disqualification of 18 months should be a starting point. This Tribunal is of the opinion that when a person appearing for a breach of Rule 190 admits at the earliest possible opportunity their non-compliance with the provisions of that Rule, that a discount of 25 percent is appropriate. The Tribunal comes to those conclusions by reason of the view that it has formed that it is necessary for a strong message to be sent to individuals who breach the Rule, and to the industry in all its wide senses to which this Tribunal has referred, that breaches of this Rule that occur now will indeed carry serious consequences.

45 Having considered that, the issue then is whether the penalty that the Tribunal considers appropriate should be further reduced by aspects of hardship or personal circumstances that attach to this individual appellant. As the Tribunal has said, the aspects of hardship that have been raised do not, in essence, distinguish this appellant from those who are otherwise generally required to appear before Tribunals, particularly in respect of the loss of the substantial

form of income to which the majority of trainers are subject when these matters occur.

5 In the circumstances the Tribunal does not consider a further reduction is required from what it considers to be an appropriate period of penalty in respect of these matters. The Tribunal notes that by its mathematical calculation a period of disqualification in respect of each of these non-compliance of 13 months and 2 weeks is appropriate. The Tribunal notes in passing that that corresponds, coincidentally, to an approximate 14-month period that the
10 Stewards determined to be appropriate.

In respect of these matters, the other issues is this: when should those periods of disqualification commence and should they run, in terms of the criminal law, concurrently, or in terms of a breach of a matter such as this, should they run
15 together? The Tribunal notes and concurs with the reasons adopted by the Stewards, and consistent with the submissions made on behalf of the appellant, that as these two non-compliance matters occurred on the same day, that they related to the same substance, that they arose in circumstances where there is nothing else to indicate the reason for it, that each of those two
20 periods of disqualification should run together.

In those circumstances no stay was granted in respect of this matter. The Stewards imposed periods of disqualification from 10 October. In those circumstances, this Tribunal determines that Mr Thomas should be disqualified
25 in respect of each of these non-compliance matters for a period of 13 months and 2 weeks which will commence on 10 October.

The second matter – and I just seek formal assistance, Mr Sanders – I think I am also required again to make the determination that the subject horses be
30 disqualified, or is that only necessary if they ran a place?

MR SANDERS: They were not placed, but they would have to make application to appeal those, in my submission.

35 TRIBUNAL: So I am not required to make any order today in respect of those?

MR SANDERS: No.

40 TRIBUNAL: The only other – subject to one other possible submission – the other matter upon which I have not taken any submissions, and I now do, is the issue of the deposit paid in respect of this appeal. The Tribunal is required to consider as part of its rulings as to whether that deposit should be returned or forfeited. Do you wish to say anything about that, Mr Hammond?

45 MR HAMMOND: I will just get instructions. Given the Tribunal's finding, my submission would be that some or if not all of that fund should be returned to the appellant, given that there is some reduction, albeit a very low one, to the original decision. There is some reduction, the Tribunal has found on that basis.

The submission is that some of the monies, at the very least, should be returned to the appellant, Your Honour.

5 TRIBUNAL: Thank you. Mr Sanders, do you wish to make submissions on this?

MR SANDERS: Obviously we submit that there has been some costs involved in hearing this appeal from the Harness Racing New South Wales perspective, and the fee is a very miniscule one, but I'll leave that up to the Tribunal to make the decision.

10 TRIBUNAL: Thank you. Any reply?

MR HAMMOND: Only to say, of course, it's his right to appeal. The Tribunal would accept that, it's everyone's right to appeal decisions of the Stewards, that's all.

15 TRIBUNAL: Yes, thank you. In respect of the issue of the deposit, the legislation certainly provides in a protective jurisdiction a right to have the Stewards' decision the subject of a review by form of an appeal. The legislation specifically recognises that. The privilege of that, however, carries with it the necessity to pay, while it might be viewed as a very nominal fee of \$250, that in respect of there being two appeals it was determined on this matter, it was necessary to pay two fees of that nature, namely \$500. The issue becomes one in essence firstly as to the costs associated with such an appeal. In my view, the legislature has provided they lie where they are, subject to the power to make orders for costs, but more importantly as to what was the outcome of the appeal. It has to be said the appeal was conducted most properly by Mr Thomas and those who've appeared for him, there can be no criticism there, and indeed in fairness to Mr Sanders and Harness Racing New South Wales, the same has to be said.

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35 However, in view of the determination of this Tribunal, it was in more of the nature of a technical reassessment of the matter rather than in respect of some substantial issue that was identified in this appeal by way of fresh evidence or otherwise, or any error in the Stewards or otherwise, the Tribunal determines that each of the deposits should be forfeited. I think that completes this matter.

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