RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

RESERVED DECISION

TUESDAY, 16 JUNE 2020

APPELLANT SHAUN SIMIANA
RESPONDENT HARNESS RACING NSW

DECISION ON WHETHER APPELLANT HAS BREACHED THE RULES

AHR 190A(1)(a) x 5 and 196A(1)(i) and (ii) x 3

DECISION:

1. Appeals against findings of breaches of the Rules dismissed
2. Directions issued for penalty determination and determination of costs incurred by the Stewards and costs of the proceedings

1. The appellant Shaun Simiana, a licensed trainer, appeals against the decision of the stewards of 15 February 2017 to disqualify him for a period of 16 years, dated from 28 July 2016, for eight breaches of the rules.

2. The stewards laid eight charges against the appellant and they are to be grouped into out of competition testing matters and administration matters. The out of competition matters are charges 1, 2, 3, 4, 7 and the administration charges are 5, 6 and 8.

3. Before the stewards the appellant pleaded not guilty to each of the eight charges and on this appeal has maintained his denial of a breach of the rules.

4. Charges 1, 2, 3, 4, and 7 – out of competition charges – are as follows:

> Rule 190A(1)(a); Where a sample taken at any time from a horse being trained or cared for by a licensed person has detected in it any prohibited substance specified in sub-rule (2):-
> (a) The trainer or any other person who was in charge of the such horse at the relevant time shall be guilty of an offence.
> (b) The horse may be disqualified…..
>
> (2) For the purpose of sub-rule (1), the following substances are specified as prohibited substances:-
>
> (a) haematopoiesis – stimulating agents, including but not limited to erythropoietin (EPO), epoetin alfa, epoetin beta, darbepoetin alfa, and …
>
> Charge 1:
>
> Pursuant to AHRR 190A(1)(a):
>
> The particulars being that Mr Simiana as the registered trainer and the person in charge of FRANCO TIAGO NZ at the relevant time, that being leading up to and including the 17th of April 2016, when a blood sample taken from that horse at your registered property, upon analysis by three approved laboratories have reported the presence of the prohibited substance Peptide VNFYAWK and or Darbepoetin which are prohibited pursuant to Rule 190A(2)(a).

Charge 2:

Pursuant to AHRR 190A(1)(a):

The particulars being that Mr Simiana as the registered trainer and the person in charge of WALKABOUT CREEK at the relevant time, that being leading up to and including the 17th of April 2016, when a blood sample taken from that horse at your registered property, upon analysis by two approved laboratories have reported the presence of the prohibited substance Peptide VNFYAWK which are prohibited pursuant to Rule 190A(2)(a)

Charge 3:

Pursuant to AHRR 190A(1)(a):

The particulars of the charge are that you Mr Simiana as the registered trainer and the person in charge of FRANCO TIAGO NZ at the relevant time, that being leading up to and including the 18th of April 2016, when a blood sample taken from that horse at your registered property, upon analysis by two approved laboratories have reported the presence of the prohibited substance Peptide VNFYAWK which are prohibited pursuant to Rule 190A(2)(a).

Charge 4:

Pursuant to AHRR 190 A(1)(a):

The particulars of the charge are that you Mr Simiana as the registered trainer and the person in charge of WALKABOUT CREEK at the relevant time, that being leading up to and including the 18th of April 2016, when a blood sample taken from that horse at your registered property, upon analysis by two approved laboratories have reported the presence of the prohibited substance Peptide VNFYAWK which are prohibited pursuant to Rule 190A(2)(a).

Charge 7:

Pursuant to AHRR 190A(1)(a):

The particulars of the charge are that you Mr Simiana as the registered trainer and the person in charge of WALKABOUT CREEK at the relevant time, that being leading up to and including the 3rd of May 2016, when a blood sample taken from that horse at your registered property, upon analysis by two approved laboratories have reported the presence of the prohibited substance Peptide VNFYAWK which are prohibited pursuant to Rule 190A(2)(a).

5. Charges 5,6 and 8- administration charges- are as follows:

196A(1) A person shall not administer or cause to be administered to a horse any prohibited substance

(i) for the purpose of affecting the performance or behaviour of a horse in a race or of preventing its starting in a race;

Charge 5:

Pursuant to AHRR 196A (1)(i) & (2):

The particulars of the charge are that you Mr Simiana as the registered trainer of FRANCO TIAGO NZ did administer to that horse a substance containing the prohibited substance Peptide VNFYAWK, in the period leading up to and or including 17 and or 18 April 2016 for the purpose of affecting that horses performance in a race at Tabcorp Park Menangle on Tuesday 19 April 2016.

Charge 6:

Pursuant to AHRR 196A (1)(i) & (2):

The particulars of the charge are that you Mr Simiana as the registered trainer of WALKABOUT CREEK did administer to that horse a substance containing the prohibited substance Peptide VNFYAWK, in the period leading up to and or including 17 and or 18 April 2016 for the purpose of affecting that horses performance in a race at Tabcorp Park Menangle on Tuesday 19 April 2016.

Charge 8:

Pursuant to AHRR 196A (1)(i) & (2):

> The particulars of the charge are that you Mr Simiana as the registered trainer of WALKABOUT CREEK did administer to that horse a substance containing the prohibited substance Peptide VNFYAWK, in the period leading up to and or including 3 May 2016 for the purpose of affecting that horses performance in a race at Penrith Harness meeting on Thursday 5 May 2016 with (sic) was subsequently withdrawn.

6. The first issue for determination is whether the appellant has breached the rules and if an adverse finding is made the approach adopted by the parties is that the matter will be finalised on penalty issues and then a determination made in respect of costs incurred by the stewards for testing and on costs of the proceedings.

A Brief History

7. The two horses Franco Tiago NZ ("FT") and Walkabout Creek ("WC") were trained at the property of the appellant.

8. On 17 April 2016 and 18 April 2016 the stewards attended the appellant's property and took blood samples from each of the horses. The horses raced on 19 April. On 3 May 2016 the stewards attended the appellant's property and took a blood sample from Walkabout Creek which was nominated to race on 5 May but withdrawn.

9. Upon receipt of a first indication of a positive reading the stewards took submissions from the appellant and then stood him down on the 29 July 2016 under AHR 183.

10. Subsequently, the test results referred to in the charges, and which will be detailed below, were received.

11. On 5 October 2016 the stewards commenced their inquiry and then issued the eight charges. The stewards resumed their inquiry on 7 December 2016 and adjourned the matter for submissions. Submissions were requested from the then solicitors for the appellant.

12. On 13 January 2017 the then solicitors for the appellant lodged reports by Dr Andrew Clarke and Dr Xavier Conlan but made no submissions to

accompany those reports. Further time was given for submissions. No further submissions were received.

13. On 15 February 2017 the stewards issued their written decision finding each of the rules breached and imposing penalty.

14. The penalties imposed by the stewards were in respect of charges 1, 2, 3, 4 and 7 a period of disqualification in each matter of six years to be served concurrently. In each of charges 5, 6 and 8 the stewards imposed a penalty of disqualification of 10 years to be served concurrently. The stewards then cumulated the penalties for breaches 5, 6 and 8 to those for breaches 1, 2, 3, 4 and 7 and imposed a total period of disqualification of 16 years backdated to 28 July 2016, the date of his suspension.

15. The stewards made usual orders for disqualification of the horses but also made orders that the appellant pay $15,000 as costs for the analytical tests.

16. On 28 February 2017 the appellant lodged an appeal in respect of one breach only. On 1 May 2017, by consent, the appellant was permitted to amend the notice of appeal to relate to each of the adverse findings, penalties and the costs order.

17. On 1 May 2017 the appellant lodged grounds of appeal which stated:

> "The decision of the stewards was not correct or preferable."

18. On 5 May 2017 the Tribunal stayed the decision of the stewards pending the determination of the appeal.

19. Attempts were made from the lodgement of the grounds of the appeal to fix this matter for hearing. The matter was substantially delayed while each side obtained expert reports.

20. The respondent continually pressed for more detailed grounds of appeal and continued to do so up till the commencement of the hearing of the appeal. Further grounds of appeal were not given. In 2019 the Tribunal indicated that further particularisation did not have to be given because the issues raised within the expert reports were, to experts such as the practitioners and experts in this case, obvious.

21. Various s16A notices to produce were sought and dealt with.

22. On 28 October 2019 the Tribunal refused an application by the respondent to revoke the stay order.

23. In October 2019 the Tribunal fixed the appeal, with dates suitable to all experts and parties, for a five-day hearing commencing on 3 February 2020.

24. For part of the days of 3, 5 and 6 February 2020 the appeal took place.

25. By consent of the parties the Tribunal adjourned the matter for the obtaining of a transcript of evidence and then fixed a timetable for the making of submissions within a total of 35 days of the first receipt of that transcript. That timetable was not kept.

26. At the commencement of the hearing the respondent lodged an "outline of opening submissions". In accordance with the timetable the respondent lodged its "closing submissions" on 11 March 2020. On 4 May 2020 the appellant lodged written submissions and on 8 May 2020 lodged the annexures to those submissions. On 18 May 2020 the respondent lodged its reply submission.

27. As a result of the identification by the respondent in its reply submission of the fact that in his written submission the appellant had not dealt with a number of issues, the Tribunal, having considered that submission on 22 May, wrote to the appellant's solicitors inviting clarification of the issues to be determined. The seven-day period expired for a response to that request and on 3 June 2020 the appellant indicated that it agreed with the Tribunal's summation of the issues no longer pressed and the issues to be dealt with, all of which are set out below.

EVIDENCE

28. The documentary evidence comprised a hearing bundle of 1643 pages in six volumes and this bundle was subsequently heavily amended because of the issues no longer to be considered at the hearing and the experts no longer required for evidence.

29. That bundle contained, importantly, the transcript of the stewards' inquiry, the usual laboratory reports, correspondence, the reports lodged with the stewards by Drs Clarke and Conlan the evidence of the respondent's veterinary surgeon Dr Colantonio. The bundle contained the stewards' decision.

30. The new documentary evidence that remained for consideration comprised the reports of Drs Cawley, Steel, Scarth for the respondent and Dr Robertson and Mr Tinniswood for the appellant.

31. In addition, the appellant tendered six references. In addition, the appellant tendered his harness racing record.

32. The Tribunal took oral evidence from Manager of Integrity, Mr Prentice, and conducted a hot-tub of witnesses comprising Dr Cawley, Dr Steel, Dr Scarth for the respondent and Dr Robertson and Mr Tinniswood for the appellant. Dr Scarth's evidence was taken by telephone.

THE ISSUES

33. As set out above, no detailed grounds of appeal were lodged and it was necessary to glean from appellant's expert's reports the issues to be dealt with.

34. The respondent, based upon those facts, prepared a hearing plan which was provided at the commencement of the hearing. After discussions the issues to be determined were reduced at the commencement of the hearing.

35. The nine topics identified on the hearing plan were as follows: –

Topic 1:

Effect of ESAs on horse and duration of effects.

Witnesses on Topic 1 Dr Clarke and Dr Wainscott.

Topic 2:

Degradation of samples at time of screening by ARFL.

Topic 3:

Plasma separation process at ARFL including NATA breaches, potential for contamination at ARFL.

Topic 4:

Control sample provided by ARFL to HKJC.

Topic 5:

Negative RASL results.

Witnesses on Topics 2 to 5 Drs Clarke, Conlan and Mr Tinniswood for the appellant, Drs Cawley and Steel for the respondent

Topic 6:

> Testing methodologies used in this case, and methodologies not used in this case, as identified by appellant's experts.

Topic 7:

> Need to conduct further experiments to discount possible sources of peptides (other amino acids, bovine colostrum), and counter-analysis.

Topic 8:

> Sample degradation and effect of haemolysis on testing methodologies used by HKJC and LGC, and need to validate methodologies for haemolyzed samples.

Topic 9:

> Packaging of sample on receipt at LGC.

> > Witnesses required on topics 6 to 9 Drs Clarke, Barker and Robertson and Mr Tinniswood for the appellant and Drs Steel and Scarth for the respondent.

36. As a result of discussions between the parties the only topics that were to be dealt with at the hearing were Topics 2, 6 and 8.

37. Accordingly, witnesses Dr Batty, Dr Clarke, Dr Wainscott, Dr Conlan and Dr Barker were not required.

38. In his written submission after the hearing the appellant, as set out in paragraph 27 above, abandoned topics 2, 6 and 8.

39. Accordingly, the evidence which occupied two-part days involving the hot-tub of Drs Cawley, Steel, Scarth and Robertson and Mr Tinniswood was not required to be further considered. Accordingly, their reports are not summarised in this decision.

40. As a result of the appellant's submission, and as identified by the respondent in its reply submission, and as summarised in the correspondence between the Tribunal and the appellant's solicitor, the following issues remain those for consideration on the appeal:

Out of competition matters:

The proper interpretation of AHR 191 and the documents issued by the laboratories.

Duplicity in charge 1.

Administration offences:

On the administration charge the evidence to infer a breach.

The use of 196A(1)(ii).

41. The rules now remaining for consideration on the appeal, relevantly, are:

"AHR 190A(1)set out in paragraph 4 above.

AHR 191(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) …

(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) …

(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 issue of a certificate, was materially flawed.

AHR 196A(1) A person shall not administer or cause to be administered to a horse any prohibited substance

(i) for the purpose of affecting the performance or behaviour of a horse in a race or of preventing its starting in a race; or

(ii) which is detected in any sample taken from such horse prior to or following the running of any race.

(2) A person who fails to comply with sub-rule (1) is guilty of an offence."

MATTERS TO BE PROVED

Charges 1, 2, 3, 4 and 7

42. The parties have incorrectly described these as presentation offences whereas they are in fact out of competition offences.

43. The matters to be proved for 190A(1)(a) are:

sample taken from a horse
horse trained or cared for by licensed person
prohibited substance detected in a sample
the appellant was the trainer or person in charge of the horse
the prohibited substance was a haematopoiesis
relevantly the haematopoiesis was EPO and/or darbepoetin alfa

44. There is no issue that each of those ingredients is proved. That is that a sample was taken from each of the horses "FT" and "WM" and those horses were trained or cared for by licensed person Shaun Simiana and that the prohibited substances relevantly were VNFYAWK and/or darbepoetin and that as required the appellant was the trainer or person in charge of those horses. In addition, it is established that prohibited substance was a haematopoiesis because it was an EPO or darbepoetin alfa.

45. As a result of submissions, the issues now relevant to these charges are:

Under AHR 191 the use of the screen test by Australian Racing Forensic Laboratory ("ARFL").

Which certificates can the respondent use for the purposes of AHR 191?

Issues of prima facie and conclusive evidence.

Duplicity.

Use of 191(5).

Charges 5, 6 and 8:

46. Under 196A(1)(i) the matters to be proved are:

Appellant was a person.

Appellant was a registered trainer (the particulars so identify)

Did administer

To a horse

A prohibited substance

For the purpose of affecting that horse's performance

In a race.

47. There is no issue the appellant was a person, a registered trainer of the two horses "FT" and "WC" and that the substance detected, namely the peptide VNFYAWK, was a prohibited substance, as was darbepoetin.

48. As a result of the submissions the issues now to be determined are:

Did he administer?

Is administration established by inference?

The amount of the prohibited substance could not affect performance.

Is it established by inference that the appellant intended to affect performance?

The same issues on the use of the 191 certificates as are identified in the charges 1, 2, 3, 4 and 7.

49. The respondent submits that if the case under 196A(1)(i) is not found proven to the requisite extent, that the respondent relies upon 196A(1)(ii).

50. The appellant opposes the use of such a provision.

51. If it is necessary for the respondent to use 196A(1)(ii), then the matters to be proved become, allowing for the matters not in issue:

Prohibited substance detected in a sample taken from a horse

Prior to or following the running of any race.

52. In this case, if the 196A(1)(ii) is required to be used, then there is no issue identified by the appellant on the establishment by the respondent of each of the ingredients of 196A(1)(ii).

SOME KEY FACTS NOT IN ISSUE

53. The appellant was a licensed trainer before the relevant dates and trained from stables at Castlereagh.

54. The two horses “FT” and “WC” were in his care between 17 April and the 3 May 2016.

55. Out of competition blood samples were taken from each horse on 17 and 18 April and from “WC” on 3 May.

56. On 19 April each of “FT” and “WC” raced at Tabcorp Park Menangle and FT won race 5 and WC was placed fourth in race 7.

57. On 3 May 2016 “WC” was nominated to race at Penrith on 5 May but was scratched from that meeting.

58. The laboratories which conducted testing in this matter are ARFL, Racing Analytical Services Ltd (“RASL”), The Hong Kong Jockey Club Racing Laboratory (“HKJC”) and LGC Ltd (“LGC”).

59. As a result of the out of competition blood samples taken on 17 and 18 April and 3 May, the laboratories conducted tests and the following results were notified to the respondent:

HORSE	SAMPLE DATE	LABORATORY	RESULT	REPORT DATE
"FT"	17 April	ARFL	Screen ESA	27 April 2016
"FT"	17 April	RASL	Not confirmed	23 May 2016
"FT"	17 April	HKJC	VNFYAWK	27 July 2016
"FT"	17 April	LGC	Darbepoetin	8 September 2016
"WC"	17 April	ARFL	Screen ESA	27 April 2016
"WC"	17 April	HKJC	VNFYAWK	6 September 2016
"FT"	18 April	ARFL	Screen ESA	27 April 2016
"FT"	18 April	HKJC	VNFYAWK	15 September 2016
"WC"	18 April	ARFL	Screen ESA	27 April 2016
"WC"	18 April	HKJC	VNFYAWK	11 September 2016
"WC"	3 May	ARFL	Screen ESA	5 May 2016
"WC"	3 May	HKJC	VNFYAWK	6 September 2016

60. The precise wording of the certification from each of those laboratories was as follows:

ARFL – in respect of each sample:

> "I hereby certify that equine blood sample number … was found to contain the following prohibited substance on screening using Quantikine ELISA when analysed at the ARFL: erythropoiesis stimulating agent."
>
> "This document is provided exclusively for use in the investigation into matters relating to the analysis of the sample sent to the ARFL for analysis."

RASL

> "The presence of an erythropoiesis stimulating agent was not confirmed in the blood sample."

HKJC

> "The analysis of plasma sample … has shown, after immunoaffinity purification (with anti-rhEPO antibodies) and trypsin digestion, the presence of peptide VNFYAWK. The control sample … was negative."
>
> [Remarks: peptide VNFYAWK is known to be a highly specific fragment of recombinant human erythropoietin or darbepoetin alfa or methoxy polyethylene glycol-epoetin beta or recombinant human EPO – Fc]"

LGC

> "The confirmatory analysis was performed using documented LGC methods, which identified the presence of darbepoetin in the plasma sample."

61. It is common ground between the parties that the ARFL analysis, using the words "was found to contain the following prohibited substance on screening using Quantikine ELISA" does not mean a negative result.

62. A brief description of the prohibited substance and the substances identified in these proceedings will assist. The Tribunal acknowledges the substantial assistance provided by the detailed written submissions of the respondent which set out the method of detection and the meaning of the various terms used in the process of detection.

63. Erythropoietin (EPO) is endogenous in a horse. The process stimulates red blood cells.

64. EPO is a hormone protein. EPO is produced by the kidney in response to low levels of oxygen in the blood and is then transported by the blood to the bone marrow where it stimulates the production of red blood cells.

65. The exogenous proteins relevant in these proceedings are recombinant human erythropoietin (rhEPO) and DPO. There are a number of forms of exogenous EPO which are used in human medicine and those proteins are Eprex, a form of rhEPO, Aranesp, a darbepoetin alfa, DPO, and Mircera, a long acting derivative also known as PEG-EPO.

66. The testing process used in the racing codes enables distinguishing between exogenous and endogenous EPO.

67. The focus in these proceedings has been on peptides T6 and T9.

68. Proteins comprise amino acids, and there are approximately 20 different amino acids, and the way they are detected differentiates the proteins.

69. Natural equine EPO has 165 amino acids in a sequence.

70. RhEPO and DPO, also comprising 165 amino acids in a sequence, but they become present and are separately identified at various points in that sequence.

71. They are identified by cutting the proteins into smaller fragments known as peptides. Each individual peptide contains a specific sequence of amino acids and these are identified in the various sequences.

72. By looking at the sequences identified it is possible to differentiate endogenous EPO from exogenous EPO. Relevantly here, as stated, that is in the T6 and T9 peptides.

73. Without further analysing the considerable detail on the identification of the sequences, it is established that if the T6 peptide sequence VNFYAWK is identified, then this is evidence that the horse has been administered either RhEPO, DPO or PEG-DPO.

74. If the T9 peptide sequence is identified, this is evidence, in one sequence that the horse has been administered RhEPO/PEG-EPO. Or if another T9 sequence identified, then it has been administered DPO.

75. There is no issue in these proceedings that the identified peptides are prohibited substances within the meaning of 190A(2) and 188A. 188A identifies a number of prohibited substances which are relevant to 196A matters.

THE AHR 191 CERTIFICATE ISSUE

76. It is the appellant's submission that the respondent cannot rely upon the evidentiary provisions of AHR 191.

Respondent's opening submission

77. The respondent's opening submission is silent on this issue as it had not been identified to the respondent prior to the submissions at the close of the evidence.

Respondent's closing submission

78. The respondent opened with a submission setting out the difference between a prima facie case and a conclusive evidence case.

79. The respondent submitted that it had established a prima facie case sufficient to establish the breaches to the Briginshaw standard.

80. It was submitted that the respondent was able to rely upon two certificates which meant conclusive evidence which could only be displaced under the material flaw issue under 191(7).

81. Case law was set out to establish that on a prima facie case, if the effect of the evidence is sufficient to produce a case, then it can be found.

82. In anticipation of arguments that might arise on the certificates, the respondent set out that it does not rely on the ARFL documents as prima facie certificates for the purposes of AHR 191. That is, that the possible argument that the ELISA screenings cannot be treated as prima facie is a false issue.

83. The respondent's submission continued, however, that it was entitled to rely on those ARFL tests and certificates as additional evidence under AHR 191(5). That is, the ARFL screening is an important step in the chronology of sample testing even though it is only a screening. The respondent submits that that certificates do not purport to be anything more. The submission continues that the appellant has failed to establish any defect in the screening undertaken by ARFL and therefore the certificates can be relied upon. Those certificates, it is said, are a matter of weight.

84. The submission continues that it was entirely appropriate for the respondent to engage ARFL to conduct that initial screening. The process is designed to detect abnormalities and it is acknowledged that further confirmatory analysis is required. Otherwise there would be a need for confirmatory analysis of every sample.

85. The respondent concluded on this issue by saying that the ARFL screening process complements the certificates issued by HKJC and LGC and therefore has weight when considering the material in support of the out of competition breach matters.

The appellant's submissions

86. The appellant makes detailed submissions and focuses upon the stewards' decision. This is a de novo hearing and it is for the Tribunal to decide the use to be made of the certificates and does not have to find error or otherwise in the stewards' decision. Accordingly, those submissions are not analysed but the arguments to support the submissions are.

87. The appellant opens on the basis that the ARFL process is a screening test and not a positive detection of a prohibited substance – ESA – therefore, that certification cannot be used under 191(1) as a certificate.

88. It is then submitted that the respondent cannot pick and choose which certificates it will use.

89. The appellant correctly points to case law that establishes that equivalent provisions in the Australian Rules of Racing are facilitative and do not exclude other means of proof. That case law establishes that the 191 process is a shortcut process for the establishment of certain matters. It is also submitted that the case law establishes that if that shortcut process is to be used, all of the prescribed steps must be complied with. Reliance is placed on Racing Victoria Ltd v Kavanagh [2017] VSCA 334 at 80 - 84.

90. The appellant's submission continues that the 191 process can only be used for the first two certificate tests undertaken. That is, that the respondent is limited to the use of two out of two tests and that each of those tests must establish a positive to a prohibited substance.

91. Here it is submitted that the ARFL process is the first test and that there was no detection of any prohibited substance, only that a prohibited substance could not be excluded.

92. Therefore, it was submitted that as there was no first certificate there is no prima facie evidence established under 191(1).

93. The submission continued that the second certificate is not admissible without a first certificate establishing a positive. That is, that the HKJC and LGC certificates are not admissible.

94. Reliance for the propositions are to be found, it is submitted, in Grant v Queensland Harness Racing Board [2006] QRAT 41 where it was said:

> "Effectively, the intent of the legislation is to identify that in the first instance a testing laboratory, if it issues a certificate identifying that a prohibited substance is present in a horse at or above certain levels, is then deemed to be only prima facie evidence of the matters to which that certificate relates. Subsection (2) however is a confirmatory procedure which when that second certificate by that confirmatory analysing laboratory is issued, cements the determination and makes the issue of the second certificate admissible as evidence of conclusive determination of the presence of the prohibited substance in question."

95. The submission continues that for charge 1, where there are three certificates, the same arguments are advanced. It is therefore said that the respondent cannot use 191(1) and (2) and the certificates are not admissible.

96. It is then submitted that the respondent has not put its case in any other way and that that is the case the appellant came to meet.

97. It is further submitted that the respondent cannot use other provisions of AHR 191 and that they did not do so.

98. Therefore, in conclusion, it is submitted that there is no evidence of a prohibited substance from the certification process.

Respondent in reply

99. In answer to the 191 arguments of the appellant that the respondent says the particulars do not address "certification" but "analysis" by two laboratories, therefore as the particulars refer to analysis by two approved laboratories, the respondent can use the screening process as a first step in the usual analytical process before confirmatory testing.

100. It is said that allowing for the way in which the Tribunal considers particulars are to be considered, quotes Vasili v Racing NSW RAT NSW 12 June 2019 at 38. Relying on the approach identified there, it is said that the particulars do not expressly state that each laboratory certified or reported the presence of the relevant prohibited substance. Vasili relevantly stated:

> "As long as the particulars fairly cover the case being brought and are sufficiently clear, then they are not to be read down."

101. The respondent then sets out principles relating to statutory interpretation to prove that the respondent does not have to rely on the first two documents. It says the appellant is wrong in submitting that that is the case. Reliance is placed upon Day V Sanders; Day v Harness Racing New South Wales [2015] NSW CA 324 where Basten JA said at 77:

> "The assumption underlying the scheme of r 191 is that two properly obtained certificates are sufficient in themselves to provide conclusive evidence of the offence, unless it can be shown that the method by which they were obtained was materially flawed, in which case they do not 'establish an offence'. The express statement of such a proviso, with no reference to any other basis for justification or excuse, is powerful evidence that no other defence was intended: these two provisions taken together are decisive in their effect."

102. The respondent submits that the certificates were properly obtained following usual processes, proper methodology and with quality sampling and testing.

103. The submission continues that 191 does not refer to first or second certificates only "a certificate" and therefore the Australian Rules of Racing

can be distinguished. It is submitted that absent a definition of certificate in the AHR and applying a purposive test, looking to the public interest for integrity requires strict measures. Further reliance was placed on Day v Sanders etc at 79 where His Honour said in part:

> "The second consideration which supports the strictness of the regime is the nature of the licensing scheme … It is clear that, as with any sport, and particularly sports using non-human animals, the public interest requires strict measures to identify unacceptable performance enhancing substances and to control or prevent their administration."

104. The next submission of the respondent is the universality of drug testing regimes which have a screening test by way of a triaging of samples to ensure that only those with abnormalities go to confirmation. The respondent submits the common sense practical effect of the rule cannot be that submitted by the appellant.

105. Lastly, the respondent submits on these points that it has always been its case that the HKJC certificates are the first certificates and that the ARFL documents are merely further evidence in support of those certificates.

106. Next it is submitted that AHR 191(5), which enables the establishment of prohibited substance in other ways, was always an alive issue in this matter. Quotations from the stewards' decision to this effect are given. They stated in part at paragraph 30 of their decision:

> "… although the ARFL test results are from a screening only, the stewards are further satisfied that these can form part of the evidence …"

107. In support it is said this is a de novo appeal and the respondent is entitled to rely on the provisions of sub-rule (5).

Conclusion

108. The Tribunal agrees with the respondent's arguments in their entirety. It would be repetitive to set them out again in detail.

109. In summary, the Tribunal finds that there is no construction to be placed on 191 that inserts the words "first" or "second" in relation to certificates to be used.

110. The respondent, the regulator, can determine which certificates it will use. It is not the case of picking and choosing between certificates.

111. The Tribunal agrees that the ARFL is a screening test only, consistent with universal practice. It is not a first certificate or a 191(1) certificate.

112. The HKJC is a certificate for the purposes of 191(1) – it could be called a first certificate for clarity in this case.

113. The HKJC certificate is prima facie evidence of the presence of the prohibited substance identified.

114. The LGC certificate is a certificate for the purposes of 191(2) in Charge 1. It could be called a second certificate.

115. The LGC certificate, as a second certificate establishes conclusive evidence of the presence of the prohibited substance as particularised in Charge 1.

116. The absence of a further certificate in Charges 2, 3, 4, 5, 6, 7 and 8 is not fatal.

117. This is a de novo hearing.

118. The opening submissions of the respondent before the Tribunal and the appellant at the opening of the hearing enlivened 191(5). Paragraph 8 of the respondent's opening submission of 3 February 2020 stated:

> "HRNSW is entitled to establish the presence of a prohibited substance in other ways: AHR 191(5)."

119. The 191(5) issue was in any event identified by the stewards.

120. Absent any other evidence of disadvantage, the Tribunal is satisfied that 191(5) is available to the respondent to use. It is facilitative and does not have to be pleaded.

121. However the respondent does not need to rely on 191(5).

122. The evidence otherwise satisfies the Tribunal that there is a prima facie case of the presence of a prohibited substance for Charges 2 to 8 from the certificate of the HKJC. The proper steps for the certification were followed.

123. That evidence is unchallenged.

124. However, it is evidence, in addition, the respondent submits and the Tribunal agrees, that the respondent can call in aid the ARFL document.

125. The ARFL document, allowing for the disclaimer it is for "investigating" matters, as a screen does refer to a finding of the prohibited substance

ESA. It is not a declaration of a positive. The analysis does not mean it is negative. It is not prima facie evidence of a prohibited substance. It goes to an abnormality in the presence of an ESA, that is, a screen for a yes or no answer, because the analysis shows an elevated response above a zero level.

126. The ARFL report, therefore, is a piece of evidence.

127. There is the further weight to be given to the screen test in that between 1 February 2019 and 29 March 2019 ARFL did 12,670 equine samples with the screen and found only one other abnormality of an ESA. In addition, the screen test was done within a time of ten days relative to Charges 1 and 2, nine days relative to Charges 3 and 4, and two days relative to Charge 5.

128. In Charges 2 to 8 the Tribunal is satisfied that the prohibited substance VNFYAWK was present in the horses, and that is established by the unchallenged prima facie evidence in the certificate of HKJC.

129. In addition, the Tribunal is secondly satisfied that the respondent proves that part of the case, by the totality of evidence, comprising the HKJC certificate as prima facie evidence, confirmed by the ARFL screening analysis and in the absence of any challenging evidence.

130. As stated 191(5) is not needed.

131. If 191(5) was needed, then that provision used on those findings would be sufficient to establish the prohibited substance was present as particularised.

132. The Tribunal repeats that this is a de novo hearing and it has to make findings and does not seek to review the correctness of the stewards' decision.

DUPLICITY

Appellant's submission

133. For the first time in the proceedings in its written submission the appellant submitted that Charge 1 fails for duplicity. That is, the Tribunal should dismiss Charge 1.

134. This submission is based upon the particulars for Charge 1, which relevantly read "the presence of the prohibited substance peptide VNFYAWK and/or darbepoetin …"

135. The appellant's submission is contained in five very short paragraphs.

136. The submission is that Charge 1 particularises the prohibited substance by naming two substances separated by and/or.

137. Therefore, it is submitted that particulars of alternatives are pleaded because each of those substances have different matters to be proven and a single offence is not enunciated.

138. The submission continues that procedural fairness means it ought not to be permitted and reliance is placed upon Mansbridge v Jason Nichols & The County Court of Victoria [2004] VSC 530.

139. The appellant quoted paragraph 68 of that decision:

> "Each act of cruelty should have been the subject of a separate charge ... created a separate offence each time … Johnson v Miller (1937) 59 CLR 467 at 498 … separate offences should be the subject of separate charges … resulted in a count which manifested the defect of latent duplicity … enough to strike at the validity of the trial."

Respondent in reply

140. The respondent submits that VNFYAWK is a component of the protein darbepoetin, therefore there are not two separate and distinct substances.

141. The respondent submits that there has been no procedural unfairness as the appellant raised no such issue with the stewards and this appeal was conducted without any complaint.

142. Having regard to Mansbridge, it is submitted that separate acts are not particularised and that there are no separate acts but one presentation offence. In particular, it is submitted that there had been one presentation offence in respect of one horse on one date, that the charge is self-evidently not duplicitous.

143. Reliance is placed upon Mansbridge at 52:

> "There will be no duplicity if a charge refers to one act of cruelty having certain characteristics, as opposed to more than one such act …".

Conclusion

144. It is apparent from Johnson v Miller cited above that the fact that this issue was not raised earlier in the hearing does not prevent a determination of duplicity now.

145. The particular refers to “the prohibited substance” then names “peptide VNFYAWK and/or darbepoetin”. But it is noted that the particulars go on to say “which are prohibited substances pursuant to rule 190A(2)(a).

146. It is noted that the particulars refer to “the prohibited substance” and not “a prohibited substance” and then says “which are”. The particulars do not refer to “a prohibited substance”.

147. 190A(2)(a) refers to haematopoiesis-stimulating agents and then provides a list which includes EPO and darbepoetin alfa.

148. Haematopoiesis is the process that leads to the formation of blood cells. Therefore, haematopoiesis-stimulating agents are ones which facilitate that. The ones that do so are not exclusively listed.

149. The Tribunal notes that the presence of a prohibited substance and the fact it is a prohibited substance was not an issue in the proceedings.

150. It is apparent that the rule focuses on haematopoiesis-stimulating agents as a prohibited substance and that can be found by various agents.

151. The peptides found enable identification of substance administration.

152. If the T6 peptide VNFYAWK, found by analysis of amino acids, is found, then the horse has been administered rhEPO, DPO or PEG-DPO. If the T9 peptide is found, then the two sequences are available. The relevant sequence for analysis of amino acids in this sample identified the administration of DPO.

153. HKJC identified the peptide VNFYAWK. The HKJC certificate said, relevantly, in its remarks, as set out above:

> “Peptide VNFYAWK is known to be a highly specific fragment of recombinant human erythropoietin or darbepoetin alfa …”

154. The peptide VNFYAWK is T6.

155. The LGC certificate identified darbepoetin. The data pack shows that was by identifying the T6 VNFYAWK and T9 DPO peptides. The report stated the search was for peptides of EPOs and these included DPO.

156. The evidence establishes an ESA can be darbepoetin alfa known as DPO.

157. The issue then becomes whether the peptide VNFYAWK and darbepoetin are different prohibited substances.

158. The real test, although not precisely particularised, is the need to establish haematopoiesis-stimulating agents.

159. It is necessary to focus on the particulars pleaded and that is the case asked to be met.

160. If T6 VNFYAWK is found then DPO was administered.

161. If T9 DPO was found then DPO was administered.

162. The finding of the two different peptides shows the administration of DPO.

163. DPO is darbepoetin alfa and ESA.

164. Darbepoetin alfa is an HSA – see 190A(2)(a).

165. Haematopoiesis-stimulating agents are a prohibited substance.

166. Therefore what is particularised is the presence of a peptide T6 VNFYAWK from a DPO and darbepoetin, which is a DPO.

167. Therefore, as submitted, T6 VNFYAWK peptide is a component of darbepoetin. VNFYAWK is a fragment of Darboetin.

168. Therefore, the particulars do not raise a different prohibited substance, they are not alternatives. Different matters do not need to be proved.

169. A single offence is identified without separate acts.

170. While not the subject of submissions, the Tribunal proceeds on the basis that darbepoetin and darbepoetin alfa do not need to be distinguished. The Tribunal's research on this issue was unhelpful.

171. In addition, the appellant was clearly a notice that sub-rule 190A(2)(a) was the issue.

172. The Tribunal has dealt with particulars in stewards' cases on a number of occasions. The quotation from Vasili was set out above.

173. Applying those principles here, the Tribunal is satisfied that procedural fairness is not breached, the appellant knows the case being put and suffers no disadvantage. The particulars fairly reflect the charge that is the prohibited substance in issue. There is one prohibited substance in issue and the matters pleaded go to its characteristics.

174. The duplicity argument is not sustained.

THE ADMINISTRATION CHARGE

175. These are Charges 5, 6 and 8. The ingredients needed to be established for these three charges under 196A(1)(i) were set out in paragraph 46 above.

176. The respondent must prove circumstantial issues, namely that the appellant did administer and did so for a specific purpose. The Tribunal will deal with these two issues separately.

177. The respondent concedes an element of intent in both limbs is required.

178. The necessary facts are canvassed in the submissions below.

179. A circumstantial case requires comfortable satisfaction as required by Briginshaw.

Administered

180. Administered is not defined. It has its ordinary meaning and the necessity to define it more closely has not been raised as an issue.

181. It is common ground there is no direct evidence the appellant administered or caused to be administered ("administered").

182. It is a case of finding the charges established on circumstantial evidence.

Respondent's Opening Submission

183. The opening submissions are essentially repeated in the closing submissions so they will be analysed later but supplemented from matters in the opening submission when necessary.

Respondent's Closing Submission

184. It is submitted that the prohibited substance is exogenous to a horse. Therefore, to be present, the prohibited substance must be administered to a horse.

185. It is submitted that at all relevant times the appellant had the exclusive care and control of the two horses. The Tribunal notes the evidence of the appellant to the inquiry that no one else attended the horse at any relevant time.

186. The respondent submits that the appellant has no explanation for the presence of the prohibited substances in the horses.

187. The respondent submits that the appellant has not administered a legitimate therapeutic substance to the two horses that would be relevant.

188. The respondent points out the appellant failed to tell the stewards' inquiry that he administered intravenously Hippiron to treat an iron deficiency to the two horses and no others. The appellant says it must have slipped his mind, and also the necessity to record it in the log book. The respondent submits this is consistent with the appellant administering the subject prohibited substances.

189. The respondent continues in its submission that the security measures at his property would make it difficult for a stranger to access and administer to the horses. These measures included a high fence, security cameras – although not at the stables – dogs and a remote-controlled front gate.

190. The fact that the prohibited substance was detected in two horses, it is submitted, was not a coincidence.

191. The fact that the two horses were each due to race at relevant sample collection times, therefore the proximity to race day indicates that the administration was to affect performance.

192. There is unchallenged evidence from Mr Prentice that the appellant phoned the respondent's offices from time to time to see if his horses were running before race fields were published. Mr Prentice says this was unusual and aroused suspicion. This was submitted to demonstrate planning. No other explanation for those inquiries has been advanced by the appellant.

193. Mr Prentice gave evidence and was cross-examined at length on performance improvement of the horses once under the appellant's training and then their decline after they were transferred.

194. Mr Prentice's affidavit set out his duties, the appellant's training record, analysed the performance of each of the horses under the appellant and under other trainers and with different drivers. He summarised the appellant's phone calls to Harness Racing and this created suspicion. Mr Prentice referred to stable observations and his experience with prohibited substances.

195. Mr Prentice said that the appellant's training record from 2004 to 2020 showed an improvement from between 9 percent and 42 percent to 63.38 percent in 2015/16 for winners and places and that this was very unusual.

196. Mr Prentice analysed “FT’s” racing history with different trainers in New Zealand and Australia. He said “FT” only had wins under the appellant and with his chosen driver and then that success ceased after transfer.

197. Mr Prentice analysed “WC” for the same issues. The appellant had a win/place rate of 60 percent with a range of other trainers of 14 to 67 percent. It is noted that other trainers also had wins with “WC”.

198. The respondent submitted that Mr Prentice was sufficiently experienced to make the observations about improvements and to analyse a sufficient range of comparable stables.

199. The respondent says the cross examination about “FT” having injured feet at relevant times in the appellant’s care was the same when it was with other trainers. It was submitted, however, that its performance with the appellant was markedly improved.

200. Therefore, the respondent submitted the Tribunal should accept Mr Prentice’s evidence on the marked improvements in performance of the two horses.

Appellants submissions

201. The appellant submits that no weight should be placed on Mr Prentice’s evidence.

202. It was submitted that Mr Prentice was unqualified in various aspects, that is, the manner in which a horse is driven, driving or race tactics, and the fact that he did not know a horse’s optimal racing years were such he should not be accepted. It was also submitted that he had not objectively researched various subjective opinions that he had set out.

203. It was said that Mr Prentice should not be relied upon because:

> “Unqualified to give evidence about the manner in which his horses were driven, driving or race tactics were not within his field of expertise.
>
> He was unaware of what year in relation to age would generally be considered to be a horse’s optimal racing years.
>
> He had not objectively researched his subjective opinions on trainers’ winning and placing percentages, trainers whose records he did not look at, and that he was unaware about comprehensive statistics published on the industry website.”

204. In support of the submission that there is no circumstantial case against the appellant, the appellant submits that there is no evidence of the following:

> no evidence of possession of EPO at any time
> no evidence of any connection of the appellant to any person capable of sourcing EPO
> no incriminatory evidence of an electronic nature
> no evidence to suggest stable inspections were anything other than a surprise to the appellant
> no evidence of any change in driving pattern of horses
> no evidence of irregular betting
> no evidence of any discernible effect upon performance
> no video surveillance of stables and paddocks
> no alarm or other security system monitoring
> no evidence to suggest that the side and back boundaries of the appellant's property are permeable.

205. The appellant continues in the submission that there is positive evidence in his favour.

206. That positive evidence is his denials, and consistent denials, of any knowledge of EPOs or their administration.

207. Particular emphasis is placed on his good character on the issue of his guilt. That evidence is referenced, and his record with harness racing. Those matters are said to show good character generally without priors and no disqualifications or suspensions.

208. It is necessary for the Tribunal to turn to those six references relevant to matters touching upon his character on the issue of guilt.

209. Mitchell Dickens, 31 January 2020, known the appellant for 15 years, who is a good friend, and trains horses for him. Regular visitor to the stables. Awareness of the charges. At no time has he heard or seen the appellant speaking of the use of any illegal substances. He is the type of person who helps out neighbours and other entities. Summarised as a person of good character who Mr Dickens could not see breaking the rules by administering any banned substance, including EPO, to any of his horses.

210. Craig Chesham, undated, known the appellant for 10 years and who has trained horses for him. Aware of the allegations. He has never heard of the appellant speak of administering any illegal substances. A person always ready to help other trainers.

211. Dr Robson, veterinary surgeon, 27 January 2020, known the appellant for 15 years and provided veterinary services for him. Very friendly and honest person and a devoted family man who is very hard-working. A very thorough horse trainer who has never requested that Dr Robson dispense him any illegal or unlicensed medications. Assesses him as an upstanding member of the industry.

212. Barbara Spackman, 1 February 2020, a next-door neighbour. A family man who volunteers to assist her. Aware of the charges and states there is no way he would do such a thing

213. Jacqueline Graham, 31 January 2020, older sister and herself a licensed trainer and representative in mini-trotting. Assesses him as hard-working and willing to help others with an attention to detail. She says he is a very anti-drug-type person. She is aware of the charges and says he would never use EPO.

214. Robert Morris, undated, has known him for 10 years as a trainer and driver and been able to observe him. Aware of these proceedings. States appellant is very distressed about them and is an honest person who is very cautious about what he feeds his horses to ensure he follows the rules. He has never been requested to undertake any illegal activity on behalf of the appellant. He finds this alleged incident out of character.

215. The appellant's harness racing record up to 4 February 2020 shows he first came under notice in April 2006 and has only come under notice for normal driving breaches. There are no disqualifications shown on that record. On 2 January 2020 he was suspended under AHR 183 on four matters.

Respondent in reply

216. The respondent relies upon the above summarised evidence to establish its case and says the appellant has only really submitted on matters where there is an absence of evidence. On one point it is submitted that the appellant's apparent surprise at a stable inspection was simply that he was caught out.

217. The respondent submits that the challenges to Mr Prentice's evidence on driving patterns is irrelevant.

218. The respondent strongly relies on the performance improvement as evidence in its favour.

219. On the absence of security at the stables, the respondent submits the existing cameras have not given evidence of any other surprising activity.

220. The respondent submits that the appellant has not given evidence to the Tribunal and been subject to cross-examination, therefore cannot submit that he has made consistent denials.

221. The respondent says that the appellant's evidence did not identify any good character.

Conclusion

222. The Tribunal accepts that at the time he is said to have engaged in this conduct he has established good character relevant to the issue of whether he breached the rules. It is a question of whether that fact outweighs other matters.

223. The Tribunal has not been able to assess the credibility of the appellant by observations of him in evidence before it.

224. The Tribunal accepts his references support the fact that his referees believe he would not breach these rules.

225. This is a circumstantial evidence case. The respondent must prove more than mere conjecture, disprove reasonable explanations of the appellant, demonstrate the evidence as a whole proves the case and not piecemeal bits of evidence. The more probable inferences must be established.

226. Each party has set out the inferences for and against. They are not repeated. Each inference is considered on its own then each considered together.

227. The Tribunal accepts that Mr Prentice is not an expert in all fields – he does not put his evidence forward otherwise. He is an experienced integrity manager. His affidavit sets out that experience and his duties. They are not challenged.

228. Having regard to the cross-examination of Mr Prentice, there is no doubt he could have made a number of additional inquiries and undertaken other research.

229. However, on the key facts his evidence seeks to establish, his evidence remains objectively established.

230. His analysis of the form for the two horses, the appellant's form as against other trainers, and the results of the various drivers engaged is unchallenged by the facts. There are certainly variables established by cross-examination that could be considered.

231. But Mr Prentice's evidence establishes that at relevant times the performances of the two horses improved. With "FT" it fell away dramatically after it left his training and with "WC" less so. In 2015/16, the relevant period, his percentages improved dramatically and that is unexplained by the appellant.

232. Mr Prentice's evidence on suspicious activities of the appellant in phoning Harness Racing NSW for race field information is established and unexplained.

233. The fact the appellant only cared for the two horses and no one else was likely to have been at the property, because of that evidence and the security issues, coupled with the fact that the appellant's two horses, not one, and each due to race, have the same prohibited substance is very telling.

234. The Tribunal accepts that the security issue is not an overwhelming factor against the appellant. The prospect of access by others to "nobble" is not eliminated by security measures but there is no other evidence to raise prospects of "nobbling".

235. The absence of any other explanation, other than denial, leaves these findings open.

236. The fact the prohibited substance could only be present by administration is also very telling.

237. All of these facts are established and are not conjecture.

238. The weight to be given to them is reasonable and when taken together can lead to comfortable satisfaction that the necessary probable inferences of administration are established.

239. But has the respondent eliminated other pieces of evidence that reasonably remain to remove that probable inference.

240. The Tribunal has found good character in the appellant favourably.

241. Each of the appellant's submissions that there is a lack of evidence, except driving pattern performance, is correct. The key ones are no possession of a prohibited substance or associated with possessors, no betting, no positive security evidence or electronic evidence.

242. The driving pattern evidence does not take the evidence of Mr Prentice from consideration.

243. The submission of the performance of the two horses in early 2015 does not address the overall performance improvement in the two horses and consideration of the appellant as a trainer from consideration.

244. The fact the appellant denies the prohibited substance or knowledge of it, together with good character, is accepted.

245. In the end it is the weight to be given to the fact that two horses in his sole care are due to race, after he made inquiries about his horses in race fields generally, each had the prohibited substance and the prohibited substance could only have been administered. In the absence of any other acceptable explanation these are key factors.

246. The respondent eliminates the other reasonable explanations advanced by the appellant.

247. The Tribunal finds the circumstantial case advanced by the respondent comfortably established as a reasonable inference of administration of the prohibited substance to the two horses established and eliminates the inferences consistent with innocence.

For the purpose of affecting performance

248. It is necessary for the respondent to prove that the administration of the prohibited substance was:

> "(i) for the purpose of affecting the performance or behaviour of a horse in a race or preventing it starting in a race."

249. Relevant to the particulars identified by the respondent in the charge, the respondent needs to prove:

> "For the purposes of affecting the performance of the horses in a race."

250. This is the case where there is no direct evidence and it is a circumstantial evidence case.

251. Again the facts are sufficiently set out in the submissions

Respondent's opening submission

252. This did not touch upon this issue.

Respondent's closing submission

253. The respondent understood it was not an issue that EPO/DPO has an effect on performance of a horse. Accordingly, the expert evidence on this point was either not called or not examined.

254. The respondent submits that an administration shortly before a race meant an intention to affect performance in those races. There would be no legitimate forensic purpose to do so, therefore the logical inference is it was intended to improve performance in a race.

255. That is, it is submitted, no other conceivable reason for such an administration can exist. Therefore it is said there is a temporal connection that is compelling.

Appellant's submission

256. The appellant opens by submitting minute concentrations were detected and this meant that EPO/DPO were not capable of being performance enhancing. The evidence to support this submission was not identified.

257. The appellant submits that when or how the prohibited substance became present is unknown and the respondent's case on this is speculative.

258. The appellant submits a specific purpose must be established and not other purposes, for example, injury management, horse husbandry etc.

259. The appellant submits that the Tribunal must engage in speculation to exclude other purposes. The appellant relies upon the other submissions made on the administration issue and says there is insufficient evidence to find a circumstantial case.

Respondent's reply submission

260. The respondent submits the reasonable intention submission of the appellant must be excluded.

261. The respondent submits the appellant has not led evidence of other purposes, for example, injury management etc.

262. The respondent submits the prohibited substance can have no legitimate application for injury management and the like and this was accepted at the inquiry.

Conclusion

263. There is no legitimate forensic purpose for the administration to a horse of a prohibited substance such as an exogenous EPO/DPO.

264. It can only be administered for wrongful purposes.

265. An administration just before a race can only be for the purposes of the race performance.

266. The fact it was in the two horses on one occasion and one of those on the second occasion is not explained way.

267. The appellant's submission on the fact a small amount was detected is not an alive issue in the proceedings. In any event, it is the intention related to the purpose that must be proved and not a discounting of the fact it was not capable of affecting performance, as actually administered, as the test.

268. The Tribunal concludes, having found administration, that the case can, on the facts outlined, be that there was no other intention in that administration so close to race day of a prohibited substance with no legitimate therapeutic purpose than to do other than affect performance must be found.

269. The Tribunal is comfortably satisfied that the respondent has proven a circumstantial case on each of the three charges to the Briginshaw standard and proven each of the ingredients in the rule and the particulars.

270. The determination is that the 196A(1)(i) cases, Charges 5, 6 and 8, are established.

The 196A(1)(ii) issue

271. Having regard to the finding of the breach of 196A(1)(i), there is no need to determine the issue of 196A(1)(ii). However, for completeness, and in case the Tribunal need consider it, the issue is determined.

272. The capacity to rely upon 196A(1)(ii) was raised on the appeal in opening oral submissions by the appellant. On opening at the hearing, the appellant asked for clarification because the stewards' decision setting out the charges referred to 196A(1)(i) and (2) (sic (ii)). However, the particulars given only referred to (i) issues.

273. The respondent at opening undertook to come back to this issue but did not at the hearing.

Respondent's closing submission

274. The respondent submitted that if (i) was not proved the Tribunal can find (ii) proven.

275. Reliance was placed on section 17A(1)(b) of the Racing Appeals Tribunal Act which states:

> "… vary the decision by substituting any decision that could have been made by the steward …"

276. Therefore, it is submitted that the Tribunal can substitute a decision that the stewards could have made and that they in fact could have found a breach of (ii).

277. The respondent acknowledged that Rule 256(7) states that before the stewards could find a breach the appellant must have been given the opportunity to cross-examine, make submissions and for the evidence against him to be identified.

278. The respondent submitted that the Tribunal therefore can find on the evidence, which is the same, that the appellant could have cross-examined and can make submissions on the issue is such that this provision can be used.

The appellant's submissions

279. The appellant submits this would be a denial of procedural fairness as the practice to charge alternative offences was not adopted.

280. It is submitted that the appellant may have approached the appeal differently and, for example, given evidence. These matters of course must be speculative.

281. It is submitted by the appellant that the stewards did not consider this alternative.

Respondent's reply submission

282. The respondent says this provision is a fallback because it principally relies on (i).

283. The respondent submits it would be illogical for the appellant to give evidence on a lesser charge as he would then be cross-examined for all purposes.

Conclusion

284. A breach of (ii) is not the same breach as set out in (i).

285. A breach of (ii) requires less to be proved with the removal of a specified purpose.

286. The fact (ii) is different, requiring detection of a prohibited substance, really makes little difference to the administration issue because without detection of a prohibited substance there would be no 196A case brought at all. The need for a relationship to a race is common.

287. There is no specificity in 196A of the rules, or the rules generally, that (ii) is an alternative, or fallback, from (i). It might be obvious, but that is different.

288. It could have been used that way by the stewards but they did not refer to it clearly, use it, particularise it, charge it or raise it before the recent opening submissions to the Tribunal.

289. It was not revisited in the oral part of this appeal hearing.

290. It is accepted that additional evidence is not required from the respondent to prove (ii) as against (i).

291. If allowed, there is on the above findings an obvious adverse finding available. The absence of evidence for the appellant is speculative and hard to envisage what it could possibly be when (ii) alone is considered absent further consideration of the purpose ingredient.

292. In the Tribunal's opinion, absent any other provision in the rules or specificity by the stewards, an alternative is not available under the rules.

293. That leaves section 17A of the Act.

294. The Tribunal is of the opinion that s17A(1)(b), allowing substitution of a decision that the stewards could have made, is not an empowerment as submitted.

295. The text and context considerations of "any decision" versus "the decision" must be considered to be more limited.

296. Case law will confirm such a reading down.

297. In Vasili v Racing NSW [2018] NSW SC 451 Garling J said at 134:

> "… the Tribunal is seized with the jurisdiction with respect to 'the decision appealed against'. That is the whole of the decision, including all parts of it. Here that means the imposition…"

298. Therefore, section 17A cannot be read so that part of this decision can be substituted.

299. It is reinforcement that a new charge is not encompassed.

300. But the Tribunal's power in a de novo hearing is to deal with the charge before the stewards, not to substitute or determine charges unless they are specifically put to the appellant.

301. The Tribunal has dealt with a number of cases where changes to the particulars are sought and the latest was Ross v Harness Racing NSW 20 May 2020. Some key points found in that matter are the legal nature of the charge could change and the particular acts change if there is an amendment to particulars.

302. The Tribunal in any event would decline to exercise a discretion to allow such a change here. It was not specifically identified while evidence was been taken as a possible outcome.

303. He has not been charged with it.

304. The evidence has closed.

305. There can be no certainty as to how the appellant might have approached a different charge, for example, an admission.

306. There are balancing factors in favour of an allowance. No real injustice is identified. There has been no clear indication of likely different evidence for the respondent. No real prejudice for the appellant has been identified. The case would not have to start again. Additional costs are unlikely.

307. However the discretion would be exercised against such a use of (ii).

308. The application, as such, to use 196A(1)(ii) would not be allowed.

DETERMINATION

309. As a result of the above findings the Tribunal is satisfied that each of the issues for decision set out in paragraphs 44 to 48 are found in favour of the respondent.

310. The cases for the respondent are accepted.

311. The Tribunal finds that the respondent has satisfied each of the ingredients to be proved in each of the 8 charges.

312. The 8 breaches of the rules are established.

313. The appeals against the findings of the breaches of the rules are dismissed.

DIRECTIONS

314. Noting the issues for determination are penalty for each of the 8 breaches, costs imposed by the stewards for laboratory certificates and costs of the appeal (together the “three issues”), that the written submissions address these and that the appellant has indicated a desire to consider further submissions, the Tribunal directs:

1. The appellant to notify the Tribunal and respondent within 7 days of receiving this decision whether he wishes to make further submissions on the three issues.
2. If the appellant wishes to make further submissions then in the notification he must set out whether he wishes to have a hearing or make written submissions and if the latter set out a suggested timetable.
3. The respondent is invited to reply as necessary within 7 days of that notification.
4. The Tribunal will then fix a hearing date or a timetable.