RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

THURSDAY 4 NOVEMBER 2021

APPELLANT PETER RUSSO

RESPONDENT HRNSW

AUSTRALIAN HARNESS RACING RULE 183

DECISION:

1. **Appeal upheld**
2. **Stewards' order of 22 October 2021 set aside**
3. **Appeal deposit refunded**

1.The appellant, licensed trainer Peter Russo, appeals against a decision of the stewards of Harness Racing New South Wales of 22 October 2021 to suspend him under Rule 183.

2. That rule provides as follows: that the stewards may, pending the outcome of an inquiry or an investigation, direct that a licence be suspended, to extract the precise and relevant words.

3. Rule 183A has been referred to in the submissions. The Tribunal does not propose to read that into this decision. It provides for the refusal to permit nomination of horses until an inquiry is completed if the stewards have prima facie evidence of a certificate in relation to a horse.

4. The test under 183 is to impose upon the Tribunal a determination of the exercise of a judicial discretion. That requires a consideration of the facts relevant to the case as presented and disregarding extraneous matters. It is important to recognise that there is no compulsion to impose this suspension, it is entirely discretionary. The Tribunal stands in the shoes of the stewards in determining whether that discretion should be exercised.

5. The overall background to this rule, in the Tribunal's experience of appeals to it in relation to 183, is that it has been exercised based upon the receipt by the regulator of one certificate which shows a positive to a prohibited substance and, indeed, a suspension has on occasions been exercised prior to a confirmation certification being either called for or received. That is particularly so with some less common drugs where specialist laboratories are required and they are often overseas. For example, peptides. Here with TCO2 – it has been around for a long time – the accredited and approved laboratories are all able to act quickly and analyse it. For example, it is so common that an i-STAT test can be conducted at the time of the taking of the original blood sample, and that was done here. It is exercised in other circumstances eg two certificates.

6. The facts that are relevant to this discretion are that the subject horse was pre-race blood sampled on 9 October. As stated, an i-STAT sample was positive. That is not relied upon by the regulator today.

7. On 11 October, ARFL received the samples and conducted a screening analysis which showed 36.8 millimoles per litre. For the purposes of this decision, the words "millimoles per litre" will be ignored and just numbers used. The threshold is 36. The measurement of uncertainty in respect of that reading is plus or minus 1, and the Tribunal pauses to note that it is a plus or minus. It could be 37.8, it could be 35.8, or something in between those. The word "uncertainty" is not to be ignored.

8. That laboratory issued its certificate on 14 October. Nothing turns, in the Tribunal's opinion, on this appeal on the issue whether that certificate was dated after the analysis by screening took place.

9. On 12 October, QRIC was requested to perform a confirmatory analysis. They received the sample on the 13th, they certified on the 13th that it was 37.3 plus or minus 1. That was the B sample.

10. ARFL then carried out further analysis on 14 October which returned 35.6 plus or minus 1 and they issued a certificate on 15 October.

11. The exercise of the discretion here, based upon those facts, is focused upon a possible breach of the prohibited substance rules for presentation with a prohibited substance. No issue is taken that TCO2 above 36 is a prohibited substance.

12. The important thing is that this is not an appeal from a decision of the stewards who have conducted an inquiry and concluded final determinations upon which an appeal is to be considered. This test is limited to the exercise of a discretion to decide what should happen to this trainer between now and the time when an inquiry by people being present actually commences. Of course, the investigation has started. It might be said, to enliven 183, that both an inquiry and an investigation are on foot. But no issue is taken upon that.

13. The Tribunal again emphasises that it will be for the stewards to determine whether the rule is breached. This determination, on the exercise of the discretion, does not require a decision whether the rule has been breached, and that is the presentation with a prohibited substance rule. It is trite to say that the inquiry may lead to the laying of such charge. As to the outcome of it, that is a matter for the stewards.

14. The challenges that are advanced in respect of the case as delineated require a brief analysis of the rules, and it is a brief one, not exhaustive. It is not required in this discretionary exercise. Simply put, the rules provide that if there are two certificates, each of which is positive, there is conclusive evidence. Case law and Tribunal determinations indicate that it is an absolute test. The only defence provided is under Rule 191(7), which is the material flaw test. No argument has been advanced here on that. There have been some faint submissions that the chains of custody have not been proven, but there is nothing advanced on this case which might indicate any material flaw in the sampling process that would fall within 191(7), and that is not further analysed.

15. If there are not two certificates – and that is the case here – then a breach of the rule can still be found on one certificate. Because the rules provide that one certificate is prima facie evidence. This decision does not

require analysis of what prima facie evidence means. But, simply put, absent that rule, prima facie evidence is sufficient to base an adverse finding. No more than one certificate can be sufficient to prove the case of a breach of the rule.

16. Prima facie evidence can be rebutted. Prima facie evidence requires a consideration of all of the evidence once the case is finished. As might be the case with a committal for trial, for example, there may be a consideration of whether there is prima facie evidence that a crime has been committed, in which case a person may be committed for trial. But they can then call evidence, should they choose at a committal, to rebut that prima facie case. That analogy is simply used to indicate that the fact there is a prima facie case is not necessarily to lead to a determination that the rule has been breached.

17. The emphasis for the appellant on this application is that there in fact is another certificate which is negative, and that is the ARFL certificate dated 15 October which shows 35.6 plus or minus 1. As stated earlier, that could be 36.6, which would be above the threshold, or it could be as low as 34.6, below the threshold, obviously. The certificate itself, at 35.6, is, in any event, below the threshold. It will be a matter for the stewards to determine, based upon the totality of the evidence, how they address the issue of the measurement of uncertainty in respect of that certificate and also the QRIC certificate, 37.3.

18. The fact is that the appellant relies in this appeal on the fact that there is another certificate which is negative. As stated, the inquiry itself in due course might determine that the prima facie case is sufficient. It is not clear to the Tribunal whether or not the case which will be run by either party will require an analysis of the systems by which the readings were determined or the meaning to be given to measurement of uncertainty.

19. There is also, on the submissions, a possibility that there will be a consideration of the issue of degradation of samples. That has not formed a substantial part of the oral submissions today but was addressed in the written submissions.

20. The Tribunal accepts that research has shown and determinations by the stewards and Tribunals in the past have accepted the principle of degradation of blood samples for the purpose of TCO2 analysis. It is not necessary for the Tribunal to determine today whether degradation has any part to play in this matter. That is for the inquiry in the future.

21. Suffice it to say that in determining the exercise of this discretion, it is hard to see how, on the dates given above – and they are not repeated – degradation would have any great part to play. Because a sample taken on the 9th, screened on the 11th, analysed on the 13th and analysed on the

14th does not appear to have been subject to a period of time for which degradation jumps out at the Tribunal as being an obvious reason why the certificate of ARFL is producing a reading that has dropped from 37.3 to its analysis of 35.6. That will be a matter for expert evidence, it appears, or, alternatively, evidence at least before the stewards for their consideration. Suffice it to say that, as the Tribunal has said, it plays no great part in its determination today.

22. The Tribunal again returns to the fact in determining this discretion that it could be the case that it was being asked to determine this matter based upon the fact that only one certificate had issued and there had been no subsequent confirmatory analysis of the positive. But that is not a necessary requirement for the finding of a breach. It is possible that a prima facie case can be found and which leads to a finding of the breach, as stated earlier, based on that one certificate.

23. Further analysis of the various dates is not required.

24. It is then an issue of considering whether that raises enough matters that require the exercise of the discretion. There is nothing before the Tribunal other than possible degradation to indicate why there is a difference in an analysis carried out one day later from an analysis one day before which takes the matter from a positive to a negative on a prohibited substance above a threshold. That is a matter for an inquiry.

25. When the Tribunal looks to issues of whether the discretion should be exercised, it is necessary to have regard to the subjective factors of the appellant and the integrity issues and those are of great importance for the regulator.

26. Integrity has to be considered not just in the bold and bare light of the fact that there is a possible positive but also on the basis of an aspect of fairness. In other words, if the facts are known to the community of harness racing generally, would it be that the regulator's strong emphasis on integrity will be degraded by the fact that this appellant was able to continue training pending the conclusion of an inquiry? The Tribunal gives great weight to integrity. But it must be tempered.

27. The subjective factors are set out in the submissions. They are all in favour of the appellant. There is no doubt he has no prior matters, that the majority of his income comes from training anything up to 11 horses at any one time, and a loss of the ability to train will occasion to him and his family financial hardship, notwithstanding the fact that he and his wife both work on a part-time basis and have other income. Hardship itself is not a factor to warrant the exercise of a discretion on those facts, but there is in those subjective facts nothing against the appellant.

28. The discretion is exercised in this way. The Tribunal is very much of the view that the prima facie case is sufficient to indicate that this appeal should not be upheld. But there are matters relating to the proximity of the two readings, one positive, one negative, and a need for that to be analysed in more detail at an inquiry than is appropriate at this appeal. If an arguable case had to be found, that would establish an arguable case. But the exercise of a discretion does not require that, but in that sense the appellant establishes that there is something upon which a discretion can be exercised.

29. When that is balanced with the integrity issues and the subjective issues, all of those when put together lead the Tribunal to a conclusion that the appellant satisfies the Tribunal that it should exercise the discretion in his favour and not continue the 183 suspension.

30. There is further comfort in that conclusion in that at the present time the preparation for a stewards' inquiry is advanced and could take place, or at least start – as to whether it concludes or not is another issue – within approximately one week. It may not be one week, it may be more, it may be less. But that is a matter for the parties and not the Tribunal. But delay itself does not mean a discretion should not be exercised in the appellant's favour.

31. In those circumstances, the appeal is upheld.

32. The order of the stewards, signed by the Integrity Manager on 22 October 2021, is set aside.

33. The further order of the Tribunal is that, there being no opposition to the application, the appeal deposit is ordered refunded.
