APPEAL of RUSSELL BELL: AR 178

APPEAL COMMITTEE: Mr John Stewart (Chairman), Mr Brett Dixon and Mr Charles Burkitt

DATE OF HEARING: 25 July 2013

REASONS FOR DECISION

The Appeal

1. On 12 July 2013 Stewards concluded an inquiry into the analysts' findings on a swab sample taken from "Mr Jansz" when that gelding won the XXXX Gold Tennant Creek Cup on Saturday 18 May 2013. The trainer, Mr Russell Bell, was found guilty of a charge under AR 178 which provides:

   > "When any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised."

   The "prohibited substances" were phenylbutazone and oxyphenbutazone.

2. Stewards suspended Mr Bell's licence for 3 months. Acting under AR 177 Stewards disqualified "Mr Jansz" from the Cup race and declared "Carneggan Dasher" as the winner.

3. On 12 July 2013 Mr Bell appealed against the finding of guilt and the penalty. On 15 July 2013 he amended his notice of appeal, confining it to the question of penalty but not contesting the finding of guilt. He sought a stay of proceedings pending the hearing of the appeal. We will have more to say about the stay but for the moment we note that it was granted without any opposition from the Stewards.

4. At the appeal hearing the Stewards were represented by Mr Lane, Chairman of Stewards. Mr Bell appeared without legal representation. No witnesses were called. The transcript of the Stewards' inquiry was admitted.

Stewards' Inquiry

5. At the Stewards' inquiry certificates of analysis by Australian Racing Forensic Laboratory and Racing Science Centre were both received. They stated that the samples contained the prohibited substances. As will be seen, oxyphenbutazone is a metabolite which can result from the presence of phenylbutazone.

6. Mr Bell denied having given the horse anything containing phenylbutazone. He suggested that the horse could have "picked up" the substance without his knowledge in the mounting yard, in the washing area, or in the horse's box either during the course of the swabbing process or at another time. To substantiate that submission he told Stewards that he noticed that that the horse's box at the Tennant Creek racecourse had been occupied by another horse or horses when he arrived a few days before the race. Then, on the morning of the race, he had to ask for the removal of another horse from the box. He questioned whether the swabbing conditions and procedures may have been conducive to contamination of the samples.

7. A Stewards' inspection of Mr Bell's stables in Alice Springs revealed the presence of phenylbutazone paste. Mr Bell told Stewards he sometimes administered phenylbutazone intravenously or as a paste. He conceded that the contents of the treatment records which he produced to the Stewards were inadequate.

8. Stewards received evidence from Mr Craig Suann, Senior Racing Veterinarian at Racing NSW. This evidence was not challenged either at the Stewards' inquiry or on appeal:

> "The finding of phenylbutazone and its metabolite oxyphenbutazone in a blood sample from a horse would indicate the prior administration of phenylbutazone to the horse. Phenylbutazone is a nonsteroidal anti-inflammatory agent used to treat a variety of equine musculo-skeletal disorders where pain and inflammation are present.
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> Phenylbutazone would be defined as a prohibited substance according to the Australian Rules of Racing since it is capable of causing an action and effect principally on the musculo-skeletal system, thereby complying with the provisions of AR.178B(1). Phenylbutazone would be categorised as an analgesic and antiinflammatory agent, thereby fulfilling the requirements of AR.178B(2). Oxyphenbutazone is an equine metabolite of phenylbutazone, therefore defining it as a prohibited substance according to the provisions of AR.178B(3).
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> Phenylbutazone is the active ingredient in a number of veterinary Schedule 4

> prescription animal remedies, either injectable solutions for intravenous injection, or granules, powders or pastes for in-feed or oral administration."

9. A letter from Dr Adam Cawley, Acting Science Manager at Australian Racing Forensic Laboratory was received by Stewards. Dr Cawley stated that it was not a requirement for the laboratory to conduct a quantitative analysis. Nevertheless he gave estimates of the levels of the prohibited substances. We have not found that evidence very helpful when seeking to arrive at a comfortable finding about the levels in comparison with other cases involving prohibited substances. More usefully for our purposes, Dr Cawley did express the opinion that the estimated levels were consistent with a 24-hour post-administration period.

10. Dr Suann gave oral evidence that, on the basis of the findings from a 12-horse administration trial, he agreed with Dr Cawley's opinion that the level of phenylbutazone was consistent with administration within the previous 24 hours but inconsistent with the possible explanation of contamination where a much lower level would be expected.

11. When asked for submissions on penalty Mr Bell told Stewards that he had been training for 20 years without a blemish. He said that he had recently purchased stables at Alice Springs and that he and his family reside at that property. Stewards expressly took those factors into account in determining that suspension rather than disqualification was the appropriate penalty. [AR 182 provides that a disqualified person shall not enter upon a racecourse, training track or training establishment.]

Stay

12. Before coming to a decision on penalty we need to explain our position in relation to the stay that was granted.

13. Some of the relevant factors were identified in the reasons of the Northern Territory Racing Appeals Tribunal in the *Appeal of Rui Severino* (24 April 2009):
    - The merit of the appeal (ie whether it is arguable);
    - Whether the application for a stay is opposed;
    - Whether the appeal will be rendered nugatory if a stay is not granted (ie the period

of disqualification being served before the appeal is determined);

- Prejudice to the applicant; and
- The public interest.

The appeal in *Severino* was against penalties of suspension and disqualification for corrupt conduct. In granting a stay the Tribunal adopted the test as defined by Justice Owen in *Stampalia v Stewards of Western Australia Trotting Association* [1999] WASC 7: "[H]as the applicant demonstrated that there are special circumstances sufficient to satisfy the Court that it is just and reasonable to order a stay so as to preserve the subject-matter and integrity of the litigation?"

14. We would add that in *Stampalia* Justice Owen made this point: "A court called on to stay a penalty pending judicial review should not lightly do something that might create a perception that the decision of the specialist entities within the industry has a provisional quality." This is an apt reminder given that LR 21 provides that "Until the hearing of the appeal or the rehearing of the case, the decision of the Stewards shall be valid and in force unless otherwise ordered by the Principal Racing Authority."

15. In granting the stay on 15 July 2013 we are satisfied that Thoroughbred Racing NT was influenced heavily by the position taken by the Stewards in not opposing the stay. Afterwards at the hearing of the appeal on 25 July, the Stewards changed their position. Mr Lane urged us to terminate the stay at midnight on Saturday 27 July. Mr Bell applied for a continuation of the stay. On 26 July we decided that the stay would continue.

16. We had in mind these reasons:
    (a) If the stay was terminated, the horses being trained by Mr Bell would have to be placed with another trainer. Mr Bell is based in Alice Springs and at the time of the appeal hearing he had several horses in Darwin for the Cup Carnival (which concluded on Monday 5 August) as well as horses in Alice Springs. While he was conducting two training operations, relocating those horses would be extremely difficult on short notice.
    (b) There were no conditions sought or imposed with respect to the length of the stay granted on 15 July. When the stay was granted there was no reason to suppose that the

appeal would be determined or even heard within the next 3 weeks.

(c) Admittedly, there was a change in circumstances when Mr Bell withdrew his appeal against the finding of guilt but that change occurred before the stay was initially granted.

(d) On the other hand, even with that change, we considered that the possibility of imposing a fine instead of suspension was deserving of serious consideration.

Penalty

17. As we have mentioned, Mr Bell did not dispute the Stewards' finding of guilt at the appeal hearing. Mr Bell submitted that a fine would be an appropriate penalty rather than suspension as determined by the Stewards.

18. The evidence about possible explanations for the presence of the prohibited substances may be relevant to the question of penalty. At the inquiry and on appeal Stewards relied upon this extract from the decision of the Northern Territory Racing Appeals Tribunal in the *Appeal of T N Pike* (21 July 1992):

> "We consider that the Rules of Racing are so framed as to promote and require drug-free racing. We agree with the stewards that it is not for the Racing Club or the stewards to prescribe or support withholding periods. Should a club wish to give veterinary advice in the racing calendar it may do so, but the responsibility is on the trainer and others connected with the horse to present it for racing free of prohibited substances. We find that the vast majority of racing clubs, their stewards and Racing Appeals Tribunals have adopted a deliberate policy of regarding the use of prohibited substances (whether or not they effect (*sic*) the running of the horse in a race) as a serious danger to the integrity of the racing industry and save in exceptional circumstances, disqualification is the appropriate penalty. There is a powerful need to deter such conduct. We are mindful of the fact that the stewards of the AJC take a different view, but we must be conscious of the vulnerability of the local racing scene and we endorse (but not without some qualification) the view of the DTC stewards that the proven presence of a prohibited substance should result in disqualification. There may arise cases where on the facts found the stewards may be convinced that the presence of a prohibited substance did arise by accident without negligence and that the substance could not affect the performance of the horse. In such a case, without limiting the circumstances, disqualification may be too harsh. Such cases will be rare."

19. It is important to note that Mr Pike had admitted administering a prohibited substance (heptaminol, a muscle stimulant) to a horse that produced positive swabs after winning two races. He was dealt with under AR 175(h)(ii) rather than AR 178. The Tribunal mentioned a scale of 6 to 12 months disqualification and imposed two

periods of disqualification of 6 months to run concurrently. The above extract has been quoted in many other cases before the Stewards and on appeal, serving as a guideline for consistency where prohibited substances are concerned.

20. It will be useful to provide other examples of decisions of the Racing Appeals Tribunal. The list is not intended to be exhaustive:
    - *The Appeal of Catriona Green* (25.09.97) - In reducing the Stewards' penalty of 6 months disqualification for a breach of AR 178 the Tribunal observed: "We do however consider the period of 6 months to be manifestly excessive. The stewards in our opinion did not give adequate weight to the distinction we have made in the past between therapeutic and non-therapeutic substances, the previous good record and character of the appellant and to the total impact of the period of disqualification." The substance was total carbon dioxide in an excessive concentration. The Tribunal inferred that, without proper supervision by the trainer, someone in the stables gave the horse a drench as part of its preparation for a race. A period of disqualification of 2 months was substituted.
    - *The Appeal of Aureole King* (16.07.99) – The Stewards' penalty of 5 months disqualification was not disturbed for a breach of AR 175(h)(ii) involving a substance potentially harmful to the horse.
    - *The Appeal of Gary Clarke* (20.08.04) – A case involving excessive TCO^2. Although the Tribunal did not find special circumstances such as existed in the *Green* case, a period of disqualification for 12 months was reduced to 6 months for a breach of AR 178.
    - *The Appeal of Lionel Houldsworth* (28.02.06) – When considering a breach of AR 175(h)(ii) the Tribunal decided that "the appropriate range for the Stewards was from 3 months where there were strong mitigating factors to 12 months where there was no discount for a guilty plea or cooperation and no basis for leniency" adding that "on the authority of this tribunal in *Pike* 6 months is a proper starting point and might well apply in the case of a first offender using a substance supplied by a vet and used in accordance with instructions." This was not regarded as a case of that kind. The trainer

had a previous matter involving a prohibited substance and the substance in the appeal matter was non-therapeutic. A period of 9 months disqualification was affirmed.

- *The Appeal of Neil Dyer* (22.02.13) – The trainer had administered a substance under veterinary advice resulting in testosterone marginally above the allowable level. Mr Dyer had been in the industry full-time for 25 years with one relevant prior matter in 2000. The Tribunal dismissed the appeal against a fine of $5,000 for a breach of AR 175(h)(ii).
- *The Appeal of Christopher Nash* (18.03.13) – The Tribunal dismissed an appeal against 6 months' disqualification for a breach of AR 178 where the horse was found to have excessive TCO^2. The appellant had been a licensed trainer for 4 years with 1 or 2 horses at a time. It was not asserted by the Stewards that Mr Nash had intentionally raised the horse's TCO^2 level and the Stewards accepted that negligence or "accident" was the likely cause. The Tribunal found that the alkalinising agents that were administered had a tendency to boost the horse's performance.

21. We endorse the Tribunal's view that, in the absence of exceptional circumstances, a breach of AR 178 merits disqualification. In *Nash* the Tribunal referred to all the above appeal cases before concluding that "disqualifications for breaches of AR 178 have ranged from periods of 3 months to periods of 9 months." As has been noted, some of the above cases involved breaches of AR 175(h)(ii). The Tribunal has not drawn a sharp line of distinction between cases under AR 175(h)(ii) and cases under AR 178. Where a prohibited substance is detected in a horse, it is obviously a serious matter regardless of whether the trainer has administered the substance or, because of his lack of care in supervising the horse, is unable to adequately explain who administered the substance or the circumstances in which the administration occurred. The relative gravity of each offence under either rule will depend on the circumstances. We accept the Tribunal's range of between 3 months and 9 months disqualification as a rough and flexible guide for a breach of AR 178.

22. As was stated in *Dyer*: "The presentation of horses for racing with the presence of prohibited substances has the tendency to undermine public confidence in racing and is therefore a danger not only to its integrity but also to its future. It is even more important

that public confidence be maintained in racing in the Northern Territory given the industry's small size, relatively small public support base and its need to rely in part upon government funding." This seems to us to give added emphasis to the message in *Pike* about the particular need for deterrence given the vulnerability of the industry in the Territory.

23. Mr Bell did not cite any cases where breaches of this kind have resulted in a fine. Still we do acknowledge – as was suggested in *Pike* - that penalties by way of fine appear to have been more commonplace in some interstate jurisdictions. There are many examples. However we also note that fairly recently, in *The Appeal of Jim Lee and Greg Lee* (09.11.2011), the Appeal Panel in NSW endorsed these remarks made by Judge Thorley some years previously in *The Appeal of G Rogerson* (24.05.98): "It seems to this Tribunal that breaches of AR 178 should ordinarily be met with penalties of disqualification or at least suspension and that fines should be reserved only for those cases where special circumstances should dictate." That passage favours much the same approach as has been adopted by the Northern Territory Tribunal and we are guided by the approach of the latter Tribunal in deciding whether a finding of "special circumstances" is appropriate. In *Lee* the Appeal Panel was of the opinion that "there were no special circumstances which would dictate a fine, and is of the view a period of suspension is appropriate." The trainers had a "long period of excellent record for some 38 years", were "forthright and cooperative at all times" but had been let down due to inadequate supervision. We mention this case not because we intend to follow the lead of the Racing NSW Appeal Panel (5 months suspension was reduced to 3 months on appeal) but to indicate that perhaps the term "special circumstances" has in recent times been given more restricted application in NSW than formerly.

Decision

24. NTR 25 gives the Principal Racing Authority wide powers when determining an appeal.

25. Guided by the experience of similar cases in the Territory, we assume the task of determining if Mr Bell has demonstrated that the Stewards have fallen into error. Other cases can provide some understanding of where a given case sits in the spectrum of gravity. But it is not instructive to embark on a detailed comparison of all of the circumstances in every case. Apparent anomalies will inevitably occur for reasons such as the presence or

absence of different circumstances, variations in the importance attached by the appeal tribunal to certain considerations, the history of the trainer in the industry and the subjective impression created by the evidence as presented.

26. Mr Bell has an outstanding record. He has been training for 20 years without any prior blemish involving prohibited substances or indeed anything else of significance. That record weighs heavily in his favour.

27. However, unlike *Dyer* for example, Mr Bell did not satisfactorily explain when and by whom the substance was administered. There was insufficient evidence to come to an inference such as was made in *Green*. That omission does not of itself give rise to an adverse finding against Mr Bell by way of aggravation of the breach. It simply means that he misses out on consideration of a possible mitigating circumstance.

28. It is not alleged that Mr Bell administered the prohibited substance. The evidence enables a finding that the substance is capable of having a therapeutic application. In other cases special consideration has been given to mitigating circumstances such as that the therapeutic substance was administered on veterinary advice or by mistake or that there was some other exculpatory factor involved in the administration. This is not a case of that kind.

29. Mr Bell put forward various theories about contamination or administration by a third person with malicious intent but they were not backed up by evidence. We are therefore unable to be satisfied that either of these explanations was plausible. We do, however, observe that, when raised as a possibility, tampering only serves to invite questions as to the adequacy of security around the trainer's stables.

30. The risk of a horse being "nobbled" will be minimized if trainers maintain an adequate level of security. We accept that on the evidence it appears that it was harder for Mr Bell to maintain adequate security at Tennant Creek than when he is in his own stables in Alice Springs. Even so, trainers have to be prepared to adapt their precautions to the conditions as they find them.

31. Mr Lane reminded us of the decision of TRNT in *The Appeal of G Leech* (07.11.08) where heptaminol was detected and a disqualification of 3 months was upheld. Like, Mr Bell, Mr Leech had a very good prior record as a trainer (7 years with nothing prior other than minor matters). We made these findings:
    (a) The presence of the prohibited substance had not been explained;
    (b) There was no evidence of accidental administration;
    (c) The substance must have been administered by injection;
    (d) The suggestion that the horse had been "nobbled" was unconvincing;
    (e) The trainer could have exercised greater security measures to reduce the risk of tampering; and
    (f) The substance had a therapeutic application but there was no evidence of the horse being treated with it.

32. As the Stewards have rightly recognized we must take account of the disastrous effect that disqualification rather than suspension would have upon Mr Bell's ordinary daily household routine.

33. Mr Bell told us that, apart from his activities as a trainer, he helps the Alice Springs Turf Club in conducting local racing. He was worried about the effect of suspension on his financial situation, his career and his family. He tendered several testimonials which were admitted by consent. We accept the authors' experience of Mr Bell's good character and his ability as a trainer; indeed Mr Lane did not suggest otherwise. Two of the letters expressed reservations about retaining Mr Bell as a trainer if his licence remains suspended. We take those comments into account in considering the possible effects of the suspension but it seems to us only natural to expect that in many cases a trainer will be fearful of the possible adverse impact of a suspension upon his business.

34. Mr Lane conceded that since this matter arose there had been great improvement in Mr Bell's treatment records.

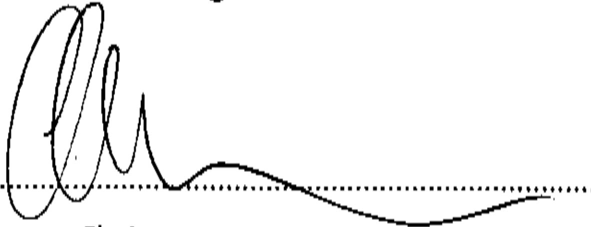
35. It appears to us that the Stewards' decision was correct. The appropriate penalty is

suspension rather than disqualification and the period of suspension of 3 months was also appropriately fixed at the lower end of the range for this type of offence taking into account Mr Bell's record and the other circumstances mentioned above.

36. As has been noted, Mr Bell has also had the benefit of a stay enabling him to compete as a trainer at the Darwin Cup Carnival. Since the stay is currently in force, the suspension of 3 months will commence from 12.01 am on Monday 26 August 2013.

37. An appeal deposit of $220 was paid when lodging the appeal and the application for a stay. One half of that amount ($110.00) will be returned to Mr Bell.

Dated 21 August 2013



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John Stewart, Chairman