NORTHERN TERRITORY RACING APPEALS TRIBUNAL

DATE: 10 January 2013

MEMBERS: Deputy Chairman: Mr Geoffrey Clift

Member: Mr David Horton

Member: Ms Nardine Collier

APPELLANT: Mr Terrence Gillett

APPEARANCES: Mr Terrence Gillett self-represented and Mr David Westover for the Stewards

HEARING DATE: 23 July 2012

IN THE MATTER OF: An appeal by Terrence Gillett from the Stewards of Thoroughbred Racing Northern Territory against the finding of guilt and the penalty of a fine of $1,500 imposed in respect of a charge made against him under AR 178E (1).

DECISION: The Appeal is upheld in part.

REASONS FOR DECISION

The appellant appeared before an inquiry conducted by the Stewards of Thoroughbred Racing Northern Territory (the "Stewards") at Pioneer Park Racecourse on 3 June 2012 and 17 June 2012 (the "Inquiry"). At the conclusion of the Inquiry on 17 June 2012 the appellant was charged by the Stewards with one breach of Australian Rules of Racing ("AR") Rule 178E (1). The particulars of the charge were evidently that, on the 3rd of June 2012, a race day, the appellant, without the permission of the Stewards, administered, or caused to be administered, a medication, namely Vicks Vaporub, to two horses, namely "Good Decision" and "Deal Breaker", prior to those two horses running in a benchmark 66 handicap over 1400 metres at Pioneer Park Racecourse on that day (the "Charge"). The appellant entered a plea of not guilty to the Charge. The Stewards, on 17 June 2012, found the appellant guilty of the Charge (the "Finding of Guilt") and imposed a penalty of a fine of $1,500 (the "Penalty").

The appellant instituted an appeal to this Tribunal pursuant to section 145D of the Racing and Betting Act (the "Act") by lodgement of a notice of appeal dated 22 June 2012 (the

"Appeal"). The notice of appeal indicated that the appeal was against the Finding of Guilt and the Penalty. The appellant subsequently lodged a document titled "Grounds of Appeal" received by the Tribunal on 18 July 2012. The grounds of appeal in connection with the Finding of Guilt were essentially: that there was no probative evidence before the Stewards that " Vicks Vaporub" had been administered to either "Good Decision" and/or "Deal Breaker"; that there was no probative evidence before the Stewards that the appellant had administered "Vicks Vaporub"to either "Good Decision" and/or "Deal Breaker" or that he had caused "Vicks Vaporub" to be administered to either of those horses and that the appellant had been denied procedural fairness during the Inquiry. The ground of appeal in connection with the Penalty was essentially that the Penalty was manifestly excessive.

The Appeal was heard by the Tribunal as constituted by the Deputy Chairman and Members Mr Horton and Ms Collier on 23 July 2012. On 23 July 2012 the Tribunal upheld the Appeal in part. The Tribunal now publishes its reasons for the decision made on the Appeal.

BACKGROUND TO THE APPEAL

AR Rule 178E (1) is in the following terms:

"(1) Notwithstanding the provisions of AR 178C (2), no person without the permission of the Stewards may administer or cause to be administered any medication to a horse on race day prior to such horse running in a race."

"Medication" is defined in AR Rule 1 as "any treatment with drugs or other substances".

The appellant is a licensed trainer and jockey.

The appellant entered two horses, "Good Decision" and "Deal Breaker", in Race 3, a benchmark 66 handicap over 1400 metres, at a meeting held at Pioneer Park Racecourse on 3 June 2012. Those two horses ran in that race and both placed. As the two horses were being led to the placegetters stalls after the race, two persons advised the Stewards that they had noticed that both horses smelt strongly of Vicks Vaporub or a similar substance.

Subsequently, the Chief Stipendiary Steward, Mr Westover, and a veterinary surgeon, Ms McEwan, inspected both horses. Mr Westover inspected both horses by, inter alia, placing two fingers into the nostrils of both. On removing his fingers he noted that they smelt of eucalyptus or camphor. Mr Westover concluded that Vicks Vaporub or a similar substance was present in the nostrils of both horses. Ms McEwan was not able to express any opinion as to what substance may have been present in the nostrils of both horses.

Mr Westover then ordered a search to be made of the appellant's race bag. A Steward, Mr Hurley, carried out a search of the race bag. He found two containers bearing the "Vaseline" logo. One container had in it a substance that smelt no different from "Vaseline". The other

container had in it a substance that smelt different to "Vaseline" and which was identified by Mr Hurley as being "Vicks Vaporub". Mr Hurley then questioned a female strapper in the employ of the appellant. The female strapper identified the container with the substance which smelt like "Vicks Vaporub" in it as being her property. She advised Mr Hurley that she had placed the substance in that container on her mouth.

Mr Westover's observations and conclusions arising from his inspection of both horses on 3 June 2012 were put to the appellant at the Inquiry. Mr Hurley also gave evidence at the Inquiry as to the search he had undertaken, his discussion with the female strapper and his observations and conclusions in connection with the two containers found in the appellant's race bag bearing the "Vaseline" logo. The female strapper did not give evidence at the Inquiry. The appellant maintained at the Inquiry that the container labelled "Vaseline" which had in it a substance that smelt like "Vicks Vaporub" belonged to the female strapper and that she used the contents to treat a cold sore on her lips. The appellant conceded that the substance in that container smelt "similar" to "Vicks Vaporub". The appellant stated that he did not know why that container which was labelled "Vaseline" had in it a substance that smelt like "Vicks Vaporub".

No analysis of either the substance found by Mr Westover within the nostrils of both horses or the substance within the container labelled "Vaseline" which smelt like "Vicks Vaporub" was undertaken to determine their chemical composition.

The Stewards sought the advice of a Mr Suann, an employee of Racing New South Wales, as to the policy of Racing New South Wales as regards the use of, inter alia, "Vicks Vaporub". An e-mail from Mr Suann to the Stewards was read into evidence. The text of the e-mail was as follows:

" The RSNW policy on treatment on course is as follows: all treatments on race day, including glycerine, Vicks Vaporub, magnetic field therapy blankets and lasers are not permitted. The use of ice packs is permissible after a horse has raced provided notice is given to the official veterinarian or stipendiary stewards.

Vicks Vaporub would be considered a medication as defined in AR 1 and accordingly should not be administered pre-race on race day as per the provisions of AR178E. It also contains the prohibited substance camphor and therefore its possession on a race course on race day would be in contravention of AR 178A (1)."

At the conclusion of the Inquiry the following exchange took place between Mr Westover and the appellant:

"Mr Westover: All right. Mr Gillett, the Stewards are of the belief that by placing a substance in a different labelled container could be considered premeditated, which makes the breach of a more serious nature. As I said before, Vicks Vaporub would be considered a medication as defined in AR 1 and accordingly should not be administered pre-race on race day as per

the provisions of AR 178E. It also contains the prohibited substance camphor and therefore its possession on a racecourse on a race day would be in contravention of AR 178A (1). Do you understand what I've just read to you?

Appellant: Yes sir.

Mr Westover: After considering the evidence before us, we are of the belief that you are in breach of AR 178E (1) and therefore be charged under that rule, which reads:

"Notwithstanding the provisions of AR 178C (2) no person without the permission of the Stewards may administer or cause to be administered any medication to a horse on race day prior to such horse running in a race."

Do you understand what I've just read to you?

Appellant: Yes

Mr Westover: Do you wish to offer a plea to the charge?

Appellant: Not guilty."

After the Charge was read to the appellant and his plea in respect to it taken, the Stewards retired to consider their verdict. The following exchange then took place between Mr Westover and the appellant:

"Mr Westover: Mr Gillett, after considering all the evidence, the Stewards find you guilty as charged. The circumstances for finding that guilt are that the Stewards believe that you did have in your possession, namely your race bag, a medication. Further to this, after an inspection of your runners post-race, I am of the opinion that a camphor based substance was present. Do you understand what I've just said to you?

Appellant: Yes, and other than I've just said Leanne out there sucking on Vaporub lollies and Ben can smell it and he's like about four metres away.

Mr Westover: We're talking about what was in your possession, okay?

Appellant: Yes.

Mr Westover: Is there anything you wish to put forward in regards to a penalty, if one be imposed?

Appellant: No.

Mr Westover: Have you ever been penalised for anything like this before?

Appellant: No."

The Stewards then retired to consider what penalty to impose in connection with the Charge. When the Inquiry resumed, Mr Westover imposed the Penalty as follows:

"Thanks Mr Gillett. Mr Gillett, it is the decision of the Stewards of the TRNT to fine you, in this instance, the sum of $1,500."

THE APPEAL

The Appeal was heard on 23 July 2012.

The notice of appeal was in the following terms:

"Appealing against the finding of Guilty to administering an illegal substance and excessiveness of fine (First offence)."

The document titled "Grounds of Appeal" subsequently filed by the appellant was in the following terms:

"1. Severit (sic) of Penalty

- First Offence
- 2nd June Adelaide River races Mr Peacock's horse scratched at races-seen administering a substance by Stewards into the mouth with a bottle. Given a Reprimand.
- I was not seen doing anything wrong.

2. Guilt

-Vaseline is not a prohibited substance.

- strapper said the Vaseline was her's that smelt of a substance was her's (not questioned) for her personal use (Mr Hurley stated in transcript taken from her)

- I was not seen doing anything wrong

- Vet said she could not find or smell anything on or in the horses' nose or on the horse

- Why was a swab not taken of the horses' nose and sent away for findings

- Only one person believed they could smell something (Mr Westover) on the horse

- Mr Hurley states in transcript that bag was open. When searching bag (I was in Jockey Room riding. Two strappers were washing horses after race and going to have horse swabbed for winning)

- Mr Westover in the transcript asked Mr Hurley which was the Vaseline confiscated from strapper. Mr Hurley stated in the transcript that he took it from the strapper, was the one that smelt as though it had a substance in it

- Substance or Vaseline never sent away for testing in jar found in bag or taken from strapper.

3. Procedural Fairness

- substance in Jars never sent away for testing

-why was a swab not taken of horses nose

- I was not allowed to question persons that stated to Stewards that they could something (two licensed persons) in horse area

- called the wrong strapper to inquiry that said Vaseline was her's. When stated in the first hearing who it was (all strappers have photo identification on them self's at races)

-No one was around when search was conducted as strapper were washing horse after race and bag was open

- Vet or Vet assistant was not at inquiry for questioning."

At the commencement of the hearing of the Appeal, Mr Westover was requested by the Tribunal to clarify that the appellant had indeed been charged only with one breach of AR Rule 178E(1) and that no charge had been laid in connection with AR Rule 178A (1). Mr Westover confirmed that the appellant had been charged with one breach of AR Rule 178E (1) only. Further, at the commencement of the hearing of the Appeal, the Tribunal enquired of Mr Westover as to whether or not he intended to seek leave to adduce evidence before the Tribunal as to the chemical composition of the medication or substance alleged to have been administered or caused to be administered by the appellant. Mr Westover responded that he did not intend to adduce any such evidence.

The Tribunal, upon consideration of Mr Westover's responses to the enquiries made of him at the commencement of the hearing of the Appeal, and upon consideration of the transcript of the Inquiry, determined that the Appeal should be upheld in part and ordered that the Finding of Guilt be reversed and the Penalty be set aside and that the fee paid by the appellant upon lodgement of the notice of appeal be refunded. The Tribunal indicated that it would publish its Reasons for Decision at a later time. These are the Tribunal's Reasons for Decision.

DETERMINATION OF THE APPEAL

The Appeal is in the nature of a rehearing as distinct from an appeal in the strict sense or an appeal in the nature of a hearing de novo. Absent express or indicative statutory provisions to the contrary an appellant must demonstrate legal, factual and/o discretionary error if the Appeal is to be successful (refer Coal And Allied Operations Pty Ltd v Australian Industrial Relations Commission and Others (2000)203 CLR 194 and Allesch v Maunz (2000) 203 CLR 172). The Tribunal is of the view that no such provisions appear in the Act. As such the appellant bears the onus of persuading the Tribunal that the Finding of Guilt by the Stewards and/or the decision by them to impose the Penalty were/was infected with legal, factual and/or discretionary error on the part of the Stewards. The Tribunal will not intervene and exercise its powers as set out at section 145ZE of the Act in favour of the appellant unless it is satisfied that relevant error has been demonstrated.

Ground of appeal "2"- "Guilt"

The Tribunal takes this ground of appeal to be, inter alia, an assertion that the Finding of Guilt was infected with error in that: there was no probative evidence before the Stewards that the appellant had indeed administered or caused to be administered a "medication" to either "Good Decision" and/or "Deal Breaker" on 3 June 2012 and /or that there was no probative evidence before the Stewards that whatever may have been administered or caused to be administered to "Good Decision" and/or "Deal Breaker" on 3 June 2012 by the appellant was in fact "Vicks Vaporub" and/or a substance containing camphor.

In order for the Stewards to have been satisfied that the appellant was guilty of the offence with which he was charged, namely administering or causing to be administered a medication, namely "Vicks Vaporub" a camphor based substance, to either "Good Decision" and/or "Deal Breaker"on 3 June 2012 prior to the horses running in race 3, they must have been reasonably satisfied that: "Vicks Vaporub" is a "medication"; "Vicks Vaporub" had been administered to either horse on 3 June 2012 and that it was the appellant that had either administered that substance to either horse or had caused it to be administered. In assessing whether or not the Stewards could have been reasonably satisfied as to those matters, the principles enunciated in Briginshaw v Briginshaw (1938) 60 CLR 336 at p.362 are to be applied. In short, the Stewards had to be comfortably satisfied of those matters upon cogent evidence and not upon indefinite testimony and/or indirect inferences.

For the purposes of deciding this Appeal it may be accepted that "Vicks Vaporub" is a "medication" in that it is a treatment used for relieving muscular aches and pains and nasal congestion in humans and for suppressing coughing in humans. Presumably it has a similar action and/or effect upon horses."Vicks Vaporub" contains, inter alia, the substances camphor and eucalyptus oil.

The Stewards determined that the substance detected by Mr Westover upon his physical examination of the nostrils of both "Good Decision" and "Deal Breaker" was in fact "Vicks Vaporub" upon the testimony of Mr Westover that he believed that that substance smelt of either eucalyptus or camphor and that he was "pretty confident" that the substance detected upon "Deal Breaker" was "Vicks Vaporub" by reason of its smell. They also made that determination upon the testimony of Mr Hurley that he had located a container in the appellant's race bag which had in it a substance that smelt to him like "Vicks Vaporub" and upon testimony of Mr Westover that the substance located by Mr Hurley smelt to him like "Vicks Vaporub".

Neither the substance or substances detected by Mr Westover in the nostrils of "Good Decision" and/or "Deal Breaker" nor the substance located in the appellant's race bag were analysed to determine their chemical composition. The female strapper was not questioned as to the composition or name of the substance located in the appellant's race bag which she had advised Mr Hurley was her property. Thus, of necessity, the Stewards' determination that "Vicks Vaporub" was present in those substances was based upon the personal observations and knowledge of Mr Westover and Mr Hurley.

The Tribunal is of the view that neither Mr Westover nor Mr Hurley possessed sufficient knowledge to be in a position to positively identify the substance or substances detected or located as "Vicks Vaporub". Their knowledge appeared to be based solely upon their use of, or the use by others of, a substance presumably labelled "Vicks Vaporub" in other prior circumstances. Their evidence was not cogent enough to enable the Stewards to be reasonably satisfied that "Vicks Vaporub" had been administered to either "Good Decision" or "Deal Breaker" on 3 June 2012. That lack of cogent evidence could lead to the conclusion that the Finding of Guilt was infected by an error of law in that it might be said that there was no evidence before the Stewards that could support that finding of fact (refer Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390 at paragraphs 90 and 91). However, in light of what follows, it is not necessary, in the disposition of the Appeal, for the Tribunal to express a concluded view on this issue.

The Tribunal is of the view that it is clear that there was no evidence before the Stewards that could support the finding that the appellant administered "Vicks Vaporub" to either "Good Decision" or "Deal Breaker" on 3 June 2012 or caused the same to be administered to those horses on 3 June 2012. The reasons for the Finding of Guilt given by the Stewards indicate that it was based, as regards administration of that substance, solely on the fact that a substance believed to be "Vicks Vaporub" was found in the appellant's race bag post race 3.This was said to amount to "possession" of that substance by the appellant. The Stewards drew the inference that the appellant was involved in the administration of this substance to "Good Decision" and "Deal Breaker" based upon this "possession". We are of the view that this inference was not open to be drawn by the Stewards in the absence of evidence that the appellant had actual possession of the substance thought to be "Vicks

Vaporub". Actual possession means "complete present personal physical control of the property to the exclusion of others not acting in concert with the accused" (refer Moors v Burke (1919) 26 CLR 265 at p.274).The evidence of the appellant was that the substance in the appellant's race bag did not belong to him but to the female strapper and was being used by her on 3 June 2012 by her placing it on her lips. That evidence was corroborated in statements made by the female strapper to Mr Hurley. The appellant did not have complete personal physical control of the substance to the exclusion of the strapper and it was not suggested that she was acting in concert with the appellant. In those circumstances, the appellant did not have actual possession of the substance.

It follows that the Finding of Guilt was infected by an error of law in that there was no evidence before the Stewards that could support the finding of fact that the appellant had administered "Vicks Vaporub" to either "Good Decision" or "Deal Breaker" on 3 June 2012 or that he had caused the same to be administered to those horses on 3 June 2012. (refer Kostas v HIA Insurance Services Pty Ltd supra).

Ground of appeal "2" is upheld.

<u>Ground of appeal "3" –"Procedural Fairness"</u>

The appellant complains that he was denied procedural fairness during the Inquiry, inter alia, in that he was "not allowed to question persons that stated to Stewards that they could smell something (two licensed persons) in horse area" and in that the "vet or vet assistant was not at inquiry for questioning".

This ground of appeal relates to the following exchanges between Mr Westover and the appellant:

"Mr Westover: Yes, I know what its for. I had the vet check both your horses and, unfortunately, she wasn't able to detect anything. Her sinuses are gone over the years though...

Appellant: There wasn't anything on them.

Mr Westover: Well I placed my fingers down both Good Decision and Deal Breaker, and I'm pretty confident when I pulled my fingers out, I could smell Vicks on Deal Breaker.

Appellant: The vet couldn't?

Mr Westover: No. And, again, the Vet advised us that over the years, with all the chemicals that she's been sniffing, hers sense of smell was gone so she couldn't take it any further. But it still leaves the question why is it on the horse and why is it with your strapper?"

"Mr Westover: So you don't know? You're not sure. Are you or your staff aware that under the Australian Rules that they are not to bring on course or administer any medication? Is Leanne aware of that?

Appellant: Yes, she knows that, she's a trainer.

Mr Westover: Yes. Does the fact that two licensed persons raised a concern that they had smelt a substance on your runner similar to Vicks as it was...

Appellant: What racing people?

Mr Westover: Two licensed people.

Appellant: Who is the licensed people?

Mr Westover: Where?

Appellant: Who are the licensed people?

Mr Westover: I'm not obligated to give names, but one of them was a Steward. I'll correct myself there. It was an official. And the other was a licensed strapper.

Appellant: Well, how do they think there was Vicks up its nose or whatever?

Mr Westover: They don't. They reported that there was a strong smell of what they think was Vicks."

A failure by a domestic tribunal to allow cross examination of witnesses is not in all circumstances a denial of procedural fairness. Much will depend upon the circumstances of the particular case (refer Bailey v Ahearn (1968) 13 FLR 199 and Kingham v Cole (2002) 118 FCR 289).

There is authority to support the proposition that, where the person the subject of proceedings before a domestic tribunal knows the case he has to meet and has an adequate opportunity to state his case, failure on the part of the tribunal to tender for cross examination an essential witness against him will not invalidate the proceedings in circumstances where that person does not request the tender of the essential witness for cross examination (refer Maloney v New South Wales National Coursing Association Ltd [1978] 1 NSWLR 161 at p. 174 citing University of Ceylon v Fernando [1960] 1 WLR 223).

The appellant does not complain that he did not know the case that he had to meet or that he did not have an adequate opportunity to state his case. The appellant did not request that the "official" and/or the "licensed strapper" be made available for cross examination. He did not request that Ms Mc Ewan be made available for cross examination. There is nothing in the transcript of the Inquiry to indicate that the Stewards would have denied the opportunity to the appellant to cross examine those persons had he requested that they be made available for that purpose. In those circumstances, no denial of procedural fairness can be made out. No error on the part of the Stewards is demonstrated.

This ground of appeal is dismissed.

Ground of appeal "1"- "Severit (sic) of Penalty"

In light of the Tribunal's decision in connection with ground of appeal "2" it is unnecessary for it to express any view in respect of this ground of appeal.

ORDERS

The Appeal is upheld in part.

Pursuant to section 145ZE of the Act the Tribunal makes the following Orders:

1. The Finding of Guilt is reversed.
2. The Penalty is set aside.
3. The whole of the fee lodged under section 145D of the Act is refunded to the appellant.

Mr Geoffrey Clift	For and on behalf of	For and on behalf of
Deputy Chairman	Mr David Horton	Ms Nardine Collier
	Member	Member