

**Appeal PA Butcher v RIU - Decision dated 21 December 2011**

**Rules:**

**Repondent(s)/Other parties:**

Racing Integrity Unit

**Name(s):**

**Decisions:**

**PHILIP BUTCHER v NZ RACING INTEGRITY UNIT (RIU)**

**DECISION OF APPEALS TRIBUNAL**

**THE 21 DAY OF DECEMBER 2011**

**APPEALS TRIBUNAL:** Mr Murray McKechnie, Chairman and Mr Bruce Squire QC

**COUNSEL:** Ms Mary Jane Thomas for Mr Butcher, Mr Michael Hodge for NZ Racing Integrity Unit

**1. BACKGROUND AND NATURE OF APPEAL**

1.1 Mr Butcher is a licensed open horseman under the New Zealand Rules of Harness Racing. At the Cambridge/Te Awamutu Harness Racing Club's meeting on the 19 May 2011 two (2) informations were laid against Mr Butcher following his drive on *Misty Magic* in Race 2. The informations were laid under Rules 868(2) and 869(3)(f) of the NZ Rules of Harness Racing.

1.2 Both the informations were adjourned on the night and were heard before a Judicial Committee on the 8 August 2011. Before the hearing commenced the RIU applied to withdraw the information laid under Rule 868(2). That was agreed by consent. Further, as the decision of the Judicial Committee notes at a pre-hearing conference, Mr Cameron George acknowledged that there was no suggestion of *team driving* and that this was not an issue before the Judicial Committee.

1.3 The Judicial Committee issued a comprehensive decision dated 17 August 2011. The charge against Mr Butcher was dismissed. The Judicial Committee directed the parties to file submissions on costs.

1.4 The Judicial Committee received submissions from Ms Thomas for Mr Butcher and a brief response from the RIU. The position taken by the RIU was that the decision to dismiss the information was what was characterised as a *50/50 call*. It was said for the RIU that in those circumstances the costs should lie where they fell i.e. that each party should pay their own costs.

1.5 The Judicial Committee then issued a decision as to costs. The date is not clear but that is not material. The Judicial Committee declined to award costs in favour of Mr Butcher. It also ordered that there be no costs payable to the JCA.

1.6 It is from the costs decision that Mr Butcher appeals. Following discussion between the Appeals Tribunal and counsel it was agreed that the Tribunal could proceed *on the papers* and that no viva voce submissions need be made. In the result both Ms Thomas and Mr Hodge have filed comprehensive submissions and the Appeals Tribunal is now able to deliver its decision.

**2. THE DECISION UNDER APPEAL**

2.1 The Judicial Committee recited that Ms Thomas had written to the RIU before the hearing on the 8 August inviting a reassessment of both charges. She submitted that the Committee should conclude the withdrawal of the charge under Rule 868(2) resulted. There is no material before us to demonstrate that the withdrawal of the charge under Rule 868(2) came about in that way. In the letter from Ms Thomas there was advice that if there was no reassessment of the charges and those charges preceded and were then dismissed a full costs award would be sought.

2.2 The reasoning of the Judicial Committee is to be found in the first part of paragraph 9 and in paragraphs 10 and 11 of the decision. Those are now reproduced verbatim.

9. *In assessing whether an Award of Costs should be made, the Committee is mindful of the position of the RIU and its Stipendiary Stewards who have an obligation to act on behalf of the entire Racing Industry and pursuant to that obligation are required to ensure that all racing is conducted properly. It follows that the Stipendiary Stewards need to be able to oversee the standards of racing and the standards of Licensed Holders without fear that occasionally they might make an incorrect decision. It is the public interest and the Integrity of the Racing Industry as a whole that the RIU and the Stipendiary Stewards are charged with protecting and in this instance*

they proceeded with a charge in relation to a driving manoeuvre that to the Stipendiary Stewards of the day did not look right and it must be accepted that to the viewing public it did not look right.

10. The Committee has had some assistance from the Decision of an Appeals Tribunal in *NZTR v C*. In that decision the Tribunal said among other things “NZTR and the JCA are created by statute and are charged with protecting the interests of a valuable New Zealand Industry, the Thoroughbred Racing Industry. In equal parts they are charged with protecting the interests of the race going public”. That also applies here.

11. In our decision we advised the parties that on the face of it Mr Butcher’s manoeuvre did not look good but in the end the decision to dismiss the charge against Mr Butcher was a close call.

2.3 It can be seen from the passages just quoted that there were two (2) grounds upon which the Judicial Committee declined to make a costs award. It is unclear whether one (1) of these grounds would of itself have been sufficient to persuade the Judicial Committee to decline the costs application. In any event we shall proceed to consider each of the grounds and whether individually or collectively they provided a proper foundation for the Judicial Committee’s determination. The first ground was that to award costs might discourage the prosecuting authority (RIU) from laying charges in the future. The second ground was that the decision to dismiss the information against Mr Butcher was a close call. We take each of these grounds in turn.

### 3. DISCUSSION

3.1 The RIU is a creature of statute. It has an obligation to ensure that the Rules of Racing (whether Thoroughbred, Harness or Greyhound racing) are upheld. It is a disciplinary body expressly created to ensure that industry rules are obeyed. It is important that those rules be obeyed for the protection of the general public who interest themselves in racing and in order to maintain confidence in the conduct of the racing industry.

3.2 The rule governing costs awards is No 1114 (3) and is in these terms:

*On the determination of an information or its withdrawal or dismissal the Judicial Committee may order all or any of the costs and/or expenses of any party to the proceedings of and incidental to the hearing of the information be paid by such person or body as it thinks fit and may fix an amount by way of such costs and expenses.*

As Mr Hodge noted in his submissions the language of the rule is neutral. There is no presumption either way. A Judicial Committee in considering whether or not to award costs is exercising a judicial discretion. Such a discretion should not be interfered with unless there has been some error of principle and/or a failure to take account of some relevant consideration.

3.3 For the RIU Mr Hodge relied upon a judgment of the English Court of Appeal in *Baxendale –Walker v Law Society* [2008] 1WLR 426. That judgment had to do with the Law Society bringing disciplinary proceedings against a solicitor. Two (2) allegations were made one (1) of which was proved. The Tribunal ordered the Law Society to pay a part of the solicitor’s costs on the basis that in respect of the charge which was dismissed costs should follow the event. The Court of Appeal held that while the solicitor’s Disciplinary Tribunal had wide and important disciplinary responsibilities for the legal profession it also had a very wide discretion as to costs. It pointed out that the disciplinary proceedings initiated by the Law Society supervised the proper discharge of solicitors obligations and sought to ensure the maintenance of high professional standards. The Court of Appeal went on to observe that the Law Society when performing that function was in a wholly different position from a party to civil litigation and that the ordinary rules that properly incurred costs generally followed the event did not apply to disciplinary proceedings against a solicitor. The costs award made against the Law Society was not upheld. Mr Hodge also drew attention to a number of New Zealand judgments. The most significant of these is *Z v Dental Complaints Assessment Committee* [2009] 1NZLR 1 at (97). That judgment of the New Zealand Supreme Court was principally concerned with the standard of proof required in professional disciplinary proceedings. The Court held, by a majority, that the civil standard of proof on the balance of probabilities flexibly applied was appropriate. The issue of when costs might be awarded was not the subject of any direct judicial ruling.

3.4 Ms Thomas pointed to the seriousness of the charge faced by Mr Butcher. He could have been fined a sum of up to \$10,000.00 and suspended from holding or obtaining a licence for a period of twelve (12) months or disqualified for the same period. Ms Thomas drew attention to the judgment of the Judicial Committee in *NZTR v C*, 5 June 2009. There it was said that the Judicial Committee is vested with a *broad discretion*. Ms Thomas acknowledged that there was a proper basis for bringing the charge and there could be no suggestion that the prosecution was frivolous.

3.5 In the submissions for RIU Mr Hodge referred to a passage in *Berry v British Transport Commission* [1962] 1QB 306. There Devlin LJ (as he then was) said

*“A Plaintiff brings an action for his own ends and to benefit himself; it is therefore just that if he loses he should pay the costs. A prosecutor brings proceedings in the public interest, and should be treated more tenderly”.*

This Tribunal believes that the words of Devlin LJ point to a distinction between the costs that are appropriate in civil litigation between parties acting in their own interests and appropriate costs where a prosecutor is fulfilling a statutory function. The distinction does not however mean that a prosecutor exercising a statutory function is in all circumstances protected from a costs award if a prosecution

does not succeed.

3.6 In our view it is important to examine the approach that has hitherto been taken under the Rules of Harness Racing. Our research has established that the practice has generally been to award costs to a party who has successfully defended charges laid under the rules. Notwithstanding the cautionary words of Devlin LJ that “a prosecutor brings proceedings in the public interest and should be treated more tenderly” we can find no evidence that costs awards made in the past have acted as some sort of disincentive or dis-encouragement. In fact the RIU, and its predecessors, have in the past, properly, laid charges in circumstances where it has been known that there has not been total compliance with approved procedures. Laying an information in such circumstances leaves the determination of the appropriate degree of compliance with the Judicial Committee who hears the charge. That is as it should be. In laying a charge in such circumstances the prosecutor must have been aware that there was no assurance that the charge would be proved. A vivid illustration of this is *NZTR v W*, 6 May 2011. The decision in that case turned upon whether or not there had been adequate compliance with the swabbing instructions laid down under the Rules of New Zealand Thoroughbred Racing.

3.7 We have considered New Zealand racing decisions (in all codes) where the philosophy behind the cost(s) rules has been examined. One such decision is *NZTR v McA*, 17 March 2011. The relevant provision under the Rules of Thoroughbred Racing is Rule 920(3). At paragraph 5.2 of its decision the Judicial Committee had this to say:

*5.2 Rule (920(3) provides that the Judicial Committee may order that all or any of the costs and expenses of the NZTR and/or any employee thereof and the Judicial Control Authority and the Judicial Committee be paid by such person as it thinks fit. The discretion to award costs under the Rule is on its face unqualified but obviously is required to be exercised on a principled basis. In New Zealand bodies such as NZTR and the Judicial Control Authority are funded by allocations from the New Zealand Racing Board, and in the case of NZTR, partly from fees and levies. Those funds are utilised to meet expenses incurred whenever it becomes necessary to take proceedings against those bound by the Rules who breach them. Unless adequate and effective steps are taken to recover those expenses, the utilisation of funds for disciplinary purposes is inevitably at the expense of the Judicial Control Authority's and NZTR's other activities in relation to the racing industry. On the face of it there seems no compelling reason in principle why those whose conduct has led to the institution of disciplinary procedures should not, within limits, bear the expense of those procedures if they are ultimately found to have breached the Rules as charged. Obviously given the nature and intended width of the discretion conferred by Rule 930(3) that factor will not necessarily be the only consideration to be brought to account in deciding to award costs and fixing the quantum in any case, but there seems no reason why that should not be the starting point for the exercise of the discretion in any given instance.*

3.8 The judgment of the New Zealand Court of Appeal in *R v Connolly* [2007] 23 NZTC 21, 172 is of interest. That was an appeal from an award of costs following an unsuccessful criminal prosecution. Persons involved with the setting up and operation of a company known as *Digitech* had been prosecuted on charges of conspiracy and money laundering. Following a hearing before a Judge alone all charges were dismissed. The trial Judge made a substantial costs award in favour of the acquitted parties. The Court of Appeal, by a majority of two to one, held that the Judge had been in error, inter alia, in failing to take into account that in making a significant order for costs this might inhibit prosecution of serious crime in the future. The costs order made by the Judge at first instance was described as a *disproportionate adverse costs award*. The Court of Appeal made a costs award in favour of some of the acquitted parties and quashed the costs award in favour of others. The figure fixed by the Court of Appeal was substantially less than that which had been set by the Trial Judge. In our view *R v Connolly* is more relevant to the quantum of costs than to whether or not costs should be made against an unsuccessful prosecuting authority. It is also important to remember the restrictive language of the costs in Criminal Cases Act 1967. The restrictive nature of that legislation is vividly illustrated by the judgment of the Court of Appeal in *R v Rust* [1998] 3 NZLR 159.

3.9 We now turn to consider whether the categorisation of the decision as a close call was a proper ground for refusing to make a costs award. First it is important to emphasise that the charge against Mr Butcher was vigorously defended. It is clear from the decision of the Judicial Committee that there was significant evidence called and detailed submissions by Ms Thomas who appeared for Mr Butcher and Mr George who conducted the case for the RIU. The Committee was required to analyse the driving manoeuvre and the comprehensive competing submissions. The charge was dismissed upon its merits. There is no suggestion that Mr Butcher escaped upon some technicality or oversight by the prosecutor.

3.10 In our view it is not appropriate to determine whether or not costs should be awarded by endeavouring to measure the margin by which a licence holder may have escaped conviction. An exception may exist where there is some technicality advanced or some oversight by the prosecutor as spoken of above. Where, as here, the merits of the matter are carefully examined then a charge is either proven or it is not. There cannot be degrees of guilt.

3.11 In our view the categorisation of the decision as a *close call* may well have been accurate. Nevertheless the charge against Mr Butcher was not established. The closeness of the call (to adapt the expression used by the Judicial Committee) may, in our view, have some relevance to the quantum of a costs award but is not, of itself, something which should bar a successful Defendant from having an award made in his or her favour.

#### **4. DECISION**

4.1 Costs awards made under the Rules of Racing are generally relatively modest. That is certainly so in respect of breaches of the riding obligations of jockeys or the driving obligations of reinsmen in harness racing. More significant costs awards have been made where the charges have involved misconduct or breaches involving prohibited drugs. We do not believe that a costs award in this case would or might influence the approach taken by the RIU on future occasions. To believe that such might happen does not reflect well upon the integrity which the RIU is required to display in bringing matters before Judicial Committees.

4.2 As to the description given to the decision by the Judicial Committee as a close call that may well have been accurate. It does not, in our view, constitute a sufficient consideration to bar a costs award. It is, to a degree, relevant to fixing the quantum of costs. That is best explained by the view we have that where a prosecution fails hopelessly a greater costs award would be appropriate than where a prosecution fails narrowly.

4.3 It follows from what is said above that the Tribunal does not believe that either of the reasons advanced by the Judicial Committee for not making a costs award, whether taken individually or collectively, was valid. In our view the Judicial Committee made an error in principle. It gave significantly too much weight to the two considerations which have been under discussion in this decision. While the Judicial Committee had a discretion there was a error of principle in the exercise of that discretion which justifies the intervention of an Appellate Tribunal. The decision of the Judicial Committee to refuse costs is quashed.

4.4 This Tribunal must now fix a costs award. Ms Thomas in her submissions seeks full costs of the amount charged to date together with what is described as work in progress to the 22 November when the Appellant's submissions were filed. Regrettably no figures were provided. Before the Judicial Committee Ms Thomas sought full costs and put forward two (2) statements addressed to Mr Butcher which in total involved fees and disbursements of something a little over \$2,000.00.

4.5 Ms Thomas submitted to the Judicial Committee on the costs question that Mr Butcher's ability to pay for costs in defending the charge was substantially less than the financial position of the RIU. We do not consider this circumstance to be a relevant consideration. Much the same could be said in respect of almost every licence holder in all three (3) codes.

4.6 It is appropriate that this Tribunal now fix the costs in respect of the hearing before the Judicial Committee and the costs in relation to this appeal. This matter has gone on long enough and the entertaining of further submissions cannot be justified. As noted earlier this appeal has been conducted upon the consideration of written submissions. Both counsel have provided helpful submissions which directly addressed the matters at issue. There is also a question as to whether an award of costs should have been made by the Judicial Committee in favour of the JCA and whether there should be an order for costs in favour of the JCA in respect of this appeal.

## **5. RESULT**

5.1 In our view costs should have been awarded to Mr Butcher by the Judicial Committee. An appropriate figure would have been \$500.00. There will be an order for costs in that sum. No order in favour of the JCA is appropriate.

5.2 On this appeal hearing Mr Butcher shall have costs in the sum of \$500.00. No costs award is made in favour of the JCA.

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Murray McKechnie  
Chairman

Signed pursuant to Rule 1114(6)

### **Penalty:**

N/A refer above.