

**Non Raceday Inquiry - RIU v LJ Justice - Decision of Judicial Committee on Penalty and Costs 16 December 2011**

**Rules:**

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

**Name(s):**

**Decisions:**

**HRNZ v L J JUSTICE**

**Hearing before Non Raceday Judicial Committee**

**Judicial Committee:** Mr Bruce Squire QC (Chairman) - Professor Geoffrey Hall

**Counsel:** Mr C J Lange – Counsel for HRNZ, Ms M J Thomas and Mr R Donnelly – Counsel for Mr Justice

**DECISION OF JUDICIAL COMMITTEE ON PENALTY AND COSTS**

**1. Introduction:**

1.1 On 31 October 2011 we delivered our Decision on a charge brought against Mr Justice under R.1004 (2) of the New Zealand Rules of Harness Racing (*"The Rules"*) which alleged that he had presented a horse named *"Smoken Up"*, of which he was the trainer, to race in the Inter Dominion Pacing Grand Final at Alexandra Park on 8 April 2011 when the horse was not free of a Prohibited Substance. The race was run as part of the Inter Dominion Championships conducted by the New Zealand Metropolitan Trotting Club and was won by *"Smoken Up"*. The charge alleged the horse was presented for the race when the level of DMSO in its system, as measured by analysis of a urine sample taken from it, exceeded 15 mg/L. Under the Rules DMSO at a concentration exceeding that level in urine is a Prohibited Substance by reason of its inclusion in the Prohibited Substance Regulations. Under R.1004 (2) where a horse is presented for a race not free of a Prohibited Substance the trainer commits a breach of the Rule and becomes liable to the penalties prescribed in R.1004 (7). In addition, under R.1004 (8) any horse connected with a breach of R.1004 (2) is required to be disqualified from any race for which it was entered and is liable to disqualification for a period not exceeding five years.

1.2 In our Decision we found the charge brought against Mr Justice proved, and that for the purposes of R.1004 (8), *"Smoken Up"* was connected with a breach of R.1004 (1) and (2) when it ran in and won the Pacers Grand Final at the Inter Dominion Championships on 8 April 2011. Our findings and the reasons for them are set out in our Decision of 31 October 2011 and will not be repeated here except to note the point made in paragraph 7.2 of that Decision that there was no evidence put before us that showed Mr Justice personally was responsible for *"Smoken Up's"* elevated DMSO level when it was presented to race on the evening of 8 April 2011, nor was there any evidence any other person with his knowledge was responsible for the horse's elevated DMSO level. The fact the horse had an elevated DMSO level beyond the 15 mg/L threshold when it was presented to race was proved to the required standard. However proof of the charge did not require the Informant to establish how and in what circumstances the horse's DMSO level came to be elevated beyond the specified limit and the evidence did not do so. We have therefore proceeded with the assessment of penalty in this case on the basis that matter remains an unresolved issue and no culpability attaches to Mr Justice personally for the horse's elevated DMSO level.

**2. Penalty:**

2.1 The penalties provided in R.1004 (7) for a breach of sub-rule (2) are:

- (a) a fine not exceeding \$10,000.00; and/or
- (b) disqualification or suspension from holding or obtaining a licence for any specific period not exceeding five years.

In addition, as indicated, R.1004 (8) provides:

*"Any horse connected with a breach of sub-rule (1), (2) or (3) shall be disqualified from any race entered and/or liable to a period of disqualification not exceeding five years".*

2.2 The predecessor to R.1004 was R.340 (4) which, as noted in our Decision of 31 October 2011, specifically provided for an *"all reasonable precautions"* defence which was removed when the Rules were restructured in 1996 and 2003. The penalties provided for a breach of R.340 (4) were:

- (i) disqualification for a specified period or for life;
- (ii) suspension of licence for a specified period or life; and/or
- (iii) a fine not exceeding \$2,000.00.

The change in penalties effected by the restructuring of the Rules which accompanied the removal of the all reasonable precautions defence was accordingly an increase in the maximum fine from \$2,000.00 to \$10,000.00, but a reduction in the maximum periods of disqualification and suspension from life to a period not exceeding five years. The implications of those changes would seem to be that with the removal of the all reasonable precautions defence, penalties imposed for breaches of R.1004 should have a greater emphasis on more significant monetary penalties but that breaches involving levels of culpability making the imposition of monetary penalties only inappropriate, should be met with more restricted periods of disqualification and suspension than had hitherto applied. The trade-off for the loss of the reasonable precautions defence was accordingly liability to reduced periods of disqualification or suspension but to more significant monetary penalties.

### **3. Counsel's Submissions:**

3.1 In his Submissions Mr Lange emphasised what he called the rationale of the Prohibited Substance rule by reference to a number of cases in which, expressed in different ways, the rule, and what was previously known as the drug negligence rule, were seen as fundamental to the maintenance of the integrity of the racing industry by ensuring horses raced on even terms unaffected by substances which for various reasons, including effect on performance, have been deemed Prohibited Substances. Mr Lange pointed out it was essential for the financial wellbeing of the racing industry, which depends significantly on betting turnover, to be seen to be conducted fairly and honestly and that the proper enforcement of the Prohibited Substances rules materially enhanced that objective. For that reason he submitted the rules imposed a high duty on trainers to ensure compliance.

3.2 Mr Lange acknowledged there was no evidence Mr Justice was responsible for "*Smoken Up's*" elevated DMSO level when it was presented to run in the Pacing Grand Final on 8 April 2011 and submitted penalty should be assessed only on the basis that as the horse's trainer, he failed in his obligation to ensure the horse raced free of a Prohibited Substance. In that regard he submitted the overriding imperative of the need to maintain integrity and public confidence in racing meant the proceedings should be regarded as akin to professional disciplinary proceedings in which penalties are imposed not for punitive reasons, but in order to maintain standards and public confidence in the profession. Applying those principles, but having regard to the fact there was no evidence of Mr Justice's complicity in "*Smoken Up's*" elevated DMSO level when it was presented to race and the fact Mr Justice had been an advocate for drug free racing, he submitted a fine at the maximum level prescribed of \$10,000.00 together with an award of costs should be imposed.

3.3 Ms Thomas for her part has pointed to the absence of Mr Justice being in any way responsible for "*Smoken Up's*" elevated DMSO level and the fact that by reason of the charge having been found proved he will lose what she called "*a significant portion*" of the \$400,000.00 winners stake money as significant mitigating factors. In addition, she submitted Mr Justice's reputation as an advocate for drug free racing has been tarnished in the news media as a result of the Decision finding the charge proved, notwithstanding the Decision specifically recorded the absence of any evidence he was complicit in what may have occurred to elevate the horse's DMSO level when it was presented to race.

3.4 Ms Thomas submitted that the Committee ought not approach the question of penalty on the basis of the comments made in the cases to which Mr Lange referred. She made the point the cases did not involve a rule of absolute liability which she said the Committee had determined was the case with the rule Mr Justice was found to have breached, and the cases referred to by Mr Lange involved greater levels of fault than in the present case. In that regard she said a distinction should be drawn, in assessing penalty, between R.1004 and the rule where intentional administration of a Prohibited Substance by a trainer was proved. She said the cases referred to by Mr Lange fell within the latter category.

3.5 Ms Thomas also pointed to the fact that the Prohibited Substance the horse had in its system was a legitimate therapeutic drug which only became a Prohibited Substance when it exceeded the threshold level prescribed by the Prohibited Substance Regulations. She said this was not a case where "*Smoken Up*" was found to have an illegal performance enhancing drug in its system and this distinction was important in assessing penalty for the breach in this case. Because DMSO was not a performance enhancing drug she submitted a breach of R.1004 relating to DMSO should be regarded as falling into what she called a special category.

3.6 Ms Thomas then referred to four Decisions relating to trainers of horses found to have been presented to race with DMSO levels beyond the threshold and who had been charged with breaches of the Prohibited Substance rule. In the first, which involved an intentional administration, the horse was found to have a DMSO level of 68 mg/L. There was a loss of winnings of approximately \$6,000.00. A fine of \$750.00 was imposed on the trainer and he was ordered to pay costs of \$500.00 in total. In the second case, also a case of intentional administration, the horse was found to have a DMSO level of 2090 mg/L. In that case the trainer was fined \$750.00 and ordered to pay costs of \$250.00. In the third case, also an intentional administration case, the horse was found to have a DMSO level of 500 mg/L. There was a loss of winnings in this case of \$18,500.00. Because of the loss of the winnings the Judicial Committee imposed no further penalty on the trainer. In the fourth case there were three separate breaches of the Prohibited

Substance Rule involving DMSO. The DMSO levels on the three occasions were 31.5 mg/L, 30.1 mg/L and 74 mg/L. The trainer admitted in each instance administering DMSO to the horse within 48 hours prior to the race. The breaches all occurred within a period of slightly less than a month in 2008. A fine of \$750.00 for each breach of the rule was imposed and the trainer was ordered to pay costs of \$500.00.

3.7 By reference to those cases, the loss of his part of the winnings of \$400,000.00, the effect on his reputation and the fact there was no evidence that Mr Justice was personally responsible for "Smoken Up's" elevated DMSO level when it was presented to race on 8 April 2011, Ms Thomas submitted that no additional penalty should be imposed.

#### **4. Discussion:**

4.1 There is always a natural reluctance to impose a penalty on someone who has not been proved to have been guilty of any culpable conduct. But the charge brought and proven against Mr Justice in this case, and the assessment of penalty for it, involves wider considerations. There can be no doubt that rules prohibiting the racing of horses affected by Prohibited Substances, whether performance enhancing or not, are fundamental to the integrity of the racing industry. The reasons are obvious and have been repeatedly articulated, in different ways, in many cases, by different Judicial Committees and Appeal Tribunals. The force of the observations made and their current validity lose nothing by their repetition. It is in that context the significance of the penalties provided for breach of R.1004 (2), after the rule had been amended to remove the all reasonable precautions defence available under the previous rule, and sub-rule (4) included, becomes apparent. What is contemplated is that sufficiently condign penalties will be imposed for breaches of the rule which will recognise, reinforce and give effect to the pivotal significance of the rule in maintaining the integrity of racing, whether or not culpable conduct is involved. Naturally where culpable conduct is involved, penalties imposed will normally be greater than in cases where such conduct is absent but we think it is wrong and contrary to the intent and purpose of the rule to assume the absence of culpable conduct should attract no, or only a token penalty.

4.2 Nonetheless the absence of culpable conduct on the part of Mr Justice is a relevant consideration in fixing penalty and we have taken account of it accordingly.

4.3 Ms Thomas submitted that we should also take account of the financial loss suffered by Mr Justice by reason of his loss of a share of the \$400,000.00 winner's stake and the reputational damage he will have suffered as a result of the publicity attendant on the charge against him having been proved. We agree those matters should be brought to account in this case, although we are not inclined to attach great weight to the latter bearing in mind the comments we made regarding Mr Justice's personal responsibility in our Decision and the fact he has been found to have been guilty of a similar breach of the rule in Australia in May 2003. We do not know the nature of the Prohibited Substance involved in that previous breach by Mr Justice, nor does the information provided to us indicate whether the breach involved culpable conduct on his part or not. But we do note that on that occasion he was fined the sum of \$8,000.00. The level of fine would seem to indicate some degree of culpable conduct by Mr Justice was likely.

4.4 Ms Thomas was right to draw to our attention the level of penalties involved in the various cases she referred to. While broad consistency in the levels of penalties imposed for like offences is obviously desirable we think the penalties imposed in those cases failed to sufficiently recognise the point of the Prohibited Substance rule and its significance in achieving and maintaining the overall objective of integrity and public confidence in the racing industry. That is particularly so given that in each of those cases there was intentional administration of DMSO to the horses involved. The comparison of those penalties with the penalty imposed on Mr Justice in Australia in May 2003, assuming the latter involved culpable conduct on his part, is instructive. In that connection we think it useful to refer also to the decision of the Australian Racing Appeals Tribunal in the case of Lisa Justice (8.5.07). Ms Justice had been found guilty of a breach of R.190 (1) of the Australian Harness Racing Rules and fined the sum of \$5,000.00. R.190 is in terms, with some minor variations, effectively the same as R.1004 (1) (2) and (4) of the New Zealand Rules. In that case the urine sample taken from the horse trained by Ms Justice was found to contain the anti-inflammatory drug Diclofenac. Ms Justice appealed against the finding of guilt and the penalty imposed. The Appeals Tribunal dismissed the appeal against the finding of guilt but allowed the appeal against penalty and reduced the fine to \$2,500.00 noting that on the evidence it was not possible to say how the Prohibited Substance came to be within the horses system prior to the race. In fixing the penalty at that level the Tribunal took account of the fact Ms Justice had an outstanding record and that for some twenty years she had never been involved with any horse with a drug problem or which had returned a positive test. The Tribunal also noted the level of drug in the horses system was low. In referring to the issue of penalty generally the Tribunal said:

*"As has been stated by the Racing Appeals Tribunal on a number of occasions, the rule which prohibits the presentation of a horse at a race meeting with a prohibited substance within its system is a rule designed to ensure as far as possible that there is a level playing field. The use of drugs is something that must be deterred. It is a matter of critical importance to the racing industry and integrity of the racing industry. The responsibility is on the trainer, and on the trainer alone, to present his or her horse free from a prohibited substance. The rule itself is of course one of strict liability and designed to preserve the integrity and public confidence in the racing industry. Principles of general deterrence and denunciation clearly apply when a horse is presented with a prohibited substance in its system. In the end, however, each case and each penalty must depend on its own individual circumstances."*

Apart from the observation the rule is one of strict liability, with which we disagree for the reasons set out in our Decision of 31 October 2011, we think the comments of the Appeals Tribunal with the emphasis on the need for deterrence and denunciation accurately encapsulate the rationale for the imposition of penalties for breaches of the rule, notwithstanding the absence of culpable conduct on the part of the trainer concerned.

4.5 Some assistance as to the level of penalty which ought to be imposed for a non-culpable breach can also be obtained from Decisions in other codes. In NZTR v S (28.10.10) Mr S pleaded guilty to a charge brought under R.804 (2) of the NZTR Rules of Racing. R.804 (2), slightly differently worded, but allowing for an all proper precautions defence, is the equivalent of R.1004 (2) of the New Zealand Rules of Harness Racing. The prescribed penalties for breach of R.804 (2) are disqualification for a period not exceeding five years; and/or suspension for a period not exceeding twelve months; and/or a fine not exceeding \$25,000.00. Mr S was the trainer of a horse which had been brought to a racecourse to race and was found to have the Prohibited Substance Lignocaine in its system. In fixing penalty in that case the Judicial Committee noted it was unable to determine who had been responsible for the administration of the drug to the horse or the circumstances in which the administration had taken place. Mr S had what the Committee described as "...an unblemished record..." and that he ran "...a well organised and excellent operation". Nevertheless noting the need to uphold public confidence in the integrity of racing and the adverse impact drug offending had on the industry, the Committee imposed a fine of \$6,000.00 and ordered Mr S to pay costs. The penalty imposed in that case, and that imposed in the Lisa Justice case referred to, together with the penalty imposed on Mr Justice himself in Australia in 2003, suggests the penalties imposed in the various cases to which Ms Thomas referred in her submissions are rather less than adequate to give proper effect to the purpose and intent of R.1004.

4.6 In the circumstances approaching the issue of penalty as outlined and giving effect to the various mitigating factors submitted by Ms Thomas which need to be brought to account, we think a fine of \$3,500.00 should be imposed.

## 5. Costs:

5.1 On behalf of the prosecuting agency the Racing Integrity Unit, Mr Lange sought costs of \$25,382.00 made up as follows:

- (a) Legal costs \$17,500.00
- (b) Accommodation and travel \$1,555.00
- (c) Hearing costs \$3,742.00
- (d) B sample testing (QLD) \$2,585.00

**Total: \$25,382.00**

In addition costs are sought by the Judicial Control Authority of \$25,451.74 made up as follows:

- (a) Accommodation and meals \$684.35
- (b) Airfares/taxis \$1,227.40
- (c) Catering/hearing days \$674.99
- (d) Dictation services \$2,520.00
- (e) Video conferencing \$345.00
- (f) Judicial fees \$20,000.00

**Total: \$25,451.74**

5.2 In her submissions Ms Thomas objected to Mr Justice being required to pay for the testing of the "B" sample on the basis that he had not agreed to pay for the test. She also objected to the expenses claimed for catering and required further information in relation to the claim for hearing costs. More generally by reference to the Decision in NZTR v C (5.6.09) she submitted that costs should be apportioned equally between the parties and that the Committee should use 50% as a guide in fixing costs in this case.

5.3 R.1114 (3) provides that the Judicial Committee may order all or any of the costs and expenses of any party to the proceedings of, and incidental to the hearing, to be paid by any person or body as it thinks fit and may fix an amount by way of such costs and expenses. On the face of the Rule the discretion is unqualified but is obviously required to be exercised on a principled basis. In NZTR v R McA (29.4.11) a Judicial Committee constituted under the New Zealand Rules of Racing, in dealing with an application for costs observed:

"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 R.920 (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".

Notwithstanding the view taken by the Judicial Committee in C to which Ms Thomas referred in her submissions we think the general approach, or starting point for determining an issue of costs should be as outlined in the passage just quoted from the McA case. In that regard we think the fact the charge was the subject of a full hearing and was proved by the Informant is relevant to the exercise of our discretion, as is the fact that those aspects of the prosecution case which were contested were by and large reasonably so, and

there is no suggestion the defence to the charge overall was based on frivolous or unsupportable positions. We think it is also relevant the determination of the charges involved issues of some factual and legal complexity.

5.4 As to the particular costs claimed by the Racing Integrity Unit we think it reasonable for the cost of testing the "B" sample to be claimed. The evidence established the "B" sample was tested at the Queensland Racing Science Centre at the request of Mr Justice and if the Racing Integrity Unit has paid for the testing or been invoiced for it because it made the arrangements, we think it reasonable for it to be reimbursed. The hearing costs of \$3,742.00 relate to expenses incurred in relation to travel and accommodation for witnesses and others required to attend the hearing. The correct amount however is \$3,632.00 rather than the amount claimed. We think those hearing costs are reasonably claimed also and allow them in the sum of \$3,632.00. In relation to the costs claimed by the Judicial Control Authority we do not think Mr Justice should be required to bear the catering costs claimed but other items claimed, as outlined, appear to be reasonable and properly claimable. We note that apart from the catering costs, which we have disallowed, Ms Thomas took no objection to the costs claimed by the Judicial Control Authority.

5.5 Approaching the exercise of our discretion in the manner outlined in paragraph 5.3 above we think Mr Justice should be required to meet 65% of the costs of both the Racing Integrity Unit and the Judicial Control Authority, excepting the claim for catering in the latter instance.

5.6 Finally we turn to the requirements of R.1004 (8). In our Decision of 31 October 2011 we found "*Smoken Up*" was connected with the breach of R.1004 (2) of which Mr Justice had been found guilty and in accordance with the mandatory requirement of that Rule "*Smoken Up*" is formally disqualified from the Pacing Grand Final, Race 8 on the Card, run at Alexandra Park in Auckland on 8 April 2011 as part of the Inter Dominion Championships conducted by the New Zealand Metropolitan Trotting Club. In accordance with R.1114 (8) we amend the placings of the horses in that race to give effect to the disqualification of "*Smoken Up*" and direct the stakes in the race be paid or handed over in accordance with the amended placings. If the stakes have already been paid or handed over in respect of "*Smoken Up*" they are directed to be repaid immediately in terms of the requirements of R.1115 (4). In the circumstances we see no reason to impose any period of disqualification on the horse.

## **Penalty:**

### **6. Result:**

6.1 In the result for the reasons outlined:

- (a) Mr Justice is to pay a fine of \$3,500.00;
- (b) He is to pay costs to the Racing Integrity Unit in the sum of \$16,425.00;
- (c) He is to pay costs to the Judicial Control Authority in the sum of \$16,104.00.

6.2 "*Smoken Up*" is disqualified from the Pacing Grand Final, Race 8 on the Card, run at Alexandra Park in Auckland on 8 April 2011 as part of the Inter Dominion Championships conducted by the New Zealand Metropolitan Trotting Club. The placings in the race are amended as set out in paragraph 5.6 above and the stakes in the race are to be dealt with as directed in that paragraph.

Dated this 16th day of December 2011

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Bruce Squire QC (Chairman)  
(Signed pursuant to R.1114 (6))