APPEAL - 510

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**ROSS A OLIVIERI**
APPLICATION NO:	**A30/08/510**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR J PRIOR (MEMBER)** **MR RJ NASH (MEMBER)**
DATES OF HEARING:	**23 OCTOBER 2003 & 27 NOVEMBER 2003**
DATE OF DETERMINATION:	**23 APRIL 2004**

IN THE MATTER OF an appeal by Mr R A Olivieri against the determination made by the Stewards of the Western Australian Trotting Association on 20 June 2000 imposing a 12 month disqualification for breach of Rule 497(1) of the Rules of Trotting.

Mr G Winston was granted leave to appear for the appellant.

Mr M J Skipper appeared for the Stewards of Harness Racing.

This is a unanimous decision of the Tribunal.

For the reasons published the appeal is dismissed.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of W.A.

APPEAL 510

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPLICANT:	**ROSS A OLIVIERI**
APPLICATION NO:	**A30/08/510**
DATE OF HEARING:	**5 July 2000**
DATE OF DETERMINATION:	**7 July 2000**

IN THE MATTER of an application by Mr RA Olivieri for an order suspending the operation of a 12 month disqualification for breach of Rule 497 of the Rules of Harness Racing imposed by the Stewards of the Western Australian Trotting Association on the 20 June 2000.

Mr S Davies, instructed by Ahern & Associates, appeared for the applicant.

Mr RJ Davies QC, assisted by Mr B Goetze, instructed by Minter Ellison, appeared for the Stewards of the Western Australian Trotting Association.

On the 27 June 2000 Mr Olivieri, a registered trainer, lodged a notice of appeal against a 12 month disqualification imposed on him by the Stewards of the Western Australian Trotting Association for breach of Rule 497 of the Rules of Harness Racing. At the same time Mr Olivieri applied for an order suspending the operation of his penalty. The application was accompanied by a letter from Mr Olivieri which sets out 9 reasons in support. The Registrar referred the application and letter to the Stewards in the usual way and sought a response. The Stewards replied in writing. In opposing the application the Stewards referred to the serious nature of the offence and the fact that Mr Olivieri was

unsuccessful in having the Committee alter the penalty imposed by the Stewards. The Committee did however approve another trainer to take over training of the horses at Mr Olivieri's stable complex.

I considered the application. Based on the documentation then before me I advised the Registrar to inform the parties that a stay would not be granted but the applicant could have the opportunity to argue the matter if he so wished. The matter came on for argument on 7 July 2000.

In support of the application I was provided with an affidavit sworn by Mr Olivieri's solicitor together with a *'draft copy'* of that part of the transcript dated 20 June 2000 which dealt with the determination by the Stewards. At page 5 of the transcript Mr Skipper, as Chairman of the Stewards' inquiry, states:

> *'As the registered trainer of BULLS ROAR you were charged under the provisions of rule 497(1) with presenting the horse to race at Gloucester Park on Monday the 12th of April 1999, where the horse had been found to have a drug administered to it. The drug being a substance capable of elevating the total carbon dioxide level in the plasma to above 35 millimoles.*
>
> *You pleaded not guilty and in defence of the charge put evidence that you took all reasonable and proper precautions to prevent the administration of the drug. During the inquiry you were afforded the opportunity to have veterinarian, Dr Stewart, assist you in presenting evidence, to advocate on your behalf and to question expert witnesses.*
>
> *The stewards heard evidence on your behalf from Dr Stewart, Professor Dawkins and also received a significant amount of written evidence. We also heard evidence from Dr Rieusset; Mr Russo, Acting Principal Chemist, Racing Chemistry Laboratory; Mr Campbell, Chief, Forensic Science Laboratory, Chemistry Centre of Western Australia, Dr Vine, Director of Racing Analytical Services Limited, and Professor Rose, Dean of the Faculty of Veterinary Science, Sydney University. We also received evidence in writing from a number of people who did not give oral evidence to the inquiry.*
>
> *You submitted that you did not knowingly administer an alkalising agent to BULLS ROAR and that you believed that none of your staff did either and that the plasma total carbon dioxide level of BULLS ROAR's blood sample on the 12th of April 1999, was elevated by factors other than the administration of an alkalising agent.*
>
> *You submitted that the total carbon dioxide threshold level of 35 millimoles in plasma, as set in the rules, was arbitrary and had no scientific basis and that BULLS ROAR's levels did not exceed the naturally occurring levels possible in horses.*

You submitted that the horse was suffering from a health/homeostasis factor on the 12th of April 1999 which may have contributed to the reported TCO_2 level.

You submitted that there was some doubt that the horse sample was, in fact, BULLS ROAR. This doubt was based on your claim that BULLS ROAR's brand needed clipping on the 20th of April 1999 therefore may not have been properly identified on the 12th of April.

You submitted that a horse's TCO_2 levels may increase by the onset of something called pre-competition anxiety.

You submitted that the sodium and protein levels in the 12th of April sample as reported in the Vetpath report 21797, demonstrated that it's reasonable to conclude that an alkalising agent containing a sodium salt could not have been administered on the 12th of April.

You submitted that you were not notified in accordance with rule 494A(2)(a).

And you submitted that the measurement process was fallible.

The TCO_2 level obtained from BULLS ROAR over the period 10th of March 1999 to 17th of April 2000 indicate to the stewards that the horse has what can be considered normal TCO_2 levels. We do not accept that BULLS ROAR's level on the 12th of April 1999 was as a result of the horse's naturally occurring levels.

Professor Rose states: "that the recorded values from the 12th of April 1999 of 37.5 and 37.1 clearly represent values well above the normal range. Given that values from BULLS ROAR between the 20th and 30th of April range from 30.8 to 31.6 then it's reasonable to assume that the reason for the value being elevated to 37.1 and 37.5 on the 12th of April was due to the administration of some type of alkalising agent."

You presented evidence that prior to its race on the 12th of April, BULLS ROAR was scouring and sweating up more than usual. However, your staff was not sufficiently concerned about the horse's condition to report it to the stewards or the race day veterinarian, Dr Rieusset. Nor did Dr Rieusset observe any abnormalities with the horse when he took its pre-race blood sample.

In any event, the evidence in relation to the effect on the plasma total carbon dioxide level of scouring indicates that the level will drop. There is no evidence that sweating causes the level to rise unless the sweating is consistent with sweat loss experienced by horses competing in endurance races. Professor Rose states: "even in extensive sweat losses, 30 to 40 litres in endurance riding, the TCO_2 values are not increased more than to 35 millimoles."

The 12th of April 1999 sample was analysed for the presence of disease particularly equine herpes. Professor Rose states: "that he cannot see any way in which if the horse was suffering from an equine herpes virus infection, that it would have altered the TCO_2 concentration. As far as any

symptoms that the horse may have been showing with such a virus infection the signs are those with a respiratory infection with nasal discharge and perhaps coughing being in evidence."

Professor Rose states: "that there are few diseases that will increase the TCO_2values. Normal healthy race horses will not have increased TCO_2 values."

It was apparent from the evidence that there was no signs after the race that the horse was suffering any health or homeostasis problems." This was further evidenced by the fact that the horse ran second in a trial at Byford on Sunday the 18th of April.

Dr Stewart concedes to Professor Rose that the health of the horse wasn't the cause of the elevated TCO_2 but a reflection of the so-called pre-competition anxiety.

A DNA analysis of the horse's blood proved that the sample from the 12th of April 1999 was taken from BULLS ROAR.

Based on the evidence before us, the existence of the so-called pre-race anxiety is, on the balance of probabilities, most unlikely. Professor Rose elaborates his views on Dr Stewart's hypothesis at length. Professor Rose's qualification only goes so far as to concede that it may warrant further investigation. Professor Rose states: "I think that there is no data that I have seen that would support that at this stage."

Professor Rose also suggested that the stewards consider the results of the New Zealand review regarding on-course effect. In our opinion, the data from that study does not support the contention of an on-course effect.

BULLS ROAR's levels do not support an on-course effect for that horse when one compares the 12th of April 1999 value with the 5th of January 2000 value.

A stay application is made pursuant to the provisions of s17(7) of *the Racing Penalties (Appeals) Act* 1990. The Act empowers the Chairperson of the Tribunal upon or prior to hearing an appeal to suspend the operation of any order until that right of appeal is exercised or has lapsed. The Act is silent as to the basis upon which this important discretion should be exercised. The discretion is expressed to be in broad general terms.

At the hearing of the application Mr S Davies, counsel for the applicant, presented a very cogent line of reasoning why the penalty should be suspended in terms of the requirements of the Tribunal's Practice Direction No 1 of August 1993. These directions are stated to be *'principles'* which *'will generally apply'* to stay applications.

Counsel submitted Mr Olivieri's case fairly neatly fits within the parameters of many provisions of the Practice Direction. Counsel argued for example the applicant clearly claims to be innocent of the charge (direction 1). There has been no delay in lodging of the appeal (direction 2) whereas there is likely to be some delay before the appeal can be listed due to the sheer size of the transcript which exceeds 1100 pages, the time required to prepare and the availability of senior counsel for the applicant (direction 3). I accept these submissions without reservation. It was also argued in the meanwhile pending the appeal, Mr Olivieri will suffer personal hardship of a financial nature if the suspension is not granted (direction 4). I accept there will be some hardship. However I am not convinced, on the material before me, that things are likely to be as grave as asserted in the supporting affidavit. The approval by the Committee of another trainer to substitute for Mr Olivieri is of some relevance. I do accept Mr Olivieri is not likely to repeat the offence (direction 6) and further that the interests of employees are to be considered here (direction 10).

Counsel for the applicant also addressed me at some length in relation to the prospects of the appeal and possible merits. This was supported in part by reference to Mr Olivieri's instructions and also by reference to sections of the transcript of the 20 June 2000.

In response Mr RJ Davies QC basically confined his submissions to the issues of the merits of the appeal and the adverse implications of a stay to the industry. Senior counsel argued with conviction that there was little prospect of the appeal succeeding. In the course of so doing it was stressed that at no stage was I taken to any of the earlier transcript or any of the hundreds of exhibits which had been introduced into the Stewards' inquiry to support the propositions which Mr Olivieri's counsel was pressing in seeking to establish an arguable case. I was also told, again with considerable conviction, that turmoil in the industry would occur if the stay were granted. This latter aspect is supported by some passages in the June transcript.

From the information before me I am satisfied that the appeal will principally address issues relating to the drug testing, whether the elevated levels could be achieved naturally and other facts which cause elevated levels rather than the

question of having taken reasonable and proper precautions to prevent administration of the substance (Rule 497(2)).

I am conscious that this is a serious offence which has important consequences for the whole industry. As direction 14 makes clear the power to grant a stay is exercised sparingly. I have carefully considered the competing public and private interest issue (direction 12).

I am not persuaded that the circumstances of this drug case, as summarised above from the transcript, makes it an appropriate one in which to grant the suspension. After weighing the submissions and based on an evaluation of its prospects of success I am not satisfied I should grant the application. The application is therefore refused.

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of WA

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APPEAL - 510

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR RJ NASH (MEMBER)

APPELLANT:	**ROSS A OLIVIERI**
APPLICATION NO:	**A30/08/510**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR J PRIOR (MEMBER)** **MR RJ NASH (MEMBER)**
DATES OF HEARING:	**23 OCTOBER 2003 & 27 NOVEMBER 2003**
DATE OF DETERMINATION:	**23 APRIL 2004**

IN THE MATTER OF an appeal by Mr R A Olivieri against the determination made by the Stewards of the Western Australian Trotting Association on 20 June 2000 imposing a 12 month disqualification for breach of Rule 497(1) of the Rules of Trotting.

Mr G Winston was granted leave to appear for the appellant.

Mr M J Skipper appeared for the Stewards of Harness Racing.

I refer to the determination of the Chairperson with which I am in general agreement and concur that this appeal should be dismissed. I wish to make a few additional comments in relation to Grounds 1, 3 and 4.

In relation to Ground 1, it was reasonably open to the Stewards to be satisfied on all of the evidence, in particular the evidence from the Racing Chemistry Laboratory of WA and Racing Analytical Services Limited (RASL) in Victoria, that the TCO_2 level in BULLS ROAR exceeded 35 mml/L and therefore find there had been an administration of a prohibited drug by virtue of the deeming provision in Rule 498 (b). The comments of the Full Court of the Supreme Court of Western Australia in Harper v Racing Penalties Appeal Tribunal [1995] 12 WAR 337 at 349, as quoted by the Chairperson in his reasons for decision, are particularly apposite.

In relation to Grounds 3 and 4, I would add that it is understandable that trainers in the industry may have been frustrated at the changing RASL Verichem control mean monthly Readings (which are graphically demonstrated on page 2 of Exhibit 2) that occurred in mid 1998. However, it seems Grounds 3 and 4 are based on the argument that the 35 mml/L TCO_2 threshold was tied to the CASCO calibrating standards. The deeming provision in Rule 498 (b) does not provide that the 35 mml/L TCO_2 level is to be measured using the CASCO calibrating standards. The deeming provision applies regardless of whether the CASCO standards or the newer ASE standards are used. In this case the ASE standards were used for the purposes of the calibration and had been in use for some 9 months prior to the violate sample being taken from BULLS ROAR. It was not demonstrated that the ASE standards did not correctly measure TCO_2 levels.

The question for this Tribunal is whether the Stewards on the evidence before them could have been reasonably satisfied the horse BULLS ROAR had a TCO_2 level which exceeded 35 mml/L. In my view it was reasonably open on all of the evidence for the Stewards to have been so satisfied.

In the circumstances Grounds 3 and 4 are not made out. However, as stated above it is clear that the changing Verichem control mean monthly Readings in 1998 created some discontent within the industry. This led to a new violate threshold for TCO_2 readings being set at 36 mml/L following an AHRC inquiry. The Committee of the Western Australian Trotting Association resolved on 31 January 2001 to cease Mr Olivieri's disqualification after he had served 7 of his 12 month term. That decision seems quite reasonable and appropriate in the circumstances but it does not constitute an admission or concession that the decision made by the Stewards in finding Mr Olivieri had breached Rule 497, was in any way erroneous.

ROBERT NASH, MEMBER

APPEAL - 510

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR J PRIOR (MEMBER)

APPELLANT:	**ROSS A OLIVIERI**
APPLICATION NO:	**A30/08/510**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR J PRIOR (MEMBER)** **MR RJ NASH (MEMBER)**
DATES OF HEARING:	**23 OCTOBER 2003 & 27 NOVEMBER 2003**
DATE OF DETERMINATION:	**23 APRIL 2004**

IN THE MATTER OF an appeal by Mr R A Olivieri against the determination made by the Stewards of the Western Australian Trotting Association on 20 June 2000 imposing a 12 month disqualification for breach of Rule 497(1) of the Rules of Trotting.

Mr G Winston was granted leave to appear for the appellant.

Mr M J Skipper appeared for the Stewards of Harness Racing.

I have read the draft reasons for determination of the Chairperson, Mr Dan Mossenson.

I agree with those reasons and conclusions and have nothing to add.

John Prior

Seal of the Racing Penalties Appeal Tribunal of W.A.

JOHN PRIOR, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**ROSS A OLIVIERI**
APPLICATION NO:	**A30/08/510**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR J PRIOR (MEMBER)** **MR R NASH (MEMBER)**
DATES OF HEARING:	**23 OCTOBER 2003 & 27 NOVEMBER 2003**
DATE OF DETERMINATION:	**23 APRIL 2004**

IN THE MATTER OF an appeal by Mr R A Olivieri against the determination made by the Stewards of the Western Australian Trotting Association on 20 June 2000 imposing a 12 months disqualification for breach of Rule 497(1) of the Rules of Trotting.

Mr G Winston was granted leave to appear for the appellant.

Mr M J Skipper appeared for the Stewards of Harness Racing.

INTRODUCTION

The appellant was the trainer of BULLS ROAR that competed in Race 6 at Gloucester Park on 12 April 1999. A pre-race blood sample was taken from the horse. The Racing Chemistry Laboratory in Western Australia reported to the Stewards a total carbon dioxide

concentration ('TCO_2') of 36.1 millimoles per litre ('mmol/l')in the sample after subtracting 1.4 mmol/l for uncertainty of measurement. Racing Analytical Services Ltd in Victoria reported a TCO_2 level of 37.1 mmol/l in the control sample. This level was subject to an uncertainty of measurement of + or – 1.2 mmol/l.

The Stewards opened an inquiry on 8 June 1999, pursuant to the Rules of Trotting as they were then called, into the elevated levels of TCO_2 reported in the samples taken from BULLS ROAR prior to it having raced on 12 April 1999. The inquiry proved to be a particularly long and complicated affair. It ran in excess of 12 months and involved some 23 separate hearing days. 1,245 pages of transcript were recorded during the process. 235 exhibits comprising over 1,200 pages were produced to the inquiry.

The Stewards charged Mr Olivieri with a breach of Rule 497(1) of the Rules of Trotting on 15 June 1999 in the following terms:

> *'... as the registered trainer of BULLS ROAR you presented the horse to race at Gloucester park on Monday 12 April 1999 where it has been found to have had administered to it a drug. You are thereby deemed to have committed an offence.'* (Stewards' Inquiry Transcript ('T') 22).

As Mr Olivieri declined to enter a plea the Stewards' inquiry proceeded on the basis of a not guilty plea.

THE APPLICABLE RULES

On 15 September 1998 the Committee of the Western Australian Trotting Association resolved that the Rules of Trotting be called the Rules of Harness Racing (Government Gazette ('GG') 5 August 1999). Harness Racing Rule 314 states:

> *'(1) These rules take effect on 1 September 1999.*
>
> *(2) The previous rules are repealed on that date.*
>
> *(3) The repeal does not affect any then existing right, privilege, obligation, disability, disqualification, suspension or other penalty.*
>
> *(4) All inquiries, investigations and similar proceedings on foot at the date of repeal or which subsequently commence in respect of circumstances or events occurring before that date shall be governed by the repealed rules and may continue on or be instituted and proceed as the case may be and decisions may be made and enforced and penalties imposed as if the repealed rules were still in force.'*

This means that despite the fact the Olivieri inquiry ran for a lengthy period after the introduction of the new rules it continued to be governed by the Rules as they applied prior to 1 September 1999. The inquiry proceedings were on foot at the date of the repeal on 1 September 1999. Accordingly, henceforth in these reasons references to 'the Rules' and 'Rule' are references to the Rules of Trotting which were current on 12 April 1999, being the date of the offence, as it is those rules which continue to govern the Olivieri situation after that date.

At the relevant time Part 42 comprising Rules 493 to 502 inclusive of the Rules dealt with the subject of administration and detection of drugs. Rule 493 addressing tests and examinations authorised the Stewards to test or examine all horses which were entered or ran in a race. Rule 494 vested in the Controlling Body (the Committee of the Club) all swabs and samples taken from a horse tested under the Rules. Rule 11(g) specifically authorised Stewards to drug test horses. Only an Official Racing Laboratory was authorised to analyse samples taken in accordance with Rule 11 (Rule 494A(1)). Rule 494A(2) specified:

> *'(2) Upon the detection by an Official Racing Laboratory of a drug in a sample taken from a horse the laboratory shall:*
>
> *(a) notify its finding to the Stewards, who must immediately notify the trainer of the horse of the finding; and*
>
> *(b) nominate another Official Racing Laboratory and refer to it the Control Sample of the same sample and, except in the case of a blood sample, the Control Rinse of the sample, together with advice as to the nature of the drug detected.*
>
> *(3) In the event of the other Official Racing Laboratory detecting the same drug in the referred Control Sample portion of the sample and not in the referred portion of the Control Rinse, the certified findings of both Official Racing Laboratories shall be prima facie evidence upon which the Stewards may find that the drug so detected has been administered to the horse from which the sample was taken.'*

Rule 497(1) of the then Rules dealing with drug free races stated:

> *'(1) When any horse which has been presented to race is found to have had administered to it a drug:*
>
> *(a) any person who administered the drug to the horse;*
>
> *(b) the trainer; and*
>
> *(c) any other person who was in charge of the horse at any relevant time,*
>
> *is deemed to have committed an offence.*
>
> *(2) It shall be a defence to a charge under sub-clause (1) for the trainer and any other person who was in charge of the horse at any relevant time to prove that he took reasonable and proper precautions to prevent the administration of the drug.'*

Rule 498(b) addressed evidentiary issues. That Rule stated:

> *'498. For the purposes of this Part:*
>
> *(a) ...*

(b) *where a sample from a horse is found to contain a substance described in this Rule in excess of maximum quantity or ratio appearing opposite the substance then the horse shall be deemed to have had administered to it a drug or drug capable of producing that substance:*

Substance	*Maximum Quantity or Ratio*
...	
Carbon Dioxide	*35.0 millimoles of Total Carbon Dioxide per litre in plasma.*
..."	

Rule 499 required trainers to notify of pre-race treatment. The Rules imposed a minimum penalty in the case of administration and detection of drugs. Rule 55A stated:

'A person who is convicted of an offence under Part 42 of these Rules, or under Part XXXII of the Rules of Trotting repealed by these Rules, is liable to a penalty which is not less than-

(a) *in the case of a first such offence, a period of 12 months disqualification;*

(b) *in the case of a second such offence, a period of 2 years disqualification;*

(c) *in the case of a third such offence, a period of 5 years disqualification; and*

(d) *in the case of a fourth or subsequent such offence, disqualification for life,*

unless, having regard to the extenuating circumstances under which the offence was committed the Controlling Body or the Stewards decide otherwise.

THE OUTCOME OF THE STEWARDS' INQUIRY

After the Stewards concluded their inquiry into the elevated TCO_2 levels found in BULLS ROAR's samples and had considered the evidence the Chairman of Stewards eventually announced a guilty finding on 20 June 2000 (T1186 para 22 – T1192). For the sake of convenience and for easier reference later I have added numbers to the paragraphs of the Stewards' reasons. Those reasons in full, with the numbering added, are as follows:

'1 *'The stewards are always mindful of the need to conclude our inquiries in a timely manner. However, given the comprehensive nature of the submissions to this inquiry and the significant impositions on our limited resources due to the unprecedented number of inquiries in the past 18 months, it has taken a considerable amount of time to finalise.*

2 *Whilst the inquiry has been in progress the industry has been embroiled in vigorous and emotional debate regarding the TCO_2 issue. The state*

ombudsman is conducting a review of the TCO_2 threshold of 35 millimole per litre. The WATA committee and the Australian Harness Racing Council rejected industry calls for the need to review the TCO_2 threshold and testing procedures.

3 *Moreover, both bodies have publicly expressed confidence in the existing procedures. Despite these distractions, our motivation throughout the inquiry was to provide every opportunity for all the relevant evidence to be heard and also attempt to conclude the matter as quickly as possible.*

4 *Some of the evidence has been of a complex nature and difficult to absorb in the manner in which it was presented. However, to the best of our ability we have carefully considered the evidence in its entirety and we have done our utmost to establish which evidence was relevant in making our decision.*

5 *As mentioned throughout the course of the inquiry, we do not consider that the plasma total carbon dioxide threshold level set in the rules was a matter for this inquiry to concern itself with.*

6 *The inquiry related to the Analyst's report on the blood sample numbered 2376 taken from BULLS ROAR prior to it competing in race 6 the Peter's and Brown's Stakes at Gloucester Park on Monday the 12th of April 1999. The sample was analysed for the plasma total carbon dioxide level by the Racing Chemistry Laboratory in Perth and the Racing Analytical Services Limited in Melbourne.*

7 *Racing Chemistry Laboratory reported a plasma total carbon dioxide level of 37.5 millimoles with 1.4 deducted as an uncertainty of measurement. The control portion of the sample was analysed by Racing Analytical Services Limited who reported a plasma total carbon dioxide level of 37.1. This value being subject to an uncertainty of plus or minus 1.2 millimoles. Both laboratories are approved by the WATA and are accredited by the National Association of Testing Authorities.*

8 *The stewards had the reported (sic) of plasma total carbon dioxide levels from BULLS ROAR on 10 occasions other than the 12th of April 1999, for the period 10th of March 1999 to the 17th of April 2000. The levels range from 29.5 millimoles to 34 millimoles. All of these values had 1.4 deducted as an uncertainty of measurement.*

9 *As the registered trainer of BULLS ROAR you were charged under the provisions of rule 497(1) with presenting the horse to race at Gloucester Park on Monday the 12th of April 1999, where the horse had been found to have a drug administered to it. The drug being a substance capable of elevating the total carbon dioxide level in the plasma above 35 millimoles.*

10 *You pleaded not guilty and in defence of the charge put evidence that you took all reasonable and proper precautions to prevent the administration of the drug. During the inquiry you were afforded the*

opportunity to have veterinarian, Dr Stewart, assist you in presenting evidence, to advocate on your behalf and to question expert witnesses.

11 *The stewards heard evidence on your behalf from Dr Stewart, Professor Dawkins and also received a significant amount of written evidence. We also heard evidence from Dr Rieusset, Mr Russo, Acting Principal Chemist, Racing Chemistry Laboratory, Mr Campbell, Chief, Forensic Science Laboratory, Chemistry Centre of Western Australia, Dr Vine, Director of Racing Analytical Services Limited, and Professor Rose, Dean of the Faculty of Veterinary Science, Sydney University. We also received evidence in writing from a number of people who did not give oral evidence to the inquiry.*

12 *You submitted that you did not knowingly administer an alkalising agent to BULLS ROAR and that you believed that none of your staff did either and that the plasma total carbon dioxide level of BULLS ROAR's blood sample on the 12th of April 1999, was elevated by factors other than the administration of an alkalising agent.*

13 *You submitted that the total carbon dioxide threshold level of 35 millimoles in plasma, as set in the rules, was arbitrary and had no scientific basis and that BULLS ROAR's levels did not exceed the naturally occurring levels possible in horses.*

14 *You submitted that the horse was suffering from a health/homeostasis factor on the 12th of April 1999 which may have contributed to the reported TCO2 level.*

15 *You submitted that there was some doubt that the horse sample was, in fact, BULLS ROAR. This doubt was based on your claim that BULLS ROAR's brand needed clipping on the 20th of April 1999 therefore may not have been properly identified on the 12th of April.*

16 *You submitted that a horse's TCO2 levels may increase by the onset of something called pre-competition anxiety.*

17 *You submitted that the sodium and protein levels in the 12th of April sample as reported in the Vetpath report 21797, demonstrated that it's reasonable to conclude that an alkalising agent containing a sodium salt could not have been administered on the 12th of April.*

18 *You submitted that you were not notified in accordance with rule 494A(2)(a).*

19 *And you submitted that the measurement process was fallible.*

20 *The TCO2 level obtained from BULLS ROAR over the period 10th of March 1999 to 17th of April 2000 indicate to the stewards that the horse has what can be considered normal TCO2 levels. We do not accept that BULL ROAR's level on the 12th of April 1999 was as a result of the horse's naturally occurring levels.*

21 *Professor Rose states: "that the recorded values from the 12th of April 1999 of 37.5 and 37.1 clearly represent values well above the normal range. Given that values from BULLS ROAR between the 20th and 30th of April range from 30.8 to 31.6 then it's reasonable to assume that the reason for the value being elevated to 37.1 and 37.5 on the 12th of April was due to the administration of some type of alkalising agent."*

22 *You presented evidence that prior to its race on the 12th of April, BULLS ROAR was scouring and sweating up more than usual. However, your staff was not sufficiently concerned about the horse's condition to report it to the stewards or race day veterinarian, Dr Rieusset. Nor did Dr Rieusset observe any abnormalities with the horse when he took its pre-race blood sample.*

23 *In any event, the evidence in relation to the effect on the plasma total carbon dioxide level of scouring indicates that the level will drop. There is no evidence that sweating causes the level to rise unless the sweating is consistent with sweat loss experienced by horses competing in endurance races. Professor Rose states: "even in extensive sweat losses, 30 to 40 litres in endurance riding, the TCO2 values are not increased more than to 35 millimoles."*

24 *The 12th of April 1999 sample was analysed for the presence of disease particularly equine herpes. Professor Rose states: "that he cannot see any way in which if the horse was suffering from an equine herpes infection, that it would have altered the TCO2 concentration. As far as any symptoms that the horse may have been showing with such a virus infection the signs are those with a respiratory infection with nasal discharge and perhaps coughing being in evidence."*

25 *Professor Rose states: "that there are few diseases that will increase the TCO2 values. Normal healthy race horses will not have increased TCO2 values."*

26 *It was apparent from the evidence that there was no signs after the race that the horse was suffering any health or homeostasis problems. This was further evidenced by the fact that the horse ran second in a trial at Byford on Sunday the 18th of April.*

27 *Dr Stewart concedes to Professor Rose that the health of the horse wasn't the cause of the elevated TCO2 but a reflection of the so-called pre-competition anxiety.*

28 *A DNA analysis of the horse's blood proved that the sample from the 12th of April 1999 was taken from BULLS ROAR.*

29 *Based on the evidence before us, the existence of the so-called pre-race anxiety is, on the balance of probabilities, most unlikely. Professor Rose elaborates his views on Dr Stewart's hypotheses at length. Professor Rose's qualification only goes so far as to concede that it may warrant further investigation. Professor Rose states: "I think that there is no data that I have seen that would support that at this stage."*

30 *Professor Rose also suggested that the stewards consider the results of the New Zealand review regarding on-course effect. In our opinion, the data from that study does not support the contention of an on-course effect.*

31 *BULLS ROAR's levels do not support an on-course effect for that horse when one compares the 12th of April 1999 value with the 5th of January 2000 value.*

32 *The sodium level in the sample is of no use to the inquiry. Professor Rose states: "that the use of plasma sodium as an exclusion test is totally unsatisfactory."*

33 *Your evidence that the plasma protein levels increments after the administration of an alkalising agent is incorrect. The protein level, in fact, drops with the administration of an alkalising agent. Lloyd states in his 1993 thesis: "There was a large decreased in the plasma total protein concentration associated with sodium bicarbonate administration. Initially, the protein concentration rose by 5 grams a litre over the first half hour and then significantly decreased below the initial value by an average of 4 grams a litre between 4 and 6 hours. After 6 hours it gradually rose until it was no significantly different from the control level at 10 hours."*

34 *The stewards did provide notification in accordance with the rules. Rule 602 provides the procedure that stewards must adopt when issuing a notice. The procedure in place for notifying a trainer in relation to an Analyst's report requires the trainer to be given written notice. The notice contains the details of the Analyst's report, in this case the plasma total carbon dioxide of BULLS ROAR on the 12th of April 1999, the details of the circumstances of the analysis of the control sample and the fact that the particular horse is banned from racing until the conclusion of the inquiry. The notice may also contain other relevant information such as copies of the relevant stable return.*

35 *The Racing Chemistry Laboratory notified the stewards by facsimile on the 13th of April that the relevant sample contained a plasma total carbon dioxide concentration of 36.1. A notice was prepared for delivery to you at the Harvey Trotting Club meeting on Wednesday the 14th April 1999. However, you were not in attendance at that meeting so the notice was not delivered at that time.*

36 *By Thursday the 15th of April the stewards had received a report from Racing Analytical Services Limited. Therefore the notice was revised to include the details of that report with the intention of delivering it to you at the meeting at Gloucester Park on Friday the 16th of April. It was at this meeting the stewards were made aware that you were in the eastern states with 'TALLADEGA'. Eventually, the stewards were able to contact you by telephone on the 16th of April and inform you of the circumstances.*

37 *It is the stewards' opinion that you were made – that we made every reasonable effort to fulfil our obligations in properly notifying you in accordance with the rules.*

38 *Importantly, the reason the rules makes the stipulation that the notification must be immediate is to ensure that a horse does not continue to race when it is the subject of a report from the Analysts.*

39 *This was not a factor in this case because BULLS ROAR had been banned from racing for waywardness on the 12th of April. Moreover, the Rule embraces all types of drugs not just TCO2. It is not the purpose of the Rule to provide an opportunity for a trainer to conduct tests on a horse with an elevated plasma total carbon dioxide level.*

40 *It is noteworthy to mention that the drafting of the present National Rules of Harness Racing, which were the rules adopted by the Western Australian Trotting Association, saw the removal of any reference to notifying the trainer immediately.*

41 *The plasma TCO2 concentrations reported in the blood samples taken from BULLS ROAR on the 12th of April were confirmed by two separate and accredited racing laboratories. Both laboratories analysed the sample using the same controls and standards on the Beckman Elise auto analyser.*

42 *The stewards don't accept your contention that the steps taken by the laboratories to rectify the problems identified with the CASCO calibrators during 1998 can in any way be responsible for BULLS ROAR's plasma total carbon dioxide level on the 12th April 1999.*

43 *We accept Dr Vine's evidence that the population surveys also confirm that the change from CASCO to ASE provided a similar degree of accuracy. We are satisfied that the laboratories took the appropriate steps to ensure that the replacement of the CASCO calibrators with the ASE calibrators was done properly.*

44 *We are satisfied that there is no justification for the claim that there was a shift in accuracy as a result of the change in calibrators. We accept Mr Campbell's evidence that the Beckman standard, derived from both CASCO and ASE standards are not significantly different. The data also shows that the precision being obtained since the introduction of the ASE standards is better than that which was obtained with the CASCO standards.*

45 *The stewards accept the evidence from Dr Vine, Mr Russo and Mr Campbell. We do not accept Professor Dawkins' contention that the laboratories' procedures are flawed. We accept that the respective laboratories utilised recognised and properly accredited methods, technology and procedures in analysing the samples for the plasma total carbon dioxide concentration and that the respective reports do provide evidence upon which the stewards can safely rely.*

46 *The steps taken by the stewards in this matter ensure that if we took action we did so based on thorough investigation and inquiry. We haven't acted solely on the reports from the racing laboratories on the race day samples. We have taken follow up samples for TCO2 analysis and other laboratories have performed analysis on blood samples to establish if there were any underlying circumstances which may be relevant.*

47 *We are satisfied that we have properly informed ourselves regarding all the relevant matters raised during the inquiry. It is not unusual in these types of cases that there is no acknowledgment of an administration of a drug, nor is it incumbent upon the stewards to identify when a drug is administered or by whom. We do, however, need to be satisfied that a drug was administered.*

48 *Based on the evidence before us, it is our opinion that on the balance of probabilities a substance was administered to BULLS ROAR which caused the reported total carbon dioxide level in the samples taken on the 12th of April 1999. Rule 498(b) deems such a substance to be a drug. It is also our opinion that it is more likely than not that such administration was made by you or with your knowledge.*

49 *We are not satisfied that you took all reasonable and proper precautions to prevent the administration of the drug. Therefore we are unanimous in finding you guilty as charged. That is, you presented BULLS ROAR to race at Gloucester Park on the 12th of April 1999 where it has been found to have a drug administered to it.*

50 *The matter of penalty must be decided under the provisions of rule 55A, and as I mentioned earlier those rules have been amended.*

51 *From the current rules, LR314C states:*

Transitional inquiries, amendment of rule 55A of the previous rules, Part 1.
In the case of a transitional inquiry, where a person is convicted of an offence under Part 42 of the previous rules, Rule 55A of the previous rules is taken to be amended by deleting the words:

"under" and "(a) part 42 of these rules other than Rule 499: or (b) Part 32 of the rules repealed by these Rules other than Rule 363 of those Rules" and substituting "under Part 42 of these Rules other than Rule 499 where the offence was committed on or after the 24th of October 1994

Part 2
In this local rule and in LR314D,
"previous rules" means the Rules of Harness Racing repealed by these rules.

Part 3
"Transitional inquiry" means an inquiry, investigation or similar

proceedings on foot at the date of repeal of the previous rules or which subsequently commence in respect of circumstances or events occurring before that date.

52 *As you have no previous convictions under the provisions of Part 42 of the repealed rules since the 21st of October 1994, the mandatory minimum penalty which applies to you is a 12-month disqualification unless, in our opinion, there are extenuating circumstances under which the offence was committed.*

53 *We now invite you to make submissions in relation to penalty and highlight what you consider to be extenuating circumstances under which the offence was committed. In the absence of any extenuating circumstances we will be imposing a period of 12 months disqualification.*

54 *The Supreme Court in Anderson when discussing rule 55A stated:*

'It is only where the extenuating circumstances under which the offence was committed are such as to cause the stewards to decide otherwise that the minimum period of disqualification will be imposed. That is to say, the extenuating circumstances which are there referred to are circumstances which reduce the culpability attaching to the commission of the offence in such a way as to warrant the imposition of a penalty less than the minimum which would ordinarily attach to the offence. It seems to me in that circumstance to be necessarily implicit in the rule that the circumstances referred to must be circumstances under which the offence was committed other than those which are ordinarily present in the case of offences of this kind under consideration and which are unusual or exceptional in that sense '

Mr Olivieri was then told that under the relevant rule (Rule 55A) he was potentially liable to a minimum penalty of 12 months disqualification. Pursuant to the Rules this offence was treated as though it were a first offence because Mr Olivieri's previous offence had been committed much earlier. He was then invited to address the Stewards on penalty.

After some brief discussion on penalty Mr Olivieri was disqualified for 12 months after the Stewards found that there were no extenuating circumstances.

The Committee of the Western Australian Trotting Association resolved on 31 January 2001 to cease Mr Olivieri's disqualification from that date. This meant Mr Olivieri had served 7 months only of his disqualification but he was able to resume training horses.

THE APPEAL

On 27 June 2000 Mr Olivieri lodged a notice of appeal against both the conviction and penalty, relying on the following grounds:

'1 *Selective use of evidence and incorrect weighing and incorrect interpretation of evidence by the Stewards.*

2 *The Stewards incorrectly used expert evidence that was later addressed and superceded by further evidence supplied under cross examination by the same expert.*

3 *The Stewards incorrectly applied the wrong onus of proof in making their findings.*

4 *The Stewards erred in not using the discretion available to them in the determination of penalty, in that they failed to apply the WATA Rules of Harness Racing 1999, using instead WATA Rules of Trotting, which were replaced on 1/9/99.*

5 *That the system of testing is materially flawed.*

6 *That Stewards took evidence that was not admitted into the inquiry and not taken into account in making their determination.*

7 *That the Stewards demonstrated bias which confirmed my apprehension of bias on their part and that the result of this inquiry was predetermined.*

8 *The Stewards erred in applying the wrong penalty provisions.*

9 *The Stewards erred in not imposing a fine.'*

At the same time Mr Olivieri applied for a suspension of operation of his penalty. The application was opposed by the Stewards. I considered the application on the documentation then before me and subsequently advised the Registrar to inform the parties that a stay would not be granted on the papers but the applicant could have the opportunity to argue the matter if he so wished before it was formally dealt with. Mr Olivieri did avail himself of that opportunity and the matter came on for hearing on 5 July 2000. On 7 July 2000 I published my reasons for refusing the application. The appeal proceedings lay dormant for a considerable period thereafter. Mr Olivieri had for some considerable time resisted the Registrar's overtures to list the matter for hearing.

By letter dated 8 January 2003 the appellant advised the Registrar of the intention to substitute the following 3 grounds of appeal for the grounds set out in the appeal notice:

'(1) *The evidence presented during the inquiry did not support the finding of administration of a drug to BULLS ROAR by myself or with my knowledge, by the Stewards as reported in their determination.*

(2) *The outcome of the inquiry was predetermined and the evidence not fairly weighed resulting in the Stewards coming to conclusions that could not have been arrived at by any reasonable person.*

(3) *The Stewards breached the contractual terms of the training licence that exists between myself and the WATA.'*

This appeal eventually came on for hearing before the Tribunal on 23 October 2003. At the outset of the appeal hearing Mr Winston applied to include an additional ground of appeal as follows:

'(4) That the accuracy of the TCO_2 analysis had not been maintained and therefore the reported TCO_2 level of BULLS ROAR could not be relied upon.'

The request was not opposed and the further ground was allowed to be added. Mr Winston proceeded with his presentation by handing up to the Tribunal a 55 page outline of submissions which he then commenced to read out. The written submission was marked ex 7. Ex 7 began by making it clear that despite the fact that Mr Olivieri had already substantially served the penalty imposed the reason for pursuing his appeal was to clear his name. Early in the course of Mr Winston's presentation it became evident that there were many inaccuracies contained within ex 7. For example, many of the references in the submission to pages of the transcript of the Stewards' inquiry and to exhibits submitted to that inquiry simply did not correlate to the source documents. Mr Winston readily acknowledged this situation when it was drawn to his attention. Initially he reacted by suggesting no weight should be given to the inaccuracies. However, once it became impractical to continue the matter was adjourned sine die to enable the submissions to be rectified. In the process I ordered revised submissions be filed and served within seven days. Despite that the replacement submissions were not delivered to the Registrar until 20 November 2003. At the continuation hearing the replacement outline of submissions, which was of roughly equivalent length to ex 7, was marked ex 8. The appeal hearing continued and was finalised on 27 November 2003 when the Tribunal reserved its decision. During the course of the continuation hearing Mr Winston sought to add a further ground regarding natural justice. At that late stage of the matter his request was refused. Further, Mr Winston was not allowed to introduce any fresh evidence at the continuation hearing. As a consequence I also ruled that anything in ex 8 which had not been the subject of evidence or dealt with at the Stewards' inquiry would not be taken into account by the Tribunal in determining the appeal.

OVERVIEW

The case presented for the appellant at the appeal comprises the outline written submissions together with a number of other supporting exhibits (ex's 1 to 6 inclusive and ex 9). The outline, ex 8, is a complex 56 page document which, unfortunately, is very poorly signposted and difficult to follow. It has no index nor meaningful headings and appears to have been drawn without proper regard to the grounds of appeal as they were ultimately presented. It contains many random assertions and fails to clearly address the four grounds of appeal which the appellant eventually came to rely on. In many respects this exhibit also fails to clearly identify the actual evidence presented at the Stewards' inquiry which could be relied on to support many of the propositions contained within it. The problems are compounded by the fact that in the written submission the appellant purports to raise new factual material in many places. As I have already indicated this material was disallowed during the course of the appeal. Assertions in ex 8 agitate a great number of contentious issues. The document is peppered with many conclusions which are not substantiated by any proper foundation of fact. The poor quality of the content has made the task of analysing and following numerous aspects of the appeal argument very difficult. Consequently, despite the detail, it has not greatly assisted me in dealing with this complex matter.

The task of the Stewards in dealing with the case advanced for Mr Olivieri at the inquiry also clearly had its complications. I agree with the comment made by the Stewards, in

para. 4 of their reasons, as to the complexity of some of the evidence presented on behalf of Mr Olivieri and the difficulty associated with its presentation.

In view of the observations in the two preceding paragraphs, the enormous amount of detail that was presented to the Stewards, the volume of scientific argument that was raised, the conflicting evidence, the way the matter was handled before the Tribunal and the scope for confusion in this appeal it is appropriate to clarify and explain the role of the Tribunal in dealing with this matter and to put things into some context by noting the scope and nature of the appeal process and the Tribunal's responsibility in performing its functions. In this particular matter the Tribunal is charged with the duty of determining proceedings brought by a trainer who is a licensed person under the rules governing trotting in this State. The appellant is aggrieved by the penalty imposed in disciplinary proceedings arising from the conduct of a harness race. Accordingly, pursuant to the *Racing Penalties (Appeals) Act* 1990 as amended, this matter has come before the Tribunal by way of an appeal against the Stewards' determination. The fact that, as previously stated, the Committee saw fit to intervene subsequent to the Stewards' decision and well before the appeal was heard by the Tribunal has no relevance. That fact must be ignored. In dealing with this appeal the Tribunal is required to:

- decide the matter based only on the issues raised in the grounds of appeal specified in the notice of appeal
- '*...act accordingly to equity, good conscience and the substantial merits of the case*' (s11(1)(b) of the Act)
- hear and determine the matter '*...upon the evidence at the original hearing when the decision or finding appealed against was made*' (s11(3)(c)) and may admit other evidence if it is considered '*...to be proper*' (s11(3)(c))
- fully and thoroughly investigate the matter (s11(3)(e)(i)).

I have approached the exercise in keeping with the above.

The Tribunal is empowered not only to inform itself as it thinks fit (s11(3)(e)(ii)) but also has the discretion to take into account any racing administration matter within the knowledge and experience of the Tribunal including matters which have arisen in other Tribunal proceedings (s11(3)(e)(iii)). In dealing with this matter I have at all times been mindful of the Tribunal's role and statutory responsibilities as identified herein.

Over a number of years the Tribunal has dealt with a not insignificant number of other appeals involving elevated levels of TCO_2. During that time, although the rules have changed, many of the substantive underlying issues raised on behalf of Mr Olivieri have been dealt with before and remain much the same. As a consequence, the Tribunal does have the benefit of a reasonably significant body of knowledge and an invaluable range of experience covering numerous issues and arguments which are again canvassed in this particular appeal. In this context it is useful background to refer to a passage commencing on page 4 of my reasons in *Nolan* Appeal 517:

> *'At the time the inquiry which led to this appeal was being handled by the Stewards there was throughout Australia a dramatic increase in the number of Stewards' inquiries as a result of elevated TCO_2 levels being detected by the official laboratories. Dr Stewart argued in several jurisdictions that the results*

from those laboratories could no longer be relied upon as conclusive evidence of an administration of a prohibited substance. Late in 1999 the official laboratories changed from the Casco standard to the ASE standard to measure the quantity of substance revealed by the analyses. The Australian Harness Racing Council held a lengthy inquiry into the issue and as a result, recommended that the violate level be increased from 35 to 36.0 mm/l. This new level happens to be the level proscribed under the Australian Rules of Racing for the thoroughbred racing industry. In Western Australia the Committee of the Western Australian Trotting Association took a number of initiatives. Firstly, on the 1 September 1999 it amended the local rules relating to mandatory penalties for drug offences. Secondly, on 10 December 1999 it too increased the violate level for TCO_2 offences to 36.0 mm/l. Thirdly, on 25 May 2001 it prescribed the apparatus known as the Beckman EL-ISE auto analyser as the only approved instrument for measuring the plasma total carbon dioxide level in a horse.'

Dr Charlie Stewart, veterinary surgeon, was present throughout the inquiry before the Stewards. He was not present simply to observe or advise Mr Olivieri. Rather he very actively participated in the process.

Despite the fact that the detail and depth of Mr Olivieri's scientific evidence and argument was exceptional a reasonable amount of what was canvassed before the Stewards and subsequently before the Tribunal in substance is not novel and therefore comes as no surprise to the Tribunal.

THE GROUNDS OF APPEAL

This appeal is unusual in a number of respects including the fact that it was eventually brought on by the appellant for hearing more than 40 months after it was instituted. In the interim, as previously explained, the grounds of appeal were redrawn twice and then added to during the course of the appeal hearing. Whilst it appears that the appellant did not have the benefit of any legal expertise in formulating the grounds one can assume that each ground ultimately relied on was the subject of mature reflection and not lightly advanced.

The ambit of the grounds of appeal as they finally emerged is relatively narrowly focussed. Ground one asserts shortcomings in the evidence presented to support the conclusion as to Mr Olivieri's culpability to do with administration. The second ground alleges the outcome was preordained and the evidence not properly applied. Ground three asserts a breach of contract arising out of the holding of a trainer's licence. The last ground attacks the reliability of the drug analysis.

Although I shall come back to each of the grounds later, I now note that, with the amendments which were made to the grounds along the way this is no longer an appeal against penalty. At the time the offence occurred the mandatory penalty was a 12 month disqualification. Unless exceptional circumstances could be demonstrated to have been present the mandatory penalty set by the then Rules had to be imposed. Extraneous circumstances in regard to the mandatory penalty were not relied on in the appeal. Rule 55A dealing with extenuating circumstances does not arise in this appeal. The penalties which were imposed on other trainers convicted for TCO_2 offences clearly are irrelevant.

When one analyses the thrust of the grounds in the light of the lengthy Stewards' reasons, it becomes clear that the following principal findings are the ones under attack:

- A substance was administered to BULLS ROAR which resulted in the high reading in question (para. 48 of the Stewards' reasons).
- It was more likely than not that the administration was made by Mr Olivieri or with Mr Olivieri's knowledge (para. 48).
- Mr Olivieri did not take all reasonable and proper precautions to prevent the administration (para. 49).
- Mr Olivieri was guilty as charged (para. 49).

GROUND ONE

The first ground of appeal states:

> *'The evidence presented during the inquiry did not support the finding of administration of a drug to BULLS ROAR by myself or with my knowledge, by the Stewards as reported in their determination.'*

So far as I understand the submission document this ground appears to be principally dealt with at page 38 onwards of ex 8. The underlying basis of the argument is repeated in a number of places in the submission. It is enunciated and emphasised at page 55 in the following terms:

> ***'There is no evidence supporting administration apart from the violate level.***
>
> ***The only conclusion that can be drawn, is that no reasonable person(s) could have made the findings in this Determination, based on the evidence presented at the Olivieri inquiry.'***

This proposition is supported by voluminous argument on the appellant's behalf. Having carefully considered that argument I am unconvinced. I am satisfied that, despite the best efforts on the appellant's behalf to demonstrate otherwise, Rule 497(1) should be applied literally to the facts and circumstances of this case. I am of the opinion all of the elements required to satisfy the Rule for a conviction are present simply because of the violate level. Based on equity and good conscience and after evaluating the merits I find no alternative but to apply the Rule to the facts simply on the basis of the way the relevant Rule is worded. As was stated by Judge Thorley in the New South Wales decision of *Hunter* (12 July 2000) p3:

> *'This Tribunal has no view, one way or the other, as to whether or not the figure of 35 mmole/litre is an appropriate figure. It is content to accept that that is the figure so prescribed and proscribed.'*

The horse which Mr Olivieri trained, BULLS ROAR, was presented to race and indeed did race at Gloucester Park on 12 April 1999. An official racing laboratory detected carbon dioxide in excess of the maximum quantity or ratio specified under the Rules at the time namely, 35 millimoles of total carbon dioxide per litre in plasma. The nominated second official racing laboratory detected the same drug in the referred control portion of the sample. Both certified findings under the Rule were prima facie evidence upon which the Stewards could rely to find that a drug had been administered to BULLS ROAR resulting in a violate level of TCO_2 being detected. Once all of the conditions precedent are

established and the Stewards have exercised their discretion and so find the Rule states the trainer '*is deemed to have committed an offence*'. I am not persuaded the Stewards were in error in reaching their conclusion based on the prima facie evidence of the laboratory certification. On the evidence before them it was clearly open to the Stewards to apply the deeming provision and find, and I would also so find, that the administration in question occurred and that Mr Olivieri as the trainer committed the offence. The Stewards were not persuaded that he had taken reasonable and proper precautions. Had I been deciding the matter in the first instance I would have reached the same conclusion.

After the Stewards announced their guilty finding it is clear from what Mr Olivieri stated to them that Mr Olivieri well understood the basis on which the Stewards found him guilty, namely:

> *'I know the Stewards have found and deemed that I have committed an offence under the rule. I believe that the Stewards, in their best endeavours, have relied on the deeming provision of the rule...' (T1197 at 64).*

I have considered the propositions commencing on page 16 of ex 8 regarding the *'...4 other areas of evidence... which appear to have been given no weight in the deliberations of the Stewards, because they supported Olivieri's position that no administration had been made to BULL'S ROAR'*. I see no merit in this argument.

The Stewards did go one step further in their findings at the end of para. 48 compared to the wording of the charge which they laid. As quoted earlier the actual charge was that as trainer Mr Olivieri presented BULLS ROAR to race where it was found to have had administered to it a drug, and consequently he was deemed to have committed an offence. By expressing an opinion '*that is more likely than not such administration was made by you or with your knowledge*' (underlining added), the Stewards have taken the matter beyond the charge. I am satisfied that there has not been any miscarriage of justice even although for the offence to have been found to be committed the Stewards need not have gone that further step. In view of the fact that I am satisfied that the offence was committed and that the Stewards properly found the offence established in accordance with the literal wording of the Rule no useful purpose is to be served by commenting on the issue of knowledge any further.

Some of the observations I made and a conclusion I reached in *Nolan* (supra) at page 12 apply to this matter and are worth repeating:

> *'The rules governing trotting were intended and did make it obligatory at the relevant time for trainers not to present horses with levels of TCO_2 of 35 millimoles per litre or more. Irrespective of an actual administration or any intentional behaviour on the part of trainers at the time, it was a serious breach of the rules for horses to compete with high levels of the substance above the specified threshold in their systems. A failure to comply resulted in an automatic penalty of 12 months under the Rules unless the actual circumstance of the commission of the offence itself were able to be shown by the trainer to be extenuating. The Tribunal is not dealing with the question of the actual penalty imposed. But even if it were none of the arguments brought to bear would satisfactorily or usefully address the mitigation aspect of the penalty. The threshold set at the time by the authority in charge of the sport, is the threshold. The laboratory results prove the threshold was exceeded. The offence had been committed.'*

It is also relevant to quote Anderson & Owen JJ in *Harper v Racing Penalties Appeal Tribunal of Western Australia & Another* [1995] 12 WAR 337 at 349:

> *'Counsel for the applicant made much of the fact that a literal construction of the Rules could conceivably result in a trainer guilty of no wrong conduct being disqualified. He tried to persuade the court that no such intention should be attributed to the committee of the Trotting Association which drew up the Rules. We do not see why. It may well be the case that those familiar with every aspect of the industry and with long experience in it have come to the conclusion that to ensure the integrity of racing and to maintain public confidence in its integrity, there is a need to impose very stringent controls and that those who wish to participate in racing for rich rewards will have to accept that the privilege of doing so many well be taken from them if for any reason, even without actual fault on their part, they present a doped horse for racing.*
>
> *That this may be a legitimate approach to take with regard to the proper control of horse and greyhound racing is implicit in a number of cases, the most recent of which is R v Disciplinary Committee of Jockey Club; Ex parte Aga Khan [1993] 1 WLR 909; [1993] 2 All ER 853; see also Law v National Greyhound Racing Club Ltd [1983] 1 WLR 1302; R v Brewer; Ex parte Renzella'*

For these reasons I would confirm the Stewards' ultimate finding. Nothing that has been put before the Stewards or placed before the Tribunal persuades me to the contrary. I would dismiss the first ground of appeal.

GROUND TWO

This ground states:

> *'The outcome of the inquiry was predetermined and the evidence not fairly weighed resulting in the Stewards coming to conclusions that could not have been arrived at by any reasonable person.'*

In support of the second ground of appeal the submission document asserts at the outset that the outcome of the Stewards' inquiry was *"...predetermined, prejudged. We believe on the evidence presented no reasonable men could have constructed the Steward's determination."* It is foreshadowed at page 2 of ex 8 that evidence would be presented which would prove this or show an inability on the Stewards' part to fully understand and give due consideration and weight to the scientific data and statistical analysis. No such evidence was lead.

It is alleged that the Stewards held *'...unfounded and unshakeable beliefs...'* and that the Stewards' veterinary consultant *'...peddled...myths and information'* (page 2). It is asserted that *'the presentation of significant evidence of non-administration, was disregarded entirely...'* (T3). It is also claimed that the views expressed by the Stewards within the inquiry confirms the appellant's apprehension of bias right from the outset (page 3). I am satisfied all of these allegations are unfounded.

The findings of the Australian Harness Racing Council TCO_2 Inquiry are quoted at pages 4 and 5 of ex 8 to and are heavily relied on in the submission document. As to that I agree

with and adopt the statement made by Mr Skipper in his very brief written submissions presented to the Tribunal (ex 10) when he states:

> *'As it transpired, with one exception, there was nothing in the AHRC review, which altered the circumstances surrounding TCO2, and Mr. Olivieri's case (Reference exhibit handed up by the Stewards at appeal hearing 23/10/03).*
>
> *The one exception being the decision to raise the violate level for TOC2 from 35.0 to 36.1 (sic) milllimoles per litre of plasma. However, this could not have any bearing on Mr. Olivieri's case as the Stewards were bound to act on the violate level of 35.0.'*

These findings of the Council are irrelevant and can have no bearing on the outcome of this appeal. Not only did the findings emerge well after Mr Olivieri's conviction but they would not have altered the Stewards' result anyway in terms of the proper application of the then current rule which covered the matter. The Council findings were handed down long after the Stewards handed down their findings. It is asserted (page 5 of ex 8) that had the Stewards deferred the hearings Mr Olivieri would not have been found guilty following the handing down of the AHRC findings. This proposition is clearly untenable in view of the Tribunal's appellate role and the relevant factors to be taken into account in determining this appeal. At the top of page 6 it is asserted that *'...the stewards must have had significant doubts about the safety of the TCO2 system'* and the query was made whether the Committee was reasonable enforcing the Stewards to complete their deliberation. This comment, like so many other comments in the submission document is pure speculation. None of the conjecture in ex 8 is supportable.

In many places the submission is couched in language which is less than objective, such as the main paragraph on page 6. The role of the Stewards, under pressure from the Committee, simply was to apply the letter of the Rules to the facts as presented to them. The administrators of harness racing, not the Stewards, were responsible to decide whether to maintain the then existing rules or to change any of the Rules. The Stewards cannot be criticised for the actions or inactions of the Committee.

It is asserted that in view of the concerns occurring around Australia over the TCO_2 results and testing and the attitudes adopted by some of the jurisdictions that the Stewards in Western Australia should have *'required proof of laboratory accuracy. The laboratories* ***never*** *provided credible evidence of accuracy throughout the entire enquiry. They merely claimed it'*. (page 6). I reject this assertion. I am satisfied it was reasonably open to the Stewards to reach the conclusions which they did in para.s 41-45 inclusive of their reasons. The choice as to which evidence to accept and which to reject was theirs and I am not persuaded they were in error in so deciding.

At the top of page 7 reference is made to a decision in New South Wales of Judge Thorley in *D Binskin* (Racing Appeal Reports 2370 dated 9 May 1997) appeal against a 12 month disqualification for a high TCO_2 reading. That decision is relied on to support the proposition that if a reported level proves not to have come from a reliable analysis then the case against a trainer collapses. In *Binskin*'s case there were serious doubts regarding the taking and the handling of the sample prior to it having arrived at the laboratory for analysis. This is not the case here.

At the top of page 10 the appellant asserts that the statement which is quoted clearly illustrates *'...the thoughts of a prosecutor, not those of an adjudicator'*. This comment

clearly illustrates a lack of understanding of the changing roles of the Stewards during the course of inquiry proceedings. At the early stages of an inquiry the Stewards have the task of carrying out a full and thorough investigation. In the course of doing so the Stewards in effect are responsible to agitate relevant issues to enable them to decide whether or not a charge should be laid. In this case, by virtue of having received the results of the blood analysis from the laboratories, the Stewards were able to lay the charge early in the piece. Once a charge is laid then the role of the Stewards changes. They become in effect the prosecutors. In that capacity it is their task to find out all relevant information, expose all material and reach the point where they are able to deliberate on all issues and ultimately adjudicate. One cannot compare the judicial role in complaint or prosecution proceedings in a court of law with a Stewards' inquiry conducted under rules governing trotting. In the court context there is a rigid separation and discrete allocation of the responsibilities and duties of the complainant prosecutor from the judicial officer determining the matter. Clearly, adjudicators in court proceedings play a very different role from Stewards in a racing context.

At the bottom of page 10 of ex 8 it is asserted that it is unreasonable for an appellant to prove his innocence *'beyond any reasonable doubt ...not on the balance of probability'*. The test in *Briginshaw* does in fact apply to this matter. The assertion just referred to in ex 8 reveals an incorrect interpretation or wrong application of that test.

On page 11 of the submission it is asserted that it was clear the Stewards had no understanding of matters analytical or scientific. I have not been persuaded that this has been established.

It is next worth commenting on the statement at the bottom of page 11 and top of page 12, which reads:

> *'The stewards made a finding in their Determination that Olivieri administered or caused to be administered alkalinizing agent(s) to Bull's Roar, resulting in the horse producing a violate level. That finding, in our view, could not be made on the basis of evidence presented. The only evidence produced by the stewards was the confirmatory TCO2 level of 35.9, a level below the new threshold. I challenge the stewards to produce any other evidence to show an administration. Under Rule 497(2), Olivieri had a defence of all reasonable care and precaution, and the evidence clearly showed that it was more likely than not, that an administration had not occurred.* ***The evidence clearly showed that administration was unlikely.'***

These propositions ignore the fact that the level exceeded the minimum allowable level at the relevant time under the Rule as it then applied. *'The new threshold'* has nothing to do with the matter. As previously indicated I am satisfied that administration for the purpose of satisfying the requirement of the Rule had occurred.

On page 15 the criticism of the failure to take into account the evidence of Professors Rose and Soma and the influence by the argument regarding pre-competition anxiety does not alter the fact that this horse returned a reading which exceeded the levels prescribed and proscribed in the Rules.

In the last paragraph on page 15 it is asserted that there was no evidence that the Stewards gave the pre-competition anxiety any weight. The Stewards in fact commented extensively on this aspect at para.s 22-27 inclusive in their reasons.

The sodium argument addressed at pages 16-20 can be despatched quickly. In my opinion it has no merit and reflects a misunderstanding of Professor Rose's evidence and the qualification he made at T799 in para 201.

I am satisfied nothing presented supports the contention that the Stewards had decided this matter in advance. The Stewards have carefully and properly analysed the relevant evidence and have reached an appropriate conclusion which was open to them. I would therefore dismiss this ground of appeal.

GROUND THREE

This ground states:

> *'The Stewards breached the contractual terms of the training licence that exists between myself and the WATA.'*

The Stewards in para.s 34 to 40 inclusive of their findings address the issue of notification of the trainer. I am satisfied with the appropriateness of the approach of the Stewards on this issue in all of the circumstances of this case. Even if the Stewards could be said to have been derelict in their duty, in regards to notification, which I do not find, the circumstances of communicating to Mr Olivieri in my opinion cannot be said to be a breach of any *'contractual term'* which under the Rules could result in the conviction being overturned. Accordingly I would dismiss ground three.

GROUND FOUR

This final ground of appeal states:

> *'That the accuracy of the TCO_2 analysis had not been maintained and therefore the reported TCO_2 level of BULLS ROAR could not be relied upon.'*

This ground can also be dealt with quickly. I am not persuaded, despite the great volume of the scientific evidence and the thoroughness of Dr Stewart's approach, that this ground is in any way supported. In dealing with ground 2 I have already addressed the issue of the accuracy of the laboratory testing. I repeat I do not consider the Stewards were in error in reaching the conclusions which they did on this aspect of para.s 41-45 inclusive of their reasons.

I would therefore dismiss the final ground as well.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of WA

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