THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN (PRESIDING MEMBER)

APPELLANTS:	**DEAN CAPELLI, NEVEN BOTICA & GARY JOHNSON**
APPLICATION NO:	**A30/08/556**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)**
DATE OF HEARING:	**22 JUNE 2005**
DATE OF DETERMINATION:	**8 JULY 2005**

IN THE MATTER OF an application by Dean Capelli, Neven Botica and Gary Johnson to re-open Appeal 556 heard and determined on the 25 February 2002 wherein the Tribunal dismissed an appeal against the disqualification of THURSTON as the second placed runner in the 2001 BMW PERTH CUP run at Ascot on 1 January 2001 pursuant to the provisions of Rule 177 of the Australian Rules of Racing.

Mr W S Martin QC assisted by Mr S G Scott, on instructions from Stables Scott, appeared for the appellants.

Mr RJ Davies QC, on instructions from Freehills, appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

Introduction

THURSTON was placed second in the Group II BMW Perth Cup run at Ascot on 1 January 2001. Second place was worth $55,000 in stake money. A post race urine sample taken from THURSTON allegedly revealed the presence of Cimetidine, a prohibited substance.

A Stewards' inquiry commenced on 13 March 2001. Later substantive sittings of the inquiry were held on 24 August, 12 November, 13 November and 31 December 2001. There was also a short sitting day on 10 December 2001.

The final sitting relating to the owners was held on 31 December 2001. The Stewards found that the circumstances referred to in Australian Rule of

Racing ("ARR") 177 had been made out. They disqualified THURSTON from the second placing. The placings were amended accordingly.

The appellants lodged a Notice of Appeal on 14 January 2002.

On 25 February 2002, I heard and dismissed the appeal. I delivered brief oral reasons for my decision. My written reasons were delivered later, and are reported at page 3503 of the Racing Appeals Reports, issue 32, August 2002.

By letter to the Tribunal dated 15 November 2004, the appellants applied to re-open the appeal. Having considered the application to re-open, I directed that there be a hearing to determine the issues raised by it. My direction was made pursuant to section 11(3) of the *Racing Penalties (Appeals) Act* ("the Act").

I further directed that the issues to be determined are:

1. Whether there is jurisdiction to re-open the appeal, and if so;

2. Whether the appeal should be re-opened.

The hearing of the application to re-open took place on 22 June 2005, and was adjourned for my decision to be made and for reasons to be delivered. This is my decision and my reasons for decision.

The Stewards' decision to disqualify THURSTON

The Stewards' decision was made on 31 December 2001. The issue for determination by the Stewards was whether the circumstances referred to in ARR 177 had been made out. That rule was in the following terms:

> *"Any horse which has been brought to a race-course and which is found by the Committee of the Club or the Stewards to have had administered to it any prohibited substance as defined in A.R. 1 may be disqualified for any race in which it has started on that day."*

In more simple terms, the issue for the Stewards was whether it had been proved to the required standard that there had been a drug administered to THURSTON. All of the evidence, on behalf of the Stewards and the appellants, had been directed towards that issue.

On 31 December 2001, the appellants asked that the proceedings be adjourned again. Mr Capelli on behalf of the appellants asked for the adjournment because his legal adviser was away, and he wanted to bring along legal representation and expert witnesses. Importantly, there had already been an expert witness called by the appellants. That witness, Mr Voak, had taken an active part in questioning the Stewards' expert witness, and had given evidence himself.

Mr Capelli raised the possibility that because metabolites were not tested for and therefore not detected, it could not be proved that the sample had passed through the horse. He said *"there are expert witnesses in the form of pathologists, chemists and others that Mr Miller would choose to come along*

as well". The raising of that possibility was a portent of things to come. However, Mr Capelli did not go further and say who another expert witness was to be, nor did he detail the substance of any further proposed expert evidence. The Stewards declined to adjourn again, and proceeded that day to consider the evidence and disqualify the horse.

The Tribunal's decision to dismiss the appeal

The appeal was heard and determined on 25 February 2002. The issues for determination were as set out in the Notice of Appeal, which were as follows:

- Denied adjournment to bring evidence from expert witnesses.
- Denied adjournment to get legal representation.
- Further grounds to be submitted.

The appeal was dismissed for the reasons given orally on 25 February 2002, together with the later published written reasons. At the hearing, the appellants did not say who another expert witness was to be, nor did they detail the substance of any further proposed expert evidence. No further grounds were submitted, despite the Notice of Appeal indicating that there would be further grounds.

In dismissing ground 1, part of the reasons included the observation that there was no evidence which the appellants could have brought to prove the assertion that the sample had been created by someone for malicious purposes.

The inquiry becomes separate

The inquiry begun by the Stewards was into the detection of the prohibited substance. There were 2 "respondents" facing possible adverse decisions. One "respondent" was the owners of the horse, who are the appellants here. The other "respondent" was the trainer, Mr J.J. Miller Jnr. Mr Miller represented his own interests, and the interests of the appellants. The inquiry began with both "respondents" being represented at each of the hearing days up to 13 November 2001. The inquiry became separate from 10 December 2001 onwards. Mr Miller presented medical certificates to the effect that he was unable to attend Stewards' hearings into this and other matters. The Stewards continued on and concluded that part of the inquiry relating to the owners on 31 December 2001. As stated above, the Tribunal heard and dismissed the owners' appeal on 25 February 2002.

The Stewards resumed that part of the inquiry relating to Mr Miller on 6 May 2002. The issue for determination by the Stewards was whether Mr Miller had breached ARR 178. That rule was in the following terms:

> *"When any horse which has been brought to a race-course for the purpose of engaging in a race is found by the Committee of the Club or the Stewards to have had administered to it any prohibited substance as defined in A.R. 1, the trainer and any other person who was in charge of such horse at any relevant time, may be punished, unless he satisfy the Committee of the Club or the Stewards that he taken all proper precautions to prevent the administration of the prohibited substance."*

In this part of the inquiry, the issue for the Stewards was whether it had been proved to the required standard that there had been a drug administered to THURSTON. This was exactly the same issue for determination as between the Stewards and the owners.

On 6 May 2002, the Stewards found the charge proved against Mr Miller. By notice dated 17 May 2002, Mr Miller appealed to the Tribunal. On 21 August 2002, the hearing took place before the Tribunal, constituted by different members. Mr Miller called an expert witness, Mr Cochrane. Mr Cochrane's evidence was to the effect that the sample which had been reported on had not passed through the horse. It had been concocted.

The Tribunal allowed Mr Miller's appeal. His conviction was quashed. In allowing the appeal, the Tribunal relied substantially on Mr Cochrane's evidence.

The appellants' beginning point

It is Mr Cochrane's evidence, given at the Tribunal on 21 August 2002, which the appellants rely upon in this application to re-open.

The appellants submit that that evidence shows the possibility that there has been a fraud perpetrated on the Tribunal in its hearing and determination of the owners' appeal on 25 February 2002. On 25 February 2002, the Tribunal relied substantially on the evidence which had been before the Stewards. It is submitted that the evidence had been falsified by a person or persons, whose identity cannot (and need not) be shown. The appellants submit that the decision of 25 February 2002 was vitiated by fraud.

1. Whether there is jurisdiction to re-open the appeal

The Act

Section 14(1)(b) of the Act is in the following terms:

> *"**14. The determination of an appeal***
>
> *(1) A determination of the Tribunal in relation to an appeal –*
>
> *(a) ...*
>
> *(b) is final and binding on the parties to that appeal, and not subject to further appeal or review."*

The cases

There is no doubt that an administrative decision may be treated as no decision at all if it satisfies certain criteria. In ***Leung -v- Minister for Immigration and Multicultural Affairs (1997) 79 FCR 400***, Finklestein J said at 411 –

> *"What is the position in relation to an invalid decision? By an invalid decision, I mean a decision which can be impugned for jurisdictional*

error or for a failure to observe procedural fairness or one that is brought about by fraud or misrepresentation."

And later at 415 –

"To ignore an invalid decision is not to revoke it. It is merely to recognise that that which purports to be a decision does not have that character. To decide the matter again is not a reconsideration of it. It is in fact the original exercise of the power to make the decision. Hence, the rule embodied in the expression "functus officio" has no application to such a case. Nor is there any need to find either an express or implicit power of reconsideration."

However, it is not apparent that the Act under which the decision maker operated in ***Leung*** had any provision similar to section 14(1)(b). Indeed, the Act in question there permitted judicial review. The position is different here, there being no express or implied power of reconsideration, and 14(1)(b) prohibiting appeal or review.

The importance of the Act by which the decision maker is bound is emphasised in ***Minister for Immigration and Multicultural Affairs -v- Bhardwaj (2002) 209 CLR 59.*** In ***Bhardwaj***, the original decision maker was the Immigration Review Tribunal. The Tribunal revoked one of its own decisions. The *Migration Act* did not expressly permit the Tribunal to act in the way it did.

All of the Judges were in agreement that the statutory scheme was determinative of whether the decision maker was correct in acting in the way it did.

Gleeson CJ said at 606 –

"In those circumstances, it was not inconsistent with the statutory scheme for the Tribunal, … to give the respondent the opportunity which the statute required …"

Gaudron and Gummow JJ said at 613 –

"… ,the Parliament may give an administrative decision whatever force it wishes. It may, for example, enact a privative clause providing that, within the limits of constitutional power, a decision is final and binding and not subject to legal challenge except pursuant to s 75(v) of the constitution."

Kirby J said at 634 to 635 –

"As to the Act, many of its provisions indicate that the course adopted was contrary to the parliamentary purpose."

Callinan J said at 647 to 648 –

"It could, if it were so minded, (and subject only to one qualification), provide that an executive or administrative decision by the minister or an official should be in all respects non-reviewable and final … "

In my opinion, consistent with what is said in ***Bhardwaj***, it is necessary first to look to see whether parliament has manifested an intention to make the decision in question final and binding. It is only if that intention cannot be found that recourse can be had to the principle that a decision vitiated by fraud can be set aside and considered again. In my opinion, it is plain that parliament has legislated to make the decisions of the Tribunal final and binding. That is what section 14(1)(b) says.

The case of ***Plaintiff S157/2002 -v- The Commonwealth*** *2003 211 CLR 476* does not advance the case for the appellants. At page 506, the majority re-affirmed the principle that in some circumstances a decision made involving jurisdictional error is no decision at all. However, the decision bears no other relation to the facts of this case. The Court in ***Plaintiff S157/2002*** was considering s 474 of the *Migration Act* as a whole, and not in its component parts. The decision was particularly concerned with the plaintiff's desire, in the case stated, to ask for the issue of prerogative writs under s 75(v) of the constitution. It is impossible to discern from the reasons of the majority anything which bears upon the question of what circumstances determine whether a decision maker has power to revisit its own decision.

It is convenient at this point to refer to ***Re Western Australian Trotting Association and Others; Ex Parte Chambers*** *(1992) 9 WAR 178.* It was held there that section 14(1)(b) of the Act does not preclude judicial review by way of prerogative writ. The result was similar to that in ***Plaintiff S157/2002.*** One aspect of both of those decisions which is significant is that the courts in each case maintained their supervisory jurisdiction of the prerogative writs. Thus, the plain words of section 14(1)(b) are tempered, so far as an aggrieved party might be concerned, by the continuing availability of the prerogative writs.

Section 55 of the Interpretation Act

The appellants submit that there is an alternative source of power for the Tribunal to re-open the appeal. The appellants refer to section 55 of the *Interpretation Act*, which is in the following terms –

> *"Where a written law confers a power or imposes a duty upon a person to do any act or thing of an administrative or executive character or to make any appointment, the power or duty may be exercised or performed as often as is necessary to correct any error or omission in any previous purported exercise or performance of the power or duty, notwithstanding that the power or duty is not in general capable of being exercised or performed from time to time."*

That provision must be read as far as possible together with section 14(1)(b). I consider that section 14(1)(b) can be read together with section 55 of the *Interpretation Act.* Section 14(1)(b) is simply a limitation on the general rule.

Conclusion

In my opinion, there is no jurisdiction for the Tribunal to re-open an appeal. Effect must be given to the plain words of the Act.

Whether the appeal should be re-opened

Inconsistent decisions

There are in existence 2 decisions of the Tribunal concerning the same subject matter. The decisions are inconsistent with each other. The reason for that is that there were 2 different hearings concerning that same subject matter. The separation of the procedure began on 10 December 2001, when Mr Miller did not attend the Stewards' inquiry. The appellants did attend, and the part of the inquiry concerning them proceeded to its conclusion on 31 December 2001. Following that, their appeal proceeded to the hearing on 22 February 2002. Because the part of the inquiry concerning Mr Miller began again after 22 February, there was always the potential for a different decision to be arrived at. That is exactly what did occur. One reason for the different decision being arrived at was that evidence which Mr Miller brought to his appeal on 21 August 2002 was not brought by the appellants to the Stewards on 31 December 2001, or to the Tribunal on 22 February 2002.

It is submitted for the appellants that it is in the interests of justice that there be a resolution of this inconsistency. I agree. However, the manner of achieving that resolution is not to re-open this appeal. There remains the possibility that the result would be the same, even after the fresh evidence was heard.

Fresh evidence

One of the criteria to be taken into account in the exercise of a discretion to re-open a matter on the grounds of fresh evidence is whether in fact the evidence is fresh, in the sense that it was not reasonably available at the time the matter was heard.

I have some doubt as to whether the proposed evidence of Mr Cochrane is in fact fresh evidence in the proper sense. I am not satisfied that it was not available to the appellants at the time they were in front of the Stewards on 31 December 2001. The submissions put to the Stewards on 31 December 2001 seemed to indicate that the appellants knew in general the type of evidence that they wished to call, and were seeking an adjournment to do that. There was a further period of 6 weeks before the appeal came to be heard at the Tribunal, yet there was no application to adduce this or any other fresh evidence.

Before the appellants came to the Tribunal on 22 February 2002, their expert witness Mr Voak had purportedly received further evidence in support of the appellants' position, in the form of an email from the manufacturers of the testing equipment. This email was dated 8 January 2002, and was tendered and became exhibit "B" in Mr Miller's appeal on 21 August 2002. There was no application made to the Tribunal to call Mr Voak or to tender this email before the Tribunal on 22 February 2002.

It has been strongly alleged in the Miller proceedings that this email is a forgery. Leaving aside that allegation, it is still not clear to me in these proceedings what was the precise relationship as at 22 February 2002 between the appellants and Mr Voak, the appellants and Mr Miller, and the appellants and Mr Cochrane. In my opinion, the appellants would have to

make those matters clear before the proposed evidence of Mr Cochrane could be considered as being fresh evidence.

Conclusion

1. In my opinion, there is no jurisdiction for the Tribunal to re-open an appeal. Effect must be given to the plain words of the Act.

2. In the exercise of discretion, I would have declined to re-open the appeal.

PATRICK HOGAN, PRESIDING MEMBER

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANTS:	**DEAN CAPELLI, NEVEN BOTICA & GARY JOHNSON**
APPLICATION NO:	**A30/08/556**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)**
DATE OF HEARING:	**25 FEBRUARY 2002**
DATE OF DETERMINATION:	**25 FEBRUARY 2002**

IN THE MATTER OF an appeal by Dean Capelli, Neven Botica and Gary Johnson against the determination made by the Stewards of the Western Australian Turf Club on 31 December 2001 disqualifying THURSTON as the second placed runner in the 2001 BMW PERTH CUP at Ascot on 1 January 2001 pursuant to Rule 177 of the Australian Rules of Racing.

Mr D Capelli appeared for the Appellants.

Mr R J Davies QC appeared for the Stewards of the Western Australian Turf Club.

BACKGROUND

THURSTON was placed second in the Group II BMW Perth Cup run over 3200 metres at Ascot on 1 January 2001. Prize money for the race was $364,000 including trophies. Second place was worth $55,000 in stake money. A post race urine sample taken from THURSTON revealed the presence of Cimetidine, a prohibited substance.

A Stewards' inquiry commenced on 13 March 2001 with the Stewards' panel consisting of:

Mr F J Powrie	Chairman of Stipendiary Stewards
Mr B W Lewis	Deputy Chairman of Stewards
Mr R J Mance	Stipendiary Stewards

Present were Mr P O'Reilly, Racecourse Investigator and Dr P J Symons, Veterinary Steward. Called to the inquiry were Mr J J Miller Jnr, the Trainer of THURSTON and Mr D Capelli, Managing Part Owner of THURSTON.

Later sittings of the inquiry were held on 24 August, 12 November, 13 November 2001 and 31 December 2001.

THE FIRST SITTING

It was common ground that Cimetidine is a prohibited substance. Dr P J Symons, Veterinary Steward with the WA Turf Club, gave evidence at pages 6 to 7 of the transcript. (T6-T7). It is a therapeutic product (T18). It is a component of the human product called Tagamet. (T15) It is used to treat ulcers (T7).

Official racing laboratories undertake the analysis of samples. In this case the presence of Cimetidine was detected by the Australian Racing Forensic Laboratory in Randwick, New South Wales. The analysis was done by Dr Shawn Stanley, whose report to the Stewards became exhibit A. Dr Stanley later gave oral evidence at the inquiry. The Racing Chemistry Centre (Perth) detected the same substance in the reserve portion of the sample. A report to that effect from Mr Horsten, Senior Chemist, became exhibit B. Cimetidine was not detected by either laboratory in the control portion of the sample.

The method of dealing with the samples complied with Rule 178D of the Australian Rules of Racing. That rule is in the following terms:

*"**178D.** (1) Samples taken from horses in pursuance of the powers conferred on the Stewards by AR.8(j) shall be analysed by only an official racing laboratory.*

(2) Upon the detection by an official racing laboratory of a prohibited substance in a sample taken from a horse such laboratory shall;

(a) notify its finding to the Stewards, who shall thereupon notify the trainer of the horse of such finding; and

(b) nominate another official racing laboratory and refer to it the reserve portion of the same sample and, except in the case of a blood sample, the control of the sample, together with advice as to the nature of the prohibited substance detected.

(3) In the event of the other official racing laboratory detecting the same prohibited substance, or metabolites, isomers or artifacts of the same prohibited substance, in the referred reserve portion of the sample and not in the referred portion of the control, the certified findings of both official racing laboratories shall be prima facie evidence upon which the Stewards may find that a prohibited substance had been administered to the horse from which the sample was taken."

The Rules do not require the Stewards to actually prove the act when, or the event by which, the administration occurred. There is an evidentiary presumption which can be used to find that fact, namely Rule 178D(3). The presumption was available in this case because the first laboratory detected the prohibited substance, and the second laboratory detected the same substance. The Stewards therefore had before them prima facie evidence that the prohibited substance had been administered to THURSTON. This was evidence on which they could act, and disqualify the horse. They had discretion as to whether or not to disqualify, because Rule 177 is expressed in discretionary rather than in mandatory terms.

THE SUBSEQUENT SITTINGS

The inquiry continued on 24 August 2001 and was further adjourned. At the resumption of the inquiry on 12 November 2001 the Stewards' panel was constituted differently following the resignation of Mr Powrie from his position at the Western Australian Turf Club.

The panel for the remainder of the inquiry was:

Mr B W Lewis	Acting Chairman of Stewards
Mr W J Delaney	Provincial Chairman of Stewards
Mr R J Mance	Stipendiary Steward

At each sitting, except the last, the trainer Mr Miller represented the owners, who are the Appellants here. At T319, on 31 December, the Appellant Mr Botica said ".... Mr Miller was running the Inquiry right, he's no longer here...". Mr Miller, acting on behalf of the Appellants had enlisted the aid of an expert witness at the sittings of 12 and 13 November. That person was Mr Lionel Voak. Mr Voak's presence and assistance may or may not have been helpful to Mr Miller in his representation of the Appellants. But the questions he asked were of assistance to the Stewards. Mr Voak 's questioning caused the analyst, Dr Stanley, to give a detailed account of the testing procedure in his laboratory. He also gave a detailed explanation of his reasons for concluding that the sample contained Cimetidine.

The 12 November sitting went over to the next day, 13 November 2001. The inquiry was then adjourned again. The final sitting was on 31 December 2001. By that time, Mr Miller was no longer acting for the Appellants. He had provided documentation to the Stewards to the effect that he was medically unfit. (T298). Mr Capelli requested an adjournment because his legal adviser was away, and he wanted to bring along legal representation and expert witnesses. (T299). The Stewards declined to adjourn again, and proceeded that day. After considering the evidence of that last day, the Chairman of the inquiry announced the Stewards' findings in these terms:

> *"Alright Mr Botica I'll read you what we believe to be appropriate. Stewards believe a reasonable opportunity has been afforded to you the owners to present evidence and question witnesses throughout this Inquiry. We do not believe the line of questioning suggested regarding taking of evidence of expert witnesses in regard to the metabolism of cimetidine will benefit this Inquiry. Expert witnesses Dr Peter Symons, Dr S. Stanley and Mr C Russo all state that little is known regarding the metabolism of cimetidine in horses. Further Dr Stanley and Mr Russo have clearly indicated that neither the sample or the reserve portion were tested for metabolites. The rules of racing do not require metabolites of prohibited substances to be detected. For these reasons we do not consider it appropriate to grant any further adjournment. Throughout this Inquiry the owners have raised their grave concerns regarding the chain of custody and integrity of sample number 1501121 relating to THURSTON from the Perth Cup on the 1st of January 2001. Stewards have carefully examined all the facets of the procedure related to the collection, storage, transport and testing of the sample taken from THURSTON on January 1, 2001. The sample taken from THURSTON on the 1st of January 2001 was witnessed by Mr Bruno Malatesta, a licensed stable employee for Mr John Miller. Mr Malatesta signed the sample card stating he was satisfied with collection, packaging and sealing procedures. After being taken the sample was properly secured and was under the supervision of official persons. Sample number 1501121 was then sent to the ARFL as part of the batch of samples where it was received in good order on the 3rd of January 2001. The initial notification signed by Dr Stanley and dated 30th of January 2001 stated that sample number 1501121 was dated three one zero one. We accept Dr Stanley's explanation for this error, which was subsequently corrected. Similarly the sampling kit audit document with ID number ARF000946 advising that sample number 1501121 was returned in security bag number 658 was adequately documented albeit unsigned. We believe these issues to be clerical errors which do not in any way impunge (sic) on the integrity of the sample. We are further satisfied that the presence of cimetidine was detected in normal screening procedures. Following the notification of irregularity the ARFL sent the reserve portion of urine and control solution to the Chemistry Centre of Western Australia in a sealed bag for analysis. These samples were received on good order with the seals in tact, cimetidine was confirmed in the reserve portion of urine but not in the control. This indicates that there has been no contamination at collection stage. Both the Australian Racing Forensic Laboratory and Chemistry Centre of WA are official racing laboratories under the Australian Rules of Racing. The Stewards are of the opinion that the allegations regarding the integrity of sample number 1501121 or the sampling and testing procedures are without any merit. We are completely satisfied with the findings of the ARFL and Chemistry Centre of Western Australia. Based on the evidence of Dr Peter Symons the Stewards are satisfied that cimetidine is a prohibited substance, a prohibited substance under the rules of racing. The Stewards are not required to actually prove the act when or the event by which the administration of the prohibited substance occurred. We rely on the evidentiary presumption of ARR178D Part 3 to prove this fact. Having come to these conclusions the*

Stewards then considered the provisions of Australian Rules of Racing 177 which state, I'll just read those to yourself, Mr Botica. It states any horse which has been brought to a racecourse which is found by the Committee of the club or the Stewards to have had administered to it any prohibited substance as defined in AR1 may be disqualified for any race in which it has started on that day. Do you understand what that rule is saying Mr Botica. That the detection of a prohibited substance may result in the disqualification of a horse from a race. Mr Botica after consideration of all the evidence presented throughout this Inquiry, the Stewards are exercising their discretion under ARR177 and we disqualifying THURSTON from second placing in the BMW Perth Cup at Ascot on 1 January 2001 and we will amend the placings accordingly."

The Appellants lodged a Notice of Appeal on 14 January 2002. The grounds of appeal are:

- *Denied adjournment to bring evidence from expert witnesses.*
- *Denied adjournment to get legal representation.*
- *Further grounds to be submitted.*

On 25 February 2002, I heard the appeal and delivered brief oral reasons for my decision. Those reasons are set out from the transcript as follows:

> In my view, this appeal is devoid of any merit at all.
>
> I have considered the various transcripts of evidence of the different stages of the inquiry right up to and including 31 December 2001. I have also considered all of the documentary exhibits that have been provided. A consideration of all that evidence indicates there is nothing about which a lawyer or an expert witness could have assisted the Appellants.
>
> The evidence showed, beyond any doubt, that the urine sample taken from the horse on 1 January 2001 was the same sample reported on by both laboratories. The evidence also showed, beyond any doubt, that the laboratory procedures with respect to both laboratories were entirely correct. The Appellants and the person who advocated for him part of the way, that is Mr Miller, were given every opportunity to obtain legal advice and to be represented if necessary. They were also given every opportunity to obtain expert assistance. For some reason, Mr Miller chose to use Mr Voak.
>
> The Stewards, in refusing an adjournment, didn't place it as strongly in their reasons as I am doing so now. They were rather more restrained in their language in their reasons for refusing the adjournment, but I don't feel the need to be so restrained. The Appellants' case before the Stewards, after all of the evidence was completed, was hopeless.
>
> Finally on the matter of disqualification, it hasn't been demonstrated that the Stewards erred in any way in exercising their discretion to disqualify the horse. The Appellant here today, Mr Capelli finishes up with an observation that natural justice has not been done and it has been deliberate. In my view, that comment is unwarranted. It is similar to some other types of observations and comments made by this Appellant and Mr Miller during the course of the inquiry.
>
> It is unsupported by any evidence and the Stewards, in my view, ought to have a justifiable sense of grievance at these types of comments by Mr Capelli.
>
> For these reasons, the appeal is dismissed.

Following are my more detailed written reasons:

GROUND ONE: DENIED ADJOURNMENT TO BRING EVIDENCE FROM EXPERT WITNESSES

This ground could only succeed if there was something about which an expert witness could assist both the Appellants and the Stewards. The Appellants, through Mr Miller and their expert Mr Voak, had challenged the accuracy of the findings of both laboratories. That was their right, despite the

evidentiary presumption available to the Stewards. The approach of the Appellants was that the sample did not contain a prohibited substance, and therefore both of the analysts or their laboratories must have done something wrong.

Dr Stanley attended the inquiry at the sittings on 12 and 13 November. That was in response to a request from Mr Miller made on 13 March (T14). Mr Miller wanted to be able to have a "representative" talk to the analyst. At the sitting on 24 August, Mr Miller presented a detailed list of documents which he requested be made available to him (T27). Much of the documentation requested related to the actual processes within the laboratory. Clearly, Mr Miller and Mr Voak wanted to question Dr Stanley on the accuracy of his conclusion that Cimetidine was present in the sample. At 12 and 13 November sittings the inquiry had before it a number of documents in response to Mr Miller's earlier request. Importantly, Dr Stanley had provided the inquiry and the Appellants with exhibit 3, a 16 page document, which I can describe as a printout of his laboratory's working documents including graphs, detailing how he arrived at his conclusion that Cimetidine was present in the sample.

Mr Voak questioned Dr Stanley on different subject matters. He began at T69. Dr Stanley gave his explanation in scientific terms at T75 and onwards. I do not pretend to understand the content of the scientific parts of his evidence. More significantly, nor did Mr Voak. Mr Voak's questions can be characterised as vague and unsubstantiated assertions, so far out of context that Dr Stanley often had difficulty in understanding what was being asked of him. All that occurred as a result was that Dr Stanley justified his findings by giving the explanations that he did.

Some of the documents that Mr Miller requested were described as " the log, the log normal, the log arithma, ...of testing procedure" (T20 on 12 November). At T74 and T75, Dr Stanley said that those terms appeared to be mathematical terms, and were used out of context in the request. Mr Voak explained that laboratories were required to keep records for 7 years. That fact had no relevance. Dr Stanley went on to explain the methodology and testing procedure. (T76). Mr Voak did not understand it. (T76). Mr Voak challenged Dr Stanley on "peaks" and "calibrations". He summarised by asserting that the work (Dr Stanley's) looked like the work of a laboratory technician. Presumably, the assertion was that the work was not reliable. In order to counter that, Dr Stanley went on to explain why the data was consistent with Cimetidine (T78). Following the explanation, Mr Voak was forced into the position of asserting that "they" decided to deliberately "stitch up" the result. (T80 and T81). The Appellant's case, as argued by Mr Voak, could not counter Dr Stanley's evidence and his documents in support. This is evidenced by Mr Voak's comment at T85, when he asserted "...unless you actually see it physically done, when you see graphs and things like that, they're not really conclusive." Mr Voak and Mr Miller simply did not accept the evidence.

The obvious point, which demonstrated that Dr Stanley was correct, was made by Steward Mr Delaney at T86, where he pointed out that the laboratory in Perth detected the same substance. This point was made again at T93, by Dr Stanley to Mr Voak "...if Cimetidine wasn't contained in the sample, any further work would have returned a negative result, would you agree?". Mr Voak's reply at T93 was "well, it depends on which way you look at it Dr Stanley. There's different points of view there". What the different points of view were, or the evidence in support of any different points of view, was never explained.

There was nothing which the Appellants could put forward to counter Dr Stanley's evidence. On Dr Stanley's evidence, there was enough for the Stewards to find that the sample contained the prohibited substance. More specifically, it was open for the Stewards to find, as they did in refusing the adjournment of 31 December, that there was nothing which a further expert witness on behalf of the Appellants could usefully add. By then, 31 December, the Appellants were on a new line of attack to the effect that the laboratory should have tested for metabolites, which would presumably then prove that the sample was one which had passed through the horse rather than one which had been created by someone for some malicious purpose. There was simply no evidence which the Appellants could have brought from an expert in order to prove that assertion.

I have referred above only to some parts of the evidence of Dr Stanley, as questioned by Mr Voak, to demonstrate that the Appellant's position was quite hopeless once Dr Stanley had given his

evidence. The Appellant's could not answer the evidence, except by avoiding the obvious or by making unsubstantiated assertions.

GROUND TWO: DENIED ADJOURNMENT TO GET LEGAL REPRESENTATION

There was even less reason for the Stewards to permit legal representation, and to adjourn to permit that to occur. In any event, there are only limited circumstances in which the Stewards are required to permit legal representation.

Throughout the inquiry, the Appellants took the alternative position that because THURSTON did not have a prohibited substance in its system, the sample which was analysed did not come from THURSTON. In seeking the further adjournment on 31 December, I assume that the Appellants wished to have legal representation in order to fully test the various possibilities in support of their position. However, the evidence up to and including that on 31 December showed beyond any doubt that the sample did come from THURSTON. The possibilities which the Appellants put up, through Mr Miler and Mr Cappelli, were far fetched. They included:

- While the horse had been impounded (for different reasons) after the race and after the taking of the sample, a security breach had occurred and it was given a substance which was the one which was ultimately analysed (T32 of 24 August).

- The reserve portion of the sample received and analysed by the laboratory in Perth was not part of the sample taken from the horse on the day. The laboratory in Perth could have "made it up" (T29 of 12 November).

- It was possible that someone used a fine syringe and injected through the sample bags while they were in laboratory custody and inserted the substance into the sample (T44 and T45 of 12 November).

- There are 11 keys to the fridge at the WATC offices in which the samples are first stored. All are held by Stewards (T165 and T166 of 13 November). Someone could take out one bag and put in another (T167).

In answer to these assertions, and others made by the Appellants along the way, the Stewards heard exhaustive evidence about the handling of the sample. Each step in the process was explained. In my view, the evidence showed beyond any doubt that the sample which was analysed and reported on came from the horse THURSTON. It is difficult to see how legal representation would have assisted the Appellants, even if the Stewards had decided to permit it.

GROUND THREE – FURTHER GROUNDS TO BE SUBMITTED

No further grounds were submitted by the Appellants.

CONCLUSION

It is important to note that a Stewards' inquiry, opened as a result of a prohibited substance being detected in horse presented for racing, has in most cases two issues to be determined. Firstly, whether any person is to be charged for presenting the horse to race when a prohibited substance has been detected and secondly, whether the horse should be disqualified from the race in question.

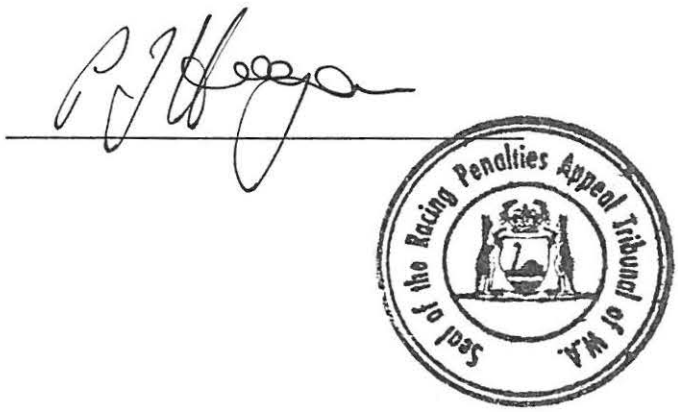
Throughout the inquiry, the Stewards were required to consider these two issues in light of the available evidence. Indeed, both Mr Miller and Mr Capelli were advised by the Chairman at T2 on 12 November that "...a charge or charges in terms of the Australian Rules of Racing may be laid during the course or at the conclusion of this Inquiry".

Mr Miller's absence from the inquiry on 31 December left the Stewards in the position of electing to proceed with the issue only of whether THURSTON should be disqualified from the race. That was their decision to make. The Stewards had by then disqualified Mr Miller until he chose to attend

Stewards' inquiries into this and other matters. The Western Australian Turf Club was also placed in the unacceptable position of having to withhold the stake money payable to the horses placed 2nd to 5th and the horse placed 8th following the disqualification of THURSTON. This important race on the Western Australian Calendar had been run 12 months earlier. THURSTON was in fact a runner in the 2002 Perth Cup on 1 January 2002, albeit with a new trainer as the result of Mr Miller's disqualification. The damage to the integrity of thoroughbred racing in this drawn out inquiry is immeasurable.

The Stewards have a discretion whether or not to permit persons appearing before them to have the assistance of experts or lawyers. There is nothing in the materials before me to indicate that the Appellants could have been assisted by either. The evidence that the sample came from THURSTON, and that the sample contained Cimetidine, was overwhelming. Nothing could have been gained by further adjourning the inquiry. The decision whether or not to adjourn is also within the discretion of the Stewards. It has not been demonstrated that the Stewards made any mistake in exercising that discretion.

For these reasons, and the reasons I delivered orally on 25 February, the appeal was dismissed.



PATRICK HOGAN, PRESIDING MEMBER