RACING APPEAL PANEL OF NEW SOUTH WALES

IN THE MATTER OF THE APPEAL OF JOHN SPRAGUE

Heard at Racing NSW Offices on Thursday 22 February 2018

APPEAL PANEL: **Mr T Hale SC - Convenor**
Mr J Nicholson
Mr K Langby

Date of Hearing: **22 February 2018**

Date of Decision: **22 February 2018**

Appearances: **Appellant – Mr J Byrnes, Solicitor**

Racing New South Wales – Mr Marc Van Gestel, Chairman of Stewards

REASONS FOR DECISION

Mr T Hale SC – Convenor, (Mr J Nicholson, Mr K Langby agreeing)

Introduction

1. Mr John Sprague, who is the Appellant, is a licensed trainer, training out of Port Macquarie. He is the trainer of the gelding, *Saint Denis*, which ran third in Race 3 the Maiden Plate over 1500 metres at Tuncurry Racecourse on Sunday, 29 October 2017 at approximately 2.30pm. A pre-race urine sample had been taken from the horse at 12.30pm. The sample tested positive to cobalt in a concentration greater than 100 micrograms per litre. The initial test result was 190 micrograms per litre.

2. As a consequence, an inquiry was convened by the Stewards on 3 January 2018, chaired by Mr Van Gestel as Chairman of Stewards, Mr Dingwall and Mr Smith. As a result of that inquiry, later that day, Mr Sprague was charged with a breach of Australian Rule 178. He pleaded not guilty. The Stewards, however,

found him guilty of the offence and imposed a penalty of 12 months' disqualification, commencing immediately, that is, 3 January 2018.

3. Mr Sprague has appealed to this Panel pursuant to s 42 of the *Thoroughbred Racing Act 1996*. A stay of the disqualification was granted pending an appeal. Section 43 of the *Thoroughbred Racing Act* governs the procedure on appeal to this Panel. The appeal is to be by way of a new hearing and fresh evidence may be given on the appeal.

Evidence and Submissions

4. At the hearing of this appeal, the Stewards were represented by Mr Van Gestel, Chairman of Stewards, and Mr Byrnes, solicitor, was given leave to appear for Mr Sprague.

5. At the commencement of the hearing of the appeal, Mr Byrnes sought an adjournment of the hearing. After some debate, this Panel declined to grant that adjournment.

6. Mr Byrnes announced, again at the commencement of the appeal, that Mr Sprague proposed to alter his plea and plead guilty to the charge, but would proceed with his appeal against the severity of penalty.

7. If I might just mention in a little detail the particular offence. The offence is a breach of Australian Rule 178, which relevantly provides:

> *Subject to AR 178G, when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised.*

8. AR 178B defines a prohibited substance. It provides that:

> *The following substances are declared as a prohibited substances:-*

Sub rules (1), (2) and (3) then set out three categories of substances. Sub rule (1) refers to:

> *Substances capable at any time of causing either directly or indirectly an action or effect, or both an action and effect, within one or more of the following mammalian body systems:*

9. Amongst the mammalian body systems listed is *the blood system*.
   Sub rule (2) refers to:

> *Substances falling within, but not limited to, the following categories:-*

   Amongst the categories listed are *haematopoietic agents*.

10. The evidence before the Stewards included a report by Dr Selig, which is exhibit 10. Dr Selig is the Official Veterinarian of Racing NSW. She explained that cobalt was a prohibited substance as defined in AR 178B, since it is capable of causing an action and/or an effect on the bloodstream within the meaning of AR 178B(1) and is a haematopoietic agent within the meaning of AR 178B(2).

11. AR 178C(1) provides certain exemptions to 178B and, in particular, it provides:

> *The following prohibited substances when present at or below the concentrations respectively set out are excepted from the provisions of AR 178B and:-*

   Amongst the list in subrule (l) is:

> *Cobalt at a mass concentration of 100 micrograms per litre in urine or 25 micrograms per litre in plasma.*

12. It is of course implicit in AR 178C that cobalt is a prohibited substance.

13. The evidence of the testing combined with the evidence of Dr Selig clearly establishes that, within the meaning of AR 178, a prohibited substance was detected in a sample taken from *Saint Denis.* In those circumstances the decision by Mr Sprague, taken on Mr Byrne's advice to change his plea to one of guilty, was proper.

14. I should say that the evidence before the Stewards also dealt with the various steps to ensure the testing of the sample. I have earlier mentioned that the result of the first test was a reading of 190 micrograms per litre, which is in Exhibit 4 of the exhibits before the Stewards, which forms part of Exhibit A before us. There was then a request for a confirmatory analysis, which was undertaken by the National Measurement Institute, which determined a concentration in the sample of 185 micrograms per litre. There was yet a further confirmatory analysis sought from Victoria from Racing Analytical, which identified the concentration at 177 micrograms per litre. Each of those readings demonstrate that the concentration of cobalt in the urine sample was well in excess of 100 micrograms per litre.

15. The charge against Mr Sprague is in the following terms:

> ***AR 178.*** *Subject to AR 178G, when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised.*

16. The particulars of the charge under AR 178 are that licensed trainer Mr John Sprague did bring Saint Denis to the Tuncurry racecourse for the purpose of engaging in Race 3 Maiden Handicap, on 29 October 2017 and a prohibited substance was detected in a urine sample taken from Saint Denis prior to running in that race as:

    a. cobalt was detected in a urine sample taken from Saint Denis prior to that gelding running in Race 3 Maiden Handicap at Tuncurry, on the 29 October 2017;

    b. cobalt is a prohibited substance pursuant to AR 178B(1) as it is an agent that is capable of causing either directly or indirectly an action or effect, or both an action and effect, within the blood system and was detected at a level that is not, under AR 178C(1)(l), excepted from the provisions of AR 178B;

    c. further or alternatively, cobalt is a prohibited substance pursuant to AR 178B(2) as it is an haematopoietic agent and was detected at a level that is not, under AR 178C(1)(l), excepted from the provisions of AR 178B.

17. I now come to the consideration of the various submissions made on the issue of severity of penalty. I should begin by noting that the offence under AR 178 is a strict liability offence (or perhaps an offence of absolute liability; for present purposes it does not matter which). Liability is imposed irrespective of whether the person has acted without fault. Statutory offences of strict liability are commonplace in the regulation of activities involving public welfare. Putting a person under strict liability is intended to assist in the enforcement of the statute or regulation by encouraging greater vigilance to prevent the commission of the prohibited act: see for example *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 530, 566-8, *Lim Chin Aik v The Queen* [1963] A.C. 160 at 174, The policy behind the imposition of strict liability in AR 178 is to similar effect. It is intended to encourage greater vigilance in ensuring that no horse is brought to a racecourse for the purpose of engaging in a race with a prohibited substance in its system.

18. The Panel was referred to a number of decisions on penalty which are of relevance. In *In the Matter of the Appeal of Stephen Farley*, a decision of this Panel of 17 June 2016, comprised of Mr Clugston (Principal Member), myself and Mr Fletcher, it was stated:

> "The Panel considers that breaches of AR 178 are serious in the overall framework of the Australian Rules of Racing as they impinge on the level playing field which is fundamental to the overall integrity of racing. The Panel is mindful of the long line of decisions of the NSW Racing Appeals Tribunal and the Racing NSW Appeal Panel in relation to the general starting point when imposing penalties for breaches of AR 178. That approach was outlined by Thorley DCJ in the Appeal of G Rogerson (24 May 1998). In that appeal his Honour said, inter alia:
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> "It seems to this Tribunal that breaches of AR 178 should ordinarily be met with penalties of disqualification or at least suspensions and that fines should be reserved for those cases where special circumstances would dictate."

19. In the decision before the Racing Appeals Tribunal of New South Wales concerning John McNair of 4 December 2015, the Tribunal (Mr Armati) referred to the principles that were set out in the Tribunal's decision concerning Gregory McFarlane of 25 September 2015:

> "What then is required of this Tribunal in determining a matter such as this? First and foremost is the need for the integrity of the industry. It is referred to in virtually every decision that Tribunals, Stewards and Appeal Panels deliver and that is paraphrased in various ways, but it is the integrity of the industry to the extent that those who participate in it, whether they be trainers, owners, regulators and the like, are entitled to expect, as is the public who has interest in Racing, whether they be betting public or those simply with abiding interest in thoroughbred Horse Racing, are entitled to expect and require of regulators that they ensure that every Horse runs on its merits, uninfluenced by substances which may cause it not to run on its merits, that is prohibited substances"

20. In the decision of this Panel *In the Appeal of Ms Collette Cooper* of 15 February this year (2018), the Panel, comprising Mr Beasley SC (Principal Member), Ms Skeggs and Mr Fletcher, again referred to relevant principles on penalty in cases of breach of AR 178 at paragraph 13:

> "The other aspect of this matter is that a breach of AR178 is a serious offence. It usually results in a disqualification or suspension, unless special circumstances are involved: see the Appeal of Farley in which the Panel follows what was said in the appeal of Rogerson, 25/5/98. One of the key objects of the Rules, including of its penalty provisions, is to uphold the image, interests and integrity of racing. A breach of AR178 – involving, as it does, the presentation of a horse to race with a prohibited substance in its system – always bring racing into disrepute. Penalties imposed for such breaches must redress that."

21. In a decision of this Panel *In the Appeal of Noel Callow* of 9 May 2017, comprising myself, Mr Carlton and Mr Clare, I said this on behalf of the Panel at paragraph 42 about the importance of deterrence.

> "Deterrence will have a broad application in relation to the Rules of Racing. The principles will extend not only to the protection of the public, but also the promotion of the safety of horses and jockeys, as well as the integrity of racing. In determining penalty, consideration may be given to the deterrent effect that the penalty might achieve in deterring a repetition of the offence and deterring others who might be tempted to fall short of the high standards required of them under the Rules of Racing. The penalty may also be seen as publicly marking the seriousness of the offence."

Resolution

22. I take these principles into account, which may summarised in this way. The presentation of a horse to race with a prohibited substance in its system, and worse still racing, will always bring racing into disrepute and affect its integrity. AR 178 is one of a number of rules which are intended to uphold the image, interests and integrity of racing by seeking to enforce the prohibition on a horse racing with a prohibited substance in its system. The rule seeks to do so by imposing strict liability upon those who present a horse to race to encourage greater vigilance in ensuring that the horse does not have a prohibited substance in its system by deterring a lack of vigilance with the prospect of a penalty if there is found to be a breach of the rule. Given the importance to the integrity of racing that no horse race with a prohibited substance in its system, breaches of AR 178 should ordinarily be met with penalties of disqualification or at least suspensions and fines should be reserved for those cases where special circumstances are demonstrated.

23. It should be noted that there is no minimum penalty imposed in relation to this particular offence and penalties are determined in accordance with AR 196(1):

> *Subject to sub-rule (2) of this Rule any person or body authorised by the Rules to penalise any person may, unless the contrary is provided, do so by disqualification, suspension, reprimand, or fine not exceeding $100,000. Provided that a disqualification or suspension may be supplemented by a fine.*

24. In this case, like many cases where there has been a breach of AR 178, the evidence does not establish how or when or why cobalt was administered in such quantities. The evidence of Dr Selig before the Stewards establishes that it was

not a result of the horse's veterinary treatment, nor was it a result of the food that it consumed. It was the result of something that occurred after 20 October 2017, since on that day the horse was tested and it had a concentration of only 13 micrograms per litre in its urine.

25. Mr Sprague is not able to suggest a likely cause of the horse's ingestion of cobalt. He gave evidence of crusher dust that he said the horse ate when in the yard at the stables. In that regard, evidence was received in Exhibit 1, which indicated that the results of the sampling analysis of the crusher dust showed that it contains 8.2 micrograms of cobalt per kilogram.

26. Dr Selig, the Official Veterinarian of Racing NSW, was called to give evidence in reply about this test. Based upon her evidence, I am able to confidently conclude that the high levels of cobalt found upon testing the horse could not have been caused by the crusher dust. Her evidence was that the horse would have to have consumed substantially more than 20 kilograms of the crusher dust in a day or a little over a day to have any prospect of it being the cause of the high levels of cobalt that were found in the testing of the horse's urine. Dr Selig discounted any serious possibility that eating crusher dust was the cause of the horse's high levels of cobalt established by the tests. I accept her evidence.

27. Mr Van Gestel accepts that Mr Sprague has given long service to the racing industry over 25 years without having previously been found guilty of any similar offence. He also accepts the evidence given by Mr Sprague that the maintenance of the penalty of 12 months' suspension will have a significant detrimental effect on his business, his staff and those for whom he trains and will have a significant financial detrimental impact upon him, including his ability to meet his financial obligations under his mortgage and other such matters. As I say, Mr Van Gestel accepted that Mr Sprague was a person who had not previously been found guilty of any similar offence. We received in evidence as Exhibit 2 testimonials from a number of significant people in the racing industry attesting to the good character of Mr Sprague and this Panel certainly accepts that he has been and is a person of good character.

28. All these matters I take into consideration as mitigating the penalty. Although I take these matters into account, I also take into account and apply the principles in determining penalty, to which I have earlier referred. I also take into consideration the seriousness of the offence. It was not a minor exceedance of the 100 micrograms per litre. As I have earlier mentioned, the tests were 190, 186 and 177 micrograms per litre. Also significant is that this is not a case where Mr Sprague, as the Appellant, could point to the circumstances which led to the excessive levels of cobalt in the horse's system and make a submission in mitigation based upon those circumstances. He was not, for example, able to show that the cobalt was ingested despite vigilance to prevent prohibited substances being ingested or administered. Evidence of this kind would ordinarily carry significant weight in mitigation of penalty. An absence of fault may be persuasive on penalty, although not relevant to whether AR 178 has been breached.

29. At an early stage this morning, during Mr Van Gestel's opening, I referred him to the decision *In the Appeal of Ms Collette Cooper*, which was determined by this Panel on 15 February 2018, comprised of Mr Beasley as Principal Member, Ms Skeggs and Mr Fletcher. In that particular case, which did not involve cobalt, the Appellant had appealed against the imposition of a penalty of 9 months' disqualification for breach of AR 178. The Panel confirmed the penalty. I raised this as being a possible bench mark for the present appeal.

30. It should be noted, however, that in that case the Appellant was able to point to the circumstances in which the prohibited substance had in fact been administered to the horse. The evidence established that it was administered by the Appellant's stable hand and that the stable hand had been the subject of some concern by the Appellant over a period of time. The Panel was able to say that, while the precise time of treating the horse was uncertain, there was no doubt that the horse was treated by the stable hand, who administered the prohibited substance as well as other substances which were not prohibited. It was accepted that the Appellant was unaware of this and was clearly let down very badly by the stable hand, in whom she placed her trust. That was an important factor in imposing a penalty of nine months' disqualification. These

factual differences suggest that this case is not the useful benchmark I initially thought it was.

31. Mr Van Gestel provided us with a table showing the penalties and period of disqualification for cobalt offences. This has been of some assistance. Consistency in the imposition of penalties is something to be sought to be achieved, but, of course, at the same time every matter has to be dealt with on its own facts. That there should be consistency is also emphasised by the approach of the New South Wales Court of Criminal Appeal in its guideline judgements on sentencing. In *R v Jurisic* (1998) 45 NSWLR 209 Spigelman CJ at 220 pointed out that guidelines assist in ensuring consistency in sentencing, but that such guidelines are intended to be indicative only.

32. There was some consideration of the decision *In the Matter of the Appeals of Mr Wayne Lawson,* a decision of this Panel comprised of Mr Beasley (Principal Member), Mr Fletcher and Mr Carlton of 28 July 2017, which was an appeal brought by Mr Lawson in respect of his disqualification for a breach of AR 178, the horse having been found to have cobalt in its urine. Mr Byrnes has pointed to the fact that there are factual differences between the circumstances in Mr Lawson's case and the present case, which would suggest that Mr Sprague should have penalty of less than the period of disqualification imposed upon Mr Lawson. Mr Lawson had been disqualified for a period of 12 months and his appeal was dismissed. The Panel said at 38:

> "Nevertheless, for a similar offence, both Mr Farley and Mr Moses received a 12 month disqualification. For the Panel in this case to impose a lesser penalty for Mr Lawson would, in our view, create an inconsistency with decisions we have referred to, which is generally undesirable. In any event, as stated above, we are of the view that a penalty of 12 months' disqualification is appropriate for Mr Lawson's offending."

33. The relevant differences between the present case and the case in Lawson are these. Firstly, Mr Lawson pleaded not guilty, whereas Mr Sprague pleaded guilty, although he did so only on the day of the hearing. Secondly, the

concentration in Mr Lawson's case was 330 micrograms per litre compared with the lesser amount in this particular case of from 177 to approximately 190 micrograms per litre. Both were significantly in excess of 100 micrograms per litre. Thirdly, they both had unblemished careers, but in the case of Mr Lawson it was a career of 13 years compared with 25 years. I note those differences. I do not see, however, they are differences which would lead to any significantly different approach to sentencing, particularly given that in both cases there is no evidence which explains the cause of the high readings of cobalt.

34. Having taken all those matters into account and applying the principles to which I have earlier referred, I have come to the view that the appropriate penalty is in fact a period of disqualification of 12 months and I would propose that the appeal be dismissed.

J NICHOLSON: I agree with the reasons and proposed orders of the Convenor.

K LANGBY: I agree with the reasons and proposed orders of the Convenor.

CONVENOR:

SUMMARY OF ORDERS – 22 February 2018

35. It follows that the following orders should be made:

1. Appeal against conviction dismissed.
2. Appeal against penalty confirmed.
3. Penalty for breach of AR 178 of a 12 month disqualification confirmed. Penalty to commence on 23 February 2018 and to expire on 23 February 2019 on which day Mr Sprague may re-apply for his licence. Acting under the provisions of AR 196(6)(a)&(b) Mr Sprague was permitted to care for and exercise his horses for seven days, however he is not permitted to start a horse in a race during this period.
4. Appeal deposit forfeited.