RACING APPEALS TRIBUNAL

NSW

Mr D B Armati

May 2018

Reserved Decision

Date of Hearing: **21 May 2018**
Decision published: **23 May 2018**

Appeal by licensed trainer Mr Sam Kavanagh in respect of ARR 175(h)(i), ARR 175(h)(ii), ARR177B(v) and ARR 178 and other Rules

ISSUES:

1. **Denial of breach AR175(h)(i) as purpose not established**
2. **Breaches AR175(h)(ii), AR177B(5) and AR178 should be treated as alternatives to breach of AR175(h)(i)**

DECISION:

1. **Breach of AR175(h)(i) established**
2. **Alternative argument rejected**
3. **Appeal to be relisted for penalty submissions**

1. Licensed trainer Mr Sam Kavanagh appeals against a decision of the Appeal Panel on finding of breaches of the Australian Rules of Racing on 6 May 2016 and against the penalty decision of the Appeal Panel on 17 June 2016 in respect of a total penalty of disqualification of six years and three months to expire on 19 August 2021.

History

2. That Appeal Panel decision was in respect of a decision of the stewards of 31 August 2015 on finding of breaches of the rules and a penalty decision of 21 September 2015 when they imposed a total period of disqualification of nine years and three months to expire on 20 August 2024 together with a fine of $3000.

3. The stewards originally dealt with 24 alleged breaches and found 23 of those proven and 1 not proven.

4. Of the 23 alleged breaches dealt with by the Appeal Panel there were admissions of breaches in respect of 12 matters, a finding of not proven in respect of 2 matters and the finding of a breach of the rules in respect of 9 matters.

This appeal

4. By this appeal the appellant, at the conclusion of evidence and submissions, has denied a breach of 1 allegation, argued that 3 are alternative allegations and admitted a breach of the rule in respect of the remaining 19.

5. Accordingly this appeal first requires a determination in respect of two issues.

6. The first issue is whether the respondent, who carries the onus, has proven that the appellant has breached ARR 175(h)(i) because he had the purpose of affecting the performance of his horse.

7. The second issue is whether allegations of breaches of ARR 175(h)(ii),177B(v) and 178 are alternatives to a breach of ARR175(h)(i), if found, or in descending order of seriousness and therefore alternatives.

8. The remaining issue is penalty for the breaches found or admitted.

9. Once the appeal in respect of these two issues has been determined it will be necessary to decide penalty and that determination has, by consent, been adjourned until after these reasons for decision are published.

The relevant breaches alleged

10. By reason of the length of the allegations the breaches 1, 2, 3 and 24 are set out on an annexure to this decision

The duty of the Tribunal on this appeal

11. The Racing Appeals Tribunal Act 1983 requires this hearing to be a new hearing and fresh evidence is permissible (s 16), and empowers a decision to dismiss, confirm or vary

the decision appealed against, refer the matter back to the Appeal Panel or make such other order in relation to the disposal of the appeal as is thought fit (s 17).

The relevant rules

12. The rules are the Rules of Racing and relevant to the issues to be decided are as follows:

> AR.175. The Principal Racing Authority or the Stewards may penalise;
>
> (h) Any person who administers, or causes to be administered, to a horse any prohibited substance -
>
> (i) for the purpose of affecting the performance or behaviour of a horse in a race or of preventing its starting in a race; or
>
> (ii) which is detected in any sample taken from such horse prior to or following the running of any race.
>
> AR.177B.(5) If any substance or preparation that could give rise to an offence under this rule if administered to a horse at any time is found at any time at any premises used in relation to the training or racing of horses then any owner, trainer or person who owns, trains or races or is in charge of horses at those premises is deemed to have the substance or preparation in their possession and such person shall be guilty of an offence and liable to penalty.
>
> 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.

13. It is noted that AR178G is irrelevant to these proceedings.

A brief overview of the facts

14. There are some thousands of pages of evidence gathered before a number of fact-finding or decision-making bodies that are relevant to the conduct the subject of the original 24 alleged breaches. Other parties were subject to alleged breaches involving related conduct. This brief overview does not seek to canvass those facts in detail and because of the very limited issues now asked to be considered the facts relevant to those issues only are set out. And further those relevant facts are limited to those which will go to the narrow issue of purpose.

15. In January 2015 the appellant trained Midsummer Sun and it won the Gosford Cup and subsequently a race day sample returned a positive to caffeine. The stewards searched the appellant's premises and found a bottle titled Vitamin Complex. Subsequently the sample produced a positive to cobalt above the threshold. Subsequent testing of the bottle disclosed cobalt at about 175 times the concentration of cobalt found in registered veterinary products for horses containing cobalt or vitamin B12. The bottle had been supplied in 2014 to the appellant by veterinarian Dr Tom Brennan, who was well-known to the appellant, with instructions how to administer the contents through a drip. The precise reasons why the appellant administered the drip will be set out in more detail later. The appellant administered the drip to the subject horse and numerous other horses until he was notified of the positive to cobalt.

16. It is not in issue that: the appellant did not know that the bottle contained cobalt; that he had been specifically told by Dr Brennan that it did not contain cobalt; the bottle gave no indication of who manufactured it, what its precise ingredients were or where it came from. It is accepted that the appellant obtained the bottle from Dr Brennan and that the appellant trusted Dr Brennan. It is also an agreed fact that the appellant did not know that the bottle contained a high concentration of cobalt. The appellant believed that it was vitamin complex and that it was a legal substance to administer.

THE FIRST ISSUE-the purpose test

17. It is alleged that the appellant has breached AR175(h)(i) because he administered a prohibited substance to Midsummer Sun for the purpose of affecting the performance of the horse in the Gosford Gold Cup in January 2015.

18. It is an admitted fact that the appellant administered a drip containing the vitamin complex, which itself contained cobalt, to the subject horse and presented it in the subject race. The presence of the prohibited substance is not in issue.

19. The rule requires that the respondent prove that the appellant administered the prohibited substance for the purpose of affecting the performance of the horse. The rule also deals with behaviour of a horse or of preventing its starting in a race-these are not the subject of particulars alleged to support the breach and need not be further considered.

20. The parties are in agreement that the law to be applied to the purpose test is that recently considered by the Victorian Court of Appeal in Racing Victoria Limited v Kavanagh & O Brien [2017] VSCA 334.

21. Briefly stated that case involved the father of this appellant and another and involved similar conduct by Dr Brennan and others in the use of of the vitamin complex on horses trained by Victorian trainers. The effects of that case can, in part, be distinguished on the basis that there the administration was by Dr Brennan and not the trainers. Again, and similar to here, the trainers had no idea that the vitamin complex contained cobalt at all let

alone at such concentrated levels and they believed what was being administered was a saline drip.

22. It is accepted by the parties here that the first limb of the rule, the administration of a prohibited substance, does not require proof that the trainer knew what was administered was a prohibited substance. That is no intent was required. Accordingly that limb is not further examined.

23. The second limb test was also examined by the three Court of Appeal judges. It must be remembered that they were dealing with different facts namely that the trainers did not administer the substance.

24. Maxwell P said at 48;

> "48 In my view, a person could not be shown to have had the relevant purpose — of enhancing performance — without knowledge or belief as to what it was that he/she was administering, or causing to be administered. In short, the mischief to which AR 175(h)(i) is directed is the intentional enhancement of the performance of a horse through the administration of a prohibited substance (whether or not the person responsible is aware that the particular substance is prohibited). The seriousness of intentional cheating of this kind is reflected in the three year mandatory disqualification fixed by AR 196(5)(vi). The higher penalty is explained by the fact that this offence involves not just administration but administration for a prohibited purpose."

25. McLeish JA said at 122 and 123:

> "122 Moreover, the purpose of the administration provisions, even bearing in mind the use of the language in connection with mandatory penalties, does not demand the implication of a requirement of specific knowledge. The observations of Anderson and Owen JJ, on behalf of five members of the Western Australian Supreme Court, are apposite notwithstanding that they were made in respect of a presentation offence rather than an administration offence:
> If it is correct to think that the financial well-being of the industry depends significantly on the maintenance of betting turnover, the need to maintain integrity in horse racing, and to do so manifestly, is easily seen to be imperative and of paramount importance. It may well be anticipated that unless racing is perceived to be fair and honest, people may be discouraged from betting. This might be thought to justify stringent controls in respect to the administration of drugs to horses and the enforcement of those controls by peremptory means. The inquiry that ensues when a doped horse is presented for racing cannot be equated to a criminal investigation and persecution. ... [The stewards] do not have the resources of the State to investigate and prove crime. Therefore they will rarely be in a position to positively gainsay the asseverations of the trainer on the subject, or his denials. Yet the stewards are ... required to try to stop doping. This is plainly an objective which is for the good of the industry as a whole, including all other licensed persons who depend on it for their livelihood. The maintenance of the integrity of trotting as a 'clean' sport naturally requires that malpractice be eliminated so far as is possible. The view may very well have been taken that the only practical way to achieve this is by

stringent rules which place on persons who wish to participate in the industry quite onerous responsibilities to present for racing only horses that are drug free

123 It is consistent with these purposes of the disciplinary regime embodied in the Rules of Racing that a person is liable to penalty where he or she has authorised the administration of a substance or exerted a capacity of control or influence to direct that to be done, in either case contemplating or desiring that the substance will be administered but not necessarily knowing what the substance is."

And at 127:

"127 These conclusions make it unnecessary to address the applicant's submission that the evidence sustained a finding that the respondents had caused the administration of the prohibited substance for the purpose in AR 175(h)(i), namely to

affect the performance or behaviour of a horse in a race. It was submitted that evidence given by the respondents to the effect that they intended the drips to assist the recovery of their horses in preparation for racing demonstrated that their purpose was to affect the horses' race performance. If accepted, the submission would appear to have the surprising corollary that any action taken to improve the health of a horse could be said to have been done for the purpose of affecting its performance in a race. Doubtless that might be said in a literal sense to be so, but it seems more likely that a more direct connection between the administration of the substance and the posited effect in a race is required. In the circumstances, nothing more needs to be said on the point."

26. Cavanough AJA said at 146:

'146….For AR 175(h)(i), there must be a malign purpose of one of the three specified kinds; …"

And at 153 and following:

"153 As McLeish JA says, this conclusion as to causation means that it is not strictly necessary to consider the further issues in the appeal insofar as those issues relate only to the charges under AR 175(h)(i) and (ii).

154 Nevertheless, I make the following observations about the 'purpose' limb of AR 175(h)(i). It seems to be accepted on all sides that charges under AR 175(h)(i) involve some kind of mental element.105 As indicated above, I consider that the words in the chapeau of AR 175(h) convey a basic mental element, namely that the person must intend that a substance be administered to a horse. It seems to me that the 'purpose' provision in sub-paragraph (i) of AR 175(h) expands that basic mental element, with the result that a person cannot be found to have administered a substance, or to have caused it to be administered, for the purpose of affecting the performance or behaviour of a horse in a race or of preventing a horse starting in a race, as the case may be, unless it be established that the person had knowledge or a belief about the identity of the substance, at least to the extent of having knowledge or a belief as to the effect or effects that the substance was likely to have on the horse.

155 In the present case, on the Tribunal's unchallenged findings of fact, it could not be said that the trainers caused a prohibited substance to be administered to the horses for a purpose proscribed by AR 175(h)(i). If they did not have any idea of

the existence or the proposed use of the cobalt, how could they have had any purpose at all in relation to it? It is no answer to say, as RVL tries to say, that, on the trainers' own evidence, they hoped or intended that the drip program would aid the recovery of the horses from strenuous training or racing. Even if such a mindset should have been attributed by the Tribunal to the trainers, and even if such a mindset could otherwise amount to a purpose of 'affecting the performance or behaviour of a horse in a race',106 it could not amount to a relevant purpose in this case because, on theTribunal's unchallenged findings of fact, the trainers' purpose would have attached only to the (clean) drip program as envisaged by the trainers, not to the extraneous substance that was inserted into the drips by Dr Brennan without the trainers' knowledge or suspicion. That substance was the only substance to which the charge under AR 175(h)(i) related. There was, therefore, no connection between any purpose that the trainers may have had and the only substance that was the subject of the charge under AR 175(h)(i)."

Appellant's submissions

27. Having set out relevant extracts from the VCA it is submitted that knowledge or belief about the identity of the substance, at least to the extent of having knowledge or belief as to the effect or effects that the substance was likely to have on the horse and a direct connection between the administration of the substance and the posited effect in a race going beyond any intention that the administration of the substance would aid the recovery of horse in preparation for racing must be proved against the appellant. The submission continues with the relevant facts, as set out earlier, supported by a detailed examination of the various occasions on which the appellant gave that evidence. Reliance is placed upon the credibility findings in respect of the appellant but these do not have to be examined as the factual metrics to decide this issue are agreed.

28. Therefore it is submitted that as the appellant did not know that the vitamin complex bottle contained cobalt that the respondent cannot establish that the appellant had knowledge or belief about the identity of the substance, at least to the extent of having knowledge or a belief as to the effect or effects that the substance was likely to have on the horse.

29. It is necessary to examine the facts on the appellant's belief and the reasons for the administration of the vitamin complex. The evidence is not in issue so it is briefly summarised.

30. The appellant points out that the aim was to aid the horses recovery after a gallop. This was because Dr Brennan told him it would aid recovery after gallops and other trainers are using it and doing well. That is the horse would bounce back quicker and that it would be more of an advantage with an older horse such as this one. This horse was pulling up better from races and able to race every two weeks. It was therefore able to race more regularly. It was important for the horse to recover as best it could and this is what the vitamin complex would achieve.

Respondent’s submissions

31. The respondent points out, in much the same fashion, that in addition to aiding recovery at a general level the purpose was to present the horse to perform as best it could. To this extent it is said that the vitamin complex was used to enhance performance because it would recover with greater advantage than a younger horse, it will get maximum benefit, it would be able to more adequately cope with continual racing and would therefore pull up better after races. It is pointed out that the appellant said "you want your horses to win". The respondent also points out that the complex was given to other horses for the same purposes. It is therefore summarised that the potential to improve the horse’s racing performance by using a complex motivated the appellant to use it in drips he gave to the horse.

32. The respondent pointed out the difference in facts from the VCA decision namely that court had focused upon the cause to administer aspect and the knowledge that was relevant to that. The Tribunal understands the gravamen of the respondent's case is that the rule goes to the question of the administration with any intent to affect performance regardless of whether there is knowledge or belief about the fact that the substance administered contained a prohibited substance. In other words if there is an administration, and intent on that is irrelevant, then it only needs to be proved that the substance that was given was given with the purpose of enhancing performance. It is said therefore that that is an inevitable consequence if subsequently that which was given is shown to contain a prohibited substance.

33. The respondent's submission, if correct, imposes a burden on this appellant to the effect that if he had knowledge that he was administering the vitamin complex, and was doing so for the purposes of enhancing performance, he has breached the rule (if the complex contained a prohibited substance).

34. The respondent's submission means there is no need to assess any wrongdoing in that knowledge. It merely requires knowledge or belief about the substance being performance enhancing and a simple performance enhancing is sufficient. This is said to flow because there is no requirement to prove knowledge or belief that the vitamin complex contained cobalt at any level. That is, it is not necessary to know that the vitamin complex contained a prohibited substance and that it is sufficient if it simply turned out that it did contain a prohibited substance. In that regard is said that there is an onus on the trainer to know what is being administered. Further it is submitted that there need only be a finding of an intended purpose in the administration. It is acknowledged by the respondent that this approach may have unfortunate consequences but that is the impact of a trainer seeking to gain an advantage.

Appellants reply submission

35. Consistent with the questions asked of the respondent by the Tribunal the appellant says that there has to be some malign purpose, some intentional cheating and that the administration believed to be for a prohibited purpose. Distinction is required from the administration, for example, of a perfectly legal substance, such as water, which may contain a prohibited substance such as arsenic at an unexpected level. Here it is pointed out that the administration environment was perfectly legal and that the fact that it contained cobalt carries with it no malign purpose.

Conclusion

36. The Tribunal has, in other cases, received submissions that the prohibited substance rules can be seen as draconian. This rule meets that description by reason of the conclusions reached in this case and having regard to the mandatory minimum penalties that flow from a breach.

37. The facts here require a different conclusion from that reached in the Victorian case. The reason is that the appellant administered a drip to which he had added the vitamin complex. In the Victorian case the trainers were not aware that Dr Brennan had added the vitamin complex to the standard drip. Accordingly, here, the appellant administered a substance which contained a prohibited substance.

38. The purpose therefore was to administer the vitamin complex to effect the performance of the horse in the subject race.

39. The following expressions in the Victorian case could lead to a conclusion that the respondent must show in the appellant knowledge that cobalt was contained in the vitamin complex.

40. Maxwell P:

> Paragraph 48-"administration for a prohibited purpose".

41. McLeish JA:

> Paragraph 122-"required to try to stop doping" (Harper); "clean sport" (Harper); "malpractice be eliminated" (Harper).
>
> Paragraph 127-"corollary that any action taken to improve the health of a horse could be said to have been done for the purpose of affecting its performance in a race";

”more likely that a more direct connection between the administration of the substance and the posited effect in a race is required".

42. Cavanough AJA:

> Paragraph 146-"there must be a malign purpose of one of the three specified kinds”.
>
> Paragraph 154-"established that the person had knowledge or a belief about the identity of the substance”;
>
> "if they did not have any idea of the existence or the proposed use of the cobalt, how could they have had any purpose at all in relation to it? It is no answer to say, as RVL tries to say, that, on a trainer's own evidence, they hoped or intended that the drip program would aid the recovery of the horses from strenuous training or racing”;
>
> "purpose would have attached only to the (clean) drip program as envisaged by the trainers, not to the extraneous substance that was inserted into the drips by Dr Brennan without the trainers knowledge or suspicion.”;
>
> "No connection between any purpose that the trainers may have had and the only substance that was the subject of the charge…”.

43. The Tribunal does not find that the use of the words doping, clean sport malpractice or malign import into the purposive interpretation of the rule a requirement that a trainer must be shown to have acted with any improper purpose, such as by mala fides or dishonesty or knowledge of wrongfulness etc.. The rule itself addresses the points about doping, clean sport, malpractice, level playing field and the like and nothing more need be imported into interpretation for that reason. In particular the use of the word malign was to entitle the three bits of conduct in the rule (performance, behaviour and not starting) and was not intended to require that malign conduct be established as part of the purpose.

44. The Tribunal does not find that a requirement for administration for a prohibited purpose goes beyond the fact that a purpose was established by reason of the fact that it was performance enhancing and that is what is prohibited if a prohibited substance was found in that which was intentionally administered.

45. The appellant had knowledge about the identity of the substance administered namely vitamin complex. The appellant knew of the existence of the vitamin complex in the drip. He knew what the drip was to be used for, namely, to improve performance. That is the direct connection between the administration and the posited effect.

46. No extraneous substance was added to the clean drip program without the knowledge of the appellant. He added the vitamin complex. It contained cobalt but that does not

become an extraneous substance as referred to by Cavanough AJA in his obiter remarks. It is not the cobalt that becomes the focus but the vitamin complex. The vitamin complex was the substance to which the purpose attached.

47. There is therefore a connection between the purpose that the appellant had, to improve performance, and the substance that was used, vitamin complex. Improving performance here goes beyond merely improving the health of a horse.

48. The following expressions in the Victorian case support the respondent's arguments.

49. Maxwell P: paragraph 48-"intentional enhancement of the performance of a horse through the administration of a prohibited substance (whether or not the person responsible is aware that the particular substance is prohibited)".

50. Here there was an intentional enhancement of performance through the administration of the vitamin complex and it is therefore not necessary to show that the appellant was aware that the vitamin complex contained cobalt as a prohibited substance.

51. McLeish JA: paragraph 122-"does not demand the implication of a requirement of specific knowledge";

"to justify stringent controls in respect to the administration of drugs to horses" (Harper);

"stringent rules which place on persons who wish to participate in the industry quite onerous responsibilities to present for racing only horses that are drug-free" (Harper).

Paragraph 123 "contemplating or desiring that the substance will be administered but not necessarily knowing what the substance is".

52. Accordingly specific knowledge of the presence of cobalt in the vitamin complex is not required.

53. These conclusions are reached on the basis that stringent controls on administration of drugs to horses are in place and if a trainer chooses to use a substance the onus is on the trainer to ensure that it is drug-free. That is the trainer will have administered the substance whether aware of what is in it or not and be responsible if it does contain prohibited substances.

54. The Tribunal accepts the respondent's submissions that the appellant must be shown to have administered the substance for the purpose of improving performance and must be responsible if that substance contained a prohibited substance. This follows from the draconian nature of the rule and its intended purpose. Such a conclusion places a substantial onus upon a trainer but it flows from the integrity and level playing field requirements of the rules of racing. Other rules place an equally heavy burden on a trainer,

for example the presentation rule in AR178. Similar conclusions apply in harness racing. See Day v Sanders and anor [2015] NSWCA 324 on absolute liability, state of mind and reasonableness- Leeming JA 88

55. The Tribunal notes that the Appeal Panel and the stewards were of the same opinion and their decisions preceded the VCA decision.

56. The appellant administered a prohibited substance for the purpose of affecting the performance of the horse.

57. On those findings each of the ingredients of the alleged breach and their particulars are established.

58. The first ground of appeal raised by the appellant is dismissed.

59. The Tribunal finds that the appellant has breached AR175(h)(i) as particularized.

THE SECOND ISSUE-alternative breaches arguments

60. Are breaches 2, 3 and 24 alternatives to breach 1, now that it has been found established, or in descending order of seriousness?

61.The alleged breaches are set out on the annexure and the relevant rules set out above.

62. It is necessary to analyse the ingredients of each of the rules to see if they are alternatives and if necessary consider the facts alleged in respect of those breaches for the same purpose.

63. The appellant submits that each of breaches of 1, 2, 3 and 24 contain common elements and are true alternatives with decreasing degrees of culpability.

64. The appellant submits two key points to support the argument they are alternative.

The Victorian approach

65. The first submission is that New South Wales should follow the approach adopted in Victoria. It is accepted that in Victoria matters can be seen to be alternative and then not proceeded with. It is submitted there should be uniformity in all jurisdictions as the rules of racing are common to all jurisdictions.

66. In answer to that submission the respondent says it is a matter for New South Wales regulators and they are not bound to follow the Victorian approach.

67. There is no statutory obligation or anything contained in the Rules of Racing which require that matters which might be alternative not be proceeded with.

68. The Tribunal accepts the respondent's submission and agrees that it is a matter for the New South Wales regulators as to how they approach possible alternatives. The Tribunal is reinforced in that conclusion as it is only aware of the practice in New South Wales and Victoria on the submissions and facts in this case.

Caselaw

69. The second submission of the appellant is based upon caselaw.

70. This submission is based upon the avoidance of double punishment which means fairer outcomes.

71. Cases involving criminal law matters are quoted. The respondent does not disagree with those principles and only seeks to distinguish the cases quoted on the basis they deal with criminal law matters.

72. It is appropriate for the Tribunal to restate its mantra that these are civil disciplinary proceedings in which a civil penalty is a possible outcome. These are not criminal proceedings and the outcome is not a sentence which is required to be framed on criminal law principles. While a civil disciplinary penalty might embrace similar notions as that which are considered in a criminal law sentence the proper approach to considering an order must be based upon civil law considerations or disciplinary considerations. Punishment is not the aim but any penalty will carry with it an inevitable aspect of punishment. As the Tribunal has expressed this on so many occasions it is not necessary to detail this issue any further.

73. The cases quoted are Australian Oil Refining Pty Ltd v Cooper (1987) 11 NSWLR 277; Pearce v The Queen (1998) 194 CLR 610.

74. To paraphrase the quotes advanced it is accepted that it is necessary to have regard to the extent to which any further punishment should be imposed when there are multiple convictions for offences with common elements. The principle requires a reflection of what an offender has done and an offender should not be punished twice if there is an overlap. Questions of cumulation, concurrence and totality need to be considered. A conviction itself is a form of punishment. Concurrent sentences are a practical way to avoid double punishment. If offences substantially overlap, even if not identical, they should be treated as alternative. It will be seen that these have a criminal law context to them.

75. The respondent submits that the individual breaches are not alternatives both by the provisions of the rules and the facts here that relate to those breaches. It is submitted that to the extent there may be some overlap that that is to be considered in relation to penalty. In considering matters on penalty a grouping of the various breaches is an appropriate approach and this was done by the stewards and the Appeal Panel. It is further submitted that the appellant has failed to demonstrate that the approaches adopted below have occasioned any unfairness or injustice and should be applied here.

76. The Tribunal finds that there should be avoidance of the prospect of double penalty if there are truly alternative allegations advanced.

Analysis of the Rules

77. AR175(h)(i) requires the following:

> any person
>
> administers or causes to administer
>
> a prohibited substance
>
> for the purpose of affecting performance, or affecting behaviour, or preventing a start.

78. Here it is any person administer a prohibited substance for the purpose of affecting performance.

79. AR175(h)(ii) requires the following:

> any person
>
> administers or causes to administer
>
> a prohibited substance
>
> detected in a sample
>
> taken prior to or following the running of the race.

80. Here it is any person administered a prohibited substance detected in a sample following the race.

81. To compare these two rules the only difference is one requires a purpose and the other a detection. In the former the substance does not have to be administered before or after a race but in the latter there has to be detection before or after the race. Any person could commit a breach of one but not necessarily be in breach of the other. Of course a person could commit a breach of both. It is noted that they affect any person which may or may not include a trainer. For the former it is not necessary to present the horse to race and the administration could take place anywhere. For the latter it has to be detection at the racecourse. The penalties for the former are more serious than the latter.

82. Here the administration for the purpose took place at the trainer’s establishment and the detection was at the racecourse.

83. They are not alternatives on these facts.

84. AR178 requires the following:

horse brought to a racecourse to race

prohibited substance detected

sample taken prior to or following the running of the race

the trainer or any person in charge of the horse

85. Here it is a trainer who has brought a horse to a racecourse and a prohibited substance detected following the race.

86. This rule is specifically directed to a trainer, or a person who has taken a horse to the races. A trainer does not necessarily have to take the horse to the races. A trainer is liable if the remaining ingredients are established. This distinguishes AR175 (h) in both its limbs as it does not only relate to a person. It does not matter what purpose the trainer had. Administer or cause to administer is not required to be proved. The mischief is it was taken to the races. This distinguishes again AR175(h) because each of those claims can be breached without being the person taking a horse to the races or being the trainer.

87. AR178 is not an alternative to either limb of AR175(h).

88. AR177B(5) requires the following:

any person

has in his possession

any substance or preparation

that could give rise to an offence under this rule if administered to a horse at any time

89. Here it is a trainer who had possession of the vitamin complex. The remaining ingredients are established. It is the same trainer who possessed as who administered. The possession was at a later time to the administration.

90. This rule is activated for possession. It does not require administration or presentation, being in charge of a horse or being a trainer. Each of the other rules can be breached for a causes to administer or bringing a horse to a race without having possessed. It is accepted that to administer one has to possess, at least temporarily, but sufficiently at law. A person can possess without administering or presenting and this differentiates this rule from the others.

91. Factually this breach is to be distinguished from the others in this case.

92. The Tribunal declines to mark allegations of breaches of 2, 3, and 24 as alternatives to breach 1 or to each other.

93. Noting the approach adopted by the stewards and the Appeal Panel, the issue of the appropriate penalty for each of breaches 1, 2, 3 and 24 will take into account the commonality of facts and the nature of the breach of each rule as particularised as well as for the other breaches.

Descending order of seriousness

94. The decision on penalty for all matters will address the issue of descending order of seriousness and therefore they are not treated as alternatives not to be dealt with on that argument.

DIRECTIONS

95. This appeal should now be relisted for determination of penalty,