

RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTER OF THE APPEAL OF BRETT THOMPSON

Appeal Panel: **Mr R Beasley SC - Principal Member**
 Mr J Nicholson
 Mrs J Foley

Appearances: **Racing NSW: Mr M Van Gestel, Chairman of Stewards**
 Appellant: Himself

Date of Hearing: **24 January 2019**

Date of Decision **24 January 2019**

REASONS FOR DECISION

1. On 6 August 2018 the racehorse Morotai won the 1100m Maiden Plate at the Forbes Jockey Club. A urine sample taken from the horse after the race was later found to contain the substance 4-hydroxy xylazine (xylazine), a prohibited substance under AR 178B. As a result of the detection of xylazine, Morotai was disqualified from the race.
2. The horse's trainer, the appellant Brett Thompson, was subsequently charged with a breach of AR 178, which is in the following terms:

AR.178. Subject to AR.177C, 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.

3. At the Stewards' Inquiry into the positive sample, Mr Thompson pleaded 'not guilty' to a breach of the rule, but was found guilty by Stewards. He was penalised by way of a fine in the sum of \$6000. He was also charged with a breach of AR 178F relating to failure to keep a record of treating the horse with medication, and fined the sum of \$400.
4. On appeal, the appellant initially challenged the finding of breach of AR 178, and the severity of the fine imposed. However, after the commencement of the appeal (at which

he represented himself, with the Stewards represented by the Chairman of Stewards, Mr Marc Van Gestel), Mr Thompson changed his plea to guilty, but maintained his challenge to the severity of the penalty imposed.

5. The appeal book containing a transcript of the Stewards' Inquiry, and the exhibits from that inquiry, was admitted into evidence as Exhibit A. Mr Van Gestel also tendered some further documents of laboratory analysis of three bottles of xylazine, and a schedule of samples taken from Morotai after it was administered with 2.5ml of xylazine on 12 November 2018 and 31 December 2018, for the purpose of ascertaining evidence as whether that substance could be detected in the horse over subsequent days. Mr Van Gestel also called Dr Adam Cawley, the Science Manager of the Australian Racing Forensic Laboratory to give evidence.
6. The important aspects of Dr Cawley's evidence, which the panel accepts, were these:
 - (a) Morotai had a reading of 18ng/ml of xylazine in its urine sample. This is best described as a moderate level (1-5ng low, 35 and above high).
 - (b) Based on a research paper he had found involving the testing of 16 horse administered 200mg of xylazine intravenously (Knych et al), the test results for Morotai conducted after administration of this drug on 12 November and 31 December last year indicated the horse did not fit the normal profile. It appears to retain xylazine in its system for periods longer than the horses sampled in the Knych et al study.
 - (c) While Mr Thompson said that he administered the xylazine to Morotai 6 days before the race on 31 July when it was shod - as is always the case with this horse - Dr Cawley was of the view that the 18ng reading was more consistent with administration within the range of 2 to 4 days. However, it can be noted that the Chief Veterinarian of Racing NSW, Dr Koenig, gave evidence at the Stewards inquiry that if the injection went into the muscle or soft tissue of the horse, it might increase the detection time over and above what appears to be the longer than perhaps normal time that a positive sample can be obtained from this horse for xylazine.

7. Additionally, it can be noted that xylazine is a drug that has a pain reducing and sedative effect, but is otherwise not considered a performance enhancing drug.
8. Finally, the evidence was that the bottle of xylazine provided to the appellant by his vet indicated that it should not be administered within 4 days of a race.
9. Before indicating our view on penalty, it is important for the panel to outline the following matters and findings:
 - (a) No allegation was made against Mr Thompson that he engaged in behaviour that could be described as improper or cheating. He is not alleged to have attempted to enhance the performance of Morotai in the race through the administration of xylazine. He was simply charged with having presented a horse to race with a prohibited drug detected in its urine following the race. The charge did not involve any allegation of intent.
 - (b) The combined evidence of Dr Cawley, Dr Koenig, and the sampling of Morotai in November and December last year allows for the possibility that the horse was administered the xylazine when shod 6 days before the race. This is what Mr Thompson said happened. In ten years, he has a clean record for any drug related offences. The panel accepts that he administered the horse with xylazine 6 days before the race, as normal when it was shod. This was outside the warning time on the label of the xylazine bottle his vet gave him. The panel therefore accepts that Mr Thompson took Morotai to the races on 6 August last year with the honest belief it had no prohibited substances in its system.
 - (c) This honest belief of Mr Thompson probably explains the reason he at first pleaded not guilty to the breach of AR 178, in relation to which intent is irrelevant.
10. Morotai was disqualified from the race. This cost Mr Thompson \$1000 as a part owner, and another \$1000 as his winning trainers fee. Some of his owners, naturally, are disgruntled with him.

11. Mr Thompson has trained horses for 10 years. He has had about 7000 starters and 280 winners. He has not been charged or found to have breached AR 178 before, or found guilty of any similar or more serious breach. References he tendered spoke to his good character, corroborated by his race record.
12. Mr Van Gestel reminded the panel that the usual penalty imposed for a breach of AR 178 is a suspension. He submitted however, to the benefit of Mr Thompson, that the circumstances here were special enough to not impose a suspension, but for a fine to be imposed instead. He provided to the Panel evidence of penalties imposed by Stewards for breaches of AR 178 involving xylazine in circumstances not dissimilar to those of this appeal where fines in the range of \$3000 to \$7000 have been imposed. Those matters involved horses where lower levels of xylazine were detected, but, as indicated above, Morotai might be an usual horse in that regard, or, to use Dr Cawley's terminology, a horse that "does not fit the usual profile".
13. Mr Thompson also gave evidence of the effect and additional cost to him as a result of the drought covering much of NSW.
14. While we do not consider the penalty imposed by the Central Districts Racing Association to be excessive, we consider a lower fine is appropriate in the circumstance of this appeal. In saying that we recognise that any penalty imposed must uphold the integrity and interests of racing. It is always damaging to the interests of racing whenever a horse returns a positive sample to a prohibited substance in a post-race urine swab, especially when it has won the race. While we do not believe that a reprimand alone is an appropriate penalty - as submitted by Mr Thompson - we are of the view that the appropriate penalty here is a fine in the sum of \$3000. We consider this penalty is one that upholds the image and integrity of racing in all the circumstances.
15. We make the following orders:
 1. Note the appellants change of plea to 'guilty' for breach of AR 178.
 2. Find the appellant guilty of AR 178.
 3. Uphold the appeal in relation to severity of penalty imposed.

4. In lieu of a penalty in the sum of a \$6000 fine, a penalty of a fine in the sum of \$3000 is imposed.
5. Appeal deposit forfeited.