RACING APPEALS TRIBUNAL

RAT 11/13

` DATE OF HEARING: TUESDAY, 17 JUNE 2014

DATE OF DETERMINATION: FRIDAY, 4 JULY 2014

TRIBUNAL: PRESIDENT: MR P ERIKSEN

ASSESSOR: MR G PRETTY

MR J PETZER, CHAIRMAN OF STEWARDS, THOROUGHBRED RACING SA LTD

MR A LINDSAY REPRESENTING THOROUGHBRED RACING SA LTD STEWARDS

APPELLANT: MR NICHOLAS WILLIAM SMART

MS A BARNETT REPRESENTING THE APPELLANT

IN THE MATTER of an Appeal by **NICHOLAS WILLIAM SMART** against a decision of Thoroughbred Racing SA Ltd Stewards.

BREACH OF RULE: ARR 177B(5)

Rule 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.

PENALTY: DISQUALIFICATION OF LICENCE FOR 12 MONTHS

DETERMINATION

This appeal emanates from a Stewards' Inquiry conducted at Thoroughbred Racing SA offices which commenced on Thursday, 3 October 2013.

The Appellant, Mr Nicholas Smart, was charged with a breach of Rule 177B(5) of the Australian Rules of Racing in that when Stewards attended his training complex he was found to have a bottle of Ilira in the office of the said training complex. Rule 177B(5) states:

> *'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.'*

The substance Ilira is commonly known as a peptide and comes within the Rules under ARR 177B(2)(q), which lists the substances which are specified as prohibited substances and states:

> *'Synthetic proteins and peptides and synthetic analogues of endogenous proteins and peptides not registered for medical or veterinary use.'*

During the Stewards' Inquiry the Appellant was charged with a breach of ARR 177B(5) and the particulars of the charge against the Appellant were as follows:

> '*The particulars are that on Thursday the 20th June 2013 during a stable inspection at the premises located at 9 Grafton Avenue, Morphettville, South Australia, which premises was used by you as a Permit Trainer in relation to the training of horses for the racing season 2012/13 and consequently for 2013/14, a substance namely Ilira Interleukin-1 Receptor Antagonist Peptide 1 milligram in 5 millilitres contained in an amber 5 millilitre vial, which substance was confirmed by Racing Analytical Services Limited, an official racing laboratory, to be a synthetic peptide, which substance was further confirmed by the Australian Pesticides and Veterinary Medicines Authority not to be an approved active constituent for a proposed or existing chemical product and not to be a registered chemical product or a registered listed chemical product and not to be subject to any APVMA permit or exemption in force at any time up to and including the first day of November 2013, which substance falls within the category of AR177B(2)(q), which sub-Rule describes among other substances synthetic peptides and peptides not registered for medical or veterinary use, which substance if administered to a horse at any time could give rise to an offence under this Rule, AR177B, was found in a cupboard in the dwelling of the said premises and consequently to be in your possession.'*

At the Stewards' Inquiry the Appellant pleaded guilty to the charge and subsequently his Permit to Train was disqualified for a period of 12 months.

The Appellant appealed to the Racing Appeals Tribunal against the severity of the penalty imposed by the Stewards. The hearing was conducted over a period of two

days. At the hearing conducted on Tuesday, 17 June 2014 the Appellant tendered the following documents:

> Report dated 12 June 2014 and Curriculum Vitae of Dr William John Marmion. Admitted and marked Exhibit 1.
>
> Affidavit of Dr Holly Anne Lewis dated 12 June 2014. Admitted and marked Exhibit 2.
>
> Affidavit of William Thomas Clarken dated 16 June 2014. Admitted and marked Exhibit 3.

The Tribunal also had three character references tendered by the Appellant. They were:

> Character reference of Phillip Stokes dated 30 May 2014;
>
> Character reference of David Hayes dated 10 June 2014; and
>
> Character reference of Tony McEvoy dated June 2014.

The Respondent produced a report from Dr John Howard Vine dated 23 April 2014, which was admitted and marked Exhibit 4. The Respondent also produced a history of the rule change to Rule 177B, as adopted on 1 December 2013.

The Tribunal also had before it the transcript and exhibits of the Stewards' Inquiries conducted on 3 October 2013, 22 October 2013 and 10 December 2013.

Sworn oral evidence was also taken at the Tribunal Hearing on 17 June 2014 and, where relevant, is referred to hereafter.

During the hearing the Tribunal was asked to rule on the construction of Australian Rule of Racing 177B, and in particular whether or not the rule created a strict liability offence, that is excluding any defence such as the defence commonly referred to as the *Proudman v Dayman* defence. I have regard to a decision of former President CR Lee in the matter of an appeal by S. Pateman when he had cause to consider a similar application by the Appellant in respect of an interpretation of ARR 81A and 81B, where he said:

> *'Proudman v Dayman, and other examples of the application of the Proudman v Dayman principle mentioned by Mr Bell, are all concerned with the strict liability imposed by statute or by regulation made under a statute. The Australian Rules of Racing, at least to the extent that they apply in South Australia, do not have the force of a statute or regulation. TRSA, as a body corporate governed by a constitution, has adopted the Australian Rules for operation in South Australia. The provisions of the Rules which govern the conduct of licensed persons, such as the Appellant, derive their force from the agreement of those persons to be bound by the Rules as a condition of the*

grant of their licence. So the powers of the Stewards in disciplinary matters derive not by force of statute or regulation, but by force of contract.

In the result, I am of the opinion that the principle of Proudman v Dayman is not available to a licensed person in breach of the Rules.'

In my opinion the Rule under present consideration can be described as a Rule that creates a strict liability. I have considered the arguments to the contrary contained in the written submissions and I still adhere to the aforementioned view.

After the Tribunal ruled in the aforementioned manner, the Appellant did not proceed with an application to change his plea from guilty to not guilty and the matter proceeded thereafter in respect of penalty.

The Appellant maintained in all of the circumstances that the penalty imposed by the Stewards, namely 12 months disqualification, was manifestly excessive, and that this Tribunal should uphold the appeal and impose a far more lenient penalty.

Factual Issues:

The following factual material on the evidence before the Tribunal does not appear to be in dispute between the parties:

1. That as at 27 July 2012 William Thomas Clarken was a licensed trainer, leasing stables at 9 Grafton Avenue, Morphettville (hereinafter referred to as "the stables";
2. That he was training the horse SLIM HENRY in preparation for racing;
3. That he contacted Dr Lewis, Veterinarian, employed at the Morphettville Equine Clinic, 90 Morphett Road, Glengowrie, South Australia, 5044;
4. That Dr Lewis on 27 July 2012 attended upon SLIM HENRY at the stables leased by Mr Clarken and administered the following substances by way of intravenous injections into the horse: (i) Ilira; (ii) Polyglycan;
5. That Mr Clarken relinquished his lease of the stables early in 2013;
6. That Mr Nicholas William Smart from early 2013 became the lessee of the stables and was the lessee at all relevant times applicable to this Inquiry;
7. That Stewards conducted an inspection of the stables on Thursday, 20 June 2013 and located a 5 millilitres capacity vial with the following information contained on the label 'Ilira, Interleukin-1 Receptor Antagonist Peptide, 1mg in 5ml, For Practitioner Use Only, Store at 4°C';
8. That the vial had remnants of the initial solution in it at the time of the Stewards' inspection and seizure of the vial in the amount of 0.47 mls.

Stewards' Inquiry:

The Tribunal received an affidavit from Dr Lewis dated 12 June 2014 (Exhibit 2). In this affidavit Dr Lewis significantly changed the evidence that she had given before the Stewards at the Inquiry into this offence. I quote from her affidavit:

'***Evidence before the Stewards Inquiry***

8. On 3 and 22 October 2013 I gave evidence before the Stewards Inquiry in which I advised the Inquiry I had administered Will Clarken's horse, SLIM HENRY, a dose of ILIRA at his stables on 27 July 2012. Veterinary records provided to the Inquiry indicate the product supplied was 1mg of the substance in a 5mL solution, which had been supplied by C4M Laboratories.

9. During the course of my evidence I was shown a photo of a vial of the product ILIRA, which I understood had been located at the former stables of Will Clarken. The vial was consistent with those I was supplied by C4M Laboratories. As I indicated to the Inquiry the yellow cap had been removed from the top of the bottle, which indicated to me it had been used.

10. During the course of my evidence, I was asked the following questions by the Chairman:

CHAIRMAN: ... is it likely you could have used the substance in that bottle and only administered part of the dose and left the remainder there?

DR LEWIS: No.

CHAIRMAN: How certain are you about that? I'm not suggesting ...

DR LEWIS: Very.

CHAIRMAN: You have, I'm asking how certain you are?

DR LEWIS: Very.'

11. At the time of giving those answers I was under the impression the bottle seized by the Stewards had either a full dose, or close to a full dose remaining and that the question referred to only a small portion of the substance being administered. This impression was confirmed by the Chairman shortly after I gave those answers, when he commented, "... the bottle itself appeared to be in very good condition and it didn't appear that

any of the product was used from the bottle itself, the bottle appeared to still have its dose in."

12. *I have since been informed that is not correct, and in fact, at the time the vial was seized the amount of substance remaining was approximately 0.47 millilitres. The substance ILIRA was quite viscous, which made it more difficult to draw into a syringe. In my view that quantity of substance remaining in the vial would be consistent with a full dose having been administered. For all intents and purposes I would consider the vial containing 0.47 millilitres to be empty.*

13. *In addition, I was asked at the Inquiry whether I came into Will Clarken's office at the stable after I administered the dose or (sic) ILIRA to SLIM HENRY on 12 July 2012. I do not now recall whether I came into the office, however it was not uncommon for me to go into the office area of the stables. I cannot say that I did not do that on this occasion. If I did, I cannot exclude that I may have left the empty vial in Mr Clarken's office even though it would be my ordinary practice to discard empty vials in a bin in my car. My recollection of Will Clarken's office was that there were often bottles lined up on the desk as well as kept in the medicine cabinet.*'

Dr Lewis was challenged as to the reliability of her memory as to whether she did access Mr Clarken's office on the day that she administered medication to SLIM HENRY, and whether or not she could have left the empty vial of Ilira at the office.

From all the evidence including the material before the Stewards, the affidavit evidence of Dr Lewis and the sworn evidence of Dr Lewis, it is apparent that at the hearing before the Stewards Dr Lewis was of the belief that the vial which was the subject matter of the Stewards' Inquiry contained "....*either a full dose, or close to a full dose remaining*....".

It is important to note that at the hearing before the Tribunal, Dr Lewis and Dr Marmion were both firmly of the opinion that this was an empty vial, and the fact that there was 0.47 millilitres residual product in the vial, to both of these busy Veterinarians, was to the same effect as the vial being empty, and that the residue could not be effectively administered to a horse.

The occurrence of the residue in the bottle was explained in detail by Dr Marmion, dealing with the shape of the bottle and the needle, the viscosity of the liquid and the practicalities involved in drawing down the product for administration to the horse.

It is the Tribunal's view that this change of understanding of the amount of Ilira that was in fact in the vial from the status of a full or near full vial, to a vial that could be

categorised as empty, in all the circumstances of this case, is significant and in the Tribunal's view has a significant outcome on the issue of penalty.

The Tribunal finds that Dr Lewis was a truthful and reliable witness and after considering all the evidence concludes:

1. Effectively the vial was empty;
2. That Dr Lewis was confused on this issue at the time she gave evidence before the Stewards' Inquiry;
3. That Dr Lewis administered, on 27 July 2012, two lots of medication to the horse SLIM HENRY and the Polyglycan was in a 10 millilitre vial and she only administered 5 millilitres, thus requiring her to create a label to put on the vial, which in accordance with her usual practice she would have left at the premises; and
4. That when Dr Lewis attended the stables, and then later the office premises of Mr Clarken on 27 July 2012, she had with her the empty vial which she left in the office premises.

Mr Clarken's Evidence:

Mr Clarken gave evidence both before the Stewards' Inquiry and the Tribunal, and swore an affidavit which was tendered and admitted to the Tribunal.

Mr Lindsay, counsel for the Respondent, was critical of his credibility.

The Tribunal accepts that he has given conflicting versions of Dr Lewis's attendance at his stables and the circumstances of Dr Lewis leaving the empty vial of Ilira after she had administered it to SLIM HENRY on 27 July 2012.

In his evidence before the Tribunal, the Tribunal formed the impression that he appeared to take the whole proceedings very seriously, appeared, at times, anxious, but it was the Tribunal's view that he had a memory of the attendance of Dr Lewis at his stables on 27 July 2012.

As the Tribunal understands the Stewards' position at the Stewards Inquiry, it was that Mr Smart had been careless in not removing the used vial from the premises that he leased from Mr Clarken and it was on this basis that Mr Smart pleaded guilty. It was never put to Mr Smart at any stage that he had obtained the vial from outside the premises and brought the vial onto the premises, either himself or through his agency, nor was this positively advanced at the Tribunal hearing.

Dr Lewis gave evidence that on her attendance at the stables on 27 July 2012 she administered two substances to the horse SLIM HENRY by way of intravenous injection, namely (i) Ilira; (ii) Polyglycan, and that it was necessary for her to write on the label of the Polyglycan medication.

The Tribunal has concluded, on the balance of probabilities, that to write on the label as aforementioned Dr Lewis accessed the office of Mr Clarken, wrote on the label of the Polyglycan vial and left this vial at the stable premises.

The Tribunal has carefully considered all the evidence including the evidence of Dr Lewis and Mr Clarken and it is satisfied on the balance of probabilities, in accordance with the principles laid down in *R v Kreutzer 213 SASCFC 130,* that the vial which was seized by the Stewards was the same vial as Dr Lewis took to the stables to treat SLIM HENRY on the 27 July 2012.

That being the finding of the Tribunal, it is the Tribunal's view that the basis upon which the Appellant was sentenced by the Stewards has substantially changed.

Penalty:

In considering penalty it is noted that there is no prescribed minimum for a breach of Rule 177B(5). The Tribunal thinks it important to have consideration of the following facts:

1. The co-operation of Mr Smart in the Inquiry before the Stewards and his plea of guilty;
2. That the vial was considered by Dr Lewis and Dr Marmion to be an empty vial for all practical purposes;
3. That at the time that Dr Lewis administered Ilira to SLIM HENRY it was not a prohibited substance;
4. That according to the records of Dr Marmion there were some 84 administrations of Ilira to horses prior to the substance being prohibited;
5. To his relatively young age of 29 years; and
6. The excellent character references tendered to the Tribunal, namely:
   Phillip Stokes, dated 30 May 2014;
   David Hayes, dated 10 June 2014; and
   Tony McEvoy, dated June 2014.

In all the circumstances, taking into account all of the matters mentioned above, this Tribunal is of the opinion that the penalty imposed by the Stewards cannot stand. The Tribunal notes that there is a significantly different factual situation now presenting which crystallizes the circumstances of the offence in a more favourable light to the Appellant.

Whilst it is acknowledged that the reasoning that the Stewards used in the sentencing of the Appellant is valid, the Tribunal is of the view that it is difficult to imagine a set of circumstances which requires this Tribunal to show leniency for the aforementioned reasons.

The Tribunal also notes that the sentence in this matter should not be used as a bench-mark because of its opinion regarding the unique nature of the mitigating facts and circumstances surrounding this offence and this Appellant.

Bearing in mind the necessity for the public to have confidence in the Racing Industry, and the difficulties associated with the identification and prosecution of offences of this nature, the Tribunal is of the view that the offence still requires a fine of a significant amount. In the Tribunal's view that amount is $2,000 which sum is to be paid within 28 days.

I order a refund of the refundable portion of the bond.