



DECISION

RACING VICTORIA STEWARDS and TERRY AND KARINA O'SULLIVAN

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| <u>Date of Hearing</u> | 12 and 13 November 2018 |
| <u>Date of Decision</u> | 29 November 2018 |
| <u>Panel</u> | Judge Bowman (Chair), Brian Forrest, Raymond Harbridge. |
| <u>Appearances</u> | Jack Rush QC, and Justin Hooper appeared on behalf of the Stewards. Stephen Schmidhofer and Simonette Foletti appeared on behalf of the Stewards with respect to penalty. Denis Connell of counsel appeared on behalf of Terry and Karina O'Sullivan. |

DARRAGH – BALLARAT, 21 NOVEMBER 2015

Charge One: AR 175(h)(i)

The Principal Racing Authority (or the Stewards exercising powers delegated to them) 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 it starting in a race.

The Stewards allege that prior to the race on 21 November 2015, Mr Terry O'Sullivan and/or Ms Karina O'Sullivan administered, or caused to be administered, to Darragh a prohibited substance, being cobalt at a concentration in excess of 200 micrograms per litre in urine, for the purpose of affecting the performance or behaviour of Darragh in the race.

Charge Two: AR 175(h)(ii) [Alternative to Charge One]

The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:

(h) Any person who administers, or causes to be administered, to a horse any prohibited substance;

(ii) which is detected in any sample taken from such horse prior to or following the running of any race.

The Stewards allege that prior to the race on 21 November 2015, Mr Terry O'Sullivan and/or Ms Karina O'Sullivan administered, or caused to be administered, to Darragh a prohibited substance, being cobalt at a concentration in excess of 200 micrograms per litre in urine, which was detected in a pre-race urine sample taken from Darragh prior to the running of the race.

Charge Three: AR 178 [Alternative to Charge One and Two]

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.

The Stewards allege that on 21 November 2015, Darragh was brought to the Ballarat Racecourse for the purpose of engaging in the IGA Liquor McKellar Mile Handicap (1600 metres) when a prohibited substance, being cobalt at a mass concentration of 200 micrograms per litre in urine, was detected in a urine sample taken from Darragh prior to the running of the race.

Plea Charge 1 - not guilty.
Charge 2 - not guilty.
Charge 3 - not guilty

Decision Charge 1 - Charge dismissed
Charge 2 - Charge proven
Charge 3 - No ruling required given the finding of Charge 2

Penalty Mr Terry and Ms Karina O'Sullivan are disqualified until 31 December 2019.

GOLD A PLENTY – SANDOWN, 7 AUGUST 2016

Charge One: AR 175(h)(i)

The Stewards allege that prior to the race on 7 August 2016, Mr Terry O'Sullivan and/or Ms Karina O'Sullivan administered, or caused to be administered, to Gold A Plenty a prohibited substance, being cobalt at a concentration in excess of 200 micrograms per litre in urine, for the purpose of affecting the performance or behaviour of Gold A Plenty in the race.

Charge Two: AR 175(h)(ii) [Alternative to Charge One]

The Stewards allege that prior to the race on 7 August 2016, Mr Terry O'Sullivan and/or Ms Karina O'Sullivan administered, or caused to be administered, to Gold A Plenty a prohibited substance, being cobalt at a concentration in excess of 200 micrograms per litre in urine, which was detected in a pre-race urine sample taken from Gold A Plenty prior to the running of the race.

Charge Three: AR 178 [Alternative to Charges Two and Three]

The Stewards allege that on 7 August 2016, Gold A Plenty was brought to the Sandown Racecourse for the purpose of engaging in the Crisp Steeplechase (3900 metres) when a prohibited substance, being cobalt at a mass concentration of 200 micrograms per litre in urine, was detected in a urine sample taken from Gold A Plenty prior to the running of the race.

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| <u>Plea</u> | Charge 1 - not guilty. Charge 2 - not guilty. Charge 3 - not guilty |
| <u>Decision</u> | Charge 1 - Charge dismissed Charge 2 - Charge proven Charge 3 - No ruling required given the finding of Charge 2 |
| <u>Penalty</u> | Mr Terry and Ms Karina O'Sullivan are disqualified until 31 December 2019. |

DARRAGH – SANDOWN, 24 AUGUST 2016

Charge One: AR 175(h)(i)

The Stewards allege that prior to the race on 24 August 2016, Mr Terry O'Sullivan and/or Ms Karina O'Sullivan administered, or caused to be administered, to Darragh a prohibited substance, being cobalt at a concentration in excess of 200 micrograms per litre in urine, for the purpose of affecting the performance or behaviour of Darragh in the race.

Charge Two: AR 175(h)(ii) [Alternative to Charge One]

The Stewards allege that prior to the race on 24 August 2016, Mr Terry O'Sullivan and/or Ms Karina O'Sullivan administered, or caused to be administered, to Darragh a prohibited substance, being cobalt at a concentration in excess of 200 micrograms per litre in urine, which was detected in a pre-race urine sample taken from Darragh prior to the running of the race.

Charge Three: AR 178 [Alternative to Charges One and Two]

The Stewards allege that on 24 August 2016, Darragh was brought to the Sandown Racecourse for the purpose of engaging in the Catanach's Jewellers Handicap (1500 metres) when a prohibited substance, being cobalt at a mass concentration of 200 micrograms per litre in urine, was detected in a urine sample taken from Darragh prior to the running of the race.

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| <u>Plea</u> | Charge 1 - not guilty. Charge 2 - not guilty. Charge 3 - not guilty |
| <u>Decision</u> | Charge 1 - Charge dismissed Charge 2 - Charge proven Charge 3 - No ruling required given the finding of Charge 2 |
| <u>Penalty</u> | Mr Terry and Ms Karina O'Sullivan are disqualified until 31 December 2019. |

The periods of disqualification are to be served concurrently.

Grace Gugliandolo
Registrar
Racing Appeals and Disciplinary Board

TRANSCRIPT OF PROCEEDINGS

RACING APPEALS AND DISCIPLINARY BOARD

HIS HONOUR JUDGE J. BOWMAN, Chairman
MR B. FORREST, Deputy Chairman
PROF R. HARBRIDGE

EXTRACT OF PROCEEDINGS

DECISION

RACING VICTORIA STEWARDS

and

TERRY AND KARINA O'SULLIVAN

RACING VICTORIA CENTRE, FLEMINGTON

THURSDAY, 29 NOVEMBER 2018

MR J.T. RUSH RFD QC, with MR J.C. HOOPER appeared on behalf of the RVL Stewards. MR S. SCHMIDHOFER appeared on behalf of the RVL Stewards with regard to penalty.

MR D.J. CONNELL appeared on behalf of Mr T. and Ms K. O'Sullivan

(1) General Background

CHAIRMAN: Licensed trainers Mr Terry and Ms Karina O'Sullivan have each pleaded not guilty to three sets of charges, in each instance two of them being alternative charges. The O'Sullivans train in partnership, so Local Rule 35F(8) applies and we shall return to a discussion of this subsequently.

The charges arise from the running of three races and the positive return to cobalt revealed in urine samples taken prior to each race. The details of these are as follows: (1) on 21 November 2015, Darragh, in the IGA Liquor McKellar Mile at Ballarat, cobalt reading, 1300 micrograms per litre; (2) 7 August 2016, Gold A Plenty in the Crisp Steeplechase at Sandown, cobalt reading, 1200 micrograms per litre; (3) 24 August 2016, Darragh, in the Catanach's Jewellers Handicap at Sandown, cobalt reading, 1200 micrograms per litre.

It can be seen that each reading is a long way over the limit of 200 micrograms per litre. The defence in each instance was based upon the general merits of the case. In essence, there were no technical defences based upon the testing procedures and the like.

Mr J. Rush QC, with Mr J. Hooper of counsel appeared on behalf of Racing Victoria Stewards. Mr D. Connell of counsel appeared on behalf of Mr and Ms O'Sullivan. Dr Grace Forbes, General Manager of Veterinary Services with Racing Victoria, gave oral evidence, along with both Mr and Ms O'Sullivan. A large body of documentary material was tendered without

objection, including the transcript of many interviews conducted by the Stewards and some expert reports.

(2) The Rules Allegedly Breached

Mr and Ms O'Sullivan are charged with breaches of AR 175(h)(i), AR 175(h)(ii) and AR 178.

(i) AR 175(h)(i): pursuant to AR 175(h)(i):

The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise 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.

This could be described as the principal charge facing Mr and Ms O'Sullivan.

Pursuant to AR 196(5), where a person is found guilty of a breach of AR 175(h)(i), a penalty of disqualification for a period of not less than three years must be imposed unless a special circumstance is found to exist.

LR 73A specifies when such a special circumstance may be found.

(ii) AR 175(h)(ii): alternatively the Stewards have charged Mr and Ms O'Sullivan under AR 175(h)(ii). After the same introduction, concerning administration of the prohibited substance, it reads:

which is detected in any sample taken from such horse prior to or

following the running of any race.

There is no set penalty for this offence. It seems to the board to be patently a lesser offence than a breach of AR 175(h)(i).

(iii) AR 178: again, alternatively, the Stewards have charged Mr and Ms O'Sullivan pursuant to AR 178. This rule reads as follows:

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.

Again, there is no set penalty and this is a lesser charge than the principal charge. It also seems to the Board to be of lesser gravity than the first alternate charge.

(3) The Standard or Degree of Proof

There is no dispute that given the seriousness of the charges and the potential consequences flowing from them, the standard or degree of proof required for the charges to be established is that described in *Briginshaw v Briginshaw* (1938) 60 CLR 36. The words of Rich J and the effect of what is required is "a state of comfortable satisfaction on the balance of probabilities" and they are

the words often used. Comfortable satisfaction can be reached by direct evidence or inference.

(4) Partnership

As stated, Mr and Ms O'Sullivan train in partnership. Accordingly, AR 35F(8) operates. It provides as follows:

Where there has been a breach of the Rules by one or both of the trainers training in partnership, then both trainers shall be deemed jointly and severally responsible and may be charged and penalised accordingly.

(5) The Dispute

The dispute in this case is essentially one that centres on the knowledge and culpability of Mr and Ms O'Sullivan. No arguments were advanced on their behalf as to the taking of samples, the method of testing, the accuracy of the results and the like. Mr and Ms O'Sullivan are basically asserting that they have no idea as to how these particularly high cobalt readings came to occur. Each denies any knowledge of or involvement in the administration of substances that could account for such readings. The Stewards have no direct proof of administration of substances which, if administered, would provide positive results. Through their counsel, they point to various matters that may well create suspicions, particularly in relation to Ms O'Sullivan. Also, the O'Sullivans purchased various medications and the like, the provenance of which can be attacked.

We turn now to whether the Stewards have established that the burden of proof has been discharged in relation to the individual charges. Effectively, bearing in mind the nature of the defences advanced, they can be dealt with collectively in relation to each regulatory provision.

(6) The Charge Under AR 175(h)(i)

For the charge to be proven, the Board must be comfortably satisfied that Mr and Ms O'Sullivan not only administered or caused to be administered cobalt at above the permitted level but did so for the purpose of affecting the horses in their races.

The burden of proof is borne by the Stewards. The case of the Stewards could be summarised as follows: these are very high readings spread over a lengthy period. They occurred at a time when the penalties for the use of cobalt were well known. However, if the O'Sullivans are to be believed, not once did father ask daughter or vice versa whether any cobalt-containing substances had been administered - I repeat that I am reading out the summary of what the Stewards had to say - and that this is incomprehensible. There were three positive findings and no explanation. Ms O'Sullivan was ordering veterinary products online and paying for them with Mr O'Sullivan's credit card. However, the Board is asked to believe that this was not followed up by him.

Dr Taylor from Ballarat is the stable's primary veterinarian and has been for some years. He calls weekly. Yet the whole issue of the elevated cobalt

readings was never raised with him. Ms O'Sullivan repeatedly refused to permit the Stewards to look into her refrigerator in her house, even when the Stewards served upon her a formal letter of 1 September 2016, referring to AR 8B, requesting to inspect the fridge and pointing out the charges that could be laid if this request was denied. She persisted with her refusal. There is then an observation of us as opposed to a summary of what the Stewards had to say: namely, for some reason which is unclear, no charge was actually laid.

Returning to the summary of the Stewards' submissions, in addition there is the matter of the use of the substance, VAM, which contains cobalt.

Mr O'Sullivan, when originally interviewed, effectively stated that it had not been used since attention was drawn to cobalt. However, there was still VAM in the stable refrigerator at the time of the Stewards' inspection. Later, it became apparent that VAM was still used from time to time and at a comparatively high level when it was so used. The above is not a complete list of the submissions on behalf of the Stewards but those are examples of the general manner in which the case was argued.

The submissions on behalf of Mr and Ms O'Sullivan could be summarised as follows: both O'Sullivans adhere to the factual matters they have asserted from the outset and maintain their innocence. They have consistently maintained that they never treat horses on a race day or within the prohibited time frame. Mr O'Sullivan did not question his daughter concerning the high readings because he knows her regime. The attack upon Ms O'Sullivan because of her refusal to permit the Stewards to inspect the contents of her domestic

refrigerator does not take things anywhere. Mr O'Sullivan was so determined to solve the puzzle of the first high reading that he hired two retired detectives who interviewed his staff.

(7) Finding in relation to AR 175(h)(i)

I turn now to the finding. The finding in relation to AR 175(h)(i):

AR 175(h)(i) is quite a demanding provision. As the Board said in the case of Racing Victoria Stewards against Peter Moody, carelessness or even negligence is not purposeful administration. Suspicions are not direct evidence. Some certainly exist in the present case, principally in relation to Ms O'Sullivan. However, such suspicions do not represent evidence from which a persuasive inference can be drawn. We are not comfortably satisfied that the charge of administering a prohibited substance for the purpose of affecting the performance or behaviour of a horse in a race has been proven. We are quite satisfied that the prohibited substance found its way into the horses as a result of something occurring within or associated with the O'Sullivan stables. There is no suggestion of some intruder, break-in, interference with the horses at the racetracks or when travelling or the like. However, we cannot be satisfied that the requirements of the rule have been satisfied.

The O'Sullivans have denied administration for the purpose of affecting performance or behaviour from the outset and, whilst suspicions may exist, persuasive evidence to the contrary and to the level of comfortable satisfaction does not so exist. Accordingly, the charge pursuant to AR 175(h)(i) is dismissed.

(8) The Charge Under AR 175(h)(ii)

For this charge to be established, it must be proven that the O'Sullivan's or either of them administered or caused to be administered cobalt above the threshold level to the horses in question. What distinguishes this charge from the first is that the requirement, for the purpose of affecting the purpose or behaviour of the horse in a race, is absent. We say at the outset that we are comfortably satisfied that this charge has been proven. As stated, there is no suggestion of any third party involvement. The O'Sullivan's were responsible for the horses which they trained and the manner of their stable operations was a long way from being satisfactory. The O'Sullivan's purchased medications from a person who was at the time a vet, who called regularly and sold them products. Apparently he is no longer a vet. These products did not have on them labels indicating that they were from a manufacturer. There seems to have been considerable uncertainty, at least on the part of Mr Terry O'Sullivan, as to exactly what was in them. A photograph of one bottle shows a label with no ingredients listed.

Ms O'Sullivan purchased various medications and the like online but would not let the Stewards examine the contents of her fridge. It is also surprising that neither Mr O'Sullivan nor his daughter asked the other as to whether the other had administered any medication or substance that might have had cobalt in it or indeed had administered cobalt, and this with three high readings over nine months. It does not indicate a properly and well-run stable.

Further, neither of the O'Sullivan appear to have made any inquiries of their regular vet, Dr Taylor, as to the content of suitability of the substances, if they were obtained online and from a person who was apparently a door-to-door salesman. In addition, there is the ultimate concession by Mr O'Sullivan that some injections of VAM, which does contain cobalt, may have taken place.

We could go on, but the ultimate conclusion is that these were poorly-run stables as far as purchase, control and administration of substances was concerned. As a result, the prohibited substance was administered or caused to be administered to three horses and in each instance, this was detected on race day. There is no suggestion by the O'Sullivan that there was any administration performed by anyone from outside the stables, whether it be by vet, intruder or the like.

We are comfortably satisfied that the O'Sullivan administered or caused to be administered the substance in question. Accordingly, we find the charge pursuant to AR 175(h)(ii) to be proven.

(9) The Charge Under AR 178

As a finding of guilt under AR 175(h)(ii) has been made, there is no need for us to make a finding in relation to the charge under AR 178. It is an alternative charge. Clearly, the ingredients of the charge have been made out. In the circumstances, no ruling is required in relation to it.

(10) The Partnership Situation

We have referred earlier to LR 35F(8) into the partnership situation. We have found Mr and Ms O'Sullivan each guilty of breaching AR 175(h)(ii). There is thus no need to invoke the operation of LR 35F(8). In any event, arguably it would seem to underline the fact that each shares responsibility for the breach by the other. The effect of this, if any, on the question of penalty, can be discussed subsequently.

(11) Conclusion

In summary, the charge pursuant to AR 175(h)(i) is dismissed. Mr Terry O'Sullivan and Ms Karina O'Sullivan are found guilty of the charge pursuant to AR 175(h)(ii).

We have considered the submissions of the parties. These are serious charges and we need not emphasise the potential damage that they have upon the industry and its reputation. These were three offences spread over 10 months; it is not a one-off incident. These are very high readings.

We know that this matter has been hanging over the heads of the O'Sullivans for quite some time, but as stated, these are very serious matters. In our view, a period of disqualification is warranted. On each charge, Mr Terry O'Sullivan and Ms Karina O'Sullivan are disqualified until 31 December 2019. It is apparent from that that whilst we find three breaches of AR 175(h)(ii), the periods of disqualification are to be served concurrently. We repeat that the end result is a period of disqualification until 31 December 2019.

Pursuant to AR 196(6)(b), the O'Sullivan's must not start a horse in any race from the date of the Board's decision, being 29 November 2018, until the expiration of the period of disqualification.
