

23 April 2021

DECISION

HARNESS RACING VICTORIA

and

CASSANDRA O'BRIEN

- Date of hearing:** 7 December 2020
- Panel:** Judge John Bowman (Chairperson) and Ms Maree Payne.
- Appearances:** Mr Andrew Cusumano appeared on behalf of the Stewards.
Mr Julian Dwyer represented Ms Cassandra O'Brien.
- Charges:** Australian Harness Racing Rule ("AHHR") 196A (1) states:
"A person shall not administer or cause 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."
Australian Harness Racing Rule ("AHRR") 190(1) states:
A horse shall be presented for a race free of prohibited substances.
- Particulars of charges:** **Charge 1**
1. On 22 March 2020, the horse 'Graceful Art' was presented to race at the Ouyen harness racing meeting in Race 4, the 'Nutrien AG Solutions Pace';
 2. At the relevant time you were the trainer of 'Graceful Art';
 3. Prior to Race 4, the 'Nutrien AG Solutions Pace', a blood sample was collected from 'Graceful Art' with subsequent analysis of that sample revealing a plasma total carbon dioxide (TCO₂) concentration of 38.0 mmol/L;
 4. As the trainer of 'Graceful Art', you administered or caused to be administered an alkalinising agent(s) to 'Graceful Art', for the

purpose of affecting the performance of 'Graceful Art' in Race 4, the 'Nutrien AG Solutions Pace', at Ouyen on 22 March 2020.

Charge 2 (Alternative to charge 1)

1. On 22 March 2020, the horse 'Graceful Art' was presented to race at the Ouyen harness racing meeting in Race 4, the 'Nutrien AG Solutions Pace';
2. At the relevant time you were the trainer of 'Graceful Art';
3. Prior to Race 4, the 'Nutrien AG Solutions Pace', a blood sample was collected from 'Graceful Art' with subsequent analysis of that sample revealing a plasma total carbon dioxide (TCO₂) concentration in excess of the allowable threshold;
4. As the trainer of 'Graceful Art' on 22 March 2020, you presented that horse to race in the 'Nutrien AG Solutions Pace' at Ouyen whilst not free of alkalinising agents, a prohibited substance when evidenced by total carbon dioxide (TCO₂) present at a concentration in excess of 36 millimoles per litre in plasma.

Pleas: Not Guilty to charge 1
Guilty to charge 2

DECISION

Ms Cassandra O'Brien, you have pleaded "not guilty" to a breach of AHRR 196A (1) – administration of a prohibited substance for the purpose of affecting performance. The alternative charge is a breach of AHRR 190 (1) – presentation of a horse with a prohibited substance in its system. You are prepared to plead "guilty" to that charge should you be found not guilty of the administration charge.

The charges arise out of a blood sample taken from the horse *Graceful Art* prior to Race 4 at Ouyen on 22 March 2020. You are the licensed trainer of *Graceful Art*. The sample proved positive, revealing a plasma total carbon dioxide (TCO₂) concentration of 38 mmol/L, this being in excess of the legal limit.

Mr Julian Dwyer, the solicitor appearing on your behalf, indicated at the outset that there would be no challenge to the science and the like. The central issue would be whether it had

been proven that there had been administration for the purpose of affecting performance. It was said that the case against you was circumstantial only.

Three witnesses were called by the Stewards. These were Stewards Mr Daniel Caruana and Mr Stephen Svanosio, as well as veterinary surgeon Dr Richard Cust. There was very little cross-examination of the Stewards or of Dr Cust. We see no reason as to why their evidence should not be accepted.

After the close of the Stewards' case, Mr Dwyer outlined some of the arguments upon which you are relying. At least one of these seems to involve a question of law. Insofar as it does, pursuant to Section 50X of the Racing Act 1958, that is to be decided by the Chairperson. Of course, valuable assistance has been provided by Ms Payne, but the ultimate Ruling is that of the Chairperson.

AHHR 196A (1) reads as follows:

"A person shall not administer or cause 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."

Mr Dwyer referred us to a number of decisions, including *Racing Victoria Limited v Kavanagh and O'Brien*. [2017] VSCA 334. Recently the Chairperson has had to consider this and other cases in relation to a Ruling in *Racing Victoria Limited v Archie Alexander* (delivered 19 April 2021). The conclusion reached was that absolute, as opposed to strict, liability applied in relation to administration as set out in the relevant Rule AR 245 (1), the equivalent of AHHR 196 (1) (ii) in the present case. I mention this because there was some discussion of strict liability during the hearing.

A guilty finding pursuant to AHHR (1) (i) requires comfortable satisfaction that:

(a) there was administration by you or caused by you (for example, at your request or with your permission) occurred; and

(b) it took place for the purpose of affecting the performance or behaviour of a horse in a race.

That administration by someone, probably within a maximum of about six hours prior to the taking of the sample, is not in dispute. It is the unchallenged evidence of Dr Richard Cust.

The key question then becomes whether we are comfortably satisfied that such administration was by you or caused by you. You emphatically deny that it was.

There is no direct evidence in this regard. Mr Cusumano, on behalf of the Stewards, stated that it is a circumstantial case. Amongst other things, it was argued that *Graceful Art* had been the subject of the provisions of the "HRV Elevated TCO2 Levels Policy" twice previously. As we understand it, this policy is implemented when a horse returns a race day reading in excess of 35.1 mmol/L, but less than 36 mmol/L. It is then the subject of pre and post-race testing for its next three starts. This occurred with *Graceful Art* following its runs on 20 November 2019 and 6 February 2020. In these tests, the range of readings was within usual and satisfactory limits – 29.9 to 33.1. Sixteen days after the second testing period ended, the reading the subject of the present charge was obtained.

Mr Cusumano also argued that, in the limited time available on the morning of 22 March 2020, only you or someone under your control or on your instructions could have carried out the administration. Thus, the only possible administrators could have been yourself, your uncle Mr Peter O'Brien (who was at the stables) or Mr Ian Watson (on whose property the stables, along with his residence, are located). There is no suggestion that the float stopped anywhere on the way to Ouyen.

That is a very brief summary of what we consider to be the essential points made by the Stewards.

The case and your background as put by you in evidence is both unusual and provocative of sympathy, not that such features have directly affected the outcome. However, they are important matters in relation to the setting in which the charges arose.

You are 25 years of age. You are not married. We accept that, very sadly, you suffer from an extremely rare form of blood disease. You have fortnightly blood transfusions. You have been in hospital for more than half your life. You have suffered three strokes and, at one stage, was on life support for six weeks. At the age of fifteen you had to start learning "all over again". At times you have been despairing and suicidal.

Despite these enormous problems, you ultimately completed your education, although Year 12 took four years. You have since completed nursing qualifications and have just finished your last placement. You have had several job offers.

Members of your family are involved in harness racing. After your third stroke in 2015, and at a time when you were suicidal, you were bought a standardbred horse, *King Rapha*. You still have that horse, along with a couple of others that you and some family members are still racing, including *Graceful Art*.

It would seem that, when your uncle Peter suffered a stroke, you, having obtained your “B” trainer’s licence, took over the training of a couple of horses. We accept that the horses have played a very important role in your health battles and your rehabilitation.

We might add that none of the above was the subject of challenge and we accept it.

Your family situation is not without its problems. You have another uncle, Mr Ricky O’Brien, who is also involved in harness racing. He is allegedly a constant source of problems within the family and particularly to you and your uncle Peter. Indeed, on 28 May 2018 you obtained a Family Violence Intervention Order in respect of him. That has since expired.

We say now that, whatever suspicions you may have, there is no evidence implicating Mr Ricky O’Brien and we make no finding that he was in any way involved in the high cobalt reading obtained from *Graceful Art*.

Originally you had your two horses stabled alongside those of Mr Ricky O’Brien, but, when the opportunity arose, you moved the horses to twin boxes on the property of Mr Ian Watson at Irymple. Mr Watson’s residence is also on the property. There was some discussion about the installation of cameras, but this did not occur prior to 22 March 2020. It has since been done.

On the morning of that day, you and your uncle, Mr Peter O’Brien, attended to the preparation of *Graceful Art*. Mr Watson was not involved, and Mr Peter O’Brien’s only involvement was assisting to get the horse on to the float. Prior to departure for Ouyen, you were absent from the scene for approximately an hour or so. You did not stop on the drive to the races at Ouyen.

You deny stomach tubing *Graceful Art* or giving it anything other than its normal regime. The race at Ouyen soon after it had been subject to the HRV Elevated TCO2 Levels Policy for the second time.

You deny breaching the Rule or administering any illegal substance. At the conclusion of your evidence, you emphasised your love of the horses and what they have done for you. You put their welfare first. You said that you do not care where they finish and you love them more than words can express.

Weighing up all of the evidence, we are not comfortably satisfied that you breached AHRR 196A (1)(i).

Your horses were stabled some distance from the house of Mr Watson. There were no cameras installed at the time. On the morning of 22 March 2020, you were absent from their stable area for a short time of an hour or a little more. Your uncle, Mr Peter O’Brien, gave you some very limited assistance, he being handicapped because of his stroke. Mr Watson took no part in what was happening. The Stewards do not challenge either of these propositions. You do not stomach tube horses and have never carried out stomach tubing. You assert that

you did not stomach tube *Graceful Art* or give it anything other than its normal feed. We accept that evidence. We find you to be a witness of truth.

We also accept the very important role which horses play in your life, given the rare and extremely serious nature of the illness from which you suffer. We accept that winning is not a great priority and that you love your two horses regardless of where they finish.

You also impressed us as being intelligent and focussed. One may well ask as to why someone in your position, and having recently completed a second HRV TCO2 Levels Policy in respect of *Graceful Art*, would, soon after, stomach tube it or feed it a prohibited substance on race day. Furthermore, its chances were obviously fancied. It started at \$3.10 favourite and won. The prospects of it being swabbed must have been considerable.

We make no finding as to how the horse came to return this reading, save that we are comfortably satisfied that it was not the result of administration by you, or caused by you, for the purpose of affecting its performance.

We would make the following observations. The installation of cameras in the vicinity of the stables had been contemplated and should have been performed. Apparently, it has since been done. Secondly, we gather that the actual location of the stables may be altered to a position closer to the house of Mr Watson. That may be advisable.

In summary, the charge pursuant to AHRR 196A (1)(i) is dismissed. The plea in relation to the charge pursuant to AHRR 190 (1) – the presentation charge - will be heard at a date convenient to the parties.

Mark Howard
Registrar, Victorian Racing Tribunal