

**Non Raceday Inquiry RIU v R J Dunn and J R Dunn - Written Decision dated 28 March 2018 - Chair, Mr T Utikere**

**Rules:**

**Repondent(s)/Other parties:**

**Name(s):**

**Decisions:**

**BEFORE A JUDICIAL COMMITTEE OF THE**

**JUDICIAL CONTROL AUTHORITY**

**UNDER THE RACING ACT 2003**

**IN THE MATTER** of the Rules of Harness Racing

**BETWEEN RACING INTEGRITY UNIT**

Informant

**AND RJ DUNN**

Respondent

**AND JR DUNN**

Respondent

**Judicial Committee: Mr Tangi Utikere** (Chairman)

**Mr Russell McKenzie** (Committee Member)

**Parties:** Mr Neil Grimstone (for the RIU)

**Dr Leo Molloy** (Lay Advocate for the Respondents)

**Informations: A6412, A6413, A6414, A6415, A6416, A6417, A6418 and A6419**

**WRITTEN DECISION OF JUDICIAL COMMITTEE DATED 28 MARCH 2018**

**FACTS**

[1] The Respondents, Mr RJ Dunn (Licensed Public Trainer) and Mr JR Dunn (Licensed Open Horseman) each face four charges under the *New Zealand Rules of Harness Racing*.

[2] The charges are detailed in Informations A6412, A6413, A6414, A6415, A6416, A6417, A6418 and A6419. They collectively allege breaches of the Prohibited Substance Rule: Rules 1004(1), (1A), (3), (3A) and (4) of the *New Zealand Rules of Harness Racing*.

[3] The relevant Rules are as follows:

*“Rule 1004 (1) For the purpose of this rule a horse is presented for a race during the period commencing at 8.00 a.m. on the day of the race for which the horse is nominated and ending at the time it leaves the racecourse after the running of that race.*

*(1A) A horse shall be presented for a race free of prohibited substances....*

*(3) When a horse is presented to race in contravention of sub-rule (1A) or (2) the trainer of the horse commits a breach of these Rules.*

*(3A) When a person is left in charge of a horse and the horse is presented to race in contravention of sub-rule (1A) or (2) the trainer of the horse and the person left in charge both commit a breach of these Rules.*

*(4) A breach of sub-rule (1A), (2), or (3A) is committed regardless of the circumstances in which the . . . prohibited substance came to be present in or on the horse.”*

[4] The relevant Penalty Provision provides as follows:

*“Rule 1004(7) Every person who commits a breach of sub-Rule (2) or (3) shall be liable to:*

(a) a fine not exceeding \$20,000.00; and/or

(b) be disqualified or suspended from holding or obtaining a licence for any specific period not exceeding five years.”

[5] The specific Informations alleged:

**Information No A6412**

*THAT, on 9 June 2017 Robert John DUNN (together with John Robert DUNN) being the trainer or person left in charge of the standardbred RISHI presented the horse to race in Race 2, the CAVALIER TROTTHING PRODUCTS/THE POINT OF SALE CO. MOBILE PACE, at the Nelson Harness Racing Club's meeting with a prohibited substance, namely caffeine, in its system in breach of the Prohibited Substance Rule: rules 1004(1), (1A), (3), (3A) and (4).*

*And you are therefore liable to the penalties which may be imposed under rule 1004(7).*

*The horse, RISHI, is subject to a mandatory disqualification from the race under rule 1004D or rule 1004(8) and is liable to disqualification up to 5 years under rule 1004(8).*

**Information No A6413**

*THAT, on 9 June 2017 Robert John DUNN (together with John Robert DUNN) being the trainer of the standardbred HAYDEN'S MEDDLE, presented the horse to race in Race 7, the HARDY'S BAR & TAB MOBILE PACE, at the Nelson Harness Racing Club's meeting with a prohibited substance, namely caffeine, in its system in breach of the Prohibited Substance Rule: rules 1004(1), (1A), (3), (3A) and (4).*

*And you are therefore liable to the penalties which may be imposed under rule 1004(7).*

*The horse, HAYDEN'S MEDDLE, is subject to a mandatory disqualification from the race under rule 1004D or rule 1004(8) and is liable to disqualification up to 5 years under rule 1004(8).*

**Information No A6414**

*THAT, on 9 June 2017 Robert John DUNN (together with John Robert DUNN) being the trainer of the Standardbred BILLY BADGER presented the horse to race in Race 10, the SPEEDY SIGNS MOBILE PACE, at the Nelson Harness Racing Club's meeting with a prohibited substance, namely caffeine, in its system in breach of the Prohibited Substance Rule: rules 1004(1), (1A), (3), (3A) and (4).*

*And you are therefore liable to the penalties which may be imposed under rule 1004(7).*

*The horse, BILLY BADGER, is subject to a mandatory disqualification from the race under rule 1004D or rule 1004(8) and is liable to disqualification up to 5 years under rule 1004(8).*

**Information No A6415**

*THAT, on 11 June 2017 Robert John DUNN (together with John Robert DUNN), being the trainer of the standardbred BILLY BADGER presented the horse to race in Race 8, the NELSON PINE INDUSTRIES NELSON WINTER CUP, at the Nelson Harness Racing Club's meeting with a prohibited substance, namely caffeine, in its system in breach of the Prohibited Substance Rule: rules 1004(1), (1A), (3), (3A) and (4).*

*And you are therefore liable to the penalties which may be imposed under rule 1004(7).*

*The horse, BILLY BADGER, is subject to a mandatory disqualification from the race under rule 1004D or rule 1004(8) and is liable to disqualification up to 5 years under rule 1004(8).*

**Information No A6416**

*THAT, on 9 June 2017 John Robert DUNN (together with Robert John DUNN) being the person left in charge of the standardbred RISHI presented the horse to race in Race 2, the CAVALIER TROTTHING PRODUCTS/THE POINT OF SALE CO. MOBILE PACE, at the Nelson Harness Racing Club's meeting with a prohibited substance, namely caffeine, in its system in breach of the Prohibited Substance Rule: rules 1004(1), (1A), (3), (3A) and (4).*

*And you are therefore liable to the penalties which may be imposed under rule 1004(7).*

*The horse, RISHI, is subject to a mandatory disqualification from the race under rule 1004D or rule 1004(8) and is liable to disqualification up to 5 years under rule 1004(8).*

**Information No A6417**

*THAT, on 9 June 2017 John Robert DUNN (together with Robert John DUNN) being the person left in charge of the standardbred HAYDEN'S MEDDLE presented the horse to race in Race 7, the HARDY'S BAR & TAB MOBILE PACE, at the Nelson Harness Racing Club's meeting with a prohibited substance, namely caffeine, in its system in breach of the Prohibited Substance Rule: rules 1004(1), (1A), (3), (3A) and (4).*

And you are therefore liable to the penalties which may be imposed under Rule 1004(7).

The horse, HAYDEN'S MEDDLE, is subject to a mandatory disqualification from the race under rule 1004D or rule 1004(8) and is liable to disqualification up to 5 years under rule 1004(8).

#### **Information No A6418**

**THAT**, on 9 June 2017 John Robert DUNN (together with Robert John DUNN) being the person left in charge of the standardbred BILLY BADGER presented the horse to race in Race 10, the SPEEDY SIGNS MOBILE PACE, at the Nelson Harness Racing Club's meeting with a prohibited substance, namely caffeine, in its system in breach of the Prohibited Substance Rule: rules 1004(1), (1A), (3), (3A) and (4).

And you are therefore liable to the penalties which may be imposed under rule 1004(7).

The horse, BILLY BADGER, is subject to a mandatory disqualification from the race under Rule 1004D or rule 1004(8) and is liable to disqualification up to 5 years under rule 1004(8).

#### **Information No A6419**

**THAT**, on 11 June 2017 John Robert DUNN (together with Robert John DUNN) being the person left in charge of the standardbred BILLY BADGER, presented the horse to race in Race 8, the NELSON PINE INDUSTRIES NELSON WINTER CUP, at the Nelson Harness Racing Club's meeting with a prohibited substance, namely caffeine, in its system in breach of the Prohibited Substance Rule: rules 1004(1), (1A), (3), (3A) and (4).

And you are therefore liable to the penalties which may be imposed under rule 1004(7).

The horse, BILLY BADGER, is subject to a mandatory disqualification from the race under rule 1004D or rule 1004(8) and is liable to disqualification up to 5 years under rule 1004(8).

#### **PRELIMINARY MATTERS**

[6] In a Minute (dated 24 February 2018), the Committee noted that it was in receipt of the Notices of Appointment, copies of the Informations, the Charge Rules and Penalty Provisions and an Authority to Charge Letter from the General Manager of the Racing Integrity Unit, Mr M Godber. It also detailed that following a teleconference on 23 February, guilty pleas were entered to all charges on behalf of the respondents. A timeframe for the provision of written Penalty Submissions from both parties was set, and they have now been complied with. As such, we are now in a position to issue a full decision.

#### **SUBMISSIONS**

[7] The RIU have submitted the following agreed *Summary of Facts*:

Mr Robert John DUNN is a Public Trainer with Harness Racing New Zealand and runs two stables. Mr Robert DUNN primarily runs the North Island stable in Pukekohe while son John Robert DUNN is the stable foreman at the Woodend Beach stable.

John DUNN was the person in charge of the horses that raced out of the Woodend Beach stable at the Nelson HRC meeting on 9th and 11th June 2017.

**Informations A6412, A6416.** RISHI is a 4 year old Bay gelding and is trained by Public Trainers C D Edmonds and Miss A D Edmonds. RISHI went to the Woodend Beach stable of R J Dunn on 5 April 2017. C D & Miss A D Edmonds entered a horse movement notification for RISHI to trainer R J Dunn from 17 May 2017 to 30 May 2017 and 6 June 2017 to 11 June 2017. RISHI was owned by Miss M F Nunan. RISHI has raced 5 times for 4 wins and stakes of \$19,450 as at 1 September 2017.

RISHI was correctly entered and presented to race at the Nelson Harness Racing Club meeting at Richmond Park Raceway on 9 June 2017. RISHI was driven in Race 2, the CAVALIER TROTting PRODUCTS/THE POINT OF SALE CO. MOBILE PACE by Mr J Dunn, winning the race and a stake of \$5,000.

Following the race the Stipendiary Stewards ordered that RISHI be post-race swabbed. The race was programmed to start at 11.38am with the gelding entering the swab box at 11.58am. Swabbing Steward Ms A Daly obtained a urine sample from the gelding at 12.00pm. The urine sample was taken in the presence of stable representative M Johnson. The urine sample was recorded with the Sample number 133342. Mr John Dunn does not contest the taking of the sample.

**Informations A6413, A6417.** HAYDEN'S MEDDLE is a 4 year old Bay gelding and is trained at the Woodend Beach stable of Public Trainer Mr Robert John DUNN. HAYDEN'S MEDDLE is owned by W S Sparks and Mrs U I Sparks. HAYDEN'S MEDDLE has raced 22 times for 3 wins and 10 placings and stakes of \$25,625 as at 1 September 2017.

HAYDEN'S MEDDLE was correctly entered and presented to race by trainer Mr Dunn at the Nelson Harness Racing Club meeting at Richmond Park Raceway on 9 June 2017. HAYDEN'S MEDDLE was driven in Race 7, the HARDY'S BAR & TAB MOBILE PACE by Mr J Dunn, winning the race and a stake of \$4,125.

Following the race the Stipendiary Stewards ordered that *HAYDEN'S MEDDLE* be post-race swabbed. The race was programmed to start at 2.22pm with the gelding entering the swab box at 2.40pm. Swabbing Steward Ms A Daly obtained a urine sample from the gelding at 3.00pm. The urine sample was taken in the presence of stable representative Mr G Lane. The urine sample was recorded with the Sample number 133351. Mr John Dunn does not contest the taking of the sample.

**Informations A6414, A6418.** *BILLY BADGER* is a 4 year old Bay stallion and is trained at the Woodend Beach stable of Public Trainer Mr Robert John DUNN. *BILLY BADGER* is owned by R K Gordon and Mrs A L Gordon. *BILLY BADGER* has raced 32 times for 6 wins and 8 placings and stakes of \$74,328 as at 1 September 2017.

*BILLY BADGER* was correctly entered and presented to race by trainer Mr Dunn at the Nelson Harness Racing Club meeting at Richmond Park Raceway on 9 June 2017. *BILLY BADGER* was driven in Race 10, the SPEEDY SIGNS MOBILE PACE by Mr J Dunn, winning the race and a stake of \$4,400.

Following the race the Stipendiary Stewards ordered that *BILLY BADGER* be post-race swabbed. The race was programmed to start at 4.04pm with the gelding entering the swab box at 4.25pm. Swabbing Steward Ms A Daly obtained a urine sample from the gelding at 4.30pm. The urine sample was taken in the presence of stable representative Mr G Lane. The urine sample was recorded with the Sample number 133345. Mr John Dunn does not contest the taking of the sample.

**Informations A6415, A6419.** *BILLY BADGER* was correctly entered and presented to race by trainer Mr Dunn at the Nelson Harness Racing Club meeting at Richmond Park Raceway on 11 June 2017. *BILLY BADGER* was driven in Race 8, the NELSON PINE INDUSTRIES NELSON WINTER CUP by Mr J Dunn, winning the race and a stake of \$6,875.

Following the race the Stipendiary Stewards ordered that *BILLY BADGER* be post-race swabbed. The race was programmed to start at 2.59pm with the gelding entering the swab box at 3.21pm. Swabbing Steward Ms A Daly obtained a urine sample from the gelding at 3.25pm. The urine sample was taken in the presence of stable representative Mr W Sparks. The urine sample was recorded with the Sample number 133363. Mr John Dunn does not contest the taking of the sample.

On the 4th July 2017 the New Zealand Racing Laboratory issued Analytical Reports indicating the presence of Caffeine in four swabs, 133342, 133345, 133351 and 133363 from the Nelson HRC meeting on 9th June and 11th June 2017.

On 5th July 2017 Racing Integrity Unit Staff went to the Woodend Beach stable of Mr R Dunn, 39 Woodend Beach Road, R D 1, Kaiapoi, and advised stable foreman Mr John Dunn of the four irregular swab results returned from *RISHI*, *HAYDEN'S MEDDLE* and *BILLY BADGER* from the first day of the Nelson HRC meeting on 9th June 2017 and *BILLY BADGER* on the second day of the meeting on 11 June 2017.

Mr J Dunn could not offer an explanation for the presence of Caffeine in the four swabs. Mr Dunn advised that they do not use any products that contain Caffeine.

Mr Dunn and the staff were interviewed and numerous samples were taken and forwarded to the Racing Laboratory for analysis for the presence of Caffeine.

Mr Dunn confirmed they had not changed any of the feed products or pre raceday treatments prior to the Nelson meeting. The horses were given boost on arriving at the course and all feed was taken to the meeting and prepared by Mr J Dunn. Precautions were taken to clean the feed bins on course prior to use.

Mr Dunn provided the diary that is used to note all treatments given to the horses. None of the horses had been treated in the month prior to the race meeting. This was confirmed by the stable veterinarians from the Rangiora Vet Centre.

On the 6th July 2017 the New Zealand Racing Laboratory issued Certificates of Analysis confirming the presence of Caffeine in the four swabs 133342, 133345, 133351 and 133363 from the Nelson HRC meeting on 9th June and 11th June 2017.

Enquiries were made at the Richmond track and samples were taken for analysis.

On 23rd August 2017 the New Zealand Racing Laboratory confirmed that none of the samples taken from the Richmond track contained Caffeine.

On 24th August 2017 the New Zealand Racing Laboratory confirmed that none of the samples taken from the stable contained Caffeine.

Since the notifications were received from the NZRL and to this point extensive and exhaustive investigations have been conducted by the RIU and the Respondents into the possibility of a third party being involved in the "knobbling" (the Committee assumes that the RIU refer to "nobbling"; we hereby refer to as such through the remainder of the Decision) of these horses. There was no evidence found to support this position. How the Caffeine came to be in the horses has not been established.

This investigation unfortunately became public knowledge prior to the RIU visit to the Dunn stable at Woodend Beach. This "leak" was also investigated and found to have come from an overheard telephone conversation between two RIU staff members which was inadvertently overheard due to the "Bluetooth" capability of his vehicle whilst parked at the Rangiora Raceway. This has been dealt

with internally.

Mr R J Dunn has held a Public Trainer's licence since 1977 and has trained over 1200 winners for stakes in excess of \$13,000,000.

Mr R J Dunn has had a previous breach of Rule 1004 for presenting WAIT AND SEE at the Westport TC on 28th December 2004 with an elevated TCO2 level and was fined \$500.

Mr J R Dunn has not held a trainers licence and was first licensed as a Junior Driver in 2000/01 and an Open Driver in 2007/08. Mr J R Dunn does not have a previous breach of Rule 1004.

## **DECISION**

[8] As indicated in the Minute of the Judicial Committee dated 24 February 2018, as all charges have been admitted, we deem the charges to be proved.

## **PENALTY SUBMISSIONS**

### The RIU

[9] For the RIU, Mr Grimstone filed written Penalty Submissions, which referred to the Sentencing Principles that are outlined in *NZTR v Dyke* (2008) at [2.2]; *NZTR v Daly* (2008). While these principles pre-date the passage of the Sentencing Act 2002, he also refers to the purposes and principles outlined in ss 7 and 8 of that Act.

[10] Mr Grimstone identified that the investigation had been lengthy and detailed, due to the unusual circumstances of the positive swabs, which raised a possibility that the four horses in question had been 'nobbled'. The RIU's investigation had been unable to ascertain the source of the positive swabs or how the Caffeine came to be in the horses' systems. He notes that while 'nobbling' cannot be ruled out, there is no evidence to support that proposition. They rely on the fact that the 'nobbling' aspect of the RIU investigation had been reviewed by a senior member of the Christchurch Criminal Investigation Branch, which found the RIU's investigation to be "detailed, thorough and robust" (Para 3.4 of *RIU Written Penalty Submissions* dated 7 March 2018).

[11] The RIU do acknowledge that neither of the respondents intentionally administered Caffeine to the horses in order to gain any competitive advantage. They found no animal remedies, or over the counter products containing Caffeine, nor evidence of any such items ever being purchased, upon inspection of the Dunn stables.

[12] The RIU adopt the position, that although there are four breaches and two respondents, due to the nature of the substance and the surrounding circumstances, they should be viewed as one breach for the purpose of penalty. They also rely on the 'totality principle' as referred to in *RIU v Finn* (Para 55 of *RIU v B Finn*, 18 August 2015) to support this position.

[13] The RIU has not specified any particular aggravating features, apart from the suggestion that the circumstances under which the four positive swabs returned a positive to Caffeine cannot be explained, despite extensive investigation.

[14] In mitigation they identify that the respondents admitted the charges at the first opportunity, along with Mr J Dunn's clear record under the rule and the fact that Mr R Dunn's previous breach of the rule occurred in 2004.

[15] The RIU have identified the cases of *RIU v Whittaker* (17 August 2015), *RIU v Finn* (18 August 2015) and *RIU v Blackburn* (18 August 2015) as comparatives to the current offending. These cases span the harness and greyhound codes, but relate to instances where the prohibited substance involved was that of Caffeine.

[16] In conclusion, the RIU submissions state that the culpability for a breach of the Prohibited Substance Rule can vary greatly. At one end of the spectrum there are cases where the respondent will be without fault, for example, where the trainer makes full and proper inquiries including with their vet, but received erroneous advice. The degree of culpability will be higher where there is a failure to make any enquiries and at the other end of the spectrum is where the trainer has been grossly negligent.

[17] They contend that the circumstances surrounding the current charges are unique. As such, the RIU submit that due to the origin of the Caffeine remaining unknown, that this matter should sit at the mid to lower level regarding penalty.

[18] Adopting the 'totality principle', they submit that the starting point should be a \$6,000 fine, with reductions for early pleas and no previous similar breaches. They submit a total fine of \$4,000 as appropriate, and do not seek any costs in this matter.

### The Respondents' Penalty Submissions

[19] Dr Molloy has filed written Penalty Submissions in his capacity as Lay Advocate for the respondents.

[20] In those submissions, he identifies that the entire situation has been unfortunate and that the Dunns' wish to focus on moving forward in a manner that minimises the impact that these charges have had on the Dunn stable and the wider reputation of the industry.

[21] He identifies Caffeine as a 'ubiquitous' substance and provided documentation to support the suggestion that some equine bodies had argued that Caffeine was no longer considered as a performance enhancer. Dr Molloy goes on to suggest that Caffeine is

everywhere and that the RIU could find no evidence to suggest that the Dunns' administered or were involved in the administration of that substance.

[22] In mitigation the submissions cite the early entering of guilty pleas simultaneously as the charges were laid and the fact that the Dunns had co-operated with the investigative process, assisting the RIU by providing statements and other associated documentation. Their good record was also cited, noting that the Dunns had led the harness premiership in recent times.

[23] The Lay Advocate identified that as a family brand, the Dunns had been 'shining lights' across the standardbred code for 40 years and that both had excelled in the driving ranks, with Robert Dunn also having been an outstanding trainer of many champions.

[24] Dr Molloy submitted that the RIU had found no evidence that the respondents were involved in this matter, other than that they had inadvertently presented the horses in question. No animal remedies or prescription medication containing Caffeine had been found at the Dunn stable. The Dunns had also sought to have this matter determined *on the papers* to minimise costs and inconvenience to all parties.

[25] The respondents rely on two similar cases as comparators: *RIU v Burrows* (22 December 2013) and *RIU v McGrath* (22 December 2013) and have helpfully supplied copies of both decisions for the Committee. In both those cases, the prohibited substance in question was that of Caffeine. The only difference suggested by Dr Molloy was that the source of the Caffeine was identified in *Burrows and McGrath*. In both of those instances, the RIU did not pursue charges, but rather sought a ruling from the JCA for the disqualification of those runners. He submits that the same course of action should have applied in relation to the current charges.

[26] Dr Molloy identifies that Mr R Dunn is the trainer of the horses in question and that Mr J Dunn 'merely works for his father'. He also submits that the training operation is fully compliant with the *New Zealand Harness Rules of Racing* and specifically refers to Rule 823(2). In doing so, he suggests that the RIU "claim incorrectly that Robert trains the Auckland based team whilst John trains those based in Christchurch (sic)". (*Written Penalty Submissions* of Dr Leo Molloy on behalf of the Respondents).

[27] He goes on to submit that all charges against Mr J Dunn should be dismissed as there is no basis for the charges against him, and that he had no role in this matter. Further, it is suggested that a failure to do so would be "totally inappropriate, out of proportion, and grossly unfair." (*Written Penalty Submissions* of Dr Leo Molloy on behalf of the Respondents).

[28] In relation to penalty, Dr Molloy identifies that the Dunn brand has been "damaged beyond repair" (Ibid). He also asks us to consider the fact that there is a considerable cost to the Dunns as a result of the loss of stake monies following the disqualification of the four runners.

[29] We are also told that the Dunns have had to invest in surveillance systems and associated hardware at their Woodend stable as a result of these investigations. They have also incurred significant legal costs associated with advice that they had sought. Dr Molloy also questions why the RIU did not exercise rights available to them under Rules 505D, 211(2)(a), 224, 226(2)(b)(c) and 303(2) to follow up alternative avenues of investigation.

[30] In summary, Dr Molloy's written submissions sought a minimal penalty along with the dismissal of charges against Mr J Dunn "...*simply because he's not the trainer of these horses, never has been, and thus he should never have been charged with these offenses (sic). The RIU can give no rational or reasonable explanation as to why John has been charged.*" (Ibid)

[31] He also concurs with the RIU that if a financial penalty is to be imposed, then there should only be one penalty. The Lay Advocate described the RIU submission of a \$4,000 fine as "risible" and referred specifically to the Australian *Kavanagh* and *O'Brien* cases. In those cases, multiple presentation offences involving cobalt attracted \$4,000 and \$8,000 penalties.

## **REASONS FOR PENALTY**

[32] The Committee has considered all of the submissions placed before it and is grateful to both parties for the provision of written penalty submissions along with relevant decisions that they have referred to in those submissions. We have also been referred to an extensive number of previous cases, which we have reviewed, alongside other cases of relevance.

[33] These charges relate to the Nelson Harness Racing Club's Meetings in June 2017. While there has been some passage of time since this event, the relevant documentation was lodged with the JCA in late February. This lengthy time frame prior to lodgement indicates that attempts have obviously been made to fully explore matters during the investigation process.

[34] It is clear that Messrs R Dunn and J Dunn have been involved in the harness racing industry over many years. They have entered guilty pleas to all charges, and the Committee proceeds to consider what is an appropriate penalty on that basis.

[35] While the agreed *Summary of Facts* provides the context surrounding the charges, the Penalty Submissions of both parties have required a detailed level of analysis by this Committee. We also note that we are also very familiar with the *Sentencing Principles* that have been identified in the RIU's submissions.

[36] It is clear that the source of the Caffeine has been unable to be determined or explained, despite what appears to have been a vigorous and robust level of investigation. An inability to identify the source is not unusual in Prohibited Substance cases and is not peculiar to this case. In light of this, there obviously remains the possibility that the Dunns' cannot be excluded as being responsible. The suggestion that the horses in question had been 'nobbled' has been reviewed by a member of the Police's Criminal Investigations Branch and we are told that as a result, there appears to be no evidence to confirm that position.

[37] The comparable cases that the RIU have submitted have one thing in common: the prohibited substance in each was that of Caffeine. While those cases are of some interest, they differ in that the source of the Caffeine was able to be identified in each of those cases. That is quite different to the circumstances surrounding the current breaches. The Committee has also referred to the decision of *RIU v CD & AD Edmonds*, 2016. In that case, the source of the prohibited substance, namely Ketoprofen, could not be determined, so has been of interest to us.

[38] Dr Molloy has suggested that the cases of *Burrows* and *McGrath* are suitable comparisons. We reject that submission. Both of those cases relate to a 'Request for a Ruling' from the JCA, not a charge alleging a breach of the Rules. The prosecutorial discretion lies with the RIU as the Prosecuting Agency as to whether or not charges are laid. As indicated in the Letter authorising the charges, the RIU General Manager Mr Godber had indicated that: "After considering all the circumstances put forward..." (Authority to Charge Letter circulated to all parties, dated 20 February 2018), in relation to these charges, he authorised the lodging of the charges against Mr R Dunn and Mr J Dunn. Consequently, the Respondents have entered guilty pleas to all charges.

[39] At para 11 of *Burrows*, it indicates that: "*Syncrofen is an additive that is sold in feed merchants and on line in New Zealand. It is manufactured by SYNCROFLEX, a Blenheim based company that makes supplements to "support the human body as well as the canine & equine friend/ athlete during hard and demanding work and or simply to maintain and compliment a balanced diet to support optimum health and perform to full potential."* The product was advertised as "*the natural and safe alternative, 100% free of banned substances, safe for competitions*". The content of para 11 of the *Burrows* decision was also evident in the *McGrath* decision (para 15).

[40] Further, at para 13 of *Burrows*, it identifies that "*Mr Burrows advised that he had asked his Vet, Mr Mike Brown, about "Syncrofen" and whether it would be safe to use on his horses. Mr Brown advised that it appeared safe to use.*" The same advice was tendered by the trainer's vet in *McGrath* (para 17).

[41] It is clear that the source of the Caffeine (Syncrofen) was known in both of those cases, a point of difference with the current case, and the trainers were not regarded as being at fault.

[42] While we have looked at the specific rules that Dr Molloy has referred to in paragraph [29] of this decision, we do not need to consider the inability of the RIU to exercise its regulatory discretion to follow up any of the alternative avenues of investigation that he suggests, as that is irrelevant for the purposes of determining penalty.

[43] In a similar vein, Dr Molloy invites us to dismiss the charges that Mr J Dunn is facing, submitting that he has no responsibility for these offences. We find it curious that this request has been promulgated at this stage of proceedings as Mr J Dunn has accepted his responsibility via his guilty pleas. To indicate otherwise could be seen as a lack of remorse; however, we do not intend to delve further into that line of thought. It seems appropriate for us to again refer to Rule 1004(3A) which states:

*"When a person is left in charge of a horse and the horse is presented to race in contravention of sub-rule (1A) or (2) the trainer of the horse **and** (emphasis added) the person left in charge both commit a breach of these Rules."*

[44] In this context it is not an 'either or' situation, as both the trainer and the person left in charge bear responsibility. It is accepted that Mr J Dunn was the person "left in charge of a horse" and that the horses were "presented to race in contravention of sub-rule (1A)" at the Nelson HRC Meetings on 9 and 11 June 2017. Accordingly we decline the request to dismiss the charges against Mr J Dunn at this late stage of proceedings.

[45] It is accepted that these are 'presentation' offences, rather than the more serious 'administration' offences. The RIU submit that due to the nature of the substance and the surrounding circumstances, this should be viewed as one breach for the purposes of penalty. We disagree. Effectively, three horses have been affected over four races, and all four races were won by the horses in question. All of the affected horses are owned by different connections, who have had to refund any stake monies they had received, as a result of the requirement to disqualify their horses from the Nelson HRC Meetings in June 2017.

[46] We are not persuaded that the loss of stake monies as a result of the horses' disqualifications, allegedly coming at a considerable cost to the Dunns, is to be considered as a significant factor in mitigation. As articulated in *RIU v Bambry* (at para [37] of *RIU v A Bambry*, December 2017) we place little weight on this submission as any financial benefits gained were as a result of not racing in accordance with the Rules; by being presented to race with the Prohibited Substance Caffeine in the horses' systems. This is part of the proper process as a result of the requirement to disqualify the horses from the races.

[47] While it appears that the source of the Caffeine is unable to be identified, despite intensive investigation, the fact remains that RISHI, HAYDEN'S MEDDLE and BILLY BADGER have been presented to race in four races with a prohibited substance in their system. The strict liability lies with Mr R Dunn as the trainer and Mr J Dunn as the person left in charge to ensure that the horses were

presented to race free of Caffeine. They have not discharged that responsibility and have pleaded guilty to all eight charges. We accept that the culpability for a breach of the Prohibited Substance Rule can vary greatly, but in our assessment, given the multiple nature of this failure, we place the level of offending at above the mid-range.

[48] We also reject any suggestion that “the Dunn brand has been damaged beyond repair” (*Respondents' Written Penalty Submissions*). It is clear that the Dunns are long-standing industry participants; Context is important to any judicial matter, and it is evident that the RIU have accepted that they are unable to determine with certainty how the Caffeine came to be present in the horses' systems. In our view, this does not lead to damage to a licence holder's reputation to the extent put to us by Dr Molloy.

[49] While we agree that the 'totality principle' is an appropriate consideration; we take the view that in the circumstances specific to this case, that principle can best be engaged when considering penalty, rather than when considering whether it would be more appropriate to treat the four positives as one breach. While the nature of the substance is relevant, and Dr Molloy points out that Caffeine is ubiquitous, we also note that it remains a prohibited substance under the Rules (*New Zealand Rules of Harness Racing*).

[50] Previous cases, have identified that there are a number of approaches when arriving at an appropriate penalty for multiple breaches. In *RIU v Lynch (RIU v A L J Lynch*, 16 October 2015), when referring to another case, the RIU identified that: “*In RIU v B Towers (15 May 2015), which related to 2 charges where the Defendant Towers failed to present his horse free of the prohibited substance namely Clenbuterol, the Committee in its written decision considered options for determining penalty for multiple charges. The Committee in Towers referred to RIU v McInerney noting that it was submitted to support the submission that **when setting a quantum, the Committee could look to set the financial penalty for the second breach at a level which was half that of the original breach.** An approach in line with that adopted in McInerney supports the view that to impose a quantum for each breach, albeit resulting from the same on-going action. As with the Beck decision the circumstances of Towers are slightly different to the present case, albeit the discussion on rationale for decision making offers something for this Committee to consider in determining penalty quantum for all 3 charges.*” (Emphasis added).

[51] We have also reviewed and considered the *Edmonds* case, in which the respondents remained unaware of how the prohibited substance (Ketoprofen) came to be in the horse's system. That case centred around one horse returning a positive on two occasions; 15 and 29 January 2016. In *Edmonds*, the RIU identified the *JCA Penalty Guidelines* starting point of an \$8,000 fine for a first 'presentation' offence, and that was the final quantum they sought. The Committee in that case was unable to, on the facts, reach any conclusion as to how the prohibited substance came to be present in the samples taken (at para 28 of *RIU v CD & AD Edmonds*, 2016).

[52] Further approaches regarding the application of the starting point for each breach in a multiple-breach situation have been articulated in *RIU v Dalgety*, 16 May 2017 and the recent case of *RIU v Brosnan*, 13 February 2018. In the *Brosnan* decision, the Committee stated: “*As already noted the penalty guide proposes a fine of \$8,000 for a so-called first presentation. If that were applied in respect of each of the three (3) breaches the fine would be \$24,000.*” The Committee then went on to apply a discount for mitigating factors, arriving at a fine of \$19,000.

[53] The *JCA Penalty Guidelines* identify a starting point of a \$8,000 fine for a first 'presentation' offence. Given the eight charges relate to three horses over four races, we consider it appropriate to adopt a hybrid approach when determining an appropriate starting point.

[54] The RIU have sought a total fine of \$4,000 for this offending. In our view, that submission is far too lenient when the specific circumstances of this offending is taken into consideration. In our assessment, a total fine at this level for eight charges would fail to have regard to the very sentencing principles that the RIU have placed before us.

[55] We have considered the two very recent cases of *RIU v KD Townley*, 12 March 2018 and *RIU v BR Negus*, 20 March 2018 where the prohibited substance was that of Ketoprofen. Each of those decisions involved only one horse in a singular race, for which the RIU in each case sought a monetary penalty of a \$6,000 fine. The end result in *Townley* was a \$7,000 fine and in *Negus* a \$5,500 fine.

[56] When these and other penalties, such as those applied in *Edmonds* and *Brosnan*, are considered alongside the \$4,000 penalty being sought by the RIU, we consider the RIU submission to be significantly disproportionate to penalties applied for similar prohibited substance offending.

[57] In a Minute (dated 26 March 2018) we provided the RIU with the opportunity to elucidate and/or expand on the rationale and reasoning that informed the position they had adopted in submitting a total fine of \$4,000 as appropriate.

[58] Their response (dated 27 March 2018), also made available to Dr Molloy, identified the following:

“*The J.C.A penalty guide provides for a starting point of an \$8000 fine for first presentation in Harness and Thoroughbred Racing Codes. In this case the R.I.U took a reduction of 25% on the J.C.A penalty guide reflecting the R.I.U's view that the positive result was a contamination but the R.I.U could not rule out third party involvement.*” (Para 3 of *Informant's Further Penalty Submissions*, 27 March 2018).

"From that starting point the R.I.U considered a \$4000 fine was reasonable, taking into account the trainers good record as previously mentioned, and that they pleaded guilty at the first available opportunity." (Para 4 of Informant's Further Penalty Submissions, 27 March 2018).

[59] After considering those further Penalty Submissions, we maintain the view that the position of the RIU still fails to have regard to the multiple nature of these breaches. While the RIU indicate that they could not rule out third party involvement, we make the observation that that is often a consideration in presentation breaches where the source of the prohibited substance is not known. In this particular case, while a possibility, we are not prepared to make such a definitive finding.

[60] In our view, we consider it appropriate to apply the \$8,000 JCA Penalty Guidelines figure in respect of each of the breaches for RISHI, HAYDEN'S MEDDLE and BILLY BADGER on 9 June 2017. In relation to the second breach for BILLY BADGER on 11 June 2017, we apply a \$4,000 figure; which is half of the starting point for BILLY BADGER's first breach. This results in an initial starting point of a \$28,000 fine. When we apply an appropriate adjustment to reflect the circumstances surrounding these breaches in accordance with the 'totality principle', we reduce that figure by just over one-third to \$18,600. This becomes our amended starting point.

[61] In mitigation, we have considered the early admissions of the breaches, the co-operation of the Dunns with the RIU investigation process, along with the previous records of both respondents, as confirmed by the RIU. While Mr R Dunn has a previous breach of the Prohibited Substance Rule (specifically Rule 1004), this dates back to 2004 and given the number of horses he has trained since then, we attach little weight to it for the purposes of this penalty. For these combined factors, we apply a discount of approximately 25 percent to the \$18,600 starting point, resulting in a total fine of \$14,000. This total is to be apportioned equally across both respondents. Having regard to the specific circumstances of these breaches, we consider this penalty to be fair, reasonable and proportionate to the offending.

## **PENALTY**

[62] The end result is a total fine of \$14,000, which is to be equally apportioned across both respondents. As such, Mr RJ Dunn is fined the sum of \$7,000. Mr JR Dunn is also fined the sum of \$7,000.

## **COSTS**

[63] The RIU have indicated they are not seeking any costs, which is a generous position to adopt. While these charges have been dealt with *on the papers*, there has been a cost to the JCA. Each Respondent is ordered to make a partial contribution to JCA costs, that sum is set at \$500 each.

## **ORDERS**

[64] The disqualification of the four horses in question (RISHI, HAYDEN'S MEDDLE, BILLY BADGER and BILLY BADGER) has already been made under the provision of Rule 1004D, which was directed in an Order of the Judicial Committee dated 24 February 2018.

Signed at Palmerston North this 28th day of March 2018.

Mr Tangi Utikere

Chairman

**Penalty:**