RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

EX TEMPORE DECISION
MONDAY 20 MAY 2019

APPELLANTS BENJAMIN TALBOT and MARK SAYER

GREYHOUNDS AUSTRALASIA RULES 86(o), (q) and (n)

DECISION:

1.Appeal of Sayer on 86 (o) and (q) upheld
2. Appeal of Talbot on 86(n) upheld
3. Appeal of Talbot on 86 (o) and (q) dismissed.
4. In 86 (o) and (q) of Talbot penalty appeal upheld and penalty of 4 months disqualification concurrent from 18 January 2019 imposed
5. 50% of the appeal deposit refunded.

BACKGROUND

1. Licensed trainer Mr Benjamin Talbot and registered veterinary surgeon Dr Mark Sayer appeal against the decision of the GRNSW Inquiry Panel of 18 January 2019 to impose penalties upon them.

2. In respect of Mr Talbot, there are three alleged breaches, each of which was found proven against him. They related to Rules 86(o), (q) and (n). Attached to this decision will be the detailed charges numbered one, two and three. In respect of those matters the Inquiry Panel determined that he be disqualified for, respectively, two years, two years and two years, to be served concurrently.

3. Dr Sayer was the subject of three charges, the third of which was dismissed, the first and second found established. In respect of those matters, for breaches of 86 (o) and (q) in what was described as concurrent penalties, he was warned off on each matter for two years. The details of the two charges numbered one and two in respect of him will be attached to this decision.

4. The Tribunal will return to the details of those breaches.

5. Before the Inquiry Panel, each of the appellants pleaded not guilty. By their appeal to this Tribunal they have maintained that denial of the respective breaches.

6. The evidence has comprised the transcript and exhibits before the Inquiry Panel and its decision of 18 January 2019. In addition, the respondent, GRNSW, has put in evidence today a newspaper summary dated 2 February 2018 of the Daily Advertiser, a Facebook post and a Facebook cover sheet. The appellant, Dr Sayer called Dr Russell to give evidence. Dr Sayer gave evidence and the appellant Mr Talbot gave evidence.

7. The factual background to these matters is that Greyhound Racing NSW had published policies to do with euthanasia. Those policies, it might be said, were made more detailed as a result of issues relating to the unlawful killing of greyhounds which led to public outcry, the intervention of Parliament by a decision to ban the industry, a subsequent revisiting of that decision with the addition of prohibitions, the reinstatement of GRNSW as one of the two bodies with responsibility for the industry, the amendment of an existing policy which bound trainers, and the introduction of a new policy.

8. Of further relevance is section 21 of the Greyhound Racing Prohibition Act 2016. Whilst that Act has been repealed, by provisions that were in the Schedule 4 to the Greyhound Racing Act 2017, those parts of the euthanasia policy of the now repealed Prohibition Act remain in force. Section 21 places the onus upon the owner of a registered greyhound,

amongst other things, to not allow its destruction or, in fact, engage in its destruction. Certain exemptions to that were provided if necessary consents were obtained.

9. The Code of Practice for the Keeping of Greyhounds in Training was also amended to introduce a euthanasia policy. In broad terms, if a greyhound was seriously ill or injured and a recommendation by a veterinarian was made, euthanasia was possible.

10. That policy was further tightened by the Supplement to Codes of Practice – Greyhound Euthanasia of 29 August 2016. That policy only allowed for euthanasia of greyhounds in accordance with the provisions within it. It mandated – and again, this is a broad summary – that to do so consent of GRNSW in writing was required, unless a veterinary practitioner in an emergency, in order to relieve it from suffering or distress due to injury or illness, could act in the absence of that consent. There were limits on when that consent could be issued, namely, the requirement of humane destruction with the appropriate notification. The requirement for appropriate disposal was also set out. Importantly, the onus was placed upon owners to proceed to certain steps before euthanasia was permitted.

11. It is to be noted that Mrs Kemp, the registered owner of the greyhound Better Cruise, which is the subject of these proceedings, was dealt with by the Inquiry Panel and found to have breached the Rules 86(ag), (o) and (q). 86 (ag) was particularly relevant to the third matter involving the appellant Mr Talbot because it is linked to the breach of 86(n) alleged against him. Mrs Kemp, as she is now known, was found to have breached the code of practice supplementary policy, to have acted improperly and to have engaged in conduct detrimental or prejudicial to the interest, welfare, image or promotion of greyhound racing. In penalty, she received, respectively, two years', four years' and four years' disqualification, concurrent. Those matters are referred to because all three were dealt with together by the inquiry panel and evidence taken from her and others before that inquiry panel.

12. The extent of the obligations to be found in the Greyhound Racing Prohibition Act and in those two policies have a focus upon the owner and upon a veterinary surgeon.

FACTS

13. The facts are that the appellant Mr Talbot has been associated with the industry since age about 15, he now being aged 39. He has been a hobby trainer for a number of years. Relevantly he has at his premises 15 kennels and in general he had 15 greyhounds in each kennel. He was asked, by Mrs Kemp, take on the subject greyhound Better Cruise and to do so for about 14 days. He took the greyhound. He described in his evidence today, not

previously referred to at all by him, that it was an aggressive animal and that was one of the reasons why he did not want it back in his kennel. Also, it had suffered from some kidney-related disabilities, which appears to have taken no substantial part in these proceedings.

14. Critically, on the subject day when the euthanasia took place, 5 January 2018, at the Wagga Wagga greyhound racing meeting, he was the licensed trainer who presented the greyhound Better Cruise to race. The greyhound raced. There was a stewards' inquiry in relation to that race. A number of things happened, not the least of which was that the greyhound was suspended by the stewards for 28 days for a first marring offence. In addition, Dr Sayer – and his status on the evening shall be returned to – vetted the greyhound after the race and found it was entirely uninjured.

15. Prior to presenting the greyhound to race, the appellant Mr Talbot had attended the premises or Mrs Kemp where in a conversation at times in company with her husband he advised that the greyhound had to go back to Mrs Kemp at the conclusion of the race on 5 January 2018. Various matters were discussed as to Mr Kemp's physical disabilities. Acknowledging his right to privacy, he has not sought to exercise that before the Inquiry Panel and the nature of his illness is an essential factor that has to be explored in this matter because it goes to the subjective elements relevant to both appellants. It is that he is suffering from brain cancer, wheelchair-bound, essentially unable, effectively, to assist himself and certainly not able to assist with greyhounds. There is a dispute on the facts as to whether he was receiving chemotherapy and other treatment in Sydney or Wagga.

16. Regardless of that, the effect conveyed to Mr Talbot was that there were difficulties in respect of their maintaining the greyhound. They were left in no doubt whatsoever – and this is prior to the presentation – that the greyhound was to be returned to them and it is to be inferred from that, with their knowledge that they were to travel to either Wagga or Sydney, that they would have to have arrangements in place for the homing of the greyhound because Mr Talbot was going to return it to them.

17. Immediately after the marring penalty was imposed, Mr Talbot conveyed that fact to both Mrs Kemp and Mr Kemp. It was on the basis that the greyhound was suspended for 28 days, he was not going to keep it and they had to take it home with them.

18. The evidence then diverges between Mrs Kemp and Mr Talbot. The Tribunal has not had the benefit of observing Mrs Kemp give evidence. It is a long-established cautionary tale to anybody, tribunal, court or the like, dealing with an appeal where a witness gave evidence follow that has not been presented to the subject decision-maker on appeal that caution must be exercised in accepting or rejecting the evidence of a witness not re-presenting. Mrs Kemp falls into that category.

19. The Tribunal has read her two telephone interviews with inspectors. It has read the transcript of the Inquiry Panel hearing, has had the benefit of reading the evidence of Mr Talbot and Dr Sayer and the submissions made on their behalf. It has also had the benefit of observing Mr Talbot and Dr Sayer in the witness box.

20. The first determination on evidence to accept is between Mr Talbot and Mrs Kemp. There are also issues between Dr Sayer and Mrs Kemp. These matters are resolved in the following way: the Tribunal has had the benefit of observing Mr Talbot and reading all the evidence including the submissions to which reference has been made. It is satisfied he is a witness of truth. It is satisfied that his recollection, expressed in his telephone interview with the inspectors so soon as after the event, was a clear and unequivocal recollection of events.

21. The first issue is whether, so far as Mr Talbot and Mrs Kemp are concerned, whether Mr Talbot raised the issue of euthanasia first. Mrs Kemp said he did and so she went and saw Dr Sayer. Mr Talbot denies that those were his words, that she came to him with that.

22. Without analysing in great detail all of the evidence, the combination of the evidence of Dr Sayer as to the sequence of events to which he made reference and what Mrs Kemp had said to him provides corroboration of Mr Talbot in his version. There are a number of points, but the key one upon which the addresses were made was that Dr Sayer rejected that Mrs Kemp said to him that Mr Talbot had sent her to see him about euthanasia.

23. Accordingly, the Tribunal is satisfied that the conversation is as Mr Talbot said it was with Mrs Kemp. Mr Kemp did not give any corroboration to the extent that he was in a position to do so. The effect of that is that Mrs Kemp raised with Mr Talbot all her difficulties, and Mr Talbot said that she should go and talk to the vet. That was obviously otherwise identified as Dr Sayer and she went to him.

24. Dr Sayer describes the unfortunate tale that unfolded from Mrs Kemp to the effect of her husband's illness, the necessity – and the Tribunal finds this as well – that they were to go to Sydney. Mrs Kemp told the Inquiry panel they were going to be in Wagga.That is such a critical factor that was relevant in the mind of Dr Sayer that it formed a reason for him to make a conclusion. It is important at this point to further examine Dr Sayer's evidence about what was said and what transpired.

25. The Tribunal has had the benefit of seeing Dr Sayer give his evidence today and briefly in the introduction it covered his professional career, his training and experience. He quite frankly and openly gave evidence about a prior matter of a disciplinary nature by the regulatory body for veterinarians

to do with a finding – and it is not for the Tribunal to assess that finding, but it was that he was reprimanded in respect of the way in which it appears he should have handled a bird that presented with a problem rather than allowing it to be left in an inexperienced employed veterinarian's hands. That is only examined as a positive reflection of his character as he volunteered it and not as a criticism of him as a professional.

26. He also critically gave evidence of how he would react to injured animals. In addition to that which he gave to the Panel's Inquiry and in his written submissions to it, he referred to the fact that he assists with WIRES and wildlife services, including Wildcare in Victoria, and gave an example of travelling at his own cost for two hours to and from Sale in Victoria to treat an injured koala, as said, at no cost. In addition, he referred to the fact that his practices – and there are eight of them – provide for WIRES, and its equivalents, free treatment and services.

27. Those matters are a true reflection of his concern as a professional for the welfare of animals. He relies on his reputation as a person with a commitment to community service and as he believes he is so perceived in his community. He has other matters to do with the sport of football, in which he enjoys a high level of standing. He does not stand alone.

28. He has called a fellow practitioner, a Dr Russell, a former university contact, in that they were, to use an analogy from other professions, codes and industries, linked somewhat compulsorily as buddies during their veterinary training. They have, unusually for that industry, remained very close friends. Dr Russell speaks most highly of the professionalism of the appellant Dr Sayer, which he has observed since they started as university students together in 1979. He assesses him as honest and truthful and a person of veterinary skills that are second to none.

29. Those matters are relevant, again to assessment on his evidence to which the Tribunal returns, in assessing the evidence relating also, of course, to Mr Talbot. The effect of that was that Dr Sayer has at all times maintained that he formed an opinion based upon his expertise that the welfare of this greyhound was such that the request to euthanase was fairly made and an appropriate outcome. That notwithstanding that he had not that long earlier assessed the greyhound as uninjured. He bases that conclusion very strongly upon the personal circumstances of Mrs Kemp and her husband and, in key terms, an inability in the short term for them to properly care for the greyhound such that its welfare would be at risk.

30. There has been no questioning at any stage of him in respect of why in the short term he did not offer at any of his eight practices, critically the one in Wagga, because it was close, to house the greyhound. He could have been injured. It would not be unusual for a veterinary practice to retain overnight or for some other period of time a greyhound or, indeed, any

animal during the course of its recuperation from treatment. There is simply no evidence about that and the Tribunal cannot speculate on it, it has not been the subject of submissions.

31. He gave evidence of various occasions, not before the Tribunal but generally, that he was satisfied with the explanations given that in his professional experience euthanasia was an appropriate outcome. He made quite clear to the Inquiry Panel that on many occasions an animal owner may, for reasons relevant to the animal owner rather than the animal itself, request euthanasia, which then is able, as the owner has requested it, to be carried out.

32. There is no evidence outside the greyhound industry and within the policies the Tribunal has summarised to preclude a veterinary surgeon from euthanasing an animal at the request of an owner. Perhaps the implied caveat upon that is that, of course, it must be done properly. And by properly, a number of matters could be analysed such as in a humane way, which of itself would then require further analysis about the appropriate use of drugs or other means to effect that and then, by whatever is the appropriate recommended means of use of that drug or other means, that it was applied in accordance with those requirements. That goes to his subjective belief as well.

33. The precise fee for euthanasing an animal has not been given. On this occasion, Dr Sayer has referred to the fact that he determined, for compassionate reasons, he would charge $40. He indicated he would carry that exercise out. Mrs Kemp and her husband left the track at about 9:30.

34. Mr Talbot has given evidence that that was the extent of his involvement to that point. Dr Sayer was present because he was retained by the local club, the Wagga Wagga Greyhound Racing Club, it shall be assumed, which was conducting the meeting, it being trite, of course, that GRNSW was then the regulatory body, known in the rules as the Controlling Body, and that the Act and the rules make provision for clubs to conduct meetings.

35. The evidence establishes that there is to be a vet on duty at a meeting and that vet is known as the on-track veterinary surgeon, or OTV. Unusually, on this night two vets were present. Dr Munro was the second vet, sent there by GRNSW, the Controlling Body. For reasons which remain unexplained, Dr Sayer in fact carried out the functions that would normally be vested in the on-track vet. To give but one example, the pre-race veterinary examination of a greyhound and, also given in evidence in these proceedings, the assessment of injuries to an animal during the course of a race. If there are any other functions, they do not need to be delineated. Dr Munro was there carrying out certain other functions.

36. Rule 110 provides that the Controlling Body or club may appoint persons to act as veterinary surgeons – sub rule (1). That, the Tribunal interprets to be, that they are a panel. Sub rule (2) provides that the Controlling Body – and it is to be noted there is no reference to the club– may nominate a veterinary surgeon to officiate at a meeting and then pass the fee for that on to the club. That is said to occur in special circumstances. The special circumstances are not known. Sub rule (3) provides where the Controlling Body notifies that a veterinary surgeon has been nominated to officiate, then that person is the veterinary surgeon in relation to that meeting, and then, critically, no other veterinary surgeon, whether appointed by the club conducting the meeting or otherwise, shall act in relation to the meeting.

37. Dr Colantonio, who was the regulatory vet at the time, had no conversation with Dr Sayer. Dr Sayer was not appointed by GRNSW, the Controlling Body. Dr Munro was. Regardless of that, whether he was officially the on-track vet or not, he was there performing the functions of an on-track veterinarian. He does not seek to hide from that. He exercised those functions and responsibilities that were to be carried with it. But that becomes, for reasons that will be apparent in subsequent findings, an issue that bears no great substance in the determination.

38. At about 10:40 Dr Sayer says he attended upon the senior steward for the meeting and handed him the appropriate paperwork. They had a conversation. Words to the effect of "I've finished work for the night and I'm clocking off" or "I now cease to exercise the functions of on-track veterinarian", "I now cease to exercise my duties as the club's veterinarian responsible for this meeting" were not uttered. Mr Marks says he was of the opinion that Dr Sayer remained on duty because trials were to be conducted after the conclusion of the last race. That of itself does not become a critical factor for the reasons that will be expressed in due course.

39. Dr Sayer then gives evidence – and has consistently done so – that from that point he considered himself to be off duty. He considered himself to be a veterinarian in private practice who happened to be at a greyhound racing course. As he described in submissions earlier, if he had gone out the front gate and come back again, there would be no issue that he was off duty. Again, for reasons expressed, that is not critical. But it does go to his subjective beliefs.

40. Mr Talbot then approached Dr Sayer to ask what was happening with the greyhound and was told to bring the greyhound to the car park to Dr Sayer.

41. Mr Talbot has given evidence today, for the first time, in express terms that he considered an instruction from the on-course vet to be binding upon him. It is to be inferred from that evidence that Mr Talbot would wish it to be found that he was, firstly, bound to follow such a direction and, secondly, if

he did so, he would be absolved from all other responsibilities as a licensed trainer.

42. Mr Talbot had earlier told the stewards at their inquiry that he considered that he had a duty to do that which was told to him, although he did not express it in precisely the same terms as he did today. Mr Talbot went and retrieved the greyhound from the kennelling area, took it to the car park and placed it in the back of his car.

43. There is a substantial dispute about people in the car and what could or could not be seen in the back of that SUV-type vehicle. In relation to the latter point, the evidence quite clearly shows an opaque covering on the rear of the passenger area of the vehicle. It was the evidence below that nobody in the vehicle could see into the tray at the back. That photograph confirms the correctness of that evidence. Mr Talbot's wife and two children were in the front of the vehicle. It is said the children were watching DVDs. There is no evidence of their awareness that the dog was euthanased in the back of that vehicle. The evidence clearly establishes that they could not have seen it take place. Some suggestion of crying children is no longer available as a finding of fact. And as to why they were crying is not known, if indeed they had been.

44. Dr Sayer and Mr Talbot give evidence that the rear folding door of the vehicle was closed across Dr Sayer to the extent of some three-quarters or more such that effectively no one could see in. He gave evidence that he used a torch to highlight the section of the greyhound's leg into which the injection was placed. Dr Munro had given evidence that she observed a substance of green being injected into the greyhound. That would necessitate that, consistent with the respondent's case, there was adequate lighting about the area such that that was a possible observation. The other difficulty in accepting that evidence is that Dr Munro had attended upon the steward and it was some 10 minutes after the injection had been administered that Dr Sayer says they arrived to see them.

45. The evidence is that the injection was administered humanely. There is no direct evidence that it is contrary to proper veterinary practice for an administration of a fatal injection to a greyhound being administered in the back of a vehicle as being contrary to proper veterinary practice. Indeed, it would be the experience of many about the matter, of which the equivalent of judicial notice can be taken, that in many cases a fatal administration to an animal may be effected other than in a veterinary practice's rooms. There are so many examples of that with animals in sport and elsewhere that they need not be examined further. In any event, there is no evidence that it is an improper practice. It is quite apparent from the evidence and experience of Dr Sayer it was done humanely, discreetly and properly.

46. There is no doubt that when confronted about his conduct by Dr Munro, who put to him quite clearly that there were rules – there is no need to summarise all of this because the evidence is an agreed fact – that Dr Sayer immediately expressed ignorance of any policy that would have precluded him from engaging in that conduct. The rest of the evidence of Dr Munro and the rest of the evidence from Mr Marks on this issue does not need to be examined.

47. The interviews to which reference has been made subsequently took place, the inquiry took place. Mr Talbot gave evidence, consistently at all times in his interview, in the inquiry and repeated, that he did not know of the existence of the policies which related to euthanasia. It is to be acknowledged that essentially they place onus upon owners and veterinarians. The nature of those policies and the reasons for their existence is something which the Tribunal would expect a responsible trainer to know about. A trainer cannot, in the absence of owners, in the absence of places to race, in the absence of regulatory agencies such as stewards and the regulatory authority, consider themselves an isolated entity responsible purely for the aspects of training.

48. The brief background the Tribunal gave earlier as to the changes in the industry effected post the initial abolition of the industry and through statements on substantial policies would have alerted any trainer to the fact that whatever the practices of the past were that there was a whole new regime under which they were to operate. In any event, the supplement to the codes of practice applies to all greyhound racing industry participants, and that includes Mr Talbot. He is a person who had care, custody and control at times of the subject greyhound and, indeed, of other greyhounds. The policy on euthanasia applied to him. He did not know about it; he should have.

49. Those then are the principal facts against which an analysis must be undertaken.

Dr Sayer

50. Dealing firstly with Dr Sayer, the first matter alleged against him is a breach of 86(o), which is, in essence, that he engaged in improper conduct.

51. The parties do not ask the Tribunal to assess the meaning of the word improper other than contrary to accepted practices.

52. The Tribunal has dealt with the meaning of the word improper in this code in its decision in Absalom, 2 July 2013. It there analysed the rules and found in essence that it would be lacking propriety or, relevant to those facts, unbecoming unseemly. But here, lacking propriety.

53. In the thoroughbred racing code, in the decision of Johnson on 28 November 2012, the Tribunal assessed the meaning of improper. After an analysis of case law, it came to the conclusion as follows:

> "It is an objective test to be considered in all the circumstances as a reasonable member of the community would regard the conduct. That reasonable person would have regard to the views of each of (named people) and have regard to the fact that it is conducted in a regulated integrity-based sport. That assessment would look to whether some or all of the conduct in all the circumstances could be objectively reasonably viewed" –

And it then went on to deal with a particular test there, here it would objectively viewed as not meeting appropriate standards.

54. It is important to have a look at what was said in O'Connell v Palmer 53 FCR 429, a South Australian District Registry General Division Court of Appeal decision, which was summarised in Johnson as follows:

> "The mental state of a person charged may, however, have an influence on the judgment which the Tribunal is to make as to whether acts done should be found to be acting in a manner unbecoming" – in that case – "a member of the Australian Federal Police. And that will be so, in the Tribunal's opinion, whether that judgment is formed by reference to what the Tribunal considers reasonable members of the community would regard as unbecoming conduct or by reference merely to its own opinion of what is unbecoming."

It then went on to deal with examples of that particular police officer.

55. Therefore, it is an objective test. But in assessing, as the reasonable person would, as to whether it is appropriate conduct, regard must be had not just to all of the circumstances but to some extent what motivated the particular person to engage in it. And that is not to turn an objective test into a subjective test but merely that one of the many ingredients to be considered in all the circumstances is, as expressed, what was the motivation for the conduct.

56. There is one fact the Tribunal said it would return to on the question of whether Dr Sayer was on duty or not, and that is the uncontradicted evidence he has given and which is consistent with what he gave below, that at the time he engaged in the actual act for which he is alleged to have breached the rules the trials had finished. Yes, he was present at the track still and, yes, he did, at the request of Dr Munro, go and examine a greyhound injured during the course of the meeting.

57. Therefore, as to whether he was the on-track veterinarian or just a veterinarian on duty, whether he had taken himself off duty or whether he was still bound as the on-track veterinarian, or veterinarian on duty, the functions for which he was retained had concluded. The fact that he, in a good Samaritan basis, at the request of a colleague, examined another greyhound, injured at the meeting, does not, in the Tribunal's opinion, move him to have, as it were, put himself back on duty or what remained as the on-track veterinarian's duty, assuming he could have been, or returned to the function of veterinarian retained by the club.

58. In any event, should he have been, the subjective reason why he did that has been given. It is an objective test. But why he went back to doing it, as has been expressed, does not change the character of his acts.

59. He was a veterinarian working for a racing club for eight years in circumstances where, as expressed, there had been turmoil in the industry and he was entirely ignorant that something as key to a veterinarian as a euthanasia policy was not known to him. It might be said in certain circumstances that such ignorance beggars belief.

60. But he has given an explanation. He received no induction from the club, as its incoming vet. There was obviously some form of explanation of his duties and two of them were summarised earlier and need not be repeated and, as said, there were others. But importantly, he has given uncontradicted evidence that on a number of occasions he asked the club, the regulator and, at various times, the regulatory vet retained by the regulator, about policies and assistance in respect of a vet's functions at the races. The only thing he ever received, which was in response from the regulatory vet – she asked him about it – was the hot weather policy. At no other stage has he been given anything.

61. It could be said that if someone chose to go and work in such a highly regulated field and does so without having informed themselves also is rather surprising. But those are the facts. They are relevant again, even if it is a failure on his behalf, that went to his subjective beliefs. He was not examined in any great detail about why he did not do a thorough Internet search of the GRNSW website to see what all the policies related to anyone associated with the industry were such as if he was called upon to do something he would know whether he could or could not or whether they should or should not.

62. But the evidence is that the regulator, despite his requests, had not given him the information which in general terms he had asked for. He did not ask for a copy of this supplementary policy, he did not ask for the policy that affected trainers, because it also affected on-course vets. The regulator now who seeks to bring charges against him based upon his failure to comply with policies is hardly in a position to criticise him when it itself has

failed to do that which, when looked at in a different way, it was obligated to do. The Controlling Body did not train him, the club did not train him. His evidence to the Tribunal today was that once retained he exercised his veterinary expertise and professionalism to perform the functions as he thought fit.

63. The next issue is whether the location in which he effected these acts of itself was against accepted principle. The Tribunal has summarised the evidence. It is satisfied that the way in which he set about these activities was humane and discrete and not apparent to the odd passer-by and at the time it was performed, after the races had finished, after the trials had finished. Notwithstanding it was in the car park and possibly in a location where he might have been seen, was not, to the extent that another person came by and asked for some assistance, that person has not given evidence that they were horrified by the acts of a dog being put down in the back of a car in the car park. The fact it was a car park itself does not make it, as expressed earlier, an improper location.

64. Also viewed on the impropriety test, the reasons he has expressed, with a genuine belief in the welfare of the animal as appropriate, remain unchallenged.

65. Having regard to all of the other facts, what remains is that the greyhound was uninjured, the need for rehoming of companion animals was alive in society. There was no written consent for him to do what he did. Whether he had not or did not fully explore all options are matters which have been dealt with. And essentially that is all that remains. One can understand the horror that might have been expressed and which seemed to have motivated the conducting of the inquiry that, contrary to all the rules, a club veterinarian had euthanased a greyhound in the back of a vehicle with a crowd around. It certainly motivated the media agitation to which the Tribunal will return.

66. Applying then an objective assessment to his conduct, was it otherwise not acceptable or contrary to industry or acceptable standards. Improper is to be analysed on these facts, on a purely objective basis. Could there be a conclusion that any reasonable member of the community, as the test must be expressed, when armed with all of the facts and circumstances and analysing all that was known to Dr Sayer and analysing why he engaged in that which he did, at the request of the owner, and who then engaged in his professional expertise with a view that he was doing the correct thing and doing it properly, that his conduct was against acceptable standards.

67. The Tribunal finds that it was not improper.

68. The Tribunal upholds the appeal in respect of charge one.

69. The next charge is against 86(q) in respect of him engaging in conduct detrimental or prejudicial to the interest, welfare, image or promotion of greyhound racing.

70. In that regard the parties are in agreement that the principles enunciated by Justice Young in Waterhouse v Racing Appeals Tribunal [2002] NSWSC 1143 are the principles to which this Tribunal must assess that test. There are many other ways of expressing it, but as the parties have not asked the Tribunal to go beyond that test and as the Tribunal has not. As was recently said by Justice Fagan in Kavanagh v Racing New South Wales [2019] NSWSC 40, on the variation of a penalty not sought by the parties that it would be procedurally unfair here for the Tribunal to depart from that exercise without the parties being heard on it. And ultimately it does not.

71. There are three ingredients. The Inquiry Panel summarised those in the following terms:

> (1) there is an element of public knowledge of his conduct and its broader context;
>
> (2) there is a tendency in his conduct to prejudice greyhound racing generally as distinct from his own reputation; and
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> (3) his conduct must be capable of being labelled as blameworthy.

72. In respect of the first test, the evidence tendered goes to the event itself. It is to be borne in mind the test is in relation to the industry and not the individual. That evidence, which it is to be accepted was fresh today, is to the effect that in the Daily Advertiser in Wagga on 2 February 2018, soon after this event but before the inquiry, stated there was an issue about an apparently uninjured greyhound, suspended for marring, that was subject to an inquiry because the stewards were inquiring into the circumstances surrounding the death of the greyhound, having been euthanased by an official veterinary surgeon at the races. That article taken by itself creates an aspect of public knowledge. Whilst it does not identify Dr Sayer, it identifies an officiating veterinary surgeon and therefore has that element of public knowledge.

73. In addition, the Facebook page, which is less than complimentary and in somewhat inflammatory language, which need not be read into the decision but which quite clearly indicates the horror which appears to have been expressed by the Coalition for the Protection of Greyhounds, or someone on its behalf, that in essence, removing all the colourful language about not caring about welfare and providing for yet another dead dog because it didn't win enough money, that it was a healthy greyhound and someone had murdered it, and which appears to have been liked by 5048 people, fulfils element one.

74. The second test is does it have a tendency to prejudice greyhound racing generally. That requires a focus on his conduct. The Tribunal proposes to assess that at the same time as the third test ingredient of blameworthy. The Tribunal in assessing the first matter dealt in considerable detail whether his conduct was improper. A test of affecting a reputation and a test of engaging in blameworthy conduct in essence is merely another way of expressing the same type of activity. Without going back through each of the elements which might make up blameworthy conduct or which, without a doubt, if blameworthy would have caused substantial harm to the industry, requires a focus on whether it was blameworthy.

75. The Tribunal can see no reason to come to a different conclusion on the impropriety test as the blameworthy test. Again, it is objective. It is to be viewed by a reasonable person knowing all the facts and circumstances which have been found in this case and which would not find, in essence, the key ingredient, which was contrary to the policy, a healthy greyhound was euthanased would in itself need an assessment of why and why in the opinion of a veterinarian it was appropriate to do so. Blameworthy does not simply require a focus that it was contrary to a policy. And that blameworthiness must be assessed on the basis that that policy was not known. Therefore, there was no intentional transgression of it.

76. In the circumstances, the Tribunal finds that the conduct was not blameworthy. That satisfies test three. That is an essential ingredient of charge two which likewise is not established.
77. The appellant Dr Sayer is not in breach of the Waterhouse principles. They form the basis submitted of the conduct prejudicial etc.

78. In those circumstances, charge two is dismissed.

79. The appeal against charge two is upheld.

80. The appeal was against the breaches. The breaches being found not established, the appeal deposit is ordered refunded.

Mr Talbot

81. A similar analysis is required in respect of the appellant Mr Talbot. In this case there are three matters, the first of which is improper conduct, the second of which is conduct prejudicial. Each of those raises the same ingredients that were just summarised with the co-appellant Dr Sayer. The third is aid and abet Mrs Kemp.

82. The key factors here are that an experienced licensed trainer, ignorant of a policy and driven by a belief that he was obliged to follow the directions

of a regulatory vet, presented a greyhound to be euthanised. The trainer knew that the greyhound was uninjured. The trainer knew that he had indicated to the owner it was to be returned. The trainer knew that he had available the kennel facility from which it had been removed to take the greyhound back. He knew of the illness of Mr Kemp and the precarious position that it placed each of Mr and Mrs Kemp in so far as the ongoing welfare of the greyhound is concerned.

83. He has formed an opinion that his contract was concluded, that it was his right to return the greyhound to the owner and the owner was obliged to take it. This is not a case of contract, it is a case of welfare and compliance with propriety rules or acceptable behaviour.

84. His evidence is unchallenged to the effect that a licensed trainer in his circumstances is able to believe that if a regulatory vet directs him to do something, he is obligated to do it. However, there can be no finding for a licensed trainer that if there is a belief that complying with a direction of a veterinary surgeon, whether regulatory or not and whether on duty or not as the case may be, may lead to some impropriety by that vet, then it cannot be accepted that the licensed trainer can simply wash the trainer's hands of the welfare requirement in relation to a greyhound.

85. Mr Talbot knew that the dog was going to be put down. He presented the dog for that purpose and allowed the euthanasia to take place in his own vehicle.

86. He has given evidence of his ignorance of the policy that binds a person who has connection with racing, which is him, about complying with the new euthanasia policy. This Tribunal has found on prior occasions that regardless of the fact this is a civil disciplinary hearing a licensed person cannot absolve themselves from compliance with the rules or absolve themselves from liability for a breach of the rule if they are ignorant of it, unless the way in which the rule is written requires a specific intent to act and that cannot be established if there is ignorance.

87. But this is an impropriety matter, it is a conduct detrimental or prejudicial to welfare matter. The Tribunal has found on many occasions that the privilege of a licence carries with it a number of obligations, not the least of which is that a trainer, firstly, must know the rules and, secondly, because the rules provide it specifically, that the trainer must know all of the policies that apply to that trainer. Likewise, a trainer is expected to know the rules and obligations so far as they relate to his client, the owner. That is not to elevate a trainer to the same liability and status as an owner, but an owner is entitled to look to a trainer to tell him what the rules and policies are such that the owners themselves do not act in breach or act in breach in concert with the trainer in respect of that which is required to be known. There cannot be an excuse for ignorance.

88. The reasonable person considering whether Mr Talbot breached the acceptable standards rule or not would be armed with the knowledge that he had the privilege of a licence as a trainer with an owner in circumstances which have been summarised, who determined that he himself would not take a greyhound back – and he has given reasons why – but that without more, when told to present a dog to be euthanased, he simply handed it over.

89. Objectively viewed, allowing for his subjective ignorance – and that is accepted – any reasonable person, in this Tribunal's opinion, would not find that Mr Talbot engaged in a standard of conduct appropriate to the privilege of his licence. Impropriety requires that he do so. The Tribunal finds that he did not.

90. Mr Talbot did not act in accordance with acceptable practices. He acted improperly.

91. The Tribunal finds that he has breached charge number one.

92. The appeal against the finding of breach of 86 (o) is dismissed.

93. The second matter is the conduct prejudicial. The law has been summarised.

94. The first test is whether, in accordance with the Waterhouse principles, there is an element of public knowledge in relation to his conduct. He is not named as being the trainer in the media material previously summarised. It is that the owner and a vet engaged in certain conduct which he was a party to, for the reasons outlined. A greyhound which he knew had no apparent injury and which he knew was to be euthanased by the officiating veterinary surgeon. All this greyhound had was a marring penalty and the difficulty of finding somewhere for it to go.

95. The Tribunal is satisfied that that publicity in which he was otherwise embraced, when viewed from a regulatory point of view and not a focus upon him as an individual, has that aspect of broader public knowledge.

96. The second test is would his conduct be prejudicial to greyhound racing generally? Again, as assessed in respect of the co-appellant Dr Sayer, the issue of blameworthiness must be assessed. Again, for the same reasons the Tribunal concluded in respect of the conduct of Dr Sayer, the Tribunal, having just outlined the reasons why it is of the opinion that his conduct was improper, comes to the same conclusion that his conduct was blameworthy.

97. It comes to the same conclusion that that type of conduct is prejudicial to the interests and welfare of greyhound racing. All of the facts are

contrary to an outsiders expectations of the industry. The second test failure is established.

98. Each of the tests in Waterhouse is found established.

99.The Tribunal finds charge two established.

100. The appeal against the finding of breach of 86 (q) is dismissed.

101. The third charge, which was set out in the Inquiry Panel decision, was not adequately expressed by them. They said the breach was aid and abet Mrs Kemp against the rules of racing. But which rules? The Tribunal called for a copy of charge three and it was provided. No further submissions have been made. The breach relates to Mrs Kemp not complying with the above stated policies - 86 (ag).

102. This is an aid and abetting case. The Rules of Greyhound Racing do not set out what is required for aiding and abetting. Aiding and abetting, whether considered in a criminal law concept or a civil disciplinary concept, imposes the same tests. Those tests require the respondent to establish a number of facts. There are five.

103. The first fact to be established is whether Mrs Kemp committed the specified breach. That specified breach for her was a breach of Rule 86(ag), which is the policy rule. That was established, proved against her, by the inquiry panel. Ingredient one is established.

104. The second thing to be established against Mr Talbot is he intentionally encouraged Mrs Kemp to commit that breach and/or intentionally set out to assist in preparations to commit that breach. And it is important to focus on what the breach was. It was a breach of policy.

105. The evidence is that Mr Talbot did not know of the policy. The evidence is, therefore, that he could not have known that Mrs Kemp was acting in breach of a policy if he himself did not know of the existence of that policy. He cannot have intentionally encouraged her to commit a breach of the policy. He could not have intentionally set out to assist her in preparing to commit that breach. The breach is not the euthanisation of the dog, the breach is the breach of the policy, which happens to involve the euthanisation of the dog.

106. Accordingly, the second ingredient cannot be established.

107. The third ingredient is that the breach which Mrs Kemp committed was one that Mr Talbot intended would be committed. Again, it is not the putting down of the dog, it is the breaching of the rule. It is not that he actually encouraged her to do it but that she did the acts that make up the breach

and one of those acts must be not just the person, contrary to the policies, euthanasing a dog but that in fact it was contrary to the policy. While three might be established on certain limbs, it certainly cannot be established upon that assessment.

108. The fourth ingredient, which is established, that he knew at the time that he was doing these acts of the physical and mental nature of that which she was doing, which was euthanisation.

109. The fifth one, which is classically referred to, is when a person withdraws from a common enterprise, as it were. That is not relevant to these facts.

110. The respondent cannot establish one of the essential ingredients of an aid and abet breach for the reasons expressed.

111. The third charge, the breach of 86(n), is dismissed.

112. The appeal against the finding of the breach of 86 (n) is upheld.

SUBMISSIONS MADE IN RELATION TO PENALTY

113. The issue for determination of penalty is that the general rule is enlivened with the various powers, including a fine, suspension, disqualification, warning off. The facts need not be repeated.

114. The conclusion in respect of the facts is that the appellant is a person otherwise of good character who has an interest in the welfare of greyhounds, has always conducted himself in accordance with the rules, has a belief as to his duties, which to this extent have been found misplaced in part today, but it did drive his actions.

115. The penalty issue really does focus upon what is the failure being found against him. Firstly, it is that he was ignorant of the rule. And unfortunately it was a rule that deals with matters of considerable importance to the welfare of the industry.

116. The other key factor is that whatever his failures were, the result was one which, whilst the greyhound was put down, it was not done so in circumstances which in other places might be called aggravation or, importantly, which would have made his conduct worse. Everything that was done was done by a veterinary surgeon in a humane way and in discreet circumstances. Those are the findings.

117. He has not himself in fact engaged in the improper putting down of a greyhound. This is not a case where, for example, he has taken it out and hit it on the head with a hammer or taken several shots to put it down or

anything of those rather unpleasant things that have driven concerns outside the industry about the industry in the past. This is not a mass grave case or anything of that nature. It is that a trainer, driven by a belief that he had a duty to do something, unfortunately not associated with an understanding of limitation on what he could do, has done what he thought was his duty and appropriate.

118. He will not reoffend. The need for a special message to him diminishes. It really becomes a question, unaided by parity or precedent, what message must be given to the industry at large and, of course, importantly, because there is publicity, to the public. What is an appropriate loss of privilege as a result of those failures as described?

119. Firstly, that message does require that there be disqualification. With respect to the Inquiry Panel and their expertise, noting that they were driven by a policy that in places talked about 10 years' disqualification for other related conduct but not the charges before them, being obviously and deeply and properly concerned about the welfare of the industry and the matters that drove them into an inquiry, in this Tribunal's opinion, found an excessive penalty.

120. When it comes to considering parity of what might be described as co-offender figures, the Tribunal does not find itself able to adopt a four-year or two-year penalty for various breaches committed by the owner as warranting the same type of loss of privilege for this appellant in his conduct.

121. The period of disqualification is merely reflecting a message to be given in a protective and non-punitive sense.

122. A period of disqualification of four months to date from 18 January 2019 is imposed in respect of each matter, to be served concurrently.

123. The appeal against penalty is upheld.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

124. Application is made for a refund of the appeal deposit. The orders available are forfeiture, refund or something in between.

125. There were three breaches alleged. In respect of one of those, he has been successful.

126. In respect of penalty he has been successful.

127. On an unscientific analysis, it could be found that he has succeeded in respect of two of the five issues that motivated him.

128. The Tribunal orders 50 percent of the appeal deposit refunded.
