

RACING APPEAL PANEL OF NEW SOUTH WALES

APPEAL OF LICENSED TRAINER MR TREVOR SUTHERLAND

Appeal Panel: **Mr R. Beasley SC (Principal Member); Mrs J. Foley; Ms J. Madsen**

Appearances: **Mr M. Van Gestel for Racing NSW**
Ms V. Heath, Barrister (instructed by Mr P O’Sullivan), for the Appellant

Date of Hearing: **6 November 2020**

Date of Decision: **24 February 2021**

REASONS FOR DECISION IN RELATION TO APPEAL AGAINST FINDING OF BREACH OF LR114(5)(e)

Introduction

1. Following an investigation, at a Stewards’ hearing on 8 September 2020 licensed trainer Mr Trevor Sutherland was found to be in breach of Local Rule 114(5)(e) which provides as follows:

“LR114 Equine Welfare

...

(5) Further to AR64JA(1), where a decision has been made to retire a horse, or not to commence racing an Eligible Horse, and that horse has been domiciled in New South Wales for the majority of its life:

...

- (e) the horse is not to be, directly or indirectly, sent to an abattoir, knackery or similarly disposed of.”

2. The particulars of the charge were as follows:

“...licensed trainer Mr Trevor Sutherland did dispose of the registered thoroughbreds Redfu and Rozzi on or around 8 April 2020, to Mr Donnchadh Brown in the knowledge that Redfu and Rozzi would be slaughtered for the purpose of using the said horses for dog food.”

3. At the hearing on 8 September 2020, Mr Brown pleaded guilty to a breach of LR114(5)(e) concerning the disposal of the horses Redfu and Rozzi (and two other horses) in breach of the local rule. He was penalised by way of a disqualification for 4 years.

4. Also on 8 September 2020, Mr Sutherland pleaded guilty to a breach of AR52 for failing to lodge a relevant Death Notification Form with Racing Australia for the horse Bless You Toby. He also pleaded guilty to a breach of AR229(h) which relates to making a false declaration in connection with the administration or control of racing. The particulars of that charge were that:

“On 13 July 2020 [Sutherland] declared through the lodgment of a stable return that Bless You Toby was spelling at Yass when such declaration was false as he was aware that Bless You Toby had been found to be deceased on 7 July 2020.”

5. For the finding of breach of LR114(5)(e), the Appellant was disqualified for a period of 3 years. In relation to his pleas of guilty to breaches of AR52 and AR229(h), he was penalised with a disqualification for a period of 6 months, but both of those penalties are to be served concurrently with the 3-year disqualification imposed for the breach of LR114(5)(e).

Appeal

6. Mr Sutherland has appealed to the Panel in relation to both the finding of breach of LR114(5)(e), and in relation to the severity of the penalty imposed upon him. He has also appealed against the severity of the penalties imposed upon him for the breaches of AR52 and AR229(h).

7. These Reasons for Decision deal only with the appeal against the finding of breach in respect to LR114(5)(e). The appeal hearing took place on 6 November 2020. Mr M. Van Gestel, the Chairman of Stewards and Head of Integrity of Racing NSW, appeared for it, and Ms V. Heath, Barrister, appeared with leave for the Appellant.
8. At the appeal hearing, an Appeal Book was tendered containing the evidence from the hearing in front of the Stewards, together with the various exhibits from the Stewards' Inquiry. Mr Sutherland also gave sworn evidence at the appeal hearing, as did Mrs Stephanie Sutherland, his wife. A series of witness statements were also tendered, some of which are referred to below.

Evidence

9. The Appellant has been a licenced trainer for about 20 years. He operates TG Sutherland Racing Stables at Wagga Wagga. He can have up to 60 horses at a time in his care, and has a 50ha property behind his stables. His association with horses and horse racing is lifelong. Ignoring for now the evidence concerning the charge under LR114(5)(e), there is evidence that he has long cared for horses, including horses who are "difficult" horses, and has a history of re-homing them. He has been a successful country trainer, but has very limited formal education. He is unlikely to be offended by the observation that his written and verbal skills reflect that he left school at a very young age.
10. The horses Redfu and Rozzi had both been bred and trained by the Appellant: Ex 6; Ex 7. Redfu was a 7-year-old gelding, that appears to have had his last race start at Wagga on 10 December 2019: Ex 7. Rozzi was a 5-year-old mare who also appears to have had her last race start at Wagga on 25 November 2019: Ex 7. The horses were retired shortly thereafter to Mr Sutherland's property. There is no doubt that on about 8 April 2020 he gave both horses to Mr Brown. There is equally no doubt that at some time shortly after that, Mr Brown shot the horses in a paddock at his property in Yass. Their meat was subsequently given to Mr Brown's dogs as food: Ex 2.

11. Having considered the evidence below, the task for the Panel in this appeal is to determine the intent of the Appellant when he gave Redfu and Rozzi to Mr Brown on or about 8 April 2020. Once a finding is made in relation to that, it is necessary for the Panel to determine what it sees as the proper construction of LR114(5)(e), in order to judge whether the Appellant should be found to have breached the rule. Set out below is the evidence that we consider of most relevance to the factual finding we must make.

Evidence of Mr D. Brown

12. Although not direct evidence from Mr Brown, Ex 2 is a letter from Dr Carly Garling (an official veterinarian and Welfare Officer for Racing NSW) to Mr Van Gestel dated 17 August 2020. In her letter, Dr Garling informed Mr Van Gestel that she had contacted Mr Brown on 14 August 2020 by email, concerning the horses Rozzi and Redfu. It would appear then that on 17 August 2020, Mr Brown contacted her and gave her certain information in relation to those horses. He confirmed that the horses had been given to him by Mr Sutherland. Her letter then contained the following:

- “7. *Mr Brown also stated that he was given those two horses as he had many working dogs.*
8. *When I asked Mr Brown if that meant he used the horse meat to feed his working dogs, he confirmed this was correct.*
9. *I asked Mr Brown if these horses were shot, and this is how they were euthanized? He confirmed this was correct.*
10. *I asked Mr Brown if the trainer who had given him these horses (Mr Sutherland) was aware of this. Mr Brown confirmed that Mr Sutherland was aware.*
11. *Mr Brown also stated that Mr Brown [this should have read “Sutherland”] rehomes the majority of his horses, however the ones he couldn’t find a home for, he gave to Mr Brown for pet food.”*

13. On 21 August 2020, Mr Brown was interviewed by Stewards acting on behalf of Racing NSW. They prepared a record of interview which is Ex 9. Mr Brown told the Stewards that he had been sent a text message by the Appellant in relation to the

horses Redfu and Rozzi (that message is outlined in full below). Mr Brown told the Stewards that the Appellant knew that he used horses for a form of hunting, and had dogs that “we do feed flesh from time to time”. He said that he had ridden both Redfu and Rozzi after they arrived at his property, but he deemed them unsuitable for either hunting or jumping. That was why he made the decision to shoot the horses and give their meat to what he describes as his “hounds”. When asked by Stewards whether Mr Sutherland knew that if he deemed the horses not suitable for hunting and jumping, they would be killed for dog food, he answered: “as far as I am aware”. There was then this exchange between the Stewards and Mr Brown:

“J. Shultz: But you do maintain that Mr Sutherland knew that they were coming here?

D. Brown: Yes.

J. Shultz: And they were going to be used as hound food?

D. Brown: Yes.

J. Shultz: Any idea why Mr Sutherland would know that, that they were going to be used as hound food?

D. Brown: Since we’ve had horses with Trevor, he knows what I do and that I have the hounds, and so on and so forth, yeah, so we’ve had probably unofficial conversations, you know, chats – not probably one-on-one, there’s probably been half the stable there, half the stable had been there, type of thing, you know?

J. Shultz: In those conversations you have had with Mr Sutherland, have you ever said, “If you’ve got something that is dangerous or something like that, I’m happy to take it”?

D. Brown: No, no.

J. Shultz: Had he ever asked if you would take a horse to be used for hound food?

D. Brown: No, no.”

14. Mr Brown also gave evidence at the Stewards hearing conducted on 8 September 2020. During that hearing, Mr Brown gave evidence about a “plan A and a plan B”. He explained that plan A involved trying the horses out to see if they were suitable as jumping/hunting horses. Plan B (which is what happened) clearly involved

shooting the horses for food for his dogs. Mr Brown also gave the following evidence:

“Chairman: So when you picked up these two horses, Redfu and Rozzi, was there any discussion between yourself and Mr Sutherland about these horses going?

D. Brown: Yes.

Chairman: Was there discussion about if they didn’t work out as a jumping course that they were to be slaughtered and fed to your dogs?

D. Brown: No.

Chairman: You never said that to Mr Sutherland?

D. Brown: I did not.

Chairman: Are you certain about that?

D. Brown: I’m certain.” (8.9.20, p.22.1059-1079)

15. Mr Brown was also questioned about the evidence he had given to Mr Shultz on 21 August 2020, and in particular where he had said “as far as I’m aware” when questioned about whether Mr Sutherland understood that if the horses were unsuitable to hunt and jump that they would be “put to the hounds”. The evidence was as follows:

“D. Brown: Yes, as far as – as far as I’m aware, but again that’s neither – I presumed he knew so-

Chairman: You presumed he knew?

D. Brown: I just presumed.

Chairman: So the answers that you’ve been providing to Dr Garling and to Mr Shultz are you saying that those answers were provided on the basis that you presumed that he knew what was going to happen?

D. Brown: Correct.

Chairman: Is that truthful evidence, Mr Brown?

D. Brown: Yes, yeah.

Chairman: You say that you never had a conversation with Mr Sutherland about horses going to be shot and used for hound food?

D. Brown: No.

...

W. R. Birch: Mr Brown, on what basis did you presume?

D. Brown: Trevor rehomes a lot of horses, okay, and he knows what I do.

W. R. Birch: When you say he knows what you do, in what sense?

D. Brown: He knows that I take in horse [sic] and I try them and if they don't work for my job, well, I have another job for them.

W. R. Birch: And that is?

D. Brown: And that is their use for my dogs.

W. R. Birch: And Mr Sutherland is aware of that?

D. Brown: I presumed he was, but he said he-

W. R. Birch: On basis do you presume that?

D. Brown: I think it's widely known what I do for sport."

16. Mr Brown was not called to give evidence at the appeal hearing.

Evidence of Mr Sutherland

17. Mr Sutherland was first questioned by Stewards in relation to what had happened to Rozzi and Redfu on 20 August 2020. A transcript of that interview is part of the evidence: Ex 8. Mr Sutherland told the Stewards that he knew Mr Brown had a property in Yass, and that he had a hunt club. He said he had given Rozzi and Redfu to Mr Brown to "see if they'll jump". He said both horses were "big, reaching sort of horses", but as racehorses were "limited", an opinion confirmed by their race records. He said his understanding was that Rozzi and Redfu would be used by Mr Brown "for jumping and for the dogs to chase around". He had first denied that he knew anything about the horses being used potentially as meat to feed Mr Brown's dogs, stating: "I don't know anything about that, sir. As I said, as far as I know, he was taking them to jump them and give them a home, sir." His evidence was:

“I thought he was taking them to jump. He’s always said, “if you’ve got anything that can jump, I’ll take it and try it for jumping and, as I said, both of them were big, tall, rangy horses and he could jump with them.”

18. During the course of his interview however the Appellant was confronted with a text that he had sent to Mr Brown on 31 March 2020 (Ex 4) which was in the following terms:

TS: “If you need some hound food probly got 2 maybe 3 down the back paddock.”

DB: “Super, when do you want them gone?”

TS: “When ever suits talk to a bloke Tommo about I’ve got running with them probley get him as well.”

DB: “OK let me know what he says and I’ll come down Friday, what time do you finish riding out?”

TS: “Done bye 930 I’ll have ready for you.”

DB: “Righto, see you then.”

19. This text message exchange with Mr Brown was brought up in the interview with Stewards on 20 August 2020 in the following way:

J. Shultz: You were definitely aware that he had dogs there. Did it cross your mind that maybe that was what they might have been used for?

T. Sutherland: I supposed it did, sir, if they don’t make it, but I thought they’d make it.

J. Shultz: So you did have some knowledge that there was a chance that they might have been slaughtered?

T. Sutherland: Well, yeah, fed to the dogs, yeah.

J. Shultz: There is a message on 31 March, Mr Sutherland: “If you need some hound food, probably got two, maybe three, down the back paddock”. What do you say to that?

T. Sutherland: Yes, sir.

J. Shultz: So you did know they were-

T. Sutherland: Well, yeah, I knew there were hounds, sir, yeah but I thought they'd jump, so...

J. Shultz: There is no doubt that message on 31 March, “If you need some hound food” – I take that as the horses, you knew, were going there on a one way ticket to be slaughtered for pet food.

T. Sutherland: As I said, sir, I thought he'd jump them. I suppose if you put two and two together there's a chance that he can do what he likes with them afterwards. As I said, I thought they'd both jump, sir, you know, he's got a lot of horses there, so...

J. Shultz: I can recall Redfu racing, I know he used to be a horse that could hang.

T. Sutherland: Yeah, and he could just do things wrong, so I certainly wouldn't give him to a kid or anyone to get hurt, you know, and that's where we're going to end up, sir, you know, so many are out there that are just dangerous, sir, so it's going to get people hurt, and I'm not a person that will, you know – we rehome them, we do a lot of work, a lot of work in rehoming, and if they're not suitable – as I said, Donny is a very capable rider, you know, you see pictures of him on Facebook jumping six foot fences and that, so he can ride, and as I said both of them jump, I had no troubles riding them and I thought they'd both take to that pretty good.

J. Shultz: I put to you that Rozzi and Redfu were given to Mr Brown for pet food due to their mannerisms.

T. Sutherland: Well, yes, sir, my-

J. Shultz: And you didn't think they were suitable for-

T. Sutherland: Well, they weren't suitable for riding horses, and I thought that he might be able to get them jumping, you know, because I knew they could jump. I jumped them at home myself and I knew they could jump, and I thought they might take to it, you know? The option was up to him when he has them what he does with them, but-

J. Shultz: No, but it was definitely an offer made to Mr Brown for pet food.

T. Sutherland: Yes, sir, yeah.” (Emphasis added)

20. At the Stewards hearing conducted on 8 September 2020, Mr Sutherland said in his evidence that “the first option” was always for Mr Brown to try both horses as jumpers / hunters: T11.549-550. In relation to his text message of 31 March to Mr Brown (Ex 4), he said in answer to a question from Mr Van Gestel that in relation to the reference “food” he meant “well, they’re slow, just slow and the hounds would probably catch them ... I thought the hounds would probably catch them they were that slow”: T10.469-476. The following exchange then occurred:

“Chairman: I put to you what it means that you’ve got two, maybe three horses in the back paddock that you were going to send to Mr Brown so that he could use them for dog food.

T. Sutherland: No, sir, that’s not – you know, it’s not what I meant anyway. What I meant is what I said. They were slow horses and that was it. Like I said, it’s a bad choice of words and I’m not an educated man, sir, and, you know, as I said, Mr Brown had always asked me for jumping horses. Them horses cold jump. I jumped on the – we’ve got an arena set up where I do a lot of jumping and we do a lot of rehoming of our horses. We’ve rehomed so many horses and I do it at my own cost, don’t even charge the owners to keep them there to do it and then we do a lot of dressage or jumping work and I’d jump these horses and, you know, they were big brave, big brave jumping sort of horses. So I thought they might have suited and I suppose it’s just a bad choice of words, but that was all I meant.” (T10.481-497)

21. Mr Sutherland thereafter denied ever having a discussion with Mr Brown about the later slaughtering horses for dog food. He maintained that “these horses were going to a jumping home”: T17.829. He denied knowing that Mr Brown fed horse flesh to his dogs: T33.1630-1648.

Evidence before the Panel

22. At the appeal hearing, Mr Sutherland gave evidence of having a conversation with Mr Brown in which Brown said to him “If they don’t make jumpers, I would normally find other places for them”: T19.939. The assertion that Mr Brown would

normally find other places for the horses if they did not make jumpers was not something that Mr Sutherland had previously told Stewards.

23. During the course of his evidence, Mr Sutherland gave a further description of both horses as being large and somewhat difficult to handle, but the sort of horses that he thought “suited the criteria that Mr Brown wanted”, and that as a “world class rider” he thought Mr Brown would have “no trouble riding them ... I thought, well, these horses have an opportunity here and I give them an opportunity”: T22.1049-1065.
24. In relation to the text message that he sent Mr Brown (Ex 4), Mr Sutherland’s evidence was that it was a “joke”. He described having a previous conversation with Mr Brown at the races where he had said of the horses: “Well, they’re not real fast. You’ll probably end up hound food.”: T23.1146-24.1155. He said it was a “bad choice of words”, but “tongue in cheek” and the text was simply to remind Mr Sutherland of their prior conversation. He gave similar evidence when examined by Mr Van Gestel about this text message: T37.1831-38.1849. He denied that he had ever had a conversation with Mr Brown about slaughtering racehorses: T44.2174-2179. He said that he knew that there was a rule that prohibited him from sending horses to a knackery or abattoir and asserted again that he had sent Redfu and Rozzi to Mr Brown “as jumping horses”. He said he “thought they went to a good home and would have every opportunity”: T49.2430-2431. He repeated this evidence when he said:

“No, sir. As I said, the rule was you can’t send it to a knackery. I didn’t send it to a knackery. I give these horses a home, a chance to be rehomed at Don Brown’s. He is a world class rider, who assured me if I can ride them, he would ride them, so I felt safe in letting Mr Brown have these horses because never – I never once ever had a conversation about slaughtering racehorses, never ever with Don Brown.” (T51.2505-2509)

Other Evidence

25. The Panel has considered all of the evidence in the Appeal Book and provided in written statements, but the following evidence is of most significance.

26. Mrs Stephanie Sutherland gave oral evidence, and a statement of hers dated 6 November 2020 was also tendered: Ex A7. In her oral evidence, Mrs Sutherland agreed that the Appellant had told her that he thought that both Redfu and Rozzi were “too dangerous to give to anyone other than Mr Brown”: T56.2758. She also explained that on the day that Redfu and Rozzi were collected by Mr Brown, the horses had their feet trimmed, and had been groomed by Mr Sutherland that morning: T60.2942-2964. In her written statement, she gave evidence of having had a discussion with Mr Brown some years back where he indicated that he was always “keeping an eye out for jumping and hunting horses” and he would be interested in taking any suitable type horses the Sutherlands had: Ex A7 at [18].
27. A statement of Mr Shane Wilson dated 2 November 2020 was also tendered: Ex A6. Mr Wilson is currently employed as a stable foreman for Darryl Burnett in Wagga, but had previously been employed as the stable foreman for the Appellant. In his statement he said that he had conversations with Mr Brown about providing Brown with horses suitable for jumping and hunting. He said he had never heard Mr Brown say anything about “killing horses or using horses for dog food”: Ex A6 at [17]. He knew Mr Sutherland had been asked by Mr Brown to take Redfu and Rozzi, but there was no discussion that either of those horses would be killed: Ex A6 at [18]. Mr Wilson also said that he knew the Appellant gave two other horses to Mr Brown - Hanging with Willy and Witchblade. He referred to a conversation where Brown said those horses would be given “every opportunity” in Brown’s “business”, which Mr Wilson took to mean hunting and jumping: Ex A6 at [31].
28. A statement was tendered of a Ms Leona Watson dated 30 October 2020 (Ex A2) in which Ms Watson gave evidence of various of her horses that the Appellant has rehomed: Ex A2 at [7]-[8].
29. A statement was also tendered from Chloe Mannell dated 2 November 2020: Ex A3. She is a trackwork rider who has been employed by the Appellant. While she was not present when Mr Brown collected Redfu and Rozzi, she said in her statement that she was present when he collected the horses Hanging with Willy and Witchblade. She stated she overheard a discussion where Mr Brown “said words to

the effect that he was an accomplished horseman and could handle the horses and that they would get them going and they would work for him”: Ex A3 at [14].

Findings of Fact

30. In their submission to the Panel, the Stewards’ position is that the Appellant’s text message to Mr Brown of 31 March 2020 (Ex 4) is clear evidence that he was offering Redfu and Rozzi to Mr Brown to be used as food for his dogs: Stewards submissions at [10]. They say this interpretation is also reinforced by the Appellant’s answers to Mr Shultz when interviewed on 20 August 2020, particularly where he answered “Yes, sir, yeah” to the proposition “But it was definitely an offer made to Mr Brown for pet food”: Stewards submissions [15], and see [19] above. They also note the evidence of Mr Brown given on 17 August (this is Dr Garling’s interpretation of what Mr Brown said) and 21 August 2020 in which he asserted that the Appellant was aware that the horses would be used for dog food. At the Stewards hearing of 8 September 2020, Mr Brown changed this evidence to saying that he “presumed” that the Appellant had this knowledge, but the Stewards submission is that the truthful evidence was given when he was interviewed on 14 August and 21 August 2020: Stewards submissions at [22]. As to this submission, the Panel does not consider Mr Brown gave untruthful evidence. Rather, we think it is highly likely that what he had said to Dr Garling about the Appellant’s knowledge was a presumption. In any event, and not forgetting the importance of the text message, we are not satisfied there was any discussion between the Appellant and Mr Brown where slaughtering or killing the horses was openly discussed.

31. Ms Heath for the Appellant in her submissions referenced the many occasions where the Appellant, both when interviewed by Stewards, again when he gave his evidence at the Stewards’ hearing on 8 September, and then in his evidence before the Panel on 6 November 2020, emphasised that he was giving Redfu and Rozzi to Mr Brown for those horses to be used as hunters and jumpers. She pointed to Mr Brown’s skills as a horseman which the Appellant was familiar with, and the fact that the horses were groomed and well-presented prior to being collected - something she submitted was inconsistent with the horses being given to Mr Brown in the knowledge that they would be immediately slaughtered for dog food.

32. In relation to the alleged admission to Mr Shultz on 20 August 2020 that he was making an offer to Mr Brown for the horses to be dog food, Ms Heath submitted that the Appellant misunderstood the question that was being asked, and that there is an important matter of context, specifically that immediately prior to saying “Yes, sir, yeah” to the suggestion that it was an offer made to Mr Brown for pet food, Mr Sutherland had said “Well, they weren’t suitable for riding horses, and I thought that he might be able to get them jumping, you know, because I knew they could jump”: Ex 8, T12.555-557. That answer is consistent with the following prior exchange between Mr Shultz and Mr Sutherland as follows:

“J. Shultz: There is no doubt that message on 31 March, “If you need some hound food” – I take that as the horses, you knew, were going there on a one way ticket to be slaughtered for pet food.

T. Sutherland: As I said, sir, I thought he’d jump them. I suppose if you put two and two together there’s a chance that he can do what he likes with them afterwards. As I said, I thought they’d both jump, sir, you know, he’s got a lot of horses there.” (Ex 8, T10.486-493)

33. Ms Heath also pointed to the Appellant’s history of rehoming horses as evidence against the proposition that he was providing Redfu and Rozzi to Mr Brown to be slaughtered for dog food.

34. In our view, when all of the evidence is considered, including all of the Appellant’s answers to Stewards during the course of their investigation, at the hearing of 8 September 2020, and then when the Appellant gave evidence before the Panel, we are comfortably satisfied that the Appellant was aware that there was a risk that Mr Brown could kill Redfu and Rozzi and then feed their meat to his dogs. Such a finding is consistent with the Appellant’s evidence, particularly those parts underlined in [19] above (“if you put two and two together there’s a chance”), taken together with his text message.

35. However, a fair reading of all the evidence makes us equally comfortably satisfied that the Appellant’s primary intent in giving Redfu and Rozzi to Mr Brown was for those horses to be used by Mr Brown as hunters and jumpers. Although the text the

Appellant sent to Mr Brown on 31 March 2020 (Ex 4) is obviously open to be interpreted as an indication that the horses were simply to be provided to Mr Brown to be used as food for his dogs, it is only one piece of evidence. The Appellant has described the text message as a poor choice of words, as a joke, and as a means of reminding Mr Brown of a prior conversation.

36. Certainly, the Panel agrees it was a poor choice of words. We also think it is an indication that the Appellant was aware that there was a prospect that these two horses could be killed by Mr Brown and used as dog food if they did not work out as jumpers and hunters. We do not consider, however, that this was the Appellant's main intent. We think his intent was for the horses to be taken by Mr Brown for the purpose of them being trialled, hopefully successfully, as hunters and jumpers. This carried with it the risk however, known to the Appellant, that they might prove unsuitable horse for this, and could ultimately suffer the fate they did.
37. Having made this finding of fact, it is now necessary for the Panel to construe the rule to see whether it supports a finding of breach.

Proper construction of LR114(5)(e)

38. LR114 was introduced to the Local Rules on 1 October 2017. Its purpose and objective "is to ensure the welfare of thoroughbred horses from birth, during their racing careers and on retirement" (LR114(1)). LR114(5)(e) should be construed consistently with the object of the rule. It should also be construed in the context of the provision as a whole, which while not set out in full here, contains a series of sub-rules which have the clear intent of promoting and ensuring the welfare of retired horses (and thoroughbreds that have not raced). LR114(5)(e) provides as follows:

"LR114(5) Further to AR64JA(1), where a decision has been made to retire a horse, or not to commence racing an Eligible Horse, and that horse has been domiciled in New South Wales for the majority of its life:

...

- (e) the horse is not to be, directly or indirectly, sent to an abattoir, knackery or similarly disposed of;

39. The Stewards submission is that the rule will be breached if a retired racehorse, like Redfu and Rozzi, is sent to a person or place with the knowledge that it will be killed for the purposes of use as food. In the Stewards submissions, the words “similarly disposed of” do not require it to be established that the horses are to be killed in a manner that in all respects resembles what would happen to them if they were sent to an abattoir or a knackery. All that needs to be established is that the horses are “similarly disposed of” in terms of outcome – that is, they are killed, for food.

40. Contrary to this, the submission made on behalf of the Appellant is that whilst the words “similarly disposed of” in the rule do not require exact “identity” of the way in which a horse would be killed at an abattoir or a knackery, it requires a “degree of likeness”: Appellant’s submissions in chief at [163]. The “similarity” that the Appellant submits is necessary for the rule to be breached, and that fit within the term “similarly disposed of” in LR114(5)(e) include:

- “(1) a building or place including holding yards where animals are slaughtered for food (abattoir) or animal food (knackery);
- (2) a commercial operation at industrial scale ...
- (3) for the purposes of sale of meat or processed food ...
- (4) the process of killing: in abattoirs and knackeries –
 - (i) animals are temporarily kept and processed for killing via concentration in a kill lot of pen;
 - (ii) animals are killed en masse, typically in a process lie;
 - (iii) animals are driven to their deaths along a race by use of electric prods ...
 - (iv) animals are driven into a stunning box or knocking box and restrained;
 - (v) once in a stunning box or knocking box, the animals are stunned or disabled by electric, physical or chemical means before the fatal injury is inflicted ...

(vi) after an animal is stunned, it is stuck and then shackled by a hind leg.” (Appellant’s submissions in chief at [175])

41. The submission made on behalf of the Appellant was that the method of destruction used by Mr Brown – whereby he shot Redfu and Rozzi in a paddock and then slaughtered them himself to feed their meat to his dogs – “had no similarity to the process of an abattoir or knackery”: Appellant’s submissions in chief at [177]. The ultimate submission put by Ms Heath for the Appellant was the following:

“The better construction is that “similarly disposed of” does not limit the application of the rule to food uses but requires not only that the sole purpose of the killing be the creation of a product but that the general nature and circumstances and processes involved bear a reasonable degree of similarity to an abattoir or knackery in those important respects that touch on the equine welfare concerns which motivated the rule. That is, disposal will be “similar” if it is by an operation at a commercial scale for the purpose of the creation of an animal product intended for resale or where the horse is killed using a method of destruction that results in death by exsanguination.” (Appellant’s submissions in chief at [186])

42. In construing this rule, the Panel’s task is to give the words used by the drafter the meaning that they are taken to have intended. “Taken to have intended” of course does not relate to the subjective intention of whoever drafted LR114. That is not known. All the Panel has to go on is the text of LR114, its stated purpose, and the application of common sense given that we are asked to interpret rules relating to the regulation, and protection, of the horse racing industry. Bearing all that in mind, at least in relation to the words “similarly disposed of”, we prefer the construction of the rule contended for by the Stewards. We hold this view even though we consider there is force in the argument put forward on the Appellant’s behalf. An approach using a somewhat economical use of words has been taken to the drafting of LR114(5)(e). However, we do not consider the words “similarly disposed of” need to have the elements or similar elements outlined in the Appellant’s submissions at [175]. In our view, the words “similarly disposed of” relate more to an end result – that is, a horse is disposed of (killed) for the purpose of its meat being used as food.

43. Both Mr Van Gestel and Ms Heath were in agreement that LR114(5)(e) requires knowledge and intent. That is, to be found in breach of the rule a person must know that the horse is “to be, directly or indirectly, sent to an abattoir, knackery or similarly disposed of”: T63.3095; Appellant’s submissions in chief at [192].
44. In the circumstances here, we have found that the primary intent of the Appellant in giving the horses Redfu and Rozzi to Mr Brown was for them to be used by Mr Brown to jump and hunt. While we have also found that the Appellant knew that there was a risk, once Mr Brown had possession of the horses, that they may not work out as suitable for hunting and jumping, and hence could be killed for meat for Mr Brown’s dogs, that was not the intent (destruction for dog food) with which the Appellant gave Mr Brown the horses. It was a risk that he knew could eventuate, rather than the intent that he had when giving the horses to Mr Brown.
45. Turning back to the words used in LR114(5)(e), the facts as found by us mean that what has occurred here is not caught by the rule. For the Appellant to be in breach of the rule, we consider that his intent must have been, in giving the horses to Mr Brown, that they would then be killed, and their meat used as food. That was not the Appellant’s intention. While knowing there was a risk that the horses could be destroyed for food, his intent was that they be used by Mr Brown for jumping and hunting. The fact that there was a risk that this would not work out, and the horses could subsequently be killed (as they were) is not a factual scenario that is caught by the rule. If the drafter wanted such a scenario to be caught by LR114(5)(e), then the rule should have, in our view, been drafted to incorporate such circumstances.
46. Accordingly, based on our factual findings as to the Appellant’s intent when sending the horses to Mr Brown, he has not breached LR114(5)(e). The appeal in relation to that finding of breach must be allowed, and the penalty imposed set aside.

Conclusions and Orders

47. There remains a severity of penalty appeal to be dealt with in relation to the Appellant’s pleas of guilty to the breaches of AR52 and AR229(h). Those appeals

should be heard as soon as possible. The orders made in the meantime are as follows:

- (1) Appeal in relation to finding of breach of LR114(5)(e) allowed.
- (2) Finding of breach of LR114(5)(e) set aside.
- (3) Penalty of a disqualification of the Appellant's licence for 3 years in relation to breach of LR114(5)(e) set aside.
- (4) Appeals in relation to penalties imposed for breaches of AR52 and AR229(h) to be heard as soon as reasonably possible.