JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 95/02

BEFORE: **THE HON. MR. JUSTICE HARRISON, J.A.**
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (AG.)

BETWEEN	**RALPH PORTER**	**APPELLANT**
AND	**THE JAMAICA RACING COMMISSION**	**RESPONDENT**

Sylvester Morris for the appellant

Audel Cunningham & Miss Stacyann Powell instructed by Dunn, Cox for the respondent

3rd & 4th December 2003 & March 30, 2004

HARRISON, J.A.

This is an appeal from the order of the Supreme Court (Hibbert, J.) on 25th July, 2002 refusing an application for judicial review by way of an order of certiorari to quash the decision of the Jamaica Racing Commission ("the Commission") made on 8th April, 2002 disqualifying the horse Slew Them Ranny, whose urine was found to contain a prohibited substance, and declaring the appellant to be guilty of negligence. He was fined a sum of $150,000.00 and warned off for two years.

The facts are that Ralph Porter (the appellant), the owner and trainer of the horse Slew Them Ranny, raced the said horse at a race meeting at Caymanas Park, St. Catherine on 1st September, 2001. The urine of the horse was taken and tested between the 3rd to the 7th September, 2001 by the

Commission. The primary sample of the said horse returned a positive finding of the drug morphine.

On 7th September, 2001 the Commission sent a letter to the appellant at an address "Johnson Pen, St. John's Road, St. Catherine," advising him of the finding of the prohibited substance on 1st September 2001 and informing him that the split sample would be tested within 48 hours and:

> "... should you wish to observe test please contact the Commission immediately."

The appellant did not then any longer reside at that address. His address then was "25 Morningside Drive, Havendale", as stated in his trainer's licence issued by the said Commission in July 2001.

On 19th September, 2001 the Commission sent to the appellant a further letter advising him that the testing of the split sample would be done at the University of the West Indies on 21st September 2001 and continuing, stated:

> "Please, therefore, be good to advise your elected observer
> of the testing date."

This letter was also sent to the Johnson Pen address.

By letter dated 26th September, 2001 again sent to the Johnson Pen address, the appellant was advised that on 24th September, 2001 the Racing Chemist confirmed his finding that the substance morphine was found in the urine sample of the said horse and that:

> "An investigation under Section 25 of the Jamaica Racing Commission Act will be held at which time you will be entitled to legal representation."

At page 16 of this record the report of the Racing Chemist, Paul B. Reece, Ph.D. dated 7th September 2001 revealed that the result of the test of the primary sample B-001916 taken from the said horse:

> "...is reported as positive, having contained indications of the presence of Morphine. Morphine is a synthetic substance which is usually used as a Narcotic Analgesic drug."

By a report dated 21st September 2001 the said Chemist stated that the split sample labeled B001916 taken on 1st September 2001 was analysed on 21st September 2001 and continuing said:

> "2. Based on the analysis, I found that the said sample showed the presence of Morphine, ..."

The Referee Chemist, James Kerr, in his report dated 23rd September 2001 said that he was present throughout the examination of the split sample on 21st September 2001, and at page 18, said:

> "The sample was labeled B-001916, and was reported as being drawn on September 1, 2001. The sample was analysed at the Chemistry Department, University of the West Indies.
>
> After thawing, sample B-001916 was observed to be dark brown in colour and slightly cloudy. The volume was approximately 200 mls. The pH was 7.37, the pH of the (A) sample was reported as 6.96.
>
> I was present throughout the examination. After examination of the data from the analyses, the presence of Morphine was confirmed in sample B-001916. The compound was easily seen on the GC profile and gave an excellent match.
>
> The duration of the analyses for September 21, 2001, was four hours and 50 minutes."

On 27th September, 2001 one Eustace Williams the Operations Steward on the instructions of the Commission visited the stables of the appellant where the horse had been housed and did an inspection in the presence of the appellant and a groom, one Clive Douglas. Mr. Williams in his report at page 24 of the record stated:

> "Mr. Porter's stables are (where security is concerned) in a very good condition. If the gates are locked and monitored, it is my opinion that, no unauthorized person should be able to gain access to any horse housed within."

The Commission appointed its tribunal under section 25 of The Jamaica Racing Commission Act ("the Act") to conduct an investigation into the matter. The appellant, in evidence before the tribunal stated that the chain link fencing to his stable "did not go up to the ceiling," thereby creating a gap so that a person could gain access to his stable from outside. He said that he complained about this gap to his landlord but it was not repaired. The hearing commenced on 17th December, 2001 and continued on 8th April, 2002. On the latter date the tribunal accepted the finding of the racing chemist that the horse Slew Them Ranny returned a positive finding of the prohibited substance morphine, and the report of Eustace Williams, the operations steward. Consequently, the tribunal disqualified the horse, found that the appellant had failed to rebut a presumption of negligence, imposed on him a fine of $150,000 and warned him off for two years.

Leave was granted on 8th May, 2002 to apply for judicial review, which was refused by Hibbert, J on 25th July 2002 resulting in the instant appeal.

The grounds of appeal as amended are:

> "1. the Jamaica Racing Commission was in error when it found that the appellant had not rebutted, on a balance of probability, the presumption of negligence on his part;
>
> 2. that the decision arrived at was in breach of natural justice and in breach of the Jamaica Racing Commission Rules".

The effect of the grounds is that the Hibbert, J should not have refused the appellant's application for judicial review because of the errors of the Commission.

The Jamaica Racing Commission Racing Rules, 1977, as amended on 1st July 2003 ("the Racing Rules 1977") are made pursuant to section 22 of the Act. It reads inter alia:

> "22. (1) ... the rules relating to horse-racing at racecourses (in this Act referred to as 'the Racing Rules') and any variations of such rules shall be prescribed by the Commission.
>
> (2) The Racing Rules may contain provisions relating to –
>
> ...
>
> (e) all such other matters, whether similar to the fore-going or not, relating to horses that are bred for racing and matters relating to racing, breeding, training and grooming as the Commission may from time to time require.
>
> (3) It shall be lawful for the Commission or its employees or agents to exercise such functions as may be prescribed by the racing Rules."

The consequences attendant on a horse, which ran in a race, and is found on examination to have a prohibited substance, the method of proof and the presumption of guilt which arises are circumscribed by Rule 207. It reads, inter alia:

> "207. (1) A horse which has been entered or declared to run in a race which on examination shows the presence in its tissues, body fluids or excreta any quantity
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> (a) of a Prohibited Substance; or
>
> (b) of any substance (other than a substance which can be traced to a normal nutrient) being a substance which by its nature could affect the speed, stamina, courage, conduct or racing performance of a horse
>
> shall be disqualified by the Commission for the race in question and may, at the discretion of the Commission, be disqualified for such time and for such races as it shall determine.
>
> (2) In any investigation held pursuant to section 25 of the Act the production of a certificate signed by the Racing Chemist shall be conclusive proof of all the facts therein stated.
>
> (3) A finding by the Racing Chemist that a Prohibited Substance ... is present in the sample taken from a horse ... shall unless the contrary be proved by the owner, trainer, groom or any person having the charge and custody or care of the horse, be proof that the horse was administered such substance ... that, in the case of a sample at any time taken at any time in the period commencing three days immediately prior to the day of a race in which the horse has participated and ending on the expiration of three days immediately after the day of a race in which the horse has participated, the horse carried the said substance ... in or on its body while participating in the race. ... Any such finding as aforesaid shall unless the contrary be proved by any

> of the persons aforesaid, also be proof that the said substance was one which by its nature could affect the speed, stamina, courage, conduct or racing performance of such horse and that the trainer, groom and any other person having the charge, custody or care of such horse has been negligent in the charge, custody or care of such horse."

The Commission is empowered to appoint a Racing Chemist for the purpose of "the analysis of all samples taken from horses or otherwise" (rule 14). This rule also obliges the Commission:

> "... if the report indicates that there may have been any infringement of the Rules, as early as possible hold or cause to be held an enquiry to determine whether or not any such Rules have been infringed."

The procedure to be adopted in respect of the sample which is taken is recited in rule 14A (1):

> "14A. (1) Subject to there being a sufficient quantity of the sample being taken all samples collected from a horse or the dead body of a horse shall be split into two parts one portion (hereinafter called 'the primary portion') shall be delivered to a Racing Chemist for testing and analysis. The remaining portion (hereinafter called 'the split portion') shall remain in the custody of the Commission and shall be preserved in the same condition as near as possible."

The procedural approach to the further analysis of the sample differs, depending on whether the initial test of the primary portion returns a finding "suspicious for" or a finding "positive for", a prohibitive substance.

Rule 14A(3) reads:

> "(3) In the event that the racing chemist reports a finding of tests suspicious for a prohibited substance and/or Furosemide overage, the remainder of the primary sample (if any) and the split portion of the

> sample shall be submitted for further testing and analysis either by the same racing chemist to whom the primary portion of the sample was delivered or by another racing chemist selected by the Commission. ... Any test pursuant to the provisions of this sub-paragraph of the split portion of the sample shall be carried out by the said racing chemist in the presence of another chemist designated by the Commission. In the event that as a result of the tests carried out pursuant to this sub-paragraph a finding positive for a prohibited substance and/or Furosemide overage is reported to the Commission the same shall be considered prima facie evidence for the purposes of Rule 207."

However, rule 14A(4) reads:

> "(4) In the event that the racing chemist to whom the primary portion of the sample was delivered pursuant to sub-paragraph (1) hereof reports a finding positive for a prohibited substance and/or Furosemide overage then if the trainer or owner of the horse from whom or of the dead horse from whose body the sample had been taken requests pursuant to sub-paragraph (7) of this Rule that the split portion be tested or the Commission pursuant to sub-paragraph (7) of this Rule directs that the split portion be tested, the split portion of the sample which remains in the custody of the Commission, shall be tested by the racing chemist who reported the positive finding in the presence of another chemist designated by the Commission. In the event that no such request as aforesaid is received by the Commission from the trainer or owner as aforesaid and no such direction as aforesaid is made by the Commission the report of the finding of the racing chemist in regard to the primary portion of the sample shall be considered prima facie evidence for the purposes of Rule 207."
>
> (Emphasis added)

Sub-paragraph (4), therefore, contemplates the involvement of "... either the owner or trainer of the horse", as provided by sub-paragraph (7), in

circumstances where, the racing chemist reports "a finding positive for a prohibited substance." Sub-paragraph (7) reads:

> "(7) In order that the split portion of a sample be tested otherwise than in accordance with the sub-paragraph (3) of this Rule, either the owner or trainer of the horse or the dead horse from whom the sample was taken shall request in writing to the Commission that the split portion be tested, such request being received by the Commission within two days after notification to the trainer of the initial positive test or failing the receipt by the Commission within the said period of such a request as aforesaid the Commission, in its absolute discretion on the third day after notification to the trainer of the initial positive test directs that the split portion be tested."
>
> (Emphasis added)

Notification ought, therefore, to have been properly given to the "owner or trainer" to enable him to have the option to make the request for the test of the split portion, as provided for by sub-paragraphs (4) and (7).

The evidential value of the result of the analysis of the split portion of the sample is emphasized by sub-paragraph (5). It reads:

> "(5) If the test of the split portion made either at the request of the trainer or owner as aforesaid or by the direction of the Commission as aforesaid substantially confirms the findings of the racing chemist in regard to the primary portion it shall be considered prima facie evidence for the purposes of Rule 207."

Judicial Review, concerned as it is, not with the decision itself of the tribunal, but with the manner in which the decision is made, will look at the wide ambit, including the steps leading up to the decision.

Administrative tribunals, accordingly, have a duty to act fairly in the exercise of its powers. Acting fairly includes the right of an individual to be told of

charges against him and the right to be heard in his defence (***Ridge v. Baldwin*** (1964) A.C. 40). It also includes an obligation on an administrative tribunal to follow statutory procedural steps laid down for the benefit of persons likely to be affected thereby.

Statutory provisions, such as service of notices on a person to be affected by the action of an administrative tribunal, are expected to be observed. However, their non-observance will not inevitably result in the grant of judicial review by the courts.

In Administrative Law by ***Wade & Forsythe,*** 7th edition, at page 253 observe:

> "Acts of Parliament conferring power on public authorities very commonly impose conditions about procedure, for example by requiring that a notice shall be served or that action shall be taken within a specified time or that the decision shall state reasons. If the authority fails to observe such a condition, is its action ultra vires? The answer depends upon whether the condition is held to be mandatory or directory. Non-observance of a mandatory condition is fatal to the validity of the action. But if the condition is held to be merely directory, its non-observance will not matter for this purpose. In other words, it is not every omission or defect, which entails the drastic penalty of invalidity.
>
> The distinction is not quite so clear-cut as this suggests, since the same condition may be both mandatory and directory: mandatory as to substantial compliance, but directory as to precise compliance."

The said authors, at page 255, also observe:

> "Procedural safeguards, which are so often imposed for the benefit of persons affected by the exercise of administrative powers, are normally regarded as mandatory, so that it is fatal to disregard them.

> Where there is a statutory duty to consult persons affected, this must genuinely be done and reasonable opportunity to consult must be given."

In ***Bradbury v. Enfield LBC*** (1967) 1 WLR 1311, where it was held that the statutory procedure under the Education Act for notice was required to be followed before the Minister could approve the scheme, Danckwerts, L.J. at page 1325 said:

> "... it is imperative that the procedure laid down in the relevant statutes be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law, and it is essential that bureaucracy should be kept in its place."

In addition to the statutory requirement of notice, there may exist as well an established practice of conduct by the administrative body giving rise to a legitimate expectation on the part of persons concerned that the practice will not be discontinued without prior notice (***Council of Civil Service Unions v. Minister for the Civil Service*** [1985] A.C. 374).

Although, at first, the principle of legitimate expectation was considered to be referable to natural justice, the right to a hearing, or the right to be consulted before a decision is made, it has been extended to a right to a procedural protection based on an established practice. In the ***Council of Civil Service Unions*** case (supra), Lord Fraser, at page 401, said that a legitimate expectation can arise:

> "either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

That appeal against the refusal to grant judicial review of the refusal of the Minister to conform to the established practice of consulting prior to making the decision was dismissed by the House of Lords, but for other reasons.

In the instant case, it is convenient to examine first, ground 2. Ground 2 complains, on the broad basis, that the tribunal's decision ignored the breach of natural justice by the Commission in that the tribunal should have found that the breach was committed because the appellant was not served with the requisite notice in accordance with Rule 14A.

The letters dated 7th September 2001, exhibit 10, and that dated 19th September 2001, exhibit 2, both of which informed the appellant that the split sample would be tested, invited the appellant or his "elected observer", to attend and observe the test, if he wished. Both letters were sent to the "Johnson Pen" address where the appellant, in terms of his current licence, no longer resided. There was, therefore, no valid notification to the appellant.

Exhibit 10 did however, refer to "the presence of a prohibited substance", and also referred to "Drug: Morphine," thereby clearly indicating that the Commission was proceeding under the provisions of Rule 14A(4), which concerns "... a finding positive for a prohibited substance ...". A later letter to the appellant dated 23rd October 2001 advising him of the investigation of the tribunal to be held on 12th November 2001 was sent to an address "29 Morningside Drive", and was apparently received by him.

The appellant was present and represented at the hearing.

Whenever the racing chemist on testing the primary sample reports a finding "suspicious for a prohibited substance" (emphasis added) the remainder of the primary sample, if any, remains and the split portion shall both be further tested, either by the same racing chemist or by another racing chemist selected by the Commission, in the presence of another chemist designated by the Commission. If this later test results in a finding "positive for a prohibited substance ..." the same is to be considered to be prima facie evidence for the purposes of Rule 207 Rule 14A(3). No notification is required to be given in these circumstances, nor is the owner or trainer involved in the process.

On the contrary, however, under Rule 14A(4) if the racing chemist on testing the said primary sample reports a finding "positive for a prohibited substance" (emphasis added), the owner or trainer of the horse must be notified of the finding, in order that he may be able to request, if he wishes, that the split portion of the sample be tested: Rule 14A(7). If the owner or trainer makes such a request, or if the Commission, on its own initiative, directs that the split portion be tested, it shall be tested by the racing chemist who reported the positive finding "in the presence of another chemist designated by the Commission".

It is significant that under the provisions of Rule 14A(4):

(a) the owner or trainer is not given a right to be present at the testing of the split portion,

(b) the same racing chemist effects the tests of both the primary and split portions of the sample,

(c) the other chemist is merely present at the testing of the split portion. He is not authorized to participate in the actual chemical analysis.

Looking at the whole scheme of the Act and the Rules it is my view that the requirement of notice to be given to the trainer or owner is mandatory in so far as such a person must be afforded the opportunity to request a test of the split portion and to be present if he or she wishes. The breach of this mandatory provision is not, however, prejudicial in that the Commission, itself may direct that the split portion be examined.

The notice is also directory in so far as the said trainer or owner may be present at the testing of the split portion though only as a mere observer. He has no right to be heard nor to present his case then, the testing being in the nature of a chemical analysis. In that regard the trainer or owner not having been served with a notice, is not fatal to the proceedings so as to give rise to judicial review. The integrity of the actual scientific testing was not challenged by the appellant. Ground 2 therefore fails for that reason.

The appellant's right to be present at the testing of the split sample, after notification arises not under the statutory provisions of Rule 14A(4) and (7) but may arise from "... the existence of a regular practice which the claimant can reasonably expect to continue..." (***Council of Civil Service Unions*** case, supra), that is, a legitimate expectation. The appellant said had he been made aware that the horse had tested positive on 7th September 2001:

> "I would get an observer to do the second testing, find out whether or not it carried the substance."

A witness, Vincent Edwards, Vice Chairman of the Trainer's Association said that if there is a positive finding at the first testing of samples both he and

the trainer would be advised and, as the trainer's representative, he would attend as an observer:

> "To participate with the referee chemist and the lab technician who previously tested, in the final test."

Legitimate expectation is a principle of fairness in which the decision-maker should not arrive at a determination of the issue without giving the person affected the opportunity to be heard, to state his case or to be consulted. It amounts to procedural fairness. In my view, the fact that the appellant was deprived of the opportunity to be present, as an observer, at the testing by chemical analysis, of the split portion of the urine sample, is not sufficient to amount to deprivation of a legitimate expectation justifying judicial review.

Rule 14A does not provide for the observer to "do the second testing ..." or permit the observer to "participate with the referee and the lab technician." There is no evidence of any existing practice of actual participation in the tests, by the observer. Nor did the witness Edwards suggest that he ever actually participated or had an observer with scientific knowledge who so participated.

However, if I am wrong in my view that in the circumstances of the case there was no prejudice as far as the mandatory provisions of the notice to the trainer are concerned, nor any legitimate expectation arising from the appellant's absence from the testing of the split portion of the sample, judicial review to quash the tribunal's finding should, nevertheless, be refused for the further reason of the nature of the relief sought.

The appellant submits that this Court should set aside the decision of the Court below, and order that certiorari issue to quash the decision of the tribunal.

Certiorari is a discretionary remedy which a court may decline to issue in some circumstances even though the tribunal in question has erred. In *Administrative Law by Wade & Forsythe*, (supra), the authors, at page 718 said:

> "The ... remedies ... declaration, injunction, certiorari, prohibition, mandamus are discretionary and the court may therefore withhold them if it thinks fit. In other words, the court may find some act to be unlawful but may nevertheless decline to intervene.
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> Such a discretionary power may make inroads upon the rule of law, and must therefore be exercised with the greatest care. In any normal case the remedy accompanies the right. But the fact that a person aggrieved is entitled to certiorari ex debito justitiae does not alter the fact that the court has power to exercise its discretion against him, as it may in the case of any discretionary remedy. This means that he may have to submit to some administrative act which is ex hypothesi unlawful. For, as has been observed earlier, a void act is in effect a valid act if the court will not grant relief against it."
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> (Emphasis added)

In ***R. v. Monopolies & Mergers Commission, ex parte Argyll Group Plc*** [1986] 1 WLR 763, a take-over bid was referred to the Commission, whose chairman, satisfied that the controversial parts of the proposals were abandoned, obtained the Secretary of State's permission to discontinue the reference. The Commission itself and not the chairman should have obtained the said permission, which was therefore ultra vires. A rival company applied for and was refused certiorari to quash the Commission's discontinuance of the reference. The Court of Appeal took the view that the Commission would have reached the same conclusion as the chairman and that substance therefore should prevail

over form. Accordingly, although the action of the chairman was unlawful certorari was refused.

In the ***Council of Civil Service Unions*** case, (supra), although it was found by the Court of Appeal and approved by the House of Lords, that the unions and employees had a legitimate expectation that they would be consulted by the Minister prior to making her decision and not having done so she acted unfairly, judicial review was refused, on the ground of national security. (See also ***Coney v Choyce*** [1975] 1 WLR 422)

In the instant case, the facts reveal that the Commission itself ordered that the split portion of the sample be tested. The chemical analysis was done. This is the exact result that would have been achieved by the appellant had he been given the proper notification. This is a proper objective approach. More significantly, in that respect, the appellant is not impugning the integrity of the test. On the contrary the appellant, through his counsel did not challenge the nature of the chemical analysis.

The drug morphine was in fact found in the urine sample of the said horse. Mr. Morris of counsel, submitted to the tribunal:

> "... there was irregularity, the procedure was not carried out, I am not saying a true test was not done; I am saying my client was deprived of the rights given to him." (Emphasis added)

This was a virtual admission that the appellant had the knowledge that the result of the test by chemical analysis would not be otherwise than positive for morphine.

The true structure of the Rules, accepts as conclusive, a test which "reports a finding positive ...," for morphine. Consequently, a finding of tests of the primary sample:

> (a) "suspicious for ..." morphine, which on further testing of the split sample, the chemist reports a "finding positive for morphine, (Rule 14A (3)) or
>
> (b) "... positive for ..." morphine, and after the trainer is notified, no request is made, nor any direction given by the Commission that the split sample be further tested;

the result shall be considered prima facie evidence for the purposes of Rule 207. In neither case would the trainer have been present at the testing.

The authors of **de Smith Constitutional and Administrative Law**, 5th Edition by **Street and Brozier** at page 619, discussing the principles governing the discretion of the court in awarding certiorari, said:

> "Certiorari may also be refused because to award it would serve no useful purpose."

A court must, indeed, look at substance and not at form. The test of the split portion of the sample was in fact done as the appellant could have requested and it confirmed the initial positive test. That is prima facie evidence sufficient for the purposes of Rule 207. There is nothing to suggest that the chemical test was flawed. It is worthy of note to repeat that the appellant was not challenging the validity of the test. He was virtually admitting that the test was unassailable. For those reasons also, the discretionary remedy of certiorari was properly refused.

Ground 1 is a complaint that the tribunal should not have concluded that the appellant had not rebutted the presumption of negligence.

This ground may only be considered on the basis of the non-evidence rule, in view of the provisions of section 28 of the Act.

> "28. All decisions of the Commission given in respect of any matter which falls within its functions shall be final."

If a tribunal arrives at its decision in the absence of any evidential material of a probative value, its decision will be seen as an error of law and accordingly found to be invalid: (See ***Attorney-General v. Ryan*** [1980] A.C. 718).

In the instant case not only was there ample evidence, but in addition there arose, a burden on the appellant to displace the presumption of negligence.

The presumption of negligence that arises under Rule 207(3), is a rebuttable presumption, that a person, "having the charge and custody or care of the horse", such as the appellant, who was the owner and trainer, may displace by evidence that he took reasonable care that the premises on which the horse was kept was reasonably secure: (***R. v. Racing Commission, ex-parte Green*** (1989) 26 JLR 81).

The appellant was taking the stance that the Tribunal should consider that:

(a) the stable was defective;

(b) someone could have come in and

(c) he had reported the defect to the landlord but it was not corrected.

He sought to place the blame on an intruder.

The evidence of the Operations Steward, Eustace Williams, was that the stables of the appellant were in a "very good condition ... (and with) the gate

locked ... no unauthorized person should be able to gain access to any horse housed within." The appellant, in evidence, stated that there was a gap between the chain link fence and the ceiling of the stable through which someone could gain access to the stall in which the horse Slew Them Ranny was housed. He knew about this "gap" from April 2001, when he first occupied those stables and said that he reported it to Mr. Angell and Mr. Miller, the Racing Secretary for C.T.L. which company had placed him in those stables, but no repairs were done. This was ample evidence before the tribunal that the appellant knew of the defect touching the safety of the stalls of the stables and took no steps to repair it himself, even temporarily. The tribunal had before it, ample evidence on which it could find that the appellant had not displaced the presumption, was in breach of his duty of care and, therefore, "negligent in the charge, custody or care" of the horse Slew Them Ranny. There is absolutely no merit in this ground.

For the above reasons, this appeal should be dismissed and the order of Hibbert, J refusing judicial review to quash the decision and orders of the tribunal affirmed.

Costs of this appeal and the costs below should be paid by the appellant to be agreed or taxed.

WALKER, J.A:

For the reasons given in the judgment of Harrison, J.A., with which I entirely agree, I would dismiss the appeal with costs both here and below to the respondent.

COOKE, J.A. (Actg.) (Dissenting)

Slew Them Ranny, a racehorse of which Ralph Porter, the appellant was the owner and trainer, contested the eighth race at Caymanas Park on the 1st September, 2001, and finished in second place. A urine sample taken from this horse revealed the presence of a prohibited substance, namely, morphine. The Jamaica Racing Commission (the respondent) subsequently held an investigation in respect of the presence of the prohibited substance pursuant to section 25 of the Jamaica Racing Commission Act. At the conclusion of this investigation before a duly constituted Tribunal on the 8th April, 2002, there was this decision.

"DECISION

CHAIRMAN: The finding of the Tribunal is as follows:

- The Tribunal accepts the finding of the racing chemist that the horse, Slew Them Ranny, returned a prohibited substance and is therefore, disqualified from the race.

- It has found that the trainer, Mr. Porter, has failed to rebut the presumption of negligence and he is fined One Hundred and Fifty Thousand Dollars (150,000) and warned off for two years.

You have forty-eight hours within which to appeal the decision of the Tribunal."

Although the record does not reveal it, apparently Porter (the appellant) appealed to the Appeal Tribunal of the Jamaica Racing Commission (the Commission). He was unsuccessful. He next sought an order of certiorari to quash the decision of the Tribunal by way of judicial review in the Court below. He was again unsuccessful, as his motion was dismissed on the 25th July, 2002. He has now appealed to this Court. The substantial ground of appeal was couched as follows:

> "That the decision arrived at was in breach of Natural Justice and the Jamaica Racing Commission Rules."

The relevant Rule of which the appellant speaks is embodied in Rule 14 of the Jamaica Racing Commission Racing Rules 1977 ("the Rules"). This Rule is reproduced in extenso as it provides the comprehensive procedural framework. However, attention will be directed specifically to Rule 14A(3), (4) and (7).

> "14. The Commission shall appoint a person to be known as the Racing Chemist whose function shall be the analysis of all samples taken from horses or otherwise. The Commission may from time to time direct the Stewards in regard to the procedure to be adopted for the collection and transmission of such samples. The Racing Chemist shall analyze all samples with expedition and report on each to the Commission in such form as from time to time may be directed by the Commission. The Commission shall if the report indicates that there may have been any infringement of the Rules, as early as possible hold or cause to be held an enquiry to determine whether or not any of such Rules have been infringed.
>
> 14A. (1) Subject to there being a sufficient quantity of the sample being taken all samples collected from

a horse or the dead body of a horse shall be split into two parts one portion (hereinafter called "the primary portion") shall be delivered to a Racing Chemist for testing and analysis. The remaining portion (hereinafter called "the split portion") shall remain in the custody of the Commission and shall be preserved in the same condition as near as possible.

(2) In the event that the racing chemist to whom the primary portion of the sample was delivered pursuant to sub-paragraph (1) hereof reports a finding negative for the presence of a prohibited substance and/or Furosemide overage in the sample the split portion of the sample which remains in the custody of the Commission shall be disposed of by the Commission.

(3) In the event that the racing chemist reports a finding of tests suspicious for a prohibited substance and/or Furosemide overage, the remainder of the primary sample (if any) and the split portion of the sample shall be submitted for further testing and analysis either by the same racing chemist to whom the primary portion of the sample was delivered or by another racing chemist selected by the Commission. In the event that such racing chemist reports a finding negative for prohibited substance and/or Furosemide overage all remaining portions of the sample shall be disposed of by the Commission. Any test pursuant to the provisions of this sub-paragraph of the split portion of the sample shall be carried out by the said racing chemist in the presence of another chemist designated by the Commission. In the event that as a result of the tests carried out pursuant to this sub-paragraph a finding positive for a prohibited substance and/or Furosemide overage is reported to the Commission the same shall be considered prima facie evidence for the purposes of Rule 207.

(4) In the event that the racing chemist to whom the primary portion of the sample was delivered pursuant to sub-paragraph (1) hereof reports a finding positive for a prohibited substance and/or Furosemide overage then if the trainer or

owner of the horse from whom or of the dead horse from whose body the sample had been taken requests pursuant to sub-paragraph (7) of this Rule that the split portion be tested or the Commission pursuant to sub-paragraph (7) of this Rule directs that the split portion be tested, the split portion of the sample which remains in the custody of the Commission, shall be tested by the racing chemist who reported the positive finding in the presence of another chemist designated by the Commission. In the event that no such request as aforesaid is received by the Commission from the trainer or owner as aforesaid and no such direction as aforesaid is made by the Commission the report of the finding of the racing chemist in regard to the primary portion of the sample shall be considered prima facie evidence for the purposes of Rule 207.

(5) If the test of the split portion made either at the request of the trainer or owner as aforesaid or by the direction of the Commission as aforesaid substantially confirms the findings of the racing chemist in regard to the primary portion, it shall be considered prima facie evidence for the purpose of Rule 207.

(6) If the test of the split portion made either at the request of the trainer or owner as aforesaid or by the direction of the Commission as aforesaid shall not substantially confirm the findings of the racing chemist in regard to the primary portion the Commission shall, subject to paragraph (9) of this Rule, not consider there to be prima facie evidence for the purposes of Rule 207.

(7) In order that the split portion of a sample be tested otherwise than in accordance with the sub-paragraph (3) of this Rule, either the owner or trainer of the horse or the dead horse from whom the sample was taken shall request in writing to the Commission that the split portion be tested, such request being received by the Commission within two days after notification to the trainer of the initial positive test or failing the receipt by the Commission

> within the said period of such a request as aforesaid the Commission, in its absolute discretion on the third day after notification to the trainer of the initial positive test directs that the split portion be tested."

An analysis of 14A(3) indicates:

(i) If there is a report of the racing chemist that there is a finding of tests suspicious for a prohibited substance then the split portion of the sample is to be further tested either by the same racing chemist or by another racing chemist selected by the Commission. (emphasis supplied)

(ii) If the racing chemist who conducted the first test conducts the further test on the split sample that test is to be conducted in the presence of "another chemist designated by the Commission."

(iii) If this further test reveals "a finding positive for a prohibited substance" such finding is to be considered "prima facie evidence for the purposes of Rule 207".

There will be reference to this Rule in due course.

In 14A(3) the testing of the split portion of the sample is entirely within the sole purview of those appointed by the Jamaica Racing Commission. There is no provision for notification of a further test to any concerned party to whom an ultimate positive finding may have adverse consequences.

14A(4). This prescribes that:

> "If the racing chemist reports a finding positive for a prohibited substance . . . (note not tests "suspicious for a prohibited substance" as in 14A(3)) then if the trainer or owner of the horse . . . from whose body the sample has been taken requests pursuant to sub-paragraph (7) of this Rule that the

> split portion be tested . . . this "shall be tested by the racing chemist who reported the positive finding in the presence of another chemist designated by the Commission". (emphasis supplied)

The introductory words of 14A(7) are not without significance. They are:

> "In order that the split portion of a sample be tested otherwise than in accordance with the sub-paragraph (3). . ." [i.e. 14A(3]

Then

> (i) Either the owner or trainer of the horse from whom the sample was found to be positive could request in writing that the split portion be further tested.
>
> (ii) This request by the owner or trainer must be done within two days after notification by the Commission as to the finding of a prohibited substance in the subject racehorse.
>
> (iii) If there is no request on the third day by either trainer or owner the Commission in its absolute discretion on the third day after notification to the trainer of the initial positive test may direct that a further test of the split sample be done.

The factual circumstances will now be unfolded:

(i) There is a letter of 7th September, 2001 from the Jamaica Racing Commission. This is reproduced hereunder.

> "JAMAICA RACING COMMISSION
>
> 8 WINCHESTER ROAD
> P. O. BOX 309
> KINGSTON 10
>
> 7th September, 2001

Trainer/Owner Ralph Porter
Johnson Pen
St. John's Road
St. Catherine

Dear Mr. Porter

This is to advise that the Racing Chemist has reported the presence of a prohibited substance in the urine sample taken from the horse **SLEW THEM RANNY** after it raced at the Caymanas Park Racetrack on the **1st SEPTEMBER, 2001.** The split sample will be tested within 48 hours of the date of this notice. Should you wish to observe the test please contact the Commission immediately.

The result of the analysis of the split sample will be communicated to you in due course but, in the interim, an authorized person from the Commission, who will be issued with a Certificate of Appointment, will visit your stable to make enquiries in connection with the finding.

A copy of this letter is being sent to the owner and groom of the horse.

Yours faithfully
JAMAICA RACING COMMISSION

.....
CUSTODIAN

C.C. **Owner:** Mr. Ralph Porter
Groom: Mr. Clive Douglas, 295 Pisces Close, Watson Grove, Gregory Park P.O.

General Manager (JRC)

DRUG: MORPHINE"

(ii) There is the further communication from the Jamaica Racing Commission dated 19th September, 2001, which is also reproduced:

"JAMAICA RACING COMMISSION

8 WINCHESTER ROAD
P.O. BOX 309
Kingston 10.

19/9/01

Trainer Ralph Porter
Johnson Pen
St. John's Road, St. Catherine

Dear Trainer Porter

Further to your letter of 7th September, 2001, please note that the second testing of sample B 00 1916 taken from your horse Slew Them Ranny on the 1st September, 2001 will take place at the University of the West Indies on Friday, 21st Sept. 2001 commencing at 8:30 a.m.

Please, therefore, be good enough to advise your elected observer of the testing date.

Yours faithfully
JAMAICA RACING COMMISSION

CUSTODIAN

*bmc-1"

(iii) There is the correspondence from the Jamaica Racing Commission dated September 26, 2001 which is also reproduced:

"JAMAICA RACING COMMISSION

8 WINCHESTER ROAD
P.O. BOX 309
Kingston 10.

PDP IE (305)

September 26, 2001

Trainer/Owner Ralph Porter
Johnson Pen
St. John's Road
ST. CATHERINE

Dear Sir:

On September 24, 2001 the Commission received a report from the Racing Chemist, confirming his finding of the substance MORPHINE in the urine sample taken from the horse **SLEW THEM RANNY** after the running of the eighth race on September 1, 2001.

An investigation under Section 25 of the Jamaica Racing Commission Act will be held at which time you will be entitled to legal representation.

A copy of Rule 207 is enclosed for your information.

Yours faithfully

JAMAICA RACING COMMISSION

B Wray
FOR GENERAL MANAGER

***jpb"**

(iv) There is no dispute that the appellant received all the above communications from the Jamaica Racing Commission by hand at his stables on the 27th September, 2001.

(v) Further, there is no issue that at the relevant time the address of the appellant was 53 Morningside Drive, Kingston 19, and not Johnson Pen, St. John's Road, St. Catherine. This fact was known to the Jamaica Racing Commission, as the last trainer's licence issued to him bore that address. Interestingly, a letter sent to the appellant relevant to the investigation

pursuant to section 25 of the Jamaica Racing Commission Act, dated October 23, 2001, was directed to the Morningside Drive address.

The appellant complains that he received no notification that there was a positive initial finding as is required by section 14A(7) of the Rules and thereby he was deprived of being present either by himself or his observer at the further testing of the split portion of the sample. Therefore, this was a breach of natural justice.

The first question to be answered is what was the procedure within the Rules that the Commission embarked on. In my view there are two procedures. There is the procedure set out in 14A(3) which deals with "tests **suspicious** for a prohibited substance." Alternatively, there is the procedure set out in 14A(4) where there is an initial **positive** finding of a prohibited substance. In the latter, by 14A(7), there is a requirement to notify the trainer of the subject horse. I must confess that it is inexplicable why there should be notification under 14A(4) by virtue of 14A(7) and not under 14A(3), given that "suspicious" should be given its ordinary meaning. So now, which of these procedures did the Commission utilize?

The answer to the question posed is impatient of debate. Firstly, the letter of 7th September, 2001, told the appellant of the "presence of a prohibited substance in the urine sample" taken from Slew Them Ranny. Therefore, this was not "a finding of tests suspicious of a prohibited substance" within 14A(3). It was "a finding positive for a prohibitive substance" within

14A(4). Secondly, in this same letter there is written "the split sample will be tested within 48 hours of the date of this notice. Should you wish to observe the test please contact the Commission immediately." The excerpted portion of this letter is in obedience to 14A(7) which mandates that there should be notification where there is an initial positive finding of a prohibited substance i.e. "otherwise than in accordance with the sub-paragraph (3)": (14A(3)). Thirdly, the letter of 19/9/01 informing the appellant of the date of the second testing of the sample concludes with this sentence "Please therefore, be good enough to advise your elected observer of the testing date."

I am compelled to the conclusion that the Commission was not pursuing a course in respect of 14A(3). I can put it no better than the Chairman of the Tribunal when in giving his view as to the rival contentions on a preliminary submission on behalf of the appellant that there was a procedural impropriety, he said:

> "CHAIRMAN: The point I am much concerned about is what Mr. McBean suggested, that 14(3) would have given the Commission the right to proceed as apparently it proceeded. Then the question one would ask one's self is, if they were intending to apply the 14(3) procedure no letter would have been sent out at all, and if any letter was sent at all, they had no intention to use 14(3). I am saying, if they had intended to apply 14(3) as the process no letter would have been sent to Mr. Porter.
>
> It is abundantly clear to me that they had not applied 14(3), and as a result

> letters were sent to Mr. Porter so he could have exercised the legitimate right by being present at the testing of the second sample. He did not get those letters because they were not sent to the proper address and to serve him with a letter seven days before the enquiry is due to take place after all has been done to my mind would be a breach of natural justice. That is my firm conviction in this matter."

Despite this trenchant, and in my view correct, pronouncement the Tribunal soon retired and on its return the proceedings continued. The submission that the Commission was acting under 14A(3) prevailed in the hearings before the Commission and the judicial review court. In this court it was argued that:

> "The invitation to the appellant to observe the test if he so desired, is not an indication that the Commission was acting under Rule 14A(7) but was in context, a mere extension of courtesy to the Appellant."

This proposition is entirely without merit.

The position is, therefore, that there was no notification to the trainer that there was an initial positive finding of a prohibited substance and, consequently, the appellant did not have an opportunity to be present at the testing of the split sample. It is true that the Rules do not make provision for the trainer or owner to be in attendance either by himself or by or with an observer. However, it is apparent that a salutary practice has long been established that the trainer or owner or an observer is entitled to be present at

the testing of the split portion. In the letter of the 7th September, 2001, (supra) it was written:

> "The split sample will be tested within 48 hours of the date of this notice. Should you wish to observe the test please contact the Commission immediately."

Again in the letter dated 19/9/01 (supra) which was to inform the appellant of the date of the second testing, the concluding sentence reads:

> "Please therefore be good enough to advise your elected observer of the testing date."

Further, there is the evidence of Vincent Edwards at the hearing before the Tribunal. He had been a trainer since 1974. He was the Vice Chairman of the Trainers' Association. He was, apparently the designated observer on behalf of his Association for attending any second testing. To his knowledge, whenever there was an initial positive finding all trainers "get the privilege of appointing an observer for the second sample testing." There can be no doubt that both the Commission and the racing fraternity had a like understanding of the procedure to be followed.

Here this procedure was not followed. The stark position is that in employing the procedure set out in 14A(4) and (7) the Commission failed to perform the unequivocal mandatory obligation of notifying the trainer of the initial positive result. If the decision of the Tribunal was allowed to stand it would mean that the Rules would be of no account. Such disregard of the Rules would bring the Commission into disrepute. There would then be no confidence in the body established by section 3 (1) of the Jamaica Racing

Commission Act "to regulate and control horse-racing and the operation of racecourses in the Island."

It was submitted that as there was no challenge to the integrity of the second testing by the appellant no prejudice was thereby occasioned to him. Consequently, the finding of the Commission would have been the same even if there had been an observer.

It was impossible to challenge the integrity of the second testing as the appellant was not given the opportunity for him and or his observer to be present at that testing. Admittedly, Vincent Edwards is not a chemist. However, at the time of the hearing before the Tribunal he had previously been present at some 60 second tests. His role at the second testing is set out below from an excerpted portion of the transcript of the hearing before the Tribunal. Mr. Woolery was a member of the Tribunal panel:

"MR. WOOLERY: Just tell us your role.

MR. EDWARDS: You inspect the bag then search for the sample.

MR. WOOLERY: In your presence the sample is searched for, so you certify that it is the correct sample.

MR. EDWARDS: We accept the delivery, certify it is the correct sample, that the bag is not torn because under the instructions if it is torn it should be discarded. The one that contains the sample, after we identify it, we put it to thaw out."

Immediately thereafter in the transcript, there is this succinct comment by Mr. Woolery:

> "MR. WOOLERY: You see, I am a little concerned that the trainer's interest is not protected if someone is not there to certify that this is the sample. I take the view that the trainer is to have someone there to protect his interest, that person must be present - that is one. Now who in the case of the absence of the observer, would certify that the sample is the correct one."

This most appropriate comment demonstrates that the integrity of the second testing cannot be assumed. I am not here casting any aspersions as to the validity of the second testing in this case. However, the Rules and their application, quite rightly, as a procedural safeguard accorded the opportunity for the trainer or owner or an observer to be present at the second testing. This was an essential and integral part of the process which would have culminated in a hearing if the result of the second test also returned a positive result.

R v Thames Magistrates' Court, ex parte Polemis [1974] 2 All E.R. 1219, is a case where the applicant moved the court for an order of certiorari to quash a conviction on the basis that he was not afforded a reasonable opportunity to prepare his case, therefore, there was a breach of natural justice. The headnote accurately summarizes the facts:

> "The applicant, a Greek who had little knowledge of English, was the master of a vessel which, on 1st July

> 1973 arrived at a berth in the London docks. The berth was clean and no oil was seen in the neighbourhood of the vessel over the next seven or eight days. On 9th July a large patch of oil appeared close to the vessel. Analysts' reports were obtained by the authorities on samples of the oil and of the oil in the vessel's bunkers. At 10.30 a m on 11th July a summons was served on the applicant charging that he was the master of a vessel from which oil or a mixture containing oil had been discharged into navigable waters, contrary to s 2(1) of the Prevention of Oil Pollution Act 1971. The applicant's vessel was due to sail at 9.00 p m on 11th July and the summons was returnable at the magistrates' court at 2.00 p m on that day. The owners of the vessel obtained the services of solicitors who immediately took steps to obtain samples of the oil, to find eye-witnesses and to obtain other evidence. They had, however, made little progress before 2.00 p m. At 2.30 p m the case came before a bench of lay justices who rejected an application for an adjournment, being impressed by the fact that the applicant's vessel was due to sail that evening. As a concession to the difficulties of the defence, however, they stood over the hearing until 4.00 p m on the same day. At 4.00 p m the justices were still occupied with their own list and so the case was transferred to a stipendiary magistrate then sitting in the same building. No new application for an adjournment was made to the magistrate although he knew that an earlier application had been made and refused. He heard the case out and convicted the applicant, fining him £5,000."

Lord Widgery, C.J. in delivering the judgment of the Court said at p. 1223 e-j:

> "In this instance, on the brief and simple facts that I have related, can it be said that the applicant was given a reasonable opportunity to present his case? It seems to me to be totally unarguable that he was given such a reasonable opportunity. He had no time to take samples, no time to see a report of the samples taken by the prosecution, no time to look for witnesses, no time to prepare any supporting evidence supportive to his own, and that too when he

was a man with a very rudimentary knowledge of the English language in a country foreign to his own. When one just looks at those facts it seems to me to be a case in which any suggestion that he had a reasonable chance to prepare his defence is completely unarguable.

What is said on the other side? Counsel for the respondents who has said everything possible, has made three points. He says first of all that the relief of certiorari is discretionary, and so it is. No one can come to this court and demand an order of certiorari as of right. No such order goes unless the court in its discretion thinks that the situation is appropriate.

Counsel for the respondents says that in this case, when one looks at the whole history of the matter right up to today, it becomes only too obvious that the applicant has no merit in his case. Counsel relies on the fact that the analyst's report supplied to the applicant was unfavourable and that there has been no sort of suggestion over the period which has elapsed since the hearing that the applicant could call any evidence in regard to the state of the weather, which would support his own theory which was that the oil had been there when he came in to berth. So, says counsel for the respondents, looking back now with hindsight on all these events, it is apparent that there is no merit in the applicant's case, and therefore the court in its discretion should refuse him an order of certiorari.

I reject that submission. It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me that it is no answer to the applicant to say, 'Well, even if the case had been properly conducted, the result would have been the same'. That is mixing up doing justice with seeing that justice is done, so I reject that argument." (Emphasis mine)

I associate myself unreservedly with the views expressed above. The appellant in this case was not given a reasonable chance to prepare his case in that neither he nor his observer was given an opportunity to witness whether the second split sample was indeed the correct one. These submissions are therefore without merit.

The appellant was fined the not insubstantial sum of $150,000 and was warned off for two years. So in addition to the fine he was prevented from pursuing the activity which was the source of his livelihood. The appellant was summoned to a hearing in that he was in contravention of Rule 207 because Slew Them Ranny had a prohibited substance in its body while it participated in a race. The concluding, and for the appellant the most significant part of section 207(3) is as follows:

> ". . .Any such finding" (of a prohibitive substance) "as aforesaid shall, unless the contrary be proved by any of the persons aforesaid, also be proof that the said substance was one which by its nature could affect the speed, stamina, courage, conduct or racing performance of such horse and that the trainer, groom and any other person having the charge, custody or care of such horse had failed properly to protect such horse and guard it against the administration or attempted administration of such substance as aforesaid."

This portion quoted creates a rebuttable presumption that a prohibited substance was administered for the purpose of influencing the performance of the horse, and that the person having charge, custody and care of the horse was negligent. Thus, there is an evidential burden on such person on a

balance of probabilities to demonstrate that all reasonable measures were taken to protect and guard the horse against the administration of the prohibitive substance: See **R v Racing Commission ex parte Clive Green** (1989) 26 J. L. R. 83. Since there is this evidential burden, that responsibility underlines the obligation to scrupulously adhere to the requisite procedure.

The Rules govern the procedure(s) to be employed by the Racing Commission. In this case there can be no doubt that the Racing Commission embarked on a procedure set out within those Rules. It failed to observe a mandatory requirement. What the Racing Commission has done is to initiate a procedure sanctioned by the Rules and then disregard the very procedure which it lawfully set in motion. This non-observance of a mandatory requirement is fatal to the decision of the Tribunal.

I would allow the appeal and order certiorari to go. It is therefore unnecessary to determine whether or not the appellant was in breach of Rule 207. The appellant should have his costs both here and in the Court below.

ORDER

HARRISON, J.A.

By a majority appeal dismissed. Order of Hibbert J. refusing judicial review of the order of the Jamaica Racing Commission affirmed. Costs of this appeal and costs in the court below to be paid by the appellant and to be taxed if not agreed.