



It appears that the first two lines from the transcript were directed at Mr James Perry, the Chairman of Stewards, that the second paragraph was directed at Mr Cable, Senior Steward, who had given evidence that he had seen Mr Achurch at a roundabout in early May 2007 and that they had "a good look at each other" while driving their cars.

3. It is of some significance that the hearing before Major Inquiry Steward, Mr Peter Callaghan SC, was dealing with a charge under Rule 231(1), namely, that a person shall not assault, abuse or otherwise interfere improperly with anyone employed, engaged or participating in the harness racing industry or otherwise having a connection with it. The charge arose from circumstances where Mr Achurch had appealed against a three month disqualification for failing to attend an adjourned Stewards' Inquiry. He stated that he had taken exception to the way in which Mr Perry had conducted himself at that appeal believing that Mr Perry had continually smiled and smirked and then had, with undue haste, published the result of the appeal on the internet. During a telephone conversation with Mr Perry, Mr Achurch, in an aggressive and loud manner said words to the effect:

*You are a smart arse. When I return I will not be licensed and you won't be able to get me. I'll be giving you a hard time. You know why? Because you are a cocksucker.*

4. In relation to that telephone conversation, Mr Achurch was charged with a breach of Rule 231(1) of the Harness Racing Rules. The terms of that Rule are:

*A person shall not assault, abuse or otherwise interfere improperly with anyone employed, engaged or participating in the harness racing industry or otherwise having a connection with it.*

As already indicated, Mr Achurch failed in his appeal against a disqualification for a period of three months in relation to that charge.

5. During the hearing of the charge before Mr Callaghan, Mr Achurch made the comments cited in paragraph [2] and they became the subject of a charge brought under Rule 247. It was clarified at the hearing that the allegation was Mr Achurch spoke in an intimidatory or otherwise improper manner.
6. The charge brought under Rule 247 was heard by Major Inquiry Steward, Ms J A Needham SC. Ms Needham concluded that Rule 247 in relation to intimidation encapsulated elements of a threat of use of unlawful means by one person against another

while improper conduct was a breach of the standards of behaviour which would be reasonably expected of a person in all the circumstances. The word "improper" was not a term of art but referred to conduct that was inconsistent with the proper discharge of a person's responsibilities and obligations. The Rule prescribed the standard of behaviour of persons appearing in an Inquiry and sought to govern the proper conduct of an Inquiry for the benefit of regulating the sport and the industry of harness racing.

7. In deciding whether the test of intimation was objective or subjective, Ms Needham took into account the purpose of the Rule which was stated to be to ensure that conduct before an Inquiry did not disintegrate into chaos and in particular did not involve threatening behaviour. Therefore, the words had to be viewed objectively and the actual effect of those words on the Senior Steward, Mr Cable and the Chief Steward, Mr Perry was irrelevant. In then considering whether the words used by Mr Achurch were in fact intimidatory, Ms Needham noted that it was difficult to reach a conclusion without evidence of the manner in which the words were said, their delivery and in the absence of evidence of the demeanour of Mr Achurch. Words on a page that may be read to be threatening can be said forcefully, in a hostile manner, or in a light hearted manner or in an ironic manner and the way in which they were said had an impact on their meaning. Having regard to the entire transcript and putting the words in their context, it was clear that Mr Achurch was alleging, in a long submission, that he was the subject of differential treatment by the Authority, was upset by this and as a result it was most unlikely that the words used as particularised were said light heartedly or with an ironic bent. The reference to Mr Cable's place of residence, his family and the specific types of violence that could be visited on him or upon a racecourse detective gave weight to the finding that the words were intimidatory. Even if wrong in this view, Ms Needham noted that the words were improper and in the context of a formal Inquiry they constituted veiled threats, notwithstanding the conditional nature of the words and given the entirety of the context of the transcript: it was improper for a person appearing before an Inquiry to make statements such as he knew where others present lived and that he could have terrorised them. The Rule was one for the good governance of harness racing and for enforcing respect for those who enforce the rules. While the threats, at their highest, implied and were couched in conditional language (but not carried out) the effect of them would raise concern in the mind of a reasonable person that the person may be at risk and thus it would tend to undermine the role of the Stewards and the administration of the industry. Applying the principles in *Briginshaw v Briginshaw*, Ms Needham was comfortably satisfied

that the charge was made out. These matters are recounted at some length in view of the fact there was no challenge to this analysis of the nature and operation of Rule 247 - the only challenge was essentially to the inadequacy of the penalty imposed, namely, a three-month disqualification.

8. In setting the penalty of a three-month disqualification, some attention was paid to the element of specific deterrence in light of the Authority's submission that Mr Achurch's record of offences could compendiously be referred to as demonstrating a lack of respect for the Stewards of the harness racing industry. At the time of consideration, Mr Achurch had been found guilty of four offences:
  - (a) there were two fines of \$1,000 and \$200 that referred to an incident on 5 June 2005;
  - (b) in March 2007, Mr Achurch was disqualified for three months for breach of Rule 187(1) for failing to attend an Inquiry;
  - (c) out of the Inquiry for breach of Rule 187(1) there arose a breach of Rule 231(1) involving the abuse of the Chief Steward, Mr Perry. The Rule 187(1) breach and the Rule 231(1) breach were the subject of appeal and in each case, the appeal was dismissed. The two periods of three months' disqualification were cumulative in accordance with Rule 257 and in the absence of the Controlling Body or the Stewards directing otherwise.
  
9. Ms Needham observed that Rule 247 did not appear to be a substantive offence and Mr Achurch had not been charged under Rule 231 or 243: he was charged under a Rule that prescribed particular types of behaviour during a proceeding under the Rule and so the seriousness of the words uttered had to be balanced against the fact that the Rule under which he was charged was directed at good governance in relation to hearings. Specific and general deterrence were factors in sitting the penalty and apart from an undertaking that in future Mr Achurch would not appear himself but would appear via legal representatives, there was no indication of contrition bearing in mind the seriousness of the offence and the fact that it arose in the context of a cumulative process of circumstances of disrespect to Stewards. Against that background, Ms Needham concluded that it was appropriate to impose a disqualification for a period of three months. In accordance with the Rules, that period of disqualification would be cumulative on the other two periods of disqualification already being served by Mr Achurch, meaning that the disqualification would commence on 29 September 2007 and expire on 29 December 2007.

10. On appeal, an amended record of Mr Achurch's breaches was tendered and accepted as factually correct. The significance of that record was that prior to being dealt with before the breach of Rule 247, Mr Achurch had been found guilty of a breach of Rule 259(1)(d), namely. that as a disqualified person he had, contrary to the Rule, entered a racecourse or another place under the control of the Club or Controlling Body. A six-month period of disqualification was imposed in relation to this offence, dating from 5 September 2007 and expiring on 5 March 2007. If the existing penalty for a breach of Rule 247 remained unaltered, that period of disqualification of three months, absence some order to the contrary, would be cumulative upon the existing penalties and would itself now expire on 5 June 2008.
  
11. Although Mr Achurch, through his legal representative, attempted to place his statements in a certain context, nevertheless, the terms of Mr Achurch's address to the Major Inquiry Steward constituted a serious breach of Rule 247. The words used were clearly intimidatory when spoken in the presence of Mr Cable and Mr Perry and the use of those words in the context of an address to a Major Inquiry Steward is to be regarded as seriously improper conduct within the meaning of the Rule. It should not need stating, but it appears necessary to refer to the important role of the Stewards and other employees attending proceedings held under the Rules of Harness Racing. Harness racing is both a sport and a business and this mixture underlines the potential for conduct that can be damaging to harness racing. Industry participants and the wagering public are entitled to expect that procedures and processes will be adopted that are aimed at protecting the industry and ensuring compliance with the Rules of Harness Racing. Bodies that are charged with the responsibility of conducting proceedings under those Rules are entitled to be treated with respect and all parties are entitled to expect such proceedings to be conducted in a proper and dignified atmosphere, free from overbearing, intimidatory or otherwise improper conduct. Mr Achurch did not need to be a lawyer to understand that what he was saying in his address to the Major Inquiry Steward was inappropriate and that it was not the way in which he was entitled to conduct himself. The written words, without the benefit of audio or visual reproduction, nevertheless, presented a chilling picture: references to knowing where people lived, smashing-in the face of a Steward, not being worried about being charged by the police for such action, baseball batting the racecourse detective and saying that the Chief Steward was worried and petrified that Mr Achurch could snap at any time and do something to him, were words clearly intimidatory in their nature, regardless of the context in which Mr Achurch wishes them to be considered. The seriousness of the breach is undoubted.

12. Both before Ms Needham and on appeal, it was submitted for Mr Achurch that the context had to be considered although it was accepted that the point he was trying to make was very badly made. The proposition advanced was that Mr Achurch was trying to demonstrate to the Inquiry that, in his telephone abuse of Mr Perry, it was relatively mild conduct and there could have been much more serious action taken if he was the uncontrolled person that the Stewards were suggesting he was. However, it is difficult to fully accept that context. It might be accepted that Mr Achurch was used to expressing himself in a robust manner, even forcefully, but he knew he was appearing before an industry Inquiry rather than being engaged in some bar room harangue.
13. In arriving at an appropriate penalty for this breach, clearly there is a need for the penalty to reflect both general and specific deterrence. The racing and associated community that may have cause to be involved in proceedings conducted under the Rules of Harness Racing should be made aware that roughhouse, intimidatory and improper conduct will not be tolerated. Participants in those Inquiries are entitled to protection from such behaviour.
14. A number of other matters were raised on behalf of Mr Achurch. It was pointed out that there was a connection between the recent offence where he failed to attend an Inquiry and ultimately suffered a disqualification for a period of three months. From this event, it is said that the episodes cascaded with, firstly, the telephone abuse of Mr Perry arising from his failed appeal against that disqualification and then his breach arising directly from his submissions in the Inquiry before Mr Callaghan that became the subject of the breach presently being considered. He was now facing a period of 15 months' disqualification and it was submitted that there needed to be some consideration of the overall nature of the breaches and in particular, consideration of the fact that this cluster of offences were inter-related although spanning a period of time. It was also submitted that Mr Achurch had apologised to Mr Perry for his conduct and that he now understood and accepted that his style of speech was offensive and so had undertaken to no longer appear in person at any Inquiry but to be represented to ensure that similar problems did not arise. It was said that these actions were an acknowledgement that he had not acted properly in the past and that he was taking steps to address his behaviour. Further, it was noted that he had not appealed against the decision of Ms Needham but had accepted her rulings and the additional period of disqualification imposed by her. These matters were put forward as significant acts of recognition by Mr Achurch of his

need to change his behaviour. While there is force in these matters, the offence is properly considered to be a serious breach.

15. Having regard to the seriousness of the breach, I am in no doubt that the disqualification for a period of three months was inadequate. This hearing on appeal is a fresh hearing and applying my own mind to the matter, I would impose a penalty of six months and set aside the original penalty of three-months' disqualification imposed by Ms Needham. I accept that Mr Achurch has taken steps to acknowledge the inappropriateness of his behaviour and how he has addressed that issue. There is also force in the submission that a number of these matters are related and that there should be a consideration of all the penalties imposed in related proceedings in reaching an appropriate penalty for this particular breach. Those considerations are satisfactorily met by a direction that the first three months of this six-month penalty imposed on appeal shall be served concurrently with the last three months' of the penalty imposed for the breach of Rule 259(1)(d), that is, running to 5 March 2008 and that the last three months of the penalty imposed on appeal will run from 5 March 2008 to 5 June 2008.
16. One final matter is deserving of mention. An issue arose as to whether Rule 247 could be categorised as not constituting a substantive offence compared with charges brought under Rules 231 or 243. The distinction between substantive law and procedural law is something of a distraction. The focus in relation to these Rules will always be on the objective seriousness of the offence - the facts will present widely divergent cases requiring a range of penalties to be considered and imposed. The fact that Rule 247 is directed at preserving a proper level of decorum in proceedings conducted under the Rules does not mean that some lesser offence is necessarily committed when that Rule is breached: this is particularly so when the Rule identifies "malicious" and "intimidatory" speech or behaviour.

## **ORDERS**

17. The Orders of the Tribunal on appeal are:
  - (a) the appeal by the Authority against the inadequacy of a three-month disqualification of Mr M Achurch for a breach of Rule 247 of the Rules of Harness Racing is upheld;
  - (b) the penalty of three months' disqualification imposed for the breach of Rule 247 of the Rules of Harness Racing is set aside and, in lieu therefore, a penalty of six months' disqualification is substituted;

- (c) the penalty of six months' disqualification will run concurrently with the last three months of the period of disqualification imposed for a breach of Rule 249(1)(d), being for the period 5 December 2007 to 5 March 2008, with the remaining three months' of the disqualification to run from 5 March 2008 to 5 June 2008.

**The Hon Justice W R Haylen**  
20 August 2007

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