RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL DB ARMATI

EX TEMPORE DECISION

FRIDAY 2 FEBRUARY 2018

LICENSEE JASON GRIMSON

AUSTRALIAN HARNESS RACING RULE 240 x 2

DECISION: 1. Appeal upheld
2. Application for costs dismissed
3. Appeal deposit refunded

1. Licensed trainer and driver Jason Grimson appeals against the decision of the stewards of 13 November 2017 to impose upon him a period of disqualification of three months for two breaches of Rule 240. At their inquiry, they set out the part of Rule 240 relied upon as follows:

> "A person shall not, whether alone or in an association with others, do, permit or suffer anything before, during or after a race which in the opinion of the Stewards or Controlling Body:-
>
> (c) is improper."

The particularisation of the first is that:

> "on 3 January 2017, in relation to betting at Menangle, you, Jason Grimson, a trainer/driver licensed by Harness Racing New South Wales, in the opinion of stewards did commit an improper action. The particulars of that improper action being that you as a trainer have made a bet as part of a five-leg multi bet. In fact, you've made two bets as part of a five-leg multi bet, which included race seven, and in that race you've backed the horse Salty Robyn NZ when you had the runner Wyndberg Terror in that race."

The second particulars were that:

> "on 2 February 2017, in relation to betting at Penrith in race five, you, Jason Grimson, a trainer/driver licensed by Harness Racing New South Wales, in the opinion of stewards did commit an improper action, the improper action being that you as a trainer have made a win bet on the horse Easy Lightning, which is other than your own horse, or other runner, Machin Out."

2. When confronted with those two allegations, the appellant immediately pleaded guilty. Subsequent to the obtaining of advice, he lodged his appeal and indicated that he no longer admitted a breach of the rules. This appeal, therefore, has been heard on the basis of a denial of the breach of the rule and in respect of that the submissions and evidence have been taken; the issue of penalty has not yet been looked at.

3. The evidence has comprised the transcripts and exhibits before the stewards, together with a further copy of the betting records.

4. As a matter of fact in these proceedings, the appellant admits that he placed the bets particularised against him and admits that those are bets are within the definition provision in Rule 1. For completeness, the Tribunal notes that that definition is:

"'Bet' or 'betting' means to make either directly or indirectly a monetary investment on the outcome of a race. "

5. The additional facts which in the Tribunal's opinion are relevant to this determination are to be found in the transcript. The issue of knowledge and the issue of industry practice, as it might otherwise be described, was touched upon by the appellant on a number of occasions.

6. The inquiry took place after a letter of 4 July 2017 to him which indicated an investigation was taking place and the stewards were looking at Rules 173, 234, 235, 235A. At the commencement of the inquiry, when the betting allegations were put to him, and in relation to another betting issue which was not the subject of an alleged breach, he said this (transcript page 5):

"THE CHAIRMAN: Okay. Did it ever occur to you then that to have a bet in a race in which you drove was an offence?"

Answer, in part: "I did know that."

Question, in part: "Did you know what your obligation was as a trainer?"

Answer: "No, I didn't know there was a rule against".

And later: "The first time I found out was when I got this sheet."

Transcript page 7:

THE CHAIRMAN: And it's your position that at that stage you didn't realise you were offending the rules as far as placing a bet on a horse in which you had a runner?"

Answer: "Yeah, I didn't know that. You could do that, like."

At transcript page 10:

appellant: "Oh, I had no idea that I couldn't back against the horse, like."

And later: "It probably never even crossed my mind when I put the bet on that I had a horse in the race."

Transcript page 17 – now, at 17, it is to be noted that he had by then been the subject of the alleged breaches of the rules. Up until transcript page 15, it might be fairly assumed that the stewards and the appellant were considering the contents of the rules identified in the letter of 4 July. At 15 it was said by the Chairman:

"We've had quite a robust discussion between members of the panel."

And then, at 16, the Chairman read out the charges and particulars to which pleas of guilty were entered.

Interestingly, at 17 the Chairman said in part this:

"you only recently became aware that it was an offence to bet on another horse as a trainer".

Transcript 27, after the stewards had dealt with the issue of penalty, the appellant said this:

"Most of the trainers don't even know about the rule. Like, all the ones that I've talked to, they said they didn't know anything about it."

Transcript 28:

"Chairman: "Well, unfortunately ignorance isn't an excuse."

And later the Chairman said:

"although you would have had to do some sort of training, I feel sure."

Appellant: "They don't – they don't – they don't say nothing to you about it."

7. The issue for determination in this appeal, based upon those facts, is whether Rule 240 has been breached in that, having regard to those facts, the conduct of the appellant was improper. Rule 240 has been read out and, whilst it is of no great moment in these proceedings, interestingly, as has been pointed out by the appellant, it is under the heading of "Corruption and related matters". The rules otherwise deal with betting. Under a heading – again, only for guidance – after the words "relating to betting" is Rule 173. It shall not be read in detail. It is paraphrased because it relates to a driver only. Here, the appellant did not drive in either of the two races the subject of these matters which involved, of course, in one case a multi bet.

8. Rule 173, paraphrased, a driver shall not bet in a race in which he participates, and various other matters about entering betting areas and how they are defined, not permitting other people to do it on a driver's behalf, or having bets in accounts other than a driver's own. It need not be looked at any further.

9. The key matters then are to be found under the heading “Illegal betting”, and they are 234 to 235A, which are as follows:

> “234. A person shall not lay or accept an illegal bet.
>
> 235. A person who believes that another person is likely to participate in or be connected with illegal betting shall not communicate with that other person in connection with such betting.
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> 235A. (1) A trainer must not lay any horse that is either under his care, control or supervision or has been in the preceding 21 days.
>
> (2) Any person employed by a trainer in connection with the training or care of horses must not lay a horse under the control of the trainer for whom he is or was employed, while so employed and for a period of 21 days thereafter.
>
> (3) An agent or manager must not lay any horse to be driven by a driver for whom he is agent or manager.
>
> (4) The connections must not lay any horse that is or may be entered by them or on their behalf, save that a bookmaker may lay a horse in accordance with his licence.
>
> (5) Where under sub-rules (1), (2), (3) and (4) it is an offence for a person to lay a horse, it shall also be an offence for that person to:
>
> (a) have a horse laid on his behalf;
>
> (b) receive any monies or other valuable consideration in any way connected with the laying of the horse by another person.
>
> (6) For the purposes of this rule ‘lay’ means the offering or the placing of a bet on a horse:
>
> (a) to lose a race;
> (b) to be beaten by any other runner or runners;
> (c) to be beaten by any margin or range of margins;
> (d) that a horse will not be placed in a race in accordance with the provisions of Rule 49.”

10. There is a preliminary point from the submissions, not argued as such but identified, about Rule 235A. The appellant submits that it was introduced for the purposes of betting exchanges. The respondent says that there is no evident about that. There is no evidence before the Tribunal about when – although it could have been found out – or why specifically 235A was introduced. The Tribunal proposes to assess it on the basis that it is not

limited in its application to betting exchanges but that when read purposively, in accordance with the requirements of Rule 309, that it applies in each of the circumstances identified in the subparagraph, not purely in respect of dealing with something at a betting exchange.

11. The submissions for the appellant touch upon the breadth of 235A. Those submissions are that it limits a trainer's right to bet. Whilst the respondent acknowledges it is not an express prohibition, but that the effect of it is such that it could have been applied to the bets made by this appellant in any event, the Tribunal does not have to decide that.

12. The respondent said that as a bet to win was made, it is the equivalent of bets on other horses. That flows from the definition of "bet" which was read out earlier. The example was given that if the trainer had bet on all the horses, then effectively, other than his own, his horse had to lose. The Tribunal will return to that. The submission is that the effect of the rule about laying bets is that by betting on every other runner you are effectively entering a lay bet, therefore within the meaning of 235A. And there is comfort also to be found, it is further said, in the fact that the rule deals with offering or placing bets. Regardless of all that, the breadth of it is said to be found purposively that if you are betting on other horses, you are requiring your own horse to be beaten.

13. The second substantial submission is that, again applying a purposive interpretation and looking to the intent of 235A, it is designed to prevent horses from not running on their merits, an integrity issue because essentially it opens up the field of a trainer having a failure on the trainer's own horse. Whilst acknowledging that during the course of the race the driver only can influence the outcome, it is said that regardless there can be an impact upon the result.

14. Various cases have been relied upon and the Tribunal will return to that.

15. The gravamen of the appellant's submissions is that the drafters simply have not covered the provision by incorporating matters which would deal with the facts here. And simply, the facts here, and could be elsewhere, the drafters have not dealt with a trainer betting on a horse other than the trainer's own horse in a race in which the trainer has a horse. They have chosen, it is said, to deal with all manner of other types of betting. It is therefore said that this Tribunal is being asked itself to redefine what is meant by "illegal betting", a play on words, as it were, from the heading "Illegal betting".

16. The appellant particularly points out the various rules which deal with various prohibitions, in particular, those on drivers under 173, trainers' employees under 235A(2), drivers, agents or managers under 235A(3), and connections under 235A(4). So far as a trainer is concerned, there is only

235A(1). It is in these terms, as set out earlier: “A trainer must not lay any horse”.

17. It is important to note the definition of “lay”. There is no expert evidence about the meaning of “lay” other than that which is contained in 235A(6) as a definition. This Tribunal is a sporting tribunal vested with, or required to effectively exercise its functions, to be vested with some knowledge about racing generally and betting in particular. It seems to the Tribunal – and it would not be a matter for reopening the case on the basis of new provisions in the course of the decision – that laying a bet has had a simple meaning for a long time.

18. Regardless of that, the drafters have chosen to set out what it means specifically by the choice of particular words in sub rule (6), and they are (a) to (c). In (a), they have chosen the words “to lose a race”. In (b), “to be beaten by any other runner or runners”. And others in (c) and (d), which are not going to arise on the facts that are here. And that set of circumstances in (a) and (b) can arise, as the rule says, by the offering or placing of a bet. Nothing turns on those words here because it is conceded that there was a bet.

19. The drafters have chosen the words “lose a race”. The Tribunal is satisfied that the meaning of those words, in the context of 235A(6), in the context of 235A generally, in the context of the illegal betting provisions found in 173 and 234 to 235A together, and in the context of the fact that the balance of the rules do not touch upon these matters other than integrity issues and other requirements generally, has the specific meaning asked of it. Can it rise to mean not the word “on a horse to lose” but mean by betting on a particular horse, your own horse might lose? It does not say that. In the Tribunal’s opinion, the rule cannot be expanded to cover, by the use of (a), a specific meaning that by betting on the other horses he was actually placing a bet that his horses would lose. He was not; he was betting on other horses to win. To win is not to lose.

20. What about (b), to be beaten by other runners, to paraphrase it? Again, specific words. He did not bet on the other horse to be beaten; he bet on it to win. He did not bet on his own horse to be beaten by others.

21. Nothing else in the rules that have been read out capture any of his conduct such that it could be said that he might otherwise have faced allegations under 235A.

22. Importantly, it was open to the drafters to cover those set of circumstances. They have either not turned their mind to it or they have elected specifically not to do it. It is simply not known what might have been in their minds when they chose to last look at the rules or when they chose, for example, to add 235A. And it might be noted in passing that the current

rule book was published as at 7 December 2017. That, of course, would not affect any prior conduct, but it is informative that the rule is still as it was.

23. It is not necessary to address the very helpful written submissions, for which the Tribunal is grateful, about generalia specialibus non derogant or, indeed, ejusdem generis and the like, because, applying the purposive interpretation, the Tribunal is satisfied that the drafters have not incorporated the subject conduct within the rules.

24. Can it therefore – and this then becomes the issue – be that the stewards could reasonably form an opinion that the conduct was improper?

25. This Tribunal has dealt with the word improper in this rule, in the Greyhound Racing Rules and the Australian Rules of Racing on a number of occasions. Those decisions have been published over time and, in essence, the Tribunal has adopted the same approach through the three codes over time. To its recollection, it first dealt with the issue in Johnson, Australian Rule of Racing 175(q), a published decision of 28 November 2012. It dealt with it in Absalom, Greyhound Racing Rule 86(f)(iii), 2 July 2013. It dealt with it in Watt, Australian Rule of Racing 175(a), on 1 May 2015. It further considered it in McDonald, Australian Rule of Racing 83(d), 10 April 2017. And, lastly, in this code, in Osborn, AHR 173(1) on 3 November 2017.

26. To merely summarise all those past findings: there was a starting point of what was said in Robbins v. Harness Racing Board [1984] VR 641. Justice O'Bryan – and again dealing with a different rule of improper or offensive, but when considering improper – said this:

> "The word improper is more difficult to define and must depend upon the context in which the expression is used. For behaviour to be improper it must be such that a right thinking person would regard the conduct as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty."

27. The simple dictionary definition of improper, often referred to by the Tribunal, touches upon reasonable members of the community and as to how they would regard the conduct. As was said in Watt, the Tribunal finds that the "improper" test here is to be assessed on an objective assessment of the evidence, considering the facts and circumstances of the conduct. It is a question of fact. Intent to act improperly does not have to be proved. The issue of whether it was improper is governed here by the proof of the particulars alleged and they have to be assessed.

28. Refining that: the particulars here do not take this test any further. Intent is not part of it. Objectively viewed, having regard to the facts, is it that which is not in accordance with propriety of behaviour or manners, etc?

29. In response, the respondent pointed out that improper can range from very serious through to something as light as manners. That is accepted. But in this sense the facts and circumstances of this matter are not dealing with manners, they are dealing with behaviour, they are dealing with conduct. They are dealing with impropriety in the sense of something that might be corrupt and related to it. Briginshaw would require that, in assessing improper here, you assess purely having regard to the fact of the trainer betting in the trainer's race, as it were, on another horse.

30. The question of what right-minded people would think, therefore, objectively considered, would require them to have regard to what is the unchallenged evidence in this case of the industry's knowledge about the conduct in which he engaged. That has been read from the transcript into the record. That evidence is unchallenged, as the Tribunal has said, and that is an important fact. There is nothing to go beyond the fact, as the appellant said, repeating transcript 27: "Most of the trainers don't even know about the rule." And the word "rule" was used. There is no such rule, as has been pointed out. "Like, all the ones that I've talked to, they said they didn't know anything about it."

31. That is the level of industry knowledge. It is suggested, without evidence, the trainers elsewhere – trainers in this code – bet on horses in other races. That requires again an aspect of what elsewhere would be called judicial notice. It does not have to be relied upon, because that is the state of the evidence just read out.

32. What of this appellant's subjective belief? It was read out many times, to paraphrase it all: I didn't know I couldn't do it. Should he have known, if the respondent is correct, he should not have done it? There have been no cases put before the Tribunal that indicate any breach of the Australian Harness Racing Rules for similar conduct. There is no evidence before the Tribunal of this regulatory body publishing anything to advise the industry that in this regulatory world, in this changing jurisdiction, the Controlling Body has formed the opinion that trainers should not be doing that. There is nothing. It leaves the industry participants who have apparently engaged in this conduct, as the evidence has established, without any indication that the Controlling Body thinks they should not be doing it.

33. In the submissions for the respondent today, the issue of integrity was strongly relied upon. That arises because if trainers can do this, then the temptation, as it were – the Tribunal's words – to have their own horse not win arises. As the Tribunal said in Osborne (page 3, paragraph 10):

> "The objective seriousness is to be viewed particularly in regard to integrity. The integrity that is relevant in a driver betting on a horse other than his own in a particular race is patent."

Then – this is the important part:

> "It leads to a question in the minds of any rational person, whether regulator, other participant or a member of the betting or general public, that something mischievous could well occur to cause that driver" –

and here are the critical words:

> "alone or in conjunction with others, to not ensure that their own horse runs to the best of its ability."

34. The emphasis on "in conjunction with others" can obviously embrace a trainer, so that a trainer could let the driver know that the trainer is betting on a horse other than the trainer's own and suddenly the mischief that is of concern to the regulators and the others on integrity arises.

35. The Tribunal accepts that that is a possibility. But it cannot, in the Tribunal's opinion, on the facts just read out in some detail about what the Controlling Body has done and not done, and what the industry members believe in, elevate a possibility of mischief, which requires more than one step, to a level where the integrity question becomes so great that it can be said that it would not be conducted in accordance with propriety. Or, to quote again Robbins, that any right thinking person would regard the conduct as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.

36. This is an opinion of the stewards case. As the Tribunal said in McCarthy, a harness racing matter, 24 January 2014:

> "where no fresh evidence is called but the transcript and exhibits before the stewards are the evidence, then the conclusion in the appropriate de novo hearing will be on the basis of the Tribunal determining whether the opinion of the stewards was reasonably held and that will follow unless no reasonable steward could have come to that opinion."

37. In the circumstances of this matter, dealing with the arguments that are here, the Tribunal has formed the opinion that this conduct cannot be assessed as improper.

38. The balance of the matters required to be established, therefore, do not need to be considered.

39. The Tribunal is of the opinion that the stewards did not come to a conclusion that was reasonably open to them.

40. Accordingly, the allegation against the appellant is dismissed and the appeal on that issue is upheld.

SUBMISSIONS MADE IN RELATION TO COSTS

41. At the conclusion of the hearing, the appellant makes application for costs.

42. The appeal has been determined in favour of the appellant and the Tribunal's jurisdiction under clause 19 of the Racing Appeals Tribunal Regulation 2015 is enlivened. The provisions of clause 19(1), therefore, are satisfied, but there is a prohibition that first must be overcome set out in 19(2). Relevant to the submissions made, the parts of subclause (2) are these:

> "The Tribunal must not make an order under subclause (1) unless the Tribunal decides:
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> > (c) a party has caused another party unreasonable cost by the manner in which the appeal has been conducted."

43. The meaning of those words can, however, be informed by the balance of (2) and, for example, while it does not apply to a respondent, matters such as vexatious or frivolous, and matters that applied to both an appellant and a respondent, the causing unreasonable delay in the conduct of the appeal. There is a strong limitation within subclause (2) by the words that the drafters have provided. There have been other decisions on this. Essentially they turn on their own facts.

44. The issue is this: has one party caused another costs? The answer is yes. Are they unreasonable? The Tribunal will return to it. And, secondly, were they unreasonable by the manner in which the appeal has been conducted?

45. Subclause (1) deals with the entitlement to costs as being a reasonable expectation, absent other conduct, as Justice Beech-Jones found in McCarthy, delivered prior to the introduction of subclause (2). So that it is not simply a case of looking to whether or not a party has been successful, because the disentitlements must be overcome.

46. Here, the facts are that the appellant was unrepresented before the stewards. He had gone to the stewards, it appears, to deal with the 4 July letter, referred to in the decision, to face certain rules, and then was confronted with a Rule 240 improper conduct matter. That was found to be breached and he was disqualified. He had expressed an opinion that he did not know what he was doing was wrong, to paraphrase it.

47. He lodged his appeal on 13 November and on 24 November a stay was granted. That stay was granted after it was opposed by the respondent. The appellant's opening approach to that stay was in his own hands, but he had indicated he had received legal advice and said that the charges were cloudy and unexplained, and put up hardship-type matters.

48. The respondent replied with a submission which opposed the stay on the basis that the matter was serious, that the breaches were ones of integrity and that the decision should stand. The next document is the critical one as to the impact it has upon this application. The legal response by his practitioners was four pages and 51 paragraphs. Setting aside the matters which do not go to the gravamen of this application now, paragraphs 1 to 16 set out why the appellant's legal representatives were telling the respondent, through the Tribunal, that the appellant was going to win.

49. Without seeking to go line by line through paragraphs 1 to 16 and then dissect the Tribunal's decision, for the most part, paragraphs 1 to 16 have found favour with the Tribunal. Nothing new has been raised since those facts and law were set out that has led to this appeal being determined on other issues. It is correct that there was no precedent for this, and that applied to both parties. It is correct that there was no decided case law, from this Tribunal or others or, indeed, by superior authority, that would indicate that the stewards were wrong. Importantly, it was an opinion of the stewards case and it did concern aspects of integrity and, in the minds of the regulator, seriousness.

50. It is submitted in response to this application that minds might differ as to what was likely to be the outcome of this matter. Apparently, there were different minds driving the respondent. Issues of guidance to the regulator, or a test case, are not pressed.

51. It is submitted in reply that this matter could have been dealt with on the papers, that after the stay was granted it was quite open to the highly qualified advice that may or may not have been given to the regulator for it to make a concession that, on the facts of this matter, it would not continue its opposition to this appeal.

52. There is nothing in the manner in which this appeal has been conducted today, or in its preparation, for which there can be any criticism of the respondent to the appeal, nor to this application. Each of the parties has approached the conduct of this appeal in a most expeditious and time-limiting fashion and have focused upon the narrow issues which they have each identified and not chased issues which are of no interest or without any likely prospect of success, thus causing unreasonable costs in that

sense. There was nothing between the lodging of the appeal and its fixing for hearing that could lead to any criticism of the respondent.

53. The issue simply becomes this: bearing in mind that the issue of costs is compensatory and based on reasonable expectations, which also provides some guidance as to what might be an unreasonable conduct, as to whether or not the respondent should be subject to an order because the way in which it conducted the appeal was to have a total disregard, as it were, of the prospects of success of the appellant. That, to the Tribunal, is the only way in which there could be a success in respect of the word "unreasonable", as previously referred to, and in its conjunction with the words "manner in which the appeal has been conducted".

54. In the end, the respondent effectively lost every point. As was said, it lost every point on the basis of the submissions that were made on the stay application.

55. A further submission was made that the scale of the bets here was minimal and that that should have played some part in respect of the matter. That is correct, they were small bets of $5 and $140, they were not large bets in any sense. That may or may not have led to some consideration. But the Tribunal is satisfied that factual matter can be disregarded as on the issue that if there was in fact such a breach, the amount of the betting might be relevant to the issue of penalty, but not relevant to the seriousness of the conduct.

56. There was a very compelling argument that from the time of the submissions on the stay application the appellant could have expected that the respondent would withdraw an opposition to the matter.

57. The respondent was on early notice by email that costs would be sought.

58. But was it unreasonable in the manner in which it conducted itself that it did not withdraw?

59. The onus is on the applicant. The applicant does not satisfy the Tribunal that that higher level of the test is satisfied, that there is that aspect of unreasonable cost caused by the manner in which the appeal was conducted. The Tribunal is not satisfied in essence that it was incumbent, it was inevitable, it was without doubt the only possible outcome in the proceedings, which might be another way of paraphrasing "manner of conduct".

60. The application for costs is dismissed.

61. The appeal deposit is ordered to be refunded.
