Appeal decision

Hearing Date: 17 December 2015 & 13 May 2016

Decision Date: 30 August 2016

Code of racing: Thoroughbred

Appeal panel: Mr B Miller (Chair), Mr P James, Mr D Kays

Appearances: Mr Tim Ryan of Counsel instructed by Mr M Tutt on behalf of the Appellant Daryl Hansen and Mr MJ Henry of Counsel on behalf of the Respondent, Racing Queensland

Decision being appealed: Breach of Rule 1AR178C(1)(a) (Presentation Rule) Disqualification of nine (9) months of Appellant's Licence

Appeal result: Appeal upheld – Disqualification quashed

INTRODUCTION

The Appellant appeals to the Racing Disciplinary Board ("The Board") in relation to a decision of the Stewards Racing Queensland made on 14 October 2015 whereby they found Mr Hansen guilty of breaching Australian Racing Rule 178, particulars of which were that he presented the horse How Can I Help to race at the Ipswich Turf Club on 18 August 2015 where a pre-race blood sample taken from the horse was found upon analysis to contain a prohibited substance:-

> *"being a total carbon dioxide level at a concentration above 36 millimole per litre as prescribed by AR178C(1)(a)."*

The Stewards imposed a nine (9) months disqualification period upon the Appellant's Licence and the Appellant appeals both the conviction and the penalty imposed.

BACKGROUND

Mr Hansen who pleaded not guilty to the charge adduced evidence from himself and his stable hand at the initial Steward's Hearing that the explanation for the horse's elevated TCO_2 reading, was due to a mix up by the stable hand in the feeding of the horse on race morning.

In attempting to establish a case against Mr Hansen the Stewards tendered two

certificates of analysis of the blood, namely an “A” sample from the Racing Science Centre (RSC) in Brisbane which recorded a reading of 37.4 mmol/L (exhibit 4) and a certificate of analysis of the blood in the “B” sample analysed by the Racing Analytical Science Limited Laboratory (RASL) in Victoria which recorded a reading of 36.5 mmol/L (exhibit 13). Both of these samples were taken pre-race at the same time from the horse.

A considerable time was spent at the first hearing date on 17 December 2015, and lengthy submissions were received from both Mr Tim Ryan on behalf of the Appellant and Mr MJ Henry on behalf of the Respondent concerning the result of the “B” sample when allowing for the measurement of uncertainty of 1 mmol/L, having a true reading of somewhere between 35.5 and 37.5 mmol/L whereas at the lower level it would not be a confirmatory reading of the “A” sample.

Further allowing for the measurement of uncertainty the “A” sample could have had a reading as low as 36.4 mmol/L.

Mr Ryan on behalf of the Appellant argued that Rule 178D(3) could not be relied upon to establish proof of the existence of the prohibited substance in the sample taken from this horse.

He went on to argue that Rule 178D(3) can only be relied upon in circumstances where the certified findings of <u>both</u> official Racing Laboratories detected the same prohibited substance. In other words, Rule 178D(3) can only be relied upon to assist in the proof of the case against Mr Hansen if the results of <u>both</u> official Racing Laboratories confirmed the certified finding of above 37 mmol/L (before the reduction for measurement of uncertainty is taken into account).

Mr Ryan further argued that without a certified finding of the Victorian Laboratory of the detection of a prohibited substance “Rule 178D(3) had no application at all and could not be relied upon to support a conclusion by the Stewards that there was in fact prima facie evidence of the existence of a prohibited substance in the sample. Further that one certificate was not enough in light of the contradictory result of the analysis of the “B” sample and the onus of proof as discussed in *Briginshaw v Briginshaw* (*1938) 60 CLR 336*.

Mr Henry on behalf of Racing Queensland, in his submission under the presentation rule, which is a rule of <u>strict liability</u>, argued that there was no onus on the Stewards to establish any intent or actual administration of the prohibited substance by the person and that an offence is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.

Mr Henry argued that in cases of strict liability the Stewards can rely on the certificates and he also opined that the likelihood of the second sample being in excess of 36 millimoles per litre was high. Mr Henry also argued that the Stewards

had before them evidence in relation to the horse being administered the offending substance by accident. He argued that the presentation rule was a very blunt instrument and that its net catches the guilty and also the people but for the rule that would otherwise be innocent. In other words those who take reasonable care and those who flout the rules are dealt with on the same basis as to guilt.

FURTHER SUBMISSIONS

At the resumed further hearing of this matter on 13 May 2016 further submissions were received from both Mr Ryan on behalf of the Appellant and Mr Henry on behalf of Racing Queensland in relation to matters which arose subsequent to the date of the first hearing and in particular in relation to whether evidence should be received in relation to the validity of the second certificate of analysis from the RASL Laboratory in Victoria.

In this regard since the initial hearing of Mr Hansen's appeal to this Board on 17 December 2015 Mr Hansen's Solicitor had obtained the accreditation certificates from the Racing Science Centre (RSC) relating to the period of time when the "B" sample was taken from the horse How Can I Help that raced at Ipswich on 14 August 2015, and was received and analysed at the second Laboratory named on the certificate, namely the Racing Analytical Services Limited Laboratory (RASL) at Flemington in Victoria.

According to Exhibit 10 the "B" Sample was received at the RASL Laboratory at 9am on 18 August 2015 having been dispatched from the Racing Science Centre in Brisbane. Analysis of that sample must have been undertaken on the same day because the certificate of analysis which is Exhibit 13 is dated the same day, 18 August 2015. Submissions were received that it is clear from Exhibits 10 and 13 that it was the same person who received the sample at RASL and who signed the certificate, namely a Ms Naomi Selvadurai (Racing Operations Manager).

Accreditation Certificates are issued pursuant to Section 132 of the *Racing Act Qld (2002)*. Section 132(3) provides that the Accreditation Certificate must include the name of each person who for the accredited facility is:

(1) Responsible for taking delivery of things for analysis, or
(2) An Accredited Analyst.

The matters referred to in this second certificate were more particularly outlined in a submission received by Racing Queensland on 19 February 2016 when it became apparent that Ms Selvadurai was not a person nominated in the 14 November 2013 Certificate of Accreditation as a person authorised to take delivery of samples for analysis at the secondary facility as required by Section 146(4) of the *Racing Act*, nor was Ms Selvadurai authorized as an Accredited Analyst for the secondary facility in the 14 November 2013 certificate as was required under Section 146 of the *Racing*

Act.

It was argued on behalf of the Appellant that Ms Selvadurai was not a lawfully nominated person for taking delivery of the sample under the certificate issued pursuant to the Act as at 18 August 2015 nor was she an authorised person to issue a Certificate of Analysis under the Act as at 18 August 2015 (which is the relevant date) because she was not recorded on the certificate as an Analyst at the secondary facility at that time. Ms Selvadurai's name only appears on 22 September 2015 certificate after the time of the relevant events.
It was argued in those circumstances, the receipt of the sample, the testing of the sample and the results of the testing of the sample have been undertaken in a way that is contrary to the authorisation within the certificate and contrary to the requirements of the Act.

In other words, the whole process that followed from the sending of the "B" Sample to the RASL Laboratory, was fundamentally flawed.

Further that there had been non-compliance with the statutory requirements designed to ensure the reliability, transparency and integrity of testing of samples for analysis under the Integrity Control Requirements of the *Racing Act* and that the testing process undertaken by RASL relating to the sample and more importantly the issuing of the certificate RS15-12823 by RASL was invalid, and that the certificate itself therefore was a nullity.

THE RECEPTION OF THE ACCREDITATION CERTIFICATES BY THE BOARD

A submission was received from Counsel for Racing Queensland to the effect that the Board should not accept the further evidence of the certificates as they were produced after the initial hearing on 17 December 2015 and for other reasons.

DECISION

This board rejected the submissions of Racing Queensland in regard to the acceptance of those Accreditation Certificates and allowed them to be submitted for the purposes of this case.

In arriving at this decision the Board was mindful that Racing Queensland is a body created by Statute of the Queensland Parliament. It was the control body of the three codes of Racing in this State and model litigant principles applied to it. In accordance with the submissions of Mr Ryan the relevant Accreditation Certificates in this case were issued by the Director General (Chief Executive) of the Department of Racing. It is impossible to believe that the control body of Racing in this State was not in possession of these certificates, both at the time of the Stewards Hearing, and in the period of time leading up to and including the date of the Hearing in December 2015.

It had been contended by Mr Henry on behalf of Racing Queensland that to permit the reception of the Accreditation Certificate evidence would violate Racing Queensland's natural justice rights and that this Board should therefore not accept the Accreditation Certificates.

This Board rejects those arguments and also the argument that we have a discretion to exclude the evidence of the Accreditation Certificates. Further the principles of natural justice must also apply to the Appellant.

The decision of this Board is that there is no discretion to be exercised. Either the reception and analysis of the "B" sample complied with the requirements of the Act or it did not. This is a mandatory provision of the Act. It is not optional for Racing Queensland or any other authority to fail to comply with the provisions of the Act.

The legislator has imposed, for sound policy reasons as argued in this appeal, an obligation on an accreditation holder to ensure that the information contained within the certificate is accurate so that, amongst other things, all persons have confidence in the integrity of the analysis of samples taken from Thoroughbred Horses in Queensland. The requirements of the *Racing Act* do not refer to whether the results are "scientifically accurate" however they do set specific compliance requirements.

It is the decision of this Board that those mandatory compliance requirements have not been carried out and as such the "B" certificate obtained from RASL Laboratory in Victoria is a nullity.

We would further add that this is certainly not a case where the Stewards are in any way at fault.

The legislation in respect of the presentation rule (for the admission of certificates) is very clear.

Certificates create strict liability and all necessary protocols and procedures in the legislation must be followed or the certificates are not admissible and of no value whatsoever. In this particular case the RASL referring Laboratory for the "B" sample to be analysed did not comply with the relevant legislation for the Accreditation Certificates of the recipient of the sample or Analyst at the relevant time and we find that the certificate for the "B" sample is therefore worthless.

In these circumstances and in the absence of both certificates being valid (the "B" sample being a nullity) a prima facie case under the presentation rule cannot exist and the charge cannot be sustained. The decision of this board is that the appeal should therefore be upheld.

Further right of appeal information: The Appellant and the Steward may appeal to the Queensland Civil and Administrative Tribunal (QCAT) within **28 days of the date of this decision**. Information in relation to appeals to QCAT may be obtained by telephone on (07) 3247 3302 or via the Internet at www.qcat.qld.gov.au