Appeal decision

Hearing Date: 27 June 2016

Decision Date: 13 September 2016

Code of racing: Thoroughbred

Appeal panel: Mr B Miller (Chair), Mr G Casey and Mr D Kays

Appearances: Mr T A Ryan, Counsel, Instructed by Fowler Lawyers, for Appellant Ms L Paton
Mr A R Forbes, Solicitor, Lander and Rogers, for Respondent, Racing Queensland.

Decision being appealed: Breach Australian Rule of Racing 178 (Presentation Rule) Disqualification – 12 months

Appeal result: Upheld

The appellant Lyn Paton was the trainer of two thoroughbred horses ("Doing Our Best" and "Pink Chaperone") that raced at Kilcoy and Toowoomba on 3 October 2015 and 24 October 2015 respectively.

A post-race urine sample was collected from each horse and forwarded to the Racing Science Centre **(RSC)** for analysis that revealed the presence of cobalt at a level in excess of the 'threshold' permitted by Australian Rules of Racing **(AR)**178(1)(l) i.e. 200 micrograms per litre. On 5 November 2015 an analyst (Mr W Jarrett) certified that the sample in respect of "Doing Our Best" contained a mass concentration of 310 micrograms per litre, and the sample in respect of "Pink Chaperone" contained 335 micrograms per litre in accordance with (Section 147(3) Racing Act 2002 **(Act).**

RSC purporting to comply with AR178(D)(7) had the 'reserve' or "B" sample analysed by another analyst (Ms Nelis) who on 4 January 2016 issued her certificate in respect of each horse and reported the presence of cobalt at the following levels: "Doing Our Best" 294 micrograms/litre, and "Pink Chaperone" 296 micrograms/litre).

The stewards at their inquiry on 26 May 2016 found the appellant guilty of contravening AR178 (the "Presentation Rule") in reliance on the certificates issued on 5 November 2015 and 4 January 2016. The penalty imposed was 12 months disqualification for each breach of the Rule to be served concurrently. Both horses were disqualified from winning their respective races. The appellant appealed both the finding of guilt and the penalty imposed.

The nub of the appeal was the question whether the reliance upon both sets of certificates from the RSC was permissible and therefore admissible against the Appellant. Mr Forbes contended that as the stewards had formed the view that the RSC was the only accredited laboratory under the Act

permitted to analyse a referred and/or a reserve sample, the certificates were admissible (Para(s) 6 and 14 of Submissions);

Furthermore, as the Act did not specifically direct how the reserve sample was to be dealt with, then the Rules prevailed. The belief that the stewards had formed entitled them to refer the reserve sample to the RSC for analysis by a different analyst (viz M/s Nelis) thus utilising the powers of AR 178D(7)(b). Alternatively he suggested that the Racing Disciplinary Board (**Board)** had the discretion to accept the certificates using its general powers under S149ZE of the Act, augmented by the discretionary power to accept "substantial compliance" with the Rules (S325A (2) (Summarising Para(s) 13 to 19 of Respondent's Submissions).

At Para (23) of his submissions he stated "there is no strict requirement upon the control body or accredited facility to deliver the reserve or "B" sample to another facility. To the contrary, there are circumstances in which it is not required".

Mr Ryan submitted to the Board that the certificates issued with respect to the Reserve samples were inadmissible as they had not been raised as a result of compliance with the relevant legislation in that the RSC was not authorised to analyse or certify to the presence of a prohibited substance by purporting to rely upon Rule178D(7). He said *"It was a precondition to the operation of Rule 178D(7) that no other official racing laboratory within Australia had the capacity to detect or to certify the presence of cobalt in a urine sample taken from a horse. Without that fact being established Rule 178D(7)(a) could not apply. In the present case then, Rule 178D(7)(b) could not validly be relied upon to establish a case against Ms Smith (sic)"* (italics added). (Para 10 Appellant's Submissions).

In this Board's decision re Rochelle Smith dated 31 August 2016 at Para. 19(g) it said "the Act required strict compliance with the terms of authorisation (by an accredited facility) for the analysis of the sample and as to how the "B" sample was to be used for confirmatory analysis. Non-accredited facilities were not contemplated at all relevant times". Although that matter (Smith) and the matter the subject of this appeal relied upon confirmatory analysis of the reserve samples, the former involved the reserve sample having been sent to a non-accredited facility for analysis and subsequently returned to RSC for additional testing, whereas the latter was referred to the RSC which had proper accreditation. The issue as Mr Ryan highlighted was whether the RSC was at the relevant time the only official laboratory whether in Queensland or elsewhere capable of analysing the sample for the presence of cobalt.

There is no dispute that S143(4) of the Act was followed initially by the stewards in forwarding the urine samples following collection to the RSC; nor was there any issue taken with respect to the procedures taken up to the issuance of the certificates of analysis for the "A" samples. However, as the Act does not specifically state how the "B" (reserve) sample was to be dealt with, the Rules which did have a prescribed procedure were followed in compliance with S 95(1) of the Act. The relevant rule was AR178D.

AR 178D (2) states "Upon the detection by an Official Racing Laboratory of a prohibited substance in a sample taken from a horse such laboratory shall –

(a) notify its finding to the stewards, who shall thereupon notify the trainer of the horse of such finding, and
(b) nominate another Official Racing Laboratory and refer to it the **reserve portion** of the same sample and, except in the case of a blood sample, the control of the same sample, together with advice as to the identity of the prohibited substance detected" (emphasis added).

Subrule (7) states "Where there is **only one** (emphasis added) Official Racing Laboratory with the capability to analyse a sample to detect and/or certify as to the presence of a particular prohibited substance in that sample and that Official Racing Laboratory detects that prohibited substance in a sample taken from a horse:

(a)……;
(b)……..;.
Para (a) provides for the analysis by a second analyst whilst para (b) provides confirmatory evidence of the presence of the prohibited substance.
At the relevant time i.e. 11 January 2015 when the certificates of analysis issued by Mr Jarrett in respect of the "A" samples were received by Queensland Racing stewards, there were many OLR's in Australia and overseas which had the capability to test for and provide the confirmatory evidence required by AR 178D(7)(b) (Ref. AR(1)).

It follows that the second set of analyses on the reserve samples conducted by Ms Nelis which were used to provide the prima facie (or confirmatory) evidence were inadmissible and were not protected by the provisions of S352A of the Act. That section could not be relied upon to justify the 'taking and dealing' with the reserve samples in 'substantial compliance' with S 143 of the Act. This matter is not to be resolved on the decision as to whether the procedures to ensure the integrity of the reserve sample have been complied with as that would not alter the fact that a substantive provision of the Act has not been followed. Succinctly put, the RSC was not authorised at the time to invoke the provisions of AR178D(7) which made reliance on S352A of the Act by the Respondent irrelevant.

The Board is reasonably satisfied applying the principles of Brigginshaw –v- Brigginshaw (1938) 6 CLR 336) that the evidence provided as prima facie proof of the existence of the prohibited substance was fundamentally flawed and unreliable to justify a finding of guilt and accordingly uphold the appeal and set aside the penalty imposed.

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