

RACING APPEALS TRIBUNAL

QUEENSLAND

NOTICE OF DECISION

APPEAL NO: RT007-09

DATE: 5 August 2009

APPELLANT: Mr Wade Birch, Chief Steward of Queensland for and on behalf of the Stewards of Queensland Racing Limited

RESPONDENT: Mr Richard William Stephenson

APPEAL FROM: Appeal from the decision of the First Level Appeals Committee to uphold an appeal by the Respondent against the decision of the Appellant that the Appellant breached AR175 (a) and the imposition of a penalty of 2 months suspension.

BREACH OF RULE: AR175 (a)

DECISION: Appeal dismissed.

APPEARANCES: A J MacSporran SC, instructed by Patrick Murphy Solicitor appeared on behalf of the Appellant.

J E Murdoch SC, appeared on behalf of the Respondent.

REASONS FOR DECISION

Mr Leo Williams AO - Chairman
Mr Brock Miller - Deputy Chairman
Mr Dennis Standfield - Member

The Notice of Appeal filed on 9 April 2009 stated the Appellant as Queensland Racing Limited. Section 167(2) of the *Racing Act 2002* ("the Act") requires that it be a Steward that appeals to the Tribunal. The Tribunal grants leave for Mr Wade Birch, Chief Steward of Queensland for and on behalf of the Stewards of Queensland Racing Limited to be substituted as the Appellant in the Appeal.

The Appeal in this matter is against the decision of the First Level Appeals Committee “the First Level” delivered on 26 March 2009 to uphold the Appeal of the Respondent against the finding by the Stewards on 9 February 2009 that the Respondent had breached AR175(a) with respect to improper behaviour and the imposition of a 2 month suspension as penalty.

The First Level has provided detailed reasons “First Level Reasons” for their decision and the Tribunal commends the First level members for providing their reasons explaining the basis of their decision.

In this Appeal however, as in any Appeal, it is incumbent on the Tribunal pursuant to Section 172(3) of the Act to give its decision “...*unaffected by the decision appealed against, on the material before the entity that made the decision and any further evidence allowed by the Tribunal.*”

AR 175(a) provides:-

- “AR175. *The Committee of any Club or the Stewards may punish:*
- (a) *any person who in their opinion has been guilty of any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing.*”

The particulars provided by the Stewards at their Inquiry when alleging the Respondent breached AR175(a) reads:-

“The particulars of the charge are, that you Mr Stephenson, a licensed trainer with Queensland Racing Limited, did act improperly in relation to the sale of a thoroughbred race horse “Cotton Candy”, in that you failed to disclose a fee received for your part in the sale of that horse, and furthermore deceived part owner Mr Dennis Curran when questioned in relation to the amount received for “Cotton Candy”.”

The factual matters relating to the particulars are set out in detail in the First Level Reasons and can be summarised as:-

Mr Stephenson was in April 2008 the licensed trainer of the horse Cotton Candy which had a number of owners of which Mr Dennis Curran had a one eighth share. The owners decided to sell the horse and asked Mr Stephenson to do so on their behalf. Mr Stephenson sold the horse to interests in Mount

Isa. The sale monies received for the horse was \$5,000.00 of which Mr Stephenson accounted \$4,000.00 to the owners and kept \$1,000.00 for himself which he did not disclose to the owners.

After the sale, Mr Dennis Curran became aware that the horse was sold for more than \$4,000.00 and on 29 October 2008 faxed a letter of complaint to Queensland Racing stating that the "secret commission" received by Mr Stephenson should be investigated.

The Stewards carried out investigations and commenced an Inquiry on 12 January 2009 which concluded on 9 February 2009 when they found that Mr Stephenson had breached AR175(a).

At the Stewards Inquiry and at the First Level Appeal, Mr Stephenson submitted both through written submissions and through his Counsel Mr Murdoch SC, that the Stewards did not have jurisdiction to investigate the matter and lay a charge against Mr Stephenson under the Australian Rules of Racing. The First Level decided the Stewards did not have jurisdiction and upheld the Appeal. The jurisdiction issue considered by the First Level will be referred to later in these reasons.

In view of the First Level decision that there was no jurisdiction, the First Level did not propose to deal with deciding on the factual matters which were in dispute but did comment in the 10th paragraph on page 18 of their decision as follows:-

"Had we ruled the Stewards had jurisdiction to deal with the matter, we would have had difficulty in resolving the 'deception issue' without having the benefit of seeing the witnesses give evidence in chief and under cross examination."

The Appellant's grounds of appeal on the Notice of Appeal are stated as:-

"The Committee erred in its interpretation of AR10 and AR175(a) in concluding that the sale of the horse by Mr. Stephenson as agent for the owners was not a "matter or incident related to racing" nor a matter "in connection with racing" such that the Stewards had no jurisdiction or power to enquire into and adjudicate upon the matter."

At the Tribunal hearing on 5 May 2009 Mr MacSporran SC for the Appellant provided an Outline of Submissions with respect to the jurisdiction issue and in the Outline of Submissions referred to the Australian Bloodstock Code of Practice ("the Code"). This was not referred to at the First Level Appeal. The Appellant's Outline of Submissions with regard to that Code reads:-

- “4. *The Appeal Committee did not have regard to the “Australian Bloodstock Code of Practice” published by the Australian Racing Board in 2005.*
5. *The Code deals with the obligations of agents such as the respondent in acting in the course of the sale of horses.*
6. *By virtue of AR7(s), Queensland Racing Limited is given power “to investigate alleged breaches of a code of practice published by the Australian Racing Board and to warn-off or punish any person who it finds to have committed a breach of such a code of practice.”*
7. *Specific power is therefore given to the appellant to investigate matters the subject of this appeal and the question of jurisdiction should be decided in favour of the appellant.”*

At the hearing on 5 May 2009 Mr Murdoch SC for the Respondent did not accept that the Code has application.

The Code is stated to be adopted and published by the Australian Racing Board and is specifically referred to in the Australian Rules of Racing in AR7 and AR175 which state respectively:-

“AR.7. A Principal Racing Authority shall have the control and general supervision of racing within its territory. Such Principal Racing Authority, in furtherance and not in limitation of all powers conferred on it or implied by these Rules, shall have power, in its discretion:-

(s) To investigate alleged breaches of a Code of Practice published by the Australian Racing Board to warn-off or punish any person it finds to have committed a breach of such a Code of Practice. [added 1.5.05]

and

AR.175 The Committee of any Club or the Stewards may punish:

(v) Any person who commits a breach of a Code of Practice published by the Australian Racing Board. [added 1.5.05]”

The purpose of the Code is set out in the document itself under the heading “Introduction” which states:-

“Introduction

The Code of Practice sets out the principles which apply to all sales of bloodstock and sales of stallion shares and nominations, be they private sales or sales at public auction, ensuring that sales of bloodstock in Australia will set and maintain a high standard of integrity and transparency, which will safeguard the interests of vendors, consignors, bloodstock agents, owners, trainers and the sales companies.”

As the Appellant was now relying on the Code and putting aside the issue of whether the conduct of the Respondent could be within the scope of the Code, the Tribunal did seek submissions from the parties in the following terms:-

- “(a) The process adopted by Queensland Racing for the implementation of policies and rules made by the Australian Racing Board;*
- (b) The legislative basis therefore;*
- (c) In particular, the procedures followed for the adoption of “The Australian Bloodstock Code of Practice” and the legislative basis for the adoption of same; and*
- (d) any other issues of and incidental to the above matters.”*

The Appellants submissions are dated 5 June 2009 (Appellant’s Jurisdiction Submissions) and the Respondent’s submissions are dated 9 June 2009 (Respondent’s Jurisdiction Submissions).

Following the receipt of each party’s Jurisdiction Submissions the Appellant sought the opportunity to present further oral submissions which the Tribunal acceded to and the oral submissions from both the Appellant and Respondent were heard on 5 August 2009. At this hearing the Appellant presented further written submissions (“Appellant’s Further Jurisdiction Submissions”).

The issue which the Tribunal has been asked to determine is essentially whether the Stewards have jurisdiction to adjudicate on a Licensee for activities associated with the sale of a racehorse.

If jurisdiction for the Stewards to deal with the matter exists, it has to be based on powers conferred on the Stewards pursuant to the provisions of the Act.

The Stewards are employees of Queensland Racing Limited (“QRL”) which is the control body in Queensland and pursuant to Chapter 2 of the Act manage the code of Thoroughbred Racing in Queensland. QRL’s functions and powers can be found in Part 3, Division 1 of the Act. Section 34 gives various specific powers to QRL for its control of racing. Chapter 3, Part 1 of the Act sets out the provisions by which a control body performs its functions with Section 78(2) of the Act specifically stating:-

“78(2) Generally, the control body performs its functions by:-

- (a) making policies about the management of its code of racing, especially about its licensing scheme for controlling activities relating to the animals, clubs, participants and venues and about the way in which races are to be held for its code of racing; and*
 - (b) making rules of racing about things dealt with in a policy; and*
 - (c) ...*
- (3) A control body’s policies ensure there is guidance for persons involved in the code of racing and transparent decision-making relating to matters dealt with by the policies.”*

The reference to policies is underlined for emphasis but it can clearly be seen that a control body must have a policy on which to base its management for its particular code.

As the Code was introduced into the Australian Racing Rules with effect from 1 May 2005 it is difficult to see how QRL can rely on its licensing scheme policy to substantiate those rules as the licensing scheme policy took effect from a date subsequent to the introduction of the Code being 7 March 2008. The Appellant’s Further Jurisdiction Submissions submit that the Code is applicable when the now repealed Racing and Betting Act 1980 (“the 1980 Act”) is considered. As the Tribunal understands it, the Appellant’s submissions are that when considering the definitions under the 1980 Act and the evolution of QRL as the control body, any adoption by the Australian Racing Board Limited (“ARBL”) of any changes to the making of new rules to the Australian Rules of Racing are binding on QRL’s licensees. This is because the predecessors to QRL (as a member of the ARBL) are bound by that company’s Constitution, and the need to ensure uniform rules of racing throughout Australia. Furthermore, if it was considered that there was any invalidity

by there not being a supporting policy, then QRL's licensing policy of 7 March 2008 can still be relied upon relating to the Code as the particulars of the conduct of the respondent occurred after 7 March 2008.

It is clear from the requirements of Section 78 of the Act that a policy needs first to be in effect before there can be a Rule. Indeed, Section 93 of the Act provides for urgent Rules of Racing in circumstances where there is not a policy but there is the need for urgency with the limitation that the rule is not of effect for a period of longer than six months. This is not the position with respect to the rules which relate to the Code.

While Section 377(1) of the Act specifically authorises that Rules of Racing prior to the commencement of the Act on 1 July 2003 are Rules of Racing, this authorisation has to be read with Section 378(2) which gave power to a control body to amend the rules or repeal the rules. The Tribunal is of the view that new rules must be underpinned by a policy of a control body. It is simply not sufficient to say that because QRL or any of the previous control bodies of racing in Queensland were members of ARBL that rules introduced by ARBL to the Australian Rules of Racing are effective in Queensland. The Rules of Racing and the policies that underpin have immense power over persons who are bound by them. Indeed, a person can lose his or her livelihood as a consequence of a breach of the Rules. Section 79 of the Act states that policies and rules of racing made by a control body are statutory instruments and have the force of law in Queensland.

As the Rules of Racing have the force of law, it seems inconceivable that Parliament when introducing the Racing Act 2002 intended that it be that the making of rules can be vested with a body such as ARBL without the strict requirements concerning the making of rules being adhered to. Indeed if this was the intention of Parliament, there should have been clear provisions in the Act that such a power can be given to an outside body. A policy must precede the application of a Rule. In the absence of a policy, AR209 which adopts the Code is not applicable and unable to be adjudicated upon by the Stewards.

As the Tribunal has found that the Code is not in force, there is no need to consider whether if it was in force, whether it would be applicable to the circumstances of the sale of the horse by the Respondent and the Tribunal makes no finding in that regard.

The other aspect of the jurisdictional issue is the matter considered by the First Level being whether within the Rules of Racing as at 1 July 2003 or subsequent rules

which have been underpinned by a policy of QRL there is power for the Stewards to adjudicate on the matter.

The general powers of QRL are found enumerated in AR1, AR7 and AR7A and powers of the Stewards in AR8A, AR8B, AR8C, AR8D and AR9.

AR1 defines the terms in the Rules and states:-

“Participant in Racing” includes

(a) a trainer;

...

(f) any person who provides a service or services connected with the keeping, training or racing of a horse.”

AR10 and AR10A provide respectively:

“AR.10. The Stewards may at any time inquire into, adjudicate upon and deal with any matter in connection with any race meeting or any matter or incident related to racing.”

and

“AR.10A.(1) The Stewards may inquire into, and adjudicate upon, any incident or occurrence arising at any organised trial or training facility.

(2) Without limiting the provisions of subrule (1) of this rule, the Stewards may:-

(a) inquire into and adjudicate on any misconduct occurring at any trial, trackwork or associated activity;

(b) inquire into and adjudicate upon any suspected breach of the Rules or of any regulations, by-laws or conditions established by a race club or other responsible body for the conduct of organised trials or the use of any training facility;

(c) take any action deemed necessary in respect of any horse.”

For the Stewards to have jurisdiction to determine the matter as they have claimed the only possible power that supports such a claim could be that contained in AR.10. This general power has two limbs, the second of which in essence is:

“...the Stewards may at any time inquire into, and adjudicate upon and deal with... any matter or incident related to racing.”

The question is whether this general power is wide enough to confer jurisdiction in respect of the sale of a racehorse by a licensed person.

The Stewards did not deal with the preliminary issue of jurisdiction in their findings on 9 February 2009 and merely assumed the power by stating that they were “...satisfied that this matter falls within the provisions of AR.10...”

In the First Level Reasons, the First Level were of the opinion that AR.10 was not wide enough to support jurisdiction of the Stewards in this matter, stating (page 17 of the First Level Reasons):-

“In our view, the words ‘in connection with any race meeting or any matter or incident related to racing’ as used in AR.10 and the words ‘in connection with racing’ as used in AR.175(a) are subject to the context in which they are used, to the words with which they are associated and to the object and purpose of the statutory provision in which they appear (Hatfield v HIC).

Both phrases gather meaning from the context in which they appear and it is that context which determines the matters to which they extend (WCB(Q) v Technical Products).

The meaning to be attributed to the words ‘in connection with race meeting or any matter or incident related to racing’ as used in AR.10 and ‘in connection with racing’ as used in AR.175(a) must be derived from the context in which they are used.

In our view, nothing in the Australian Rules of Racing would extend the meaning of those words to include the sale of a horse by a licensed trainer in these circumstances.

In our view, the Australian Rules of Racing provide for the proper conduct of thoroughbred racing and its related activities, for instance, the training, stabling and keeping of thoroughbred horses and the conduct of licensees on or off a racecourse when engaged in such matters.”

The First Level further stated (at page 18 of the First Level Reasons):

“In our view, if a licensed trainer happens to regularly or irregularly engage in other racing industry activities (i.e. other than the keeping, training and racing of horses under his care) those activities do not necessarily have a connection with racing simply because the trainer is a licensee.

In our view, the sale of the horse by Mr Stephenson as agent for the owners was not a matter or incident relating to racing within the meaning of the term as used in AR.10. In the circumstances, we consider the Stewards did not have the power to inquire into and adjudicate upon the matter.”

Issues as to whether a particular matter is or is not a matter or incident related to racing can raise difficult questions. Page 17 and 18 of the First Level Reasons sets out examples where the First Level considered there could be a distinction between “activities which have a connection with the racing industry” and “any matter or incident related to racing”. The Tribunal is of the view that it is the former that applies in this matter.

The Tribunal concurs and accepts the reasoning of the First Level that the sale of a racehorse in the circumstances of this matter is not a matter which is within the scope of AR10 and the Stewards did not have the power to deal with the matter.

The Appeal is dismissed.

Mr Leo Williams AO
Deputy Chairman

Mr Brock Miller
Deputy Chairman

Mr Dennis Standfield
Member