Appeal decision

Hearing Date: 27 June 2016

Decision Date: 31 August 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 R Smith
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

1) The appellant Rochelle Smith was the trainer of two thoroughbred horses "Vimzig" and "Grey Countess" that she presented to race at Toowoomba and the Gold Coast on 16 May 2015 and 30 May 2015 respectively.

2) Officiating stewards arranged for a post-race urine sample to be obtained from each of those horses and were subjected to scientific analysis; each sample was found to contain a prohibited substance (cobalt) in excess of the permissible 'threshold' concentration under Australian Rule of Racing (AR)178C(1)(l)…200 micrograms per litre). Those analyses were performed at the Racing Science Centre, Brisbane (RSC) and Certificates of Analysis by an accredited analyst issued on 26 June 2015 disclosed the presence of cobalt in both horses at levels of 335 micrograms/litre and 'greater than 400 micrograms/litre' in "Vimzig" and "Grey Countess" respectively.

3) RSC through an accredited veterinary surgeon then forwarded the "B" or "reserve" portions of the urine samples to Chem Centre, Western Australia purportedly for confirmatory testing for cobalt. The samples were subsequently analysed and Certificates of Analysis issued on 7 July 2015 which purported to detect cobalt at 390 micrograms/litre in the "Vimzig" sample, and 1300 micrograms/litre in the "Grey Countess" sample.

4) On 30 July 2015 Racing Queensland stewards opened an inquiry into the presence of cobalt detected in both horses at a concentration above the 'threshold' permitted by the Rule, and admitted into evidence the Certificates of Analysis issued from both the RSC and Chem Centre, before adjourning the inquiry. That inquiry subsequently resumed on 26 May 2016 when the Appellant was found in breach of the relevant Rule (AR178). However, in the intervening period of the two inquiries, stewards via the RSC had arranged for the unused portions of the "B" samples to be returned from the Chem Centre to the RSC for what was to be used as a 'confirmatory' test.

5) On 4 February 2016 an accredited analyst (not the same analyst who issued the Certificates on 26 June 2015) detected cobalt in those samples at the following levels viz 355 micrograms/litre in the "Vimzig" sample, and 'greater than 400 micrograms/litre' in the "Grey Countess" sample.

6) In reliance of the result(s) of the scientific analyses performed at the RSC the stewards based their finding of guilt. They in effect abandoned the evidence (Certificates of Analysis) originally provided by the Chem Centre laboratory, which is apparent from the transcript of the stewards inquiry on 26 May 2016 (P41 Ls 32/33 & P43 L3). In contrast to the stewards no similar retraction was conceded by Mr Forbes before the Board.

7) It is the dealing with and analysis of the "B" sample which forms the basis of the appeal.

8) Mr Ryan submitted to the Board that a collective non-compliance with the Integrity provisions of the Racing Act 2002 (Act) by stewards, RSC, and the Chem Centre rendered any evidence inadmissible as it pertained to the "B" samples from the time they left the RSC, and in particular their handling and testing at the Chem Centre, and the usage of the results of the analysis of them when re-tested by the RSC. Essentially, the certificates issued by the Chem Centre on 7 July 2015 and the RSC on 4 February 2016 were inadmissible. In particular he emphasised that the sending to, the receipt by, and subsequent analysis at the Chem Centre was unlawful, as the RSC had no authority to forward the samples to and request testing from a non-accredited facility. Furthermore, the Chem Centre had no authority to deal with the samples received for the purpose of S143 of the Act.

9) Mr Forbes on the other hand submitted that the critical factor in determining the probative value of the evidence was to the effect that as the integrity of the samples was maintained and that substantial compliance with the Rules with regards to the taking and dealing with the samples was satisfied, the resultant Certificates of Analysis were reliable. He submitted that certificates from the RSC and/or the RSC and the Chem Centre were permissible. He particularly stressed that the RSC had the discretion to determine where the "B" sample was to be tested, whether it be the Chem Centre (non- accredited) or at the RSC itself. This discretion was patently available due to the wording of S143 of the Act. To allay any doubt, as it were, as to the integrity of the processes followed at the Chem Centre and the reliability of the resultant Certificates of Analysis, he submitted that S352A of the Act enabled the accredited veterinary surgeon from the RSC to verify to those facts.

10) In the appeal decision of this board delivered 28 June 2016 in the matter of (Kenneth John Belford – re Breach of AHRR 190(1))…it said "It is widely accepted that a Rule such as 190(1) of the Rules creates an offence of strict liability. In other words, the first Certificate of Analysis from the Drug Testing Laboratory established prima facie evidence and the second Certificate of Analysis if able to be relied upon (emphasis added) together with the first Certificate of Analysis is conclusive evidence". That in essence is the situation with regards to this appeal, although it involves horses from a different code of racing. The severe consequences following upon a finding of guilt demand that the evidence relied upon to support such finding must be assessed proportionately . It demands that strict compliance with the relevant legislation be adhered to.

11) It was accepted at the appeal that at the time the "B" sample was forwarded to the Chem Centre, although it was an Official Racing Laboratory (AR1), it was not an accredited facility as contemplated in Part 2 Chapter 4 of the Act; nor was it a secondary facility for the accredited facility (RSC) as defined (S 129(1)(d) of the Act).

12) Whilst no evidence of an agreement between the control body (Racing Queensland) and the RSC (S. 40 of the Act) was formally relied upon at the appeal hearing it was tacitly accepted that one existed.

Similarly, no formal proof was produced that the Chem Centre was not an accredited facility or a secondary facility for the RSC, but the appeal was conducted on the basis that it was not.

13) Section 143 (3) of the Act directs that where the "results of the analysis" are to be used by the control body for a purpose "other than for research or survey purposes" then it "must" take and deal with the thing for analysis under the integrity board's procedures mentioned in S115(3) of the Act. (Emphasis added). Those procedures comprising Protocols "A" and "B" are predicated on the use to be made of the samples to be taken e.g. urine sample to be split into two portions when being used to investigate a suspected breach of a control body's rules (ref. Part 3.1.1 and 3.1.2(b) of Protocol "A"). Part 4 of the same Procedures sets out in detail the process required to guarantee that the samples have been collected by authorised personnel of Racing Queensland using specified equipment, the completion of specified documentation to ensure traceability of the samples collected, and their safety custody following collection, and up to the time of delivery to the nominated person at the accredited facility. (Emphasis added).

14) The methodology used and other processes employed at that facility for the analysis of the thing collected and delivered to that facility are not determined by the Procedures enumerated in the S115 document. That is a matter contemplated by S.131 of the Act when the Chief Executive is satisfied "the facility's procedures for analysis…….are of a standard to ensure the integrity of the analysis"..(S131 of the Act paraphrased with parenthesis added). Once it becomes accredited, does the facility then in turn have the unbridled volition to do whatever it may with it as Mr Forbes suggested?

15) He said (inter alia) "Once it's delivered here, the Act is silent on how to deal with the same after that…..The Act does contemplate that the control body does have a choice. It either delivers it here or it can deliver it to another facility – not another accredited facility but, most importantly, another facility. And that's the relevance of section 143" (P13 L35 to 39).

"So, in this particular instance, once it is in the hands of the Science Centre, it was for them to do what it could do with it in compliance with the Act and the Rules. And, of course observing that it must ensure the integrity of the sample. ……As the Act doesn't dictate as to what happens to the sample beyond that, apart from issuing certificates and so on, the Rules apply….the Rules prevails only if the Act doesn't cover it. So, in this instance, there's nothing within the Act so the Rules prevail….." (Emphasis added).

"So, in that context, what the Rules do provide – and my friend has taken you to 178D – that once the same is tested and evidence of a prohibited substance occurs, subsection (2) kicks in, and that is it has to go to another centre, another official racing laboratory. Chem Centre is an official racing laboratory. It was tested by them and the certificate issued. The matter ends there. The stewards didn't have to rely upon the certificate which was issued early this year when they (sic) sample came back here". (P13 Ls 41 to 47; P14 L1). (Emphasis added).

16) Section 143(4) (a) of the Act (paraphrasing) compels Queensland Racing to deliver 'the thing for analysis' (urine samples) to an accredited facility under the agreement. That process is covered by the Procedures referred to (Part 4.6 & 4.7 supra). No issue was taken with the process as it pertained to the initial delivery of the sample to the RSC. No issue was taken with respect to the Certificates issued by the RSC on 26 June 2015. Mr Ryan however, strongly objected to the admission of the Certificates issued by the RSC on 4 February 2016 and the Chem Centre on 7 July 2015 respectively, as he stated "nowhere in any of these procedures is there any recognition of a procedure for sending a sample to a non-accredited laboratory. It does not appear. And, more importantly, nowhere is there any provision

for an accredited laboratory to take responsibility for the tasks that the control body itself is required to do" (Appeal P.5 L23 -27).

17) Whilst the Act may be silent as to what is to occur if a confirmatory analysis is required, Rule178D does contemplate such contingency. Sub-rule (2)(b) of the Rule requires stewards to "nominate another official racing laboratory and refer to it the reserve portion of the same sample…..etc." (inverted commas added). Sub-rule (3) enables prima facie evidence to be ascribed to the presence of a prohibited substance should that other laboratory detect the same substance as the original laboratory, which supports the finding of the RDB in the matter of Belford (para 10). This is the process which Mr Forbes says validates the use of Certificates from either the RSC and/or Chem Centre. Mr Ryan countered in effect that although the Rule confirmed the general principle of the requirement for confirmatory certificates from different laboratories, that the Chem Centre certificate was obtained through a process proscribed by S145 of the Act, and the only permissible alternative if the second RSC certificate was to be relied upon was to rely upon sub-rule (7) if it applied. He was of the view that it did not.

18) Sub-rule (7) authorises an ORL to issue two certificates (using different analysts) when it is the only laboratory "with the capability to analyse a sample to detect and/or certify as to the presence of a particular prohibited substance" (inverted commas added).

Mr Ryan said "Now, it's accepted, it seems, that in December 2015, the Racing Science Centre was not the only official racing laboratory with that capability. The Chem Centre in Western Australia had the capability. The certificates that it issued itself in July 2015 confirmed that, if it needed to be confirmed.

" And I understand from the correspondence that my friends had with Mr Tutt that that's not disputed in this case, that there were other laboratories in December 2015 that were capable of conducting a cobalt assessment in relation to a urine sample from a horse. So that's not in dispute". (Appeal P10 Ls 31-44). The statement was not contested before the RDB.

19) On the whole of the evidence before it, the Board is reasonably satisfied applying the principle of Brigenshaw –v- Brigenshaw (1938 60 CLR 336) of the following:

a) the Integrity requirements of the Act were sufficiently complied with (as that term is understood in S352A of the Act) with regards to the taking and dealing with the samples and the ultimate issuance of Certificates dated 26 June 2015 from the RSC ;

b) the taking and dealing with the "B" samples and the subsequent issuance of Certificates from the Chem Centre on 7 July 2016 was not authorised or contemplated by the Act which contemplated strict compliance with the legislation. The Chem Centre was not authorised to receive let alone deal with the samples including their analysis;

c) the stewards via RSC had no authority to request the Chem Centre to analyse the "B" samples and the RSC was not authorised to send them to the Centre for the purpose contemplated by the Act;

d) RSC was not authorised to analyse the remaining portion of the "B" samples sent to it from the Chem Centre, as it was in receipt of samples from a non-accredited source;

e) in view of the unauthorised dealing with the samples by the Chem Centre the integrity of the samples and any Certificate resulting from their analysis, gave rise to serious doubts as to the reliability of them for the purpose for which they were subsequently used;

f) the stewards were not authorised to use the Certificates issued on 4 February 2016 by RSC as they had not been issued in compliance with the terms of the Act (there being more than one ORL in existence at the time capable of the analysis of the specimens);

g) 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;

h) the terms of the Act should have been complied with in preference to reliance upon the terms of the Rules (S91(5) of the Act);

i) it would have been unfair and a denial of justice to have allowed the use of certificates raised as a result of analysis of the “B” samples in the circumstances that existed in this Appeal.

The Appeal is Upheld and finding of guilty and penalty imposed is set aside.

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