RACING APPEALS TRIBUNAL OF NSW

Tribunal: Mr D B Armati

31 July 2019

In the matter of the appeal by Mr Neil Costello v Racing NSW against warning off under LR6

DECISION:

1. **Appeal dismissed**
2. **Appeal deposit forfeited**

1. The Appellant appeals against a decision notified by the Chairman of Stewards, Mr Marc Van Gestel, of 8 October 2018 of the determination made by the Racing NSW Chief Executive that the warning off issued against the Appellant Mr Costello was to remain in force until certain information had been provided to the satisfaction of Racing NSW. The Tribunal will set out in the decision the full terminology of that letter.

> "I refer to your client Mr Neil Costello and his attendance at an interview conducted by Racing NSW Stewards on Friday 5 October 2018.
>
> While Mr Costello did provide further information to the Stewards, including information that he failed or refused to provide at the earlier interview, the following information is still outstanding:
>
> 1. Full name and contact details of the person who provided him with a number of substances that were not dispensed in accordance with relevant State and Commonwealth legislation, primarily Commonwealth AGVET Code and NSW Poison and Therapeutic Goods Regulation (2008).
>
> 2. Names of persons he was going to contact to provide the full name and contact details of the supplier identified in paragraph 1.
>
> Further, Racing NSW is not satisfied in respect to the evidence provided by Mr Costello regarding the circumstances surrounding the acquisition of the products from the unnamed person and the supply of these products to Mr Smith. In particular, Mr Costello is required to precisely detail how he procured the products, including but not limited to details of his communications with both the supplier and Mr Ben Smith and payment (with associated supporting documentation such as invoices and payment receipts.
>
> Racing NSW Chief Executive Mr Peter V'landys AM has confirmed that the warning off issued against Mr Costello will remain in force until such time that the above information is provided to the satisfaction of Racing NSW."

2. The decision to warn off was exercised under the Rules of Racing Local Rule 6, which reads as follows:

"The Board has power to warn off any or all racecourses within its control any person whose presence thereon, in the opinion of the Board, is not desirable."

3. The issue of the decision made by the Chief Executive, as falling within the terms of "the Board", has not been ventilated in this decision, but as a result of Kavanagh v Racing New South Wales [2019] NSWSC 40, a decision of Fagan J, the power of the Chief Executive to do so is undoubted.

4. By grounds of appeal of 27 September 2018, the appellant set out three grounds of appeal. Only 1 and 3 are pressed.

Ground 1: Procedural Fairness

1. The Appellant was not afforded procedural fairness as required by law.

(a) A failure to disclose to the Appellant information prior to the making of the determination to imposing the sanction.

(b) A failure to give notice of the matters to be relied upon by the decision-maker.

(c). A failure to disclose, before making the determination, the case that the Appellant had to meet.

(d) A failure to provide the Appellant with any reasonable opportunity to respond to the material referred to in (a) above.

Ground 2: Not pressed

Ground 3: Determination Was Unreasonable

3. The determination and sanction are manifestly unreasonable, unjust and/or illogical.

(a) The sanction imposed lacks any intelligible justification.

(b) The decision to warn off the Appellant does take into account any of the circumstances surrounding the Appellant's case.

(c) The decision-maker has provided no reasons for the determination.

5. It is to be noted that the grounds of appeal are dated 29 September 2018 and the decision before the Tribunal is essentially that of 8 October 2018.

6. It is necessary to refer briefly to the history that on 21 September 2018 the Appellant was interviewed by Stewards and a warning off given to him on that date. That led to the appeal of 25 September, to which the grounds of appeal relate and, without issue, the subsequent decision of 8 October, which was a continuation of the warning off, is related to that original ground of appeal. In other words, a further document of appeal is not required by the Tribunal.

7. The section of the Racing Appeals Tribunal Act setting out the power of the Tribunal in determining an appeal relating to thoroughbred racing is to be found in s 17. To summarise it, the Tribunal can dismiss the appeal, confirm the decision appealed against or vary a decision by substituting any decision that could have been made or referring the matter to Racing NSW for rehearing or, lastly, to make such order as to the disposal of the appeal as it thinks fit.

8. The Act requires that this be a de novo hearing.

9. After some brief submissions in the matter, the Tribunal has determined, without quoting references, that it shall apply the Briginshaw test to the facts before it. That is, having regard to the seriousness of a warning off, so much greater must the scrutiny of the evidence be before a determination is made.

10. The evidence has comprised a pre trial bundle of 257 pages. To summarise the key parts of that which have been the subject of submissions in this matter, it comprises the Appellant's interview with the Stewards of 21 September, the interview of 5 October, the determination

letters of 21 September and 5 October and various documents by way of exhibits that were before the Stewards and, critically, certain invoices which had issued. In addition, there are various other documents which relate to a broader issue, to which the Tribunal will return, which has not been the subject of submissions. It is to be noted that no additional evidence has been given to the Tribunal.

11. This matter reached the stage of 8 October as a result of certain intelligence received by the Stewards, which led them to commence an inquiry into the actions of a licensed trainer, Ben Smith, as a result of positives being received for cobalt on presentation of his horses to race. Smith was interviewed. The Appellant was not named.

12. Smith, under compulsion, produced a telephone. From an examination of his telephone records, the Appellant's name came up. As a result of further inquiries, the Stewards determined that they required the Appellant to produce his telephone records and he did so and to attend an inquiry on 21 September and he did so. The Appellant was questioned in relation to his supply of various substances to Smith.

13. At the conclusion of his second interview the Appellant had named a person known as Matt as the supplier to him of the products that he, the Appellant, supplied to Smith. Lacking detailed information about this person Matt, assuming that is the correct name, the Appellant was asked to find out who he was. The Appellant said he would make inquiries. The Stewards required him to name the people of whom he was going to make inquiries and to give the name and contact details of that supplier, known in the transcript as Matt. None of that information has been forthcoming and that, in a summary form of the evidence, brings into

context the decision of the Stewards of 8 October to reaffirm the decision of 21 September, but by 8 October on different grounds.

14. That is a summary of the background to put in context the two issues that concerned the Stewards and are referred to in the letter of 8 October. The Tribunal notes in particular that the state of the evidence is that adduced at the conclusion of the Stewards' inquiry on 5 October. The Appellant has not given any evidence and nor has any evidence otherwise been adduced to produce any material in answer to the two issues identified by the respondent in the letter of 8 October 2018.

15. To paraphrase it, the name and contact of Matt has not been advanced and the names of the persons he was going to contact to try and track down Matt have not been given. It is noted that Appellant indicated he was going to do that on 5 October. His warning off continued on 8 October with that entreaty to him. As of today, 31 July 2019, the Appellant has produced nothing to this Tribunal and, it is to be implied, to the Stewards, in respect of those two areas of concern. There is no evidence before the Tribunal which would indicate in any fashion why the Appellant has not progressed those matters. The Tribunal is of the opinion, this being a de novo hearing, that it is to determine the appeal on the basis of the evidence it has today.

16. The issues described by way of background identify two key points, which are the subject of the Appellant's outline of submissions in writing and which the Appellant addressed in the hearing. As always, the Tribunal was very grateful for a written document encapsulating a party's case.

17. To break the matters down into their two components, the first being the name and contact details of the person known as Matt, it is said that in

relation to the Stewards' decision that it was not open to them because the Appellant could only be in default if he in fact knew those details and that it was his evidence to the Stewards he did not know. Therefore, absent any other evidence, there could not be a finding made that he has acted in a way which would warrant a warning off. It is also said, on a procedural fairness point that that proposition of his failure was not put squarely to the Appellant that he in fact knew it, but was refusing to provide those details.

18. The key facts about the supply to the Appellant and in relation to the second point are somewhat similar. The second point, namely the failure to name the persons whom the Appellant would speak to to try and track down Matt is a cause of concern for the Stewards and remains so on the submissions, that is, a refusal to name those people. The written submissions and the oral submissions for the Appellant emphasise that that is based on an assumption, namely that there were people in the industry who did know the full name and contact details of the supplier and that in fact the Appellant knew who those people were. It is submitted that there is no evidence that he knew. It is also put that those matters should have been put more squarely, by procedural fairness, to the Appellant. The Appellant otherwise, it is submitted, assisted with other names with whom he had dealings.

19. What then are the key parts of the evidence? They are summarised underneath and the background to them has been given because there were two interviews, the first of which only ranged over 21 pages on 21 September because the Appellant walked out of the Stewards' inquiry.

The Tribunal has already reflected on the fact that he voluntarily attended that inquiry.

20. The Appellant described to the stewards how he would visit Mr Smith and treat his horses and was asked about other products. At that point the Appellant commenced to take, legitimately, a desire to leave until he had some advice. There was, of course, no compulsion on him to remain, but the the result, squarely and unambiguously put to him, that if he did leave the interview, there would be consequences for him. He did not answer the questions relating to supply and left and the warning off , as set out, was issued.

21. He then again, and it is in his favour, presented himself for interview on 5 October. On this occasion he was legally represented. To paraphrase the early part of that 86-page interview, the Appellant lied on a number of occasions about what he had done. Without seeking to be exhaustive, he was at pains to point out that the only things he gave to Smith were from a Condell Park supplier.

22. Not surprisingly, the Stewards, as the interview unfolded, put to him that which they had discovered from Smith's telephone extracts, which contained supply invoices from the Appellant to Smith of a number of products. Some of those products are perfectly legal. Some of them, as it turned out, were only prescribable by registered vets and some have strong limitations on their usage. Many of them were not properly labelled. To paraphrase again for a substantial period of the interview, the Appellant was simply caught out. He denied that he was supplying anything other than the Condell Park products and, when caught out, he

commenced - and it did not happen until page 19 - to start to give some information, the balance of which is that which the Stewards now seek.

23. At transcript page 19 he describes how he had obtained products, which were on the list, from a person whose surname he did not know, but knew him as Matt, who he had seen two or three times and who called into his place. He was described as a smallish person, maybe Asian, not full Asian, but Asian in appearance. He had dealt with him for 15 months. The Appellant did not have a phone number for him and Matt just turned up. At that point early on he was asked this question:

> "Q. Do you have a contact number for him?
> A. No, but I can make some inquiries."

24. The Stewards then questioned him at length about various products contained on his invoice to Smith. At page 33 he said he had not seen Matt since the Appellant last supplied Smith with some of Matt's products, but Matt did give him a catalogue, that he Matt paid cash, that he invoiced Smith, that he lent money to Smith and Smith paid him cash or otherwise acquitted the supply costs. Critically, at 35 he was asked:

> Q. Matt. Are you sure you don't know the identify of this person?
> A. No, but I'll make some inquiries.

He continued then at 36 to describe how Matt simply just turned up and he did not have his phone number.

25. There were then a series of questions about various SMS messages and the like and other people with whom the Appellant had had dealings and then at transcript page 60 Steward Mr Dingwall said:

> "Q. All I wish to ask Mr Costello is that in relation to Matt you said that to contact him that you would speak to someone or some people in order to contact him. Who are those people?

A. Can't remember. I know one of them is Ben, but I think I might have sent somebody—-

Q. I put it to you that you don't want to disclose the people that you're going to reach out to contact Matt and I want an unequivocal answer who you're going to contact in order to reach out to Matt. I can't be any clearer than that.
A. I might have sent some. I might have sent the price list to someone, but I don't know who I sent it to.

Q. You said you would be able to reach out to someone to contact Matt. I want to know who you're going to contact in order to facilitate that.
A. I'll have to - well, I'll have to make some inquiries.

CHAIRMAN:

Q. I want to know those names?
A. I don't know yet. A couple of greyhound trainers probably.

MR DINGWALL:

Q. Who are they? I want their names?
A. I can't supply them.

Q. Are you refusing to?
A. I'm not refusing. I just can't remember.

Q. You can't remember. So what's going to jog your memory?
A. Well, I'll have to think about it.

Q. I suggest you start thinking about it right now. Who are they? I'll ask you one final time. Who are the people that you're going to reach to contact Matt?"

Solicitor interviened and there was then a short adjournment. On resumption:

"A. I'm going to call around some people."

And later:

"A. Well, I'll call. I'm going to call a lot of people to see if they know him and where he is and I'm going to do my best to get back. Listen, the cards are on the table. I'm going to find him. I'll get back to you."

And later:

"A. As I said, I'll make inquiries to find out who they are.

CHAIRMAN:

Q. So you're not going to tell us the names of those persons?
A. No, because I don't know. I'll have to make some inquiries.

Q. I don't know if that answer is satisfactory, Mr Costello.
A. Well, I can only do my best and I'm going to get back to you.

Q. Why can't you tell us who you're going to talk to?
A. Look, I have to make inquiries if people know this man. I'm not putting aspersions on other people if they've done nothing wrong.

Q. But you must have some inclination that these persons know a Matt and you must have spoken to your associates?
A. Yeah, but I'm not going go into it if they are not guilty. I'm just trying to find out who it is. I can bring the brochure back, probably the price list. I can chase that it - it might have his contact details on that. That's the best I can do at the moment.

Q. So you're not in a position to tell us the identity of those persons. Is that what you're saying to us?
A. Yes."

26. There was then a whole lot of other queries and the name of GES Vet Services came up in relation to another trainer and may or may not relate to the actual brochure that Matt had provided. The evidence is uncertain. Then transcript page 83:

"CHAIRMAN:

Q. Are you sure this person is Matt? Are you sure you don't know the identity of the person that supplied it to you?
A. No, no.

Q. Mr Costello, I'm just wondering whether that evidence is actually factual or not, whether you know the identity of this person and you won't give this person up.
A. I'm going to do everything in my power to get this Matt's name and number and you can question him."

27. Those are the key parts of the evidence that go to issues 1 and 2, identified in the letter of 8 October 2018, as the Tribunal. The parties in their oral submissions have taken the Tribunal to other parts of the evidence, but they are the keys ones.

28. Returning then to issues 1 and 2, it is to be accepted that the Appellant co-operated in a number of ways with the Stewards. He gave his telephone record and attended each of the inquiries. In relation to the telephone record there seems to have been something of a coincidence in the minds of the satewards that at or about the time the Stewards were making their inquiries telephones were lost. The Appellant lost his, but he did produce his current telephone.

29. He did, to quote the submissions, “fess up” about the fact that he was the supplier, but it has to be said he only did so once he was unequivocally caught out in the lies which he was telling. He did on numerous occasions offer to make inquiries and left the evidence before the Stewards at the stage that he could give them nothing further about Matt or his supplier.

30. The Appellant has at the end of the day admitted certain things. He says that his lies were on the basis of him attempting to mitigate the damage that was being occasioned to him. It is not surprising he sought to do so because it appears he has been caught out in supplying products, which he was not entitled to supply because they could only be supplied by veterinarians, that he was providing other products which were unlabelled and that in the context of a person licensed as a harness racing person and with admitted knowledge of the nature of the conduct in which he was engaging improperly.

31. There is an inherent unbelievability about the whole of his relationship with his supplier. Persons unknown gave the Appellant’s name to this person Matt, who may or may not have been a vet, who turned up out of the blue, as it were, conveniently when he happened to be home, and

gave him a brochure and price list, with an offer to provide him with products, which he knew he should not be supplying. It has not been the subject of submissions, but the Tribunal struggles to wonder why the Appellant would be singled out by Matt as a person, amongst others, he should call upon. The Tribunal moves on from that concern.

32. A person turns up three or four or perhaps occasionally more over a period of 15 months, unannounced, without any contact details, apparently somehow becoming known as Matt in a Toyota vehicle, who may or may not be a vet and it appears, on speculation, because there had been no contact about it, with a list of all of the products that the Appellant wanted to supply to Smith, including even on one occasion frozen samples of stem cells. There is no evidence. There can only be conjecture as to how the person Matt knew the frozen stem samples would be needed and that he happened to have it in the back of his Toyota when he speculatively turned up to fortuitously provide the Appellant with products he wanted and which the Appellant then on-provided to Smith.

33. It is has been noted that everything was done in cash, cash payment to Matt, cash payments on the loan arrangements or otherwise with Smith. It must be acknowledged and he admitted it in his own interviews that he was the only person issuing invoices, but he did at least issue invoices with his ABN number on them. In fact it stands in his favour.

34. As to his memory issues, he was at pains to point out to the Stewards that, as a result of disabilities, he was on various painkillers. He had been on Valium and he was immediately concerned in his first interview he might not have a sufficient memory of various events in which he had

engaged. When he turned up legally represented for the second interview no such qualifications were advanced by him, nor was there any evidence upon which it can be discerned he was struggling to remember by reason of any medication which he was taking. It is uncertain what he was taking. No medical evidence is adduced by him which would support the fact any of the evidence, which is against him, can be discounted on the basis of medical treatment or treatment.

35. In any event he was legally represented at the second interview. It was entirely open to that lawyer to put to the Stewards matters in relation to that and she did not. The Tribunal does not accept that, in determining this matter, anything can be found in favour of the Appellant by reason of the possibility of treatment affecting memory.

36. It is to be noted that the Appellant has not been able to adduce, nor do the Stewards have, evidence which would go to indicate, other than based upon conjecture on the various unfavourable determinations able to be drawn by them in respect of the Appellant, that in fact he does know anything more about the supplier Matt. Whilst it has an element of inherent implausibility about it, particularly for a person that was caught out in his lies, that it could be in fact that he simply does know who Matt is.

37. It is in respect of the second ground of concern to them that there are issues of greater importance. The Tribunal has read onto this record the numerous occasions on which the Appellant said he would make inquiries. There is not skerrick of evidence that the Appellant has done so. He comes before this Tribunal seeking to have it not determined that he should be disavowed from the industry on the basis the Stewards are

forming assumptions, the assumptions that in fact the Appellant did know who the supplier contacts were and other people would as well, but there is no evidence that he has made any inquiries which might have dealt with those concerns back on 5 October 2018. It was open to him to do so. There is no evidence that he has not been able to do so, nor that he could not do so for any other reason that is apparent to the Tribunal.

38. The aspect of the application of LR6 brings into play the necessity for a consideration of certain principles in a number of decisions the Tribunal has dealt with, with warnings off and the nature of them, and has adopted a number of earlier decisions by the Racing Appeals Tribunal and its predecessor as to what a warning off is about and when it is required. The latest decision, which has been put to the Tribunal, was its own decision in a harness racing matter of Greg Bennett of 21 March 2017. There the Tribunal summarised a number of authorities.

39. To even paraphrase more again today, because the law has not been the subject of great concern to the parties, firstly, to go back to Judge Goran in the Fine Cotton matter, known as Clarke, 1 February 1985, where he said:

> "The ability to warn off is a necessary part of the control of racing. It is a protective power rather than a punitive power. It is meant to protect racing from undesirable persons, such as cheats and frauds."

And later:

> "Being kept away from racing as a protection for racing itself."

40. It is to be noted that in Vallender v Harness Racing NSW, Kavanagh J, 10 November 2011, Racing Appeals Tribunal NSW, her Honour noted that the warning off is a discretion in a regulatory body in a particular and

serious circumstance. It might be noted in Vallender that there was a warning off in place and that related to non-production of telephone records. Prior no finalisation of her Honour's hearing, Vallender produced his telephone records. Her Honour, therefore, referred the matter back to the Board of Harness Racing NSW for them to determine whether that would deal with the concerns that led to the warning off which was the subject of the appeal to her. In fact not long after her Honour's decision HRNSW in fact did lift the warning off. It is, therefore, that a warning off is not finite and can, whether under LR6 or otherwise, be vacated.

41. In a matter of Sarina, a harness racing matter, 15 August 2013, the Tribunal, as presently constituted, reflected upon the fact that certain conduct had the capacity to thwart an investigation and found that there is harm by such conduct. Therefore, in Sarina the Tribunal rejected a submission that there is no ongoing issue if co-operation has not been completed and there it found there had been no attempt to ameliorate or acknowledge or admit the ongoing conduct and, therefore, a balancing exercise was undertaken in looking to the interests of that appellant and the protection of the integrity of the harness racing industry.

42. The Tribunal has noted in a number of decisions the frequency with which a warning off has been given and it set those out in Bennett and, as set in Bennett, just to name, for the purpose of partial completeness, the matters of Magnus, Hardy, Olson, Barnes and Nightingale and since those, the last of which was in 2011, the Tribunal itself has dealt with warning offs on a number of occasions.

43. This does not involve a blanket refusal to co-operate, but one which involved the Appellant going and doing something. It has not been the

subject of a submission, but it might be noted that between the interview of 5 October and the letter of 8 October there is no evidence of the Appellant having done anything in fulfilling the inquiries which he undertook to take. The Tribunal has already found that between 8 October and today there is no evidence of the Appellant having done so.

44. The inescapable conclusion is that the capacity of the Stewards to continue with their investigation into the supplier, known in these proceedings as Matt, has not been able to be progressed. So far as the aspects of co-operation with it by this Appellant are concerned, no assumptions are required. It is quite apparent from reading the transcript of the Stewards' inquiry of 5 October as a whole that the Appellant quite clearly understood what he was being asked to do and what he was required to do. Should the decision of the Stewards have been premature on 8 October, it is apparent from the findings to date that there has been no advancement which would cure that as of today.

45. As was said in Bennett, quoting from Vallender and other cases, the integrity of the industry is paramount. Integrity here involves a Stewards' investigation into the supply of products to a trainer and that trainer has subsequently presented two racehorses to race with the prohibited substance cobalt in them. It is quite a proper function of the Stewards to seek out every avenue to ascertain precisely what happened in respect of that matter. It could be that nothing that this Appellant did, nothing that Matt did in any way, at the end of the day is linked to the cobalt presentation, but at present that is not known. It is not known on the evidence available to the Tribunal.

46. The factual findings are made to the Briginshaw standard. The determination of the Tribunal is, on the factual matters it has made reference to, that as the investigation is still potentially thwarted and will be until the Stewards are able to be satisfied by the completion of their inquiries, until this Appellant co-operates with them and enables the completion of that inquiry, that the protection and welfare of the industry, in particular, in respect of its reputation, but also to some extent to which cobalt is still possibly a welfare issue and undoubtedly so in excessive quantities, that there could be, but it is not an important determination, a welfare issue as well. Integrity and welfare matters are key matters. Integrity here is much more available as a relevant issue.

47. The community, in viewing the current state of these matters, could not be comfortably satisfied that the Stewards are able to provide that protection to the industry, which is essential, not only in respect of the possible conduct here, but conduct in relation to other matters.

48. In those circumstances, until the Appellant has fully co-operated with the Stewards, the Tribunal is of the opinion that he should be warned off. That warning off is, to be clear, based on the failure to comply with the second of the grounds, namely the making of inquiries which, when made, may well assist the Stewards by further investigation or otherwise in respect of chasing down the person known as Matt.

49. The respondent overcomes the grounds of appeal.

50. In those circumstances the Appellant's appeal against the warning off of 8 October 2018 is dismissed.

51. The Tribunal orders that the Appellant, pursuant to LR6, be warned off.

52. The Tribunal orders the appeal deposit be forfeited.