

**RACING APPEALS AND DISCIPLINARY BOARD  
(Original Jurisdiction)**

*Racing Victoria Stewards*

*v*

*Smerdon and others*

**JURISDICTION RULING**

Judge Bowman	Chair
Mr B Forrest	Deputy Chair
Mr G Ellis	Member

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An argument concerning jurisdiction has arisen in the case of Mr Smerdon. It has been dealt with in advance of the hearing proper. It involves only him and it was thought best to hear and decide it prior to hearing the cases against the other persons charged.

Mr McHenry, on behalf of Mr Smerdon, spoke to written submissions provided and exchanged in advance. Mr Bennett did likewise on behalf of the Stewards. We are indebted to the legal representatives on both sides for their timely, detailed and well-researched submissions, and that is a genuine observation.

**The original submissions on behalf of Mr Smerdon**

The original written submissions of Mr McHenry could be summarised as follows.

10 On 29 March 2018, Mr Smerdon surrendered his licence to train. On 30 March, that surrender was accepted. Accordingly, submits Mr McHenry, since 30 March 2018, Mr Smerdon has not been a licensed person. AR 2 and LR 3 had been broadly interpreted to capture anyone who did any act or the like to which reference is made in the Rules. Such persons were regarded as carrying out an activity that brought them within the jurisdiction of the Rules. The decision of the Privy Council in  
15 *Stephen v Naylor* (1937) SR (NSW) 127 is the leading authority endorsing this wide interpretation.

However, at least in this state, the situation changed with the decision in *Clements v Racing Victoria Ltd* [2010] VCAT 1144. Essentially VCAT found that whether or not a person was subject to the Rules of Racing was a question of contract or consent. Clements was a former licensed bookmaker who had become a professional punter and was so at the relevant time. It was emphasised by VCAT  
20 that the powers of the Stewards were contractual. A contract was their source. What was needed, if the powers of the Stewards were to be broadened to make the Rules more widely applicable, was a legislative mandate.

Subsequently the Racing Act was amended. The concept of a relevant person was introduced in section 5F(1) and that term is defined in section 3. The significant part for the purposes of the present  
25 case reads:

*A person who participates, whether at a racecourse or any other place, in an activity connected with, or involving, horse racing in Victoria or wagering on horse racing in Victoria.*

30 It is trite that persons need to be subject to the rules at the time the Rules are enforced against them. For example, Clements' past status as a licensed person did not mean that he was forever bound by the Rules. His previously being bound is not relevant in determining whether he was subsequently subject to them when not licensed.

In the present case, submits Mr McHenry, Mr Smerdon ceased to be licensed as at 30 March 2018.  
35 The contract was then terminated by agreement. Section 5F(1) of the Act now alone deals with the circumstances which must exist to render a person bound by the Rules. A person cannot be bound by the Rules if not a member of the categories described. Strict interpretation must be applied where it is sought to impose laws or rules that seriously infringe upon common law rights and freedoms. If no licence is held, it is submitted, the Rules do not apply. As at 30 March, any contract between  
40 Mr Smerdon and Racing Victoria was terminated by consent. By seeking to commence the hearing on 30 April, the Board will be seeking to apply the Rules of Racing to him and this cannot be done.

He is not a person to whom the Act applies. He is not a relevant person within the meaning of the Act.

45 In section 5F(1), the word "is" is used. This means that there must be a direct proximity between a person's status - for example, being licensed - and the application of the Rules. A person must fall within a nominated category at the time the Rules are being applied. Past status cannot bring a person within the operation of the Rules. It would have been easy to draft an appropriate provision if this were intended. Mr Smerdon surrendered his licence for personal reasons. That surrender has not allowed him to cheat in anything of substance. The most that can happen is that he is warned off. In 50 practical terms, this would achieve little, given that he has already surrendered his licence. In summary, Mr Smerdon cannot be brought within the Rules for the purpose of the hearing on 30 April 2018 without his consent, which will not be given.

### **The original Submissions on behalf of the Stewards**

I turn now to the written submissions on behalf of the Stewards in response to Mr McHenry's original 55 written submissions. The Stewards' position in these written submissions could be summarised as follows.

There is no doubt but that Mr Smerdon is bound by the Rules on the dates of the misconduct with which he has been charged - that is, between 26 June 2010 and 7 October 2017 – and between then and the date on which the charges were laid, 9 January 2018. The question then becomes whether he 60 can then avoid a disciplinary hearing and any resultant sanction by surrendering his licence prior to the hearing, the surrender being on 29 March 2018, and the Stewards' alleged acceptance of this on 30 March, which acceptance is in any event disputed.

The Stewards' position is that, as a matter of contract and statute, Mr Smerdon cannot deprive the board of jurisdiction. This is said to be because of the following.

65 (1) it would be inconsistent with the judicially recognised objectives of the rules and public interest;

- (2) it is inconsistent with the authorities;
- (3) it is inconsistent with the purpose of the introduction of sections 5F and 5G of the Racing Act;
- (4) the contract between the parties has not been terminated;
- 70 (5) Mr Smerdon agreed to be bound by the Rules and that he could be penalised for any breach occurring whilst he was a licensed person. He was so licensed at the time of the alleged breach.
- (6) Any purported termination by Mr Smerdon of his contractual relationship could not affect accrued contractual rights and obligations as to disciplinary matters.

75 The submission goes on as follows. Courts have repeatedly rejected attempts by persons to resign a membership after being charged and then argue that the relevant disciplinary body lacks jurisdiction. Reference is made to *R v Wilson; ex parte Robinson* [1982] Qd R 642, where the court was not persuaded that there was any substance in the submission that the authority of a disciplinary committee was a matter of contract and came to an end with a resignation.

80 This decision was followed more recently in the case of *Harding v Institution of Professional Engineers New Zealand Inc* [2014] NZHC 2251. The contractual relationship that existed at the time of the conduct and of the complaint was emphasised. Reference is also made to the decision of Gobbo J in *Paterson v Public Service Disciplinary Tribunal* [1994] 1 VR 229.

Courts have frequently emphasised the importance of proper regulation of the racing industry. The  
85 Rules have effect under contract law and by statute, in accordance with section 5F of the Racing Act. In contractual language, the circumstances addressed and the purpose or objects involved are all to be considered. Preserving the integrity of racing is an important consideration. There is public interest in ensuring that complaints are investigated and relevant persons held to account. Enabling a person to evade a disciplinary hearing by surrendering a licence is the opposite of those objectives.

90 AR 7 gives the Principal Racing Authority the power to license trainers as it thinks fit and at any time to suspend, vary or revoke such a licence. Reference is also made to LR 35A. There is no provision for surrender of a licence or acceptance of a surrender. There was no acceptance that a surrender

would relieve Mr Smerdon of his existing obligation to face the hearing of charges already laid. His unilateral surrender did not terminate the contract.

95 Reference is also made to AR 2 and AR 3. Mr Smerdon agreed to be bound by the Rules. The Rules applied to him as at the dates in the Notice of Charges and continue to apply. Further, Mr Smerdon is and was a relevant person for the purpose of sections 3(1) and 5F(1) of the Racing Act. Thus, at least during the relevant period, the Rules applied to him.

Mr Smerdon has been charged with serious offences. All have required steps to be taken. All charges  
100 must be heard and determined by the RAD Board. The decision to charge sets in train a series of mandatory events culminating in the RAD Board hearing and appropriate imposition of penalties. This is similar to what occurred in the cases of Wilson and Harding. The penalties include disqualification and warning off.

The argument advanced on behalf of Mr Smerdon cannot be correct for the following reasons:

- 105 (1) it is inconsistent with the objectives of the Rules and the Act;
- (2) it is inconsistent with the authorities mentioned:
- (3) it is evident from sections 5F and 5G of the Act that a relevant person can be charged and the charges heard by the RAD Board. The relevant Second Reading Speech confirms this.
- Acceptance of Mr Smerdon's argument would produce a nonsensical result. The rules can be  
110 enforced in respect of conduct engaged in whilst a person was a relevant person.
- (4) Mr Smerdon contractually agreed that if he engaged in prohibited conduct whilst a licensed trainer, Racing Victoria could penalise him. That agreement does not cease when he ceases to be a trainer.
- (5) when he was a licensed trainer, Mr Smerdon engaged in the offending conduct, was charged  
115 and pre-hearing steps were taken. The contractual right of Racing Victoria to conduct a hearing occurred whilst Mr Smerdon was a licensed trainer and was not affected by any purported termination.

(6) There are important practical and public interest reasons why a person charged with misconduct should potentially be subject to a warning off. There are greater disabilities imposed than those that operate in relation to an unlicensed person.

Unlike the situation in Clements, Mr Smerdon was covered by the Rules of Racing on the dates of the alleged conduct and when the Notice of Charges was served. Further, there were subsequent amendments of the Act and Rules following the decision in Clements.

In summary, the Board has jurisdiction to hear the charges. At all relevant times, Mr Smerdon has been the licensed or relevant person and clearly subject to the rules. This cannot be affected by any attempt at surrender of his licence.

#### **The subsequent Submissions on behalf of Mr Smerdon and the Steward's response thereto**

I move on now to the more recent submissions that came from Mr McHenry yesterday and the response to them. Mr McHenry forwarded brief written submissions yesterday. A major element of these and to which he spoke concerns surrender. He argued that the Stewards had accepted the surrender. In essence, the Stewards had delivered to Mr Smerdon a show-cause letter or notice which, combined with the public remarks of the chief steward, was tantamount to an acceptance of the surrender. That brought to an end any contract and withdrew any consent to be bound by the Rules of Racing.

Reference was made by Mr McHenry to the decision in *McLachlan v Stock Exchange Ltd and R v General Medical Council*. He argued that it is implicit from these decisions that a request to be removed from the relevant role, if acquiesced to, may remove jurisdiction from a disciplinary body.

In the present case, there is no prohibition on the surrender of a licence. There is inherent power so to do. The fact that the rules are silent in relation to a surrender does not mean that this cannot occur.

Mr Smerdon had the power and the capacity to surrender his licence and, by its conduct, Racing Victoria accepted that surrender.

Mr McHenry further submitted that a licensed person is bound by the Rules and Mr Smerdon is not licensed. Any contract does not survive its termination. The amending Act only applies in certain circumstances. Its intent was to remove any doubt concerning the enforceability of the rules. It would have been very simple for the legislature to make it clear that the rules applied notwithstanding the change in status, but it did not do this.

In reply, Mr Bennett made oral submissions, which could be summarised as follows. There is no provision in the Act or the Rules for the surrender of a licence. In any event, it is the Directors as a Board, not the Stewards, who grant and deal with licences, and the Board has done nothing.

Further, the Stewards did not accept the surrender in any event. There has been no acceptance. Mr Smerdon continues to be subject to the Rules. Reference was again made to the cases such as Wilson and Harding. Jurisdiction is not removed after a licence is surrendered.

In relation to the correct way to interpret the amending legislation, reference is made to the case of *Mills v Meeking* [1990] 169 CLR 214 at 233 and the following pages.

In reply, Mr McHenry argued that it would be inconceivable that a licence could not be surrendered. It was also absurd to think that Mr Smerdon could escape the after-effects of his alleged behaviour by surrendering his licence, given the publicity which the matter has received.

That completes the summation of the very detailed submissions that were made and I will move on to our ruling.

## 160 **Ruling**

Our conclusion is this. Applying the Briginshaw test, we are comfortably satisfied with the following. We prefer and accept the submissions on behalf of the Stewards. We do not accept that Mr Smerdon can escape the consequences of his alleged behaviour or the jurisdiction of this Board by the surrender of his licence, be it an attempted surrender or an effective one. We can and will continue to deal with his case.

We have come to this conclusion for the following reasons, which are not listed in order of importance or significance.

(1) There is a very significant difference between the circumstances in the present case and those in Clements. At the time of the alleged offending, Mr Smerdon was a licensed person.

170 Clements was not.

(2) The decision at VCAT in Clements' case placed very considerable emphasis on the presence or absence of a contract, given that Clements was not a licensed person. In the absence of a contractual relationship, jurisdiction did not exist. VCAT suggested amendment of the Act.

175 (3) The Racing Act was subsequently amended as part of the Justice Legislation Amendment (Miscellaneous) Act 2013. It received bilateral support. It is clear from Hansard that its prime objective was to bring an end to the situation that allowed Clements to avoid the jurisdiction of this Board.

(4) Section 5F and 3(1)(b) of the Act were amended. Following this, it could be said that there were two categories of persons to whom the Act applied. These were those who were  
180 licensed, that is, persons the subject of a contract, and the new category of a relevant person. I read the definition before but I will read it again. A "relevant person" is:

*A person who participates, whether at a racecourse or any other place in an activity connected with, or involving, horse racing in Victoria or wagering on horse racing in Victoria.*

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(5) The amendment broadened the jurisdiction very considerably to pick up persons who are subject to contract and persons who fall within the new definition of "relevant person" and who are not subject to contract. In our opinion, Mr Smerdon falls into both categories. We say this because we are of the view that the contract was in place at the time of the alleged  
190 offending and continues to be in place. In any event, the concept that a person can breach a

contract and then surrender it so as to avoid the consequences of the breach is not one which we accept. As stated, this is quite a different situation from that in Clements.

195 (6) The newer concept of "relevant person" covers persons not necessarily contractually tied to Racing Victoria. It extends jurisdiction to other persons participating in an activity connected with racing, however fleeting or casual that may be. Mr Smerdon clearly fell into that category at the time of committing the alleged offences.

200 (7) We think that there is nothing in any argument that focuses attention upon the use of the words "is" or "participates". Many statutory provisions are expressed in the present tense - for example, various offences pursuant to the Crimes Act. In the present case, a somewhat ridiculous situation would result if the section was interpreted to the effect that it did not apply to past conduct. Detection of the offence, apprehension of the offender and the like would all have to take place as the offence was being committed.

205 (8) Thus, what could be described as the fundamental question is whether the charges against a trainer, in this case Mr Smerdon, for breaches of the Rules of Racing can be heard and determined by the RAD Board after a trainer has surrendered or attempted to surrender his licence. In our view, whether it be by reason of the licensing contract or by reason of the 2013 legislation amending the Racing Act, this Board does have that jurisdiction.