



APPEAL RESULT

DISTRIBUTION: Chief Executive
Group Integrity Services
Group Racing and Group Racing Development
ARB, ATA, TVN, VJA
Office of Racing
T Moxon – National Drug Register
Racing Press

FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 25 August 2015

SUBJECT: **APPEAL HEARING RESULT – TRAINERS:
MARK KAVANAGH & DANNY O'BRIEN**

Panel Judge John Bowman (Chair), Mr Josh Bornstein (Deputy), Mr Chris Fox.

Appearances Mr Damian Sheales and Mr Tim Purdey, instructed by Mr Johnathan Quilty of Lander & Rogers, appeared as Counsel for Messrs. Kavanagh and O'Brien.

Mr Jeff Gleeson QC, instructed by Mr David Poulton of Minter Ellison, appeared as Counsel for the stewards.

On Monday, 3 August 2015 the Racing Victoria stewards made an order pursuant to AR 8(z) imposing conditions on the prizemoney earned by licensed trainers Mark Kavanagh and Danny O'Brien.

The order being that each trainer's percentage of prizemoney earned in Group and Listed races conducted in Victoria on and after Monday, 3 August 2015 be held by Racing Victoria pending the final determination of the serious charges before the RAD Board.

In the event that a trainer is found:

1. not guilty of all charges issued under AR 175(h)(i) and AR 175(h)(ii) the prizemoney held by RV will be distributed to the trainer; or
2. guilty of any charge issued under AR 175(h)(i) or AR 175(h)(ii), RV Stewards will submit that the permanent forfeiture of the prizemoney held by RV ought to occur and may be taken into account as part of any penalty imposed.

A Notice of Appeal against **the decision and penalty** was lodged by Messrs. Kavanagh and O'Brien via their legal representatives on Wednesday, 5 August 2015.

The matter was heard by the RAD Board on Wednesday, 19 August 2015.

DECISION:

1. *The Appeals are successful in part.*
2. *The decision of the Stewards made on 3 August 2015 whereby the condition was ordered is varied in accordance with these orders.*
3. *That any trainer's percentage of prize money earned by Mark Kavanagh in Group and Listed races conducted in Victoria on and after 3 August 2015 up to the maximum amount of \$100,000 be held by Racing Victoria pending the final determination by the RAD Board of the charges laid against Mr Kavanagh on 11 June 2015.*
4. *That any trainer's percentage of prize money earned by Danny O'Brien in Group and Listed races conducted in Victoria on and after 3 August 2015 up to the maximum amount of \$200,000 be held by Racing Victoria pending the final determination by the RAD Board of the charges laid against Mr O'Brien on 11 June 2015.*
5. *That in the event the RAD Board finds none of the charges laid against Mr Kavanagh made out, or if the charges are otherwise withdrawn, any prize money held pursuant to order 3 shall be distributed forthwith to Mr Kavanagh.*
6. *That in the event the RAD Board finds none of the charges laid against Mr O'Brien made out, or if the charges are otherwise withdrawn, any prize money held pursuant to order 4 shall be distributed forthwith to Mr O'Brien.*
7. *Subject to orders 5 and 6, there be liberty to apply to the RAD Board upon the final determination by the RAD Board of the charges laid against either of the Appellants as to the distribution to that Appellant of any prize money held by Racing Victoria pursuant to orders 3 or 4.*

Georgie Gavin
Registrar - Racing Appeals & Disciplinary Board

**IN THE RACING APPEALS AND
DISCIPLINARY BOARD**

BETWEEN

THE STEWARDS OF RACING VICTORIA LIMITED

and

MARK KAVANAGH

DANNY O'BRIEN

REASONS FOR DECISION

These are Appeals by two licensed trainers, Mark Kavanagh and Danny O'Brien (the **Appellants**), against the decision of the Stewards on 3 August 2015 whereby the Stewards made the following order in respect of each of the Appellants:

That any trainer's percentage of prize money earned by [the Appellant] in Group and Listed races conducted in Victoria on and after 3 August 2015 be held by Racing Victoria pending the final determination of charges laid against [the Appellant] by the RAD Board. In the event that [the Appellant is] found:

- (a) not guilty under AR 175(h)(i) and (h)(ii), the prize money held by Racing Victoria will be distributed to [the Appellant]; or*
- (b) guilty of either of the charges under AR 175(h)(i) or (h)(ii), the Stewards will submit that the permanent forfeiture of the prize money held by Racing Victoria ought to occur and may be taken into account as part of any penalty imposed.*

For the purposes of these Appeals, the order as made in relation to each of the Appellants was referred to as "the condition".

In the Notices of Appeal filed on behalf of each of the Appellants, the grounds of Appeal are as follows:

1. That the purported condition is *ultra vires* of the powers conferred upon the Stewards by the *Rules of Racing*.
2. That the condition imposed is unreasonable.

The order imposing the condition on each of the Appellants was made by the Stewards in purported exercise of the power conferred on them by AR 8(z), which is in the following terms:

8(z) *Notwithstanding anything contained within these Rules, and not in limitation of any power conferred by these Rules, where a person has been charged*

with a breach of these Rules (or a local rule of a Principal Racing Authority) or a person has been charged with the commission of an indictable criminal offence, the Stewards pursuant to the authority delegated by the Principal Racing Authority, if of the opinion that the continued participation of that person in racing might pose an unacceptable risk to, prejudice or undermine the image, interests or integrity of racing, may:

- (a) suspend any licence, registration, right, or privilege granted under these Rules to that person;*
- (b) prevent any horse owned (or part-owned) or leased by that person from participating in any race or official trial;*
- (c) order that any registration of the transfer of ownership and/or training of a horse related to that person not be effected;*
- (d) make any other direction or order related to the person which is in the interests of racing,*

pending the hearing and determination of the charge under these Rules, the relevant local rule or the relevant criminal charge.

AR 8(z) was introduced into the Rules of Racing in October 2013. This is the first time that a decision pursuant to AR 8(z) has come before this Board. It is also the first time that the Stewards have purported to take action pursuant to it.

The circumstances of the Appeals are that following a lengthy investigation, the Stewards on 11 June 2015 laid charges against the Appellants for alleged breaches of AR 175(h)(i), AR 175(h)(ii), 175(k) and 178 in relation to elevated levels of cobalt detected in certain racehorses under their care which competed in races in the latter part of 2014.

In Mr Kavanagh's case, the charges concern elevated levels of cobalt detected in respect of the horse *Magicool*, which returned positive cobalt readings on 4 October 2014, having run in the UCI Stakes (Listed) over 1800 metres at Flemington.

In relation to Mr O'Brien, the charges are in respect of four horses who returned positive cobalt readings, namely *Caravan Rolls On* which raced at Flemington on 1 November 2014, *Bondeiger* which raced at Flemington on 1 November 2014, *De Little Engine* which raced at Ballarat on 22 November 2014, and *Bullpit* which raced at Moonee Valley on 19 December 2014.

On the same day that these Appeals were heard, the hearings of the charges against the Appellants were set down by the Board (separately constituted) to commence on 30 November 2015.

The charges are being contested by both Appellants.

By letters dated 24 July 2015 from the solicitors for the Stewards (**show cause notices**), the Appellants were requested by the Stewards to show cause why the Stewards ought not exercise the powers conferred upon them by AR 8(z), and specifically the power to suspend each trainer's licence to train, and to prevent any horse owned or part-owned by them from participating in any race or official trial, pending the hearing and determination of the charges.

The solicitors for the Stewards, in order to "provide assistance in respect of your preparation of any written or oral submissions to the Stewards in connection with the show cause notice[s]" detailed certain further matters for the trainers' consideration by letter dated 26 July 2015.

Written submissions were made on behalf of the Appellants in relation to the show cause notices, and a hearing, referred to as the "show cause hearing", was conducted by the Stewards on 29 July 2015.

Following the show cause hearing, and with the benefit of submissions made on behalf of the Appellants, the Stewards advised the Appellants on 3 August 2015 that they had formed the opinion that the continued participation of the Appellants in racing might undermine the image of racing, and ordered that the condition be imposed upon them. The reasons for imposing the condition and not, for example, suspending the licences of the Appellants to train, were set out in the letter from the solicitors for the Stewards in which the Appellants were informed of the decision.

The Notices of Appeal were lodged on behalf of the Appellants on 5 August 2015.

For the purposes of the present Appeals, the Board has had the benefit of, and has considered, the lengthy submissions provided on behalf of both the Stewards and the Appellants. It also had the benefit of oral submissions by the parties made at the hearing on 19 August 2015.

An initial matter is whether these Appeals should be dealt with as appeals in the strict sense, or as appeals de novo. The Appellants submitted that the Appeals ought to proceed as hearings de novo. The Stewards did not oppose this course.

Accepting that it is a matter of the Board's discretion, the Board is of the view that the Appeals should be dealt with de novo, and the hearing was conducted on this basis.

That said, and as clarified by Counsel for the Appellants, the only matter at issue for the purposes of the Appeals is the condition imposed on each of the Appellants pursuant to the decision of the Stewards. Counsel for the Appellants submitted that it was not the intention of the Appellants to reopen whether entirely different actions should be taken pursuant to AR 8(z), such as suspension of licences to train.

This confinement of the scope of the Appeals appeared to be accepted by Counsel for the Stewards, who did not submit that the Board should make any orders against the Appellants pursuant to AR 8(z) other than orders in the same terms as made by the Stewards.

Significantly, the hearing of the Appeals proceeded on the basis that there was no issue, and that it was accepted by the Appellants, that the continued participation of the Appellants in racing pending the determination of the charges against them, might prejudice or undermine the image or interests of racing for the purposes of AR 8(z).

In these circumstances, the enlivening words of the AR 8(z) are satisfied. The issue for the Appeals is whether the Board is satisfied that directions or orders should be made in relation to the Appellants pursuant to AR 8(z) and, if so, the terms of such directions or orders.

Having considered the matter and the submissions advanced by the parties, the Board is satisfied that orders should be made pursuant to AR 8(z) in relation to the Appellants in the circumstances of this case. However the Board is not satisfied that the orders should be in the terms made by the Stewards.

The orders that the Board is satisfied should be made are set out below.

As to whether orders should be made at all – the Board is satisfied that this is an appropriate case for the exercise of the power conferred by AR 8(z) given the seriousness of the charges and the prohibited substance to which they relate, and the impact of the charges on the image of racing. The charges include charges under AR 175(h)(i), which concerns administration of a prohibited substance for the purpose of affecting the performance or behaviour of a horse in a race. The charges have received, and continue to receive, substantial and widespread publicity. That publicity is detrimental to the image of racing. The Board agrees with the submissions made by Counsel for the Stewards that in the circumstances attending the present charges, “business as usual” pending the hearing and determination of the charges by the Board would not be appropriate or in the interests of racing. The concession by the Appellants in relation to the applicability of the enlivening words of AR 8(z) is also significant in this regard.

The Board emphasises that in reaching this conclusion, it is in no way expressing any view on the strength or otherwise of the charges or whether the charges against either or both of the Appellants will be made out. As noted above, the Appellants are defending all of the charges, as is their right.

As to the terms of the orders that might be made in the exercise of the Board’s discretion, there are difficulties with the condition as imposed by the Stewards.

First, the condition is unlimited as to the amount of trainer’s prize money that might be held pursuant to it. An unlimited condition could lead to significantly varying, and potentially disproportionate and unfair, outcomes.

For example, if either of the Appellants were to be fortunate enough to train the winners of one or more of the principal Group or Listed races conducted in Victoria during the period that the condition were to operate, the amount withheld might significantly exceed any fine that might be ordered against them. This is not in any way to predetermine the outcome of the charges (which are being contested), or

whether a fine would be imposed if certain of the charges are established, and what the quantum of any such fine should or might be.

Further, in the Board's view, an unlimited condition might lead to a far greater sum being held in respect of the Appellants than is reasonably necessary to protect against the risk posed to the image of racing by the continued participation of the Appellants in racing pending the determination of the charges against them.

It must also be borne in mind that the trainer's prize money to be withheld would be in relation to different races, and possibly different horses – and in any case, in relation to races which are unconnected with the charges laid against the Appellants.

The Board also takes into account the substantial amounts of trainer's prize money that are capable of being won during the period that the condition is to operate.

In the circumstances, the Board is of the view that any condition imposed on the Appellants should be capped as to a fixed amount of trainer's prize money that may be withheld.

As regards the amount of any cap that should apply, there is a difference between the Appellants.

Mr Kavanagh is facing charges in respect of elevated cobalt levels detected in one horse which competed in one race. Mr O'Brien on the other hand is facing charges in relation to four different horses which competed in four different races.

In the Board's view, the maximum amount of trainer's prize money that should be held in respect of Mr Kavanagh should be \$100,000, and for Mr O'Brien the maximum amount should be \$200,000.

The second difficulty with the condition as imposed by the Stewards concerns subparagraphs (a) and (b), which purport to provide for what is or may happen in relation to the held trainer's prize money in the event that the Appellants are found not guilty or guilty of either of the charges under AR 175(h)(i) and (ii).

The condition is silent as to what is to happen in the event that either or both of the other charges are made out.

In relation to (b), the import of the sub-paragraph is unclear, given that it is concerned only with what the Stewards might submit in the event of a guilty finding in relation to charges under the two rules specified.

Further, and perhaps most significantly, (b) appears to be predicated on an assumption that prize money withheld can be forfeited and forfeited permanently if the Appellants be found guilty of either of the charges under AR 175(h)(i) or (h)(ii).

The Board doubts that there is any power under AR 8(z)(d), or elsewhere in the Rules, for trainer's prize money earned in relation to horses in races unconnected with charges before the Board to be withheld and then forfeited if charges under AR 175(h)(i) or (h)(ii) are made out. AR 196(1) does not provide for forfeiture as a basis on which a person may be penalised, and the fact that AR 196(2) specifically refers to forfeiture in very different circumstances, further suggests that forfeiture is not otherwise available as a penalty or remedy in the present situation.

The Board also doubts that a trainer's prize money earned through races unrelated to the charges can be withheld and then used or effectively set off under the Rules against a fine which might be ordered at a future time if the specified charges are made out.

However, and whilst doubting these matters, the Board does not need to decide them in order to determine the present appeals. In the Board's view, the appropriate course is not to have as part of any orders subparagraphs of the type referred to in (a) and (b), but rather to make orders in relation to each Appellant that any trainer's percentage of prize money held pursuant to the condition be distributed to the Appellant upon and in the event that the Board finds that none of the charges against the Appellant are made out, and otherwise that there be liberty to apply upon the determination by the Board of the charges laid against the Appellant as to the distribution by Racing Victoria of any trainer's percentage of prize money earned which is held by Racing Victoria pursuant to the orders.

Finally, there is the question whether the Board has power to make orders of the kind that are contemplated by these Reasons and set out below.

In the written submissions of the Appellants, it was contended that the condition as ordered by the Stewards under AR 8(z) was ultra vires of the powers conferred upon the Stewards by the Rules of Racing. This was for two reasons.

First, the Appellants contended that the condition imposed by the Stewards was a penalty, and that by reason of LR 6C(1) (which provides for the original jurisdiction of the Board) the Stewards are precluded from hearing any matter or penalising any person relating to a "Serious Offence". By reason of the definition in AR 1, breaches of AR 175(h)(i) and (ii) are Serious Offences.

Second, the Appellants contended that the condition imposed by the Stewards was ultra vires because there is no power of forfeiture that can be applied to any trainer's percentage of prize money that is withheld.

The Board does not accept the first argument of the Appellants. AR 8(z) is an Australian Rule of Racing, and as such by reason of LR 1(2) it prevails over LR 6C(1). In addition, AR 8(z) was introduced after LR 6C(1), and it is to be inferred that those making AR 8(z) were cognisant of the terms of (existing) LR 6C(1), and that by including the words "*[n]otwithstanding anything contained within these Rules*" in AR 8(z), AR 8(z) was intended to prevail over LR 6C(1) to the extent of any inconsistency.

As to the second basis on which the Appellants contended that the condition as ordered by the Stewards was ultra vires, for the reasons stated forfeiture is not an element of the orders which the Board proposes to make, and therefore the challenge by the Appellants on this basis does not arise.

The Board is further satisfied that the orders contemplated by these Reasons and set out below are otherwise within the power conferred by AR 8(z).

AR 8(z) provides for the making orders of the kind referred to in (a) to (d) of AR 8(z) pending the hearing and determination of charges in the event that the enlivening circumstances referred to in AR 8(z) are satisfied.

AR 8(z)(d) is expressed in very broad terms, conferring a power “*make any other direction or order related to the person which is in the interests of racing*”.

Plainly, such a general power cannot be exercised capriciously, and nor can it be exercised so as to make an order or direction which is not in the interests of racing. Whatever the boundaries of the power conferred by AR 8(z)(d) may be, the Board is satisfied that there is a sufficient causal nexus for the rule to apply between the circumstances which relevantly enliven AR 8(z) (namely, that the continued participation of the trainer in racing might prejudice or undermine the image of racing), and orders which impose a condition that the trainer’s prize money up to a specified amount be held pending the hearing and determination of the charges against the trainer. A principal reason that a trainer participates in racing (and continues to do so) is in order to secure prize money which is distributed to trainers pursuant to LR 16(3) in accordance with the Prescribed Fee Schedule. Currently, the allocation of total prize money to trainers published in the Prescribed Fee Schedule is 10%. The orders which the Board proposes to make as set out below concern such prize money.

The Board is also satisfied that the orders set out below are in the interests of racing.

It is obviously implicit in the foregoing that the Board considers that the orders set out below are reasonable.

The Board also notes that it was not argued before it whether in reaching its decision in relation to these Appeals, the Board must be “comfortably satisfied” within the meaning of *Briginshaw v Briginshaw* (1938) CLR 336. Whether the principles enunciated in *Briginshaw* have application to the issue in the present Appeals is open to doubt. However and in any event, the Board is comfortably satisfied of its conclusion concerning the matters in issue.

Having regard to the matters set out in these Reasons, the Board makes the following orders in relation to the Appeals:

1. *The Appeals are successful in part.*
2. *The decision of the Stewards made on 3 August 2015 whereby the condition was ordered is varied in accordance with these orders.*
3. *That any trainer's percentage of prize money earned by Mark Kavanagh in Group and Listed races conducted in Victoria on and after 3 August 2015 up to the maximum amount of \$100,000 be held by Racing Victoria pending the final determination by the RAD Board of the charges laid against Mr Kavanagh on 11 June 2015.*
4. *That any trainer's percentage of prize money earned by Danny O'Brien in Group and Listed races conducted in Victoria on and after 3 August 2015 up to the maximum amount of \$200,000 be held by Racing Victoria pending the final determination by the RAD Board of the charges laid against Mr O'Brien on 11 June 2015.*
5. *That in the event the RAD Board finds none of the charges laid against Mr Kavanagh made out, or if the charges are otherwise withdrawn, any prize money held pursuant to order 3 shall be distributed forthwith to Mr Kavanagh.*
6. *That in the event the RAD Board finds none of the charges laid against Mr O'Brien made out, or if the charges are otherwise withdrawn, any prize money held pursuant to order 4 shall be distributed forthwith to Mr O'Brien.*
7. *Subject to orders 5 and 6, there be liberty to apply to the RAD Board upon the final determination by the RAD Board of the charges laid against either of the Appellants as to the distribution to that Appellant of any prize money held by Racing Victoria pursuant to orders 3 or 4.*