

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

***RVL Stewards v Daniel Nikolic***

***DECISION RE APPLICATION  
as heard on 20 June 2013***

|                |        |
|----------------|--------|
| Mr R Lewis     | Chair  |
| Mr J Bornstein | Member |
| Mr C Enright   | Member |

---

This is an application by Mr O'Dowd who appears for Daniel Nikolic that the RAD Board has no jurisdiction to hear or determine this case as Nikolic at the time of the alleged offences was a disqualified person and was therefore not subject to AR 175(a) which is in the following terms:

*"The Committee of any Club or the Stewards may penalise:*

- (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."*

Mr O'Dowd submitted that at the time of the conduct that is the subject of the charges, namely 8 November 2012 and 29 November 2012, Nikolic was not a licensed person under the Rules of Racing ("the Rules").

It was further submitted that as a consequence of Nikolic no longer holding a licence to ride in races, that any obligations on him to comply with the Rules had also come to an end. Specifically, it was submitted that Nikolic's contract with Racing Victoria had ended at the time his disqualification took effect in October 2012.

Mr Holdenson QC, who appeared on behalf of the Stewards, submitted that Mr Nikolic's contractual obligations to Racing Victoria survived the disqualification on 2 bases.

First, it was submitted that the penalty of disqualification imposed on Nikolic did not negate or terminate the contractual relationship and as a result he was bound to observe the Rules as at November 2012 and beyond that time.

Secondly, it was submitted that at the time of the VCAT hearing in November 2012, VCAT was by virtue of relevant provisions of the VCAT Act, exercising the functions of the original decision-maker, the RAD Board. As Nikolic was seeking a review, he was therefore taking part in a "matter coming within the Rules" and was therefore deemed to consent to be bound by them, in accordance with AR2 and LR3.

The question for determination then is whether a jockey who has been disqualified is, nevertheless, bound to observe the Rules of Racing, after the disqualification takes effect.

In order to determine that question, regard must be had to the proper interpretation of the Rules, and to the contractual relationship, if any, between Mr Nikolic and Racing Victoria as at November 2012.

Until his disqualification, Nikolic was a licensed jockey for some years. As a licensed jockey, he was required from time to time to seek a renewal of that licence. On 15 June 2012, Mr Nikolic submitted to Racing Victoria a Jockey Renewal application, signed by him. That Application attached an acknowledgement in the following terms:

***“TERMS AND CONDITIONS OF LICENCE***

1. *The rider acknowledges and agrees to be subject to and be bound by:*
  - a. *The Rules of Racing of each Principal Racing Authority in which State or Territory he/she rides as amended or varied by each Principal Racing Authority from time to time;*
  - b. *The exclusive jurisdiction of each Principal Racing Authority in which State he/she rides, its Officials and Stewards in respect of all matters arising in relation to racing in the State or Territory of that Principal Racing Authority;*
  - c. *Such rules and directions as may from time to time be formed, made or given by the Directors for each Principal Racing Authority (“Directors”), the Stewards or the Principal Racing Authority (“Stewards”), or the Officials of any racing club registered by the Principal Racing Authority to conduct thoroughbred racing under the Rules (“Club”).”*

The signed Jockey Renewal Application was submitted and accepted by Racing Victoria on that day, and took effect on 1 July 2012.

**The Rules of Racing of Racing Victoria**

Notwithstanding the title, the Rules are constituted by the Australian Rules of Racing made by the Australian Racing Board (“AR”) and the local Rules and Rules of Race Betting of Racing Victoria (“LR”). The Rules define “licensed” as follows:

*“A person is licensed if he has the requisite Licence required by the Rules”.*

“Person” is defined as:

*“Includes any syndicate, company, combination of persons, firm, or Stud owning or racing a horse or horses”.*

The provisions dealing with the application of those Rules are as follows:

***“AR2***

*Any person who takes part in any matter coming within these Rules thereby agrees with the Australian Racing Board and each and every Principal Racing Authority to be bound by them.*

***LR3 – Persons deemed to be bound by the Rules***

*Any person who takes part in any matter coming within the Rules is thereby deemed to consent to be bound by them, and to be so bound.*

**AR7(iii)** prescribes the powers of a Principal Racing Authority which include:

(d) *To penalise:*

- (i) *Any person contravening the Rules or disobeying any proper direction of any officials, or*
- (ii) *Any licensed person or official whose conduct or negligence in the performance of his duties has led, or could have led, to a breach of the Rules.*

The Rules also provide for the licensing of certain persons in connection with thoroughbred racing, including jockeys and trainers. Other individuals, including stable employees, must be registered: See LR39A.

**AR175A** – provides that:

*“Any person bound by these Rules who either within a racecourse or elsewhere in the opinion of the Committee of any Club or the Stewards has been guilty of conduct prejudicial to the image or interests, or welfare or racing may be penalised.”*

**AR182** provides that certain consequences flow in respect of a person who is disqualified. For example, subject to any conditions imposed by Stewards or a Principal Racing Authority, a person disqualified may not:

- Enter any racecourse or training track owned or operated by a Club;
- Be employed to engage in any capacity in any racing stable;
- Ride any racehorse in any race;
- Participate in any way in the preparation for racing or training of any racehorse.

In the event that these conditions are contravened by the disqualified person, AR182(3) provides that the period of disqualification shall automatically recommence as from the most recent date of such contravention, and the person may also be subject to further penalty.

On the face of it, the Rules operate on a broad range of persons. Some rules impose obligations on licensed persons; others, simply on “persons”.

Absent the Rules having a statutory force, the source of any obligations arising from the Rules derives from the law of contract. Similarly, the disciplinary powers of domestic tribunals like the RAD Board, derive from the law of contract. In *Clements v Racing Victoria Ltd* (2010) VCAT 1144 (30 July 2010), the Tribunal stated at paragraph 28:

*“Such Tribunals have power to discipline any person who expressly or impliedly agrees to be bound by the Rules, (either in writing or by custom and practice) by which the Tribunal operates.”*

In that case, the Victorian Civil and Administrative Tribunal (“VCAT”) considered an appeal from a decision of the RAD Board. The critical issue was whether Racing Victoria, the controlling body of Victorian Racing, could impose a penalty on a person who had not agreed to be bound by the Rules. In that case, a penalty had been imposed on Mr Clements, a professional punter. It was found in that case that at no time had Mr Clements agreed to be

bound by the Rules of Racing (paragraph 36) and as a result, there had never been a contractual relationship between him and Racing Victoria. As a result, he could not be disciplined for his conduct.

In that case, VCAT declined to follow the Privy Council decision in *Stephen v Naylor* (1937) 37 SR (NSW) 27, a case in which a punter was found to be bound to observe the rules of racing not because he consented to be bound but because “he permitted himself so to act as to bring his actions within their purview”. As a result, there is now conflicting authority on whether the “purview of the rules” principle is good law in Australia.

It is not difficult to conceive of many situations involving persons who have not expressly agreed to be bound by the relevant rules of racing but who nevertheless are involved in racing or can bring to bear their influence on racing. This situation poses considerable difficulty for racing authorities in seeking to maintain the integrity of racing. Indeed, it may be that legislative intervention is warranted.

The circumstances of this case are somewhat different from those in *Clements*. Up until his disqualification in October 2012, Nikolic was clearly bound to observe the Rules. The question remains whether, upon being disqualified, the contractual relationship between Mr Nikolic and Racing Victoria was brought to an end and as a result, Nikolic was no longer bound to observe the Rules.

In order to determine that question it is necessary to consider the Rules as a whole. An interpretation of the rules that is workable and underlined by common sense is to be preferred.

Upon a proper construction of the Rules, the Board finds that the disqualification did not have the effect of terminating the contract between Nikolic and Racing Victoria. Mr Nikolic remained bound to observe the Rules of Racing, as at November 2012, and remains so bound at least during the period of his disqualification. His period of disqualification does not expire until 2 October 2013.

The Board’s reasons for so finding are as follows:

When Nikolic applied for a renewal of his license, and that application was accepted by Racing Victoria, a contract was formed. The terms of that contract included that Nikolic agreed to be bound by and observe the Rules, as varied from time to time.

The Rules are silent as to when and how the contract may terminate.

The Rules contemplate that during a period of disqualification, a disqualified person is required to observe certain conditions, failing which further disciplinary action can be taken: AR182. It is also significant that AR 182(1) provides that a racing authority may, in its discretion, impose conditions other than those specified in the sub-rule (1) on the disqualified person. The clear intention to be derived from this rule is that the relationship of rights and obligations between the racing authority and the individual is to continue during the period of disqualification. That is fortified by AR182(3) which provides for a further penalty to be imposed in respect of a breach of the conditions set out in AR182(1).

The Board does not accept Nikolic’s submission that the obligations imposed by AR182 continue even though the contract is at an end.

On a proper construction, the contract meant that, notwithstanding a penalty of disqualification being imposed on Mr Nikolic, Mr Nikolic was under an obligation to continue to observe the rules, at least for the period of the disqualification. It is not necessary to

decide whether Nikolic is obligated to observe the rules beyond that period. The circumstances dealt with by VCAT in Clements are different from this case. Unlike Mr Clements, Nikolic expressly agreed to be bound by the Rules.

There is obvious sense in Racing Victoria having a continuing supervisory capacity over a disqualified person at least during the period of the disqualification. As much is suggested by AR 182. Were it not so, a disqualified person would be able to undermine the integrity of racing with virtual impunity as soon as a penalty of disqualification took effect. This would be a perverse outcome.

Accordingly, the Board finds that the charges are valid and Nikolic's submission that the RAD Board is precluded from hearing them for lack of jurisdiction is rejected.

### **PROCEDURAL FAIRNESS**

The Board will rule upon this issue on the receipt of written submissions. The Board directs that the applicant deliver written submissions to the Board and to the respondent before 5pm on Wednesday, 26 June 2013 and the Board further directs that the respondent deliver written submissions to the Board and to the applicant before 5pm on Friday, 28 June 2013.

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## ADMINISTRATIVE DIVISION

### REVIEW AND REGULATION LIST

VCAT REFERENCE NOS. Z40/2013 & Z41/2013

### CATCHWORDS

Application for Review; decision of the Racing Appeals and Disciplinary Board; *Racing Act 1958* – s 83OH(1); Rules of Racing; Application of Rules to a disqualified jockey; Jurisdiction of Board to hear charges brought against jockey where alleged conduct occurred during period of disqualification; Earlier adverse findings of Tribunal in relation to conduct the subject of charges; Whether Board is disqualified from hearing charges on basis of perception of bias; *Clements v Racing Victoria Limited* (Occupational and Business Regulation) [2010] VCAT 1144 distinguished; Application dismissed; Decisions of Board affirmed.

|                        |                               |
|------------------------|-------------------------------|
| <b>APPLICANT</b>       | Daniel Nikolic                |
| <b>RESPONDENT</b>      | Racing Victoria Limited       |
| <b>WHERE HELD</b>      | Melbourne                     |
| <b>BEFORE</b>          | Judge Jenkins, Vice President |
| <b>HEARING TYPE</b>    | Hearing                       |
| <b>DATE OF HEARING</b> | 3 September 2013              |
| <b>DATE OF ORDER</b>   | 13 September 2013             |
| <b>CITATION</b>        |                               |

### ORDER

- 1 The Tribunal finds that:
  - (a) Daniel Nikolic was subject to the Rules of Racing of Racing Victoria at the relevant time of alleged conduct the subject of two charges that he breached AR175(a) of the Rules of Racing of Racing Victoria (the ‘Charges’);
  - (b) The Racing Appeals & Disciplinary Board has jurisdiction to hear and determine the Charges;
  - (c) The Racing Appeals & Disciplinary Board is not disqualified on the basis of a reasonable apprehension of bias from hearing the Charges.
- 2 The decisions of the Racing Appeals & Disciplinary Board made on 24 June and 8 July 2013 following a hearing of applications made by Daniel Nikolic are affirmed.
- 3 The Application of Daniel Nikolic is dismissed.



Judge Jenkins  
Vice President



**APPEARANCES:**

For Applicant

Mr P O'Dowd of Counsel instructed  
O'Sullivan & Saddington

For Respondent

Mr P Holdenson QC instructed by Minter  
Ellison

## TABLE OF CONTENTS

|  |    |
|--|----|
| ORDER .....                                      | 1  |
| TABLE OF CONTENTS .....                          | 3  |
| REASONS.....                                     | 4  |
| NATURE OF APPLICATION .....                      | 4  |
| BACKGROUND.....                                  | 4  |
| APPREHENDED BIAS .....                           | 8  |
| Applicant's case .....                           | 8  |
| Respondent's Reply .....                         | 9  |
| Procedural Fairness and Perception of Bias.....  | 10 |
| ABUSE OF PROCESS .....                           | 12 |
| JURISDICTION OF THE BOARD AND THE TRIBUNAL ..... | 13 |
| Applicant's case .....                           | 13 |
| Respondent's Reply .....                         | 18 |
| ANALYSIS AND FINDINGS.....                       | 20 |
| Apprehended Bias and Abuse of Process.....       | 20 |
| Jurisdiction of the Board .....                  | 22 |
| ANNEXURE A .....                                 | 25 |
| RELEVANT RULES OF RACING.....                    | 25 |

## REASONS

### NATURE OF APPLICATION

- 1 On 21 May 2013, Racing Victoria Limited (RVL) stewards issued two charges against the Applicant, Daniel Nikolic, for alleged breaches of Rule 175(a) of the Australian Rules of Racing ('AR 175(a)') (the 'Charges').
- 2 The Charges arose out of two alleged incidents at this Tribunal during November 2012, when, during the hearing of charges relating to the Applicant threatening Chairman of Stewards, Terry Bailey, the Applicant allegedly acted improperly by threatening Stipendiary Steward, Wade Hadley.
- 3 The hearing of the Charges has not yet been heard by the Racing Appeals and Disciplinary Board (the 'Board'). Rather, this is a review of the Board's decision to:
  - (a) reject the Applicant's assertion that the Board is precluded from hearing the Charges due to lack of jurisdiction; and
  - (b) refuse the Applicant's application to dismiss or permanently stay the hearing of the Charges on the basis of apprehended bias.

### BACKGROUND

- 4 On 7, 8, 28, 29 November and 11 December 2012,<sup>1</sup> Judge Macnamara, Vice President of the Tribunal, heard the matter of *Nikolic v Racing Victoria Limited*.<sup>2</sup> That proceeding involved a review of the Board's decision to uphold a two year disqualification placed on the Applicant for threatening Racing Victoria chief steward Terry Bailey and his family at Seymour in September 2011. Judge Macnamara affirmed the decision of the Board<sup>3</sup> and the full decision and reasons are published.
- 5 The Charges which the Applicant now faces arise from incidents which allegedly occurred during the hearing of the above case. Judge Macnamara makes comments about those events as follows:<sup>4</sup>

55 Before turning to a consideration of the issues joined before me as to the events of 4 September, it is necessary to say something as to what is alleged to have occurred on two days during the hearing at this Tribunal.

56 One of the witnesses called by the stewards in the course of the hearing before me as part of their case to uphold the determinations made by the RAD Board, was Mr Hadley, the Chief Steward of Tasmania who was on 4 September acting as a Victorian steward on secondment. Since then, apparently

---

<sup>1</sup> The additional date required for submissions on determinations.

<sup>2</sup> (Occupational and Business Regulation) [2012] the Tribunal 1954.

<sup>3</sup> Upon hearing submissions as to determinations on 11 December 2012, Judge Macnamara modified the penalty on Charge 1 so as to record a period of one year's disqualification followed by one year's suspension.

<sup>4</sup> In the 'Postscript' of the decision at paras 55-59.

arrangements have been made for him to take up a permanent appointment as steward with Racing Victoria. The stewards' case was put on first before this Tribunal. Following the close of that case, in the examination and cross-examination of Mr Nikolic, Mr Dunn QC who appeared with Mr Mukherji for Racing Victoria was granted leave to recall Mr Hadley. Mr Hadley said that when he had completed his evidence as part of the stewards' case and was leaving the witness box, Mr Nikolic, immediately behind his counsel, put his two hands on either side of his mouth, as if speaking confidentially, and said to Mr Hadley *'you're a disgrace'*.

57 On 29 November, while a short stand down was being observed during Mr Dunn's cross-examination of Mr Nikolic, Mr Hadley said he was approached by Mr Nikolic whilst he sat in a seat in the public area in a corridor in the Tribunal building, immediately outside the hearing room. Mr Hadley gave evidence that he was working on a stewards' report. Mr Hadley said that Mr Nikolic made a clicking sound with his mouth. Mr Dunn cross-examining Mr Nikolic, suggested that it was a sound that mimicked the mechanical action of a firearm. As I heard the demonstration by Mr Hadley, it sounded more like the sound which one would make to signal a horse to move on, *'giddy up'* as it were. Mr Hadley said he heard the same sound a second time and Mr Nikolic winked at him as Mr Nikolic walked out the door of the hearing room. Mr Hadley said that Mr Nikolic then turned left, heading away from the King Street frontage of the building. Mr Hadley said he continued working on the stewards' report on his iPad. The next he knew, he said that he was aware of Mr Nikolic sitting beside him. Mr Hadley demonstrated Mr Nikolic sitting one seat up from him on his left side, that is, on the King Street side but continued checking his report. Mr Nikolic said, according to Mr Hadley *'You are going up in the world, aren't you?'*. Mr Hadley said it was an even tone with no malice in it. Mr Nikolic made the same remark or words to the same effect a second time. Mr Hadley said he responded, *'I am just trying to make a living'*. He said Mr Nikolic then said *'well I think you are going up in the world. We will see where it ends up.'* He said he made no response and Mr Nikolic said *'what a fucking fine specimen of a human being'*. The exchange ended, according to Mr Hadley, with Mr Nikolic rising from his seat, saying *'you're all tarred with the same brush, you can't even make fucking eye contact'*. Mr Nikolic then walked away toward King Street, that is, to the front of the Tribunal building. Mr Hadley said that he decided to seek out the Racing Victoria lawyers after having made a note of the words spoken to him on his iPad.

58 Mr Hadley said that he sat in a different seat at the intersection of two corridors, one running parallel to King Street, the other running from the back of the building toward King Street, typing

his notes into his iPad. He then moved down the central corridor in the Tribunal building, heading out the main entrance. He was looking for the Racing Victoria legal team. Mr Hadley said that Mr Nikolic and another man moved to the same foyer area in which he, Mr Hadley, was standing. He attempted to ring one of the Racing Victoria stewards, Mr Kane Ashby. He walked outside to the plaza in front of the Tribunal building and noticed that Mr Nikolic had also moved to that area. There was a television camera which was pointed at Mr Nikolic. According to Mr Hadley, Mr Nikolic was looking straight at him.

59 Mr Nikolic denied making any clicking sound with his tongue. He said that when he met Mr Hadley in the corridor, Mr Hadley initiated the discussion, saying *'things aren't going too good for you'*. Mr Nikolic said it was he who remarked *'I'm trying to make a living'*, not Mr Hadley. He denied speaking the words attributed to him by Mr Hadley. It was because of Mr Hadley's remark to him *'things aren't going too good in there'*, that Mr Nikolic sat down next to him. Mr Nikolic agreed that he sat down near Mr Hadley but that it was *'three seats up'*. In cross-examination Mr Dunn QC for the stewards, asked *'did you then go past him and continue on, but come back?'* Mr Nikolic replied *'I came back. I was on my phone'*. (t/s 166 lines 26-27) Mr Nikolic said that in response to Mr Hadley's remark to him, he replied *'I am just trying to do my job'*. Mr Nikolic denied following Mr Hadley out the door onto the plaza, remarking *'there is only one exit out of here'*. He denied that he spoke to Mr Hadley in an intimidating voice. He said *'I did sit beside him, but not directly beside him and I was simply going through my phone so if that's intimidating ...'* (t/s 167 lines 32-34)

6 His Honour further discusses these events within the 'Conclusion':<sup>5</sup>

92 I am not called upon to make any findings directly as to the ...events that did or did not occur in the corridor outside the Tribunal in the course of the hearing; ...

93 All of these matters may require incidental consideration to the extent that they shed light upon the probabilities relative to the matters which are the subject of the charges.

104 What is alleged against Mr Nikolic here bears a striking resemblance to the principal allegation against him as to the incident at the Stewards' Tower at Seymour on 4 September. In both cases, Mr Nikolic is alleged to have launched a verbal assault on a steward without immediate provocation and out of earshot of anyone other than the steward and Mr Nikolic. In both cases, Mr Nikolic agrees that there was some sort of confrontation but denies the worst of what was alleged against

---

<sup>5</sup> In paras 92-93 and 104-108.

him, and says that whatever happened arose only because he was goaded by the steward who initiated the confrontation.

105 In the case of the incident in the corridor outside the Tribunal hearing room, none of the matters about some alleged feud or animus between Mr Nikolic or Mr Bailey has any application. Mr Hadley has only recently become a Victorian steward, he has no prior history of conflict with Mr Nikolic. Aside from the general consideration that he is now a steward of Racing Victoria, and would for that reason generally be expected to support Racing Victoria, he has no apparent motive to fabricate allegations against Mr Nikolic. In the witness box he impressed as a sober man of good judgment, as one would expect of a person who has served as the Chief Steward of Tasmania. Again, it seems unlikely that such a man would gratuitously goad Mr Nikolic.

106 Mr Hadley's account is clearly the preferable one.

107 I am fortified in that view by video surveillance material that was screened in the course of the Tribunal hearing. There is no video surveillance in the corridor in which Mr Hadley was sitting; however, video cameras in the Tribunal's registry counter area do allow a view in the background down the corridor. One can see Mr Nikolic's figure move through the registry area, through the door, down the corridor directly toward Mr Hadley and sit down next to him. Mr Nikolic moves confidently and deliberately. There is no hesitation and no turning. All of which is inconsistent with the view that he sat down next to Mr Hadley only because of some jibe uttered by Mr Hadley as Mr Nikolic walked past. Mr Nikolic holds what appears to be a cup of coffee. There is no sign of a phone.

108 Again, the video surveillance showed Mr Nikolic moving to the outdoor plaza at the front of the Tribunal building immediately after Mr Hadley did. In the circumstances, I accept that this was calculated to intimidate Mr Hadley.

7 Prior to the final hearing by the Tribunal in relation to the matter for review then before it, the Applicant had applied for a stay of the penalty imposed by the Board. That application was opposed by RVL and a stay was not granted to the Applicant.

8 On 21 May 2013 the Charges were laid against the Applicant, referable to his alleged conduct at the Tribunal on 8 and 28 November 2012.

9 The particulars of Charge One are: that the Applicant acted improperly within the precincts of the hearing room at the Tribunal when he spoke to Mr Hadley after he left the witness box and stated: 'You're a disgrace.'

10 The particulars of Charge Two are: that the Applicant allegedly approached Mr Hadley during a break outside the hearing room and acted improperly by engaging in offensive and threatening conduct towards Mr Hadley.

- 11 On 20 June 2013, the Charges came before the Board. However, on that occasion, Counsel for the Applicant raised two preliminary challenges, based upon the Board's alleged lack of jurisdiction to hear the Charges; and that, in any event, the Board was disqualified on the basis of a reasonable apprehension of bias. The Applicant now applies to the Tribunal for review of the Board's decisions rejecting those challenges.
- 12 The Rules of Racing of Racing Victoria are constituted by the Australian Rules of Racing made by the Australian Racing Board, preceded by the letters 'AR'; and the Local Rules and Rules of Race Betting, preceded by the letters 'LR'. Rules relevant to this hearing are set out in Annexure A.

## APPREHENDED BIAS

### Applicant's case

- 13 Counsel for the Applicant relied upon the well settled rule of law that circumstances existed in which a fair minded lay observer with knowledge of the material objective facts might entertain a reasonable apprehension that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question in issue.<sup>6</sup> It is not of course necessary to prove actual bias.
- 14 The Applicant takes issue with the fact that, prior to any charge being notified to the Applicant, His Honour Judge Macnamara has already made a finding that the conduct alleged did occur and that it was intended to intimidate.<sup>7</sup>
- 15 In *British American Tobacco v Laurie*,<sup>8</sup> French CJ identified the two-step test in *Ebner v Official Trustee in Bankruptcy*:<sup>9</sup>

The first is "the identification of what it is said might lead a judge ... to decide a case other than on its legal and factual merits." The second is an "articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits."  
In *Ebner* the constructed observer was the "fair-minded lay observer" concerned only with a reasonable apprehension of bias.
- 16 Counsel submitted that, in this case, both the first and second questions (referred to in *Ebner*) are answered by the same material. The decision made by Judge Macnamara bears directly on a critical factual issue in the current proceedings, and imputes motivations for such actions.<sup>10</sup> This means that the important fact-finding process as to the question of the alleged conduct (and its intent) must be tainted by the mist of

---

<sup>6</sup> *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 293-294 (Mason, Murphy, Brennan, Deane and Davison JJ); and see *Johnson v Johnson* (2000) 201 CLR 488, 492 [11] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>7</sup> Paragraph 17 of the Applicant's submissions.

<sup>8</sup> (2011) 242 CLR 283, [37].

<sup>9</sup> (2000) 205 CLR 337.

<sup>10</sup> Paragraph 14 of the Applicant's submissions.

unaccountability and possibly prejudgment.<sup>11</sup> Unwittingly, the orders made by the Tribunal create a situation of a reasonable apprehension of bias.<sup>12</sup>

- 17 That same situation, to the fictitious bystander, would impede scrutiny and review on further appeal.
- 18 Counsel further submitted that it is irrelevant that the Tribunal did not have jurisdiction to determine the Charges and did not consider whether the alleged conduct constituted a breach of the Rules. The fact that findings were made in relation to the alleged conduct, which became the subject of the Charges, is sufficient to raise a reasonable apprehension in the mind of a lay observer that the Board would be unduly influenced and prejudiced in their assessment of the Charges.
- 19 Counsel characterised the decision of the Respondent in relying upon the evidence led in relation to the alleged conduct, in the context of the Tribunal's review of earlier charges, as an election which it made to effectively bolster its case. Having done so, it cannot now complain that bringing the Charges before the Board, which is based upon the very same conduct, would prejudice the Applicant, both before the Board and any future proceedings in relation to the Charges, before the Tribunal.
- 20 Counsel conceded that no objection was made before the Tribunal as to the conduct of the proceedings and no appeal was lodged against the Tribunal's determination. However, Counsel submitted that the issue of unfairness only arises in the context of the Stewards' decision to subsequently charge the Applicant, relying upon the same conduct which was considered by the Tribunal.

### **Respondent's Reply**

- 21 With respect to the hearing of the Charges, Counsel submitted that the Board will:
  - (a) give proper attention to the evidence adduced before the Board;
  - (b) entertain any submissions made concerning the evidence adduced before the Board and the findings which should or should not be made concerning that evidence;
  - (c) not consider itself bound by any findings of fact made by His Honour Judge Macnamara at the Tribunal; and
  - (d) be impartial in making any finding of fact, and in resolving the issue(s) which arise for determination, in the hearing of the Charges.
- 22 Furthermore, the Board notes that it has neither said nor done anything to indicate that the Board considers the findings of fact made by the Tribunal to be binding upon the Board or to have been correctly made or appropriate.

---

<sup>11</sup> Paragraph 20 of the Applicant's submissions.

<sup>12</sup> Paragraph 18 of the Applicant's submissions.

## Procedural Fairness and Perception of Bias

- 23 In these circumstances, Counsel submitted that there can be no basis upon which the Board could determine that it is disqualified on the basis of a reasonable apprehension (or perception) of bias by reason that it might be 'influenced by' some findings of fact made by the Tribunal.
- 24 Specifically, Counsel submitted that the relevant test has not been satisfied in the circumstances of this case,<sup>13</sup> namely: whether a fair-minded lay observer might reasonably apprehend that the Board might not bring an impartial and unprejudiced mind to the resolution of the question(s) the Board is required to decide.
- 25 In its application:
- (a) The test is objective and not determined by the particular views or beliefs of the Applicant;<sup>14</sup> and
  - (b) It is assumed that the fair-minded lay observer will:
    - be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality.<sup>15</sup>
- 26 Counsel further contended that the following authorities support the Respondent's position that the operation of the above test cannot preclude the Board from hearing the Charges brought against the Applicant:
- (a) First, the fact that a judge has, in (previously) imposing sentence upon an accused's co-accused, made adverse findings concerning the conduct of an accused, does not give rise to a reasonable apprehension of bias. Consequently, the judge is not precluded from presiding over the trial of the accused (which may involve the conduct of a voir dire in which findings of fact concerning the credibility of the accused may need to be made) and, if the accused be convicted, the judge is not precluded from imposing sentence upon the accused;<sup>16</sup>
  - (b) Secondly, the fact that a judge has refused an application by an accused (for example, an application for bail, an application that the trial be stayed or an application that certain evidence sought to be adduced by the prosecution be excluded), in which the accused has given evidence (perhaps on a voir dire) which has been rejected by the judge, and in which findings of fact adverse to the credibility of the accused have been made by the judge, does not give rise to a

---

<sup>13</sup> *Johnson v Johnson* (2000) 201 CLR 488, at para [11] at p 492.

<sup>14</sup> *Johnson v Johnson* (2000) 201 CLR 488, at para [12] at pp 492–493.

<sup>15</sup> *Johnson v Johnson* (2000) 201 CLR 488, at para [53] at p 508.

<sup>16</sup> *Sonnet v R* (2010) 30 VR 519, at paras [15]–[28] at pp 523–527; also see: *R v Kearns* [2003] NSWCCA 367.

reasonable apprehension of bias, with the consequence that the judge is not precluded from presiding over the trial of the accused;<sup>17</sup> and

- (c) Thirdly, the fact that a judge has, in granting an injunction, made findings of fact concerning the evidence given by a witness who was a likely witness on the claim for damages in the same proceeding, where there was nothing to indicate that those findings represented the judge's concluded views on the matter, did not give rise to a reasonable apprehension of bias.<sup>18</sup>

27 Counsel distinguished the facts of *Gacic v John Fairfax Publications Pty Ltd*<sup>19</sup> on the basis that, in that case, the judge 'having seen and heard the witnesses and presumably formed a view about them', had already decided an issue, or a considerable part of an issue, that had to be considered by that same judge.

28 The basis of the application made on behalf of the Applicant is that the findings of fact made by the Tribunal have had the effect of 'disqualifying' the Board from conducting the hearing of the Charges. However, the circumstances cited in the above cases reject such an outcome, even in the context of the same judicial decision-maker. That is, each of these cases concerned an application made by a party to a proceeding, based upon something which the trial judge himself/herself had done and which was asserted to have had the effect of 'disqualifying' the judge, but which failed, because the conduct of the judge did not give rise to a reasonable apprehension of bias. Having regard to these authorities, there is no logical reason why the Board should disqualify itself in the subject circumstances.

29 Furthermore, the test cannot be applied in such a way as to frustrate the proper powers and functions of the Board to hear and determine charges, in accordance with the regulatory regime under which it operates. Counsel sought to invoke the rule of necessity, enunciated by the High Court as follows:<sup>20</sup>

The rule of necessity gives expression to the principle that the rules of natural justice cannot be invoked to frustrate the intended operation of a statute which sets up a tribunal and requires it to perform the statutory functions entrusted to it. Or, to put the matter another way, the statutory requirement that the tribunal perform the functions assigned to it must prevail over and displace the application of the rules of natural justice.

---

<sup>17</sup> *R v Masters & Others* (1992) 26 NSWLR 450, at pp. 469 & ff; *R v Lars & Others* (1994) 73 A. Crim. R. 91, at pp 103–108; *R v Karounas* (1995) 63 SASR 451; 77 A. Crim. R. 479, at pp 488–489.

<sup>18</sup> *Re Morling; Ex Parte Australasian Meat Industry Employees Union* (1985) 60 ALJR 402; 66 ALR 608 (Dawson J).

<sup>19</sup> [2012] NSWSC 793 at [6].

<sup>20</sup> *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 in the joint judgment of Mason CJ and Brennan J at p 89; see also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, at para [4] at pp 343–344.

- 30 Applying the rule of necessity, Counsel submitted that there is no material distinction between the Rules of Racing (which are contractual in nature), which confer functions, jurisdiction and powers on the Board and a statute which confers functions, jurisdiction and powers upon a tribunal or court.

### **ABUSE OF PROCESS**

- 31 Applicant's Counsel made the following further written submissions in response to the Applicant's assertion to the effect that the laying of the Charges was effectively an abuse of process, in light of the earlier findings of the Tribunal in relation to the same conduct.<sup>21</sup>
- 32 The findings of fact made by the Tribunal concerning the Applicant's conduct toward Mr Hadley at the Tribunal on 8 November, 2012 and 29 November, 2012:
- (a) were not determinative of the two charges the subject of the hearing before the Tribunal;
  - (b) were not indispensable or fundamental to the ultimate factual findings involved in the determination by the Tribunal that each and all of the elements of the two offences, the subject of the two charges heard by the Tribunal, had been proven to the requisite standard; and
  - (c) did not involve or lead to any finding or determination by the Tribunal that the Applicant had thereby (on either 8 November, 2012 or 29 November, 2012) committed any offence(s) contrary to the Rules of Racing.
- 33 Indeed, the Tribunal did not even have the jurisdiction to determine whether or not the Applicant had, with respect to his conduct toward Mr Hadley at the Tribunal on 8 November, 2012 and 29 November 2012, thereby breached the Rules of Racing.
- 34 In these circumstances, the Board, in determining whether or not the Charges have been proven to the requisite standard and, if so, whether the Applicant ought be penalised for such conduct, will not be making a determination on a matter already determined by the Tribunal.
- 35 Moreover, no complaint was made before the Tribunal concerning any lack of particularity with respect to the allegations made concerning the conduct of the Applicant toward Mr Hadley at the Tribunal.<sup>22</sup> The Applicant was represented by senior Counsel and his legal representatives were not denied a full opportunity to deal with those allegations. In any event, the sufficiency or otherwise of those particulars does not bear upon whether or not a proceeding before the Board constitutes an abuse of process. In this regard, there is no suggestion that the Applicant has not been provided with

---

<sup>21</sup> Paragraphs 16-20 of Counsel's submissions dated 28 June 2013.

<sup>22</sup> In response to the specific complaint made within paragraph 7 of the Applicant's Submissions dated 25 June, 2013.

sufficient particulars of the Charges and there is no suggestion to the effect that the Board will not permit the Applicant to defend fully those Charges.

- 36 Finally, Counsel distinguished the cases relied upon by Applicant's Counsel<sup>23</sup> on the basis that the issue, the subject of the determination in each of those cases, was resolved against the party who then subsequently sought again to agitate the very same issue, with the consequence that that party was making a collateral attack upon the earlier decision. In short, in the instant case, the Stewards make no challenge whatsoever to any findings made by the Tribunal, let alone challenge an adverse determination of some matter by the Tribunal.

### **JURISDICTION OF THE BOARD AND THE TRIBUNAL**

- 37 The Board is constituted under LR 6A and derives its jurisdiction to hear and determine appeals under LR 6B and hear and determine charges of a serious offence under LR 6C. The Board is authorised to impose penalties set out under AR 196.
- 38 Section 83 OH(1) of the *Racing Act 1958* provides that a person whose interests are affected by a decision of the Board may apply to the Tribunal for review of that decision. The Tribunal then exercises all the decision-making powers conferred on the Board. The Tribunal is not confined to the material upon which the original decision was made and may receive evidence which was not before the original decision-maker.<sup>24</sup> A decision of the Tribunal becomes a decision of the original decision-maker (the Board).

### **Applicant's case**

- 39 The Applicant submitted that the Board has no jurisdiction to hear or determine the Charges because, at the time of the alleged misconduct, he was already a disqualified person and was therefore not subject to AR 175(a). That is, when the conduct, the subject of the Charges took place, namely 8 November 2012 and 29 November 2012, the Applicant was not a licensed person under the Rules.
- 40 Further, as a consequence of the Applicant no longer holding a licence to ride in races, any obligations on him to comply with the Rules had also come to an end. Specifically, the Applicant's contract with RVL had ended at the time his disqualification took effect on 2 October 2012.
- 
- 41 The particulars of the both Charges brought against the Applicant originally pleaded that:
- You were, at all relevant times, a jockey licensed by RVL.
- 42 At the hearing before the Board, the Stewards sought to amend the Charges by deleting the above statement. Applicant's Counsel submitted that the Board and the Respondent thereby acknowledged that the Applicant was

---

<sup>23</sup> Paragraph 9 of the Applicant's written submissions dated 25 June, 2013.

<sup>24</sup> Section 51 of the *Victorian Civil and Administrative Tribunal 1998*; *Davidson v Victorian Institute of Teaching* (2006) 25 VAR 186.

not licensed at the relevant time. As a consequence of the Board's decision on 2 October 2012 and the fact that the Applicant was not granted a stay pending determination of a review of the Board's decision by the Tribunal, the Applicant ceased to be a licensed person within the meaning of the Rules from 2 October 2012.

- 43 Applicant's Counsel submitted to the effect that by making an application for renewal of licence, which included Terms and Conditions as to Licence, the Applicant was merely acknowledging that the licence was granted on condition that he be bound by the Rules during the currency of his licence and cannot be taken as an agreement to be bound by such Rules otherwise.
- 44 Accordingly, once the licence was terminated, at the instigation of the Stewards, the conditions attaching to such licence, which invoked the Rules, ceased to have any application. Any 'agreement' by the Applicant to be bound by the Rules was conditional upon the continuation of the licence.
- 45 Counsel further relied upon the limited nature and extent of the Board's jurisdiction, which is predicated upon a contractual agreement.
- 46 In *Myers v Casey*,<sup>25</sup> the High Court affirmed that disciplinary powers of domestic tribunals derive from the law of contract. Applying this principle, Counsel submitted that if the relevant contract has been extinguished then the mere fact that the Applicant pursued an appeal against that decision at the Tribunal does not re-enliven the rights and obligations which had existed under the contract prior to 2 October 2012. The Applicant simply exercised his right to seek a review of that decision, which, if successful, would have invalidated the disqualification, and reinstated his licence with the contractual rights and obligations which attach to it. Until that occurred, the Applicant had no such rights and obligations.
- 47 Counsel further relied upon the decision of the Tribunal in *Clements v Racing Victoria Ltd.*<sup>26</sup> In that case, the Stewards directed a non-licensed person, Mr Clements (a professional punter), to provide his telephone records relating to matters into which they were enquiring, purportedly under AR 8 (which empowered Stewards to obtain production of certain records etc). Mr Clements refused and the Board determined that he should be 'warned off' indefinitely (which was found to have the same effect as disqualification). The Tribunal was required to determine if Mr Clements, as an unlicensed person, was subject to the Stewards' powers under AR 8.
- 48 The Board originally reasoned that because betting was an integral part of racing, and that a number of rules regulate betting, people who engage in betting would generally be regarded as taking part in racing. As a professional punter, Mr Clements bet on his own account and 'for a few mates'. The Board referred to his frequent attendance at race meetings, his association with a jockey, and his betting amounts and patterns, including

---

<sup>25</sup> (1913) 17 CLR 90. The High Court found that *Myers* had contracted to abide by the rules by entering his horse in the race concerned. Refer also para 30 in *Clements*.

<sup>26</sup> [2010] VCAT 1144.

'laying' horses. Accordingly, the Board was satisfied that Mr Clements 'brings himself within the purview of the rules'. The Board adopted the principles established in *Stephens v Naylor* and found that the Rules relevantly applied to Mr Clements.

- 49 On appeal, the Tribunal set aside the Board's decision. The Tribunal highlighted the distinction between *Myers* and *Clements*, in that in *Myers* it was found that in consideration of being able to enter his horses in races, he would be bound by the stipulations contained in the rules. In other words, the court found consent in *Myers*. However, in *Clements*, the Tribunal found that Clements did not agree to be bound by the Rules, either expressly or by implication.
- 50 The relevant findings in *Clements*, in summary, were as follows:
- (a) The Rules of Racing are made by a private entity (The Australian Racing Board). The Rules provided that RVL may make Local Rules ('LR') which are regarded as Rules of Racing within its territorial authority;
  - (b) Mr Clements was not a licensed person, he was a member of the public albeit earning income from racing;
  - (c) The mere fact that AR2 and LR 3 state, in essence, that any person who takes part in any matter coming within the Rules consents to be bound by them, does not make it so. Merely asserting jurisdiction (unilaterally) does not confer it;
  - (d) The Tribunal analysed the decision in *Stephen v Naylor*<sup>27</sup> and in particular the manner in which the principle relied upon the status of the Rules of Racing, and the apparent treatment by the Privy Council of such Rules as if they had statutory effect:<sup>28</sup>

41. On the basis of this extract, RVL contended that the critical test for jurisdiction was whether a person has, by his or her actions, brought themselves within the purview of the Rules. It was submitted that this test has been consistently adopted by courts and tribunals since *Stephen v Naylor*.

42. In the extract quoted the Privy Council effectively treated the Rules as if they had statutory force such that they applied to anybody who came within their terms. No authority has been cited in support of this proposition.

43. Australian Courts are no longer bound by decisions of the Privy Council, but that is not to say that such decisions are to be lightly disregarded.

44. The jurisdiction of the Stewards to impose a penalty on Mr Clements must rest on a proper legal basis. The power to impose a penalty for failing to comply with a direction of the Stewards is

---

<sup>27</sup> At paragraph 40; (1937) 37 SR (NSW) 127.

<sup>28</sup> At [41]-[44].

predicated on the proposition that AR8 applies to Mr Clements. As Lewis and Taylor put it:

Jurisdiction over both the person and the subject matter is required for a governing body to exercise its disciplinary function ... there must be a relationship between the governing body and the person or club that allows the lawful and practical enforcement of that jurisdiction: if there is in fact no basis on which the person or club can be constrained, a claim to jurisdiction is hollow. In short, there must be some reciprocity in relation to jurisdiction as between the person or club and the governing body.<sup>29</sup>

51 The Tribunal then continued its analysis by examining the authorities dealing with the powers of domestic tribunals:<sup>30</sup>

50. A necessary corollary to the contractual source of the Stewards' powers is that those powers do not extend to individuals who do not agree (either expressly or by implication) to be bound by the Rules. This was succinctly stated by Denning LJ (as he then was) put it in *Lee v The Showmen's Guild of Great Britain*:<sup>31</sup>

The jurisdiction of a domestic tribunal ...must be founded on a contract, express or implied. Outside the regular courts of this country, no set of men can sit in judgment on their fellows except so far as Parliament authorizes it or the parties agree to it.

51. This general proposition has also been held to apply to racing tribunals. As Sir Thomas Bingham MR observed in *R v Disciplinary Committee of the Jockey Club, Ex parte Aga Khan*:<sup>32</sup>

The Jockey Club cannot, of course, impose contractual conditions on those who do not seek any licence or permit from it and therefore do not enter into any contract with it. This is a class which includes members of the general public.

52 The Tribunal further noted that:<sup>33</sup>

53. We do not doubt the importance to the general public of the disciplinary functions exercised by the Stewards and the Board. But the fact that the stewards' investigatory powers may provide a public benefit by protecting the integrity of racing does not alter the fact that their powers are contractual.

53 In dealing with the actual power sought to be exercised, the Tribunal said:<sup>34</sup>

---

<sup>29</sup> A Lewis and J Taylor (eds), (Sport: Law & Practice (2<sup>nd</sup> Ed 2008; [A2.10].

<sup>30</sup> At [50]-[51].

<sup>31</sup> [1959] QB 329.

<sup>32</sup> [1992] EWCA Civ 7.

<sup>33</sup> At [53].

<sup>34</sup> At [68].

68. AR8 is a broad, invasive power. It empowers the Stewards to require a person to hand over any ‘mobile phones, computers, electronic devices, books, documents and records ... relating to any meeting or inquiry’. Courts have been slow to imply the existence of such an invasive power.<sup>35</sup> Nor is it to the point that rules such as AR 8 are for the public benefit, to keep the sport of racing untarnished. As Fraser J observed in *Demerara Turf Club and Others v Phang*:

Such absolute power when attributed to institutions which are popular may also have to be accorded to the institutions which are disliked and the implications might encourage grave forebodings in the minds of those who cherish individual freedom and are wedded to the idea that no man ought to be made to suffer loss or damage by an arbitrary assumption of jurisdiction.<sup>36</sup>

69. It seems to us that the principle of legality applies with equal force to the interpretation of rules of domestic tribunals. Just as domestic tribunals are subject to the rules of natural justice – an aspect of the rule of law – so too should their rules be construed by reference to the principle of legality. Any doubt in interpretation should be resolved in favour of the person said to be subject to the rules.

71. The application of the principle of legality in the context of this case supports a conclusion that the powers in AR8 do not extend to persons who have not agreed to be bound by the Rules. It would be contrary to this principle to extend the application of the Rules to persons who have not agreed to be bound by the Rules but have, by their actions, brought themselves ‘within the purview of the Rules’. Such a test is simply too vague and imprecise to provide a proper basis for the conferral of coercive power.

72. In conclusion, and contrary to the decision of the Board, we have decided that Mr Clements was not subject to AR8. The source of the Stewards’ powers under that rule is contractual and those powers do not extend to persons who have not agreed (either expressly or by implication) to be bound by the Rules. The contractual nature of the powers of a domestic tribunal (such as the Stewards and the Board) is clearly supported by authority in both England and Australia and our conclusion is also consistent with the principle of legality.

73. To the extent that *Stephen v Naylor* stands for a broader proposition – that rules such as AR8 apply to persons who, by their actions, bring themselves within the purview of the Rules – we respectfully decline to follow that decision.

---

<sup>35</sup> *Egan v Willis* (1998) HCA 71.

<sup>36</sup> [1961] 3 WLR 454.

54 Counsel invited the Tribunal to apply the reasoning in *Clements* case for the following reasons:

- (a) At the time when the Board sought to impose the Rules upon Mr Clements, he was actively involved in his punting activities which necessarily involved a close association with racing generally;
- (b) By contrast, at the date when it is contended that the Applicant was bound by the Rules of Racing, he was a 'disqualified person'. Not only did this mean that he was not involved in the very activity in which he had previously engaged (when his licence (or contract) existed) i.e. riding horses (even track work), or even attending at a racetrack. Accordingly, at the relevant time, he was far from 'within the purview of the rules';
- (c) In *Clements*, it was a simple case of there being no agreement by Mr Clements to be bound by the Rules. In the present case, the Rules only applied to the Applicant by virtue of his application for and grant of a licence. Once that licence was terminated, the contract was terminated, and the terms and conditions no longer applied to him. The Applicant's earlier agreement to be bound by the Rules was no longer applicable or binding upon him.

55 Accordingly, Counsel submitted that the Board has no jurisdiction to make a finding that the Applicant breached AR175(a) nor to impose any penalty, as the Applicant was not, at the relevant time, subject to AR175(a).

### **Respondent's Reply**

56 The question for determination therefore is whether a jockey who has been disqualified is, nevertheless, bound to observe the Rules of Racing, after the disqualification takes effect and potentially, for the period of disqualification.

57 In order to determine that question, regard must be had to the proper interpretation of the Rules, and to the contractual relationship, if any, between the Applicant and RVL as at November 2012.

58 Until his disqualification, the Applicant was a licensed jockey for some years. As a licensed jockey, he was required from time to time to seek a renewal of that licence. On 15 June 2012, the Applicant submitted to RVL a Jockey Renewal application, signed by him.<sup>37</sup> That Application attached an acknowledgement in the following terms:

#### **TERMS AND CONDITIONS OF LICENCE**

1. The rider acknowledges and agrees to be subject to and be bound by:

---

<sup>37</sup> Exhibit 1.

- a. The Rules of Racing of each Principal Racing Authority in which State or Territory he/she rides as amended or varied by each Principal Racing Authority from time to time;
- b. The exclusive jurisdiction of each Principal Racing Authority in which State he/she rides, its Officials and Stewards in respect of all matters arising in relation to racing in the State or Territory of that Principal Racing Authority;
- c. Such rules and directions as may from time to time be formed, made or given by the Directors for each Principal Racing Authority (“Directors”), the Stewards or the Principal Racing Authority (“Stewards”), or the Officials of any racing club registered by the Principal Racing Authority to conduct thoroughbred racing under the Rules (“Club”).”

59 The signed Jockey Renewal Application was submitted and accepted by RVL on that day, and took effect on 1 July 2012.

60 In summary, Respondent’s Counsel submitted that the Applicant’s contractual obligations to Racing Victoria survived the disqualification on two bases.

(a) First, the penalty of disqualification imposed on the Applicant did not negate or terminate the contractual relationship and as a result he was bound to observe the Rules as at November 2012 and beyond that time; and

(b) Secondly, at the time of the Tribunal hearing in November 2012, the Tribunal was, by virtue of s 51 of the VCAT Act exercising the functions of the original decision-maker, the Board. As the Applicant was seeking a review, he was therefore taking part in a ‘matter coming within the Rules’ and was therefore deemed to consent to be bound by them, in accordance with AR2 and LR3.

61 In his oral submissions, Counsel confirmed RVL’s position that the *Clements* case was wrongly decided. While it was conceded that the application of the Rules to the Applicant, in the current circumstances, is not explicit, the Rules otherwise make clear that:

(a) it was intended that persons who may not be licensed but engaged in certain misconduct within the ambit of RVL’s jurisdiction, impliedly consented to be bound by the Rules, to the extent that they may be applicable. For instance AR 175A is expressed to apply to ‘Any person bound by these Rules...’; whereas other Rules referred to a licensed person;

(b) in committing to the Rules upon being licensed, the licensee also agrees to be bound by Rules which govern post disqualification conduct, such as AR 182; and

(c) in committing to the Rules upon being licensed, the licensee also derives certain rights, such as the ability to appeal a decision of the Board to the Tribunal.

62 Counsel further clarified that while a disqualified jockey is obviously not subject to those Rules which refer to a 'licensed jockey', such person is otherwise subject to any Rules relating to 'a person'.

## **ANALYSIS AND FINDINGS**

### **Apprehended Bias and Abuse of Process.**

63 In the Tribunal's view, there is no proper basis for the Applicant's contentions either that the Board is precluded from hearing the Charges on the basis of a reasonable apprehension of bias or that the Charges constitute an abuse of process.

64 It is necessary to consider the context in which the alleged 'source' of the apprehended bias arose. The sequence of events may be summarised as follows:

- (a) charges against the Applicant were found proven before the Tribunal in an earlier hearing;
- (b) in reaching findings in relation to those earlier charges, the presiding Judge took into account, as a matter of credit, findings made on the basis of evidence given in that hearing, as to alleged misconduct committed by the Applicant on two occasions during the course of that hearing;
- (c) subsequently, the Stewards laid the (further) Charges against the Applicant, founded upon the alleged misconduct committed during the course of the earlier hearing;
- (d) there was no objection taken during the earlier hearing to the additional evidence being given or to the Applicant being cross-examined about it; and
- (e) there was no appeal lodged against the determination of the Tribunal made in the earlier hearing and there was no criticism raised in the current application to the conduct of the earlier hearing or to the manner in which the Judge relied upon the evidence relating to the alleged misconduct.

65 In his carefully reasoned judgment, His Honour Judge Macnamara expressly clarified the context in which he was considering the alleged incidents, which subsequently became the subject of the (further) Charges:

92 I am not called upon to make any findings directly as to the ...events that did or did not occur in the corridor outside the Tribunal in the course of the hearing; ...

93 All of these matters may require incidental consideration to the extent that they shed light upon the probabilities relative to the matters which are the subject of the charges.

- 66 It is self-evident, both from the circumstances in which His Honour came to consider the alleged misconduct of the Applicant and the findings which he ultimately made, ancillary to his findings in relation to the charges before him, that the 'source' of the alleged apprehended bias does not relate to the current Charges at all. That is, there were no allegations of breaches of the Rules before the Tribunal at the earlier hearing which arose from the alleged misconduct which occurred at the hearing. The current Charges were not before the Tribunal and no findings were or could be made in contemplation or expectation that any such Charges would be subsequently laid.
- 67 Furthermore, it is quite clear from the authorities referred to by Applicant's Counsel, that even the same judicial decision-maker will not necessarily be disqualified merely by reason that earlier adverse findings had been made in relation to the same party.
- 68 In this case, the Charges brought before the Board for hearing and determination are not the charges that were before the Tribunal, at the earlier hearing. Any proceedings before the Board into the hearing of the Charges will be a hearing of the evidence in relation to the Charges, for the first time. It is not a mere duplication or reflection of the evidence presented to the Tribunal, in an entirely different context and for an entirely different purpose.
- 69 The Board would be in dereliction of its duty if it were to have regard to any matter other than the evidence presented before it. The fair-minded lay observer is presumed to accept that a professional body, such as the Board, will conduct a hearing into the Charges with integrity and impartiality. It is not reasonable to anticipate or apprehend that the Board would be unduly influenced by findings of another decision-maker, which were not made in the context of the (current) Charges and where the Board is duty-bound to have regard only to the evidence before it and otherwise undertake its own enquiry, during the course of a hearing, as it sees fit.
- 70 The Tribunal further finds that there was no abuse of process in the RVL seeking to adduce evidence of the alleged misconduct by the Applicant in the earlier hearing and seeking to use it in the way that it did; and the Stewards subsequently raising the Charges against the Applicant. Indeed, it would be extra ordinary if such perceived misconduct could never be the subject of further enquiry and charge by reason that it was relevant, for another purpose, in another proceeding. In this regard, the authorities cited by Counsel for RVL relating to necessity are also relevant.

## Jurisdiction of the Board

- 71 The detailed and helpful submissions of both parties have been summarised above. In simple terms, the Applicant contends that the Rules apply to him only as an incident of his licence and once disqualified he ceases to have any rights as a licensed jockey and conversely the Rules cannot be enforced against them.
- 72 In the Tribunal's view, the Applicant was subject to the Rules at the relevant time.
- 73 Applicant's Counsel relied upon the findings in *Clements* case as being directly applicable. Respondent's Counsel suggested that this case was not correctly decided.
- 74 The Tribunal endorses the decision in *Clements* case. Furthermore, in the Tribunal's view, the Tribunal's decision in *Clements* case is clearly distinguishable. In that case, Clements had never been licensed and could never be said to have contractually agreed to be subject to the Rules. He was a professional punter who had allegedly procured or otherwise been supplied with inside information for the purpose of his betting business. As part of their investigations into the activities of the Applicant and other associates, the Stewards sought production of the mobile and landline phone records of Clements, relying upon AR 8. There was no suggestion that Clements attended the races other than a private punter, albeit that he engaged in the business of betting on his own account 'and for a few mates.' He was not charged as a jockey, horse owner or horse trainer. His activities did not otherwise bring him under the direct or indirect regulation of the RVL. In these circumstances, it is not surprising that he resisted the RVL's direction to produce his telephone records.
- 75 In marked contrast, in this case, the Applicant:
- (a) Had been a licensed jockey for many years;
  - (b) Most recently applied for and was granted annual renewal of his licence with effect from 1 July 2012;
  - (c) The Jockey (licence) Renewal contained an acknowledgement to be signed by the applicant for the licence renewal including that the rider acknowledges and agrees to be subject to and bound by the Rules of Racing of each Principal Racing Authority in each State or Territory in which he/she rides;
  - (d) Following the Applicant's disqualification by the Board on 2 October 2012 ('the October 2012 decision'), and upon application to the Tribunal for review of that decision, the Applicant also sought a stay of the Board's decision, which was refused;
  - (e) In his application for review by the Tribunal of the October 2012 decision, the Applicant was seeking to have the decision of the Board

set aside and, as a consequence, his licence would be reinstated with effect from the date of original disqualification;

- (f) During the hearing of the review of the October 2012 decision, the alleged misconduct which became the subject of the Charges took place; and
- (g) The position being adopted by the Applicant means that, during the period of disqualification, he may be in breach of the Rules with impunity, while at the same time taking action to overturn his disqualification and bring himself back within the Rules.

76 In the Tribunal's view:

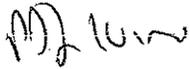
- (a) The Jockey Renewal does not have the effect, of itself, of applying the Rules to the Applicant during any period of disqualification. The attached acknowledgement is clearly intended to alert an applicant to the fact that consent is required to certain disclosures, for instance a police check, and that a licence application is subject to acceptance of and compliance with the Rules, once licensed;
- (b) The extent to which the Rules expressly relate to 'a person' or 'any person' are to be interpreted and applied in the context of activities which otherwise bring such person within the Rules. For instance, AR 82 clarifies certain activities which a disqualified person is prohibited from engaging in, subject to the potential dispensation afforded by the consent of the Principal Racing Authority. Further Rules referring to 'any person' clearly relate to persons otherwise engaged in activities under the *Racing Act 1958* or the Rules, such as AR39, AR 49, LR26, AR56B, AR64J, AR64K, AR66, AR68A, AR69K, LR 71A, AR72, AR81, LR 36A, AR89, AR94, AR175, AR178A, LR71A, and AR192; and
- (c) The ambit of AR2 and LR3, in light of the *Clements* case, are problematic but are otherwise not determinative of the application of the Rules in this case.

77 However, the position adopted by the Applicant is otherwise untenable for the reason that, by making application to the Tribunal for the review of the October 2012 decision; by seeking a stay of the Board's decision; and seeking to set aside that decision with the effect, if successful, that his disqualification would be quashed and his licence reinstated with effect from 2 October 2012; the Applicant has clearly evidenced an agreement and intention to be bound by the Rules.

78 It is unnecessary to determine the application of the Rules to disqualified persons more broadly than required in the circumstance is of this case. There is no question that the Rules constitute a private treaty to which a person, either as licensee or otherwise, must explicitly or by necessary implication, agree to be bound. The Tribunal is satisfied that the Applicant cannot purport to invoke the review mechanism of the Tribunal, for the

purpose of reinstating his status as a licensed jockey, without impliedly consenting to be bound by the very Rules to which he seeks to be officially subject.

- 79 Accordingly, the Applicant was bound by the Rules at the relevant time when he committed the alleged conduct, the subject of the Charges. The Board has jurisdiction to hear and determine those Charges.
- 80 In making these findings the Tribunal does not in any way reflect upon the efficacy or merit of the Charges.



Judge Jenkins  
Vice President

## ANNEXURE A

### RELEVANT RULES OF RACING

81 AR 1 include the following definitions:

“**Licensed**” A person is licensed if he has the requisite Licence required by the Rules.

“**Person**” includes any syndicate, company, combination of persons, firm, or Stud owning or racing a horse or horses.

82 AR 2 and LR 3 provide:

#### **Application of the Rules**

AR2 Any person who takes part in any matter coming within these Rules thereby agrees with the Australian Racing Board and each and every Principal Racing Authority to be bound by them.

LR3 — Persons deemed to be bound by the Rules.

Any person who takes part in any matter coming within the Rules is thereby deemed to consent to be bound by them, and to be so bound.

83 AR 175(a) provides:

The Committee of any Club or the Stewards may penalise:

- (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.

84 AR 182 provides:

- (1) Except with the consent of the Principal Racing Authority that imposed the disqualification, and upon such conditions that they may in their discretion impose, a person disqualified by the Stewards or a Principal Racing Authority shall not during the period of that disqualification:
  - (a) Enter upon any racecourse or training track owned, operated or controlled by a Club or any land used in connection therewith;
  - (b) Enter upon any training complex or training establishment of any Club or licensed person;
  - (c) Be employed or engaged in any capacity in any racing stable;
  - (d) Ride any racehorse in any race, official trial, jump-out or test;
  - (e) Enter or nominate a horse for a race or official trial;
  - (f) Subscribe to any sweepstakes;
  - (g) Race or have trained any horse whether as owner, lessee or otherwise;

- (h) Share in the winnings of any horse.
- (i) Participate in any way in the preparation for racing or training of any racehorse.
- (k) Open a betting account, operate an existing betting account, transact a bet or have a bet transacted on his/her behalf, have any interest in or share in any bet, receive a benefit from any bet placed with a licensed wagering operator in connection with any thoroughbred race meeting held in Australia.

[amended 1/2/01, 30/4/03, 1/9/09, 11/4/12]

- (2) Except with the consent of the Principal Racing Authority that imposed the disqualification, no person who in the opinion of the Principal Racing Authority or the Stewards is a close associate of a disqualified person shall be permitted to train or race any horse. [sub-rule (2) amended 1/10/00, 30/4/03]
- (3) Unless otherwise determined by the Principal Racing Authority that imposed or adopted the penalty, the period of disqualification of any person who contravenes any of the provisions of sub-rule (1) of this rule, shall automatically recommence as from the most recent date of such contravention, and the person may also be subject to further penalty. [added 1/12/10]
- (4) The provisions of sub-rule (3) shall apply to any person to whom AR 182 applies, regardless of when such penalty that gives rise to the application of the rule was imposed. [added 1/12/10]

85 AR 195A provides:

Upon any licensed person being disqualified his licence shall cease and determine and he must make application to the Principal Racing Authority to be relicensed. [amended 1/11/99; replaced 1/10/02; amended 30/4/03].