6 December 2019

**DECISION**

**GREYHOUND RACING VICTORIA**

**and**

**MR BEN DIVIRGILIO**

**Date of hearing:** 21 November 2019

**Panel:** Judge John Bowman (Chairperson), Judge Graeme Hicks (Deputy Chairperson) and Ms Judy Bourke.

**Appearances:** Mr Damien Hannan instructed by Mr Marwan El-Asmar appeared on behalf of the Stewards.

Mr Lynton Hogan represented Mr Ben Divirgilio at the hearing.

**Charge:** Greyhounds Australasia Rule 92(5)(c) states:

(5) Pending the decision or outcome of an inquiry, the Controlling Body or Stewards may direct that-

(c) a licence or other type of authority or permission be suspended.

**Particulars of charge:** On 13 November 2019, Greyhound Racing Victoria suspended Mr Divirgilio’s licence for an indefinite period.

**DECISION**

At the outset, I would emphasise that this appeal involves questions of law and of mixed fact and law. Accordingly, pursuant to section 50X of the *Racing Act 1958*, such questions are to be determined by me as chair. I have heard this appeal with deputy chair Judge Graeme Hicks and member Judy Bourke, and I thank them for their assistance and their wisdom. However, the ultimate decision is entirely mine.

This appeal by Mr Benjamin Divirgilio (the appellant) essentially concerns the operation of section 77 of the *Racing Act* and of several local rules. The appellant is a licensed trainer, as is his father, Mr Rinaldo Divirgilio. At this time, the case centres upon the alleged use of live baiting. It is alleged that this was carried out by Mr Rinaldo Divirgilio with the appellant’s knowledge. It is alleged that a dog or dogs trained by him were at the property of his father. It is further alleged that the appellant made false or misleading statements to the stewards in the course of their investigation.

By a detailed letter of 7 November 2019, the stewards notified the appellant of his immediate temporary suspension pursuant to local rule 11.14. He was further advised that the investigations manager would be considering further suspension in accordance with GAR 92 (5) (c). The appellant was requested to provide further information as to why his registration should not remain suspended.

The appellant forwarded a lengthy response by an email dated 11 November 2019. The stewards responded by a letter dated 13 November 2019 in which the ongoing suspension was confirmed.

The appellant then served a Notice of Appeal of 14 November 2019. Three grounds were set out in this Notice and these were relied upon at the hearing of the Appeal on 21 November last. Mr Lynton Hogan of Counsel appeared on behalf of the Appellant and Mr Damian Hannan of Counsel appeared on behalf of the Stewards. I shall deal with the three grounds in turn.

The first ground deals with the question of whether, in the circumstances, the Stewards had the power to suspend. The second and third grounds address the issue of whether, if the Stewards did have the power, they should have suspended the appellant.

1. Did the Investigating Steward have the power to suspend the appellant’s licence?

This involves what could be called a jurisdictional point, which is a straight question of law. Essentially the appellant asserts that, pursuant to section 77 (2) of the *Racing Act,* a Steward can only cancel or suspend the registration of a trainer in accordance with the Rules and subject to the Board’s approval. It is submitted that, in the present case, there is no proof that the suspension was imposed with the approval of the Board.

I am not persuaded by this argument. In my opinion, the requirements of section 77 (2) must be seen in context and particularly with what is contained in section 77 (1). The operation of the provisions should be seen as a whole and not in isolation.

Section 77 (1) sets out a large number of powers of the Board. Section 77 (1) (ca) specifically gives the Board the power to suspend the licence or registration of a greyhound racing industry racing participant. How is this then done, or, put another way, how does section 77 work?

The answer is to be found in section 77 (2). The relevant portion of this reads as follows:

A steward of the Board…who is authorised in writing by the Board… may, in accordance with the rules and subject to the Board’s approval, take the following action in relation to … a greyhound industry participant who contravenes the rules –

(d) cancel or suspend the registration of the greyhound racing industry participant.

In other words, section 77 (1) gives to the Board certain powers, including the suspension of licences. This power can be delegated. Pursuant to section 77(2), the Board can authorise in writing certain other persons to take certain types of approved actions. It is a type of approved delegation. Thus, the Board can authorise and approve in writing Stewards to take all sorts of steps including imposing fines, suspending, disqualifying, withholding prize money and the like. As pointed out by Mr Hannan, were it not so the Stewards would have to return to the Board every time they wished to take the simplest of disciplinary measures.

I am quite comfortably satisfied that the Act and the Rules are intended to operate in the above manner. This is also in accordance with the purposive approach to statutory interpretation – see, for example, the decision of the High Court of Australia in The Queen V Magennis [2019] HCA 35.

The next question is whether the appropriate evidence of authorisation and approval has been put before me. Again, I am comfortably satisfied that it has.

Exhibit 1 is the Instrument of Authorisation of the relevant Investigative Steward, Mr Simon McLean. It is signed by the Chairperson of the Board, Mr Bernard Carolan. It lists, or approves, certain actions that can be taken by the authorised person, Mr McLean. These include the powers of disqualification or suspension. I am comfortably satisfied accordingly.

2. Should the suspension have been imposed?

The second and third grounds of appeal are directed to this issue.

Essentially, the second ground asserts a failure to afford procedural fairness. It is claimed that there is no evidence that the appellant’s personal circumstances and background were taken into account, and the same is said of other people affected by the order made. There is no evidence that viable alternatives were considered. There are potentially huge individual consequences to the appellant.

I am not persuaded by these arguments. Potentially, this was a very serious matter and requiring immediate action. The seriousness of the situation was apparent from the contents of the notice of 7 November 2019. It followed an interview at the appellant’s property on 25 October 2019 and another at Warragul on 7 November 2019. The appellant’s registration was then suspended on that day. Apart from setting out grounds, the notice indicated that the suspension was temporary and the appellant was invited to show cause as to why his registration should not remain suspended.

The appellant’s response was to provide a detailed four page submission dated 11 November, he having been provided by the Stewards with copies of the evidence, including video and audio material.

On 13 November 2019 the Investigation Manager informed the appellant that, having regard to all the circumstances, the appellant would remain suspended.

Further, it has been made clear to the appellant that the suspension does not apply to his partner, Lyn, with whom he lives. She can continue to train her own dogs.

In addition during the course of the hearing before the Board, the Stewards made it clear that they would be pressing for a rapid hearing of this case, hopefully early in 2020.

Finally, it is again emphasised that this case involves the very serious matters of live baiting and animal welfare. As part of their evidence, the Stewards have a series of text messages between the appellant and his father. These appear to constitute *prima facie* evidence of the matters alleged, in addition to having the potential to raise doubts as to the credibility of the appellant.

When all of the above is taken into account, it seems to me that the argument that the appellant has not been afforded procedural fairness is without merit and I do not accept it.

A number of matters referred to above have the potential also to be of relevance to the third ground advanced by the appellant. This could be summarised as being that the decision of the Stewards via the Investigations Manager was unreasonable in all of the circumstances and bearing in mind the available evidence. It was argued that an indefinite suspension without charge results in loss of livelihood. It could result in loss of the appellant’s home and places severe restrictions on others. It also results in the immediate dislocation of greyhounds. Further, there are dangers of error because of the very limited information available. An open timeframe of suspension is said to be unsatisfactory.

I am not persuaded to uphold the appeal on the basis of the third ground. Given the importance of the matter and the nature of the available evidence, the decision to suspend immediately, having provided to the appellant important parts of that evidence and the chance to respond thereto, seems to me to be clearly reasonable. I am comfortably satisfied that this is so.

This is particularly so when two other matters are borne in mind. Firstly, the Stewards have made it clear that the appellant’s partner can continue to train her greyhounds at the property which they both occupy. Secondly, and importantly, the Stewards assured the Tribunal that they were eager to press on rapidly with the hearing of the matter and were hoping that the case could be heard early in 2020. Obviously to have a person suspended for a lengthy period without the chance of being heard is undesirable. Should there be any undue delay not of his making, the appellant can always bring the matter back before the Tribunal.

In summary, the appeal is dismissed.

Mark Howard
Registrar, Victorian Racing Tribunal