5 November 2020

**APPLICATION**

**RACING VICTORIA**

**and**

**MS JENNY GOW-WHYTE**

**Date of hearing:** 31 July 2020

**Panel:** Judge John Bowman (Chairperson).

**Appearances:** Mr Justin Hooper appeared on behalf of the Stewards.

Mr Trevor Monti appeared on behalf of Ms Gow-Whyte.

**Charges and particulars:** **Charge One: AR 244**

**AR 244 Administration of prohibited substance to affect race performance**

(1) A person must not:

(a) administer; or

(b) cause to be administered,

a prohibited substance on Prohibited List A and/or Prohibited List B to a horse for the purpose of affecting the performance or behaviour of the horse in a race, or of preventing it starting in a race.

**Particulars of Charge**

1. You are, and were at all relevant times, a trainer bound by the Rules of Racing.
2. You were at all relevant times, the trainer of *Soul Fire.*
3. On 3 August 2018*, Soul Fire* ran in the Elephant & Castle Hotel BM70 Handicap over 1100 metres at the Geelong racecourse (**the race**).
4. Prior to the race you administered, or caused to be administered, to *Soul Fire* a prohibited substance, being cobalt at a concentration in excess of 100 micrograms per litre in urine for the purpose of affecting the performance or behaviour of *Soul Fire* in the race.
5. Cobalt exceeding a mass concentration of 100 micrograms per litre in urine is a prohibited substance pursuant to Part 2 of Schedule 1 of the Rules of Racing.
6. At the time of the relevant conduct described, it was an offence under AR 175(h)(i) (as then in force) to engage in the conduct described in particular 4.
7. By reason of AR 8(2)(e) of the Rules of Racing, any offence committed under or in breach of the previous Australian Rules is deemed to be an offence committed under or in breach of these Australian Rules.

**Charge Two: AR 245(1) [Alternative to Charge One]**

**AR 245 Administration of prohibited substance in sample taken from horse before/after running in race**

(1) A person must not:

(a) administer; or

(b) cause to be administered,

a prohibited substance on Prohibited List A and/or Prohibited List B to a horse which is detected in a sample taken from the horse prior to or following the running of a race.

**Particulars of Charge**

1. You are, and were at all relevant times, a trainer bound by the Rules of Racing.
2. You were at all relevant times, the trainer of *Soul Fire.*
3. On 3 August 2018*, Soul Fire* ran in the Elephant & Castle Hotel BM70 Handicap over 1100 metres at the Geelong racecourse (**the race**).
4. Prior to the race you administered, or caused to be administered, to *Soul Fire* a prohibited substance, being cobalt at a concentration in excess of 100 micrograms per litre in urine, which was detected in a pre-race urine sample taken from *Soul Fire* prior tothe running of the race.
5. Cobalt exceeding a mass concentration of 100 micrograms per litre in urine is a prohibited substance pursuant to Part 2 of Schedule 1 of the Rules of Racing.
6. At the time of the relevant conduct described, it was an offence under AR 175(h)(ii) (as then in force) to engage in the conduct described in particular 4.
7. By reason of AR 8(2)(e) of the Rules of Racing, any offence committed under or in breach of the previous Australian Rules is deemed to be an offence committed under or in breach of these Australian Rules.

**Charge Three: AR 240(2) [Alternative to Charges One and Two]**

**AR 240 Prohibited substance in sample taken from horse at race meeting**

…...

(2) Subject to subrule (3), if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who was in charge of the horse at any relevant time breaches these Australian Rules.

……

**Particulars of Charge**

1. You are, and were at all relevant times, a trainer bound by the Rules of Racing.
2. You are, and were at all relevant times, the trainer of *Soul Fire.*
3. On 3 August 2018*, Soul Fire* was brought to the Geelong racecourse for the purpose of engaging in the Elephant & Castle Hotel BM70 Handicap over 1100 metres (**the race**).
4. A prohibited substance, being cobalt at a concentration in excess of 100 micrograms per litre in urine, was detected in a pre-race urine sample taken from *Soul Fire* prior to the running of the race.
5. Cobalt exceeding a mass concentration of 100 micrograms per litre in urine is a prohibited substance pursuant to Part 2 of Schedule 1 of the Rules of Racing.
6. At the time of the relevant conduct described, it was an offence under AR 178 in particulars 3 and 4.
7. By reason of AR 8(2)(e) of the Rules of Racing, any offence committed under or in breach of the previous Australian Rules is deemed to be an offence committed under or in breach of these Australian Rules.

**Charge Four: AR 254**

**AR 254 Injections prohibited at certain times**

(1) A person must not, without the permission of the Stewards:

(a) inject;

(b) cause to be injected;

(c) attempt to inject; or

(d) be a party to the injection or attempted injection of,

a horse engaged to run in any race:

(i) at any time on the day of the scheduled race and prior to the start of that race; and/or

(ii) at any time during the 1 clear day prior to 12.00am on the day of the scheduled race.

**Particulars of Charge**

1. You are, and were, at all relevant times a trainer bound by the Rules of Racing.
2. You were at all relevant times the trainer of *Soul Fire*.
3. On 5 June 2018, Soul Fire was entered to run in Race 7, the Garden Tyrepower BM64 Handicap over 1200 metres at Warrnambool (**the race**).
4. Without the permission of the Stewards, you injected *Soul Fire* or caused *Soul Fire* to be injected at some time:
	1. on 5 June 2018, prior to the race; or
	2. during the One Clear Day prior to 12:01am on 5 June 2018.
5. At the time of the relevant conduct described, it was an offence under AR 178 AB(1) to engage in the conduct described in particular 4.
6. By reason of AR 8(2)(e) of the Rules of Racing, any offence committed under or in breach of the previous Australian Rules is deemed to be an offence committed under or in breach of these Australian Rules.

**Pleas:** Guilty to charges 2 and 4.

 **Charges 1 and 3 were withdrawn by the Stewards**

**APPLICATION**

This somewhat unusual application comes before me as the result of Orders made by me on 31 July 2020. It concerns whether a particular Order can be revisited pursuant to the Slip Rule or whether I am *functus officio*.

Both in the hearing on 31 July 2020 and in the present application Mr Justin Hooper of counsel represented the Stewards and Mr Trevor Monti QC appeared for Ms Gow-Whyte. The hearing on 31 July 2020 was conducted by way of a telephone link-up, as was the present application, in which each counsel made helpful submissions.

The factual background is as follows. Ms Gow-Whyte is a widow aged 72 years. She trains a very small team of horses. She is based at Mount Gambier and has been a trainer for some 48 years. In my Decision of 31 July, I described her as having an excellent record.

On 31 July 2020 Ms Gow-Whyte pleaded “Guilty” to two charges. Each charge concerned the horse “*Soul Fire”,* trained by her. The first related to its run at Geelong on 3 August 2018 (“the Geelong charge”), when it ran third. The second, and totally separate, charge concerned its run at Warrnambool on 5 June 2018 (“the Warrnambool charge”), when it won. Whilst totally separate, the two charges were part of the same presentation by the Stewards and were heard together as a matter of convenience.

The Geelong charge concerned a breach of Australian Rule of Racing 245 (1) (“AR 245 (1)”). The Warrnambool charge concerned a breach of Australian Rule of Racing 254 (1) (“AR 254 (1)“). As stated, to each charge Ms Gow-Whyte pleaded “Guilty”.

At the conclusion of the evidence and submissions, I adjourned for approximately 30-40 minutes so as to consider what had been put before me and write my decision. It is my practice to read aloud to the parties my hand-written decisions and subsequently have them reduced to the format which will ultimately appear on the Tribunal website. I followed that practice on this occasion.

The decision which I read over the telephone to the parties outlined and summarised the charges and the circumstances. I dealt firstly with the charge pursuant to AR 245 (1) concerning the race at Geelong. This was by far the more serious charge, involving as it did a positive return from *Soul Fire* to the prohibited substance cobalt. There was no challenge to the proposition that the administration was unintentional, the cobalt reading probably emanating from the unwise use of a natural product recommended by a friend. In any event, Ms Gow-Whyte was suspended until the end of the calendar year.

The second and considerably lesser charge was the breach of AR 254 (1). This involved the giving of an injection to *Soul Fire* the day before it was due to race at Warrnambool. As I stated in handing down my decision, there was nothing sinister or quasi-criminal about this treatment. There was no suggestion of prohibited substances or the like. It was a matter of timing. The penalty imposed involved a comparatively brief period of suspension in turn suspended for 12 months and which could be activated by a further breach.

I come now to the part of the decision which is the source of the current dispute and which was read to the parties. I have underlined the wording that is particularly relevant.

“Finally, Soul Fire is disqualified from both Race 7 at Geelong on 3 August 2018 and Race 7 at Warrnambool on 5 June 2018. In each instance, the finishing order is to be amended and any prize money involved is to be redistributed”.

I have checked the handwritten draft which I read to the parties. I have also listened to the recorded version of the decision. There is no doubt but that the above version is completely accurate.

Bearing this in mind, I turn now to the relevant Rules in relation to horses being disqualified as a result of breaches of AR 245 (1) and AR 254 (1).

AR 274 is applicable for breaches of AR 245 (1). It reads:

“If a horse is disqualified from a particular race…the prize or money…is to be awarded as though the horse had not started in the race”.

Disqualification of *Soul Fire* as a result of the breach of AR 245 (1) is not challenged. In any event, there is little indication of any discretion existing.

By way of contrast, the comparable situation in relation to breaches of AR 254 (1) is actually found in AR 254 (3), which reads as follows:

“If a person breaches sub rule (1), but the horse competes in the race, the horse may be disqualified from the race”.

Clearly a discretion exists as to disqualification. The exercise of such discretion can then affect the issues of the finishing order and thus the refunding and redistributing of prize money.

I would add that I accept that first prize money for this race at Warrnambool was in the order of $12,000 and that Ms Gow-Whyte was both the trainer and owner of *Soul Fire.* Thus, the refunding of $12,000 would be entirely her responsibility.

The above is the background to the present dispute. I turn now to the issue as to whether the Slip Rule applies or whether I am *functus officio.*

My decision is based upon the following reasons, which are not set out in order of importance or significance. However, before dealing with the possible application of the Slip Rule, I shall set out certain matters concerning the hearing and its immediate aftermath.

Firstly, no application was made at any time by the Stewards to the effect that *Soul Fire* should be disqualified from the Warrnambool race. They did not seek any ruling that the finishing order be amended. They did not seek that the prize money be refunded or redistributed. It was not something for which they asked or even mentioned. To state the obvious, the relevant parts of the Order made by me were so made without any submission or request on the part of the Stewards or discussion by either party.

Secondly, this meant that Ms Gow-Whyte and her counsel were wrongly deprived of the right to be heard in relation to a discretionary matter. They could not be expected to have anticipated that any such Orders, which had not been sought, would be made.

Thirdly, there was no discussion of the Orders before, during or immediately after the making of them. The hearing concluded in the normal fashion and without relevant comment or objection. To the best of my recollection, it was a matter of days later that it was first drawn to my attention, following a phone call by Mr Monti to the Registrar. That is no criticism of Mr Monti. It is mentioned simply to emphasise that there was no objection raised, no discussion conducted or submissions made by either party at the time of the making of the Order.

Fourthly, and using a neutral term, there is no doubt but that I made an error. Wrongly, I bundled together Orders pursuant to AR 245 (1) and AR 254 (1) when they were quite separate. One Order was effectively compulsory or automatic and the other was not. It was discretionary. I repeat that this Order was not requested or apparently noted by either party at the time or immediately thereafter.

Fifthly, the result has been that Ms Gow-Whyte has been deprived of the right to be heard in relation to the operation of AR 254 (1) and (3). Further, I also accept that, for a person in her position, the finding of $12,000 in excess of two years after receiving it is no small matter.

Next, I turn to the operation of the Slip Rule itself.

At the outset, it is to be remembered that what occurred did so in the context of the Victorian Racing Tribunal (“the VRT”) being a statutory disciplinary body established pursuant to the Racing Act 1958 (“the Act”). Pursuant to Section 50Q (1) (h) of the Act, the Tribunal must act fairly and according to the substantial merits of the matter. Pursuant to Section 50Q (1) (i), it is bound by the rules of natural justice. Section 50Q (1) (j) provides that it is not bound by any practices or procedures applicable to courts of record, except to the extent that it adopts them. Pursuant to Section 50Q (1) (m), it may otherwise regulate its own procedure for a hearing. This context should be borne in mind.

Over the years, there have been decisions of various courts in relation to the Slip Rule, particularly in the context of courts of record and/or specific Rules relating to the operation of a particular judicial body. However, assistance can be gained from some of them.

Firstly, I will turn to the long-established test of whether or not a mistake is accidental or deliberate. In *Hatton v Harris* [1892] AC 547, Lord Herschell described the test as being whether, if the matter had been brought to the court’s attention, would the correction at once have been made? That test has been applied as recently as the decision of the Full Court of the Family Court in *Vadisanis* (2015) FLC 93-671. In the present case, had the error of treating a discretionary order as being mandatory and not hearing submissions by the parties been brought to my attention at the time, I would certainly have corrected the situation at once and at least heard the parties in relation to it. The same would have been the case if it had been brought to my attention that I had effectively bundled together AR 245 (1) and AR 254 (1) instead of dealing with them separately.

Secondly, even if the VRT were a court of record and had perfected orders disposing of the matter, that would not necessarily be the end of the matter. In *Vadisanis*, reference was made to the judgement of Callinan J in *DJL v Central Authority* (2000) 201 CLR 226. Having referred to the general rule that courts lack inherent power to re-open perfected orders disposing of proceedings, His Honour said:

“The stated exceptions to this general rule are few and rarely found in practice. On the current authorities they are confined (statute apart) to the correction of formal errors and the like, fraud, or failure to give a party a hearing.”

Of course, the VRT is not a court of record, but, even if it were, the exception referred to by Callinan J may well apply. In a discretionary matter, an order was made against a party without that party being heard in relation to it.

I might add that this exception to the rule was also applied in *Vadisanis*, this being because a mistake of the court denied a party the right to be heard on the issue of costs. Thus, there are some similarities to the present situation.

Thirdly, as stated, the VRT is not a court of record. It is effectively a disciplinary tribunal operating pursuant to the Act and in accordance with statutory provisions concerning natural justice, fairness and the like, particularly as set out in Section 50Q. It deals with matters in this statutory setting. If underlining was required, this effectively underlines the conclusion that Ms Gow-Whyte is entitled to be heard on the subjects of the operation of AR 254 (3), whether *Soul Fire* should be disqualified and whether the prize money should be returned.

My conclusion is that the Slip Rule does operate in this case. I am not persuaded that I am *functus officio.* The relevant parts of the Order of 31 July 2020 are set aside pending further submissions as to the exercise of the discretion contained in AR 254 (3) and generally.

Mark Howard
Registrar, Victorian Racing Tribunal