24 July 2020

**RULING – PRELIMINARY DISPUTE**

**RACING VICTORIA**

**and**

**MR RICHARD LAMING, MR MARNU POTGIETER & MD ZAYAUR RAHMAN**

**Date of hearing:** 25 June 2020

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

**Appearances:** Ms Amy Wood appeared on behalf of the Stewards.

Mr Damien Sheales appeared on behalf of Messrs Laming, Potgieter and Rahman.

**Charges:**

**AR 255 Stomach-tubing prohibited at certain times**

1. *A person must not, without the permission of the Stewards:*
2. *stomach-tube;*
3. *cause the stomach-tubing of;*
4. *attempt to stomach-tube; or*
5. *be a party to the stomach-tubing or attempted stomach-tubing of,*

*a horse engaged to run in a race, official trial or jump-out:*

* 1. *at any time on the day of the race, official trial or jump-out and prior to the start of that event; and/or*
	2. *at any time during the 1 clear day prior to 12.00am on the day of the scheduled race, official trial or jump-out.*
1. *Provided that the stomach-tubing or attempted stomach-tubing occurred on race day or during the 1 clear day prior to 12.00am on race day for a horse engaged to run in a race on that race day, if a person breaches subrule (1) a disqualification of not less than 12 months must be imposed (other than where the person is not, in the opinion of a PRA (or a person employed or engaged by a PRA) or the Stewards, the principal offender), unless there is a finding that a special circumstance exists, in which case that penalty may be reduced.*

**AR 232 Failure to observe processes and directions of PRAs or Stewards**

*A person must not:*

*…*

1. *while the Stewards are exercising their powers, performing their functions or carrying out their duties:*

*…*

1. *obstruct, hinder or delay the Stewards in exercising their powers, performing their functions or carrying out their duties; or*
2. *incite any other person/s to obstruct, hinder or delay the Stewards from exercising their powers, performing their functions or carrying out their duties, or fail to prevent any other person/s on premises the Stewards have entered under AR 22(1)(l) from doing so.*

**Particulars:**

**Richard Laming – Charge 1 AR 255**

1. You are, and were at all relevant times, a trainer licensed by Racing Victoria.
2. You are, and were at all relevant times, the trainer of *Jamaican Rain*.
3. You train from licensed premises at 1-11 Cyril Beechey Lane, Cranbourne (the **Premises**).
4. On 5 November 2019, *Jamaican Rain* was entered to run in Race 6, the Group 3 Jim Beam Stakes over 1400 metres at Flemington Racecourse at 1:55pm (the **Race**).
5. Without the permission of the Stewards, on the morning of the Race and prior to the Stewards arriving at the Premises at approximately 8:44 am, you stomach-tubed, caused the stomach-tubing of, attempted to stomach-tube and/or were a party to the stomach-tubing or attempted stomach-tubing of *Jamaican Rain* at the Premises.
6. Your conduct as described at paragraph 5 above was in breach of AR 255(1).

**Richard Laming – Charge 2 AR 232**

1. You are, and were at all relevant times, a trainer licensed by Racing Victoria.
2. You are, and were at all relevant times, the trainer of *Jamaican Rain*.
3. You train from licensed premises at 1-11 Cyril Beechey Lane, Cranbourne (the **Premises**).
4. You have security cameras installed throughout the Premises which record motion detection and audio activity (**Unifi System**). The footage captured by the Unifi System is recorded onto a Network Video Recorder (**NVR**) at the Premises.
5. At approximately 7:30 am on 5 November 2019, exercising their powers as Stewards under the Rules of Racing, in particular AR 22(1)(l), Racing Victoria Stewards Mr Mark Stevens and Mr Dion Villella attended the Premises and conducted a race day inspection.
6. At approximately 8.44 am on 5 November 2019, exercising his powers as a Steward under the Rules of Racing, in particular AR 22(1)(l), Racing Victoria Steward Mr Mark Stevens attended the Premises and conducted a further race day inspection (**Second Inspection**).
7. Shortly after Mr Stevens’ arrival at the Premises for the Second Inspection, he commenced an investigation into the potential race day treatment of *Jamaican Rain* (**Investigation**). The Investigation was an exercise of the Stewards’ powers pursuant to the Rules of Racing, in particular AR 20(a) and AR 22(1)(a).
8. During the Investigation, at approximately 10:30 am on 5 November 2019, the NVR was collected from the Premises by the Stewards.
9. On 5 November 2019, prior to the NVR being collected from the Premises by the Stewards, you deleted, or incited another person to delete, files from the NVR.
10. Your conduct, as set out above in paragraph 9, was in breach of AR 232(c).

**MD Marnu Potgieter – Charge 1 AR 255**

1. You are, and were at all relevant times, a stable employee registered by Racing Victoria and employed by licensed trainer, Mr Richard Laming.
2. Mr Laming is, and was at all relevant times, the trainer of *Jamaican Rain*.
3. Mr Laming trains from licensed premises at 1-11 Cyril Beechey Lane, Cranbourne (the **Premises**).
4. On 5 November 2019, *Jamaican Rain* was entered to run in Race 6, the Group 3 Jim Beam Stakes over 1400 metres at Flemington Racecourse at 1:55pm (the **Race**).
5. Without the permission of the Stewards, on the morning of the Race and prior to the Stewards arriving at the Premises at approximately 8:44 am, you stomach-tubed, attempted to stomach-tube and/or were a party to the stomach-tubing or attempted stomach-tubing of *Jamaican Rain* at the Premises.
6. Your conduct as described at paragraph 5 above was in breach of AR 255(1).

**MD Zayaur Rahman – Charge 1 AR 255**

1. You are, and were at all relevant times, a stable employee registered by Racing Victoria and employed by licensed trainer, Mr Richard Laming.
2. Mr Laming is, and was at all relevant times, the trainer of *Jamaican Rain.*
3. Mr Laming trains from licensed premises at 1-11 Cyril Beechey Lane, Cranbourne (the **Premises**).
4. On 5 November 2019, *Jamaican Rain* was entered to run in Race 6, the Group 3 Jim Beam Stakes over 1400 metres at Flemington Racecourse at 1:55pm (the **Race**).
5. Without the permission of the Stewards, on the morning of the Race and prior to the Stewards arriving at the Premises at approximately 8:44 am, you were a party to the stomach-tubing or attempted stomach-tubing of *Jamaican Rain*.
6. Your conduct as described at paragraph 5 above was in breach of AR 255(1)(d).

**Pleas:** Reserved in each case

**GENERAL BACKGROUND**

This application comes before me by way of a preliminary dispute as to whether certain documents and material proposed to be placed before the Tribunal by the Stewards at the ultimate hearing currently listed to commence on 26 October 2020 should be excluded. Oral submissions were made by Mr Damien Sheales of counsel, representing Messrs Laming, Potgieter and Rahman, in support of a proposed order that the material in question be excluded. Ms Amy Wood of counsel, representing the Stewards, resisted the making of such an order. The dispute involves questions of admissibility of evidence, this intern involving questions of law or mixed fact and law.

The case itself concerns the alleged breach of AR255 by all three persons charged. This in turn relates to alleged stomach tubing of Jamaican Rain on the morning of 5 November 2019, on which day it was to run in the Jim Beam Stakes at Flemington. Mr Laming, who was the trainer of Jamaican Rain, is also charged with a breach of AR232 – in essence, hindering or obstructing the Stewards in the exercising of their powers. Messrs Potgieter and Rahman, employees of Mr Laming, are only charged with the stomach tubing offence.

Thus, this preliminary hearing is a dispute which concerns proposed evidence to be adduced by the Stewards, inherent in which is consideration of the Tribunal’s powers to exclude same and of the issue of whether such power should be exercised.

**STATUTORY PROVISIONS**

The relevant provisions of the *Racing Act 1958* (the Act) concerning the operation of this Tribunal include the following, to be found in Section 50Q:

“(h) must act fairly and according to the substantial merits of the matter;

(i) is bound by the rules of natural justice;

(j) is not bound by the rules of evidence or any practices of procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures; and

(k) may inform itself on any matter as it sees fit”.

**SOME OBSERVATIONS AS TO THE OPERATION AND APPLICATION OF THE ABOVE IN PRACTICE**

Perhaps the starting point is the well-known statement of Evatt J. in *R v War Pensions Entitlement Appeal Tribunal: Ex parte Bott* 50 CLR 58 that the rules of evidence should not simply be ignored because they “represent the attempts made, through many generations, to evoke a method of enquiry best calculated to prevent error and elicit truth”.

True it is that Evatt J. was dissenting generally but that general approach has since been considered and at least in part adopted in appropriate circumstances – see, for example, the discussion in *Pires v DibbsBarker Canberra Pty Limited [2014] ACTSC 283.* It and other cases are discussed in the helpful article “Tribunals not bound by the laws of evidence” by Stephen Warne on “The Australian Professional Liability Blog”. I would also refer to such texts as “Natural Justice”, by Flick and “Pizer’s Annotated VCAT Act” by Pizer and Nekvapil.

In *Rodriguez v Telstra Corporation Ltd.* (2002) 66 ALD 579, Kiefel J. made the observation that decisions (of the type being discussed) must not be made without evidence having probative force, inferences must not be drawn without evidence and the tribunal must not base its conclusion on its own view of a matter which requires evidence. A corollary of this is that tribunal members are not to carry out their own investigations and take into account evidence other than that put before them.

In addition, regard should be had to what was said by Brennan J. in Re *Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247. Rules of evidence which have been excluded expressly by the Stewards should not be allowed to creep back through a domestic procedural rule.

However, in the present case and, as set out above, Section 50Q(1)(j) of the Act specifically contains the words “except to the extent that it adopts those rules (of evidence), practices or procedures (applicable to courts of record)”.

From my experience, whilst strict application of the laws of evidence is not appropriate in cases heard by a disciplinary body or administrative tribunal, the degree of assistance which such laws can provide varies. That assistance tends to be much greater in a large case, such as the present, where each side is represented by experienced and competent counsel, as compared to a small case involving unqualified representatives or litigants in person.

The bottom line is that, as stated in *Pires,*:

“…the underlying principles of fairness, natural justice, reliance on credible and relevant evidence which underpin those rules remain applicable. The approach is to be determined from the circumstances of the precise case”.

**THE APPLICATION OF THE ABOVE TO THE PRESENT DISPUTE**

As stated, in the present disciplinary dispute I am fortunate to have before me experienced and very competent counsel. This enables me to take an approach closer to that of a court of record, should that be necessary. However, it does not mean that I am to adopt strict rules concerning the admissibility or interpretation of documentary evidence.

Mr Sheales has objected to a considerable number of documents contained in what could be described as the Stewards’ court book of proposed evidence, effectively claiming that they are inadmissible. In virtually every instance, the basis of the objection is that the documents concerned, and the proposed evidence involved, consist of no more than speculation. That is particularly so in relation to what Mr Sheales described as “the boots issue” – essentially a footprint or “boot print” found in a stall in the relevant part of Mr Laming’s stables.

It may be that, ultimately, some speculation is involved in “the boots issue”. It is also possible that the weight to be attached to the documentary and other evidence concerning such issue turns out to be virtually zero. However, bearing in mind the above discussion as to the principles involved, I am not prepared to strike out or rule inadmissible these documents. They are simply documents and photographs which may or may not carry any evidentiary weight, depending on how the hearing unfolds. Their alleged evidentiary value has been asserted. Providing that at the hearing there is no attempt to introduce some surprise evidence in relation to them (which seems unlikely and would probably provoke an application for an adjournment), I do not see why they should be excluded from evidence at this stage.

The above ruling concerning “the boots issue” takes care of 10 of the 14 photographs or documents ultimately in dispute.

I turn now to the remainder. The first of these relates to the report of Dr Grace Forbes, veterinary surgeon. The Stewards agree that certain paragraphs – namely, paragraphs 30 – 34 inclusive – do not require any argument and can be deleted from the evidence. However, one sentence in paragraph 29 remains in dispute. In essence, Dr Forbes has stated that the fact that the person handling *Jamaican Rain* is seen in a photograph and video to have a windsucking strap in his hand may be consistent with replacing, removing or refitting the horse’s rug and windsucking collar.

Mr Sheales has submitted that this is just speculation that does not require expertise and that the photographs “show what they show”. Ms Wood has argued that the significance of the windsucking strap is something that Dr Forbes can and ought to give evidence about.

In this instance, essentially I agree with Mr Sheales. The observation of Dr Forbes is hardly conclusive – “may be consistent with” – and does not read as a useful piece of expert evidence. It may be that some expansion upon it based upon the experience and expertise of Dr Forbes may render it both admissible and of assistance to the Tribunal. However, in its present form, the observation is indeed speculative, and, on face value, not a matter requiring expert evidence. To give an example, one would not need an expert tailor to give evidence as to whether a person in the street with an overcoat over his or her arm on a day when rain had just ceased had recently taken it off.

In summary, I am of the view that the sentence in question should be excluded, but I am not ruling that this topic cannot be the subject of further evidence and examination at the hearing.

The next objection, also based on speculation, concerns a proposition put by a Steward, Mr Villella, to one of those charged, namely Mr Rahman. It effectively enquires as to the state of mind of another person charged, Mr Potgieter, at the time of certain behaviour by him. Mr Sheales argued that this is sheer speculation and an enquiry or observation that should not form part of the evidence contained in the interview. Ms Wood submitted that the particular question should not be viewed in isolation and was part of a line of enquiry as to why Mr Potgieter had left so unexpectedly, bearing in mind the presence of the stomach tubing equipment.

In my opinion, this line of questioning is quite appropriate and, whilst the wording of the question under consideration is not ideal, it is part of a line of enquiry concerning the allegedly sudden and unexpected departure of Mr Potgieter and the alleged cessation of his activities. As stated, the wording may not be perfect, but the topic is certainly potentially relevant and admissible. It seems to me that the statement or question of Mr Villella is something that can be explored at the ultimate hearing, but, when seen in context, should remain in evidence at this stage.

The next objection concerns the interview of Ms Sarah Francis, stablehand, by the Stewards. In my opinion, the questions and answers to which objection is taken are admissible. Essentially, it is questioning concerning the possible use and location of a bucket. It seems to me to be potentially relevant. Ms Francis is a stablehand employed by Mr Laming. Of course, the relevance and weight to be attached to her answers can be the subject of submissions and of further questioning at the ultimate hearing. However, I am not prepared to exclude the questions and answers to which objection has been taken at this stage.

That leaves the objection to parts of the interview of Mr Potgieter concerning the horse having a dripping nose and the possible attempted drenching of it. Again, at this stage, the questions and answers in relation to this seem to me to be admissible. As pointed out by Ms Wood, Mr Potgieter is the assistant trainer. These seem to me to be legitimate matters for the Stewards to pursue, and that includes the colour of substances found in and around the floor of the stables and buckets. Again, the weight to be attached to this evidence seems to me to be a matter to be dealt with at the hearing. Potentially, it could be relevant, and I am not prepared to rule at this stage that it be excluded.

I believe that I have dealt with the aspects of the potential evidence that were in dispute. I would again refer to the earlier discussion concerning evidence and the like at a disciplinary hearing (as this upcoming hearing will be), bearing in mind the statutory provisions and at least some of the relevant decisions and material.

Mark Howard
Registrar, Victorian Racing Tribunal