Reasons

Decision Date: 9 May 2016

Hearing Date: 21 April 2016

Code of racing: Greyhound

Appeal panel: Mr B Miller (Chairman), Mr P James and Mr D Kays

Appearances: Mr J.E. Murdoch QC instructed by Attwood Marshall Lawyers for the Appellant, George Kadniak
Mr M.J. Tutt, Solicitor for Racing Queensland

Decision being appealed: 18 months disqualification of licence

Appeal result: **Upheld**

The Appellant is the trainer of the greyhound *"Your Deal"* which was drug tested prior to it competing in a race at Albion Park on 12 October 2015 when a sample taken from the greyhound proved positive to Cobalt. The Stewards of Racing Queensland found the Appellant guilty and disqualified him from holding or obtaining a licence for a period of 18 months. The Appellant has appealed that determination but in his Notice of Appeal to this Board, it confirms that the Appeal was against penalty only. The Appellant through his counsel Mr Murdoch, has sought leave to amend such Notice to enable him to appeal also against the conviction. The submissions by the Appellant are that he has good grounds to support the Board exercising the discretion to allow this amendment as contained in the Outline of Submissions of the Appellant tendered to this Board by Mr Murdoch. The major grounds relied upon were:

(c) *He was inadvertently misled by the document hand delivered to him which is now Exhibit A. That clearly misled him into thinking that the referee portion of the sample went to an interstate laboratory for analysis;*

(d) *It was not explained to him that in fact both certificates of analysis tabled at the Stewards' Inquiry related to tests conducted at the Racing Science Centre at Albion Park*

(e) *It was only after the Appeal was lodged and lawyers went through the paperwork that other significant legal flaws in the case for the Stewards were exposed;*

(f) *The Respondent has been given fair and timely notice of the request to amend.*

There was no objection by the Respondent to the amendment being sought and this Board was satisfied with the explanations and has allowed the Appeal to proceed on both the conviction and penalty.

The main issue of this Appeal seems to be without doubt the fact that the RSC performed the analysis on both the primary sample as well as the referee portion of the sample which is unusual to say the least in the experience of the members of this Board. There is no doubt that the Local Rules of greyhound racing enable that to be done as a result of an amendment to LR18 which became effective on 27 November 2015. LR18(7) stipulates:

> *Where for any reason the Controlling Body considers sufficient the Controlling Body requests the drug testing laboratory approved by the Controlling Body which has provided a certificate as described in sub-rule (1) to provide a further such certificate; and*
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> *(a) a portion of the same or specimen referred to in sub-rule (7) is analysed under the supervision of a qualified analyst who was not responsible for the analysis the subject of the certificate referred to in sub-rule (1).*

The Rule goes on to stipulate that the further certificate generated from this second analysis shall be conclusive evidence that the prohibited substance was present in the greyhound at the time that the sample was taken from the greyhound. That of itself may seem appropriate in circumstances where there is no probable or possible alternative to the drug testing laboratory. The question here is whether that was appropriate or allowable and whether the certificate that issued therefrom was admissible or not. There is no evidence as to why a second laboratory was not called upon to present an analysis. In the exhibits there is a letter to the Victorian Laboratory RASL seeking an analysis of the reserve portion but for reasons best known to Racing Queensland, that letter was not actioned either by a response or by the receipt of any certificate.

The date 27 November 2015 is important. That is the date upon which the amending legislation came into force and the Appellant argues that there is no retrospective element that can be allowed by virtue of the provisions of the legislation. Local Rule 18(7) does not have any retrospective effect unless the Local Rules provide therefore. It would appear in the opinion of this Board that the amendment was never intended to have retrospective effect. Pursuant to Section 32 of the *Statutory Instrument Act 1992*, a statutory instrument of which the rules of racing are one, commence on the day on which the instrument is made. The commencement date therefore is 27 November 2015 which would allow, in certain circumstances, the Controlling Body to have the same laboratory analyse both samples after that date.

The swab was taken from the greyhound on 12 October 2015, some seven weeks prior to the amendment to the Act. The primary sample was analysed between 13 October and 27 October as evidenced by the Certificate of Analysis issued by the Racing Science Centre and dated 27 October. On that same date, a letter was directed to the Racing Analytical

Services Limited (RASL) requesting analysis of the sample numbered 382770 to determine the presence and concentration of Cobalt. On 30 October, a letter was directed to Mr George Kadniak, the Appellant from Racing Queensland confirming that a discrepancy had been detected in the primary sample and confirming that the reserve sample was to be forwarded to RASL for referee analysis.

On 4 January 2016, James Dart, Chief Steward of Greyhounds, advised Dr Karen Caldwell of the Racing Science Centre to present the reserve portion of the sample to an analyst of the Science Centre for further analysis. That letter, Exhibit 10, confirmed *"The sample remains in the possession of the Racing Science Centre".*

On 29 January 2016, Dr Karen Caldwell of the Racing Science Centre advised Racing Queensland that the sample had been submitted to the Racing Science Centre for analysis on 5 January 2016 and attached the Certificate of Analysis from the Racing Science Centre for the reserve sample plus the Certificate of an Accredited Veterinary Surgeon for the reserve sample. The first being dated 28 January 2016 and the second 29 January 2016. Both that Certificate of an Accredited Veterinary Surgeon and the same certificate issued in respect of the analysis of the primary sample were signed by Dr Karen Caldwell. The two Certificates of Analysis were signed by different accredited analysts. It would appear therefore that both certificates would have been properly obtained had both certificates been requested after 27 November 2015. In the opinion of this board, the second certificate is therefore inadmissible in determining whether there is conclusive evidence of the fact that the greyhound was presented for a race not free of prohibited substances. There is no doubt that the first certificate is admissible and is prima facie evidence. The second certificate is what is demanded and required for there to be conclusive evidence of that fact.

The question then to be determined is whether the prima facie evidence can support a conviction. The authorities throughout the history of drug related offences demand that there be two positive results, one from the primary sample and the second and conclusive one from the referee sample. In the opinion of this Board, that did not occur.

Much was made by Mr Murdoch of the probable or possible errors manifest in the Certificates of Analysis themselves. Firstly, it was stipulated that there had to be a definite determinate figure as to the quantitative analysis of the drug in question. That we believe has been more than adequately resolved by the evidence before the Stewards of the experts who confirm that whilst the threshold limit is 100mgs, the testing procedures identify a minimum threshold of 200mgs such that twice the legislated minimum quantitative figure must be proven for Cobalt before any charges can be brought. Suffice to say that it was in the opinion of this Board a satisfactory resolution that a figure of more than 200mgs was sufficient to justify the Certificate of Analysis being valid.

Secondly and perhaps more importantly, was the suggestion by Mr Murdoch that the legislation demands that the date on which the analysis was taken must be definitive by at least reference to a specific date if there be one or if there be a period, then the period

should be a reasonable period and not something of the order of 12 days as was the position in this matter.

This Board is satisfied that it would be almost impossible for a Laboratory to be definite in respect to the number of days in a period during which actual testing procedures were undertaken. In our view, it is not the intention of the legislation to require such a definitive statement and we are satisfied that the period of time noted in the certificate, namely *"between 13 October and 27 October 2015"* satisfies the requirements of the legislation.

In our opinion this conviction cannot stand and the Appeal is upheld.

Further right of appeal information: The Appellant and the Steward may appeal to the Queensland Civil and Administrative Tribunal (QCAT) within **28 days of the date of this decision**. Information in relation to appeals to QCAT may be obtained by telephone on (07) 3247 3302 or via the Internet at www.qcat.qld.gov.au