

DISTRICT COURT OF QUEENSLAND

CITATION: *Queensland Racing Limited v Missen* [2010] QDC 111

PARTIES: **Queensland Racing Limited**
(Appellant)

v

Dale Robert Missen
(Respondent)

FILE NO/S: 2482 of 2009

DIVISION: Appeal

PROCEEDING: Appeal under s 193(1) *Racing Act* 2002.

ORIGINATING COURT: District Court, Brisbane.

DELIVERED ON: 30 March 2010

DELIVERED AT: Brisbane

HEARING DATE: 22 March 2010

JUDGE: Searles DCJ

ORDER: **(1) The appeal be upheld; and**
(2) The decision of the Racing Appeals Tribunal of 30 July 2009 be set aside.

Catchwords: RACING ACT 2002 – NATURE OF APPEALS
STRUCTURE - whether the First Level Appeals Committee established by Control Body's rules pursuant to the Act had jurisdiction to hear appeal where notice of appeal filed out of time – whether a valid appeal was commenced – whether Secretary to Committee had power to determine whether appeal is to be heard.

RACING APPEAL TRIBUNAL – JURISDICTION – whether Tribunal had jurisdiction to hear appeal.

Acts Interpretation Act 1954, s 23, s27A.
Australian Rules of Racing
Racing Act 2002, s 95, s 96, s 167(3), s 193(1).
Queensland Local Racing Rules

COUNSEL: *Fox v Percy* (2003) 77 ALJR 989.
A.J MacSporran SC – Appellant
H.A Walters - Respondent

SOLICITORS: Patrick Murphy – Appellant
Connolly Suthers – Respondent

- [1] This is an appeal from a decision of the Racing Appeals Tribunal (Tribunal) pursuant to s 193(1) of the *Racing Act* 2002 (Act) which allows an appeal on a question of law only.
- [2] On 2 June 2009, following a Stewards' Inquiry held at the Rockhampton Jockey Club, the respondent was found by the stewards to have breached AR 81A(1)(a) in that his urine sample was found to contain a diuretic substance, Frusemide. The stewards imposed a suspension on the respondent's licence to ride in races from 6 June 2009 to 23 August 2009.
- [3] The respondent appealed to the Tribunal which appeal was heard on 30 July 2009. The present appellant was a respondent to that appeal and advanced arguments similar to those which I have heard in this appeal. It argued that the present respondent had no right of appeal to the Tribunal so that the Tribunal lacked jurisdiction to hear the appeal. In the result, the Tribunal found it had jurisdiction, heard the appeal and upheld it.

Issue for determination

- [4] The issue of law for determination in this appeal is whether the Tribunal had the requisite jurisdiction to entertain the respondent's appeal.

Statutory framework

- [5] The relevant legislation and rules are set out in Schedule A to this judgment.

Background

- [6] At the Tribunal hearing the respondent gave evidence that he had attempted delivery to the First Level Appeal Committee Secretary (Secretary) on 4 June 2009, the second day following the conclusion of the Stewards Inquiry, but could not raise her and left a message on her voicemail. The respondent lodged his appeal to the Committee the following day, Friday 5 June, a day late, not having lodged it within 2 working days of the Stewards' decision as required by Local Rule (LR 31(8)). The Secretary decided, under that rule, that the appeal not be heard.¹
- [7] In the result, the Tribunal found that, as the position of Secretary was not a statutory appointment, the power given to the Secretary in LR31(8) could not oust the jurisdiction of the Committee or Tribunal, and that the decision by the Secretary in deciding that the appeal was not to be heard must be regarded as a decision of the Committee.²
- [8] The Tribunal further found that the respondent had lodged an appeal which the Committee refused to hear, and which had not been heard within 6 weeks in terms of s 167(3)(a) and (b) of the Act. In that regard the Tribunal said³:-

“The simple facts of this matter are that the Appellant did lodge an appeal with the First Level on 5 June 2009 that has not been heard because of an executive decision and by s 167(3) the Committee is

¹ Tribunal decision pp 3 and 4.

² Tribunal decision p 10.

³ Tribunal decision p 10.

deemed to have decided to dismiss the Appeal. Any purported “power” given to the First Level Appeal Secretary is subordinate to the right of the appellant to have the Tribunal determine his appeal under s 167(3) of the Act.

The Tribunal is of the view that the reference to “ ... the appeal not be heard by any First Level Appeal Committee in LR(8) is within the scope of ... “refuses to hear an appeal ...” as referred to in s 167(3)(a) of the Act.”

On the basis of the above, the Tribunal assumed jurisdiction and dealt with the appeal. No reasons were given by the Tribunal in support of its finding that an appeal had been lodged by the respondent notwithstanding it was lodged out of time.

Appellant’s argument

- [9] The appellant advanced the same argument it advanced as a respondent before the Tribunal; that the notice of appeal was lodged out of time, the Secretary exercised her discretion against the appeal being heard, with the result no valid appeal was ever on foot. From there, because there was never a valid appeal, the respondent had not exhausted his right of appeal to the committee as is required by LR31(4) before becoming entitled to appeal to the Tribunal. Hence, the appellants says no valid appeal to the Tribunal was ever lodged resulting in the Tribunal having no jurisdiction to hear the respondent’s appeal. Further, it argues, s 167(1)(c) only allows an appeal by the respondent directly to the Tribunal from a decision of the Stewards, if there was no right in the respondent to appeal to an appeal committee which, in this case, there was.
- [10] In oral submissions the appellant said there were two possible views open as to the correct categorisation of the Secretary’s decision. The first relied upon LR31(17) which provides:-
- “When an appeal to a First Level Appeals Committee is properly commenced, it is the responsibility of the First Level Appeals Secretary to convene a panel of three persons to act as the First Level Appeal Committee to hear the appeal.”
- [11] The appellant argued that as the appeal was lodged out of time, it was not “properly commenced” within LR31(17) and that the Secretary’s decision in declining to have the appeal heard was an administrative decision under LR31(17). In other words, she considered the appeal, saw that it was outside the 2 working day period in LR31(8), was not obliged to convene a panel under LR31(17), and decided she would not do so, and that the appeal would not be heard.
- [12] The alternative interpretation relied upon the implied delegation argument which the respondent advanced in oral submissions. That argument of the respondent relied upon s 98 of the Act which gives the Committee power to decide its own procedures and proceeded on the basis that the Secretary had delegated authority from the Committee in relation to her decision, and that, as her decision was that of the Committee, it was reviewable. In short, it was said that it was a validly delegated power and a valid decision of the Committee.

- [13] In answer to that, the appellant argued that the Secretary's decision, even if made by a delegate of the Committee, was not a reviewable decision because it was not a decision made on the appeal. Of the above two alternatives, the appellant's submission was that the first was the better view.

Respondent's argument

- [14] As to the Secretary's power under LR31(8), the respondent relied upon ss 95 and 96 of the Act, and the *Acts Interpretation Act* 1954. It argued that the right of appeal to an Appeal Committee under s 95 was given to that Committee. Section 96 empowered the appellant, as a control body, to provide in its rules for the establishment of a relevant Appeal Committee, how appeals to it were to be started and any time limits applying to an appeal.
- [15] From the above premise, the respondent argued that it was for the Committee and for the Committee alone to make a decision as to whether or not the Notice of Appeal was valid and the secretary had no power to act independently of the Committee and thereby oust the jurisdiction of the Committee. The respondent said, by reference to ss 23 and 27A of the *Acts Interpretation Act* 1954, that the appellant's rules were not drafted in a manner evidencing a delegation of the Committee's power to the Secretary, and that the rules treated the Secretary as having separate and distinct functions to the Committee to the intent that the Secretary had no delegated power to perform the function of determining the validity of an appeal.
- [16] The respondent further argued that the Committee should have determined the question of the validity of the appeal and had failed to do so, thus triggering s 167(3) of the Act. This provision deals with the situation where the Committee refuses to hear an appeal or does not determine it within 6 weeks. In either instance it is deemed to have dismissed the appeal. According to the respondent, he did lodge an appeal with the Committee on 5 June 2009 and the hearing of that appeal was prevented by the intervention of an administrative decision by the Secretary, a person without statutory authority to determine that the appeal not be accepted for determination.
- [17] In oral submissions the respondent argued that the Secretary's decision was authorised by the Committee, and therefore, was a valid decision and reviewable by the Tribunal. No evidence in support of that so called authorisation was identified nor were the terms of the alleged authority.
- [18] He also argued that once an appeal was filed, albeit out of time, it was nevertheless an appeal until the Secretary decided that it would not be heard. He said a Secretary's decision under LR31(8) that the appeal may not be heard was the same as if the Committee itself had made such a decision. I requested any authority in support of the proposition that an appeal, filed out of time was, nevertheless, a valid appeal until the Secretary decided otherwise, but the respondent was not aware of any authority.

Appeals structure

- [19] It seems to me, that the appellant's local rules are designed to filter the number of appeals to the Tribunal by setting up an intermediate appellant process allowing

appeals to the Appeals Committee in relation to most matters.⁴ That much was accepted by the respondent. Once it is established that a right of appeal to the Committee is available, as was the case here, it is necessary under LR31(4) to exhaust that right of appeal before any right of appeal to the Tribunal accrues.

- [20] LR31(6) provides that the notice of appeal must be lodged with the Secretary within 2 working days of the date of the stewards' decision under appeal. LR31(7) further provides that the date of lodgement for the notice is the date it is received by the Secretary. There can be no doubt that the timelines in this appeal process are very tight. Some may say, unreasonably so. But that is what the rules provide for.
- [21] Once a notice of appeal (appeal) is lodged, LR31(17) obliges the Secretary to convene a panel of 3 persons to act as the Committee to hear the appeal. LR31(18) details the pre-requisites for membership to the Committee; clearly designed to have Committee members who, collectively, have legal knowledge, and importantly, a knowledge of the rules of racing.
- [22] Importantly, however, the Secretary has no obligation to convene the committee unless the subject appeal has been "properly commenced". That, to my mind, leads into the Secretary's power under LR31(8) to decide whether or not an appeal is to be heard by the Committee. In the absence of any authority to the contrary, which I have not been given, I agree with the appellant's submission that reference to an appeal in the Act and rules is reference to a validly constituted appeal.
- [23] Appeals are not creatures of the general law, but that of statute.⁵ It is important to identify the provision which confers the ability to appeal and to ensure that any pre-requisite to that appeal has been complied with.⁶ In my view, the pre-requisite to a validly constituted appeal to the Committee was the filing of the notice of appeal within 2 working days.
- [24] As to the correct categorisation of the role of the Secretary and her decision, the wording of LR31(8) could be clearer. I agree with the respondent that there is nothing in the rules evidencing a delegation of the Committee's powers to the office of Secretary. But is the power in LR31(8) in the nature of a valid authorisation in the Secretary to decide, on behalf of the committee, whether or not an appeal should be heard as the respondent argued? I think not. Despite the use of the words "may decide" in LR31(8), I think there would need to be clearer language in the rules to achieve that. There is nothing in the rules empowering the Committee to delegate any of its powers. Nor is there any provision in the rules for the Committee to extend the period of 2 working days within which a notice of appeal must be lodged, much less such power in the Secretary.
- [25] The respondent says that the Committee has power to extend time which is implicit in the power given to the Secretary under LR31(8) to decide whether an appeal will be heard or not, encompassing a situation where an appeal is filed out of time. I am not persuaded by that argument. If an appeal has been validly instituted, then the

⁴ Section 167(1)(c) allows an appeal directly to the Tribunal if there is no right of appeal to an Appeal Committee.

⁵ See *Fox v Percy* (2003) 77 ALJR 989 at 993, [20] per Gleeson CJ, Gummow and Kirby JJ and cases there referred to; Paper entitled, 'Appeals' presented to Queensland Law Society Symposium 6 March 2004 by D F Jackson QC at [1].

⁶ Ibid D F Jackson QC [6].

secretary is obliged to convene an appeal committee. If it has not, the secretary has no power to determine that the appeal will, nevertheless, be heard. Although it is not necessary to decide the point, it seems to me the committee would be empowered under s.98(1) of the Act to extend time for filing the appeal if an application was made.

- [26] I agree with the appellant that the better view of the Secretary's power under LR31(8) is that it is an administrative power to be addressed and exercised when addressing the power under LR31(17) to convene a Committee where an appeal has been properly commenced.
- [27] I do not consider that the notice of appeal lodged with the Committee instituted a valid appeal, so that the Committee was never seized of an appeal. That position obtains whether one takes the view that the Committee comes into existence when convened by the Secretary under LR31(17), or is, in effect, in existence because of the pool from which is to be drawn upon by the Secretary where appropriate. It is not necessary for me to decide that point.
- [28] It follows that as a result of no valid appeal having been lodged with the Committee, the respondent did not exhaust that right of appeal under LR31(4) so as to entitle him to appeal to the Tribunal. The Tribunal in entertaining the respondent's appeal to it was not addressing a valid appeal and was, in my view, without jurisdiction to hear it.

Order

- [29] The Order of the court is:-
- (1) That the appeal be upheld; and
 - (2) That the decision of the Racing Appeals Tribunal of 30 July 2009 be set aside on the ground that it had no jurisdiction to entertain the appeal the subject of that decision.

I shall hear the parties on the question of costs.

Schedule “A”

1. *Racing Act 2002*

Section 91 – Obligation to have rules of racing for code of racing:

- (1) A control body must make rules of racing for its code of racing, including matters that it believes necessary for the good management of racing under the code.
- (2) In making its rules of racing, a control body must have regard to whether the rules have sufficient regard to the rights and liberties of individuals as mentioned in the Legislative Standards Act 1992, section 4(3).

Example for subsection (2) –

In making its rules of racing, the control body for thoroughbred racing must consider whether its proposed system for deciding a protest has sufficient regard to natural justice for the jockeys in the race.

- (3) Failure to comply with subsection (2) does not affect the validity of the rules.
- (4) A control body’s rules of racing must be consistent with this Act and the control body’s policies.
- (5) To the extent of an inconsistency between a provision of this Act and the rules, the provision prevails over the rules.

Section 92 – Matters for which rules of racing may provide:

- (1) A control body’s rules of racing for its code of racing may provide for a matter only if the control body, in a policy, authorises the making of rules of racing in relation to the matter.
- (2) to remove doubt, it is declared that this section applies even if a provision of this Act states that a control body’s rules of racing may provide for a matter.

Division 2—Appeals under rules of racing

Section 95 – Appeal against some decisions of steward under rules of racing

- (1) A control body's rules of racing for its code of facing may allow a person aggrieved by a reviewable decision to appeal against the decision to an appeal committee established by the control body.
- (2) In this section—

reviewable decisions means either or both of the following decisions—

 - (a) a decision by a steward, for the control body, suspending a licence held by a person for a period of not more than 3 months;
 - (b) a decision by a steward, for the control body, imposing a penalty of at least \$100 but not more than \$2000.

Section 96 – Provides Establishment of appeal committee

A control body's rules of racing may provide for the following in relation to an appeal committee—

- (a) the establishment of an appeal committee, including establishment from time to time or for a period of time;
- (b) remuneration, if any, to be paid by the control body to the members of the committee;
- (c) how an appeal is started;
- (d) time limits that apply for an appeal;
- (e) how a member of the appeal committee must disclose to the other committee members and the parties to the appeal any conflict of interest, financial or otherwise, relating to the proceeding that could conflict with the proper performance of the member's functions for the proceeding.

Section 98 – How appeal committee may consider an application for appeal

- (1) To the extent a matter relating to the procedure of an appeal committee is not provided for under this Act or the relevant control body's rules of racing, the appeal committee may decide its own procedure.
- (2) In making a decision relating to an appeal, the appeal committee—

- (a) must observe natural justice; and
 - (b) is not bound by the rules of evidence; and
 - (c) may inform itself of anything in the way it considers appropriate.
- (3) An appeal is by way of rehearing, unaffected by the original decision, on the material before the steward who made the decision appealed against and any further evidence allowed by the appeal committee.

Chapter 5 – Review of the decisions by Tribunal

Part 1 - Establishment and membership of Racing Appeals Tribunal

Part 4 - relates to the organisation, jurisdiction and operation of Tribunal

Section 166 – Jurisdiction of Tribunal

- (1) The Tribunal has jurisdiction to hear and decide appeals made to it under this Chapter.
- (2) The Tribunal also has the other jurisdiction given to it under this Act.

Section 167 – Decisions that may be Appealed

- (1) Subject to subsection (4), a person aggrieved by any of the following decisions may appeal to the Tribunal against the decision –
- (a) a control body's decision to –
 - (i) refuse to grant a renew a licence; or
 - (ii) take disciplinary action relating to a licence; or
 - (iii) take an exclusion action against a person; or
 - (iv) impose a monetary penalty on a person;
 - (b) A decision of an appeal committee made in relation to an appeal against a monetary penalty imposed by, or other decision of, a steward;
 - (c) the imposition of a monetary penalty by, or other decision of, a steward or a control body if there is no right of appeal to an appeal committee against the decision;
 - (d) another decision of a control body prescribed under a regulation.

- (2) A steward of a control body may appeal to the tribunal against a decision of an appeal committee made on an appeal against the steward's decision.
- (3) Subject to an order under section 169, if –
 - (a) an appeal committee refuses to hear an appeal from a decision of a steward of the control body that established the committee; or
 - (b) within 6 weeks after lodging an appeal mentioned in paragraph (a), the appeal has not been decided by the appeal committee;

The committee is taken to have decided to dismiss the appeal.

Section 168 – Starting an appeal against decisions as allowed under s 167

- (2) The notice of appeal must state fully the grounds of appeal and the facts relied on.
- (3) The notice of appeal must be lodged with the director within 14 days of the appellant receiving notice of the decision being appealed.
- (4) The tribunal may at any time extend the period for lodging the notice of appeal.

Section 186 – Powers of tribunal on appeal

- (1) On an appeal, the tribunal may make any decision that the entity that made the decision appealed against could have made.
- (2) Without limiting subsection (1), the tribunal may-
 - (a) confirm the decision appealed against; or
 - (b) vary the decision appealed against; or
 - (c) set aside the decision appealed against and substitute its own decision.

Queensland Racing Local Rules made by Queensland Racing pursuant to s 91 of the *Racing Act 2002*

Queensland Racing Local Rules amended to 1st May 2005

LR1 In the interpretation of the Rules and of any program of a race meeting held under the Rules the following words, unless the context otherwise requires have or include meanings as follows:

“**Act**” means the Racing Act 2002 (the Act) as amended by any Act in substitution thereof.

“**Appeals Committee**” means any body of persons appointed by the Principal Racing Authority or by legislative enactment to hear appeals made under the Rules.

“**Appellant**” means a person aggrieved by a decision of the stewards and who has given notice of intention to appeal against such decision in accordance with the Rules.

Appeals from the decision of the Stewards: - Local rule 31

LR31

- (1) Pursuant to section 95/96 of the Racing Act the Principal Racing Authority shall appoint a committee, hereafter referred to as the Appeals Committee, to hear appeals from decisions of the stewards.
- (2) A person may appeal to a First Level Appeal Committee from any decision made by a Steward to impose upon that person:
 - (a) a suspension of licence for a period of not more than 3 months; and/or
 - (b) a penalty of at least \$100 but not more than \$2000.
- (3) The right of appeal to a First Level Appeal Committee is in addition to any right of appeal to the Racing Appeals Tribunal provided by the *Racing Act 2002*.
- (4) If a right of appeal to a First level Appeal Committee is available to a person, that right of appeal is to be exhausted before the person lodges any appeal to the Racing Appeals Tribunal.
- (5) Any person who wishes to appeal to a First level Appeal Committee (an “appellant”) must lodge a “Notice of Appeal” in the prescribed form (available on the Queensland Racing website or from Queensland Racing’s offences) with the First Level Appeals Secretary:-
 - (a) by delivery to any regional office of Queensland Racing:-
 - (b) express post to PO Box 629 Hamilton Central Qld 4007;
 - (c) by facsimile to (07) 3852 2718; or
 - (d) by email to:

appealsecretary@queenslandracing.com.au

- (6) A notice of Appeal must be lodged with the Appeals Secretary within 2 working days of the date on which the steward made the decision which is the subject of the appeal.
- (7) The date of lodgement for a notice of appeal in the prescribed form is the date on which it is received by the Appeals Secretary.
- (8) Should the First Level Appeal Committee Secretary not receive the appeal in the prescribed form within 2 working days of the date on which the steward's decision (which is the subject of the appeal) is made, then the First Level Appeal Secretary may decide that the appeal not be heard by any first level appeal committee.
- (9) Any person who wishes to appeal to the First Level Appeal Committee must pay a first level appeal fee of \$400.00 when lodging the prescribed form to commence an appeal, or at a further time agreed in writing with the First Level Appeal Secretary.
- (10) If a person fails to pay the first level appeal fee as set out above, then the appeal must not be heard by any First Level Appeal Committee.
- (11) Upon lodgement of a notice of appeal and payment of the first level appeal fee, an appellant is not required to pay any penalty imposed by a steward, until the first level appeal is determined.
- (12) Upon lodgement of a notice of appeal and payment of the first level appeal fee, a person may apply in the same form to the Integrity manager, Queensland Racing, for a stay of a suspension of that person's licence, pending the outcome of a First level Appeal Committee hearing.
- (13) the Integrity manager may in his/her absolute discretion decide whether to approve a stay of the suspension of a person's licence, pending the outcome of a First Level Appeal Committee hearing.
- (14) The Integrity Manager may impose conditions on the licence during the term of any stay.
- (15) In the event that a first level appeal is withdrawn by an applicant, any stay on the suspension of a person's licence immediately ceases.
- (16) In the event that a first level appeal is not determined within 14 days of the date on which the notice of appeal is lodged,

any stay on the suspension of a person's licence ceases unless the Integrity Manager continues the stay of the suspension for such time as the Integrity Manager considers sufficient for that person to apply for and obtain a stay of the suspension from the Racing Appeals Tribunal.

- (17) When an appeal to a First Level Appeal Committee is properly commenced, it is the responsibility of the First Level Appeal Secretary to convene a panel of three persons to act as the First level Appeal Committee to hear the appeal.
- (18) Any first level appeal committee must consist of:
- (a) one person who is a lawyer of at least 5 years standing;
 - (b) one person with a thorough knowledge of the rules of racing; and
 - (c) a further person who is either a lawyer of at least 5 years standing or possesses a thorough knowledge of the rules of racing.
- (19) Any person appointed to a first level appeal committee must satisfy the criteria set out in section 97 of the *Racing Act 2002* and must advise the First level Appeal Secretary should they become ineligible for appointment at any time.
- (20) It is the responsibility of each member of a first level appeal committee to co-operate with other members to expedite the outcome of an appeal.

Acts Interpretation Act 1954 (as amended)

Section 23:

- (1) If an Act confers a functional power on a person or body, the function may be performed, or the power may be exercised, as occasion requires.
- (2) If an Act confers a functional power on a specified officer or the holder of a specified office, the function may be performed, or the power may be exercised, by the person for the time being occupying or acting in the office concerned.
- (3) If an Act confers a function or power on a body (whether or not incorporated), the performance of the function, or the exercise of the power, is not affected immediately because of vacancies in the membership of the body.

Section 27A:

(1) If an Act authorises a person or body to delegate a functional power, the person or body may, in accordance with the Act and any other applicable law, delegate the function or power to:-

(2) ...

3(A) ...

3(B) ...

3(C) ...

(4), (5), (6) and (8) ...

8(A) ...

8(B) ...

(9),(10), 10(A), 11, 12, 13, 14, 15, and 15A ...

(a) (a person or body by name); or

(b) a specified officer, or the holder of a specified office, by reference to the title of the office concerned.

3(D) Anything done by or in relation to the delegate in relation to the delegation is taken to have been done by or in relation to the delegator.

(4) A delegated functional power may be exercised only in accordance with any conditions to which the delegation is subject.

(16) In this section power includes doing an act or making a decision for the purpose of performing a function.

END OF SCHEDULE "A"