IN THE RACING APPEALS TRIBUNAL

MARK AZZOPARDI
Applicant

v

GREYHOUND RACING NEW SOUTH WALES
Respondent

DETERMINATION

Date of hearing:	**31 October 2024** **7 November 2024 – Further written submissions of the Respondent** **14 November 2024 – Further written submissions of the Appellant**
Date of determination:	**23 December 2024**
Appearances:	**Mr J McLeod instructed by Advocatus Lawyers for the Appellant** **Mr P Wallis instructed by Pryor Tzannes and Wallis for the Respondent**

ORDERS

1. **Pursuant to cl 10(6) of the *Racing Tribunal Regulation 2024* (NSW), the time for the filing of a Notice of Appeal in respect of the decision of the Respondent of 22 December 2016 to disqualify the Applicant for a period of 9 years and 9 months, is extended to 5.00 pm on 20 January, 2025.**

2. **Pursuant to cl 10(6) of the *Racing Tribunal Regulation 2024* (NSW), the time for the filing of a Notice of Appeal in respect of the decision of the Respondent of 22 August 2017 to disqualify the Applicant for a period of 13 years commencing at the expiration of the disqualification the subject of order (1), is extended to 5.00 pm on 20 January, 2025.**

3. **The Applicant is to file with the Appeals Secretary, by 5.00 pm on 20 January 2025, a Notice of Appeal in proper form and a statement of Grounds of Appeal, in respect of each of the decisions in orders (1) and (2) above.**

4. **The Applicant is to file with the Appeals Secretary, by 5.00 pm on 3 February 2025, all evidence upon which he relies in support of the Notices of Appeal referred to in order (3), together with an outline of submissions.**

5. **The Respondent is to file with the Appeals Secretary, by 5.00 pm on 17 February 2025, all evidence upon which it relies together with an outline of submissions.**

6. **The Appellant is to file with the Appeals Secretary, by 5.00 pm on 21 February 2025, any evidence and submissions in reply.**

7. **The parties are to provide to the Appeals Secretary, by 5.00 pm on 24 February 2025, with available dates for a hearing in March 2025.**

8. **I reserve any question of costs, and any question as to the forfeiture or refund of any appeal deposit, until the conclusion of the appeal.**

INTRODUCTION

1. By a Notice of Appeal dated 2 September 2024 (the Notice), Mark Azzopardi (the Applicant) seeks an extension of time in which to bring appeals against two determinations of the Respondent, the first that he be suspended for a period of 9 years and 9 months for a breach of r 83(3) of the *Greyhound Racing Rules* (the Rules), and the second that he be suspended for an additional period of 13 years (cumulative on the first period of disqualification) for a separate breach of the same rule. The matter has a complicated history and, as will become apparent, there has been some confusion surrounding the precise terms of the present applications.

2. The applications were heard on 31 October 2024, following which I received supplementary written submissions from both parties. I was also provided by the parties with a joint Tribunal Book, along with a supplementary bundle of evidence prepared by the Applicant.

3. The applications are opposed by the Respondent. It should be noted that in view of the time at which the relevant events arose, the Respondent is named as Greyhound Racing New South Wales. It is the predecessor of the Greyhound Welfare and Integrity Commission (GWIC), the current governing body of greyhound racing in NSW which is established under s 4 of the *Greyhound Racing Act 2017* (NSW).

4. Counsel for the Applicant pointed out in the course of the hearing that GWIC has indicated that it does not oppose the applications.[1] As I commented at the time, that is of limited relevance. To begin with, GWIC is not a party to the present proceedings. The named Respondent has chosen to actively oppose the applications. In any event, even if the Applicant succeeds in establishing that I have the jurisdiction to deal with the applications, consideration will then turn to whether special and exceptional circumstances have been established.

[1] Transcript 5.22 – 5.38.

Ultimately, that is a matter for me, irrespective of the consent of some other individual or organisation.[2]

THE FACTS

The first Stewards' decision

5. On 25 October 2016, the Respondent charged the Applicant with a breach of r 83(2) of the Rules in the following terms:[3]

> *That [the Appellant], a registered trainer, while in charge of the greyhound 'Carjack Arrest', presented the greyhound for the purposes of competing in Race 3 at Richmond on August 5 2016 in circumstances where the greyhound was not free of any prohibited substance.*

6. The prohibited substance was amphetamine.[4]

7. The Applicant was found guilty by Stewards[5] and disqualified for a period of 9 years and 9 months, commencing on 22 December 2016[6] (the first Stewards' decision).[7]

The second Stewards' decision

8. On 9 May 2017, the Respondent charged the Applicant with a further breach of r 83(2) of the Rules in the following terms:[8]

> *That [the Appellant], a registered trainer, while in charge of the greyhound 'Very Choosy', presented the greyhound for the purposes of competing in Race 8 at Bathurst on 19 September 2016 in circumstances where the greyhound was not free of any prohibited substance.*

9. The prohibited substance was caffeine, and its metabolites theophylline, paraxanthine and theobromine.[9]

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[2] Transcript 50.1 – 50.21.
[3] TB 4.
[4] TB 4.
[5] TB 5 at [10].
[6] TB 5 at [14].
[7] TB 6 – 7.
[8] TB 10 at [1].
[9] TB 10 at [2].

10. In circumstances where the Applicant did not respond to the charge, the Stewards proceeded on the basis that he had entered a plea of not guilty.[10]

11. The Applicant was found guilty and disqualified for a period of 13 years (the second Stewards' decision).[11] That penalty was ordered to be cumulative upon the disqualification imposed in the first Stewards' decision.[12]

12. Accordingly, as matters presently stand, the Applicant is disqualified until 22 September 2039.[13]

The previous application made to this Tribunal

13. On 13 October 2022, this Tribunal (differently constituted) dismissed an application brought by the Applicant for an extension of time in which to appeal against the first and second Stewards' decision[14] (which is referred to in the material as the *"2022 RAT Decision"*).

THE PRESENT APPLICATIONS

The terms of the applications

14. The present applications were initially set out in the Notice.[15] As I have already noted, there has been some confusion surrounding the terms of the applications. For reasons which will be obvious, that issue needs to be clarified at the outset. In order to do so, it is necessary to make reference to the terms of the Notice, some aspects of the Applicant's written submissions, and statements made by counsel for the Applicant at the hearing.

[10] TB 11 at [7].
[11] TB 12 at [17].
[12] TB 12 at [18].
[13] On my calculations, the time period of the disqualification calculated by the Tribunal in its previous determination in 2022 at [3] and [4] is incorrect.
[14] Commencing at TB 17.
[15] Commencing at TB 85.

The Notice of Appeal

15. In setting out the terms of the applications, and the grounds on which they are made, the Notice stated the following:[16]

> ***THIS APPEAL*** *is an application to the Racing Appeals Tribunal for leave to appeal against the First Stewards Decision and the Second Stewards Decision. Previously, the Racing Appeals Tribunal in October 2022 refused leave to appeal. The Applicant by his present application makes a fresh application for leave to appeal, based on new medical evidence obtained after October 2022* (emphasis in original in each case).

16. Under the heading "*Grounds of Appeal*" the following is stated in the Notice:[17]

> *Regulation 10(7) of the Racing Appeals Tribunal Regulation 2015 (NSW) (Regulations) empowers the Racing Appeals Tribunal to extend the time for lodging an appeal under regulation 10(1) or lodging a notice of grounds of appeal under regulation 10(4), or both, if the Racing Appeals Tribunal determines that special or exceptional circumstances justify the extension.*
>
> *In the 2022 RAT Decision, the Racing Appeals Tribunal determined to not grant leave under regulation 10(7). That is because while the Racing Appeals Tribunal determined that special circumstances did not exist in the case of the Applicant for (a) the period before February 2018, and (b) then the period from May 202 until the time that the Applicant sought leave to appeal, there was no evidence of the existence of special circumstances between February 2018 and May 2020.*
>
> *The Applicant now makes a fresh application for leave to appeal on the basis of the evidence of Dr Stephen Allnutt and Carlo Jacobs Bloom.*
>
> *The Applicant says that the 2022 RAT decision is wrong, and that leave to appeal should be granted. The Applicant says that he was labouring under special circumstances between February 2018 and May 2020, such that the Racing Appeals Tribunal in the 2022 RAT decision should be set aside.*
>
> *By this application, the Applicant asks for the following orders:*
>
> 1. *That the Racing Appeals Tribunal set aside the 2022 RAT Decision.*
> 2. *That for the purpose of section 10(7) of the Racing Appeals Tribunal Regulation 2015 (NSW), the Racing Tribunal orders that the time for the Applicant lodging an appeal against the First Stewards Decision and the Second Stewards decision be extended to 5.00 pm in Sydney on the seventh (7th) day after the Tribunal makes order 1.*

[16] TB 85.
[17] TB 86 – 87,

The written submissions of the Applicant

17. For the purposes of the hearing, the Applicant filed written submissions dated 16 September 2024.[18] In summarising what was described as his *"position on the application",* those submissions included the following:[19]

> *.... The application is for an extension of time to appeal three decisions of the Racing Appeals Tribunal, those being:*
>
> *(a) a decision made by Greyhound Racing (NSW) (GRNSW) stewards on or about 22 December 2018 to disqualify the Appellant for 9 years and 9 months in respect of an amphetamine presentation offence (**First Disqualification Decision)**.*
>
> *(b) a decision made by GRNSW Stewards on or about 22 August 2017 **(Second Disqualification Decision)** in respect of a caffeine presentation offence to disqualify the Appellant for 13 years. (This sanction was ordered to be served cumulatively with the penalty imposed in the First Disqualification Decision.*
>
> *(c) The decision of the Racing Appeals Tribunal (**the Tribunal)** dated 13 October 2022 **(2022 RAT Decision)** to refuse the Appellant's application for an extension of time to appeal the First and Second Disqualification Decisions (albeit it is only the findings at [123] and [133] of the decision that are appealed, and not the whole 2022 RAT De Decision).*
>
> *It is accepted that the Tribunal may consider it unnecessary for that 2022 RAT Decision to be overturned at all, considering that by the present application, it is to consider afresh whether an extension of time in respect of the First and Second Disqualification Decisions should be granted because of one or more special or exceptional circumstances, namely a psychiatric and/or depressive condition of the Appellant, impacted by drug dependency, which impaired the Appellant's ability to appeal within time and represents a causal reason why he did not do so within time after the First Disqualification Decision, the Second Disqualification Decision, and the 2022 RAT Decision were made. The existence of those special or exceptional circumstances is supported by new medical evidence and warrants the extension of time sought. It is evidence that was not available at the time of the 2022 RAT Decision.*

General observations

18. I pause at this point to make the following observations.

19. First, there is an obvious inconsistency between the terms in which the applications are articulated in the Notice, and the terms in which they are

[18] Commencing at TB 88.
[19] TB 88 – 89 at [1].

articulated in the written submissions. The Notice makes reference to applications for an extension of time in which to appeal against two determinations. The written submissions refer to applications for an extension of time in which to appeal against three determinations.

20. Secondly, the Notice makes various references to "*leave*" to appeal. Clause 10(7) of the *Racing Appeals Tribunal Regulation 2015 NSW* (the 2015 Regulation), which the Notice cites, makes no reference to any requirement for leave.

21. Thirdly, the Notice purports to bring the application pursuant to the 2015 Regulation. The written submissions purport to bring the application pursuant to the provisions of the *Racing Appeals Tribunal Regulation 2024* (the 2024 Regulation).

22. Fourthly, and for the reasons I have outlined, the Notice does not accurately reflect the applications which are actually being made, a factor which counsel for the Applicant ultimately conceded.[20]

23. Fifthly, the written submissions of the Applicant articulate the present applications as being in the nature of applications for an *"extension of time to appeal three decisions of the Racing Appeals Tribunal"*. Of the three decisions which are then cited, two are decisions of the Respondent. Only one is a decision of the Tribunal.

24. Sixthly, counsel for the Applicant said the following at the hearing:

> *"We're not here today seeking any finding or setting aside of anything about the 2022 decision … We're not seeking any relief at all in respect of the 2022 RAT decision. I want to make that very clear".*[21]

[20] Transcript 17.28 – 17.29.
[21] Transcript 16.26 – 16.37; see also Transcript 18.28 – 18.29.

25. That proposition is at odds, firstly with the terms of the Notice, and secondly with the terms of the written submissions. Counsel for the Applicant ultimately conceded that the written submissions *"don't accurately reflect the more confined nature of today's application"*.[22]

26. Finally, counsel for the Applicant accepted that the findings made by the Tribunal in 2022 could not be re-litigated.[23] That was, again, inconsistent with the terms in which the applications were articulated, both in the Notice and the written submissions.

The terms of the applications

27. The matters outlined above were ventilated at some length in the course of the hearing. That culminated in the following exchange, in which counsel for the Applicant stated his position, on the basis of which I have proceeded:[24]

> *MR MCLEOD: Then I can make very, very clear to the Tribunal and my friend, the only order we seek by this application, and the language that I would ask to be substituted if it needs to be in the notice of appeal, is that in 8(a).* ***That's the order that we seek, 8(a) of the written submissions. That's it. Not 8(b). We do not seek the relief in 8(b).*** *And there was a correspondence in the last week or two that made that clear. Because we accepted, and I accepted, that there is no ability of this Tribunal to go back behind the 2022 RAT decision.*
>
> ***All we're seeking is that 8(a) paragraph relief, and so for completeness, the notice of appeal, we do not seek anything but what is sought in 8(a) of the written submissions.***
>
> *TRIBUNAL: So we can ignore -----*
>
> *MR MCLEOD:* ***It's simply an extension of time.***
>
> *TRIBUNAL: We can ignore what is in the notice of appeal in terms of the basis on which the appeal is articulated, and we can draw a line through the passage to which I drew your attention earlier, and we can replace it with 8(a) of your submissions, which is the application?*
>
> *MR MCLEOD: Correct. And the last page of the notice of appeal before the annexures -----*

[22] Transcript 17.42 – 17.43.
[23] Transcript 17.14 – 17.18.
[24] Transcript 18.45 – 19.38.

TRIBUNAL: Yes.

MR MCLEOD: ----- the fourth page, is, just to be clear, we do not seek that first order there stated. Do not seek it. And I would ask that proposed order 2 be replaced with the language that appears in paragraph 8(a) of our written submissions, just to make it clear.

TRIBUNAL: ***So not an application for leave to appeal?***

MR MCLEOD: ***No.***

TRIBUNAL: Which is what the notice says. ***It's not a challenge to or an appeal against, however one might describe it, the 2022 decision of this Tribunal. It is an application pursuant to clauses 10(1)(b) and 10(6) of the 2024 regulation for an extension of time?***

MR MCLEOD: ***Correct*** *(emphasis added in each case).*

28. It is noted that paragraph [8](a) of the written submissions to which counsel for the Applicant referred is in the following terms:[25]

> *That pursuant to Regulation 10(1)(b) and 10(6) of the Racing Appeals Tribunal Regulation 2024 (NSW) (RAT Regulation 2024) the Tribunal orders that the time for the Appellant lodging an appeal against the First Stewards Decision and the Second Stewards Decision be extended to 5.00 pm in Sydney on the seventh day after the decision of the Tribunal in this matter.*

29. That articulates two applications for an extension of time, one in relation to the first Stewards' decision, and the other in relation to the second Stewards' decision. I have proceeded on the basis that they are the applications I am required to determine.[26] It should be noted that although the Applicant does not seek relief in respect of the 2022 RAT Decision, it is the position of the Respondent that on a proper construction of the relevant legislative provisions, that decision is final and binding, and that it operates to prevent the present applications from being brought.[27]

[25] TB 90.
[26] Transcript 20.26.
[27] Transcript 19.42 – 20; 20.32 – 20.37.

THE APPLICANT'S EVIDENCE

30. The Applicant gave evidence at the hearing. His evidence-in-chief may be summarised as follows:

(i) he was first registered as an industry participant in 1996/1997, and as a Trainer in 1998/1999;[28]

(ii) his disciplinary history contains four "presentation offences", the last two of which gave rise to the two decisions which are the subject of the present applications (i.e., the first Stewards' decision and the second Stewards' decision);[29]

(iii) neither of those offences involved any attempt on his part to deliberately cheat;[30]

(iv) he feels embarrassed and ashamed about those offences;[31]

(v) he has previously experienced severe depression, which led to his divorce;[32]

(vi) he had previously been a regular user of illicit drugs;[33]

(vii) he did not see any of the correspondence sent to him by the Respondent outlining his rights of appeal against the first Stewards' decision or the second Stewards' decision;[34]

(viii) he travelled to Ireland in 2017 and took up a position as a greyhound trainer[35] following which he travelled to Malta;[36]

(ix) he returned to Australia in 2018 and moved to Grafton;[37]

(x) he has not used illicit drugs since 2018;[38]

[28] Transcript 11.23 – 11.30.
[29] Transcript 11.47 – 12.9.
[30] Transcript12.32.
[31] Transcript 13.17.
[32] Transcript 13.34 – 13.41.
[33] Transcript 14.8.
[34] Transcript 14.34.
[35] Transcript 14.43.
[36] Transcript 22.1 – 22.30
[37] Transcript 22.35.
[38] Transcript 22.43.

(xi) until May 2020 he was unaware of any rights of appeal he may have had regarding the two decisions in question;[39]

(xii) he did not make any further application following the 2022 RAT decision as he was not aware that he could;[40]

(xiii) he first consulted his present Solicitor in early to mid 2023;[41]

(xiv) he retains an ambition to train greyhounds and has support from several owners for whom he previously acted as a trainer.[42]

31. When cross-examined, the Applicant said that:

(i) he had two offences which predated those which are the subject of the present application, one in 2013 and the other in early 2016;[43]

(ii) he did not have a clear recollection of whether he obtained legal advice in relation to, or otherwise became involved in, the process surrounding those matters;[44]

(iii) he had some recollection of consulting solicitors previously;[45]

(iv) he was aware that the present matters were important;[46]

(v) his mind was clear, and he was "*entirely different*", when he returned from Malta;[47]

(vi) he always maintained a desire to return to the greyhound racing industry but wasn't sure he could do anything about it;[48]

(vii) it had been open to him to put medical evidence before the Tribunal when it made its decision in 2022.[49]

[39] Transcript 23.25.
[40] Transcript 23.25.
[41] Transcript 25.25.
[42] Transcript 25.36 – 26.7.
[43] Transcript 26.41 – 27.5.
[44] Transcript 27.14.
[45] Transcript 28.3 – 28.27.
[46] Transcript 28.33.
[47] Transcript 29.1 – 29.9.
[48] Transcript 29.14 – 29.20.
[49] Transcript 30.13 – 30.30

THE MEDICAL EVIDENCE

32. The evidence before me includes a report of Dr Stephen Allnutt, Consultant Forensic Psychiatrist, dated 14 March 2024.[50] Dr Allnutt evaluated the Applicant on 7 December 2023 and 1 February 2024.

33. The Respondent did not seek to cross-examine Dr Allnutt, and accordingly his opinions are unchallenged. They include the following:

    (i) the Applicant suffered from significant depression from the breakdown of his marriage in 2012, up to 2018/2019;[51]

    (ii) the Applicant suffered from a substance abuse disorder between about 2012 and 2017;[52]

    (iii) the Applicant's depressive symptoms started to improve in about 2019, but persisted to some degree up until 2022;[53]

    (iv) any diagnosable psychiatric illness has been in remission since about 2022;[54]

    (v) during the periods in which he was suffering from depression:

        (a) the Applicant's motivation, and his interest in pursuing legal proceedings, would have been undermined, and would have been further complicated by his substance abuse disorder;[55]

        (b) his decision making abilities, his motivation to communicate, and his motivation to give thought to rationalise his situation, would have been undermined;[56]

        (c) he would have had the capacity to understand information, but his motivation, energy and interest to act on that information would have been undermined;[57]

[50] Commencing at TB 47.
[51] TB 55 at [2]; [5].
[52] TB 55 at [2].
[53] TB 56 at [6].
[54] TB 56 at [7].
[55] TB 56 at [8](a).
[56] TB 56{8](a).
[57] TB 56 at [9].

(d) his motivation to engage in legal matters would have been undermined;[58]

(e) his naivety, IQ level, and limited education, could have contributed to his attitude towards his legal circumstances and obligations.[59]

THE RELEVANT LEGISLATIVE PROVISIONS

The Racing Appeals Tribunal Act 1983 (NSW)

34. Section 15A(1) of the *Racing Appeals Tribunal Act 1983* NSW (the Act) is in the following terms:

> ***15A Appeals to Tribunal relating to greyhound racing***
>
> *(1) Any person who is aggrieved by any of the following decisions may, in accordance with the regulations, appeal against the decision to the Tribunal—*
>
> *(a) a decision of a greyhound racing club within the meaning of the Greyhound Racing Act 2017 ,*
>
> *(b) a decision of a steward appointed by the Greyhound Welfare and Integrity Commission.*
>
> *(2) Any of the following persons or bodies that are aggrieved by any decision of the Greyhound Welfare and Integrity Commission or Greyhound Racing New South Wales may, in accordance with the regulations, appeal against the decision to the Tribunal--*
>
> *(a) any person,*
> *(b) a greyhound racing club within the meaning of the Greyhound Racing Act 2017.*

35. It is noted that these provisions do not extend so as to allow a previous decision of the Tribunal to be the subject of an appeal.

36. Section 17A of the Act is also relevant to the issues before me and is in the following terms:

[58] TB 57 at [11].
[59] TB 57 at [11].

17A Determination of appeals relating to greyhound racing or harness racing

(1) The Tribunal may do any of the following in respect of an appeal under section 15A or 15B—

(a) dismiss the appeal,

(b) confirm the decision appealed against or vary the decision by substituting any decision that could have been made by the steward, club, the Greyhound Welfare and Integrity Commission, Greyhound Racing New South Wales or HRNSW (as the case requires),

(c) make such other order in relation to the disposal of the appeal as the Tribunal thinks fit.

(2) The decision of the Tribunal is final and is taken to be a decision of the person or body whose decision is the subject of the appeal.

37. Finally, s 18 of the Act is in the following terms:

18 Regulations respecting appeals

(1) The regulations may make provision for or with respect to appeals to the Tribunal under this Act and, in particular, for or with respect to--

(a) the procedures to be followed at or in connection with any appeals under this Act,

(b) the suspension of a decision appealed against under this Act pending the determination of the appeal,

(c) the payment of fees and costs in respect of appeals under this Act, and

(d) any matters incidental to or connected with appeals under this Act.

(2) Without affecting the generality of subsection (1), the regulations may--

(a) prescribe classes of matters in respect of which appeals may not be made under this Act, or

(b) provide that no appeals may be made under this Act except in respect of prescribed classes of matters.

The Racing Appeals Tribunal Regulation 2024 (NSW)

38. The parties ultimately proceeded on the basis (in my view correctly) that the 2024 Regulation (as opposed to the 2015 Regulation) is relevant the applications. To the extent which is material for present purposes, cl 10 of the 2024 Regulation is in the following terms:

10 Lodgement of notice of appeal

(1) For the Act, section 18(1)(a), a person may appeal against a decision specified in the Act, section 15A by lodging a notice of appeal with the Secretary within—

(a) 7 days after being notified of the appellable decision, or
(b) a longer period granted by the Tribunal on the application of the person.
...

(5) An application for an extension of time for lodging a notice of appeal made under subsection (1)(b) must be--

(a) in the approved form, and
(b) given to the Secretary.

(6) The Tribunal may only grant an extension of time for lodging a notice of appeal under this section if satisfied it is appropriate to do so because special or exceptional circumstances exist.

THE ISSUES

39. There are potentially two issues I am required to determine, namely:

(i) whether the legislation allows the applications to be brought or, in other words, whether I have jurisdiction to deal with them; if so

(ii) whether the test in cl 10(6) of the 2024 Regulation is satisfied (the special or exceptional circumstances issue).

40. As to the first, it is the Applicant's position, in broad terms, that notwithstanding the 2022 RAT Decision, there is nothing in the legislation which precludes the present applications being made. The Respondent's position is that on a proper construction of the relevant legislative provisions, particularly s 17A(2) of the Act, the applications cannot be brought and I have no jurisdiction to deal with them.

41. Only if I find in favour of the Applicant on the jurisdictional issue will I be required to consider the special and exceptional circumstances issue.

THE JURISDICTIONAL ISSUE

Submissions of the Applicant

42. At the hearing, counsel for the Applicant made three fundamental submissions in support of the proposition that I have jurisdiction to deal with the applications. Those submissions may be summarised as follows:

    1. The jurisdiction to hear and determine the present applications is not conferred on the Tribunal by virtue of s 17A of the Act, but by a combination of s 18 of the Act, and cl 10 of the 2024 Regulation.

    2. Section 17A of the Act, and specifically s 17A(2), does not operate to shut out the jurisdiction to deal with the present applications.

    3. Properly construed, s 17A of the Act is directed to substantive appeals, not applications of the present kind.

43. In developing these propositions, counsel for the Applicant submitted that there was nothing in the language of the Act, or in the 2024 Regulation, which reflected any intention on the part of the Parliament to prohibit the number of occasions on which an application for an extension of time to lodge an appeal could be made. He submitted that common law principles of res judicata and issue estoppel had no role to play, because determinations of this Tribunal are not akin to curial decisions of a Court, and that on a proper construction of the legislation this Tribunal is empowered to determine, more than once, the *"genuine cases that warrant an extension of time"*.[60]

44. Counsel emphasised his submission that there is nothing in the text of the relevant legislation which might suggest that there was intended to be a prohibition upon the making of more than one application for an extension of time.[61] Fundamental to counsel's position was the proposition that in providing

[60] Transcript 35.34 – 36.10.
[61] Transcript 36.12 – 36.20.

that the decision of the Tribunal is final and binding, s 17A(2) should be construed as referring to a decision in respect of a substantive appeal, and not a decision in relation to a preliminary application of the present kind.[62]

Submissions of the Respondent

45. Fundamentally, counsel for the Respondent submitted that s 17A(2) of the Act provided the complete answer to the jurisdictional issue. He submitted, by reference to that provision, that the 2022 RAT Decision was final and binding. Counsel submitted that if the Applicant's position were accepted, it would lead to an absurdity because there would "never be an end" to applications of this kind.[63] He described the proposition that an application of this nature does not amount to a substantive determination of a person's rights as *"ill founded"*[64]. He further submitted that the regime established by the Act and the 2024 Regulation was such that this Tribunal is, subject to any application to the Supreme Court of New South Wales for judicial review, the ultimate determiner of matters dealing with discipline and penalty.[65]

46. To the extent that cl 10 of the 2024 Regulation might be read as distinguishing between an application on the one hand, and an appeal on the other, counsel submitted that the reference to "application" should be construed as part and parcel of the appeal process, such as there is no relevant distinction to be drawn.[66]

47. In supplementary written submissions, counsel for the Respondent submitted that on a proper construction of ss 17A and 18 of the Act, no express distinction is drawn between an application for an extension of time on the one hand, and a substantive appeal on the other.[67] Counsel reiterated the proposition that if the

[62] Transcript 36.29 – 36.46.
[63] Transcript 51.32 – 51.45.
[64] Transcript 52.1 – 52.4
[65] Transcript 52.6 – 52.10.
[66] Transcript 53.30.
[67] At [5] – [10].

Applicant's position were accepted, there would never be an end to applications of this nature, which ran contrary to principles of finality of litigation.[68]

Submissions of the Applicant in reply

48. In written submissions in reply, counsel for the Applicant submitted that the Respondent's own submissions proceeded on the basis of the very distinction which it eschewed.[69] It was further submitted that the Respondent's position was counter-intuitive, and contrary to proper and logical statutory construction.[70]

CONSIDERATION – THE JURISDICTIONAL ISSUE

49. I have reached the conclusion there is nothing in the text of the Act, or in the text of the 2024 Regulation, which reflects an intention of the part of the Parliament to impose finality on a determination of an application to extend time in which to bring an appeal. To the contrary, the Parliament has, in my view, impliedly drawn a distinction between the determination of a substantive appeal (which, having regard to s 17A(2) of the Act, is final) on the one hand, and the determination of an application for an extension of time in which to appeal (which, given the absence of a similar provision, is not final) on the other.

50. I accept that in the context of administrative decision-making, finality is a powerful consideration.[71] However, it is not conclusive, because the Parliament may give an administrative decision whatever force it wishes.[72] An administrative decision therefore has the force and effect which is given to it by the law pursuant to which it is made.[73] What that means at a practical level is that the jurisdictional issue in the present case is to be determined by reference to principles of statutory construction which may be summarised as follows.

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[68] At [11] – [12].
[69] At [3].
[70] At [5].
[71] See *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; (2002) 209 CLR 597 per Gleeson CJ at [8]; 603.
[72] *Bhardwaj* at [8]; *Kabourakis v The Medical Practitioners Board of Victoria* [2006] VSCA 301 at [48] per Nettle JA (as he then was).
[73] *Kabourakis* at [48].

51. First, the primary objective of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute. The meaning of the provision must therefore be determined by reference to the language of the statute as a whole.[74]

52. Secondly, the task of statutory construction begins and ends with a consideration of the text, which must be considered in light of its context, its legislative purpose, the relevant legislative history, and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.[75]

53. Thirdly, context should be considered in the first instance, and not merely when ambiguity is said to arise.[76]

54. Fourthly, although the legal meaning of a particular provision will ordinarily correspond with its grammatical meaning, the context of the words, the consequences of a literal or grammatical construction, and the purpose of the statute, may require the provision to be read in a way that does not correspond with the literal or grammatical meaning.[77]

55. Fifthly, a construction that promotes the purpose of the legislation is to be preferred over one which does not.[78]

56. Finally, it is a circular, and erroneous, approach to statutory construction to construe the words of a definition by reference to the term defined.[79]

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[74] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1990] HCA 28 at [69] – [70] per McHugh, Gummow, Kirby and Hayne JJ.
[75] *Thiess v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12 at [22] – [23]; *SAS Trustee Corporation v Miles* (2018) 265 CLR 137; [2018] HCA 55 at [20]; [41]; [64].
[76] *STZAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34; at [14]; [36].
[77] *Certain Lloyds Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; [2012] HCA 56.
[78] *Project Blue Sky* at [78].
[79] *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404; [1994] HCA 54 at [419] citing *Wacal Developments Pty Limited v Realty Developments Pty Limited* (1978) 140 CLR 503; [1978] HCA 30.

57. In my view, the fundamental principle that the task of statutory construction begins and ends with a consideration of the text supports the conclusion that the present applications and be brought, and that I have jurisdiction to deal with them. This is so for the following reasons.

58. First, is that there is nothing whatsoever in the text of cl 10 the 2024 Regulation, or in the Act, which supports the proposition that an application for an extension of time can only be made on one occasion. Had the Parliament intended that this be the case, it could easily have said so.

59. Secondly, the text of cl 10 of the 2024 Regulation clearly distinguishes between an appeal on the one hand (referred to cl 10(1) and an application for an extension of time in which to lodge an appeal (referred to in cl10(5)) on the other. That textual distinction runs entirely contrary to the position advanced by the Respondent. It is both sensible and logical for there to be a distinction between an appeal on the one hand, and an application for an extension of time to appeal on the other. The two proceedings are entirely different, and involve separate and distinct considerations.

60. Thirdly, the terms of s 17A(2) run contrary to the submissions of the Respondent. Section 17A(2) refers to a "decision" being final and binding. The only decisions that s 17A empowers the Tribunal to make are those in s 17A(1)(a), (b) and (c). None of those are decisions in respect of an application to extend the time in which to bring an appeal.

61. Fourthly, whilst the issue must ultimately be resolved by reference to the principles I have cited, support for the conclusion I have reached is to be found in s 48(1) of the *Interpretation Act 1987* (NSW) which is in the following terms:

> ***48 Exercise of statutory functions***

> *(1) If an Act or instrument confers or imposes a function on any person or body, the function may be exercised (or, in the case of a duty, shall be performed) from time to time as occasion requires.*

62. Section 48 must, of course, be read subject to the expression of any contrary intention. It is for that reason that one is always driven back to a question of the proper construction of the relevant legislative provisions. No such contrary intention is evident in the preset case, be it in the Act or in the 2024 Regulation. In that regard, the present case can be usefully distinguished from those authorities in which a conclusion was reached that there was no basis in the relevant statute for concluding that a power could be re-exercised.[80]

63. For these reasons I am satisfied that I have the necessary jurisdiction to hear and determine the applications, notwithstanding the 2022 RAT Decision.

THE SPECIAL OR EXCEPTIONAL CIRCUMSTANCES ISSUE

Submissions of the Applicant

64. The submissions of counsel for the Applicant on this issue can be summarised as follows:

    (i) there is, even at a threshold level, an inherent unfairness in the penalties that were imposed on the Applicant;[81]

    (ii) the penalties imposed are, as a general proposition, inconsistent with hose which would be likely to be imposed now, to the point where they are unjust and crushing;[82]

    (iii) the inherently oppressive nature of the penalties is reflected not only in their magnitude, but in the order that they be served cumulatively;[83]

[80] See for example *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429 at 444 per French J (as he then was).
[81] Transcript 38.5 – 38.15.
[82] Transcript 38.27 – 38.30.
[83] Transcript 39.21.

(iv) the opinions of Dr Allnutt further support a conclusion that special or exceptional circumstances have been made out.[84]

Submissions of the Respondent

65. The submissions made by counsel for the Respondent at the hearing on this issue may be summarised as follows:

(i) notwithstanding the Applicant's mental health, the evidence supported a conclusion that he was able to function during the relevant periods;[85]

(ii) the difficulties with which the Applicant has been beset, whilst deserving of some sympathy, should not be allowed to dilute the importance of ensuring the integrity of greyhound racing.[86]

66. In supplementary written submissions, counsel for the Respondent submitted that:

(i) the lapse of time since the limitation period expired required *"extraordinarily strong"* arguments to constitute special or exceptional circumstances;[87]

(ii) unfairness, regardless of how extreme it might be, should not be taken into account in determining whether circumstances are special or exceptional;[88]

(iii) the Applicant had, at varying stages of the process, access to lawyers.[89]

[84] Transcript 43.26.
[85] Transcript 58.44.
[86] Transcript 59.1 – 59.7.
[87] At [13](3).
[88] At [13](4).
[89] At [13](5).

CONSIDERATION – THE SPECIAL OR EXCEPTIONAL CIRCUMSTANCES ISSUE

67. In *Callaghan v Harness Racing New South Wales*[90] I made the following observations regarding what constitutes special or exceptional circumstances in the present context

> *[45] The term "special or exceptional circumstances" is one which is used from time to time in statutes and regulatory provisions to place limits upon the exercise of a power.*[91] *The Macquarie Dictionary defines the term "special" as:*
>
> > *...relating or peculiar to a particular person, thing, instance; having a particular function, purpose, of a distinct or particular character; being a particular one; extraordinary or exceptional.*
>
> *[46] It defines the term "exceptional" as:*
>
> > *... forming an exception or unusual instance; unusual; extraordinary; exceptionally good, as of a performance or product; exceptionally skilled, talented or clever.*
>
> *[47] With these matters in mind, the following general principles may be distilled from the authorities:*
>
> 1. *the use of the word "or" in the term "special or exceptional circumstances" may be indicative of a deliberate differentiation between "special" on the one hand, and "exceptional" on the other;*[92]
> 2. *that said, and in light of the above definitions, the distinction between "special" and "exceptional" may be more illusory than substantial;*[93]
> 3. *the words "special" and "exceptional" are ordinary English words describing a circumstance which forms an exception which is out of the ordinary course, unusual, special or uncommon;*[94]
> 4. *whilst the words "special" or "exceptional" do not mean "unprecedented or very rare", in order to be special or exceptional, the circumstances relied upon must fall outside what is usual or ordinary;*[95]

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[90] A decision of 30 July 2024 commencing at [45].
[91] *R v Young* [2006] NSWSC 1499 at [19].
[92] *R Brown* [2013] NSWCCA 178 at [22] per the Court (Rothman, Fullerton and Beech-Jones JJ).
[93] *R v Wright* (Supreme Court of NSW, Rothman J), 7 June 2005 unreported) cited in *Brown* at [23].
[94] *Harvey v Attorney-General Queensland* (2011) 229 A Crim R 186 at [24]; *R v Kelly* (2000) 1 QB 198 at 208; *R v Celeski* [2016] ACTSC 140 at [41].
[95] *R v Watson* [2017] ACTSC 311 at [42]; *Harvey* at [42]; *Groth v Secretary, Department of Social Security* (1995) 40 ALD 541 at 545; *Celeski* at [42].

5. *special or exceptional circumstances may be established by the coincidence or combination of a number of factors;* [96]

6. *the approach to determinising whether special or exceptional circumstances are made out must be a flexible one, and a conclusion reached by reference to the individual circumstances of the case;*[97]

7. *delay is a relevant factor in determining whether circumstances are special or exceptional;*[98]

8. *special or exceptional circumstances may include events which would render compliance with the relevant period (in this case, 7 days) unfair or inappropriate,*[99] *and may also include events which are outside reasonable anticipation or expectation;*[100]

9. *although it will enable a decision maker to understand why a time limitation was not complied with, merely explaining a delay, or a failure to comply with a limitation period, will not, at least of itself, constitute a special circumstance justifying an extension of time.*[101]

68. In my view special or exceptional circumstances have been established in the present case by virtue of a combination of two principal factors.

69. The first is the penalty imposed on the Applicant in each case. Whilst not every issue in relation to penalty would be capable of constituting special or exceptional circumstances, the Applicant has been disqualified for a period of almost 23 years. I have read the decisions in each case.[102] It is difficult to determine the basis on which the decision maker(s) reached the conclusions that they did in terms of penalty. It is at least arguable that the penalties are manifestly excessive. Shutting out the Applicant from prosecuting an appeal in those circumstances would have the capacity to visit considerable injustice on him. Conversely, the Respondent did not assert, at any stage, that it would be prejudiced by the

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[96] *Young* (supra) at [20]; *Brown* at [27]; *Grant v R* [2024] NSWCCA 30 at [30]; see also *Watson* at [16] and the authorities cited therein.
[97] *R v Medich* [2010] NSWSC 1488; *R v Pirini* Supreme Court of New South Wales (McClellan CJ at CL), 8 September 2009 unreported; *R v Chehab* (Court of Criminal Appeal New South Wales (Latham, Fullerton, Adamson JJ) unreported; *Grant* at [30] citing *R v Khayat (No. 11)* [2019] NSWSC 1320 at [14].
[98] *Beadle v D-G of Social Security* (1985) 60 ALR 225; [1985] FCA 234 at 674.
[99] *Beadle* at 674.
[100] *R v Steggall* [2005] VSCA 278 at [27], cited with approval in *Burlock v Wellington Street Investments Pty Limited* [2009] VSC 565.
[101] *Connelly v MMI Workers Compensation (Vic) Limited and ors*. [2002] VSC 247.
[102] At TB 5 and TB 11.

Applicant being permitted to prosecute the appeals which, for the reasons I have stated, are clearly arguable.

70. The second, is that the evidence of Dr Allnutt weighs heavily in favour of a conclusion that for at least part of the relevant period, the Applicant was burdened with mental health issues which affected his judgment. Those matters also go at least some way to explaining the delay. As I have noted, Dr Allnutt's evidence was not challenged, and there is no reason not to accept it.

71. I am unable to accept the blanket proposition advanced by the Respondent that the lapse of time in the present case mandates a conclusion that special or exceptional circumstances could only be made out if the Applicant's position were assessed as being *"considerably strong"*. I am similarly unable to accept the proposition that unfairness is an irrelevant consideration. Both of those propositions are somewhat inconsistent with those authorities which establish that a flexible approach must be taken in determining the question of whether special or exceptional circumstances have been established, and that the task is to be undertaken by reference to the particular facts and circumstances of the case.[103]

ORDERS

72. In formulating the following orders I note two matters.

73. The first, is that I am mindful of the fact that given the time of year, this decision may not come to the attention of those acting for the Applicant until the early part of 2025. It is for that reason that I have extended the time beyond that which was sought.

74. The second, is that the orders for the filing of ***evidence*** mean what they say. If either party wishes to rely on any evidence at the hearing of the appeal, such

[103] See the authorities cited in Footnote 97.

evidence, be it in the form of a statement of a witness or otherwise, is to be filed with the Appeals Secretary. Neither party should proceed on the basis that leave will inevitably granted to allow oral evidence to be adduced in the absence of a statement.

75. I make the following orders:

1 Pursuant to cl 10(6) of the *Racing Tribunal Regulation 2024* (NSW), the time for the filing of a Notice of Appeal in respect of the decision of the Respondent of 22 December 2016 to disqualify the Applicant for a period of 9 years and 9 months, is extended to 5.00 pm on 20 January, 2025.

2 Pursuant to cl 10(6) of the *Racing Tribunal Regulation 2024* (NSW), the time for the filing of a Notice of Appeal in respect of the decision of the Respondent of 22 August 2017 to disqualify the Applicant for a period of 13 years commencing at the expiration of the disqualification the subject of order (1), is extended to 5.00 pm on 20 January, 2025.

3 The Applicant is to file with the Appeals Secretary, by 5.00 pm on 20 January 2025, a Notice of Appeal in proper form and a statement of Grounds of Appeal, in respect of each of the decisions in orders (1) and (2) above.

4 The Applicant is to file with the Appeals Secretary, by 5.00 pm on 3 February 2025, all evidence upon which he relies in support of the Notices of Appeal referred to in order (3), together with an outline of submissions.

5 The Respondent is to file with the Appeals Secretary, by 5.00 pm on 17 February 2025, all evidence upon which it relies together with an outline of submissions.

6 The Appellant is to file with the Appeals Secretary, by 5.00 pm on 21 February 2025, any evidence and submissions in reply.

7 The parties are to provide to the Appeals Secretary, by 5.00 pm on 24 February 2025, with available dates for a hearing in March 2025.

8 I reserve any question of costs, and any question as to the forfeiture or refund of any appeal deposit, until the conclusion of the appeal.

THE HONOURABLE G J BELLEW SC

23 December 2024