RACING APPEALS TRIBUNAL
NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

EX TEMPORE DECISION

WEDNESDAY 13 NOVEMBER 2019

APPELLANTS ROBERT HOWARD
and
NATINA HOWARD

APPEALS AGAINST DECISION BY GWIC TO SUSPEND APPELLANTS' LICENCES UNDER GRR 92(5)(c)

DECISION

1. Appeals dismissed
2. Pending the decision or outcome of the stewards' inquiry the licences of each appellant are suspended.
3. Appeal deposits forfeited

1. Licensed public trainer, breeder and studmaster, Mr Robert Howard, and licensed owner, trainer and breeder, Mrs Natina Howard, appeal against the decision of the Greyhound Welfare Integrity Commission, ("GWIC"), to suspend each of their three licence categories with effect from 25 October 2019.

2. That decision was made by GWIC exercising its powers under Rule 92(5)(c) of the Greyhound Racing Rules. Relevantly, that states:

> "(5) Pending the decision or outcome of an inquiry, the Controlling Body or Stewards may direct that:
> (c) a licence or other type of authority or permission be suspended."

3. The Howards have been associated with the greyhound industry for some time. Mrs Howard has grown up in that industry. Mr Howard was licensed , apparently left it but returned to it in about 2013. The Howards together operate the Keinbah training track and associated facilities involving public training, breeding, owning and studmaster activities. They have no prior adverse matters of which the Tribunal has been advised. They are people of good-standing in the greyhound industry.

4. They are well spoken of by the greyhound rehoming, as it is known. On behalf of that entity, Ms Jodi Green has provided a three-page reference which basically talks about the quality of the facility run by the Howards, providing happy, healthy dogs which play in clean environmental areas and which enable the rehoming body to take greyhounds to be sent elsewhere which are in a proper condition, as it were. She describes them as honest people and going out of their way to ensure the safety and well-being of the animals which they look after. They are hard-working and honest people and, as she describes them, upstanding members of the greyhound industry. Being aware of the allegations, Ms Green states she has never seen anything which would cause her to be concerned.

5. Without going into their personal circumstances, Mr Howard has suffered a work-related injury which prevents him from performing employed work. He received the benefit of a compensation payment. With the benefit of some of that money and the sale of other property they purchased the subject training track for a not insubstantial sum of money, spent a considerable sum of money upgrading that track, and for privacy those figures will not be read into this decision.

6. And in the course of upgrading it, they unfortunately came across an aspect of asbestos. As a result of asbestos examination, graves containing dead greyhounds were discovered. It became, apparently, according to the evidence here, known as the Keinbah Inquiry in which over a period of time the Howards were involved, it appears on the evidence of Mrs Howard, as innocent people. There is no reason to doubt that at all. The effect of that

inquiry upon them was to have been substantially personally devastating. As she described it, she was crucified by the regulator in respect of it. It is quite apparent that she had an unsatisfactory experiences, which need not be further examined, during the course of that inquiry, with various officers of the then regulator.

7. There is no doubt, therefore, that a successful track had been established, a successful operation, from 2013 without anything untoward whatsoever. Mrs Howard was in the practice of purchasing on a very frequent basis from opportunity shops bags of rags, as it were. Those contained various synthetic materials – toys, blankets and the like. Frequent purchases were made. Those items were then used about the property either as cleaning rags, as training by way of play activities for the pups and other greyhounds and also, critically, the contents of one of those bags contained an item.

8. That item was placed on a lure in the bullring. The bullring has been out of action for some six months because of the drought. The bullring was rarely used, perhaps six times since 2013. The subject item had, according to Mr Howard's advice to the inspector and in submissions and on the evidence here, been attached to the lure in the bullring for a substantial period of time, possibly up to three years. The property had been inspected. There is no evidence of what the actual inspectors did and whether they looked at the subject item and formed an opinion about it or not. Suffice it to say that in the number of inspections that took place this item had not previously come to notice.

9. It is Mrs Howard's evidence that she assumed the item to be a synthetic rag. Mr Howard advised the inspector, Mr Turner, who gave evidence, that it was an old sleeve off a mink coat. Mr Howard told the inspector he was not aware that it was not a synthetic. It is apparent from the evidence of the inspector that upon sighting this item he formed an immediate suspicion. His opening remarks were, "What have we got here?" Those remarks were made after he had had a somewhat strange conversation, it has to be said, with Mr Howard about various matters to do with the operation of the training track and aspects about using skins of dead rabbits and things like that. It is not necessary to examine that further in this particular appeal.

10. The suspicions of the inspector were such that he set about seizing the item and it was subsequently surrendered to him by Mr Howard. The item itself has been photographed. An observer, having been shown that photograph, may well come to the conclusion that the inspector's immediate suspicion was justified. Suffice it to say, it was. And it turns out that it was a justified suspicion.

11. The inspection took place on 28 June 2019. The item was sent to a laboratory for analysis on 28 June. No delay there by the regulator. The

laboratory undertook microscopic examination. The effect of that examination was that the following conclusion was reached:

> "the fibres were natural in origin and are fur/hair from an animal skin."

12. That is an unambiguous conclusion. It is not qualified. The author of the report, Dr Frankham, then continued after that conclusion by reporting that it was examined to see whether it might comprise cattle hair. The report went on to indicate it was not cattle hair. The report then continued with the following words:

> "DNA analysis could possibly be carried out as an additional step to confirm this identification that these fibres are of a natural origin but not from cattle."

13. There is nothing in the rules that requires a confirmatory analysis of material to determine whether it falls within Rule 86B. The reference to confirmatory analysis by means of DNA analysis was purely for the purposes of confirmation of identification. That confirmation is not a mandatory step. It will provide greater certainty and, indeed, it might even provide an indication of the actual animal from which the fur or hair originated. The present evidence, however, is unequivocal: it is fur or hair from an animal skin.

14. It might be noted that that report was dated 1 October, a delay of some three months from its receipt by the testing laboratory, which incidentally is known as the Australian Centre for Wildlife Genomics at the Australian Museum. The regulator, having received that report on 1 October, on 23 October asked the appellants to make submissions by 25 October as to why they should not be suspended under 92(5)(c). They responded promptly the next day. Promptly, on 25 October, the decision to suspend was exercised, the discretion exercised and the decision notified.

15. On 1 November a notice of appeal was lodged. It is noted that there was no stay application. It is noted that since that date of suspension, with the exception of some pups and an older breeding dog and of two dogs that are under medical certificate, the remaining 40-dogs that were on the property have been removed from it.

16. The further evidence is that as a result of certain issues, which will not be disclosed for privacy reasons in this decision, Mr Howard is again required to take medication. He had been under medication but, having taken up this industry again, he was able to remove himself from that need. But as a result of this matter he is now back on medication.

17. In addition, Mrs Howard has been obliged to now work seven days a week instead of lesser periods. She does five days a week in employment in

the care industry and two days TAFE teaching in that industry. She has returned to that seven-day a week work to provide finances which have now ceased to come in as a result of the suspensions and the loss of the ability to exercise her licence. Indeed, at the moment it is costing the Howards money to maintain the animals they have as there is no income against that. Those then are the facts.

18. The test to be applied here is not, in the Tribunal's opinion, the tests that would be applicable for a stay application. This is not a stay application; this is an appeal decision on whether or not a discretion should be exercised under 92(5)(c). That requires that the Tribunal exercise a judicial discretion, having regard to all the facts and circumstances before it, both as to the factual matters and to the regime in which a licensed person participates. And, of course, necessarily, the regulatory nature of that regime. It is trite to say that, of course, a licence is a privilege. It is trite to say that it carries with it certain obligations.

19. In looking at the seriousness of the matter, the submissions for the respondent point out the gravity with which the regulator views this type of issue. This is not a live-baiting matter. It is, however, one which, it is possible, and, bearing in mind that no charges have been laid, but it is the nature of the submission of a possibility of charges in the following terms under 86B(1):

> " A person who, in the opinion of the Stewards…,
>
> (a) uses, in connection with greyhound training, education or preparation to race, or racing, any …animal carcass or any part of an animal….."

But even more critically, under (e):

> "is in any way directly or indirectly involved in committing, or is knowingly concerned with such conduct".

19. It is not necessary to examine the use of the word "knowingly" as it appears in subparagraph (e). It is apparent that it is the intention of the regulator – and this is a matter for the final hearing – to provide that if certain ingredients are established, a penalty is imposed.

20. But what are the consequences if such an adverse finding is made? It is a mandatory period of disqualification of 10 years and, in addition, a fine of a considerable sum of money is also mandated. That period of disqualification and that fine must be imposed unless special circumstances exist, when a lesser penalty may be imposed.

21. That possible outcome, which is put to the Tribunal by the respondent, indicates the very high test which these appellants must meet in respect of their subjective matters against which is the integrity of the industry, which of course is driven, when it comes to the use of animal products, by welfare, not just of greyhounds but of all animals which might fall within the meaning of 86B(1). That barrier is very high.

22. What then of the matters to enable a discretion to be exercised not to impose that suspension?

23. Firstly, delay. There has not been a substantial delay which is troubling to the Tribunal by the actions of the regulator. The regulator virtually immediately sent the material for analysis. There was a delay, which must be found on the current evidence to be beyond its control, from 28 June to 1 October when the report was made. There was then a delay of some three weeks to 23 October when, for reasons unexplained in respect of that delay, a decision was made to call upon show cause submissions on a suspension. Those submissions were received and the decision to suspend was made within two days. There is no delay.

24. There has been no delay occasioned by the respondent in respect of this appeal. There is a suggestion that there is delay at the moment by reason of DNA testing. That is a matter for the regulator. The regulator has been advised by the testing facility at the Australian Museum that there will be a DNA result by 6 December. As the submissions for the appellants point out, if that was to be in the criminal field, it would be a possible record. The Tribunal takes the equivalent of judicial notice to the fact that DNA testing is notoriously slow. However, there is uncontested evidence that it will be available by 6 December. There is no evidence as to when an inquiry may be convened. But having regard to the expedition with which the respondent has progressed the matter to date, there is no reason to find that there will be further delay to the prejudice of the appellants.

25. There is the fact that there have been no prior matters, that there have been no matters of a similar nature. Therefore, the ongoing risk to the industry, should the suspensions not be imposed, is assessed as non-existent on the evidence available. There is comfort in that conclusion by reason of the evidence of Mrs Howard as to why the product was there, balanced to some extent by, as described, the somewhat strange remarks by Mr Howard to the inspector when he first arrived.

26. The aspects then of the personal side require consideration of hardship. Hardship has been occasioned to each of them by reason of a loss of income; additional hardship to Mrs Howard by a requirement to work seven days a week. There is the additional hardship of a type to which reference has been made and is not examined further for Mr Howard.

27. The other aspects are whether or not this truly will be assessed at the lower end of the scale of objective seriousness. That has been addressed. In essence, it is necessary to look briefly at the evidence how this came to take place. It has been summarised. What it turns out is that the appellants have not been driven by the need for greater caution because, as the evidence here is, they were not put on notice by anything that occurred to them that what was here being used was animal fur or hair.

28. As Mrs Howard said in her submissions – Mr Howard repeated them to GWIC and has been said by Mrs Howard in her evidence on appeal – having regard to her background, she had never seen an animal that had any hair or fur like this and it, to her, was synthetic. She was reinforced in that conclusion by the synthetic backing. She was also more than acutely aware of the rules and in particular the rule about having this particular type of product on their licensed facility.

29. All of those matters are important. They give comfort as to the likely future way in which, if the suspension is not imposed, the Howards will conduct themselves.

30. This is not an occasion to determine what is a likely penalty. The issue is, as has been set out, an assessment of the objective seriousness of the conduct viewed in the context of the actual actions themselves that they took or did not take, and of the likely outcome and therefore of a message type.

31. Have the subjective factors to which reference has been made overcome those critically important factors that go to the integrity and, importantly, welfare of the industry? The answer to that is no.

32. The Tribunal forms the opinion that the subjective circumstances of these appellants do not justify the granting of this appeal on the basis of a suspension of the decision, having regard to the individual matters to which the Tribunal has made reference and when they are all considered as a whole.

33. The Tribunal is of the opinion that the discretion to suspend is the appropriate discretion pending the resolution of the stewards' inquiry.

34. In those circumstances, each of the appeals is dismissed.

35. The Tribunal orders that pending the decision or outcome of the stewards' inquiry the licences of each appellant are suspended.

36. The Tribunal orders each of the appeal deposits forfeited.
