

## **RACING APPEALS TRIBUNAL**

**D B Armati**

### **IN THE MATTER OF A STAY APPLICATION BY KENNETH BURNETT**

**8 November 2021**

1. Mr Burnett a licensed trainer has lodged an appeal against the decision of 25 August of IHP appointed by GWIC, to disqualify him for a total period of 12 months for 3 breaches of Greyhound Racing Rules 86©, 86(f)(i) and 86(g). He appealed on 31 August 2021. He has lodged a Stay Application .
2. The Tribunal has read the Application for a Stay together with the submission, the submission of the respondent ("GWIC") opposing a stay, the reply submissions.
3. The Tribunal has power to suspend (ie stay) or vary the decision under cl 14 of the Racing Appeals Tribunal Regulation by ordering that the decision not be carried into effect, or be carried into effect to the extent specified and conditions may be imposed. The appellant has lodged the appropriate written application to vest the Tribunal with jurisdiction. Any stay will remain in force until revoked or the appeal is dismissed, determined or withdrawn.
4. The Regulation is otherwise silent as to the tests to be applied for consideration of a stay application.
5. In accordance with established practice this decision is made in the absence of the parties, but after consideration of the documents listed in paragraph 2.
6. The relevant test therefore is that the Tribunal exercise a discretion having regard to the scope and purpose of the legislation and rules of racing considering the material before the Tribunal.
7. The principles that apply therefore are:
  - (a) It is sufficient that the applicant for the stay demonstrate a reason or an appropriate case to warrant favourable exercise of the discretion: *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694.
  - (b) The onus is upon the applicant to demonstrate a proper basis for a stay which will be fair to all parties.
  - (c) The mere filing of an appeal does not demonstrate an appropriate case or discharge the onus.
  - (d) The Tribunal has a discretion involving the weighing of considerations such as balance of convenience and the competing rights of the parties.
  - (e) Where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, the Tribunal should normally exercise its discretion in favour of granting a stay. It was otherwise expressed in *Kalifaif Pty Ltd v Digi-Tech (Australia Ltd)* (2002) 55 NSWLR 737 at 17 "that there is a real risk that he will suffer prejudice or damage, if a stay is not granted, which will not be redressed by a successful appeal".
  - (f) The Tribunal will not generally speculate upon the appellant's prospect of success, but may make some preliminary assessment about whether the appellant has an arguable case, in order to exclude an appeal lodged without any real prospect of success simply to gain time.

(g) Therefore if the applicant establishes that the appeal raises real issues and there is a risk of prejudice or damage which will not be redressed then the Tribunal will then consider the balance of convenience (“Kailifair” supra).

8. The appellant’s submission addresses arguable case, subjectives, no threat to industry, on balance of convenience and generally. It attaches a submission by Ms Heath of counsel to GWIC on the IHP hearing and this addresses invalidity of the s58(3) notice, bias, procedural fairness, detailed submissions on the facts going to no breach and on penalty. It also attaches a submission by solicitor Mr Cleverley to IHP also raising failures in the 58(3) notice and failures in respect of requests for documents touching upon an apparent inquiry on procedure by Mr Haylen QC.

9. GWIC’s response opposes the stay. It details the history of the matter, sets out legal principles, rejects the procedural points as applying or otherwise cured on appeal, and addresses the facts. It continues on likely penalty.

10. The appellant’s reply submission deals with delay, contrition, 58(3), bias, and the Haylen report, procedures on appeal and the lack of independence of the GWIC officers.

11. The Tribunal seises on a narrow issue for the decision. It does not need to address the issues on: 58(3), bias, procedural fairness, the Haylen report, delay, independence of officers.

12. The principles are clear. Appellant to establish an arguable case and if he does the balance of convenience must be in his favour.

13. There are 3 breaches alleged and pleas of no breach. For the first two the penalties have been served and there is no utility in further considering those on a stay application. The 4th charge is the most serious in the respondent’s submissions and has a 12 month disqualification expiring on 15 January 2022. It is a wilful assault or interfere with a steward at a meeting.

14. In its submission the respondent faintly concedes a faintly arguable case and the assault may not be made out. It is nevertheless argued that the facts are strong and the respondent will prove the case.

15. The appellant in reply seises on that concession.

16. The Tribunal is satisfied that the submissions identify a number of instances during the incident where there is a contest as to what happened, the reasons for the admitted acts and therefore interpretations of the facts.

17. The tests for a stay mandate against findings of facts that are for the appeal hearing and no conclusions on facts are drawn in this decision.

18. The test requires an arguable case but not a conclusive or overwhelming case etc.

19. The appellant establishes an arguable case on the 4th charge. As stated no assessment is then required or made on charges 2 and 3.

20. The Tribunal is satisfied there is a case on balance of convenience.

21. The appellant's subjectives touch upon the impact of the charges on him, which go to the future, licence for 20 years, family circumstances including illness and financial, contribution to industry and industry attachment. It is submitted there is no ongoing threat to industry. Reliance is placed on the nugatory principle.

22. The respondent relies upon integrity, seriousness of the incident and the likely penalty, past similar conduct.

23. The Tribunal is particularly concerned that the balance of the penalty may well be served before the appeal is concluded although it sees no reason on the submissions that a hearing will be delayed. That would render the appeal nugatory if successful. Acknowledging the seriousness of the allegation and the issue of integrity for the office of steward and therefore any likely message that would be negative by granting a stay it is determined that the factors in favour of the appellant prevail.

24. The arguable case is found and the balance of convenience in favour of the appellant.

25. The Tribunal orders that the decision of IHP of 25 August 2021 not be carried in to effect pending the determination of the appeal, or other order, on condition that the appellant prosecutes the appeal expeditiously.