RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

WEDNESDAY 20 APRIL 2022

APPELLANT SCOTT AUSTEN

RESPONDENT GWIC

APPEAL AGAINST GWIC DECISION TO REFUSE APPLICATION FOR REGISTRATION AS OWNER AND TRAINER

DECISION:

1. **Appeal upheld**
2. **Appeal deposit refunded**

1. The appellant, Scott Austen, appeals against the decision of GWIC of 25 November 2021 to refuse his application for registration as an owner and trainer.

2. Two grounds for the adverse decision were relied upon by the Commission at that point and they were that he was not a fit and proper person and it would not be in the best interests of the greyhound racing industry to license him.

3. The industry is a regulated disciplinary-based privilege of licence operating system and governed by the Greyhound Racing Act which provides, amongst other things, integrity of the industry. The scheme the industry commission has put in place involves licensing and an applicant demonstrating to the Commission, for the privilege of a licence, that they are a fit and proper person.

4. By this appeal, the appellant assumes that onus and the appellant must prove to the Tribunal that he is both a fit and proper person and it would be in the interests of the greyhound racing industry that his licence be granted to him.

5. The evidence in this appeal has been the brief which was served by the respondent upon the appellant and the Tribunal and is, in this case, relatively limited, being of 45 pages only. It contains, critically, the application, various matters which were required and which are not in issue that he had to establish, a National Police Certificate, character references, submissions that the appellant made to the Commission, and submissions made by counsel for him, Mr Di Carlo, to the Commission. The Tribunal notes the appellant has not given evidence before it. The matter has proceeded on submissions.

6. The law to be applied has been recently dealt with by the Tribunal in the thoroughbred racing appeal of Sweeney. That decision of 6 April 2022 is referred to because it incorporated a further legal principle in more detail to that which the Tribunal had set out on numerous occasions and in prior decisions in this jurisdiction in matters of Zohn and Vanderburg and other cases in particular. The relevant parts of the Tribunal's decision in Sweeney were paragraphs 4 and 5, which state:

> "4. The law to be applied has been considered by the Tribunal in numerous decisions in this and the other two racing codes. The respondent has referred to Zohn v Harness Racing NSW, a decision of the Tribunal of 11 July 2013. The Tribunal has referred to more recent decisions of 30 November 2015 of Vanderburg, a greyhound racing appeal, and Scott, 15 July 2015, a harness racing appeal. The law applied, therefore, in relation to the assessment of fitness and

propriety and relevant, therefore, to what appropriate protective order is necessary in this case, was set out in Scott as follows:

> 'It is apparent therefore that the statutory or regulatory regime which has been put in place has a strong emphasis upon regulation and of the importance of the reputation of the industry in relation to matters of consumer confidence and the like. And for that reason a number of matters relating to conduct, which might have some impact upon the reputation of the industry, are to have a strong focus.
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> Not only that, but it is to the proper conduct of racing and its general integrity that there must be a further focus. In the decision of Zohn 11 July 2013, which was an application by Zohn against a refusal of a trainer's licence, an appeal which was dismissed, the Tribunal set out the provisions it, in that matter, considered appropriate to be the tests against which this applicant is to be assessed. Those parts of Zohn are:
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> > "The law relating to fitness and propriety falls, and has been considered in many different areas. Perhaps the key one is the decision of Hughes & Vale Pty Ltd v New South Wales [No 2] [1955] HCA 28, which dealt with the principles of fitness and propriety in this sense:
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> > > ' ... their very purpose is to give the widest scope for judgment and indeed for rejection. "Fit" (or "idoneus") with respect to an office is said to involve three things, honesty knowledge and ability: "honesty to execute it truly, without malice affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it"'". (A reference to Coke).

In determining that test is the question as Henchman DCJ said so long ago in the case of Sakallis, a real estate agent's licence application, that is:

> 'The Court is considering whether it can with safety to the interests of the public accredit to that public that the applicant is a fit and proper person to hold a licence and to be entrusted with the functions permitted to such a licensee by the Act. The Court acts in order that the public may be protected and the persons who receive the imprimatur of the Court should be

such that the court can fairly recommend them to the public as honest persons in whom confidence may be reposed.'

Quoting from New South Wales Law Institute v Meagher he went on to say:

> 'There is therefore a serious responsibility on the court – a duty to itself, to the rest of the profession, to it suitors, and to the whole of the community to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to that credential. It is not a question of what he has suffered in the past, it is a question of his worthiness and reliability for the future.'

And again quoting from Ex Parte Meagher:

> 'By the words "fit and proper persons" is meant persons who have been proved to the satisfaction of the court not only to be possessed of the requisite knowledge of law but above all to be possessed of a moral integrity and rectitude of character so that they may safely be accredited by the court to the public as fit without further inquiry to be trusted by that public with their most intimate and confidential affairs without fear that the trust would be abused.'

I pause to note that of course was dealing with an application for a solicitor. The test here is not as high as that, but it does nevertheless give some broader meaning to the words earlier expressed.

As Judge Head said in the case of Trevor James Pye, unreported, District Court 19 August 1976:

> 'I think the investigation which the court should make in those circumstances is concerned more with an assessment of whether his disrespect for the law in the past is likely to influence his actions in the future.'

And it was said in Ziems v Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279 at 290:

> 'What has been dealt with, and importantly to be considered, is misconduct in the vocation concerned.'

The Tribunal was taken to Australian Broadcasting Tribunal v Bond [1990] HCA 33 or otherwise (1990) 170 CLR 321, where Justices Toohey and Gaudron stated:

> ‘The expression “fit and proper person”, standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of “fit and proper” cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.’

The Tribunal was taken to the Victorian Civil and Administrative Tribunal decision, VCAT reference number B352/2008, an appeal of Pullicino determined on 13 May 2009 by the refusal of an appeal against a rejection of an application for a licence. The Tribunal was taken to paragraph 13. Paragraph 13 is to be read in the context that it follows paragraph 12, which set out a number of authorities, including some to which reference was made in Zohn, as well as some Victorian decisions.

The Tribunal member, Deputy President Coghlan, then said the following at 13:

> ‘It will be seen then that the term “fit and proper person”
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> - gives the widest scope for judgment and rejection
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> - involves notions of honesty, knowledge and ability
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> - depends on its own circumstances
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> - may be manifested in a variety of circumstances in a multitude of ways
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> - may depend on the purpose of the legislation’.

I agree with those enunciated principles as being relevant. I consider, however, that the additional matters to which I made reference in Zohn have to be considered as well.

And to focus on some key ones just at this point, they are that the function of this Tribunal in assessing Mr Scott's appeal is to focus upon conduct that has occurred to the present time and then look to the future as to whether there is likely to be a repetition of the subject conduct. In doing so, it is important to have regard to conduct in the vocation with which this application is concerned and it is important therefore to assess any disrespect for the law in the past on any likely influence that will have upon his actions in the future. Those are some of the key matters for consideration.

5. In addition, there is the further case, to which the Tribunal makes reference, of the appeal of Ian James Banks v The Council of Auctioneers, unreported, District Court of New South Wales, 29 June 1971, a decision of Judge Henchman, where he quoted his own decision in Sakallis, to which reference has been made in this matter already, where he said:

> 'I take this view with some sympathy and with the reminder that a man once found guilty of a crime involving dishonesty is not necessarily for ever debarred from his chosen profession as the cases of Macaulay, Davis, Lenehan 77 CLR 403 and Clyne (1962) SR 436 show. But I do not think this thought can permit the grant of a licence during the period while the appellant is under a recognizance imposed by a court resulting from a self-confessed crime of stealing. The application is refused.'"

7. In addition to those principles, the appellant has taken the Tribunal in the submissions made to the Commission, and repeated today, in addition to the cases referred to in the precedent decision, to matters which require emphasis on the length of time since the offending occurred, being R v L; ex parte Attorney-General [1996] 2 Qd R 63 at 66, and also the necessity to reflect upon rehabilitation, or progress towards rehabilitation, as established in R v CBQ [2016] QCA 125 at 37.

8. In the written submissions for the respondent today, there is also reference to the case of Nikolic, which was Nikolic v Racing Victoria Limited (Review and Regulation) [2017] VCAT 406, on which the principles:

> "an understanding of the statutory objectives and evaluation of the ability of an individual to discharge the responsibilities of a particular licence is what is required."

And later:

> " ... an individual's conduct within a vocation, but is not necessarily restricted in this way."

And later:

> " … a real nexus can be drawn between those offences and the holding of the licence to ride."

9. The respondent also referred to O'Connell, Racing Appeals Tribunal, 26 October 2018, which cited Frugtniet, which is Frugtniet v Board of Examiners [2005] VSC 332, of the necessity for the appellant:

> "has shed a past conduct; and that it may take years of demonstrated good conduct before that can be done."

10. Essentially, therefore, what has to be established is that the Tribunal, having regard to all the evidence before it at the present time, and having regard to the nature of the licence applied for, must project into the future to determine whether the appellant has satisfied the Tribunal today that he has the requisite degrees of fitness and propriety and that it is in the interests of the industry that he be licensed.

11. The principal facts are that the appellant is now some 45 years of age. He was first licensed in 2008 in New South Wales as a greyhound owner and held that registration until 18 October 2020. And from 29 January 2013 to 18 October 2020, he was a trainer, breeder and studmaster. As noted, those registrations expired on 18 October 2020. He is also registered as a greyhound owner in Queensland.

12. A disciplinary history for him in New South Wales whilst licensed is referred to. And, in very brief terms: 2013, Rule 39(3), $100 fine. 2015, Rule 136(1), $100 fine. 2014, Rule 86ab, reprimand. A period of suspension under Rule 95(2)(c) from 30 June 2016 to 2 August 2016, prior to a determination of 29 June 2016 for a breach of Rule 84(4), for which a $750 fine was issued. And the Tribunal is advised that related to a human growth hormone.

13. That last matter has an element of relevance, the others are not matters that are pressed to any great extent as to his fitness today.

14. It is important to note that other than those matters, the appellant has not had other disciplinary matters which are factually before the Tribunal.

15. The appellant was a licensed security guard. And the Tribunal pauses to note that to be a security guard he had to be licensed, and that required fitness and propriety, and that required that he understand the privilege of a licence, much as it is required of him in this regulatory regime as well.

16. In breach of the privilege extended to him, while working at the airport, he engaged in the supply of cocaine. The facts that were before the Lismore

District Court are that over a period of six months in 2016 he engaged in six supplies of a total of 30 grams of cocaine. The gravity of those matters was such that he was charged with possession, a matter for which a Form 1 taken into account determination was made.

17. But in respect of the supply, he was sentenced to a term of imprisonment of two years and three months to commence on 27 July 2017 and to conclude on 26 October 2019, and upon which he was subject to a non-parole period of one year and three months, to commence on 27 July 2017 and conclude on 26 October 2018, when he would be released subject to supervision.

18. The Tribunal pauses to note that it was the opinion of the District Court that his criminal conduct was of such gravity that such a substantial sentence was imposed upon him. It is not necessary to examine scale of severity of sentence for supply of cocaine or other drugs. It is trite that the range of sentences could have been from a non-conviction through to, in certain circumstances, life imprisonment. Those matters do not require further examination. It is the sentence imposed upon him that the focus must be.

19. The evidence establishes that he served his term of incarceration, that he was released on parole on supervision and was not called up for any breach of his parole conditions. It is also trite to say that he must have complied with the terms of his incarceration and been what might loosely be described as a model prisoner who earned the privilege of having been released on parole in the first place. That parole period, as noted, expired on 26 October 2019. He has no other criminal record.

20. On 13 July 2021, he made the subject application as an owner trainer. At this point the Tribunal notes, consistent with the case law that it must apply, an owner trainer is the highest category of licence on which a privilege can be extended in this jurisdiction. It enables him to virtually do everything in the industry. It is, therefore – and the Tribunal accepts the submission – that the focus requires greater attention upon him by reason of the privilege of the licence sought.

21. The appellant made a submission to the Commission, and that is the substantial evidence of his personal circumstances. He there emphasised he had never had positive swabs, that he had participated, when he had the privilege of a studmaster's licence, in the giving to charity and race clubs of vials which could then be auctioned off for the benefit of charities or racing clubs. He engaged in rehoming of greyhounds. He took great care in ensuring his greyhounds were given the utmost care and well-presented.

22. The appellant emphasises that upon his release in October 2018 he was licensed and continued to exercise the privilege of that licence in this State without coming under adverse notice.

23. The appellant is at great pains in that submission to point out that he paid his debt to society, to use his terms, in respect of the criminal conduct in which he engaged. He also made reference to a Secretary of a New South Wales Department who himself the Tribunal is aware as a young man was convicted of supply and spent a period of time in prison. No emphasis has been placed on that matter.

24. The appellant was subject to interview by Inspector Sutherland of the Commission and the interview went through that principal history and the appellant's emphasis – and this was for the purposes of his application – that he had served his time and has not reoffended. He has had no other charges. Some of the facts which were gleaned from the Tribunal's reference to his criminality were taken from this interview as well.

25. He again emphasised that even whilst on bail he continued to train greyhounds, he did so from his release from prison, and again emphasises his charitable activities.

26. He also emphasises that if he was going to reoffend – that is, his criminal reoffending – he would have already done it in that time. And this was an interview of 18 August 2021.

27. The appellant takes comfort in the submissions from a comment by the inspector that the appellant is not currently on ICOs, bonds or on parole, or anything like that, but she conceded after that remark that it was essentially not her decision. Indeed, that is factually correct. The court determined that he was not eligible for an ICO and he was not considered appropriate for a bond; indeed, his conduct was considered more serious than that. But he was eligible and was given parole and he complied with that parole.

28. In submissions made by Mr Di Carlo of counsel, who represents him today, certain precedents to which the Tribunal has made reference earlier were relied upon and are taken into account. And he has also emphasised that in respect of the case law, the test to be applied for a greyhound owner and trainer is less than a number of those cases to which the Tribunal has made reference, and the Tribunal accepts that. In relation to the test for a solicitor – and no disrespect was intended by the submission, and nor does the Tribunal adopt any disrespect for the privilege of a licence in this jurisdiction – the Tribunal finds that the necessity to establish fitness and propriety as a solicitor requires a greater burden to be met than that for an owner trainer in this jurisdiction. However, the principles to which the Tribunal has referred in those cases for a solicitor remain apt.

29. Emphasis is placed upon the fact that his criminal conduct was not in the vocation concerned. To quote case law, it was his private life, it had no connection to greyhound racing.

30. In submissions on his behalf today, in addition to those to which reference has been made, comfort is taken from the references, to which the Tribunal will return; the statement that he is otherwise of good character, and is aware of the conduct in which he engaged as being wrongful, and all of that provides an appropriate level of insight and the learning from which the Tribunal can look to the future. Again, submissions were made emphasising the nature of the licence sought. But, more importantly, substantial emphasis, because it is the key to this case, was placed upon a true calculation in the appellant's submission on the time elapsed upon which the Tribunal should assess his fitness today. And that was because it was submitted that the respondent is taking too narrow a calculation of time elapsed, and that is the respondent's position of time elapsed since October 2019.

31. It is pointed out that he had time in the industry before his criminal conduct. He had time from charging, on bail, and he has had time since he was released on parole and he has had time since his parole expired to reoffend, if he was going to, and he has not done so. As stated, the nexus between the licence sought and his criminal conduct is again emphasised.

32. It is said, therefore, based upon all of that evidence on behalf of the appellant, that he has proved himself a reformed person.

33. The Tribunal turns to the two references before it deals with the other submissions.

34. The first is by Ross Evans, which is undated but it was provided for the purposes of the Commission's fitness inquiry. The referee has known him for eight years, having worked for Ladbrokes, that he is aware of the various sponsorships that the appellant has engaged in. He has dealt with the appellant in respect of the industry itself, in respect of breeding, more particularly in the studmaster activities. The referee is fully aware of his criminal history and, indeed, visited him in jail. He was able to observe his treatment of greyhounds as being exemplary. And also to his charitable donations of breeding material. Interestingly, this referee remains at a loss to understand why he should have his past criminal conduct brought up against him.

35. The second referee is Brian Barton, again undated, but for the purposes of the Commission's inquiry. He refers to the appellant's passion for the sport, and the industry should be welcoming of such people. He has known him for 15 years and met him when the appellant had his studmaster breeding capacities. He has never had any concerns about him. He

considers it abhorrent for the Commission to be kicking “someone when they are down”, and he should be able to effectively get on with his training or owner training activities. He describes him as likeable, generous, kind, an asset to the sport. And again refers to his charitable donations. He says he will not reoffend and has learned from his mistakes and paid for them. This referee did hold a position of Chairman and Treasurer of the Auburn-Lidcombe GBOTA branch for a period of approximately six years. It is important to recognise that persons who have held positions of importance in the industry and in the vocation for which the licence is sought who are prepared to stand for an applicant are to be given greater weight than those who are independent to the industry, and the Tribunal does so.

36. The key case for the respondent is that this appellant has failed to demonstrate that he has overcome the two burdens which the Commission found against him. The respondent fairly makes certain concessions that he has favourable references as to his character, awareness of his prior conduct and having learned from his mistakes. And also that he has prior experience in the industry for which he now seeks licensing.

37. But emphasis is placed on the category of licence and also that he has not demonstrated that he has shed his past conduct. In that regard, the Tribunal pauses to note that whilst he did not give evidence before it to demonstrate before the Tribunal itself that he has shed his past conduct, his submissions to the Commission itself, and the terms of his record of interview with the inspector, contain within it clear expressions of his belief that he has learnt from his past lessons and has not, prior to that criminal conduct, or since, engaged in anything of a criminal nature, nor of anything substantial in the industry. The appellant did not address his past breach of a positive substance matter in this industry. That, however, the Tribunal notes, was in 2016, nearly six years ago, and there was no repetition of that conduct up until October 2020.

38. Those then are the facts, submissions and the legal principles.

39. Has then the appellant demonstrated to the Tribunal that he has the requisite degrees of honesty, knowledge and ability for licensing with the highest category of licence in this industry as an owner and trainer, based upon a satisfaction of the Tribunal that his past conduct would not be repeated, that he has learnt his lesson, that he understands the privilege of a licence and the necessity for compliance with a regulatory regime, and that he can be entrusted with the imprimatur of this Tribunal to the public at large and to the industry generally that he has the requisite degrees of fitness?

40. His criminal conduct was serious. Drug supply, which warranted such a heavy sentence as two years and three months, cannot lightly be set aside. The appellant has this advantage over others: firstly, that he no longer is

subject to any formal supervision, he is not on a bond, his parole has expired and he satisfactorily completed it. He has had time prior to his criminal conduct and subsequent to it in the industry and has not come under adverse notice (other than set out above). The fact that, therefore, his criminal conduct was not in this vocation has a slightly less serious connotation to it than if he had been in breach in more recent times and likely to be so, in the Tribunal's opinion, in this industry itself.

41. That makes his case a stronger one. It takes him away from many others who have not been able to demonstrate since the conclusion of their criminality, whether by way of completion of a bond or parole, as the case may be, by the effluxion of time that they have demonstrated their fitness. Here, the Tribunal again emphasises, that it is his history effectively from 2008 to 2020 that gives him the edge that he is of fitness in this industry.

42. The appellant satisfies the Tribunal that he is fit and proper to have the privilege of a licence as an owner trainer.

43. The appellant satisfies the Tribunal that it will not be contrary to the interests of the greyhound industry generally that he be licensed.

44. The appeal is upheld.

45. The next issue, therefore, for the Tribunal is the appeal deposit, and the Tribunal notes an application was made during the course of submissions for a refund.

46. Application is made for a refund of the appeal deposit. The appeal has been successful. No submissions are made to the contrary.

47. The Tribunal orders the appeal deposit refunded.
