IN THE RACING APPEALS TRIBUNAL NEW SOUTH WALES

BEN SARINA
Appellant

v

HARNESS RACING NEW SOUTH WALES
Respondent

REASONS FOR DETERMINATION

ORDERS:

1. **The Tribunal does not have jurisdiction to hear and determine the Appellant's appeal**

INTRODUCTION

The Charge against the Appellant

1. In 2011 Ben Sarina (to whom, for reasons of convenience, I shall refer as the Appellant), who was then a licenced harness driver, was charged by Harness Racing New South Wales (the Respondent) with a breach of Rule 187 (2) of the Harness Racing Rules (the Rules). That rule was in the following terms:

> *A person shall not refuse to answer questions or to produce a horse, document, substance or other piece of equipment or give false or misleading evidence or information at an enquiry or investigation.*

2. The charge against the Appellant was pleaded as follows:

> *Pursuant to the powers under AHR 300 afforded to this Investigation Panel by the HRNSW Authority, you, Mr Ben Sarina, a licensed Trainer/Driver, are charged under AHR 187(2) for giving false evidence to the investigation into alleged corruption and improper practices in Harnessing (sic) Racing in New South Wales (the investigation).*

3. The particulars of the charge included the following:

> *The particulars of the charge are that during a formal review as part of the investigation conducted on Wednesday 16 November 2011, you gave false evidence in relation to telephone communication between yourself and former HRNSW employee Mr Paul O'Toole.*

4. The particulars went on to set out an excerpt from an interview conducted with the Appellant on 16 November 2011 in which the false evidence was allegedly given. Those particulars were later amended but those amendments are not material for present purposes.

5. The charge against the Appellant, to which he pleaded not guilty, arose from what became colloquially known as the *"Green Light Scandal"* which, in short, involved an investigation by the Respondent into allegations that one or more of its employed Stewards had been involved in corruptly accepting bribes from industry participants, in exchange for assurances that particular horses would be excluded

from drug testing in association with their participation in various harness racing events.

6. It is not necessary, for present purposes, to canvass the facts of that investigation, or the Appellant's involvement in the conduct which led to it. It is sufficient to note that for the purposes of hearing and determining the charge brought against the Appellant, the Respondent convened a Special Stewards Panel (the SSP).

The determination of the Special Stewards Panel

7. In a decision dated 18 December 2012, the SSP found that the charge brought against the Appellant was established.[1]

8. On 25 February 2013, following a separate hearing on the question of penalty, the SSP concluded that, pursuant to r 256(2)(d), the Appellant should be warned off permanently.[2]

The Appeal to the Racing Appeals Tribunal

9. The Appellant lodged an appeal to the Tribunal against the decision of the SSP.

10. In a determination dated 15 August 2013 (to which I will refer as *Sarina 1*), the Tribunal (differently constituted) dismissed that appeal[3].

The further Appeal to the Racing Appeals Tribunal

11. On 17 July 2015, the Appellant lodged a further appeal.

12. In a determination made on 9 December 2015 (to which I will refer as *Sarina 2*), the Tribunal (differently constituted) concluded that it had no jurisdiction to entertain that appeal[4].

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[1] At [63].
[2] At [16].
[3] At p. 15.
[4] At [40].

13. In light of the matters which have been raised in respect of the present appeal, a number of aspects of Sarina 2 should be noted at this point.

14. To begin with, the appeal in Sarina 2 was said to be against the decision of the Respondent:[5]

> *… to reject the application made by [the Appellant] for the lifting of the warning off imposed by the [SSP] on 25 February 2013 and confirmed on appeal by [the Tribunal] on 15 August 2023 arising from a breach of AHR 187(2).*

15. Bearing in mind the history of the matter, the Tribunal identified[6] the issue before it as whether it had jurisdiction entertain the appeal. The Tribunal noted[7] the submissions of the Respondent that principles of Res Judicata and Issue Estoppel applied, and that those principles, along with the provisions of s 17A of the Act, meant that the decision of the Tribunal in Sarina 1 was final.

16. In concluding that it did not have jurisdiction to hear and determine the appeal, the Tribunal found it unnecessary to consider the estoppel issues raised by the Respondent, and essentially based its determination upon a consideration of various statutory provisions, including those contained in the *Racing Appeals Tribunal Regulation 2015* (NSW) (the Regulation). The Tribunal's conclusions in Sarina 2 in respect of some of those provisions included the following.

17. First, in respect of cl 9(1)(d) of the Regulation, the Tribunal said the following:[8]

> *24. The Tribunal is a creature of statute and must take its powers and duties from the legislative scheme creating it. In interpreting those legislative provisions a purposive interpretation is appropriate and must be done in the light of the fact this is a sporting tribunal. As stated earlier the Tribunal cannot clothe itself with jurisdiction. The Tribunal accepts the respondent's argument that Parliament has intentionally limited the types of decisions with which it can deal. That flows from the long title, the limitation on the types of decisions to those provided in the regulation and the specificity and exhaustive nature of clause 9. Many examples could be given of decisions of HR or stewards which are not appealable in this*

[5] Sarina 2 at [1].
[6] Sarina 2 at [3].
[7] Sarina 2 at [10] – [11].
[8] Sarina 2 at [24]-[26].

code or the other two codes. A simple example is a mandatory minimum of a fine of $200 before an appeal can be lodged under Clause 9 (1)(d).

25. The issue becomes whether the decision of HR was a decision to "warn off". If it is not then it does not fall within clause 9. That is, is a decision of HR not to lift or vary a warning off a warning off? HR has specific power to lift or vary a warning off. The Tribunal does not. There is nothing in the scheme of the legislation nor in the subject rules which can be read to establish that a lifting or varying is the equivalent of the imposition of warning off. In particular there is nothing in clause 9 that would equate to that. The Tribunal does not accept that there can be any argument that it has an implied power to hear an appeal about a refusal to vary or lift as against the actual fact of warning off.

26. The Tribunal finds that the appeal does not fall within clause 9(1)(a) as the actions of HR do not comprise a decision to warn off.

18. Secondly, in terms of cl 9(1)(g) of the Regulation, the Tribunal said the following:[9]

27. It is next submitted by the appellant that the actions of HR involved a refusal to register.

28. The facts do not support such a conclusion. A letter was written seeking permission to drive again. That request was not dealt with. A pre-consideration of that request was the need to have the warning off lifted or varied. That pre-consideration was not met. There is no factual basis to support a refusal to register.

29. In addition the letter of request for a warned off person could not meet the scheme provided for in the rules for the registration of an unlicensed person such as the appellant. As this issue was not argued it is not necessary to set out the provisions of the rules, suffice it to say that there are forms and documents required.

30. The Tribunal finds that the appellant does not establish that there has been a refusal to register which will enliven clause 9(1)(b) of the regulation.

19. Thirdly, and again in terms of cl 9(1)(g) of the Regulation, the Tribunal said the following:[10]

31. The appellant also raises a brief argument that he has suffered a continuation of suspension of rights and privileges.

32. This argument was not the subject of detailed submissions. The Tribunal cannot find that an unlicensed person such as the appellant can be subject to the suspension of any right, such as a licence to drive, in circumstances where he has

[9] Sarina 2 at [27] – [30].
[10] Sarina 2 at [31] – [37].

no such licence. No implied entitlement exists to which a suspension could attach.

33. That [sic] the appellant fails to satisfy the Tribunal that he falls within clause 9(1)(g).

34. The next issue is the application to reopen the 2013 appeal proceeding.

35. The Tribunal considers this issue is not available to the appellant because of the provisions of section 17A. the 2013 decision was final. The appellant's only rights were to take a question of law to the Supreme Court of NSW.

36. The appellant does not satisfy the Tribunal that it has any power to visit itself with jurisdiction to revisit its orders. The appellant's attempt to equate this jurisdiction to the jurisdiction of a court granting injunctions is misplaced. There can be no such equivalent. This Tribunal is a creature of statute and there is no equivalent provision to the injunction power granted or to be found in any case law. There is no implied power to reopen proceedings for any purpose such as that argued.

37. It is therefore not necessary to do with the res judicata or issue estoppel arguments. To the extent that they might apply the arguments of the respondent are accepted to the effect that each of the necessary steps to establish res judicata and issue estoppel have been met [sic] That is, [sic] issue had been fully litigated, it had been decided, the same issue was dealt with between the same parties.

The present appeal

20. On 5 March 2024, the Appeals Secretary received an email from Ms Barbara Scott on behalf of the Appellant which was in the following terms:

I represent Ben Sarina and Mr Sarina wishes to appeal a decision of HRNSW.

The decision being appealed is HRNSW decision not to hold an inquiry into inaccuracies in a document prepared by HRNSW 12 years ago for use in a hearing in December 2012 involving Mr Sarina.

That decision of HRNSW was made 4 March 2024 and contained in a letter which is attached (paragraph 1)

I note that the appeal forms on the HRNSW website relate to appealing to the Tribunal after a decision has been made by the NSWHR Appeal Panel. In this situation, the HR Appeal Panel have no jurisdiction to hear the appeal.

Part 15B(1)(c) of The Racing Appeals Tribunal Act 1983 allow a person who is aggrieved by a decision of HRNSW to appeal to the Tribunal.

Can you please advise if there is a different Notice of Appeal form for this situation as the Appeal form on the website is not really suitable. That form talks about the decision of the NSWHR Appeal Panel, whether the appeal is against conviction or penalty and a stay of proceedings. None of those questions are relevant to this appeal.

If you require any further information, please do not hesitate to contact me

21. The correspondence of 4 March 2024 to which Ms Scott referred was under the hand of the Chief Integrity Officer of the Respondent, Mr Michael Prentice, and (in part) was in the following terms:

The purported "errors"
1. Your communications are misconceived. For the avoidance of doubt, Harness Racing New South Wales (HRNSW) will not be conducting any 'inquiry' or 'investigation' into purported inaccuracies in an aide memoir prepared by HRNSW 12 years ago for use in a hearing in December 2012 involving Mr Sarina.

2. The allegation in your email of 27 February 2024 that HRNSW is "now aware that there is evidence that the investigating stewards put forward untrue and misleading information" is incorrect. You have not provided any evidence of that kind, or indeed, any evidence at all. What you have done is performed your own analysis of some of the evidence from proceedings against Mr Sarina in 2012, that you say demonstrates error in factual findings made by the Special Stewards Panel and the Racing Appeals Tribunal when the matter was heard on appeal. Your emails therefore contain submissions, not evidence.

3. As advised to you in Mr Buckman's letter of 16 January 2024, Mr Sarina was legally represented by counsel in those proceedings, was fulsomely heard in respect of the matter (including by making both written and oral submissions), and he has exhausted all of his appeal rights some time ago. The time to make submissions about evidence and aide memoirs relied upon by HRNSW in proceedings against Mr Sarina in 2012 has long expired.

4. In any case, even if the errors that you purport exist were correct, those purported errors, taken at their highest, could not result in Mr Sarina being found "not guilty" of the breach to Australian Harness Racing Rules (AHRR) 187(2) for giving false or misleading evidence at an inquiry or investigation.

5. The false or misleading evidence that Mr Sarina gave to Stewards was that he only had dealings with Mr O'Toole "through speaking to him at the trotting authority"; had not spoken to Mr O'Toole on his mobile phone; and had no dealings with Mr O'Toole of a racetrack. The purported "errors" that you have identified, even if they were correct, would only reduce the number of times that mobile phone contact was made between Mr Sarina and Mr O'Toole, of a racetrack, and using a mobile phone. Put another way, the purported errors are incapable of proving that Mr Sarina might be "not guilty" of a breach to AHRR 187(2).

> *6.I otherwise repeat the terms of Mr Buckman's letter of 16 January 2024 that HRNSW has no jurisdiction to overturn factual findings of the Racing Appeals Tribunal of New South Wales, and again declines your invitation to do so. Your client's matter was heard, and finalised, over a decade ago.*

22. Following further correspondence with the Appeals Secretary, the Appellant filed a Notice of Appeal on 11 March 2024. Contrary to what had been stated in the original correspondence of 4 March, the Notice of Appeal particularised the appeal as being one against the determination of the SSP to warn off the Appellant.

23. The Notice of Appeal was accompanied by:

    (i) a letter of 11 March 2024 to the Appeals Secretary entitled *Ben Sarina out of time application;* and

    (ii) a copy of the decision in Sarina 1.

24. On 11 March 2024, following receipt of this material, a number of procedural orders were made for the purposes of case managing the appeal. In the preamble to those orders I made the following observations:

> *The Tribunal notes the application made by Ben Sarina (the Appellant) for an extension of time under cl 10(7)(a) and (b) of the Racing Appeals Tribunal Regulation (2015) to bring an appeal against a determination of 25 February 2013 made by a Special Stewards Panel for a breach of r 187(2) of the Harness Racing Rules. The Tribunal further notes that such a determination was the subject of an unsuccessful appeal to the Tribunal (differently constituted) delivered on 15 August 2013. In these circumstances, the Tribunal considers that there may be an additional issue of whether the Tribunal has the requisite jurisdiction to deal with an appeal, even if the application for an extension of time is successful.*

THE ISSUES

25. It follows from the above that there are two issues for determination, namely whether:

(i) the Tribunal has the jurisdiction to hear and determine the appeal that the Appellant seeks to bring; and, if so

(ii) the Appellant should be granted an extension of time in which to do so.

26. With the consent of both parties, those issues have been determined on the papers, absent a formal hearing.

27. In the event that I come to the conclusion that I do not have jurisdiction to hear and determine the appeal, consideration of the second issue will become otiose.

THE MATERIAL PROVIDED BY THE PARTIES

28. The Appellant has provided the following material:

(i) a copy of the (undated) determination of the Tribunal in a matter of *Cameron Fitzpatrick*;

(ii) a copy of the decision of the Court of Appeal in *Day v Harness Racing New South Wales* [2014] NSWCA 423;

(iii) a copy of the determination of the Tribunal in a matter of *Mary-Jane Mifsud* of 11 March 2019;

(iv) a copy of the determination of the Tribunal in a matter of *Tony Pullicino* of 22 August 2022;

(v) a copy of a medical referral of Dr Mohammed Amjad of 13 February 2015 pertaining to the Appellant, along with accompanying documents;

(vi) a copy of a letter to the Respondent from Smythe Wozniak Legal dated 19 October 2012 pertaining to the Appellant's capacity to attend the hearing convened by the SSP;

(vii) submissions in response to those filed on behalf of the Appellant;

(viii) a copy of the determination of the SSP dated 18 December 2012;

(ix) a copy of the determination of the SSP on penalty dated 25 February 2013;

(x) a copy of a letter forwarded to Mr Michael Prentice, the Chief Integrity Officer of the Respondent, dated 25 March 2024; and

(xi) a copy of a letter dated 9 July 2015 from Mr Prentice to the Appellant advising that the Board of the Respondent had rejected an application for the warning off to be lifted.

29. The Respondent has provided the following material:

(i) an outline of submissions;

(ii) copies of the decisions of the Tribunal of 15 August 2013 and 9 December 2015;

(iii) a copy of a Court Attendance Notice issued to the Appellant alleging the offence of recklessly causing grievous bodily harm to Michael Hurley on 27 February, along with copies of further documents relating to that charge including evidentiary statements; and

(iv) a copy of the letter dated 9 July 2015 referred to in [27](xi) above.

30. It should be noted that some of the material provided by the parties goes solely to the second issue identified above. In light of the conclusions I have reached, such material has not been considered.

THE RELEVANT LEGISLATION

31. It is uncontroversial that the Tribunal is a creature of statute.

32. Given that the first issue to be addressed is that of jurisdiction, it is appropriate to at this point to set out some relevant legislative provisions.

The Racing Appeals Tribunal Act 1983 (NSW)

33. To the extent relevant for present purposes, the long title to the *Racing Appeals Tribunal Act 1983* (the Act) is in the following terms:

An Act to constitute a Racing Appeals Tribunal to hear appeals from ..... certain decisions under the Harness Racing Act 2009, and for other purposes.

34. The Tribunal is constituted by s 5 of the Act. Section 15B, which is contained within Division 2 of Part 3 of the Act, governs appeals to the Tribunal in respect of harness racing and is in the following terms:

> ***15B Appeals to Tribunal relating to harness racing***
> *(1) A 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 the Appeal Panel on an appeal under the Harness Racing Act 2009;*
> *(b) decision for which an appeal is properly made to the Appeal Panel under the Harness Racing Act 2009 if the Appeal Panel –*
> *(i) neglects or refuses to hear the appeal or*
> *(ii) fails to make a decision on the appeal*
> *(c) a decision of HRNSW.*
>
> *(2) HRNSW may, in accordance with the regulations, appeal to the Tribunal against a decision referred to in subjection (1)(a) or (b).*

35. Section 17A of the Act embodies the common law principle of finality in respect of the Tribunal's determinations by providing:

> ***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, ... or HRNSW ....;*
> *(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.*

36. Section 18 of the Act addresses the appeals which may be brought before the Tribunal 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 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 2015 (NSW)

37. Consistent with both provisions of s 18 of the Act, and the long title, cl 9 of the Regulation prescribes those decisions from which an appeal shall lie to the Tribunal under s 15B of the Act (i.e., appeals relating to harness racing). To the extent relevant cl 9 is in the following terms:

9 Decisions from which an appeal lies to Tribunal

(1) An appeal may be made to the Tribunal under section 15A or 15B of the Act only in respect of a decision--
(a) to disqualify or warn off a person, or
...
(g) to suspend any licence, right or privilege granted under the rules, or

...

38. Clause 10(1) of the Regulation provides that an appeal pursuant to s 15B of the Act must be lodged with the Secretary within 7 days of the date on which the Appellant is notified of the decision which is the subject of the appeal.

39. Finally, cl 10(7)(a) of the Regulation confers a power on the Tribunal to extend the time for lodging a Notice of appeal if it is satisfied that special or exceptional circumstances exist that justify such extension.

The Australian Harness Racing Rules

40. It is also necessary to note two particular definitions contained in the Dictionary to the Rules. The first is the term *"suspension"* which:

    (i) in relation to a licenced person means the temporary or permanent withdrawal of all rights provided by any licence issued by a Controlling Body;

    (ii) in relation to a horse, means the temporary or permanent withdrawal of its right to participate in any race;

    (iii) in relation to a non-licenced person, means the temporary or permanent withdrawal of a right to participate in a facet of Harness Racing.

41. The second are the terms *"warned off"* and *"warning off"* which mean *"a decision or penalty prohibiting a person from entering any racecourse or place under the control of a club or the Controlling Body"*. A person who is "warned off" shall be subject to the same prohibitions as a disqualified person mentioned in rule 259 sub-rule 1.

<u>THE FIRST ISSUE – JURISDICTION</u>

Submissions of the Appellant

42. The Appellant submitted that he fell within the definition of a "person aggrieved" within the meaning of s 15B(1) of the Act, such that it was open to him to bring an appeal under the Regulation. In this latter respect, he submitted that his proposed appeal fell within cl 9(1)(g), namely an appeal against a decision to suspend any licence, right or privilege granted under the rules.

43. The Appellant acknowledged the history as I have outlined it above. More specifically, the Appellant acknowledged the decision of the SSP, as well as the decisions of the Tribunal in Sarina 1 and Sarina 2. In doing so, he specifically stated that he *"accepts and respects [the decision in Sarina 2]"*. The Appellant went on to submit that the present appeal was *"not an application to revisit [Sarina*

2]", but was against the Respondent's decision to *"suspend any licence, right or privilege granted under the rules**, via the penalty of a warning off**"* (my emphasis).

44. In developing this position, the Appellant submitted that in issuing the warning off, the Respondent had, inter alia, permanently suspended his licence, rights or privileges granted to him under the rules. Accordingly, it was submitted that the appeal fell within the terms of cl 9(1)(g) of the Regulation.

45. The Appellant further submitted that the present appeal was not an attempt to circumvent the decision in Sarina 2 because:

    (i) a person is able to appeal against a warning off under cl 9(1)(a) of the Regulation, or against a suspension under cl 9(1)(g);
    (ii) the SSP suspended his rights or privileges;
    (iii) that suspension was a "sub-set" of the penalty of a warning off; and
    (iv) a distinction was to be drawn between a "warning off" on the one hand, and a "suspension" on the other.

Submissions of the Respondent

46. The Respondent made a number of submissions in opposition to the Appellant's position.

47. First, the Respondent submitted that the Notice of Appeal amounted to an abuse of process, in circumstances where the outcome now sought by the Appellant was identical to the outcomes which had been sought in:

    (i) Sarina 1;
    (ii) Sarina 2; and
    (iii) a series of previous (and apparently informal) applications to the Respondent for the warning off to be lifted.

48. Secondly, it was submitted that in seeking to bring the appeal, the Appellant was effectively repeating the position he had previously adopted, in circumstances where the same issue he now seeks to raise had been affirmatively determined against him.

49. Thirdly, it was submitted that when properly viewed, the present appeal amounted to nothing more than an attempt to circumvent the determination in Sarina 1, which the Appellant had sought (unsuccessfully) to do in Sarina 2.

50. Fourthly, and to the extent that the Appellant sought to argue that a warning off fell within cl 9(1)(g) of the Regulation, the Respondent submitted that such a proposition could not be made out in light of the definitions of the terms *"suspension"* and *"warning off"* in the Rules.

51. Fifthly, it was submitted that the position adopted by the Appellant failed to come to terms with, and address, the fundamental facts that (a), the proposed appeal did not fall within cl 9 of the Regulation, and (b) the principle of finality embodied in s 17A of the Act.

52. In these circumstances the Respondent submitted that the Appeal should be dismissed.

Submissions of the Appellant in reply

53. In reply, the Appellant emphasised his stated position, namely that the present appeal was one against a decision to suspend a licence, right or privilege and was therefore an appeal within cl 9(1)(g) of the Regulation. On this basis, he sought to argue that the appeal was *"different to the 2013 appeal which was under cl 9(1)(a)"*.

54. Various references were made in the Appellant's submissions in reply to the fact that evidence which was before the SSP was *"factually untrue",* that the Respondent *"had refused to arrange an interview/enquiry"* so as to allow the

Appellant to *"present what he had discovered",* that a *"miscarriage of justice"* had occurred as a consequence of false evidence being given, and that the Respondent had *"refused to hear [the Appellant]"* in relation to these matters. I should simply say that in my view, none of those matters bear upon the question of whether the Tribunal has jurisdiction to hear and determine the appeal, and I have not had regard to them.

55. Finally, it was submitted that in the event that I came to the conclusion that there was no jurisdiction to hear and determine the appeal, or alternatively if I found that there was jurisdiction but concluded that an extension of time should not be granted, I should request the Board of the Respondent to *"reconvene as a matter of urgency to hear [the Appellant] on the matter of the untrue evidence put forward by investigating Stewards"* on the basis that this was "*a serious integrity issue"*.

CONSIDERATION

56. In considering the question of jurisdiction it is important, at the outset, to define precisely how the Appellant puts his case. For that purpose, it is necessary to identify two matters, namely:

    (i) the decision against which the appeal is brought; and
    (ii) the provision(s) of the Regulation relied upon.

57. As to the first matter, there is a degree of inconsistency in the Appellant's position. In the original correspondence to the Appeals Secretary, it was stated that the appeal was against a decision made by the Respondent on 4 March 2024 not to hold and enquiry into asserted inaccuracies in a document prepared in or about 2012. However, in the Notice of Appeal the decision the subject of the appeal was specified as that of the SSP. Given the Appellant's submissions, particularly those in reply, I have proceeded on the basis that the appeal is against the decision of the SSP, made on 25 February 2013, to permanently warn him off pursuant to r 256(2)(d).

58. As to the second matter, the submissions of the Appellant make it apparent that he relies on the provisions of cl 9(1)(g) of the Regulation. In this regard his submissions state the following:[11]

> *[The Appellant] seeks to lodge an out of time appeal. The appeal is against [the Respondent's] decision to suspend any licence, right or privilege granted under the rules, via the penalty of a warning off.*

59. The Appellant's case, therefore, is that the decision of the SSP to warn him off was a decision to suspend a licence, right or privilege which had been granted to him under the Rules, such that he comes within cl 9(1)(g) of the Regulation.

60. For the reasons that follow, and bearing in mind the basis on which the Appellant puts his case, I am not satisfied that the Tribunal has jurisdiction to hear and determine the proposed appeal.

61. I accept that the Appellant is a *"person aggrieved"* within s 15B of the Act. However, that alone does not clothe the Tribunal with jurisdiction. Whilst the fact that the Appellant might be a person aggrieved confers a prima facie right of appeal, that right can only be exercised *"in accordance with the Regulations"*. In other words, the Appellant has a right of appeal only if he can come within one of the categories specified in cl 9 of the Regulation. For the reasons set out below, the Appellant's attempt to bring himself within the terms of cl 9(1)(g) must fail.

62. The requirement that the Appellant bring himself within one of those categories is strict. That arises from the fact that the Parliament has, by enacting cl 9 of the Regulation, stipulated in precise terms those appeals in respect of which the Tribunal will have jurisdiction. In this regard, the Appellant categorises the decision of the SSP as being a decision to suspend a licence right or privilege granted under the rules "*via the penalty of a warning off*". On that basis, he seeks

[11] At p. 3.

to bring himself within cl 9(1)(g) of the Regulation, thus conferring jurisdiction on the Tribunal. In my view, that position is untenable for a number of reasons.

63. To begin with, the definitions of the terms *"suspension"* and *"warning off"* in the rules make it clear that a distinction is to be drawn between the two. The terms are not to be conflated.

64. Moreover, in making provision for those decisions against which an appeal might be brought, the Regulations themselves draw a similar distinction, which is self-evident from the separate inclusion of cl 9(1)(a) and cl 9(1)(g).

65. In those circumstances, the fact that a person who is warned off permanently may also be suspended, in the sense of having his or her rights withdrawn, is not to the point. It is clear that in enacting the Regulations, it was intended that in terms of conferring jurisdiction to hear and determine an appeal, the two circumstances were to be regarded as separate and distinct.

66. It follows that in my view, the Appellant's attempt to bring himself within cl 9(1)(g) is fundamentally flawed. It involves an impermissible conflation of the provisions of cl 9(1)(a) and cl 9(1)(g). I am fortified in that conclusion by the fact that the long title to the Act makes reference to appeals from *"certain decisions"*. That, in my view, is a further indication that the provisions of cl 9 are to be interpreted as creating separate and distinct circumstances in which an appeal can be brought, and in which jurisdiction on the Tribunal can thus be conferred.

67. Further, there is no warrant to read into cl 9(1)(g) the words *"in the nature of a warning off"* as the Appellant seeks to do in an attempt to bring himself within that provision. There is no ambiguity in the terms of cl 9(1)(g) and in those circumstances it is not open to the Appellant to read into a statutory provision words which are simply not there. Moreover, in the circumstances of the present case, the Appellant's attempt to do so entirely overlooks the provisions of cl 9(1)(a) which address, in specific terms, an appeal against a warning off. The Appellant

has already exercised his right of appeal in respect of that determination, leading to the decision in Sarina 1. Section 17A of the Act thus renders Sarina 1 final.

68. Despite the Appellant's assertions to the contrary, what he really seeks to do by the proposed appeal is relitigate the determination made in Sarina 1 in a different guise. His attempt to distinguish between the fact that the appeal in Sarina 1 was brought under cl 9(1)(a) of the Regulation, and that the present appeal is sought to be brought under cl 9(1)(g) of the Regulation, is to draw a distinction without a difference. The simple facts of the matter are that:

    (i) the Appellant was warned off by the SSP;
    (ii) that penalty was affirmed in Sarina 1; and
    (iii) s 17A of the Act imposes what is, in effect, a statutory estoppel, and renders the determination in Sarina 1 final.

69. As a consequence of those matters, it is not open to the Appellant to seek to litigate the issue of his warning off for a third time.

70. Finally, bearing in mind that the proposed appeal centres on the decision to warn off the Appellant, the conclusion reached in Sarina 2[12] was that there was no jurisdiction to hear an appeal of that kind. I have set out the salient parts of that determination, with which I respectfully agree. The proposition that it was open to the Appellant to rely on cl 9(1)(g) was specifically rejected by the Tribunal on that occasion.[13] That determination provides further support for the conclusion that there is no jurisdiction to determine the appeal.

71. Whether a combination of any of the factors to which I have referred would, as the Respondent has submitted, support a conclusion that the proposed appeal constitutes an abuse of process, is not something I need to determine. Further, and given my conclusions, it is not necessary for me to consider the provisions of

[12] See [10] – [11].
[13] At [33].

cl 10 of the Regulation, or the material provided by either party in relation to that aspect of the matter.

CONCLUSION

72. Although the submissions of the Respondent invited me to dismiss the appeal, there appears to me to be a procedural difficulty in making an order in those terms. Accepting, for the reasons I have stated, that I have no jurisdiction to entertain the appeal, it follows that there is no appeal before me. If there is no appeal before me, there is nothing to dismiss. In these circumstances, the appropriate order is simply that there is no jurisdiction.

73. Similarly, as I have no jurisdiction to hear and determine the appeal, I have no jurisdiction to make any order regarding the appeal deposit. I would only observe that, given the conclusion I have reached and the reasons I have expressed, the equitable outcome would seem to be that the appeal deposit be refunded. However that will be a matter for the parties to resolve between themselves.

74. Finally, as I have previously noted, the Appellant submitted that in the event that I were to reach the conclusion that there was no jurisdiction to hear and determine the appeal, I should request the Board of the Respondent to convene to hear the Appellant on the issue of false evidence given by Stewards in relation to the investigation which lead to the penalty imposed by the SSP. An allegation of that nature is not a matter for me and I have no power to make the request sought. Accordingly, I do not propose to do so.

ORDER

75. The Tribunal does not have jurisdiction to hear the Appellant's appeal.

THE HONOURABLE G J BELLEW SC

14 May 2024