RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

RESERVED DECISION

5 SEPTEMBER 2019

APPELLANT MICHAEL EBERAND

GREYHOUNDS AUSTRALASIA RULES 86(n)and (o)

DECISION

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

BACKGROUND

1. The appellant, Michael Eberand, appeals against a decision of the steward of Greyhound Racing NSW ("GRNSW") of 25 March 2019 to impose upon him a monetary penalty of $2500 for a breach of rule 86 (n) but no additional penalty for a breach of rule 86 (o).

2. The steward Mr Adrian Anderson had been appointed by GRNSW to conduct an inquiry in relation to the export of greyhounds by a number of persons. The steward made breach findings of the two rules on 22 January 2019 in respect of the appellant and others and imposed a penalty decision on 25 March 2019 in respect of the appellant.

3. In written submissions the appellant indicated that his appeal was now only in respect of the two findings of breaches of the rules and not in respect of penalty for those breaches, if found established on appeal. However he maintained that he had not breached the two rules.

4. The grounds of appeal identified a number of issues for consideration and these were set out in detail in the appellant's written submission. However at the hearing only certain parts of the grounds of appeal and parts of the written submissions were relied upon. The Tribunal only deals with those matters remaining alive at the hearing.

THE CHARGES

5. The Tribunal notes that the charges are for breaches of the Rules as they existed in 2015.

6. The two charges and their particulars are as follows:

"RULE 86:

A person (including an official) shall be guilty of an offence if the person-

(n) knowingly aids, abets, counsels or procures a person to commit a breach of these Rules-

Particulars:

He knowingly aided, abetted, counselled or procured [Stephen Farrugia] to commit a breach of Rule 124(1) by the export of Wandering Mija ("WM") without a greyhound passport and certified pedigree ("the documentation") issued by Greyhounds Australasia ("GA").

(o) has, in relation to a greyhound or greyhound racing, done a thing, or omitted to to do a thing, which in the opinion of the Stewards or the Controlling Body, as the case may be, is negligent, dishonest, corrupt, fraudulent or improper, or constitutes misconduct-

Particulars:

in facilitating the export of WM to Dubai without a valid passport and certified pedigree, he has done a thing that is negligent, improper, or constitutes misconduct."

7. The Rule 86(n) matter refers to rule124(1) which was as follows:

RULE 124(1):

“Any person intending to export a greyhound, being the subject of these Rules or to those of a relevant Registration Controlling Body, from Australia or New Zealand to any other country (excluding Australia or New Zealand) must, prior to meeting the quarantine and inspection service requirements of the relevant country, obtain a greyhound passport and certified pedigree issued by Greyhounds Australasia."

THE EVIDENCE

8. The hearing proceeded on the basis of submissions with limited additional written evidence. No witnesses were called. Accordingly it is not necessary to set out in detail the voluminous documents contained in the two bundles tendered by the respondent and the one bundle tendered by the appellant. Those three bundles contained all of the documents that were before the steward including in particular records of interview, transcripts, statutory declarations, correspondence and documents of proof. The respondent tendered an email trial which proved that no passport or certified pedigree had issued by GA for the export of WM to Dubai. The appellant put in evidence the RAT decision in the appeal of Farrugia of 28 September 2018.

9. The respondent conceded that if it had been applied for there was a possibility that the appellant, or others, could have obtained a greyhound passport and certified pedigree from GA for WM for the export to Dubai.

THE FACTS

10. There is a considerable body of evidence available to the Tribunal. In setting out the facts on which this decision is based the Tribunal indicates that it has read all that evidence and considered the differing versions by various witnesses and participants. The Tribunal notes the limited factual matters emphasised in submissions in this appeal.

11. Therefore there is not a detailed recitation of the evidence and statements or conclusions why the following findings are made. The evidence is not dissected in detail in this decision.

12. The findings below are those made by the Tribunal based on that approach.

PARTICIPANTS

13. The appellant at all relevant times was a licensed harness racing trainer. He was the breeder of WM. He transferred WM to a syndicate comprising his son Bradley Eberand and James Cortis. From January 2015 he was a director of the Greyhound Breeders and Trainers Association ("GBOTA").

14. Peter Lagogiane ("Lagogiane")was a licensed trainer who was based in Dubai and working for the Crown Prince of the emirate. He was involved on behalf of the Crown Prince in the purchasing and importing into Dubai of greyhounds from overseas jurisdictions. He was a long time acquaintance of the appellant.

15. Stephen Farrugia ("Farrugia") was a breeder and developer of greyhounds and involved with other family members in the export of greyhounds to overseas jurisdictions. He was a frequent purchaser of greyhounds from breeders and licensed persons for the purposes of export. His family business openly advertised for greyhounds for purchase and export. The Tribunal dealt with his appeal on 28 September 2018 in relation to various breaches involving export of greyhounds and failing to comply with the rules on transfer of greyhounds. He was well-known to the appellant. Lagogiane had used him to purchase and export greyhounds to Dubai prior to the dealings the subject of this appeal. Lagogiane knew Farrugia had the expertise and know how to export greyhounds and to attend to all necessary arrangements to do so. He ran a trial track at Glengarry.

THE TRANSACTION

16. WM was exported to Dubai.

17. No greyhound passport or certified pedigree issued by Greyhounds Australasia was obtained for the export of WM.

18. Each of the participants knew that as a result of their arrangements that WM would be exported to Dubai.

19. As a result of discussions with the Crown Prince, Lagogiane, in June 2015, telephoned the appellant and made inquiries about another greyhound but the appellant informed him it was not for sale and the appellant indicated that WM might be. The appellant was assured that there were no welfare issues in Dubai. Discussions took place on the sale of WM and its transfer to Dubai.

20. The appellant spoke to the syndicate owners and they expressed interest in selling WM. Neither the appellant nor the syndicate owners had any knowledge of or experience in a sale of a greyhound for export. The appellant indicated he would make inquiries. He said he would do so:

".. check out whether it is all above board, ridgy-didge.."

21. The appellant made inquiries of GRNSW and was referred to GA. The appellant stated that his conclusion on that conversation with an officer of GA was that

the officer was unhelpful. In essence he was told that an application would have to be made, there was complicated paperwork to be completed but that no indication was given of the likely success of any such application.

22. The appellant reported back to the syndicate owners of the complexities involved with export and it was determined that they were all too busy and the sale would not proceed.

23. While the appellant's evidence varied from his interviews to his statutory declaration and at the inquiry it appears open to find that he reported that decision back to Lagogiane.

24. Either at the time of that reporting back or earlier Lagogiane had told the appellant that it was Farrugia who would buy WM and do its export.

25. In the meantime Farrugia had been in discussion with Lagogiane and representatives of the Crown Prince and a price for WM was settled at $5000.

26. Later the appellant saw Farrugia at Glengarry and was told that Farrugia wished to buy WM for $5000 for the purposes of exporting it to the Crown Prince in Dubai. The appellant was told to drop WM off with its papers and he would be paid in cash. It is at this meeting that the appellant says that Farrugia told him "that he had all exporting approvals". The appellant says that he told Farrugia that he would be responsible for the greyhound and would need to register it in Farrugia's name. The agreement for the sale was settled.

27. in his interview of 2 March 2018 the appellant told the steward that at that meeting Farrugia said to him he had the "the licensing to do that", that is the export. The appellant says that he replied "you buy the dog and then it's yours and your responsibility to get the exporting correct". The appellant acknowledged that Farrugia did not say that he had the ability to get passports or made any reference to a requirement for passports. He said it was implied that they had "the capability to do it legally". He acknowledged that Farrugia probably did not know that he needed a passport to export the greyhound. The Tribunal notes that it is an established fact in the Farrugia appeal, and not in dispute here, that Farrugia knew nothing about the requirement for a passport or a certified pedigree.

28. The appellant then obtained the syndicate owners' approval to proceed. The syndicate owners signed the transfer papers.

29. On 6 July 2015 the appellant took WM and the signed transfer papers to Glengarry, handed WM to Farrugia who countersigned the transfer papers and paid the appellant cash of $5000.

30. The signed transfer papers are in evidence and in accordance with the agreement that he would do so, Farrugia, having signed those papers, accepted that he would comply with the rules relating to the transfer. The form states:

"I/We hereby agree to be bound by and to comply with all such Rules and Statutory provisions in respect of greyhound racing and registration…" .

31. WM was registered in the name of Farrugia and shortly after that exported to Dubai by Farrugia.

32. At the steward's inquiry the appellant was questioned by the steward that in view of his knowledge and standing in the industry that he should have checked that the purchasers were following the processes that he now knew existed for a passport. The appellant replied:

"No, Peter had told me that they look after all that, that they do, that's what they do and I had no reason to believe they weren't reputable….. I told him about the phone call to GA and he said to me that they look after all that, that they know what they're doing."

33. In his interview with the steward on 2 March 2018 he was asked what Farrugia said about looking after the export process. The appellant said:

"clearly he said to me that they had the licensing to do it, or the, I'm not sure if the word was assisting, but the capability to do it legally. No problem."

34. He was then asked what he had been told about their ability to get passports. The appellant said;

"They never mentioned that. They just thought they had the ability to export as far as I recall…….. Because I don't know that they knew and I have my doubts that they knew……. I think in hindsight they probably had the whatever the federal government exporting approval is……. And saw that as they had the approval, yep."

MATTERS TO BE PROVED

35. The respondent accepts that it must prove its case in respect of each breach to the Briginshaw standard.

Rule 86(n)

Ingredients

the appellant is a person who

knowingly

aids or abets

a person

to commit a breach of these rules

36. The respondent does not rely upon the ingredients of counsels or procures.

37. It is not in issue that the appellant is a person within the meaning of the rule.

38. It is not in issue that Farrugia is a person who has committed a breach of these rules. That is established because it is proved and not in dispute that Farrugia exported WM to Dubai and did not have a passport or certified pedigree from GA contrary to rule 124(1) as particularised.

39. There remains to be found whether the ingredients of knowingly and also aids or abets are proved.

86(o)

Ingredients

the appellant is a person who

in relation to a greyhound or greyhound racing

done a thing, or omitted to do a thing,

which in the opinion of the Stewards or the Controlling Body is

negligent, dishonest, corrupt, fraudulent or improper, or constitutes misconduct.

40. The respondent does not rely upon the ingredients of dishonest, corrupt, fraudulent or improper.

41. It is not in issue that the appellant is a person within the meaning of the rule.

42. It is not in issue that the matters particularised are in relation to a greyhound or greyhound racing.

43. It is not in issue that the conduct particularised comprises the doing of a thing or omitting to do a thing.

44. It is not in issue that the conduct particularised, if otherwise proved, will meet the test of "in the opinion of the Stewards". The opinion of the Controlling Body is not relevant.

45. There remains to be found whether the conduct particularised was negligent or constituted misconduct.

THE RELEVANT LAW

AID AND ABET

The Respondent

46. In its written submission the respondent accepted it had to prove three ingredients namely:

Farrugia breached rule 124(1)-this is not in issue

the appellant knew about the essential circumstances that established that breach

the appellant assisted or encouraged Farrugia to commit the breach.

47. In its oral submission the respondent accepted that it had to prove the appellant knowingly aided and abetted.

48. The respondent urged that careful consideration must be applied in the application of principles from criminal law cases which were dealing with accessory before or after the fact as compared to aid and abet cases.

49. The respondent accepted it must prove the commission of the substantial offence before it could establish aid and abet-this is not in issue as the respondent has proved the breach of rule 124(1).

50. In its written submission the respondent stated that it was necessary to prove knowledge by a combination of suspicious circumstances and failure to make inquiry, Pereira v DPP (1988) 82 ALR 217 at 219-220 ("Pereira") or by wilful blindness, Giorgianni v R (1985) 156 CLR 473 at 495-505 ("Giorgianni").

51. The respondent expanded on these issues in oral submissions, as follows.

52. In Pereira the court stated at 219 in obiter remarks:

"Even where, as with the present charges, actual knowledge is either a specified element of the offence charged or a necessary element of the guilty mind required for the offence, it may be established as a matter of inference from the circumstances surrounding the commission of the alleged offence. However, three matters should be noted. First, in such cases the question remains one of actual knowledge: Giorgianni…It is never the case that something less than knowledge may be treated as satisfying a requirement of actual knowledge. Secondly, the question is that of the knowledge of the accused and not that which might be postulated of a hypothetical person in the position of the accused, although, of course, that may not be an irrelevant consideration. Finally, when knowledge is inferred from the circumstances surrounding the commission of the alleged offence, knowledge must be the only rational inference available. All that having been said, the fact remains that a combination of suspicious circumstances and failure to make inquiries may sustain an inference of knowledge of the actual or likely existence of the relevant matter. In a case where a jury is invited to draw such an inference, a failure to make inquiries may sometimes, as a matter of lawyers shorthand, be referred to as wilful blindness…"

53. In Giorgianni the Head Note states:

> **“No one may be convicted of aiding, abetting, counselling or procuring the commission of an offence unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender. Wilful blindness, that is to say the deliberate shutting of one's eyes to what is going on, is equivalent to knowledge, but neither negligence nor recklessness is sufficient".**

54. The respondent took the Tribunal to the decision of Gibbs CJ where he said at 487:

> **"suspicion of the existence of facts, although relevant when the accused has deliberately shut his eyes, does not by itself amount to or take the place of knowledge for present purposes. Further, it is not correct… be convicted… because he has acted recklessly….. However connivance or wilful blindness, is only relevant to the liability of the secondary party to an offence because it virtually amounts to knowledge.**
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> **My view of the law may be summed up very shortly. No one may be convicted of aiding, abetting, counselling or procuring the commission of an offence unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender. Wilful blindness, in the sense that I have described, is treated as equivalent to knowledge but neither negligence nor recklessness is sufficient."**

55. The respondent took the Tribunal to the decision of Mason J at 495:

> **“As we have seen, knowledge of all the essential facts giving rise to the dangerous driving is necessary to constitute commission of the offence on the part of the applicant. But it is not necessary that there should be actual knowledge of all the essential facts constituting the offence in order to establish secondary participation. It is enough if the defendant has deliberately shut his eyes to a relevant fact or has deliberately abstained from obtaining knowledge by making an inquiry for fear that he may learn the truth.."**

56. The respondent took the Tribunal to the decision of Wilson J, Deane J and Dawson j at 504:

> **“… Intent is an ingredient of the offence of aiding and abetting or counselling and procuring and knowledge of the essential facts of the principal offence is necessary before there can be intent. It is actual knowledge which was required and the law does not presume knowledge or impute it to an accused person where possession of knowledge is necessary for the formation of criminal intent. Secondly, although it may be a proper inference from the fact that a person has deliberately abstained from making an inquiry about some matter that he knew of it and, perhaps, that he refrained from inquiry so that he could deny knowledge, it is nevertheless actual knowledge which must be proved and not knowledge which is imputed or presumed."**

The Appellant

57. The Appellant's written submission on the law to be applied was set out in 21 paragraphs. They are summarised. Reliance is placed upon Giorgianni and others.

58. Having stated the common law requires the aider or abettor to be present at the commission of the offence by the principal offender it was stated that to be an accessory before the fact his conduct should indicate :

he knew that the particular deed was contemplated and

he approved of or assented to it and

his attitude in respect of it in fact encouraged the principal offender to perform the deed.

59. It was submitted that as the appellant had to be linked in purpose with the person actually committing the offence and is by his words or conduct doing something to bring about or rendering more likely such commission. It was submitted that that link in purpose is not established through ignorance of the facts such the there was a belief it was an innocent act. It was submitted he must at least know the essential matters which constitute the offence.

60. It was conceded that it was not necessary that there should be actual knowledge of all the essential facts but it would be enough if there was a deliberate shutting of the eyes to a relevant fact or abstaining from obtaining knowledge by making an inquiry for fear that the truth may be learnt .

61. It was then submitted that there must have been an intentional participation in the principal offence with knowledge of the essential matters which make up that offence whether or not there was knowledge that that amounted to an offence . That is that the person intended to act as a secondary participant but with knowledge of the essential facts of the principal offence.

62. It was submitted that it is actual knowledge and not presumed or imputed knowledge. It was conceded a proper inference could arise from deliberately abstaining from making an inquiry about matters he knew of.

63. On a submission not in dispute, it was put that negligence or recklessness cannot constitute knowledge.

64. Next it was submitted his participation must be intentionally aimed at the commission of the acts which constitute the offence. It is not sufficient if knowledge or belief extends only to the possibility or even probability that the acts will constitute the factual ingredients.

65. it was submitted that while exposure to the obvious may warrant the inference of knowledge the shutting of one's eyes to the obvious is not an alternative to actual knowledge which is required as the basis of intent to aid and abet. Knowledge of the essential facts includes knowledge of the principal in the first degree's intention. This knowledge will crystallise in the accessory's mind before he involves himself as an accessory to that offence. Accordingly it is necessary to have knowledge after an awareness of the principal offenders intentions in the future that he then encourages and assists rather than awareness of the actions done by the principal offender in the past.

66. In conclusion it was stated that the respondent must establish that the secondary participant intentionally participated with knowledge or awareness that the principal offender was committing or was about to commit the offence and that the secondary participant intended his acts to assist or encourage the principal in the first degree or intentionally conveyed to the principal in the first degree that he supported what was being done and would be willing to provide some help if necessary.

67. In oral submissions the appellant relied upon the principle that the appellant was entitled to proceed on the basis that the other parties would proceed in accordance with the rules and that they would be expected to comply with the rules.

68. It was also submitted that it was necessary for the respondent to prove that the appellant encouraged the breach of the rule.

69. The appellant's written submission in reply revisited Giorgianni and the decision of Wilson j, Deane J and Dawson J at 505 (supra):

> **"Intent is an ingredient of the offence….. knowledge of the essential facts of the principal offences is necessary before there can be intent…. The law does not presume knowledge or impute it… It is nevertheless actual knowledge which must be proved and not knowledge which is imputed or presumed… The necessary intent is absent if the person alleged to be a secondary participant lacks knowledge that the principal offender is doing something or was about to do something which amounts to an offence…".**

The Respondent in Oral Reply

70. it was emphasised that the knowledge could come from the circumstances coupled with a closing of the eyes.

71. It was submitted that the appellant's argument that it was necessary to prove the appellant encouraged is not correct as the case could be proved by one or both of assist or encourage.

NEGLIGENCE / MISCONDUCT

Negligence

The Respondent

72. In oral submissions it was said it was not necessary to find that duty was owed but there was a need to look to the context of the rule and the facts.

73. The RAT decision of Rowe of 29 July 2016, paragraphs 11, 32 to 35 were relied upon. That case dealt with rule 86(o). The Tribunal said:

> **"11. The meaning of negligence in this rule is determined by the Tribunal from the following analysis: there is no definition of negligence in the rules; there is no case law presented to the Tribunal as to Racing Appeal Tribunal decisions on this rule or, indeed, under the other codes. All of those things are not surprising because negligence has had, since the snail was in the bottle a long time ago, a straightforward and ordinary meaning. Many courts and authors have phrased it in slightly different ways, but all of them come back to what this Tribunal might paraphrase as being what a reasonable person did or did not do in the circumstances that confronted that person when that conduct is assessed on an objective basis.**
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> **32. The Tribunal does not accept the ejusdem generis argument to the effect that negligent has to be in the context of some mental element which has some relationship to the other ingredients – dishonest, corrupt, fraudulent or improper or misconduct. The Tribunal is satisfied that the rule is so worded and is so broad as to adopt differing concepts, each of which has differing connotations. Dishonest, corrupt and fraudulent obviously connote aspects of a mental element. Negligence has always been assessed on the basis that the subjective conduct of a person who is said to have acted negligently is irrelevant. It is an objective test. Therefore, negligence can be distinguished from the other ingredients in 86(o) for that and, no doubt, a number of other reasons.**
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> **33. The argument is also advanced on the basis that that ejusdem generis test would enable a differentiation between human error and the conduct said to have been engaged in here, and that human error has no part to play in respect of negligence. In respect of that, the Tribunal sees no assistance from analysing the remaining words in the sub rule of dishonest, corrupt, etc, in**

trying to ascertain what is the meaning of negligent as it is found in the rule. The Tribunal has already defined negligence and the test to be applied to it relevant to the subject rule.

34. As to whether human error has any part to play in negligence and whether aspects of human error mean a person is not negligent, obviously is the remaining issue. In that regard, human error can be negligent; it may not. The fact that it may comprise human error does not mean it cannot comprise negligence. The fact that it can be negligent, as has been said, may or may not embrace human error. The Tribunal sees no benefit in trying to assess whether the actions of the appellant on this occasion were human error or negligent. The reason for that is that it is a question of whether the appellant was negligent or not negligent within the test defined.

35. In assessing, therefore, whether or not this appellant was negligent, some submissions were made in the matter about whether mens rea has any part to play in it. As was analysed in Burnett, the Tribunal sees no benefit in analysing that submission because mens rea has no part to play in the aspects of negligence as they are advanced here."

74. Therefore it was submitted that what a person might have thought is irrelevant.

The Appellant

75. Noting that the word negligent was not defined in the rules it was submitted it should be given its natural and ordinary meaning but within the context of the whole of the rules.

76. Therefore it was submitted that regard must be had to the contractual duties, obligations and responsibilities of the parties imposed under the rules. It was said that outside the rules there was no tortious or legislative duty, obligation or responsibility that applied. It was submitted that the rules cannot arbitrarily create duties, obligations or responsibilities without a proper legal basis.

77. Reliance was placed upon the fact that a new rule, 124A, was added in December 2017 to place a clear obligation on owners/sellers of greyhounds to ensure a passport was in place. Therefore it was said that the rules as of 2015 and not 2017 must be the focus and that the conduct was not prohibited at that time.

78. It was submitted there needed to be an obligation on a person to act on a duty otherwise there was no basis to hold them responsible for it and that their duty could only be found from a standard. That standard was to be found in the rules and not generally. There was reinforcement in the submission by the fact that the new rule was subsequently added.

79. The appellant noted the steward particularised this breach on the basis of "knew or ought to have known", "recklessly indifferent" and "careless or failed to take proper or reasonable care to avoid acts which could reasonably be foreseen".

80. The appellant focused upon the particularisation of the breach with the word facilitate. It was said this is a nebulous term but the particularisation addressed this. It was nevertheless said that there were differing degrees of alleged misconduct ranging from knowing, being recklessly indifferent or being careless in failing to take proper and reasonable care and therefore there was a shifting bases for the alleged breach. This had led to a duplication submission not repeated before the Tribunal.

The Respondent in Oral Reply

81. It was submitted that it was wrong to suggest that a new rule was added for the reasons advanced. There could have been many reasons, for example, a particular conduct had not been previously covered. That is the 2015 rule has to be assessed on a stand-alone basis. That a new rule cleared up something does not make the fact that the old rule was not correct.

Misconduct

82. Adopting Rowe (supra) the respondent submitted that ejusdem generis meant that misconduct could be distinguished from negligence fraud etc.

83. It was accepted that not all breaches of the rules would necessarily mean misconduct.

84. The law relating to misconduct was otherwise not amplified by the parties.

85. The appellant noted that the steward adopted a common law dictionary meaning of "what a right thinking person would require of it."

THE SUBMISSIONS ON THE APPLICATION OF THE RELEVANT LAW

AID AND ABET

The Respondent

86. In its written submission, having noted that the breach of rule 124(1) by Farrugia was not in issue and established, submitted that it was not necessary to establish that the appellant knew of the terms of that rule or that what Farrugia was doing was an offence because it will suffice if the appellant had knowledge that WM was to be exported and did not or would not have the required documents.

87. On the facts it was said that the appellant knew that the purpose of the sale was for the export of WM and that the appellant was aware of the requirement to obtain documents from GA. This was particularly so as the sale did not originally proceed because of the complexities of the documentation. Armed

with that knowledge it is said that the appellant did not ever receive any indication from Farrugia that he knew of the documentation requirement or the ability to obtain it and that the appellant made no inquiries of Farrugia or GA to see if the documentation had been obtained.

88. Accordingly it was submitted that the appellant had no facts from which he was able to conclude that the documentation had been or would be obtained and he failed to ask pertinent questions of the appropriate people and bodies.

89. Therefore it was submitted that it was open to conclude that he knew or was wilfully blind to the fact that WM was being exported without GA approval.

90. It was submitted that such a conclusion must be available on the basis that the express purpose of the sale was the export of WM and documentation was required yet the appellant was wilfully indifferent as to whether it had been sought or granted therefore he knowingly aided and abetted the breach.

The Appellant

91. In a 50 paragraph written submission the appellant, having canvassed the applicable law, submitted in detail on the facts.

92. Having noted that the appellant was not present at the time of the export of WM it was said that it was necessary to prove the appellant knew that Farrugia intended to export WM without the documentation and that the appellant approved or assented to this conduct and encouraged it.

93. It was submitted that the appellant's knowledge of these facts could be established if it was proved that he deliberately abstained from obtaining knowledge by making an inquiry of Farrugia for fear that he may learn the truth and deliberately shut his eyes to the fact that there was no intention to obtain the documentation. It was said that it would not be sufficient if was only proved that there was a possibility or even a probability that the export would take place without the documentation.

94. It was submitted that as the Farrugias had no knowledge of the documentation requirements because of their ignorance of the rule then Farrugia could not have had the intention to commit the offence of export without documentation either when he was negotiating the sale or effecting the export.

95. Having acknowledged that the appellant knew the greyhound was to be exported to Dubai it was nevertheless still required that the respondent prove that the export was intended to take place without the appropriate documentation and that the appellant encouraged Farrugia to do so. It would still be necessary to prove that Farrugia acted upon the encouragement. Accordingly it was submitted that it would be impossible for the appellant to have known of Farrugia's intention to commit the offence when Farrugia had no such intention.

96. It was submitted that the evidence did not establish that Farrugia communicated to the appellant such an intention or that the appellant would have known that Farrugia was ignorant of the requirement. This was particularly so on the basis that the appellant was entitled to rely upon the fact that Farrugia would comply with the rules.

97. It was further submitted that the appellant was ignorant of the involvement of Mrs Farrugia particularly as he had had no communication with her and she did not know of the export requirements in any event.

98. The appellant then dealt with the issue of wilful blindness.

99. It was submitted it is necessary to prove that the appellant made a deliberate decision not to make an inquiry so he could deny knowledge but as Farrugia was ignorant of the requirement no such inquiry could have been made and therefore there would be no wilful blindness. It was emphasised that the appellant was entitled to rely upon Farrugia complying with the rules and that removed a need for inquiry. There was no reason to ask the question in the circumstances as the duty, obligation and responsibility was solely that of Farrugia once the sale to him was complete.

100. It was submitted that the appellant had had represented to him that Farrugia would be responsible for all export requirements but that that was unintentionally misleading because of Farrugia's ignorance of the documentation requirement.

101. It was emphasised that the appellant was entitled to rely upon the facts that the Farrugias advertised and held themselves out as exporters therefore there was no reason to ask further questions of compliance with the documentation rule.

102. The next critical point relied upon in the written submission was the fact that the appellant's reliance upon any any representations to him ceased once the sale to Farrugia was complete. Particularly so as the appellant was only an agent for the syndicate owners. That is the sale to the Crown Prince was a separate transaction from the sale by the syndicate owners to Farrugia. It was submitted it would be in error to merge the two transactions.

103. Accordingly the fact that the appellant made inquiries of GA and he became aware of the difficulties of obtaining the documentation coupled with the fact the appellant was not in the business of exporting greyhounds all falls away from consideration when the separation of the two transactions is taken in to account.

104. The fact that the appellant was formerly a GRNSW board member, a GBOTA board member, well-known industry figure, professional man, all elevated the Briginshaw test here to a high standard. The appellant should have been accepted on his evidence.

105. It was therefore said that his conduct was not wilfully blind, reckless or negligent because he was entitled to rely, in the sequence of transactions, upon the fact that there would be compliance with the rules.

106. It was then submitted that no duty arose for the appellant under the rule as it was written in 2015.

107. Finally it was submitted that Farrugia gave no evidence of the appellant's knowledge of Farrugia's intentions and the appellant's evidence should have been accepted as to the representations made to him.

108. The appellant made written submissions in reply.

109. It was again emphasised that the conduct was not prohibited by the rules as they existed in 2015. Reliance was placed upon various other decisions but the Tribunal was not taken to those matters in any detail.

110. On the issue of knowledge it was submitted that the appellant being aware of the intention to export did not participate in the actual arrangement for that to occur despite knowing that the documentation process was complicated. Reliance upon the fact that the Farrugias were in the business of exporting was again raised.

111. As the appellant did not participate in the actual export without the requisite approval he could not have known that that would take place because he did not know the intentions of the Farrugias to act without that documentation. Particularly as they did not know at all of the need for the documentation.

112. On wilful blindness it was submitted that Farrugia did not have the intention to breach the rule because he did not know about it therefore the appellant could not have known of or aided and abetted him because of that ignorance. This was also because his obligation ended when the sale transaction to Farrugia was completed.

113. It was emphasised that knowledge should not be imputed.

114. A new submission was made to the effect that Farrugia pleaded guilty to the export to Macau and not Dubai and no charges were laid against him for export to Dubai. It was submitted this because there was no perceived offence for exporting to Dubai at that time and therefore there could be no aiding and abetting or facilitating such an offence.

115. Therefore it is submitted that there is no finding of guilt against Farrugia for exporting to Dubai and therefore the appellant cannot be found to have aided and abetted such an offence nor facilitated it.

The Respondent’s Oral Submissions

116. The respondent rejected the appellant's submission that the appellant's obligations ended when he finalised the sale to Farrugia because it was a bifurcated transaction. This was because Farrugia was only a conduit for the transaction between Lagogiane and the Crown Prince. That arose because the appellant's negotiations started with and ended with the export of WM to Dubai . The negotiations were with Lagogiane and that was for the sale and export to Dubai. The purpose of export was known. It was known that it was not a domestic sale to Farrugia. The appellant was merely directed to speak to Farrugia and transfer WM for the cash. The conduct and the export were related.

117. Therefore it was submitted that the appellant participated in the arrangements to export WM to Dubai without the required documents.

118. The submission that there was no breach of the rule at the time was rejected because rule 124(1) existed at that time, was breached and the allegations relate to aiding and abetting and facilitating that breach.

119. It was submitted that a breach of 124(1) is strict and the intentions of Farrugia irrelevant and need not be proved.

120. It was submitted that the transaction could not take place without the appellant’s involvement and he contemplated the sale and export and knew that formal papers were needed. Therefore it is said that each of the elements of 124(1) were proved. The appellant agreed on the price, was in favour of the transaction and ensured the owners agreed.

121. The case for the respondent was that knowledge was proved by wilful blindness.

122. It was submitted that was established because the appellant knew that WM was to be exported to Dubai, he made inquiries and knew of the complexity of the documentation system, he facilitated the sale and delivery of WM and turned a blind eye to the documentation requirements. Therefore there was wilful blindness. Further he engaged in wilful blindness by not following up compliance with the documentation requirement. That is he did not ask Farrugia whether he had obtained the documentation and he did not ask GA if it had issued it for WM for this particular export.

The Appellant’s Oral Submissions

123. The opening submissions were to the effect that the appellant's evidence should be accepted particularly as it was done in the end by statutory declaration upon which he was not cross-examined.

124. It was submitted that there were two transactions and it was not a bifurcation. The appellant worked on the basis there were two phases and that his involvement ended with the handing over of WM to Farrugia. It was not in dispute that inquiries were made of GA and there was knowledge of the complexity of the documentation requirements. It was also submitted that there were initial discussions with Lagogiane and they ended and then there were discussions with Farrugia but with the knowledge Farrugia would obtain all necessary export approvals.

125. The necessity for Farrugia to comply with the rules and entitlement of the appellant to rely upon that compliance were emphasised. It was repeated that that was established by the wording of the transfer form. Therefore it was submitted that the appellant was entitled to expect that Farrugia would comply with the export rules on documentation or otherwise. This was apparent because the appellant did all that was required of him as an agent and on behalf of the owners.

126. Therefore the appellant had no reason to suspect a breach of the rule and it was submitted that there was not a skerrick of evidence or any inference available to the appellant that Farrugia would breach the rule.

127. It was submitted that the knowledge required was that the export would be illegal. This could not be established as the appellant did not have that knowledge and he was entitled to expect that Farrugia would comply with the rule. There was no future state of affairs then existing about which he had knowledge. That is the appellant did not have knowledge that if an application was made it would not be approved or that there would be no application.

128. It was submitted that the respondent had to prove the appellant was linked in purpose and that purpose required knowledge that Farrugia would export without the documentation. It was submitted there was no encouragement to that effect. It was submitted there was merely a sale on terms.

The Respondent's Oral Reply

129. It was submitted that the statutory declaration of the appellant was not the only evidence that should be considered and regard should be had to his interviews, evidence to the inquiry and emails to the president and chief executive of GRNSW.

130. It was submitted that the whole of the transaction indicates knowledge in the appellant of the intention to export to Dubai and the need for documentation. It was submitted no reliance should be placed upon the statements of Lagogiane and Farrugia that they had the necessary export documents because at that time no sale had been made.

131. It was submitted that the appellant was directly linked in the purpose of export and was therefore obliged to ensure compliance with the rule but that he deliberately shut his eyes to essential matters.

132. It was re-emphasised that there was but one transaction in the whole process.

NEGLIGENCE/MISCONDUCT

The Respondent

133. It was submitted that the appellant's membership of GBOTA at a time it was addressing codes of conduct and animal welfare with members bound by a code of conduct should ensure that all members strictly complied with the rules and had an heightened obligation to do so. In addition the appellant's various positions in the industry should have made him astute to the export requirements and the need to make appropriate inquiries of GA.

134. It was submitted however the appellant operated from complete ignorance and took no steps to find out if the rule was being complied with. Therefore he facilitated the sale and export in circumstance of negligence and misconduct.

The Appellant

135. It was submitted that the appellant had no contractual duty or responsibility to make the inquiries of the purchaser as the sellers were not the exporters and their legal interest ceased at the date of sale. With no legal right to interfere there was no entitlement to intervene.

136. It was submitted that the appellant had no greater obligations than anyone else as a result of his various positions but that in any event the evidence established that GBOTA had not discussed at its meetings the export of greyhounds without passports.

The Respondent's Oral Submission

137. It was submitted that the facts establish from all the circumstances that the documentation was not there and his wilful blindness to that reality, with the actual knowledge that he had of the processes, was negligent.

138. It was said that the same facts establishes misconduct. It was accepted that a breach would not always be misconduct but here it was because he was appraised of the need for the documentation but ignorant of whether it existed.

The Appellant's oral Submission.

139. It was submitted that as the agent for the sellers there is no obligation to continue to inquire after the sale was complete. That is the syndicate was not an exporter and its legal interests had ceased on title passing. Accordingly there was no duty owed against which negligence or misconduct could be assessed.

The Respondent's Oral Reply Submission

140. It was again emphasised that the rule in 2015 was that which had to be assessed and the subsequent amendment irrelevant.

141. It was submitted that any reasonable person knowing all of the circumstances and facts will consider the appellant's conduct careless because he did not check up on the documentation in circumstances where he should have. That carelessness was negligence and misconduct for a person in his position. It was acknowledged that would not necessarily be negligence or be misconduct for other people.

DISCUSSION

142. The Tribunal accepts the evidence of the appellant on his knowledge of the relevant matters on the documentation, that is the Greyhound passport and certified pedigree to be issued by GA.

143. It is accepted that Farrugia told the appellant that he had all exporting approvals and the licensing to do that and that he told Farrugia that it was his responsibility to get the exporting correct. It is further accepted that those statements implied in the appellant's mind that the exporters had the capability to do it legally. That evidence also establishes that the appellant was entitled to believe that Farrugia accepted that it was his responsibility to obtain the documentation. There is the further evidence in the appellant's favour that he was told that "they" look after all that and he considered them to be reputable-a fair conclusion because they were known exporters.

144. It is an accepted that the appellant had spoken to GA and was fully appraised of the need for such documentation, the difficulties of completing it and the uncertainty of the outcome. Such a conclusion is reinforced by the initial decision of the syndicate owners not to proceed.

145. It is further accepted that the Farrugias had no knowledge of the documentation requirements. This requires a finding which is made that references by Farrugia to having the appropriate exporting approvals and licensing could not have incorporated the necessary documentation but could only relate to the Commonwealth export requirements. However such specificity was not conveyed to the appellant. There was no evidence from Farrugia that he had told the appellant that he did not know about the exporting requirements. There is no evidence that the appellant knew Farrugia would breach rule 124(1).

146. Therefore on these findings there is no basis to elevate the knowledge of the appellant on the documentation requirements to knowledge that Farrugia did not have them or would not obtain them.

147. Those findings also establish that the knowledge of the appellant of the documentation requirements did not require him, in all the circumstances, to make further inquiry of Farrugia or of GA because his mind was properly closed to such a need by the things that he had been told.

148. As set out earlier these key findings are made although earlier versions by the appellant, if they had been accepted, could have led to different conclusions.

Aid and Abet

149. It is necessary for the respondent to prove that the appellant knew about the essential circumstances that establish the breach and the appellant assisted or encouraged the breach. The respondent acknowledges it seeks to establish these matters by wilful blindness.

150. The Tribunal, based upon the above factual determinations, cannot conclude that the appellant deliberately abstained from making an inquiry about the documentation because of what he had been told and fairly believed. He did not fail to make that inquiry so that he could later deny knowledge of it.

151. The appellant did not have actual knowledge of each of the ingredients of the breach of the rule that are relevant. That is he did not know that Farrugia was exporting or intended to export without the documentation or that it would not be obtained. As determined, the appellant believed that all the necessary documentation was in hand or would be obtained. Therefore there was no failure to question because of a fear that the appellant would have been advised that the documentation did not exist or would not be obtained.

152. There is nothing about all the circumstances, with the exception of the fact that the appellant knew about the documentation requirement, which elevates his failure to inquire to wilful blindness. There was no shutting of the eyes.

153. Accordingly it cannot be found that the appellant knew that the export would be without documentation, that he approved or assented to that fact and thereby by his actions encouraged or assisted Farrugia to export without the documentation. There was no linking in purpose.

154. Further it is found that there was no intentional participation in the principal offence based upon knowledge of essential matters.

155. Even if the possibility or probability of the export without the documentation extended to the appellant he had no intention in the commission of the act.

156. The respondent's case that the appellant had knowledge of export without documentation is rejected. It is not accepted that the appellant was without facts upon which he could safely conclude that the export would be without the appropriate documentation and that therefore he should have made some further inquiry or asked pertinent questions. There was no wilful indifference to the documentation requirement.

157. As submitted by the appellant it was not possible to establish the necessary aiding and abetting because the Farrugias were entirely ignorant of the need for the documentation. Therefore if the Farrugias acted without intent on the documentation then the appellant could not have intentionally, or otherwise, have assisted or encouraged them to do so.

158. The respondent fails to establish the remaining two ingredients set out under Matters To Be Proved namely the respondent acted knowingly and aided and abetted. That is the respondent does not establish that the appellant knew about the essential circumstances that established the breach nor that the appellant assisted or encouraged the commission of the breach.

159. There is not the necessary combination of suspicious circumstances (the finding is there were none) and failure to make inquiry (the need to was not activated).

160. The issue of knowledge based upon the only rational inference is not made out.

161. As wilful blindness and suspicious circumstances coupled with failure to inquire is not made out then knowledge is not made out.

162. The appellant's acts were innocent.

163. These findings mean that the respondent cannot establish that the appellant aided and and abetted Farrugia to breach rule 124(1).

164. The respondent fails to establish a breach of rule 86(n).

Negligence/Misconduct

165. The Tribunal is satisfied that the appellant's industry work, exposure and experience in the industry are such that it is difficult to accept that he was not aware of issues of export. It is accepted that the evidence establishes it was not discussed at meetings of GBOTA. This factual finding must be coupled with the second strand here that the appellant had made inquiries of GA about export requirements.

166. Objectively viewed therefore there is indeed a heightened expectation that this appellant would be on notice to ensure everything was done properly.

167. However the appellant has not failed to do that which the reasonable person would do when his conduct is assessed because of the factual finding that he operated on the basis that Farrugia would attend to all the documentation requirements.

168. Accordingly he has not acted negligently as defined in Rowe, supra.

169. The knowledge of the appellant from his industry experience and inquiries of GA and his knowledge of the whole of the transaction including the intention to export WM to Dubai do not overcome the finding that he believed there would be compliance with whatever was required.

170. The respondent does not establish that the appellant "new or ought to have known", was "recklessly indifferent" nor "carelessly failed to take proper all

reasonable care to avoid acts which could reasonably be foreseen" (matters particularised by the steward).

171. A right thinking person would not condemn the appellant for his conduct.

172. These findings mean that the respondent cannot establish negligence or misconduct.

173. The respondent fails to establish a breach of rule 86 (o).

Other Arguments.

174. The appellant raised a number of other arguments which do not need to be determined having regard to the above findings.

175. The first of those matters was the issue whether there were two contracts or one. That is whether there was a separate contract that ended with the transfer to Farrugia and then another which commenced with the transfer by Farrugia. The contrary argument is that it was a bifurcated transaction.

176. Without having to determine the legality of these matters there is much persuasion in the respondent's argument that there was but one transaction with various steps.

177. The second of those matters was that as the rule was written in 2015 no duty arose in the appellant.

178. Without having to determine the correctness of that argument it is open to conclude that that submission should be rejected. It misconstrues the case brought against the appellant which is a breach of rule 124(1) by Farrugia and that the appellant aided and abetted or was negligent or misconducted did himself in respect of that breach. It is not the case against the appellant that he breached the rule. It is accepted that the 2017 amendments would catch the appellant.

179. The further argument on the second point was that as the rule did not apply no duty could arise against which a test of negligence could be based - there was no contractual obligation created. There needed to be that duty, obligation or responsibility in the rules. It was further submitted that the appellant could not interfere in the actions of Farrugia. The respondent submitted that there was no need to find a duty. That is the context of the actions and the rules needed to be the focus. The test in Rowe was relied upon as requiring a focus on the facts and circumstances and applying the reasonable person test. The Tribunal finds that the test expressed by the respondent is correct but the decision does not rest on that finding.

180. The third of those matters is that Farrugia was not charged with an export to Dubai but only to Macau. That argument raises irrelevant considerations. Here for the aid and abet or for the appellant to be negligent or misconduct himself does not turn upon the issue whether Farrugia faced breach allegations and was found to have breached the export rule. The issue is only

whether Farrugia in fact breached the export rule by exporting to Dubai without the documentation.

181. The fourth issue is that Farrugia by signing the transfer papers agreed to be bound by the rules and therefore the appellant cannot be responsible if Farrugia did not comply.

182. There is force in this argument but only to the extent that it goes to the need for the appellant to have made inquiries because of his knowledge. That falls away because of the finding that he believed that the rule would be complied with , not because he could rely on the principle.

FINDINGS

183. The respondent fails to satisfy the Tribunal to the Briginshaw standard the facts necessary to establish either breach.

184. The Tribunal finds that the appellant has not breached rules 86(n) and (o) as particularised against him.

185. On the opinion of the stewards test the Tribunal is satisfied that the alternative findings by the steward were not reasonably open to him (McCarthy RAT 24 January 2014).

186. The appellant's appeal against the findings of the Steward is upheld.

187. The issue of penalty does not arise for finalisation.

APPEAL DEPOSIT

188. At the hearing, after explanation of the duty upon the Tribunal at the conclusion of an appeal to make orders in respect of the appeal deposit, each party advised the Tribunal that any such orders were in its discretion.

189. The function of the Tribunal is to order the appeal deposit refunded, forfeited or partially refunded/forfeited.

190. The appellant has succeeded on the appeal and there are no reasons why, as part of the success of the appeal, the deposit should not be refunded to him.

191. The Tribunal orders the appeal deposit refunded.