IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP.100/96

NOT RECOMMENDED

IN THE MATTER OF The Judicature Amendment Act 1972

BETWEEN CHRISTOPHER WILLIAM JOHNSON
of Christchurch, Jockey
Plaintiff

A N D THE APPEAL JUDGES APPOINTED BY THE PRESIDENT OF THE NEW ZEALAND RACING CONFERENCE
at Wellington
First Defendants

AND THE NEW ZEALAND RACING CONFERENCE
at Wellington
Second Defendant

Hearing: 1,2 and 3 May 1996

Counsel: J.R. Billington for Plaintiff
A.D. Ford and T.C. Mitchell for Defendants

Oral Judgment: 3 May 1996

ORAL JUDGMENT OF GALLEN J.

The plaintiff in these proceedings seeks an order quashing or setting aside the decision of the Appeal Judges appointed by the President of the New Zealand Racing Conference at Wellington, given on 16 April 1996 by which they set aside the decision of the Westland District Committee previously delivered on 5 February 1996. The Appeal

There was a reference to the elbow having been used in an unfair way. There is a suggestion that there had been an endeavour to make contact with other riders and to impede their movements. There was on the part of the plaintiff, a denial of contact. One of the other riders was specifically asked (at p.7):-

Q. ".....When you were racing very close to C W Johnson, do you believe that Johnson may have used his elbow outwards to detain your movements of your arm in any way?
A. It is difficult to say with Chris's style?
Q. No, I am asking you a straight out question - Did Johnson's elbow come in contact with you?
A. Yes.
Chair: You are saying it did?
A. Yes, but through the style of Mr Johnson's mount.

The rider who had given that evidence, expanded his evidence by suggesting that those conducting the enquiry, should look at the film. There seems to have been a complaint that he had been touched on the right front upper part of his body. He was asked (at p.8):-

"Q. Do you feel you were being pushed out from the inside?
A. .....I felt I got a bit of pressure....."

The charge was in fact upheld. Information was then sought as to the appellant's riding performance. It is not unimportant to refer here to what the Stipendiary Steward then said. He said (at p.10):-

> "Mr Chairman, as you know Chris Johnson is our leading Jockey in N Z. Chris is a very experienced jockey, probably one of the best jockeys to work with as far as working on race day. I cannot speak highly enough of his performances in that light. Johnson was found guilty of Foul Riding in July and I believe he was suspended for five weeks. The Rule does say that if he is found guilty he should be suspended for six months/minimum of six months, unless there is extenuating circumstances. I believe Mr Chairman, I agree with your decision. However, I would expect you to take into account the horses were racing very tight and Johnson was in a very tight situation."

conducted by way of re-hearing. It then appears that the cross-appeal as to inadequacy of sentence, was dismissed.

In announcing the decision of the Committee, the committee indicated that it was its intention to give a formal decision and that was subsequently done, but it is in very brief terms and adds little to the comments that I have already made. The Stipendiary Steward then appealed the decision of the Westland District Committee, to the present first defendant. I should observe in passing that the Appeal Judges who constitute the first defendant, are appointed by the President of the New Zealand Racing Conference. Mr Billington in his final submissions, suggested that that too has a bearing on allegations as to unfair procedure. Since it is clearly contemplated by the Rules and since the Rules bind all those persons who are involved in the sport, I do not think that that contention can have any weight. The appellate body was in my view, properly constituted in terms of the Rules.

Having heard the material before them and the submissions made both for the appellant who was the Stipendiary Steward and the respondent who is the plaintiff in these proceedings, the Judges reserved their decision which was given subsequently. That is a full written decision. It sets out in detail the basis of that decision with the reasons for it and ultimately concluded that the appeal of the Stipendiary Steward ought to be allowed. The decision of the District Committee was reversed. The decision involved a conclusion that the plaintiff was guilty of foul riding as he had originally been so found by the initial inquiry and as a consequence for the reasons given in the decision, his licence was suspended for a period of 6 months but the Judges went on to say that 2 months of that suspension were to be regarded as having been already served for the reasons set out. It is against that decision that these proceedings are brought.

It is the contention of the plaintiff that the decision of the Appellate Judges was objectionable because of the approach which they adopted to the decision appealed from. For the reasons which are set out in the statement of claim, the plaintiff maintains that the decision is fatally flawed as being contrary to the rules of natural justice and the statement of claim indicates 9 separate respects in

reasons were given to justify it, or perhaps more appropriately, to explain it. The obligation to give reasons in cases of this kind is related to particular cases in respect of which a right of appeal exists. It depends on the necessity for appellate tribunals to be fully aware of the reasons which led to the decision appealed from and also of course, provide the necessary material for a person affected by that decision, to assess whether or not it should be taken further. It is for that reason, that the Courts have on a number of occasions and in a number of authorities, indicated that there are obligations on persons who are required to conduct inquiries of this kind, to make it clear where their decision is subject to appeal, the reason why they arrived at that particular conclusion.

The Appellate Judges in this case considered that the reasons given by the Westland District Committee were so inadequate that they were in fact entitled to disregard that decision and indeed I think the decision goes far enough to conclude that the decision was not supportable. Mr Billington's contention is that a consideration of the very short decision of the District Committee, taken in conjunction with the transcript, indicates the extent to which the District Committee heard the witnesses and considered other material, including the videos. He submits that that is sufficient to satisfy any obligation resting on the District Committee to justify its conclusion in terms of the reasons given.

There was a discussion by counsel of a number of the authorities which refer to the obligation to give reasons, but in the end I think the matter falls to be determined in a different way. The procedure relating to the hearing is fixed by R.359 (1). That allows the Judges to conduct the hearing in such manner as they think fit and I refer of course to the hearing before the Appeal Judges. They may conduct it on the basis of the written records of the proceedings of the tribunal or tribunals below, or by way of an actual rehearing of part or all of the evidence. That as I read the Rule, is a matter for the Judges to determine. In this case, whether they were right or wrong on their views that the decision of the District Committee was fatally flawed because of inadequate reasons, they were entitled to come to the conclusion that in the circumstances as they saw them, it was appropriate to deal with the appeal by way of re-hearing rather than an assessment of the decision

Stewards at the first inquiry, who had the advantage of hearing oral evidence from the persons directly involved in the incident out of which the charges arose, so that to the extent to which their decision was based on conclusions as to credibility, that decision must be regarded as suspect. Mr Billington drew attention to the fact that the Appellate Judges placed a considerable weight on their own view of the video taped material available to them and used that to resolve conflicts in the oral evidence. He also drew attention to the fact that at the District Committee hearing, video tape evidence was produced by the plaintiff to indicate the particular style of riding which he adopted and which it was said explained the incident the subject of the charges in such a way as to remove any sinister construction. That video did not form part of the record and was not made available to the Appellate Judges. The plaintiff contends that it is both unreasonable and unacceptable to resolve conflicts in the evidence in a manner contrary to that accepted at the earlier hearing when the persons conducting such hearings, had the advantage of direct and personal assessment of the persons making the assertions under consideration. This is one of the stronger arguments in favour of the plaintiff.

The Judicial Committee at Greymouth and the District Committee, both did have the advantage of seeing the protagonists and hearing directly what they had to say. There are in the end however, three reasons why I do not think that this ground is sufficient to enable the plaintiff to succeed. The first is to repeat a matter which has significance in respect of other grounds of appeal. The procedure adopted by the Judges, that of considering the transcript rather than calling evidence, was clearly open to them on the Rules and the disadvantages to which Mr Billington refers as to making assessments of credibility, must apply in every case where an appellate tribunal deals with the matters before it on the basis of the record taken at earlier hearings. Secondly, the transcript in this case must be taken as including the video taped material. This gave the Judges an opportunity at each of the hearings, to consider the oral evidence in the light of what was recorded of the incident at the time it occurred. They had the advantage of seeing the actual incident as it was recorded and I note that on each occasion it seems to have assumed a significant part in the

Judges at the appellate hearing that if there was an unacceptable action, then it was merely a part of the plaintiff's riding style. That particular conclusion was rejected by the Appellate Judges in strong terms. While it might have been better for them to see the actual video, it should also be pointed out that it did not form part of the record as the racing videos did. It had been produced by and in the end retained by the advisor to the plaintiff. As Mr Ford submitted, it could have been made available by the plaintiff through his advisors and if it was not, then I think it was open to the Judges to conclude that the reliance was on the description given during the course of the hearing, rather than necessarily on the graphic portrayal, although this may have assisted. I do not think that this ground is sufficient to justify rejecting the decision either.

The next argument relied upon was that the Judges adopted a definition of 'foul riding' for the purposes of the Rule, which was incorrect both as a definition and by comparison with other riding offences. Mr Billington's argument here, depended upon the fact that in other cases, what has been accepted as constituting foul riding, involved the striking of one rider by another or that other's mount with a whip or crop and there was no suggestion of that here. In his submissions in reply, Mr Billington expanded that by saying that it had been a submission made for the appellant in the proceedings before the Appellate Judges and made by Mr Ford, that in fact it involves some degree of assault and he contended that that was an appropriate way of defining "foul riding" at least for the purposes of this case. The term 'foul riding', is obviously one which relates particularly to the sport of racing and needs therefore to be considered in that context. The Judges accepted a definition in another case that it had to involve a deliberate act and I am prepared to accept that that is appropriate. They also went on to accept as a part of the definition, that the deliberate act had to be designed to give an unfair advantage. They accepted too a comment in one of the other cases, that it could be an impulsive or instinctive action done in the heat of the moment, but I note that the definition from which they drew those conclusions, went on to make it clear that the definition was not to be conscribed or restricted, since it was designed to cover a considerable number of kinds of behaviour. The *Shorter Oxford English Dictionary* defines the term in a sporting context as being "behaviour which is irregular or unfair". It could no doubt be described as being

The Judges in their discussion of this aspect of the matter, relied heavily upon what they had themselves seen in the video and particularly the head-on video. They referred to the nature of the finish, to the material which suggested that in their view the tightness of the finish was actually caused by the plaintiff himself. They considered that the interpretation that they had considered was correct, they they were entitled regardless of the opinion expressed by the Judges on the earlier occasion, to substitute their own opinion and in my view they were entitled in the approach which they adopted, to do so at least in so far as they were determining whether or not foul riding had been established. Mr Billington went on to say however, that they did not take into account the personal circumstances of the plaintiff and the consequences to him of the decision. Those are not I think mitigating circumstances as contemplated by the Rule. The discretion which is conferred by sub-para.(b) of the same Rule, does not appear in sub-para.(a) and I do not think that the Judges can be criticised for the way they approached this aspect of the matter.

Then it is contended that the Judges were wrong in that they failed to give the plaintiff the opportunity to be heard in respect of all relevant matters of penalty. I propose to return to this ground and leave it at this stage until I have dealt with the other matters on which reliance is placed.

It is contended that the Judges were wrong in that they failed to state the proper burden and standard of proof appropriate to the particular case and that in any event, they failed to observe both. Mr Billington contended that it was an obligation of tribunals in the position of the Appellate Judges in this case, to make it clear that they had applied the burden and standard of proof which in administrative law is appropriate to cases of this kind. He put an emphasis upon and I accept, that the burden of proof is on the prosecution and that the standard of proof, while the civil standard, must take into account the seriousness of the allegations both in themselves and in the effect which their establishment can have on the persons affected by them.

Mr Billington contended first that the decision was flawed because this standard of proof was not referred to by the Judges in the

the greatest concern. It is contended by the plaintiff that the Judges were wrong in that they failed to give the plaintiff an opportunity to be heard in respect of all relevant matters of penalty. There was a dispute between counsel as to the factual aspects of this contention. Clearly the question of penalty was raised in the submissions made on behalf of the appellant Stipendiary. A perusal of the transcript makes it clear that from time to time, comments were made as to penalty. It is the case for the defendant that the question of penalty was at all times before the Judges and that it was appropriate for them to arrive at a decision in relation to penalty because of the fact that they were substituting a different offence for that which the District Committee had found the plaintiff guilty and on which they had imposed a penalty, but that does not in fact deal with the principal concern expressed by the plaintiff.

I note that from time to time in the transcript as recorded, there are references as to penalty, but it seems to me on looking at them with some anxiety, that they almost all tend to relate to the principal matter under consideration and that was the way in which the Judges approached the matter, whether or not the matter had been determined by the earlier decision and what ought to happen in terms of their ultimate decision. There are a number of references by counsel for the plaintiff to the fact that it would have been appropriate for the matter to have been remitted to the District Committee for determination. The transcript itself indicates that having heard all the material which had been placed before them, the decision was reserved. The decision when it was issued, dealt with the question of penalty. There is nothing comparable to that which occurred before the District Committee where once the decision had been made the District Committee sought specifically, submissions on penalty.

I have already indicated that there is a dispute between counsel as to this aspect of the matter. Counsel for the plaintiff at the hearing, who was not of course counsel at this hearing, has filed affidavits in which he specifically indicates that he had approached the matter on the basis that if the appeal was allowed, the matter of penalty would have been the subject of a separate hearing. This is what had occurred before the West Coast District Committee. It is what would normally occur in matters of this kind. Mr Ford submitted and submitted

it is quashed and set aside and the matter is remitted to that body for the hearing of submissions and the determination of penalty. Having regard to the circumstances, since I have directed that that part of the decision which relates to penalty be quashed, the plaintiff must be regarded as not at present at least subject to the suspension which was then imposed, that being part of the penalty. The matter will therefore have to be dealt with by the appropriate tribunal in the appropriate way and ultimately it is a matter for them to determine what is an appropriate response.

All questions of costs are reserved.

RP Gallen J

Solicitors for Plaintiff: Messrs Deacon and Tannahill, Wellington

Solicitors for Defendants: Messrs Bell, Gully, Buddle, Weir, Wellington