

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CIV 2009-485-001767

UNDER The Declaratory Judgments Act 1908
IN THE MATTER OF An originating application by New Zealand
Thoroughbred Racing Incorporated,
Applicant

Hearing: 2 November 2009

Counsel: M G Colson for New Zealand Thoroughbred Racing Inc.
A R Galbraith QC in support of the 'one vote per race date'
interpretation
G N Galloway in support of the 'one vote per club' interpretation

Judgment: 3 November 2009

JUDGMENT OF WILD J

Introduction

[1] There is an ambiguity in the Constitution of New Zealand Thoroughbred Racing Incorporated (NZTR). To resolve this, NZTR applies for a declaration as to whether voting on constitutional change is on the basis of one vote per club, or one vote per race date.

[2] Each alternative interpretation was argued by different counsel, and I was provided with background information to give a factual context to the Constitution.

The NZTR and its constitution

[3] NZTR is the entity administering thoroughbred racing in New Zealand. Thoroughbred racing refers to galloping races, or simply the “gallops”, as distinguished from standardbred racing (“harness” racing) and greyhound racing.

[4] NZTR is an incorporated society. Effectively, it is a “super club”, having amongst its members the 65 racing clubs in New Zealand entitled to use the Totalisator. These range in size from large, prominent clubs such as the Auckland Racing Club or Canterbury Racing Club, to small clubs such as the Waipukurau Jockey Club and Waikouaiti Racing Club. NZTR’s membership also includes 54 Clubs not entitled to use the totalisator. Those non-totalisator Clubs are not relevant to this proceeding, and I say no more about them.

[5] Governance arrangements for the racing industry are set out in the Racing Act 2003. The racing industry comprises the three racing codes mentioned in [3], and the racing clubs that are members of those codes. The Act established the New Zealand Racing Board (NZRB), replacing the former New Zealand Racing Industry Board and Totalisator Agency Board (TAB). Section 11 sets out the membership of the Board, in particular providing that one of its members is appointed on the nomination of NZTR.

[6] One of the Board’s functions is to distribute, to the three codes, available surpluses from revenue received by the Board from racing betting. Unless a majority of the racing codes otherwise agrees, s16(3) provides that the distributions are to be:

... in the same proportions that the Board considers are the proportions to which the codes contributed to the New Zealand turnover of the Board for that racing year.

[7] Of the \$119 million approximately the Board hopes to distribute this racing year, \$64 million (approximately 54%) will be distributed to NZTR. That reflects that the gallops are the most popular form of racing in New Zealand.

[8] Part 3 of the Act deals with racing codes and clubs. It requires NZTR to obtain the Board’s approval of a statement of intent or business plan. Among the

criteria for Board approval set out in s 23(4) are whether the Board considers that any of that code's rules are:

...

- (ii) Undemocratic; or
- (iii) Unfairly discriminatory; or
- (iv) Unfairly prejudicial ...

[9] Section 25 imposes on NZTR the responsibilities for distributing funds received from the Board to racing clubs, and the apportioning of those monies among the clubs.

[10] There is also provision, in s 27, for dissolution of a racing club. Subject to applicable legislation (e.g. s 27 Incorporated Societies Act 1908), disposal requires the approval of NZTR.

[11] Part 4 deals with racing rules and the racing judicial system. The racing rules each code is required to make and maintain are not to be confused with the Constitution of NZTR, with which I am concerned.

[12] The points of referring to the provisions of the Act are three-fold:

- a) The statutory recognition of NZTR as one of the three racing codes (for galloping races);
- b) The requirement that NZTR have rules which are not undemocratic or unfairly discriminatory or prejudicial; and
- c) The requirement that the Board distribute its surplus funds to the three codes in the proportions that each has contributed to those funds.

[13] In addition to the distributions from the Board described in [7], NZTR receives income from charging fees for some of its services, and from levies to its member clubs under clause 15 of NZTR's Constitution. These levies currently total about \$2.7 million per annum. They are based on the stakes at the clubs' race dates.

The levies vary from about \$6,000 for an industry day (total stakes of about \$60,000 for 10 races), to \$12,000 for a premier day (stakes of at least \$280,000 for the 10 races). The average levy per race day is about \$8,000.

[14] The NZTR's member clubs receive their income from five sources:

- a) The distribution by NZTR, pursuant to s 25 of the Act, of funds received by it from the Board.
- b) 16% of every dollar of on-course betting generated by the club, paid direct to it by the TAB.
- c) Sponsorship money e.g. from a corporate entity or individual sponsoring a race.
- d) From on-course hospitality i.e. food and beverages sold on course on race days.
- e) Non-race day activities e.g. many racing clubs also run their facilities as function centres.

[15] The point emerging from this is that what flows from NZTR to its member clubs, and back from those clubs to NZTR, in money terms, is based on racing activity – race days – and the money they generate.

NZTR's Constitution

[16] The Constitution of NZTR is a written document. It took effect from 1 April 1999. It comprises 24 clauses and two schedules, in total running to 31 pages. The arrangement of the contents is conventional. The focus of this judgment will be on clause 9 Meeting Procedure, and clause 19 Alterations to Constitution. I will refer to some other relevant definitions and clauses.

[17] There are the following relevant definitions in clause 2 Interpretation:

“Club” means a registered Club and includes the Clubs listed in the First Schedule.

“General meeting” means either an Annual General Meeting or a Special General Meeting or both (as the case may be) of (NZTR).

“Race Date” means a day in respect of which pursuant to the last previous decision of the NZRB under section 47 of the Racing Act 2003 a Club was allocated a totalisator licence or restricted totalisator licence irrespective of whether the Club has actually held a meeting on any such day.

“Racing Year” means the period beginning on the 1st day of August in any calendar year and ending on the 31st day of July in the next succeeding calendar year.

“Small Club” means a Club having one, two or three Race Dates.

“Totalisator Club” means a Club for the time being holding either a totalisator licence or both a totalisator licence and a restricted totalisator licence issued to it under section 45 of the Racing Act 2003.

[18] Clause 4 gives the primary object of NZTR as:

- (a) To promote and advance thoroughbred racing in all its forms in New Zealand.

[19] Clause 5 deals with Membership. It is sufficient to include, as a schedule to this judgment, a list of the 65 member clubs entitled to use the Totalisator, and the number of race days allocated to each in the current racing year (1 August 2009-31 July 2010).

[20] Clause 7 covers Representatives to NZTR. It provides:

- (a) Each Totalisator Club shall be entitled to elect or appoint a Representative to attend a General Meeting of (NZTR) on behalf of the Club.

...

[21] Clause 8 deals with General Meetings. Clause 8.1 stipulates when the annual general meeting is to be held. Clause 8.2 provides for notice of that meeting and 8.3 lists the business of the meeting e.g. adoption of minutes of the previous AGM, receiving the Board’s report, receiving financial statements and so on. Clause 8.3(a) includes as business items:

- (vi) to consider motions for resolution;

- (vii) to consider such other general business as the Meeting resolves to consider.

[22] Clauses 8.4-8.6 deal with Special General Meetings. A SGM can be directed by the Board or requisitioned by not less than 10% of Totalisator Clubs. The requirements for a notice of an SGM are stipulated, and clause 8.6 restricts the business to that stated in the notice.

[23] Clause 9 deals with Meeting Procedure, be it an AGM or a SGM. Clause 9.6 is one of the two which are the focus of this application. It provides:

9.6 Voting

- (a) Every question coming before any General Meeting of Thoroughbred Racing shall be decided by open voting provided however that a secret ballot may be permitted by the Chairman of such Meeting if a majority of the Representatives present and entitled to vote signify that they require such question to be decided by such a ballot.
- (b) Unless otherwise required by this Constitution, every question shall be decided by a bare majority.
- (c) The full number of votes which the Representative of any Club is entitled to exercise shall be given for or against any question put to the vote and shall be recorded not as personal votes of the Representative but as the vote of his/her Club.
- (d) On any question put to the vote at a General Meeting of Thoroughbred Racing, the number of votes which the Representative of each Club shall be entitled to exercise (if such Club is entitled to vote on such question) shall be one vote for each Race Date which the Club has been allocated in the Racing Year in which the vote is occurring reduced by the number of Race Dates (if any) which the Club has Relinquished or forfeited either voluntarily or otherwise in that Racing Year prior to the vote.

[24] Clause 10 is a lengthy one dealing with the Board of NZTR, including the election of directors. Relevant is that the system of voting for directors is similar to that in clause 9.6(d) i.e. it is on the basis of one vote for each race date allocated to the club in the racing year, less any race dates relinquished or forfeited prior to the vote.

[25] The other clause that has led to this application is clause 19. It provides:

19 Alterations to Constitution

This Constitution may be rescinded, amended or added to only by resolution in that behalf passed by a three-fifths majority of all Representatives present and voting at an Annual General Meeting, or a Special General Meeting convened for that purpose. No amendment may be made to this Constitution which affects clause 20 relating to liquidation unless it has first been approved by the Inland Revenue Department.

The issue

[26] For any change to the NZTR Constitution, clause 19 requires a three-fifths majority. But, unlike clause 9.6(b), clause 19 is not specific as to the type of voting. Is it a three-fifths majority of the representatives present and voting, or a three-fifths majority of the votes those representatives cast pursuant to clause 9.6(b)? Put in a different way, does clause 19 alter both the majority required (from the bare majority (over 50%) stipulated by clause 9.6(b) to the three-fifths (60%) required by clause 19), or does it alter both the majority required, and the basis for voting (from one vote per race date to one vote per club)?

Interpretation principles

[27] It is sufficient to refer to *Laws of NZ Incorporated Societies and Other Associations* at para 27:

27. Nature of rules. The rules of an incorporated society constitute a contract between the society and its members. ...

The principles applicable to the construction of other legal documents should be applied to the rules: that is, they should be fairly construed as a whole and their intentions derived from a reasonable interpretation of the language used. They should be construed so as to give them reasonable efficacy and a workable construction.

...

Argument for the one vote per club interpretation

[28] The following summarises Mr Galloway's argument.

Internal context

[29] First, literally interpreted, the wording of clause 19 favours the one vote per club option, because it stipulates for a “three-fifths majority of all representatives present and voting ...”. The majority required is of the representatives voting. As each representative represents a Totalisator Club, effectively the required majority is of Totalisator Clubs.

[30] Secondly, voting on “any question” under clause 9.6(d) is to be contrasted to voting “only by resolution” under clause 19. A “question” under clause 9.6(d) is confined to issues relating to the day-to-day business of NZTR. The word “resolution” in clause 19 is apt to the constitutional amendments which are “exceptional events in the life of” NZTR, and will only be made occasionally. Clause 9.5(a) does apply to clause 19, though only to posit that a resolution must result from valid votes i.e. of a representative duly appointed under clause 7 or a proxy duly appointed under clause 9.4.

[31] Thirdly, the three-fifths (60%) majority required by clause 19 reflects that changes to the Constitution by resolution are serious and exceptional, further supporting the view that the clause 9.6(b) voting system cannot apply.

[32] Fourthly, the fact that clause 19 contemplates constitutional change being made at “a special general meeting convened for that purpose” further emphasises the special nature of voting under clause 19. The notice requirement for an SGM is more stringent: clause 8.5 (“not less than one (1) month’s notice in writing ...”).

[33] Fifthly, it is unlikely that a sub-part of a sub-clause (i.e. clause 9.6(b)), would control the operation of a ‘stand-alone’ or ‘main’ clause (clause 19).

[34] Sixthly, if the clause 9.6(d) voting system was intended to apply to clause 19, then clause 19 could have said so clearly, just as it clearly states that the voting requirement is a “three-fifths majority”.

Wider context

[35] Mr Galloway pointed out that, of the 65 member totalisator clubs of NZTR, 34 are small clubs and 31 large clubs i.e. clubs with four or more race dates. Mr Galloway pointed out that, under a ‘one vote per race date’ system:

- The 12 largest clubs would be able to cast nearly 50% of the total votes ($163/334 = 48.8\%$).
- Those 12 clubs, if they joined with the next five largest, would command 203 votes, just over 60%. Thus, 17 of the 65 clubs could, by voting together, achieve constitutional change.

[36] Mr Galloway submitted:

21. ... while that kind of system might be appropriate, due to its potential efficiency, for voting on NZTR’s day-to-day business, it would be grossly disproportionate and unfair as a method of voting on changes to the Constitution itself. The NZTR Constitution exists for the benefit of all member clubs equally. Moreover, it governs matters of vital importance for the life of the NZTR as a whole, including Membership (Clause 5), Finance (Clauses 14 and 15) and Rules (Clause 18).

Argument for the one vote per race date interpretation

[37] I do not intend separately summarising this. As will become clear, I accept it as the correct interpretation. Mr Galbraith’s argument in support of it is largely subsumed in my decision.

Decision

[38] The structure of NZTR’s Constitution groups the rules under subject headings. The rules relating to the procedure at meetings are in clause 9. One of the procedures at meetings – be the meeting an AGM or an SGM – is voting. So the voting rules are in clause 9, specifically in clause 9.6.

[39] As Mr Galbraith points out, only clause 9.6(b) contemplates a departure from those voting rules:

- (b) *Unless otherwise required by this Constitution*, every question shall be decided by a bare majority.

(my emphasis)

Thus, voting at meetings is to comply with clause 9.6, save only if some other clause in the Constitution requires a voting majority other than a bare majority.

[40] Alterations to the Constitution are covered by clause 19. The voting requirements in clause 9.6 will apply where a proposed alteration to the Constitution is put to the vote, unless some departure from them is stated in clause 19. And it is. Clause 19 increases the voting majority required from a bare majority (over 50%) to a three-fifths majority (60%). The difficulty that has led to this application arises from the way clause 19 is worded. Notwithstanding the literal interpretation, contended for by Mr Galloway as outlined in [29], the effect of clause 19 is clear:

- The Constitution may be amended at an AGM or SGM (if at a SGM, then clauses 8.4-8.6 will apply).
- Voting on the proposed amendment is to be in accordance with clause 9.6, save only that clause 9.6(b) does not apply. Instead, a three-fifths majority of the votes cast in accordance with clause 9.6(d) is required.

[41] This meaning is clear because it is only the voting majority required by clause 9.6(b) that is changed by clause 19. Reinforcing that, is the fact that clause 9.6 contemplates only a change to clause 9.6(b). Nowhere in clause 9.6 is there any suggestion that the basis of voting carefully spelt out in clause 9.6(d) may be changed by some other provision in the Constitution. Everything about the finances of the racing industry in general, and NZTR in particular, underlines the fundamental importance of that basis of voting – that each Club’s representative has one vote for each race date his/her Club has been allocated in that racing year. It is race meetings, and the revenue they generate from betting, that is the life blood of the industry. Thus, it is not surprising that the voting power at meetings of NZTR is

proportionate to race meetings held. In other words, there is clearly operating the adage “he who pays the piper calls the tune”.

[42] I deal now with the points Mr Galloway advanced in support of the ‘one vote per club’ interpretation. I have already accepted his first point, that the literal interpretation of clause 19 favours the one vote per club option. That literal interpretation is available only because the drafting of clause 19 does not unambiguously state what I am sure was intended.

[43] The interpretation principles I referred to in [27] require that I construe the Constitution as a whole, and favour an interpretation which is reasonable and efficacious over one that is literal.

[44] Reading clause 9.6 with clause 19 resolves the ambiguity in the latter. I am in no doubt that the meaning of clause 19 is better expressed thus:

This Constitution may be rescinded, amended or added to only by resolution in that behalf passed by a majority of three-fifths of the votes, cast in accordance with clause 9.6(d), of all representatives present and voting at an Annual General Meeting, or a Special General Meeting, convened for that purpose ...

[45] Two other provisions in the Constitution provide further support, albeit peripheral, for this interpretation. The first is that the one vote per race date basis of voting is also stipulated for the election of directors of NZTR. I mentioned this briefly in [24]. Clause 10.3(a)(ix) provides:

(ix) On the day and at the time so fixed, the Returning Officer, in the presence of the scrutineers, shall open the voting papers and after setting aside all invalid voting papers, count the number of valid votes recorded for each candidate. For the purposes of this election, the number of votes which each Totalisator Club shall be entitled to exercise shall be one (1) vote for each Race Date which the Club has been allocated in the Racing Year in which the vote is occurring reduced by the number of Race Dates (if any) which the Club has Relinquished or forfeited either voluntarily or otherwise in that Racing Year prior to the vote.

[46] The second point also relates to the Board of NZTR. It is that clause 10.1, dealing with the composition of the Board, requires that one of the 10 directors be appointed by small clubs. That director is termed the “Small Clubs’ Director”. In

looking at the wider context, Mr Galloway made some play of the fact that larger clubs can outvote Small Clubs. I accept that, but it is consequent upon the fact that those larger Clubs are “paying the piper”. However, Small Clubs still have voting power (proportionate to their Race Dates), and their views will also be made known at Board level through their appointed director. So they are by no means disenfranchised.

[47] Turning to Mr Galloway’s second point, I do not see substance in his suggestion that a distinction is to be drawn between voting on “any question” under clause 9.6(d), and voting “by resolution ... passed by a three-fifths majority” under clause 19. Clause 9.5 substantially removes any force from the point. It is another of the sub-clauses of clause 9 dealing with meeting procedure. It deals with resolutions, in particular stipulating in clause 9.5(a) for the validity of a resolution passed by a majority of the valid votes recorded. Mr Galloway specifically accepted that clause 9.5(a) applies to clause 19 i.e. applies to a vote on an alteration to the Constitution. So, somewhat inconsistently, he contended that, while clause 9.5(a) applied to clause 19, clause 9.6(d) does not. I agree with Mr Galbraith that the words “any question” in clause 9.6(d) are not to be read down; that they are an encompassing term which includes a resolution. The same applies to the words “every question” in clause 9.6(a). Indeed, when I pressed Mr Galloway about this, he was minded to concede that the concepts of voting on “every question” (clause 9.6(a)), “any question put to the vote” (clause 9.6(d)) and “voting ... by resolution” (clause 19), were used interchangeably in the Constitution.

[48] I do not follow how Mr Galloway’s third point advances the one vote per Club interpretation. The point correctly identifies that the real nub of clause 19 is the requirement for the higher, three-fifths (or 60%), voting majority for constitutional change. But the point throws no light on which of the alternative interpretations is the correct one.

[49] Mr Galloway’s fourth point perhaps overlooks that clause 19 permits of constitutional change either at an AGM, or at a “Special General Meeting convened for that purpose”. Like the previous point, this one also throws little light on which of the alternative interpretations is correct.

[50] I have substantially dealt with Mr Galloway's fifth and sixth points. Contrary to his submission, I consider the structure of the Constitution is that clause 9.6 will control voting on constitutional change, save only to the extent "otherwise required" by clause 19. I do agree with Mr Galloway that clause 19 could *more clearly* have stated that the clause 9.6(d) voting system applies to clause 19.

[51] Mr Galloway's points about the wider context are well made. There are perhaps two main responses to them. First, the consequences he outlines are the operation of "he who pays the piper calls the tune". The 17 largest Totalisator Clubs have over 60% of the vote because they hold over 60% of the race meetings that are the source of the industry's revenue.

[52] Secondly, if the "one vote per Club" interpretation were adopted, the 34 Small Clubs would have 52% (34/65ths) of the votes. That is the bare majority required by clause 9.6(b) for what Mr Galloway termed the "day-to-day business" of NZTR, and would be sufficient to stymie proposed constitutional change with which the small Clubs did not agree.

[53] While Mr Galloway termed this outcome a more representative or equitable one, it would have the consequence that the code would be controlled by Clubs who are producing only about 40% of the industry's revenue. In saying that I recognise that there is not necessarily a correlation between race dates and betting and revenue. Although the analogy may be more contentious than helpful, in the course of argument I likened that outcome to the United Nations General Assembly, now effectively controlled by a majority of nations which does not also pay the majority of the cost of running the Organisation. Is this really equitable? Certainly, it means that he who is not paying the piper is nevertheless calling the tune.

Result

[54] Upon NZTR's originating application, I make a declaration that voting under clause 19 of NZTR's Constitution is to take place on the basis that each representative of a Totalisator Club has one vote for each race date which that representative's Club has been allocated in the racing year in which the vote is

occurring, reduced by the number of race dates (if any) which the Club has relinquished or forfeited either voluntarily or otherwise in the racing year prior to the vote.

[55] No orders as to costs are required.

Solicitors:

Bell Gully, Wellington for New Zealand Thoroughbred Racing Inc.

Duncan Cottrill, Christchurch for the 'one vote per club' interpretation

SCHEDULE

**REGISTERED CLUBS ENTITLED TO USE THE
TOTALISATOR**

Race dates allocated for the 2009-2010 racing year

NORTHERN REGION

<i>Area One</i>		<i>Area Two</i>	
Club	Race Dates Allocated	Club	Race Dates Allocated
Auckland RC	25	Cambridge JC	3
Avondale JC	13	Matamata, Racing	11
Counties RC	12	Rotorua, Racing	11
Dargaville RC	2	Rotorua-BOP HC	1
Paeroa RC	7	South Waikato RC	1
Pakuranga HC	1	Taumarunui RC	1
Thames JC	1	Taupo RC	4
Whangarei RC	7	Tauranga, Racing	10
		Te Aroha, Racing	8
		Waikato RC	15
		Waipa RC	7
		Whakatane	2

CENTRAL REGION

<i>Area One</i>		<i>Area Two</i>	
Club	Race Dates Allocated	Club	Race Dates Allocated
Hawke's Bay RI	13	Egmont RC	4
Levin RC	4	Feilding JC	3
Masterton RC	2	Foxton RC	5
Otaki-Maori RC	9	Manawatu RC	8
Poverty Bay TFC	2	Marton JC	4
Waipukurau JC	1	Opunake RC	2
Wairarapa RC	2	Rangitikei RC	2
Wairoa RC	2	Stratford RC	1
Wellington RC	11	Taranaki RC	15
Woodville	6	Wanganui JC	9
		Waverley RC	3

SOUTHERN REGION			
<i>Canterbury</i>			
<i>Area One</i>		<i>Area Two</i>	
Club	Race Dates Allocated	Club	Race Dates Allocated
Amberley RC	0	Westland RC	1
Ashburton RC	5		
Banks Pen RC	2		
Canterbury Racing	24		
Greymouth JC	1		
Kumara RC	1		
Marlborough RC	3		
North Canterbury RC	2		
Reefton JC	1		
South Canterbury RC	6		
Waimate RC	1		
<i>Southern</i>			
<i>Area One</i>		<i>Area Two</i>	
Club	Race Dates Allocated	Club	Race Dates Allocated
		Central Otago RC	2
		Gore RC	4
		Kurow JC	1
		Oamaru JC	4
		Otago RC	12
		Riverton RC	4
		Southland RC	5
		Tapanui RC	1
		Waikouaiti RC	1
		Wairio JC	1
		Winton JC	2
		Wyndham RC	1