

TASMANIAN RACING APPEAL BOARD

Appeal No 11 of 2017/2018 – DYLAN FORD
Appeal No 12 of 2017/2018 – PHILLIP FORD

Panel:	Tom Cox (Chair) Rod Lester Wendy Kennedy	Appellant:	Appeal #11 - Dylan Ford Appeal #12 - Phillip Ford
Appearances:	Reid Sanders for Office of Racing Integrity Anthony O'Connell for the Appellants	Rules:	Not applicable
Heard at:	Launceston	Penalty:	Not applicable
Date:	7 February 2018	Result:	Dylan Ford: Decision quashed Phillip Ford: Decision quashed

REASONS FOR DECISION

DYLAN FORD & PHILLIP FORD

1. On 7 February 2018, the Tasmanian Racing Appeal Board (the Board) heard an appeal by Phillip Ford against the refusal by the Director of Racing to grant him a stable hand's licence pursuant to his application filed on 11 December 2017.
2. On the same day, the Board heard an appeal by Mr Dylan Ford against the refusal by the Director of Racing to relocate his registered training establishment from 222 Ballyhooly Road, Mangalore to 110 Broadmarsh Road, Brighton.
3. With the agreement of all parties, both appeals were heard together with evidence in each appeal being evidence in the other appeal. This was so, because the Director of Racing contends that Phillip Ford is not a fit and proper person to hold a stable hand licence and, as the registered proprietor of the training establishment at 110 Broadmarsh Road, Brighton, he presents a risk to Mr Dylan Ford complying with the Rules of Racing from that establishment.
4. It is convenient to first deal with Mr Dylan Ford's appeal, but before we do, the Director of Racing has challenged this Board's jurisdiction to hear an appeal against his decision to refuse any application to relocate a registered training establishment under r.119C of the Rules of Racing. The basis of the jurisdictional challenge is that such a decision is not a decision that imposes a condition on Mr Dylan Ford's licence, granted or approved under the Rules of Racing, and thereby is not appealable pursuant to s.28A(1)(h) of the *Racing Regulation Act 2004*.

5. AR119C(1) provides as follows:

A trainer shall not without the prior approval of the Stewards stable any horse trained by him in any location other than any registered training establishment of the trainer.

6. S.28A(1)(h) of the Racing Regulation Act 2004 provides as follows:

A person may appeal to the TRAB if the person is aggrieved by a decision of the Director to – (h) impose conditions on the person’s licence, or registration, granted or approved under the Rules of Racing;

7. The essence of the Director’s submission is that his refusal to provide prior approval of the trainer’s entitlement to train any horse at a registered training establishment does not “impose a condition” on Mr Ford’s licence for the purposes of the Act.

8. We reject that submission. It has long been recognised that the Rules of Racing are rules to which industry participants are contractually bound. A licensed participant within the industry may only participant in accordance with the terms or conditions imposed under the Rules of Racing. It is trite to say that a trainer’s right to stable any horse is conditional on the prescribed authority’s approval of a location from which horses may be trained. Such a location must be a registered training establishment for the purposes of r.119C. It follows that the Director’s failure to approve any alternate location is a decision which imposes a condition (the condition being either that no location is approved or that an unsuitable or undesirable location remains approved) about which the trainer may be aggrieved. In this case it is not so much the Director’s refusal to approve the alternate location that is the decision about which the trainer is aggrieved, instead, it is the Director’s decision, by implication, that the trainer, Mr Dylan Ford, may only train his horses from his existing registered training establishment at Mangalore. That is the condition about which Mr Dylan Ford is aggrieved and it is that decision (or more accurately the imposition of that condition on his licence) that he is entitled to appeal against under the Act.

Mr Dylan Ford’s Appeal

9. The merits of Mr Dylan Ford’s appeal may be dealt with briefly. The Director, by letter dated 12 December 2017, set out, in point form, the basis of his refusal to approve the registration of the property at Broadmarsh Road, Brighton. The reasons were as follows:

- *We are not satisfied that you can adequately prevent unlicensed persons from accessing your training area and horses under your care;*
- *Your evasive and misleading answers during the Licensing meeting;*
- *Your failure to adequately provide what you now say is your residential address on your previous licensing application, and or your failure to advise the ORI of any amendment;*
- *The number of previous prohibited substance offences, related to Trainers whom have been located on the property at 110 Broadmarsh Road, Brighton*

10. Mr Ford contends that the alternative location at Broadmarsh Road should be approved for the simple reasons that: the track is larger than the track at Mangalore; its location is closer to the Brighton training centre which provides pool facilities;

his rental costs will be lower than what he presently pays; and that he also intends to live on the site which, as we understand it, will be a matter of convenience to him.

11. Mr Ford also contends that he is fully qualified to train his horses and can do so without any input from his father, Mr Phillip Ford.
12. It should also be borne in mind that the reason why the facility has become available is because the trainer who previously trained from the establishment was disqualified for presenting horses with prohibited substances. Neither Mr Dylan Ford, nor Mr Phillip Ford, were in any way identified as being a part of that contravention of the Rules of Racing.
13. In our view, the Director's contentions lack merit. The first and last contentions above relate to the supposed risk that Mr Phillip Ford poses as the owner of the property and a previously disqualified industry participant; disqualified for prohibited substance offences contrary to the Rules of Racing. It is true that Mr Phillip Ford has been disqualified for serious offences but the Director's contentions are premised on the assumption that because Mr Phillip Ford has that history, he will act in a manner that will place Mr Dylan Ford in contravention of the Rules. The considerations which the Director has had regard to have simply not occurred and may never occur. These considerations also suffer from the fact that there is no historical basis to support a finding that Mr Phillip Ford was involved in any contravention by the trainers who previously worked horses at the property. The nexus between those earlier contraventions and Mr Phillip Ford's ownership of the property appears to have been presumed in the absence of any supporting evidence.
14. The second and third contentions relate to Mr Dylan Ford's alleged misleading and deceptive behaviour at interview. It is said that he was misleading and deceptive about his true residential address. As to these contentions, we find that even if he was evasive about his residential address, such a consideration has little to do with the suitability or otherwise of a registered training establishment. There is no requirement that he reside at the training establishment.
15. If the Director contends that Mr Dylan Ford is not a fit and proper person for want of candour, that is an entirely different matter, and not one that arises for consideration at this appeal.
16. Either the establishment is suitable or it is not. It has previously been deemed suitable for other trainers to use the establishment. It follows, in our view, that it remains suitable unless for some other reason the establishment should not be approved. At its highest, the other reason, according to the Director, is the risk posed by Mr Phillip Ford's presence at the establishment and that that risk may result in future breaches of the Rules of Racing. That may be so, but if there are future breaches by either appellant, the Rules of Racing are there to capture such conduct and, no doubt, appropriate penalties will follow.
17. To the above reasons, we add the reasons and findings below in respect of Mr Phillip Ford's appeal.
18. The Director's decision is quashed. Mr Dylan Ford's deposit will be returned to him.

Mr Phillip Ford's Appeal

19. In Appeal No.4 of 2016/17 (Mr Scott Ford) this Board observed as follows:

The Director's power to refuse to grant a licence - Rule 90(5)

7. Pursuant to s.6(2)(f) of the Racing Regulation Act 2004 (the "Act"), the Director is responsible for granting licences under the Rules of Racing. The Rules of Racing, in turn, provide by rule 90(5) that an application for a licence may be refused by the Director "without assigning any reason."

8. The Rules of Racing are rules to which industry participants become contractually bound, but they are also given statutory consequences.¹ For instance, by s.111(2) of the Act the Rules of Racing may provide for the suspension of registrations, the creation of offences and imposition and recovery of fines.

9. Although rule 90(5) may afford the Director with a contractual right to refuse to grant a licence and to do so without providing an applicant with reasons for such a decision, the Director has confined his position to require satisfaction that Mr Ford is a fit and proper person to be associated with the harness industry. In other words, for the purposes of this appeal, the Director submits that under the Rules of Racing Mr Ford must satisfy this Board that he is a fit and proper person to be associated with the harness racing industry. If he does, it should follow, that his appeal should succeed.

10. Because the Rules of Racing are in the nature of a binding contract between the Director and industry participants, we will proceed on the basis proposed by the Director, however, it should be noted that we have not concluded that rule 90(5) necessarily imports a requirement for an applicant to be a fit and proper as a pre-requisite to the Director exercising his right to refuse to grant a licence. That issue can be left for another day.

20. It is now the day for this issue to be decided. The Director contends that if the requirement that the applicant be "fit and proper" is not a prerequisite to the granting of a licence, then he has effectively an unfettered discretion to refuse any licence "without assigning any reason".

21. In our view, the requirement that an applicant be "fit and proper" before a licence is granted under the Rules of Racing is a prerequisite to the granting of such a licence. We note that AR90(6) provides as follows:

A licence may be suspended or cancelled:

- (a) by the Controlling Body or the Stewards for breach of a term or condition of the licence; or*
- (b) by the Controlling Body where the Controlling Body is satisfied that the person holding the licence is not a fit and proper person to be associated with harness racing.*

22. It would seem to us that if the requirement that the applicant is "fit and proper" does not apply at the time a licence is initially granted an inherent absurdity arises. This is because if, at the time of granting the licence, the Director holds the view that the applicant is not a fit and proper person he would be required to grant the licence and simultaneously suspend or cancel it. The Director would be required on the one hand to grant a licence contrary to his duty to control racing to ensure its integrity is maintained, while on the other cancelling the licence in discharge of that duty.

¹ NSW Thoroughbred Racing Board v. Waterhouse & Anor. [\[2003\] NSWCA 55](#) at [35]

23. We are fortified in this view because the words in 90(5) – “without assigning any reason” should not be construed as meaning without any good reason. The refusal to grant an otherwise suitable candidate in circumstances where there was no other reason – for instance to place a limit on the number of trainers – would be to condone capricious decision making. That would not be consistent with the underlying purpose of the Act and the Rules of Racing which is to provide for “the better regulation” of the racing industry.
24. As for the merits of Mr Ford’s application, we direct ourselves in accordance with our observations in Appeal No.4 of 2016/17 Mr Scott Ford at paras.11-13

Fit and Proper Person

11. The appeal before the Board was pursuant to s.28A(1)(a) of the Act against the refusal by the Director of Racing to grant a licence. As such the onus was on Mr Ford to demonstrate that he ought to be granted the licence he was seeking. The key issue for the Board (as it had been for the Director) was whether Mr Ford was a fit and proper person to hold a licence within the harness racing industry. Rule 90(6) of the Australian Harness Racing Rules provides that a licence may be suspended or cancelled by the Director where the Director is satisfied that the person holding the licence is not a “fit and proper person” to be associated with harness racing. While it is not specifically stated that a requirement for the granting of a licence is that the applicant is a fit and proper person to be associated with harness racing, the Board, as noted above, will proceed on the basis that Mr Ford meets that prerequisite.

12. The nature of Mr Ford’s appeal is not such that he needs to demonstrate an error by the Director; rather he bears the onus of satisfying the Board that he ought properly be granted a licence. Thus the Board is not limited to consideration only of the material before the Director when the licence was refused or the basis upon which he made his decision, but may have regard to all material before it at the hearing; that is the documentation noted above, and the evidence and submissions at the hearing on 10 November.

13. The interpretation of “fit and proper person” was dealt with by the High Court in Australian Broadcasting Tribunal v Bond [\(1990\) 170 CLR 321](#). In paragraph 36 of their joint decision Justices Toohey and Gaudron stated: “The expression “fit and proper person”, standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of “fit and proper” cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not a fit and proper person to undertake the activities in question.”

The Steward’s Contentions

25. The Stewards contentions are conveniently set out in the letter to Mr Phillip Ford dated 12 December 2017:

Following your application and appearance before the Licensing Panel, the Office of Racing Integrity determined that you are not a fit and proper person to be issued a licence at this stage, for the following reasons:

- *Your offence history, which demonstrates a high level of non-compliance with the Rules, particularly prohibited substances and conduct matters;*
- *Your failure to comply with a previously imposed disqualification;*
- *Your reasoning for being licensed – “have some fun”, or attend the races does not require the privilege of a licence;*
- *You were misleading to the Licensing Panel regarding the circumstances which lead to your recent Criminal Conviction;*
- *The protective nature of a licensing regime in the Harness industry;*
- *That the issuing of a licence is a privilege, and you need to demonstrate to the industry that you can conduct yourself appropriately without holding a licence for a period of time.*

Mr Ford’s contentions

26. Mr Phillip Ford’s contentions are as follows:

- (a) he has served his time for his previous disqualification (4 years) from 2012.
- (b) he has the skill set necessary to satisfy the requirements of a stable hands licence pursuant to r.90(3);
- (c) he has not been the subject of any inquiry by Stewards during or since his period of disqualification which expired in March last year;
- (d) he wishes to obtain a stable hand’s licence in order to teach his daughter, Taylor, and to be involved in her development as a driver;
- (e) although he has a recent conviction for failing to leave a licensed premises, that conviction was disclosed in his application and is not relevant to a consideration of whether he is a fit and proper person. In the alternative, he says that it was a minor offence and should be given little weight.

27. The Stewards do not dispute that the appellant is suitably skilled to hold a stable hand’s licence. The true basis of the Director’s refusal appears to be the risk that because Mr Phillip Ford has previously not complied with the Rules, he will fail to do so in the future. It cannot be said that he does not pose any risk on account of his past offending, however, his offending is not so poor to assume that he will reoffend. He has served his period of disqualification without incident and passed another year outside the industry.

28. In Phillip Ford’s penultimate appearance before this Board (Appeal No.4 of 2010/2011), the following comments were made:

20. This is the appellant’s third offence within a period of eight years. To adopt a practice of administering alkalising agents immediately after one of his horses has raced was careless if not reckless. He knew, or should have known, that the horse may have been required for post-race swabbing, regardless of however or whenever he was so advised. In that knowledge he should have ensured that he and those with the care of his horses only provided his horses with water until they had left the track.

21. *An example of his ambivalence to the standard expected of him is borne out by the fact that he did not relay the direction which was given to him after the race that only water should be administered to Boozy Rouge. It may be said that relaying that direction would have been futile in light of Nathan Ford's conduct, but that does not alter the fact that the appellant took no steps to ensure compliance with the rules, futile though they may have been.*

22. *Leaving aside the absence of a finding that the horse had been the given the drink, the matters which were expressly stated by the stewards to have been taken into account were proper considerations for the purposes of determining penalty.*

28. In his last appearance before this Board (Appeal Nos. 5 & 6 of 2010/2011) the following comments were made:

42. *During the inquiry the appellant was asked to explain why the horses had presented with elevated TCO₂ readings. He responded that:*

"I can't really explain, I haven't changed any routine that I normally do with them.

I feed salt.

Fine salt, potassium chloride and potassium citrate."

43. *At the inquiry he was asked:*

"Mr Ford we dealt with a matter that was ongoing from September which was concluded effectively yesterday – in one sense similarly used potassium citrates and nitrates in preparations there, what measure did you take from the time you were notified of that problem to the presentation of these horses, to ensure that the introduction of that feed would not elevate a TCO₂ level?"

44. *Mr Ford, later, responded:*

"Well I reduced the – instead of putting, I think it used to be 10 to 1, I used to just do 10 to half of each."

45. *The above exchange related to the appellant modifying the amount of alkalinising agents as a proportion of the appellant's horses' feed.*

46. *In our view, the Board ought not interfere with the penalty issued by the stewards unless they acted on a wrong principle, allowed extraneous or irrelevant matters to guide them, mistook the facts, failed to take into account some material or failed to take into account some material consideration.*

47. *The matters referred to by the stewards were all relevant consideration. However, in our view, the stewards erred in one regard. Although the appellant was charged with two breaches of AR191, the conduct giving rise to each breach was the same; that is, the appellant's negligent or even reckless feeding routine. Had the stewards taken into account that material consideration, they ought to have exercised their discretion pursuant to AR257 to direct that the penalties of disqualification should be served concurrently as opposed to cumulatively.*

29. As can be seen from these comments, Mr Ford's culpability for previous breaches of the rules has been variously described as negligent, ambivalent and reckless. His character and reputation have been negatively impacted by his record, but not, in our view, to the extent that the public could not have any confidence that he will not reoffend as a licensed stable hand. The Director's position may, quite properly, be

different if Mr Ford was applying for a trainer's licence with all of the added responsibility that entails.

30. He is suitably qualified to obtain the licence. His intentions for doing so, being his desire to assist his daughter, are reasonable. He has been out of the industry for 7 years and, in our view, has sought to re-enter it at a suitable level. The appellant also demonstrated some contrition for his previous offending in acknowledging that he was not proud of his earlier breaches of the rules for contraventions relating to prohibited substances. His troubles with the law, concerning his failure to leave a licensed premises, are relevant, but should not be held too harshly against him.
31. Taking all of these matters into account, we have not come to the same view as the Director. That is, we are not satisfied that Mr Phillip Ford is not a fit and proper person to be granted a stable hand's licence. Put another way, we are satisfied that Mr Ford is a fit and proper person, and suitably qualified, to obtain a stable hand's licence.
32. The Director's decision is quashed. Mr Phillip Ford's deposit will be returned to him.