BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 25 of 2007

BETWEEN:

BARBADOS TURF CLUB ***Appellant***

AND

EUGENE MELNYK ***Respondent***

Before: The Honourable Sherman Moore, Chief Justice (Ag.), The Honourable Sandra Mason, Justice of Appeal, and The Honourable Kaye Goodridge, Justice of Appeal (Ag.)

2010: June 28 & 29; and

2011: March 31

Mr. Vernon Smith, Q.C., Mr. Hal Gollop and Mr. Steve Gollop for the Appellant

Mr. Alair Shepherd, Q.C., and Mr. Philip McWatt for the Respondent

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JUDGMENT

Introduction

MOORE CJ (Ag.): On 6 March 2004 the race horse 'Kathir', owned by Mr. Eugene Melnyk (Melnyk), won the Sandy Lane Gold Cup. In a routine examination carried out after the race, methylprednisolone was found in a sample of Kathir's urine. Under the Barbados Turf Club (BTC) Rules of Racing, methylprednisolone is a prohibited substance. The Prohibited Substance Body (PSB), a disciplinary committee of the BTC, held an inquiry and on 6 January 2005, the PSB disqualified Kathir and imposed a fine of $500 on Mr. Naz Issa (Issa), the trainer of Kathir. Issa was also ordered to pay the costs and expenses of the inquiry and to ensure the return of the Gold Cup trophy and the purse.

[2] On 11 January 2005 Melnyk brought an action against the BTC claiming the following relief:

> "A declaration that the decision of the PSB
>
> (a) to disqualify Kathir;
>
> (b) to fine Issa $500;
>
> (c) to order Issa to pay the costs and expenses of the inquiry; and
>
> (d) to order Issa to ensure the return of the Gold Cup trophy and purse
>
> was null and void."

The Pleadings

[3] In his amended statement of claim Melnyk alleged that:

(a) the Articles, Bye Laws and Rules of Racing of the BTC form a contract of membership between the BTC and Melnyk;

(b) by Clause 20 of the Bye Laws the BTC undertook with its members to conduct all race meetings in accordance with the Rules of Racing;

(c) the BTC undertook that any hearing by the stewards into the conduct of its members and/or whether any penalty, disqualification or prohibition ought to be visited upon any member would be conducted fairly and in accordance with the rules of natural justice;

(d) the BTC failed to observe the rules of natural justice when the PSB conducted the disciplinary hearing against the trainer; and

(e) as a result of that failure he suffered loss and damage.

[4] By its defence the BTC admitted, *inter alia*, that it was an express and implied term of its Rules of Racing that any hearing by its stewards would be conducted fairly and in accordance with the rules of natural justice.

The Order of the Trial Judge

[5] On 25 October 2007 the trial judge found in favour of the respondent and made the following order:

"(1) A declaration that the decision of the PSB whereby it:

(a) disqualified "Kathir" from the first place in the Sandy Lane Gold Cup Race 2004;

(b) fined the trainer, Mr. Naz Issa, $500; and

(c) ordered the said trainer to pay all reasonable costs and expenses related to the enquiry and such reasonable compensation as may be determined by the stewards of the Club;

was null and void.

(2) A permanent injunction restraining the defendant its officers, servants or agents or members from enforcing the said decision.

(3) That the defendant shall pay to the plaintiff his costs of the action certified fit for two counsel.

(4) That there be a stay of six weeks on the decision."

[6] It is from that finding and order that the BTC has appealed.

The Appeal

[7] The appellant filed six grounds of appeal.

Grounds 1 and 2

[8] These grounds are dealt with together because they are challenges to paragraphs [86] to [111] of the decision of the trial judge. These grounds alleged that:

> "(i) The learned trial judge erred in that in having ruled, obiter, that the Court was not entitled to substitute its own decision for that of the disciplinary tribunal, she then failed to apply the Rules of Racing fully. In the circumstances, she misappreciated *(a) (sic)* that under Rule 39(b), if a horse tests positive for having raced with a prohibited substance, it is automatically disqualified and by virtue of Rule 73(e) absolute and strict liability are imposed on the trainer of the horse. The Rule imposes a mandatory fine on the simple basis of a positive analysis for a prohibited substance.
>
> (ii) Because of (i) the learned trial judge erred when she went on to apply rules of natural justice in relation to the hearing of the PSB which simply confirmed the disqualification of the horse Kathir and imposed a fine upon the trainer Mr. Naz Issa in accordance with the Rules of Racing."

[9] At paragraph [82] of her decision the trial judge found that the decision of the PSB to disqualify Kathir was null and void and at paragraph [83] she said that the finding effectively disposed of the action. Yet from paragraphs [86] to [111] she embarked on an extra-judicial excursion which has occasioned much argument by both counsel even though at paragraphs [83] and [85] she had determined that it was unnecessary to do so.

[10] Mr. Gollop's acceptance in ground 1 of his grounds of appeal that paragraphs [86] to [111] were obiter effectively disposes of grounds 1 and 2.

Ground 3

[11] This ground alleges that "the learned trial judge erred in law when she incorrectly held that Mr. Eugene Melnyk had locus standi in this matter." Mr. Gollop referred to paragraph [2] of the decision of the trial judge where she stated:

> "The action is based on the allegations of Melnyk that the Turf Club breached an alleged contract of membership between the Turf Club and himself, when it failed to comply with certain provisions of the Rules of Racing (the Rules) and to conduct the enquiry in accordance with the rules of natural justice."

He submitted that "the ratio of the decision is built on these very allegations" and as a result the decision "must therefore be considered deeply flawed" because "the PSB hearing had nothing to do with Melnyk. The action of the PSB was a disciplinary action against the trainer of the horse Kathir to enable him to explain his conduct as a trainer whose entrant had been found to race with a prohibited substance."

[12] Mr. Gollop also submitted that Melnyk was not a party to the disciplinary proceedings and therefore could not challenge them. He contended that it was Issa who entered the horse Kathir in the Gold Cup race and not Melnyk. He said that the instant case is not on all fours with ***R v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan [1993] 2 All ER 853 (Aga Khan)*** because in that case the Aga Khan had himself entered the filly ***Aliysa***.

[13] In response, Mr. Shepherd, Q.C., for the respondent, argued that the trial judge was correct in identifying the basis of the action as alleged breaches of an alleged contract between the appellant and the respondent. He relied on the ***Aga Khan,*** a case in which the Aga Khan had sought judicial review of disciplinary action of the Jockey Club.

[14] The following is taken from the headnote of the case:

> "The Jockey Club controlled and regulated horse racing in Great Britain by virtue of the fact that all race meetings had to be licensed by the Jockey Club and run under the Rules of Racing and persons connected with racing had to be licensed by or registered with the Club. The applicant was the head of a large religious sect and a major racehorse owner and breeder.

> As an owner wishing to race horses the applicant had to register with the Jockey Club and enter into a contractual relationship with the Club by which he expressly submitted to the Rules of Racing and acknowledged that he was governed by the disciplinary powers of the Club. In 1989 one of the applicant's horses won a major race, but a routine sample of its urine taken after the race was found to contain camphor, which was a prohibited substance under the Rules of Racing. After an inquiry by the disciplinary committee of the Jockey Club the horse was disqualified and the trainer was fined £200. The source of the camphor was never identified and it was never alleged that either the applicant or the trainer had caused or connived at the doping of the horse or that its performance had been affected in any way. The applicant, who was deprived of the prize money for the race, claimed that the decision was damaging to his standing as a religious leader and to his reputation as a major racehorse owner and breeder, and that the value of the horse for breeding purposes had been greatly depreciated. The applicant sought judicial review of the disciplinary committee's decision."

[15] In that case as in the instant case, after an inquiry the horse was disqualified and the trainer fined. Counsel in the ***Aga Khan*** had argued that:

> "[The] relationship [of the Jockey Club] with those who, like the applicant, agree to be bound by the Rules of Racing is an essentially private law relationship based on contract. A duty to conduct any inquiry fairly would be implied into this contract and if the applicant could establish a breach of that duty he could recover appropriate private law remedies by way of declaration, injunction and damages."

Accepting this argument, ***Sir Thomas Bingham MR*** concluded at p. 867 as follows:

> "[T]he powers which the Jockey Club exercises over those who (like the applicant) agree to be bound by the Rules of Racing derive from the agreement of the parties and give rise to private law rights on which effective action for a declaration, an injunction and damages can be based without resort to judicial review…"

At p. 871 of the said judgment ***Farquharson LJ*** said:

> "It is conceded that there is or at all events was a contractual relationship between the Jockey Club and the applicant, both when he applied to be and was accepted as a registered owner and when he entered Aliysa for the Oaks. There was in all probability also a contract between the applicant and those responsible for Epson racecourse. By entering into those agreements the applicant was expressly submitting to the Rules of Racing and acknowledging that he was governed by the disciplinary powers of the Jockey Club."

[16] Mr. Shepherd also submitted that the use of the word "entered" by ***Farquharson LJ*** and ***Hoffman LJ*** cannot be interpreted solely to mean that the Aga Khan himself, as opposed to acting through his trainer and agent, entered his horse in the race. He said that it is instructive that disciplinary hearings in the ***Aga Khan*** were carried out against the trainer and not the Aga Khan and ***Farquharson LJ*** stated specifically that the committee's findings had imputed no blame to him, as owner.

[17] In our opinion, the ***Aga Khan*** is authority for the proposition that the respondent's membership in the Turf Club created a contract between the respondent and the appellant wherein *(a)* the respondent agreed to be bound by all the Rules of the appellant; and *(b)* the appellant undertook to conduct all disciplinary hearings against its members in accordance with its Rules of Racing and the principles of natural justice. This contract may conveniently be called the "membership contract". But as appears from the judgment of ***Hoffman LJ*** in ***Aga Khan***, when the respondent entered his horse in the Gold Cup, another contract, what may be called the "event contract", arose between the appellant and the respondent wherein they agreed to be bound by the rules governing the event, the "Gold Cup".

[18] The relevance of the ***Aga Khan*** to the instant case comes starkly into focus when it is considered that *(a)* taking into account the necessary adaptations and modifications, the Rules of Racing of the BTC follow closely those of the Jockey Club; and *(b)* rule 140 of the Rules of Racing of the BTC provides that "The Orders and Instructions of the British Horseracing Board and the Rules of Racing and Instructions of the Jockey Club for the time being in force shall apply in any case not provided for in these Rules unless same are clearly not applicable or clearly inconsistent with the import or intent of these Rules in the particular case." In addition, the commonality of the facts between the ***Aga Khan*** and the present case cannot be gainsaid.

[19] The House of Lords decision in ***Clarke v. The Earl of Dunraven and Mount Earl [1897] AC 59 (Earl of Dunraven)*** lends some support to the view that a contract existed between the BTC and Melnyk. In that case:

> "Two yachts were entered by their respective owners for a club race, each owner undertaking with the club to be bound by the club sailing rules. By the rules the owner of any yacht disobeying any of the rules was to be liable for "all damages arising therefrom." One of the yachts in breach of a sailing rule, through improper navigation without the actual fault or privity of the owner, ran into and sank the other yacht:-

Held, that there was a contract between the owners upon which the owner of the damaged yacht could sue the owner of the other…"

At page 63 ***Lord Herschell*** said:

> "I cannot entertain any doubt that there was a contractual relation between the parties to this litigation. The effect of their entering for the race, and undertaking to be bound by these rules to the knowledge of each other, is sufficient, I think, where those rules indicate a liability on the part of the one to the other, to create a contractual obligation to discharge that liability. That being so, the parties must be taken to have contracted that a breach of any of these rules would render the party guilty of that breach liable."

[20] The decision in the ***Earl of Dunraven*** illustrates the attitude of the courts in relation to the enforcement of contractual rights. There was no immediate contract between the yacht owners but they each had contracted with the club to obey the rules of yachting and the court found a contract between them – one party having breached the contract with the club by damaging the yacht of the other party.

[21] In the instant case Melnyk as owner of Kathir, had a contract with the BTC. Melnyk as owner of Kathir had a contract of principal and agent with Issa, the trainer, authorising him to enter Kathir for the race. Melnyk was entitled to enforce his contract in order to vindicate his rights thereunder if, in his opinion, the BTC had breached the term in the contract to observe the rules of natural justice at the disciplinary hearing with the BTC.

[22] For the foregoing reasons, we hold that Melnyk had locus standi to bring the action.

Ground 4

[23] Ground 4 alleges that the learned trial judge erred in law when she made orders in respect of Mr. Naz Issa who was not a party to the action.

[24] Mr. Shepherd, Q.C. submitted that the respondent alleged in his statement of claim "that the agreement between him and the appellant contained certain implied terms which provided that any hearing by the stewards into the conduct of its members and/or whether any penalty, disqualification or prohibition ought to be visited upon that member would be conducted fairly and in accordance with the rules of natural justice…." He said that the trial judge found that there was a breach of natural justice in the conduct of the inquiry and the appellant having not appealed that finding, cannot challenge it before this court.

[25] This Court agrees with Mr. Shepherd that the finding of the trial judge that the principles of natural justice were breached by the PSB was not challenged in this appeal. The trial judge's ruling that there was a breach of the principles of natural justice by the PSB *ipso jure* rendered the proceedings a nullity and any decision made by it invalid. Accordingly, Melnyk was entitled to a declaration to this effect. The learned trial judge granted such a declaration. She did not purport to make any order in respect of "Mr. Naz Issa when he was not a party to the action". At paragraph [113] of her judgment, she does mention Mr. Naz Issa, but only as part of the decision of the PSB which was declared by her to be null and void.

Ground 5

[26] This ground is without merit. It alleges that the learned trial judge erred in law in that in granting the relief of declaration and prohibitory injunction only, she made no appropriate order that would mandate the appellant to award the prize to the respondent. This remedy was not claimed by the respondent. It is settled law that a contractor may choose whatever remedies are available to him on a breach of contract: (See ***Johnson v Agnew [1980] AC 367.***)

Ground 6

[27] This ground alleges "that the learned trial judge further erred in that she has done nothing that could order the appellant to confirm the first placing of the horse Kathir which the PSB found had raced with a prohibited substance in its body contrary to the Rules of Racing." This ground fails for the same reason as ground 5.

Disposal

[28] In the circumstances this appeal is dismissed. The respondent shall have his costs to be prescribed in accordance with Part 65.5 of the ***Supreme Court (Civil Procedure) Rules, 2008***.

Chief Justice (Acting).

Justice of Appeal.

Justice of Appeal (Acting).