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ON APPEAL
FROM THE SUPREME COURT OF
NEW SOUTH WALES
EQUITY DIVISION
IN PROCEEDINGS 762 OF 1977

BETWEEN:

FERD DAWSON CALVIN

(Plaintiff) Appellant

AND:

JOHN HENRY BROWNLOW CARR

(First-named Defendant)

JOHN HENRY BROWNLOW CARR, BLAKE RAYMOND PELLY,
DENIS PATRICK ROWE, SIR JOHN WORROKER AUSTIN,
ROBERT ANDREW HOWELL, WILLIAM FRASER GORDON,
JOHN HORACE INGHAM, THOMAS RENDELL STREET,
REX JAMES WHITE

(Second-named Defendants)

JAMES JOSEPH MEEHAN, HECTOR JOHN MAHONEY,
DOUGLAS GEORGE MCKAY, JACK BARRY HICKMAN,
THOMAS JOSEPH CARLTON, NORMAN SWAIN,
BRIAN HILTON KILLIAN

(Third-named Defendants)
Respondents

CASE FOR THE APPELLANT

Adrian Twigg & Co.,
221-227 Elizabeth Street,
SYDNEY. N.S.W. 2000 Australia

By their Agents:

Waterhouse & Co.,
4 St. Paul's Churchyard,
LONDON. E.C. 4 M. 8BA. U.K.

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INTRODUCTION

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1. This appeal is brought, pursuant to leave granted by the Supreme Court of New South Wales, from a final judgment of that Court given by the Honourable Mr. Justice Rath on 23rd June 1977, dismissing a suit brought by the Appellant (as Plaintiff) against the Respondents (as Defendants), and from certain orders as to costs made on that date and on 28th June 1977.
2. In his suit, the Appellant challenged the validity of a disqualification purportedly imposed on him under the Rules of Racing of the Australian Jockey Club and claimed declaratory and injunctive relief in respect thereof.
3. The first-named Defendant was at all material times the Chairman of the Committee of the Australian Jockey Club and was sued as nominal defendant for and on behalf of the Australian Jockey Club pursuant to S. 4 of the Australian Jockey Club Act, 1873. The second-named Defendants were at all material times the members of the Committee of the Australian Jockey Club. The third-named Defendants were at all material times the Stipendiary Stewards holding office under the Rules of Racing of the Australian Jockey Club.

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THE REGULATION OF HORSE RACING
IN NEW SOUTH WALES

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4. Horse racing within New South Wales (and the Australian Capital Territory) is controlled by the Australian Jockey Club (hereinafter called "the A.J.C.") through its Committee. The A.J.C. is an unincorporated association, the affairs of which are managed by the Committee. Other bodies or associations control horse racing within the other parts of Australia, each in its own territory, and each such body or association (including the A.J.C.) is known as a Principal Club.

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5. The administration of horse racing in New South Wales is governed by a body of rules known as the Rules of Racing of the Australian Jockey Club (hereinafter called "the Rules") and by certain statutory provisions.

The Rules consist of -

- (a) rules made by or pursuant to agreement between the Principal Clubs and known as the Australian Rules of Racing;
- (b) further rules made by the A.J.C. and known as the Local Rules of the Australian Jockey Club.

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6. The Rules provide, inter alia, as follows:

Australian Rules of Racing

"2. Any person who takes part in any matter coming within these Rules thereby agrees with each and every Principal Club to be bound by them."

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"4. Any act done or decision made by a Committee of a Club or by Stewards in the exercise or intended exercise of any right power or authority conferred by or under any of the Rules shall except where otherwise provided in the Rules be final and conclusive."

"6.(a) These Rules apply to all races held under the management or control of a Principal Club, and shall, together with such Rules (not being repugnant to or inconsistent with these Rules) as may from time to time be made by the Principal Club in its territory, be read and construed as the Rules of the Principal Club in such territory and, subject to the provisions of Rule 35, shall apply to all races held under the management of a Principal Club or any registered Club and to all meetings registered by a Principal Club.

....."

"7. The Committee of a Principal Club shall have the control and general supervision of racing within its territory. Such Committee, in furtherance and not in limitation of all powers conferred on it or implied by these Rules, shall have power, in its discretion:-

(a) To hear and decide appeals as provided for in its Rules or by law.

....."

"8. To assist in the control of racing, Stewards shall be appointed according to the Rules of the respective Principal Clubs, with the following powers:-

.....

(e) To punish any person committing a breach of the Rules,

....."

"9. A majority of the Stewards present at any meeting of the Stewards shall have all the powers hereby given to the Stewards, and a Deputy Steward shall be considered to be a Steward. If voting is equal the Chairman shall have a casting vote."

"135. (a) Every horse shall be run on its merits.

.....

(c) Any person who in the opinion of the Stewards has breached, or was a party to breaching, any portion of this Rule may be punished, and the horse concerned may be disqualified."

"175. The Committee of any Club or the Stewards may punish:

.....

(f) Any owner, nominator, lessee, member of a Syndicate trainer, jockey, rider, apprentice, stablehand, bookmaker, bookmaker's clerk, or person having official duties in relation to racing who refuses to attend or give evidence at any enquiry or appeal when requested by the Committee or Stewards to do so.

.....

(k) Any person who has committed any breach of the Rules.

....."

"182. So long as a person remains disqualified by the Stewards or Committee of a Principal Club.

(a) He shall not enter any racecourse under the control of any Club or on which a meeting is being held under these Rules, or any part thereof, or any land used in connection therewith.

(b) He shall not subscribe to any sweepstakes.

(c) No horse shall be entered by him whether acting as agent or principal for any race.

(d) He shall not be employed in any racing stable or ride a horse in any exercise or trial except with the consent of the Committee which imposed the disqualification.

(e) No horse shall be permitted to race which is wholly or partly owned or leased by him or his wife, or in the winnings of which he or she has an interest.

(f) No horse of which he is the owner, or, in the case of a leased horse, he is the lessee, shall be placed or remain in the care of any licensed trainer."

"196. Any person or body authorised by the Rules to punish any person may, unless the contrary is provided, do so by disqualification, or suspension and may in addition impose a fine not exceeding \$1,000, or may impose only a fine not exceeding \$1,000."

"197. No person shall be entitled to make any claim for damages by reason or in consequence of the imposition,

annulment, removal, mitigation, or remission of any punishment imposed or purporting to be imposed under the Rules."

"198. No club, official or member of a club shall be liable to any person for any loss or damage sustained by that person as a result of, or in any way (either directly or indirectly) arising out of the exercise of any right, privilege, power, duty or discretion conferred or imposed, or bona fide believed to have been conferred or imposed, under the Rules."

"199. Every person aggrieved by any punishment imposed by the Committee of a Club or an Association or by the Stewards may subject to the Rules appeal to the Committee."

Local Rules of The Australian Jockey Club

"25. (a) The Committee may from time to time appoint Stipendiary Stewards to act at meetings within the Metropolitan Area and such other meetings as may be directed by the Committee.
....."

"27. Stewards appointed under the two preceding Rules shall have and may exercise all the powers, duties, and authorities conferred upon the Stewards by the Rules"

"29. The Committee or the Stewards may permit accredited representatives of the Press to be present at any inquiry in such numbers and subject to such conditions as may from time to time be deemed proper."

"29A. A person attending or required to attend before the Stewards or the Committee of a Club or Association shall not be entitled to be represented by any other person, whether a member of the legal profession or otherwise, provided that an apprentice jockey may be represented by his master or other trainer acting for his master."

"70. (a) Any person appealing to the Committee of the Australian Jockey Club shall within seven days after the decision appealed against has been given, lodge with the Committee or Stewards from whose decision he desires to appeal a notice in writing stating the grounds on which he intends to appeal.

- (b) The appellant shall within ten days after such decision lodge with the Secretary of the Australian Jockey Club the sum of \$50 together with a copy of such notice of appeal."

"71. Subject to the provisions of the Australian Jockey Club Act, the Committee of the Australian Jockey Club may on the hearing of the appeal:-

- (a) Remit the matter in dispute to be reopened or reheard by the Committee of the Club or Association or Stewards from whose decision the appeal is brought; or
- (b) Upon the evidence already taken and any additional evidence, which in their opinion it was desirable to admit or obtain, make such order as in their opinion ought to have been made by such Committee or Stewards, or as in their opinion may be necessary to ensure the determination on the merits of the real question at issue; and
- (c) Make such order as they may think proper for payment of the costs and expenses of the appeal and with reference to the disposal of the said sum of \$50."

"72. Subject as aforesaid the Committee may at its discretion allow the appellant to be represented by counsel on the hearing of any appeal and in any case may have counsel present to assist the Committee."

"73. Subject as aforesaid no fresh evidence shall be adduced on the hearing of any appeal to the said Committee except by leave of the Committee."

"74. The Committee or Stewards from whose decision any appeal is brought shall as soon as possible after the lodging of notice of such appeal cause all exhibits and a true copy of the notes of evidence taken before them to be sent to the Australian Jockey Club."

7. Certain powers are conferred on the Committee of the A.J.C. by S. 32 of the Australian Jockey Club Act, 1873, which is in the following terms:

"32. (1) In any of the following cases, that is to say:
(a) where the stewards of the Australian Jockey Club or the committee or stewards

of any other club or race meeting registered by the Australian Jockey Club under the Rules of Racing of the Australian Jockey Club have -

- (i) disqualified or warned off any person,
 - (ii) disqualified any horse,
 - (iii) revoked the license of any trainer, jockey or rider or suspended any such license for a period exceeding one month, or
 - (iv) fined any person a sum of not less than ten dollars; or
- (b) where any body, empowered by the club, in accordance with the Rules of Racing of the Australian Jockey Club, to hear and determine appeals from any decision of the committee or stewards of any club registered as aforesaid which is within the jurisdiction of such body, has dismissed any appeal in respect of any matter referred to in paragraph (a) of this subsection or neglected or refused to hear and determine any such appeal, any person considering himself aggrieved thereby may appeal to the Committee of the Australian Jockey Club:

Provided that no appeal under this subsection shall lie to the Committee of the Australian Jockey Club unless the appellant has first exercised any other right of appeal which may be conferred on him by the Rules of Racing of the Australian Jockey Club.

- (2) (a) Any appeal to the Committee of the Australian Jockey Club under subsection one of this section shall be in the nature of a re-hearing. Such Committee in hearing any such appeal shall sit as in open court.
- (b) The decision of such Committee on any such appeal shall be final and shall be given effect to by the stewards of the Australian Jockey Club or the committee or stewards of any other club or race meeting to whose jurisdiction the appellant is subject.

- (3) (a) For the purpose of hearing and determining any such appeal the Committee of the Australian Jockey Club and the chairman or other person presiding at the hearing of any such appeal shall have the powers, authorities, protections and immunities conferred by the Royal Commissions Act, 1923, as amended by subsequent Acts, on a commissioner and the chairman of a commission respectively appointed under Division 1 of Part II of that Act, as so amended, and the said Act, as so amended, section thirteen and Division 2 of Part II excepted, shall, mutatis mutandis, apply to any witness summoned by or appearing before such Committee.
- (b) An appellant shall be entitled to be represented before such Committee and may be so represented by a barrister, solicitor or agent.
- (4) The decision of such Committee on any such appeal shall be upon the real merits and justice of the case and it shall not be bound to follow strict legal precedent.
- (5) (a) Expressions used in this section shall have the meanings respectively ascribed thereto in the Rules of Racing of the Australian Jockey Club.
- (b) This section shall be construed as supplemental to and not in derogation of or limited by the Rules of Racing of the Australian Jockey Club."

CIRCUMSTANCES AND EVENTS

GIVING RISE TO THE SUIT

8. The Appellant was at all material times a member of the A.J.C., a director and shareholder of a company engaged in the breeding of thoroughbred race horses in New South Wales, and owned, and was engaged in the racing of, thoroughbred horses.

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.9.

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9. On 13th March 1976 at a race meeting conducted by the A.J.C. at Randwick Racecourse (within the Metropolitan Area) a horse called "Count Mayo", of which the Appellant was a registered part-owner, ran in a race of 1200 metres called the Eastlakes Handicap - Second Division. The horse was ridden by jockey Peter William Cuddihy, and was attended by the trainer's stable foreman, Ronald Thomas Dawson.

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24.

10. After the race the third-named Defendants, other than Brian Hilton Killian (hereinafter collectively called "the Stewards") conducted an inquiry relating to the running of "Count Mayo". On 26th March 1976 at the conclusion and as a result of the inquiry, the Stewards -

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(a) purported to find that the Appellant had been a party to a breach of Rule 135 (a) of the Rules, in that Cuddihy did not allow "Count Mayo" to run on its merits and that Dawson was also a party to the said breach;

(b) purported to disqualify the Appellant and each of Cuddihy and Dawson for twelve months as from 26th March 1976.

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11. The effect of the Appellant's disqualification, if valid, would have been, inter alia -

(a) to preclude him during the period of disqualification from entering any racecourse under the

control of any person or body holding or proposing to hold a race meeting in the Commonwealth or on which a meeting is being held under the Australian Rules of Racing;

(b) to prevent any horse which is wholly or partly owned or leased by him or his wife, or in the winnings of which he or she has an interest, being permitted to race during the period of disqualification;

(c) to terminate his membership of the A.J.C., by virtue of the operation of Clause 11 of the Rules and Regulations of the A.J.C.

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12. On 9th April 1976 in purported pursuance of S.32 of the Australian Jockey Club Act 1873, the second-named Defendants (hereinafter collectively called "the Committee") commenced hearing appeals by each of the Appellant, Cuddihy and Dawson against their respective purported disqualifications.

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13. On 12th April 1976 at the conclusion of the hearing of the said appeals, the Committee upheld the appeal of Dawson and purported to dismiss the respective appeals of the Appellant and of Cuddihy.

14. On 13th April 1976 the Appellant commenced the suit the subject of this appeal.

BASIS OF THE APPELLANT'S CLAIM
FOR RELIEF

15. Before the trial judge, the Appellant challenged the validity both of the decision of the Stewards and of the proceedings and decision of the Committee.
16. The grounds of challenge to the validity of the decision of the Stewards were, in summary, as follows:
 - (a) that in the conduct of the Stewards' inquiry and in their purported finding against and disqualification of the Appellant neither natural justice nor fairness was observed in the several respects specified in paragraph 16 of the Statement of Claim;
 - (b) that upon the evidence adduced during the inquiry, no reasonable man could have formed the opinion that the Appellant had been a party to a breach of Rule 135 (a);
 - (c) that there was no evidence adduced during the inquiry to support the conclusion that the Appellant was a party to a breach of Rule 135 (a).
17. The grounds of challenge to the validity of the proceedings and decision of the Committee were, in summary, as follows:
 - (a) that in the conduct of the proceedings before the Committee and in the purported dismissal of the

Appellant's appeal neither natural justice nor fairness was observed in several respects;

(b) that there was no evidence that the Appellant was a party to a breach of Rule 135 (a);

(c) that upon the evidence before the Committee no reasonable man could have found -

(i) that there had been any breach of Rule 135(a) or that the Appellant was a party to any such breach;

(ii) that the purported disqualification of the Appellant by the Stewards should stand or be given effect to;

(d) that the Committee had failed to perform their statutory duty under S. 32 of the Australian Jockey Club Act, 1873;

(e) alternatively to the foregoing, that by reason of the invalidity of the purported disqualification of the Appellant by the Stewards, the Committee had no jurisdiction to hear or determine an appeal from that purported disqualification.

BASIS OF RESPONDENTS' RESISTANCE
TO CLAIM

18. Before the trial judge, the Respondents contested each of the grounds of the Appellant's challenges to the validity of the decision of the Stewards and of the proceedings and decision of the Committee, and

advanced certain further contentions which were, in summary, as follows:

- (a) that Rule 4 of the Australian Rules of Racing rendered the decision of the Stewards immune from challenge;
- (b) that S. 32 (2) (b) of the Australian Jockey Club Act, 1873, ousted the jurisdiction of the Court;
- (c) that Section 32 (3) (a) of the Australian Jockey Club Act, 1873, rendered the Committee immune from suit;
- (d) that the appeal to the Committee by the Appellant amounted to an election binding on the Appellant not to approach the Court for a declaration of the invalidity of his disqualification by the Stewards;
- (e) that the appeal to the Committee "cured" any defect in the Stewards' inquiry.

DECISION OF TRIAL JUDGE

19. In his reasons for judgment, His Honour:

- (a) held that the Stewards were bound by the principles of natural justice;
- (b) held that the Stewards had failed to observe those principles by receiving all the evidence of Cuddihy Galea, Todd and Campbell, and part of the evidence of Mason without the Appellant's being present or being invited or given the opportunity to be

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present, and without informing the Appellant of the nature, substance, or effect of that evidence, or giving him an opportunity to answer the same; the evidence of Cuddihy being relevant on all aspects of the charge against the Appellant and being (apart from the Appellant's own evidence) the only evidence bearing on the question of his being a party to not allowing the horse to run on its merits, and the evidence of Galea, Todd and Campbell being prejudicial to the Appellant or capable of being so regarded by the Stewards;

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(c) held that the Stewards may have failed to observe the principles of natural justice in a further respect, namely that the Plaintiff did not have an opportunity of being heard on the question of penalty;

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(d) rejected the other grounds of challenge to the validity of the decision of the Stewards;

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(e) rejected the grounds of challenge to the validity of the proceedings and the decision of the Committee;

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(f) rejected each of the contentions of the Respondents referred to in sub-paragraphs (a), (b), (c) and (d) of paragraph 18 above;

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(g) held that the proceedings on appeal to the Committee constituted a hearing de novo and that the defects in the Stewards' inquiry were thereby "cured".

ISSUES IN THIS APPEAL

20. The principal contentions which the Appellant proposes to advance on the hearing of this appeal are, in outline, as follows:
- (a) that the Stewards were bound to observe the principles of natural justice;
 - (b) that the Stewards failed to observe those principles, on the grounds specified in paragraph 16 of the Statement of Claim (except sub-paragraphs (f), (g) and (h) thereof);
 - (c) that the purported disqualification of the Appellant by the Stewards was consequently invalid;
 - (d) that the proceedings and decision of the Committee did not operate to "cure" the defects in, or to validate, the purported disqualification of the Appellant by the Stewards;
 - (e) alternatively to (d), that by reason of the invalidity of the purported disqualification of the Appellant by the Stewards, the Committee had no jurisdiction to proceed with and determine the Appellant's appeal;
 - (f) that each of the contentions of the Respondents referred to in sub-paragraphs (a), (b), (c) and (d) of paragraph 18. above, was correctly rejected.

21. The Appellant does not propose on the hearing of this appeal to challenge the validity of the decision of the Stewards on the grounds referred to in sub-paragraphs (b) or (c) of paragraph 16. above, or to challenge the validity of the proceedings and decision of the Committee on the grounds referred to in sub-paragraphs (a), (b), (c) or (d) of paragraph 17. above.

STEWARDS BOUND TO OBSERVE
PRINCIPLES OF NATURAL JUSTICE

22. It is submitted that in enquiring into the question whether the Appellant was a party to a breach of Rule 135 and what, if any, punishment should be imposed in respect thereof, the Stewards were bound to observe the principles of natural justice and that a high standard of fairness was required of them. Considerations supporting these propositions include the following -
- (a) the penalties which the Stewards could impose were substantial and included disqualification for any period.
 - (b) disqualification of a member of the A.J.C. for a breach of Rule 135 would ipso facto terminate his membership, depriving him of valuable privileges;

- (c) disqualification of a person might result in the loss of his means of livelihood or other serious financial loss, and would result in severe curtailment of his activities associated with horse racing throughout Australia;
- (d) a person found guilty of being a party to a breach of Rule 135 and punished by the Stewards would suffer serious damage to his reputation;
- (e) no person can participate in horse racing in New South Wales without becoming subject to the rules and to the disciplinary powers of the Stewards;
- (f) a person appearing before or charged before the Stewards has no right of legal representation;
- (g) an owner who is or may be charged before the Stewards can be compelled to attend and give evidence;
- (h) a person in respect of whom the Stewards make or purport to make a finding of guilty or impose or purport to impose a punishment is deprived of any right to damages arising therefrom.
- (i) The press may be present at the inquiry (and were, in the present case).

FAILURE OF STEWARDS TO OBSERVE

PRINCIPLES OF NATURAL JUSTICE

23. It is submitted that the Stewards failed to observe

the principles of natural justice in the respects referred to in paragraphs 24 to 29 hereunder.

24. (a) A substantial part of the inquiry had concluded and a substantial amount of evidence had been received by the Stewards before the Appellant was informed that a charge of being a party to a breach of Rule 135, or any charge, was made or contemplated against him.
- (b) The course of the inquiry was in substance as follows:

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Examination of Cuddihy in Appellant's absence.

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Examination of Appellant and Dawson.

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Statement by Appellant.

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Examination of Mason in Appellant's absence.

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Further examination of Appellant.

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Further examination of Appellant and Mason.

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Examination of Galea in Appellant's absence.

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Examination of Cummings.

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Statement by Appellant.

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Further examination of Appellant.

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Showing of film of race.

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Examination of Bartley.

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Further examination of Cuddihy in Appellant's absence.

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17th March 1976 (Continued)

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Appellant, Cuddihy and Dawson charged.

21st March 1976

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Examination of Todd and Campbell in Appellant's absence.

26th March 1976

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Further examination of Galea in Appellant's absence.

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Examination of Hickman in Appellant's absence.

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Further examination of Todd, Campbell and Galea in Appellant's absence.

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Showing of New Zealand films.

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Examination of Wallace.

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Statement by Appellant.

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Further examination of Appellant.

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Decision given.

(c) The first communication to the Appellant that any charge was made or contemplated against him was when he was charged at the end of the proceedings on 17th March 1976. The evidence which preceded this event comprised substantially the whole, or alternatively a substantial and necessary part, of the relevant evidence against the Appellant in the inquiry.

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p. 168 line 34

p. 174 line 39 -

p. 175 line 19

Furthermore, the evidence shows that prior to this event the Appellant was considered by the Stewards to be in the position of an accused person, e.g. the Appellant, Cuddihy and Dawson were referred to in the official transcript of the Stewards' Inquiry as "parties" at the time the film of the race was shown, and the Stewards treated the Appellant as entitled to call witnesses, and as a person to whom they could "give" an adjournment, immediately after the examination of Bartley. This was a matter peculiarly within the knowledge of the Stewards, none of whom was called to give evidence.

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25. The Appellant was not present, or invited or given the opportunity to be present, while substantial parts of the evidence in the inquiry were received by the Stewards. The Appellant was not informed of the nature, substance or effect of those parts of the evidence and was deprived of an opportunity to answer the same.

The evidence which was so received in the absence of the Appellant included -

- (a) The evidence of Cuddihy on 13th March 1976.
- (b) The evidence of Mason on 13th March 1976.
- (c) The evidence of Galea on 17th March 1976.

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(d) The further evidence of Cuddihy on 17th March 1976.

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(e) The evidence of Todd and Campbell on 21st March 1976.

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(f) The further evidence of Galea on 26th March 1976.

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(g) The evidence of Hickman on 26th March 1976.

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(h) The further evidence of Todd, Campbell and Galea on 26th March 1976.

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This evidence comprised, apart from the Appellant's own evidence, substantially the whole, or alternatively a substantial and significant part of the relevant evidence against the Appellant in the inquiry.

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pp. 399-400,
pp. 408-410.

26. The Appellant was not informed as to the grounds on which or the respects in which the Stewards or any of them claimed or considered that "Count Mayo" was not run on its merits, otherwise than as a matter of inference from questions put to the Appellant or in his presence during the course of the inquiry. The only such grounds or respects capable of being inferred from such questions were -

(a) that the whip was not used;

(b) that the horse veered towards the outside of the track in the home straight;

(c) such matters (if any) as are suggested in the following questions put to the Appellant -

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"When the horses turned into the straight, were you concerned about how far it was back in the field?"

.....

p. 160 line 27

Were you concerned about the jockey not trying to do anything more?

.....

p. 160 line 30

From your observation of the race: at the Furlong he had not moved on the horse.

.....

p. 161 line 11

You were not concerned when the rider was sitting quietly coming to the home turn?"

Yet, the evidence shows that the Stewards, or one or more of them, considered that the horse was not run on its merits on the following grounds or in the following respects, also -

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(i) that the jockey missed the start, then veered out on the track and then pulled the horse back in again, losing ground in so doing;

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(ii) that from the start the jockey did nothing to improve the horse's position;

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(iii) that the jockey did not use any vigour in the straight.

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27. The Stewards took into account their own observations of the riding of the horse in the race and relied on those observations.

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413-415,
231-234.

These included matters which the Stewards or one or more of them considered to be indicative that the horse was not run on its merits.

None of these matters was communicated to the Appellant otherwise than by suggestions implicit in questions put by one or other of the Stewards to the Appellant or in his presence.

Certain of those matters were not even communicated to the Appellant in that way, including those referred to in sub-paragraphs (i), (ii) and (iii) of paragraph 26 above.

28. Certain of the Stewards took into account matters purportedly observed by them respectively without informing others of the Stewards or the Appellant what those matters were. Some of those matters were either inconsistent with observations made by others of the Stewards or were mistaken. The Appellant was deprived of a proper opportunity to answer such matters.

These matters include -

- (a) The purported observation by Swain, that between the 500 and 600 metre marks the horse raced on the fence, which was inconsistent with Meehan's observation and was conceded by Swain to be incorrect.
- (b) The discrepancy between the observations of Meehan on the one hand and Carlton, Swain and McKay on the other hand, as to whether the horse ran with its head in the air for about 50 metres shortly after the start.

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p. 141 line 25
p. 234 line 37
p. 257 line 32

p. 218 line 11
p. 249 line 32
p. 256 line 18
p. 258 line 28

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p. 59.

29. After the Stewards had found the Appellant to have been a party to a breach of Rule 135 (a), he was given no opportunity to make submissions or call evidence on the question of punishment before the Stewards purported to disqualify him, nor was he given any such opportunity at any other stage of the inquiry. After the Appellant was found guilty, the Chairman of the Stewards proceeded immediately to impose the penalty and there was no possible way of making further submissions (short of pointedly interrupting the Chairman).

INEFFECTIVENESS OF PURPORTED DISQUALIFICATION

30. The observance of the principles of natural justice is a condition precedent to the exercise of the power to punish vested by the Rules in the Stewards. If, as is submitted, this condition was not fulfilled in the instant case, the power did not become exercisable, and accordingly, did not in the instant case exist at the time it was purportedly exercised. It follows that the decision of the Stewards was ineffective as an exercise of that power.

31. Alternatively to paragraph 30 above, the observance of the principles of natural justice is a condition precedent to the exercise of the power to punish vested by the Rules in the Stewards, as against the

person punished or so far as he is affected or concerned. If, as is submitted, this condition was not fulfilled in the instant case, then as against the Appellant or so far as he is affected or concerned, the power did not become exercisable and did not exist at the time it was purportedly exercised.

It follows that as against the Appellant, or so far as he is affected or concerned, the decision of the Stewards was ineffective as an exercise of that power.

32. The ineffectiveness of a purported exercise of such a power in breach of the principles of natural justice is not conditional upon the making of an order by the Court declaring it to be invalid or setting it aside or quashing it. But if this be incorrect, the Court in the instant case should in that event have made such an order, thus fulfilling the condition.

NO "CURING" OR VALIDATION BY COMMITTEE PROCEEDINGS

33. No power is conferred on the Committee by the Rules or by the Australian Jockey Club Act, or otherwise, to dispense retrospectively (or at all) with a condition precedent to the exercise of a power vested by the Rules in the Stewards, or to transmute an act of the Stewards which is ineffective, into an act by the Stewards which is effective.
34. The Committee did not purport to exercise any such power, nor did it purport to impose any punishment

or to exercise any but an appellate function. The only relevant act of the Committee was to dismiss the appeal. The only operative imposition of punishment was that of the Stewards, and if that was invalid there was no valid disqualification.

35. His Honour the trial judge's decision is based on the supposed authority of the judgment of the Privy Council in Pillai v. Singapore City Council [1968] 1 W.L.R. 1278. The proposition which His Honour considered to be established by that judgment and to govern the instant case was:

"that a decision of [a] tribunal, which would otherwise be vitiated by a denial of natural justice has the defect 'cured' by a hearing de novo (provided the latter hearing itself suffers from no such defect)".

It is submitted that the relevant part of the judgment in the Pillai Case:

- (a) was obiter dictum;
- (b) was founded on a misconception in a critical respect of the facts and judgment in Annamunthodo v. Oil Field Works Trade Union [1961] A.C. 945;
- (c) is contrary to the decision in the Annamunthodo Case (supra);

(d) is wrong in principle;

(e) has no relevant application to the facts of the instant case.

36. In elaboration of sub-paragraph (d) of paragraph 35 above, the following matters are submitted additionally to the matters submitted in paragraphs 30 to 34 above:

(a) The Appellant was entitled under the Rules and the Act to a fair original hearing by the Stewards and (if he so desired) a fair appellate hearing by the Committee. The Stewards are professional supervisors of horse racing necessarily having considerable expertise in the management and behaviour of horses during a race. The members of the Committee on the other hand have no such necessary expertise, being persons drawn from other walks of life elected annually by the members of the A.J.C., their duties being of a casual nature. A fair appellate hearing by the Committee alone is no substitute for a fair original hearing by the Stewards together with (if it is sought) a fair appellate hearing by the Committee.

(b) If the appellate hearing "cures" the defects in the original hearing, the Appellant is thereby deprived of an effective right to appeal, since

the appellate hearing de novo must be regarded as being in substitution for the invalid hearing by the Stewards. The Appellant would be receiving only a hearing de novo and would thus be deprived of a review of the decision made at that hearing, which the appeal provisions of the Rules and the Act contemplate.

37. In elaboration of sub-paragraph (e) of paragraph 35 above, it is submitted that a hearing should not be regarded as a hearing de novo for relevant purposes unless:

- (i) the provisions which govern its conduct so require; and
- (ii) it is in fact so conducted.

Neither condition was satisfied in the instant case. As to the first, Local Rules 71 and 73 are inconsistent with the Committee hearing being a hearing de novo. As to the second, the following among other aspects of the actual conduct of the proceedings before the Committee in the instant case are inconsistent with such proceedings constituting a hearing de novo:

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p. 212 line 14
p. 217 line 32
p. 240 line 23
p. 249 line 24
p. 256 line 34

- (a) The transcript of the proceedings before the Stewards was put before the Committee at the outset and evidence was adduced as to its accuracy both

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p. 259 line 10
p. 252 line 23
p. 299-300

from the Stewards and on one matter from the shorthandwriter, Nolan.

pp. 207-217

(b) The appeal was opened to the Committee by Counsel assisting them in terms suggesting that the disqualification imposed by the Stewards and the evidence before the Stewards constituted the starting point of the Committee's consideration of the matter and that it rested on the Appellant (and Cuddihy and Dawson) to displace the Stewards' decision.

pp. 217-218
pp. 240-241,
pp. 249-250,
pp. 256-257,
pp. 258-259.

(c) It was not sought to elicit from the Stewards in chief any but a most perfunctory account of their observations of the race.

(d) The evidence to the Stewards of certain persons from whom the Stewards had procured evidence was put before the Committee as part of the transcript of the proceedings before the Stewards and those persons (Galea, Todd and Campbell), were not called to give evidence before the Committee.

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(e) The terms in which the Committee's decision was expressed (viz. "to dismiss the appeal of Messrs. F. Calvin and P. Cuddihy and to uphold the appeal of R. Dawson"), and the failure of the Committee to invite submissions as to penalty, suggest that the Committee did not regard themselves as hearing

the matter de novo, but only for the purpose of considering whether it had been shown that the Stewards' decision was wrong.

NO APPELLATE JURISDICTION IN COMMITTEE

38. So far as presently relevant it was a condition precedent to the Committee's jurisdiction under S. 32 of the Act that the Stewards "have....disqualifiedany person", and a condition precedent to the Committee's jurisdiction under the Rules that there was a "punishment imposed by the Stewards" (Australian Rule 199). If, as is submitted, there was no effective disqualification or punishment by the Stewards, neither of these conditions was fulfilled.

STEWARDS' DECISION NOT IMMUNE UNDER AUSTRALIAN RULE 4.

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pp. 70-71

39. It is submitted (as His Honour held):

(a) That on its true construction Australian Rule 4 does not have the effect of rendering a purported disqualification or decision imposed or made in contravention of the principles of natural justice immune from challenge in the Court.

pp. 71-73

(b) That if Australian Rule 4 did otherwise have that effect it would be to that extent void as contrary to public policy.

COMMITTEE'S DECISION NOT IMMUNE UNDER S.32(2)(b) OF THE ACT

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pp. 88-92

40. It is submitted (as His Honour held) that on its true construction S. 32(2)(b) of the Australian Jockey Club Act does not exclude the jurisdiction of the Court to inquire into the validity of the proceedings before the Committee.

COMMITTEE NOT IMMUNE FROM SUIT UNDER S. 32 (3)(a) OF THE ACT

pp. 92-94

41. It is submitted (as His Honour held) that on its true construction S. 32(3)(a) of the Australian Jockey Club Act does not render the Committee immune from suit in the Court.

NO BASIS FOR DOCTRINE OF ELECTION

pp. 94-95

42. It is submitted (as His Honour held) that there is no basis for holding that the Appellant was precluded by his conduct from challenging the validity of his purported disqualification by the Stewards in the Court.

CONCLUSION

43. It is submitted that this appeal should be allowed with costs and that in lieu of the judgment and order of the Supreme Court of 23rd June 1977 dismissing the Appellant's suit with costs and the orders of 28th June 1977, the following orders should be made:

- (i) A declaration that the purported disqualification of the Plaintiff by the Stewards on 26th March, 1976 was and is void and of no effect (or alternatively, an order that the purported disqualification of the Plaintiff by the Stewards on 26th March 1976 be set aside or quashed).
- (ii) A declaration that the purported dismissal by the secondnamed Defendants on 12th April 1976 of an appeal by the Plaintiff from the said purported disqualification was and is void and of no effect.
- (iii) A declaration that the Plaintiff was not by virtue of his said purported disqualification by the Stewards on 26th March 1976 or by virtue of the said purported dismissal by the second named Defendants on 12th April 1976 of his said appeal, disqualified within the meaning of the Rules of Racing of the Australian Jockey Club or within the meaning of Rule 11 of the Rules and Regulations of the Australian Jockey Club.
- (iv) An order that each of the Australian Jockey Club, the secondnamed Defendants and the thirdnamed Defendants be restrained from, by themselves and their respective officers, servants and agents -

- (a) acting upon the basis that the purported disqualification of the Plaintiff was valid or effective;
 - (b) acting upon the basis that the Plaintiff was disqualified within the meaning of the Rules of Racing of the Australian Jockey Club or within the meaning of Rule 11 of the Rules and Regulations of the Australian Jockey Club;
 - (c) communicating the purported disqualification of the Plaintiff to any other Principal Club.
- (v) An order that the Defendants pay the Plaintiff's costs, other than reserved costs.
 - (vi) An order that the incidence of reserved costs be remitted for determination by the Supreme Court.

for the following, among other -

REASONS

- (1) That the Stewards were bound to observe the principles of natural justice and failed to do so.
- (2) That the purported disqualification of the Appellant by the Stewards was invalid.

- (3) That the proceedings and decision of the Committee did not operate to "cure" the defects in, or to validate, the purported disqualification of the Appellant by the Stewards.
- (4) That the Committee had no jurisdiction to proceed with and determine the appeal.

M. H. McLelland

M. H. McLELLAND

W. W. Caldwell

W. W. CALDWELL