IN THE SUPREME COURT OF NEW ZEALAND

SC 68/2007
[2008] NZSC 46

BETWEEN	LISA KATHRYN CROPP Appellant
AND	A JUDICIAL COMMITTEE First Respondent
AND	BRYAN FRANCIS MCKENZIE Second Respondent

Hearing: 13 March 2008

Court: Blanchard, Tipping, McGrath, Anderson and Gault JJ

Counsel: A Ivory and A Shaw for Appellant
S J E Moore and G H Anderson for Second Respondent

Judgment: 17 June 2008

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the second respondent costs of $15,000 and reasonable disbursements, to be fixed if necessary by the Registrar.

REASONS

(Given by Blanchard J)

[1] This appeal challenges the validity of a random drug-testing regime for jockeys contained in the Rules of Racing of New Zealand Thoroughbred Racing (NZTR) made prior to the enactment of the Racing Act 2003 but required by that Act

to be regarded as having been made for the purposes of s 29 of the Act.[1] The Act requires every racing code to make and maintain in force rules regulating the conduct of racing by that code.[2] Without limiting that requirement, s 29(2)(d) authorises rules to provide, inter alia, for "the conduct and control of race meetings, including safety requirements". Section 29(2)(i) authorises rules providing for "any other matters relating to the conduct of races and racing that the racing code thinks fit". But, by virtue of s 31(1), any provision of any racing rule that is in conflict with any provision of the Act, any other Act, or the general law of New Zealand is invalid. Section 32 requires the racing code to send a copy of the rules to the Minister responsible for the administration of the Act (the Minister of Racing) and declares that the Regulations (Disallowance) Act 1989 applies to them as if they were regulations.[3] They must also be notified in the Gazette. They are not, however, transformed by this process into regulations. They remain rules of a domestic body made under authority delegated by Parliament.

[2] NZTR's Rules of Racing provide that a Racecourse Inspector may, and has power to:[4]

> require a rider or stablehand to permit a sample of his blood, breath, urine, saliva or sweat (or more than one thereof), to be obtained from him by or under the supervision of a registered medical practitioner or by an authorised person at such time and place as the Racecourse Inspector shall nominate.

Every jockey's licence to ride contains a condition that the licence holder must permit a urine sample to be so obtained whenever so required; and licence holders are deemed to accept all conditions imposed on their licences.[5]

[3] It is an offence against the rules for a jockey to have any controlled drug (as defined in the Misuse of Drugs Act 1975) present in his or her urine.[6] Every rider who rides or presents himself to ride a horse at a racecourse or training centre under the control or jurisdiction of a club registered with NZTR is thereby deemed to have

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1 Section 29(3).
2 Section 29(1).
3 The fact that rules could have been disallowed, but were not, does not immunise them from a challenge in the Courts: *McEldowney v Forde* [1971] AC 632 at p 644.
4 Rule 226(2)(d).
5 Rule 310(2) and (3).
6 Rule 528.

consented to the obtaining of a sample of urine when required by a Racecourse Inspector.[7] Penalties for breach of these rules include disqualification or suspension of licence, in either case for up to 12 months, and/or a fine.

[4] After riding at a race meeting at the Te Rapa racecourse on 7 May 2005, the appellant, Ms Cropp, a licensed jockey, was required by a Racecourse Inspector to provide a urine sample. The sample was taken in accordance with a protocol made pursuant to NZTR's constitution. Reference will be made later to the protocol and its status. After analysis, Ms Cropp's sample was reported several days later to be positive for the presence of amphetamine and methamphetamine, which are both controlled drugs. She was charged with two breaches of r 528. The hearing before the first respondent, a Judicial Committee appointed under s 39 of the Racing Act, has not yet been completed. Ms Cropp has made a number of challenges to the Committee's jurisdiction. The only one with which this Court is concerned is the validity of r 226(2)(d), pursuant to which Ms Cropp was required to supply the urine sample, and, consequentially, of r 528.

[5] That challenge was rejected by the Judicial Committee and by both Courts below. The Judicial Committee did not accept the view that the New Zealand Bill of Rights Act 1990, and in particular the guarantee of freedom from unreasonable search or seizure in s 21, was applicable in interpreting the rules. It said that NZTR is essentially a private body and that its function of granting a licence to ride is a private function. This is a stance no longer taken by NZTR and rightly so, since NZTR is plainly performing a public function[8] when making its Rules of Racing. The rules are made, or deemed to be made, pursuant to a statutory power (s 29).

[6] The rule-making power and the validity of a rule must be interpreted and determined consistently with the requirements of the Bill of Rights.[9]

[7] The Judicial Committee therefore determined the matter on the wrong basis, as was apparent to the Courts below. Its reasons should however be noted for its

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7 Rule 528(3).
8 In terms of s 3(b) of the Bill of Rights.
9 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at para [68].

finding that the purpose of the rules in issue is to ensure that racing is conducted in a safe manner. At para [68] of its ruling, the Committee said:

> the drug testing regime in terms of the NZTR testing of jockeys is concerned with health and safety issues to ensure that jockeys, who are prepared to take controlled drugs or illicit substances do not ride and thereby endanger themselves, and fellow jockeys. This is the primary purpose behind R 528.

The High Court

[8] Ms Cropp instituted a proceeding in the High Court seeking a declaration that the rules and/or the protocol are unlawful and invalid in so far as they purport to provide authority for the obtaining of bodily samples; and that the sample taken from Ms Cropp and produced in evidence against her was therefore unlawfully obtained.

[9] In a well-reasoned judgment refusing the declarations and consequential orders,[10] Andrews J accepted that the Bill of Rights applied and interpreted the relevant rule-making power in s 29(2), namely the power to make rules for "the conduct and control of race meetings, including safety requirements", in light of "the common law presumption of legality and s 6 of [the Bill of Rights]". The Judge said that Parliament could not be presumed to have intended to legislate contrary to fundamental human rights, nor intended NZTR to have the power to make rules in conflict with such rights. Such an intention, she said, would have to be evidenced by express words or necessary implication.[11]

[10] Andrews J considered whether the rules did breach or limit a fundamental right and, if so, whether any such limit was a reasonable one in terms of s 5 of the Bill of Rights. She concluded that where urine samples were taken for the purposes of drug-testing there was an invasion of a person's reasonable expectation of privacy and bodily integrity (protected by s 21) and a prima facie breach of the right. NZTR had argued that Ms Cropp had consented to the drug-testing regime as a condition of the licence she had applied for. Andrews J said, however, that it was questionable to

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10 [2007] NZAR 465.
11 At para [43].

what extent the consent could be genuinely informed if there was "no specific authority" for the taking of the sample.[12] She preferred to proceed under s 5 of the Bill of Rights by assessing the reasonableness of the limit placed on Ms Cropp's rights. She analysed this question in accordance with the *Oakes* test[13] as restated and applied by this Court in *R v Hansen*.[14]

[11] Andrews J found that the purpose of the drug-testing regime was race day safety, for which purpose NZTR was expressly authorised to make rules under s 29(2)(d) of the Racing Act. She accepted that this purpose was not negated by the fact that a jockey is permitted to continue to ride at the race meeting where testing occurs after supplying a sample; that it was impractical to stand a jockey down until the result of testing was known. That would be an unnecessary infringement of a jockey's rights. Another rule allowed a Racecourse Inspector to require a jockey to undergo a medical examination if the jockey showed signs of being unfit to ride.[15]

[12] The Judge was satisfied that the purpose of the drug-testing rules was to ensure safety through identifying those taking drugs and deterring those who might do so. Deterrence was "an integral element in achieving the safety objective".[16] The measure was rationally connected with the purpose.

[13] Andrews J then considered whether the limiting measure impaired the right no more than was reasonably necessary for sufficient achievement of its purpose and concluded that was so. Suspicion-based testing would not suffice. She noted with approval the view of the Employment Court in *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd*:[17]

> The evidence that random testing acts as a deterrent persuades us to hold that in safety sensitive areas where the consequences can be catastrophic, the objection to the use of intrusive methods to monitor in an attempt to eliminate a recognised hazard must give way to the over-riding safety considerations. These factors take precedence over privacy concerns.

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12 At para [62].
13 *R v Oakes* [1986] 1 SCR 103.
14 [2007] 3 NZLR 1.
15 Rule 226(2)(e).
16 At para [81].
17 [2004] 1 ERNZ 614 at para [251].

Safety of participants in a particular race was a paramount consideration which Parliament had expressly recognised.

[14] Finally, the Judge considered whether the limit was in due proportion to the importance of the objective. The drug-testing rules did not contain "any detailed protection against self-incrimination" but that needed to be considered against their purpose and other factors the Judge had already referred to. She found that they were not disproportionate to the importance of their objective. Measured against s 5, the rules did not breach Ms Cropp's right and there was no need to "read down" s 29. The rules were intra vires the rule-making power.[18]

The Court of Appeal

[15] The Court of Appeal agreed[19] but on a different basis. It said that breach of common law fundamental freedoms or of s 21 of the Bill of Rights depended upon the absence of consent. Similarly, the right to avoid self-incrimination pre-supposed an unwillingness to provide information.[20]

[16] Speaking for the Court, Fogarty J said that co-operative business activity has never depended, and could never depend, on a pre-condition that everybody who participates agrees completely with all the rules at all times. In the real world individuals submit to the rules when they voluntarily associate in an activity governed by rules. "That submission is the consent".[21] There might be circumstances where individuals were prevented from joining in co-operative events by discriminating rules and those prohibitions might well raise a breach of the freedom to associate at common law and by s 17 of the Bill of Rights. A breach might arise if persons were compelled to associate, such as to join a union, contrary to their conscience or political opinions. But this was not one of those cases. Ms Cropp was in "no different position than a commercial pilot of passenger planes. Such people have to submit to medical tests, if they want to do that job."[22]

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18 At paras [89] – [91].
19 [2008] NZAR 50.
20 At para [16].
21 At para [24].
22 At para [25].

[17] The Court of Appeal was accordingly of the view that no fundamental invasion of Ms Cropp's privacy had occurred and that the rule in question was validly made. There was a general power to make rules for safety. Counsel for Ms Cropp had had to acknowledge that random testing for use of drugs was a method used all around the world in similar situations as a means of preventing harm.

Ms Cropp's consent

[18] It is as well to begin by addressing the relevance of Ms Cropp's submission to the rules of racing and by putting to one side the Court of Appeal's analysis which Mr Moore, for the second respondent, the Racecourse Inspector appointed by NZTC, understandably felt unable to support. A requirement to supply a bodily sample, and the analysis of that sample, constitutes a search. Even when a contract exists between the body requiring the sample and the person required to supply it, or to submit to its being taken, if that body is exercising a public function the very entitlement to conduct any search and also the manner in which a particular search is conducted will be subject to scrutiny under s 21 of the Bill of Rights.

[19] The entitlement of the Racecourse Inspector to conduct the search turns on whether the authorising rule is the lawful outcome of the exercise of the statutory rule-making power. That power must be interpreted as authorising only rules that are consistent with the Bill of Rights. Accordingly any power to make a rule conferring the entitlement to conduct a search does not authorise searches that would be unreasonable and so infringe protected rights under s 21.

[20] No consent or submission to such a non-conforming rule can save it because, as Wade and Forsyth remark:[23]

> The primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possesses. Once again, the principle of ultra vires must prevail when it comes into conflict with the ordinary rules of law.

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[23] *Administrative Law*, (9th ed, 2004), p 239.

Ms Cropp cannot be taken to have consented to be drug-tested if the rule requiring her to supply a sample was invalid.

[21] Nor can consent put the conduct of a particular search under a lawful rule outside the protection of s 21 of the Bill of Rights. Depending on the manner in which the search is undertaken, a consent may, however, indicate that it is reasonable. Whether consent has been given, and if so the quality of that consent, are clearly relevant matters when the Court is assessing the reasonableness of a search. The more specific the consent is to the circumstances in which the search takes place, the more strongly it may support the view that the search was reasonable. Conversely, a general consent, given in advance, would be of little assistance in determining the reasonableness of a search conducted at, say, a jockey's home at 3 o'clock in the morning. Also relevant will be whether a consent is freely given and whether it is an informed consent.

[22] Ms Cropp could never be said, in a Bill of Rights context, to have given her consent freely when she was required to give it before she could obtain a licence to undertake her occupation. Nor could it be said that she had given an informed consent to unlawful testing, except perhaps in the unlikely event that it was pointed out to her when she applied for her licence that the drug-testing regime might be unenforceable. That of course did not happen. Ms Cropp plainly never considered the matter on the basis that the testing regime might be invalid and therefore something to which she did not have to consent. It follows that in this case her consent is of no significance in deciding whether the requirement that she provide a bodily sample complied with s 21.

[23] The role played by the jockeys' consents in NZTR's Rules of Racing is really one of administrative convenience only. It brings home to them the need to supply samples when lawfully required to do so and, in a practical sense, may avoid arguments about the right of a Racecourse Inspector to require a sample to be supplied. But, in truth, the jockeys are being required to supply samples regardless of any element of consent, as r 528(3) actually seems to recognise when it speaks of

a jockey presenting himself to ride a horse at a racecourse being *deemed* to have consented to have a sample obtained from him if required by an Inspector to permit it to be obtained. But that assumes the validity of the rules requiring samples to be supplied.

[24] So, contrary to the view of the Court of Appeal, the real question is whether the drug-testing rules were authorised by the Racing Act, interpreted in accordance with the general law and the Bill of Rights. There was only limited argument by the appellant that if the rules were valid the application of them in the particular case was unreasonable.

Were the rules authorised?

[25] Subordinate legislation involving a relevant guaranteed right or freedom will be invalid when the empowering provision, read in accordance with s 6 of the Bill of Rights, does not authorise its making. Where the Bill of Rights is a relevant consideration, and obviously it will then be an important consideration, the Court gives the generally expressed empowering provision a tenable meaning that is consistent with the right or freedom. "In accordance with s 6, that meaning is to be preferred to any other meaning".[24]

[26] For the appellant, Mr Ivory's starting point was that the drug-testing regime employed by NZTR involved an intrusion into the bodily integrity of someone who, like Ms Cropp, was obliged to supply a urine sample. It was submitted that both at common law, and also under s 21 of the Bill of Rights, such a fundamental human right as bodily integrity may not be interfered with except under a statutory provision where the right is excluded or abridged expressly or by necessary implication; and that, as Lord Hobhouse said in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*:[25]

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[24] *Drew v Attorney-General* at para [68].

[25] [2003] 1 AC 563 at para [45], approved by the Privy Council in *B v Auckland District Law Society* [2004] 1 NZLR 326 at para [58].

> [a] *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.

Counsel said that s 29 of the Racing Act does not expressly or by necessary implication authorise *any* drug-testing regime and certainly not random drug-testing. Section 31 of that Act in fact amounted to what Mr Ivory termed a "statutory reminder" of the principle of legality by which statutes are to be read in a manner which protects basic or fundamental rights.[26] *Bennion on Statutory Interpretation* comments, however, that the true principle is not "legality" but that the Courts should be slow to impute to Parliament an intention to override established rights and principles where that is not clearly spelt out. "There is nothing new in this: it is a well-established interpretative principle."[27]

[27] Counsel is correct in pointing out that the Courts will presume that general words in legislation were intended to be subject to the basic rights of the individual.[28] That presumption naturally applies to words which authorise subordinate legislation. We consider, however, that counsel's argument is unsustainable in relation to the rules in question. As he accepted, s 29(2)(d) expressly authorises rules directed to the safety of racing. The safety of horses and jockeys, in what is under the best of conditions a dangerous occupation, might well be imperilled were jockeys to ride under the influence of controlled drugs, with methamphetamine being a prime example.

[28] The opinion of the Judicial Committee, endorsed by the High Court, that the racing of horses is potentially very dangerous is amply justified, as is their opinion that drug-use increases that inherent danger. This is well recognised in case law in the United States, for example, in the majority opinion of Circuit Judge Posner in

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[26] See *R v Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539 at pp 587 – 590 per Lord Steyn.

[27] (5th ed, 2008), p 823.

[28] *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115 at p 131 per Lord Hoffmann.

Dimeo v Griffin for the Seventh Circuit Court of Appeals sitting en banc.[29] His judgment dealing with random testing points out that a racehorse weighs half a ton and that the persons at greatest risk of accident are jockeys and (in harness racing) drivers who are:

> at risk from each other but also from the other participants, and that is why it is important that all the participants be careful and alert. Drug use impairs care and alertness, slows reflexes, impairs judgment.
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> The more dangerous an activity is, the more dangerous is drug use by participants in it. Horse racing is the most dangerous of the common sports, other than auto racing. An average of 2 jockeys are killed each year [in the United States] out of some 2,000, and another 100 are injured seriously enough to be disabled for at least a week. The Jockeys' Guild has 40 permanently disabled members -- one out of every 50. The annual death toll of 1 per 1,000 implies that a jockey who races for 10 years has a 1 percent chance of dying in a race. How much the use of illegal drugs contributes to this toll is unknown, but cannot be assumed to be trivial.

[29] Whether or not the statistical material cited by Judge Posner is comparable to the position in New Zealand, the underlying point concerning the enhancing of the risk in an already dangerous occupation cannot be denied.

[30] Counsel sought to say that there has been no evidence that drug-taking by jockeys is a particular problem in the racing industry but the unfortunate consequences of the taking of drugs in the community generally are too well known to need confirmation by evidence and there can be no reason to believe that jockeys as an occupational group are more likely to be abstinent than the general population. We agree with the conclusion of the Employment Court in *NZ Amalgamated Engineering Printing and Manufacturing Union Inc*, that that consideration justifies random drug-testing of persons engaged in "safety sensitive areas."[30]

[31] The "safety requirements" of race meetings on any sensible reading must encompass measures designed to eliminate, or at least minimise, the taking by jockeys of drugs which may induce unsafe riding practices or behaviour, both by

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[29] 943 F.2d 679 (1991) at p 683.

[30] At paras [251] – [257]. The United States Supreme Court has not required a particularised or pervasive drug problem before allowing the government to conduct suspicionless drug-testing: *Skinner v Railway Labor Executives' Association* 489 US 602 (1989); *National Treasury Employees Union v Von Raab* 489 US 656 (1989) and *Board of Education of Independent School District No. 92 of Pottawatomie County v Earls* 536 US 822 (2002) at p 835.

detecting and deterring drug-taking. The Judicial Committee and the Courts below have concluded that this was the purpose of the rules which are under challenge. That has not been plausibly questioned by the appellant. The fact that a positive test result will not be available on the race day, and that another rule is available to prevent an obviously intoxicated jockey from riding on that day, is no answer. The purpose of the random drug-testing rules is deterrent. Without a deterrent, drug consumption which is not immediately obvious to an observer, but which may still adversely affect a rider's judgment and behaviour in the heat of a race, may be undetected and therefore unprevented.[31] And, as was said in argument, for a jockey who contemplates using drugs, the degree of randomness affects the degree of the risk of being detected, and therefore the effectiveness of the deterrent.

[32] It is hard to see the supply of a urine sample as an interference with bodily integrity, although it can be accepted that a requirement for a sample involves intrusion on personal privacy. But even so, and taking into account that aspect of personal integrity, we are satisfied that the power to make rules for safety requirements in the conduct and control of race meetings authorises the creation of a drug-testing regime intended to deter drug-taking. Without random testing there will be insufficient deterrence and the safety of race meetings may be compromised. The risk of danger to riders and to valuable horses is sufficiently great that, even taking account of the human rights values to which Mr Ivory referred, we are entirely unpersuaded that, whether considered against the common law background of fundamental human rights or against the guarantee of freedom from unreasonable search and seizure in s 21 of the Bill of Rights, the racing code had no power to impose a random drug-testing regime for jockeys.

[33] In considering whether the rules are inconsistent with s 21 it is unnecessary to proceed through a step by step analysis in accordance with *R v Hansen*, as the High Court Judge did, because s 5 of the Bill of Rights is not in play. A search or seizure which is unreasonable in terms of s 21 cannot be justified in terms of s 5.

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[31] In relation to another occupation where impaired performance can create great danger, the operation of railroads, the United States Supreme Court has endorsed the view that great human loss can be caused before any signs of impairment became noticeable; that an impaired employee will seldom display any outward signs detectable by the lay person or, in many cases, even the physician: *Skinner* at p 629.

[34] In the present case it is necessary to consider whether the breadth of the rules which were actually made, and the absence from them of certain features, affect their validity. The criticisms made by counsel for the appellant are that the rules are over-broad, and therefore beyond the rule-making powers of NZTC under s 29(2)(d), because random testing is not expressly confined to particular times, places or circumstances and because not all the proscribed drugs have potential for inducing dangerous behaviour; that an appropriate and fair process for the obtaining of samples is not prescribed in them; and that there are no restrictions on the use which may be made of the samples which jockeys are required to supply.

[35] As has been seen, the Racing Act provides for rules relating to safety at race meetings. The rules relating to random testing, which could possibly in isolation be viewed as allowing testing unrelated to safety at race meetings, must necessarily be read in this light. Testing must be related to racing. It must be for the purpose of safety at race meetings and must be carried out in a reasonable manner. There is no need for the rules to spell out these implicit qualifications on the powers given to Racecourse Inspectors. It is always the case that an exercise of power under delegated legislation must be done for the purpose for which the power is conferred and must be done in a reasonable manner. A rule must be construed as if these limits were expressed in it. Like a statutory power, it is subject to such limits even if stated in unqualified terms.[32]

[36] The question then is whether testing at other than a racecourse on a race day is justified as relating to racing safety. Any consideration of whether the rules are too widely expressed must take account of the potentially dangerous character of the activity to which they relate, which has already been described, and the legal obligations concerning safety of those who organise and participate in racing. It is also to be borne in mind that where, as here, there is no question of bad faith on the part of the maker the Courts are generally slow to interfere with the exercise of wide powers to make regulations or their equivalents.[33] That will be likely to be the approach taken when the maker is possessed of specialised knowledge or expertise.

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[32] See *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 (SCNZ) at para [33].
[33] *McEldowney v Forde* at pp 645 and 653.

[37] The legal obligations which exist in relation to the activity of horseracing include compliance with the Health and Safety in Employment Act 1992. Section 16 of that Act, inter alia, requires a person who controls a place of work to take all practicable steps to ensure that no hazard that is or arises in the place harms people who are in the place with the consent of the person. A racecourse is certainly a place of work and obviously on race days jockeys are people who are there with the consent of the person who controls it. It is true, as Mr Ivory pointed out, that NZTR does not itself own or operate any racecourse. That is done by individual racing clubs. It is they who must comply with s 16. But in making rules for the conduct of the thoroughbred racing industry with which the clubs must comply, and in effect making those rules on behalf of the clubs collectively for their benefit, it is permissible for, and even incumbent upon, NZTR to frame those rules so that the clubs can comply with their safety obligations in accordance with standards which apply to them all.

[38] A rule framed to permit random testing only on a racecourse and only on race days would be unlikely sufficiently to fulfil the purpose of promoting safety at race meetings. It can be accepted that NZTR envisages that normally testing will occur on a race day at the racecourse where the jockey required to undergo testing is riding. That is clear from the existence of the Drug Testing Protocol for Riders which the Board of NZTR adopted under s 11 of its constitution on 12 July 2002 and pursuant to which Ms Cropp was dealt with. On the other hand, it is evident that the protocol was not intended to restrict testing only to the circumstances which it contemplates. It was not made pursuant to the rules and therefore cannot be regarded as a qualification to them which amounts to a restriction. It does no more than to set out a procedure intended to be followed in the normal situation.

[39] But a random drug-testing regime which could operate only at a racecourse on race days would not adequately deter drug-taking by jockeys which might lead to the imperilling of themselves, other riders and horses. If jockeys were freed from any risk of detection on non-race days there would obviously be a greater temptation to indulgence on those days, with the potential for the development of addiction and consequent preparedness to take drugs on or immediately before race days, which might for some time go undetected until the jockeys in question were selected by the

random process for testing on those days or were involved in an accident or other incident resulting from their drug use. In argument, Mr Moore was also able to point, by way of example, to the possible need to seek a further test on another day from a jockey who constantly failed to supply on race days the minimum quantity of urine needed for testing, claiming an inability to do so because of wasting to reduce weight, thereby frustrating the operation of the protocol. It would plainly be very difficult to draft rules comprehensively to cover all situations in which a demand for a test outside race days, but related to safety on race days, could properly be made.

[40] As we have said, the impugned rules must be read as authorising such random drug-testing only in relation to safety at race meetings. Read in that way, the rules cannot be said to be either conceptually uncertain or unreasonable in their application merely because they do not attempt particularity. They are not, as a consequence, so ambiguous that Parliament cannot have meant the rule-making power to cover them, to adapt the words of Cooke J in *Transport Ministry v Alexander*.[34] We accept that greater particularity might be difficult to achieve if NZTR is to preserve the flexibility needed to achieve its important purpose of race safety. There may possibly be particular instances in which a jockey is unsure about whether a Racecourse Inspector is properly acting for that purpose in randomly requiring the jockey to supply a urine sample for testing or is otherwise acting unreasonably in the particular circumstances. But the fact that such instances may occur in practice does not mean that the rules themselves are too uncertain or are unreasonable and must be found to be beyond the authorised rule-making power. A rule, like a bylaw, is to be treated as valid unless it is so unclear in its effect as to be incapable of certain application in any case.[35] This is but an aspect of the requirement that the rule must be authorised. The power conferred in the authorising legislation does not permit the creation of a rule which cannot be given an ascertainable and reasonable meaning.

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34 [1978] 1 NZLR 306 (CA) at p 311.

35 *Percy v Hall* [1996] 4 All ER 523 (CA) at p 535 per Simon Brown LJ. A regulation may also be invalid on this ground.

[41] We conclude that it was accordingly within the powers of NZTR under s 29(2)(d) of the Racing Act to promulgate rules which permitted random drug-testing other than at a racecourse on a race day without specifying time, place and circumstances.

[42] Then complaint is made that NZTR has chosen to proscribe all drugs which are listed as controlled drugs under the Misuse of Drugs Act 1975. Some of these drugs are said by the appellant to present no danger under horse racing conditions. The short answer to this submission is that if a drug is listed under the 1975 Act it is because the Expert Advisory Committee on Drugs, established under that Act, considers it has the potential adversely to affect the health or behaviour of users. It was therefore entirely reasonable for NZTR to take the view that it should not pick and choose which controlled drugs it should proscribe under its rules. The possession of any of them is unlawful under the 1975 Act unless under an exemption applying pursuant to s 8 of that Act. It could be said that the rules should have expressly reflected the possibility that such an exemption may apply in the case of a jockey; that the jockey may be taking a controlled drug pursuant to a prescription written by a medical practitioner. But, in practical terms, a prosecution under the rules is most unlikely to occur if a prescription is produced by the jockey to explain the presence of a drug. The rules should not be declared invalid on this account. In *Clements v Bull*,[36] Fullagar J rightly criticised the approach of beginning by thinking up examples of the possible application of a bylaw (or, in this case, a rule) which are at once seen to be capricious, fanciful or absurd and then saying that the power cannot possibly extend to the creation of such consequences. It is to be remembered in this connection that the rules have the purpose of promoting race safety and are not directed at prevention of unfair performance enhancement.

[43] The appellant also submitted that the random drug-testing rules were invalid because they did not contain any operating mechanism governing how samples

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[36] (1953) 88 CLR 572 at p 581.

would be taken and processed. It seems to us, however, that this is not a matter which affects the validity of the rules themselves. It is, rather, something which may affect the lawfulness of an exercise of the power given under the rules on a particular occasion. The power itself is validly conferred. The Inspector may require a urine sample to be supplied. But if a proper process is not followed in an individual instance the actions of the Inspector or of those who receive the sample and carry out the testing for drugs may not be reasonable. There may in that instance be a breach of s 21, as there is when a validly issued search warrant is not executed in a reasonable manner.

[44] It so happens that NZTR has in fact prescribed a procedure to be followed for the obtaining and processing of urine samples and has a contract with the ESR laboratory in Wellington for the carrying out of the necessary analysis. The form used to record the obtaining of samples is one supplied to NZTR by the ESR for that purpose and the sample kits are also supplied by it. These arrangements are set out in the protocol. That protocol is not part of NZTR's Rules of Racing but is used as a matter of practice when samples are required to be supplied at a racecourse. The fact that a Racecourse Inspector may, arguably, have the discretion to employ a different process is of no moment in determining whether the drug-testing on a particular occasion, done in accordance with the protocol, was reasonable.

[45] It is said for Ms Cropp that the protocol is deficient, and therefore operates unreasonably, because there is an inconsistency of treatment as between jockeys depending upon whether they have or have not been able to supply 30 mls or more of urine. It is only if they have done so that the sample is split, with one part being made available to the jockey. If not, the protocol provides for the jockey to be advised that the sample has not been split because of the insufficient amount and to be given the opportunity to return to the drug-testing station no later than by a time stipulated by the registered medical practitioner or authorised person who is supervising the collection of the sample in order to supply a further sample of sufficient quantity.

[46] It was not suggested in argument before us that the protocol was not followed in Ms Cropp's case. The suggestion that the protocol is deficient because of potential inconsistency has no merit. A minimum quantity of urine is presumably needed for reliable testing. It is desirable and fair that a jockey should also have available a sufficient part of the sample so as to be able to have his or her own testing carried out as a check on the accuracy of the result reported to NZTR by the ESR. Hence the figure of 30 mls, which apparently does provide enough for the division. But it has to be recognised that the jockey may be physically unable to produce that amount of urine following energetic riding during a day of racing, preceded perhaps by fasting. Any sensible testing procedure must allow for that situation and, in the absence of evidence to the contrary, the arrangements sanctioned by the protocol seem to be entirely reasonable in this respect.

[47] The last of the appellant's arguments was that the rules are invalid because they do not provide a protection against self-incrimination for jockeys in relation to the samples produced by them for testing. It was submitted that a jockey may incriminate him or herself by being required to supply a sample of urine which, if tested and found positive for drugs, could be used in a criminal prosecution of the jockey, presumably for possession of the drug in question. This argument was unsupported by reference to any authority and must be rejected. All the authorities are in fact the other way. Wigmore[37] explains that the privilege against self-incrimination is intended "to prevent the use of legal compulsion to extract from a person a sworn communication of his knowledge of facts which would incriminate him". It is directed at *testimonial* compulsion. It does not justify an individual refusing to supply physical evidence which exists and can be found independently of any testimony of the individual, such as bodily samples. In the words of Justice Holmes,[38] "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be

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37 *Wigmore on Evidence* (McNaughton revision, 1961), Vol 8, § 2263.

38 *Holt v United States* 218 US 245 (1910) at pp 252-253. See also *Schmerber v California* 384 US 757 (1966); *Sorby v The Commonwealth of Australia* (1983) 152 CLR 281 at p 292; *R v Apicella* (1982) 82 Cr App R 295 (CA); *Saunders v United Kingdom* (1996) 23 EHRR 313 at para [69]; *R v Saifiti* (Court of Appeal, CA 43/02, 17 April 2002) at para [12] and *R v W* (Court of Appeal, CA 328/06, 31 October 2006) at para [20].

material". Andrew Ligertwood[39] comments that there must be some testimonial link in the act of production if the privilege is to apply.[40] That could not be the case in relation to urine or other bodily samples supplied by jockeys under the Rules of Racing or indeed by other sportspersons under codes of conduct applicable to their sports, such as the World Anti-Doping Code 2003, which is recognised by the Sports Anti-Doping Act 2006. The privilege is now dealt with by s 60 of the Evidence Act 2006. The definition of "information" in s 51(3) restricts the privilege to a right not to provide information that is in the form of an oral or documentary "statement"[41]. A refusal to produce real evidence emanating from a person in the form of a urine sample does not engage the privilege.

Result

[48] The appeal is dismissed, with costs of $15,000 and reasonable disbursements to be paid by the appellant to the second respondent.

Solicitors:
Gibson Sheat, Wellington for Appellant
Meredith Connell, Auckland for Respondents

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39 *Australian Evidence*, (4th ed, 2004), para [5·157].

40 See also *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191 at p 195 (Court of Appeal).

41 Defined in s 4 as "a spoken or written assertion by a person of any matter" or "non-verbal conduct of a person that is intended by that person as an assertion of any matter."