IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2018 01851

KATE GOODRICH — Appellant

v

RACING VICTORIA RACING APPEALS AND DISCIPLINARY BOARD — First Respondent

- and –

RACING VICTORIA LIMITED — Second Respondent

JUDGE:	NIALL JA
WHERE HELD:	Melbourne
DATE OF HEARING:	18 March 2019
DATE OF JUDGMENT:	18 April 2019
CASE MAY BE CITED AS:	*Goodrich v Racing Victoria Racing Appeals and Disciplinary Board*
MEDIUM NEUTRAL CITATION:	[2019] VSC 248

ADMINISTRATIVE LAW – Judicial review – Victorian Civil and Administrative Tribunal – Review of decision of Racing Victoria Racing Appeals and Disciplinary Board – Failure to allow stewards to inspect horse on race day – Whether the Victorian Civil and Administrative Tribunal misapplied s 51(2) of the *Victorian Civil and Administrative Tribunal Act 1998* by setting aside the decision under review and not making another decision in substitution for it or remitting the matter – Whether seeking to obtain documents of appointment of the stewards was a collateral purpose amounting to an abuse of process – Whether reasonable apprehension of bias on the part of the Victorian Civil and Administrative Tribunal – No error in the Victorian Civil and Administrative Tribunal's reasoning or conclusion that would justify overturning its decision – Application for leave to appeal granted – Appeal dismissed – *Victorian Civil and Administrative Tribunal Act 1998* ss 49, 50, 51, 75, 148.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr R Appudurai	Davis & De La Rue
For the Respondents	Mr O P Holdenson QC with Mr E M Nekvapil	Minter Ellison Lawyers

HIS HONOUR:

Background[1]

1 The appellant is a horse trainer licensed by Racing Victoria. On 4 January 2017, she was charged with breaching r 8D of the Australian Rules of Racing ('the AR') as, on 12 December 2016, she had not allowed the Racing Victoria Stewards ('stewards') to inspect horses on race day.

2 In the particulars appended to the charge, it was alleged that the appellant maintained licensed training premises in Kilmore, Victoria. She was training a horse called Street Stalker which, on 12 December 2016, was entered to run in race six at Kilmore. On that day, two men identifying themselves as stewards, Mr Melville and Mr Quintner, attended the premises for the purpose of conducting a race day stable inspection. It was alleged that the appellant did not allow the stewards to undertake the inspection; did not allow them to examine the horse; and refused to obey a reasonable direction to allow an inspection of the horse. It was said that this conduct contravened AR 8D as an obstruction or hindering of the stewards in the exercise of the powers vested in them under the AR.

3 By letter dated 13 December 2016, the Chairman of Stewards advised the appellant that the stewards would not approve nominations and entries of horses trained by her until the issues arising from 12 December had been resolved. Soon after, a similar position was taken by Racing New South Wales ('Racing NSW').

4 The charges were presented before the Racing Victoria Racing Appeals and Disciplinary Board ('RADB').[2] On 18 January 2017, at a directions hearing before the RADB, the appellant agreed that she would not nominate horses for races until the charge had been resolved.

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1 This summary of the background of the proceeding is drawn from *Goodrich v Racing Victoria Racing Appeals and Disciplinary Board (Review and Regulation)* [2017] VCAT 1842 ('VCAT Reasons No 1'); *Goodrich v Racing Victoria Racing Appeals and Disciplinary Board & Racing Victoria No 2 (Review and Regulation)* [2018] VCAT 405 ('VCAT Reasons No 2').

2 Established under the Rules of Racing of Racing Victoria, LR 8A.

5 On 10 March 2017, on the appellant's plea of guilty, the RADB suspended the appellant for three months but immediately suspended that penalty for 12 months. By reason of her agreement, and the refusal of stewards to accept nominations from her until the charges had been determined, the appellant was prevented from nominating horses for a period of approximately three months.

6 On 26 April 2017, the appellant applied to the Victorian Civil and Administrative Tribunal ('the Tribunal') for a review of the decision of the RADB. Between April and October 2017, the matter was adjourned by consent on a number of occasions and the interlocutory steps proceeded at a leisurely pace.

7 By email on 4 October 2017, the solicitors for Racing Victoria Limited ('Racing Victoria') wrote to the Tribunal, with a copy to the appellant's solicitors, noting that in its reasons for decision the RADB had recorded that it was:

> aware of a long history of conflict into which Racing Victoria has at times been inevitably drawn. This relatively simple case, with a central, straightforward issue to be determined, was not the time for a re-run of, or an investigation into, that long history of conflict.

8 The email went on to say that the proceeding was likely to involve further applications by both parties and hearings before the Tribunal, and that the 12 month period over which the penalty had been suspended was mostly spent and would very likely lapse by the time the matter was heard and determined by the Tribunal. The email then stated as follows:

> Racing Victoria therefore considers there is no merit in pursuing the decision and penalty the subject of review. In the interests of avoiding the expense and resources associated with continuing the proceeding, Racing Victoria will therefore not pursue the charge or penalty the subject of this review, or call any evidence in support, and will consent to pay the [appellant's] costs.

9 Ultimately, Racing Victoria's email stated that it:

> made an application to Senior Member Proctor for orders disposing of the proceeding, by ordering that:
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> 1. The decision and penalty of the [RADB] dated 10 March 2017 be set aside; and
>
> 2. Racing Victoria pay [the appellant's] cost of the proceeding.

10 By letter dated 9 October 2017, the appellant's solicitors wrote to the Tribunal, declining to debate the matters set out in the Racing Victoria email adding that 'the resolution proposed by [Racing Victoria] … is not the most advantageous resolution potentially available to the [appellant]'.

11 The letter attached correspondence between the parties in which the appellant had sought disclosure of the relevant instruments of appointment of the stewards who had attended on her property in December 2016. After noting that a charge of refusing to allow stewards to conduct a routine race day inspection could not be substantiated unless the persons who sought to carry out that inspection had, at that time, been stewards properly appointed, the appellant's solicitor said the following:

> On behalf of [the appellant] I note that she cannot be in a position to properly evaluate the relative merits of the disposition disclosed to the Tribunal in the [Racing Victoria] email, until such time that her counsel and I have had the opportunity to consider the appointment documents.

12 As set out in the letter, the appellant's solicitor had instructions to issue a witness summons for the production of the appointment documents returnable at a directions hearing.

13 Apprised of that correspondence, on 16 October 2017, the Senior Member ordered that a directions hearing be held on 31 October 2017 and, after referring to the witness summons that had been foreshadowed by the appellant, directed the principal registrar not to issue the summons. The Senior Member gave brief reasons for those orders, and it is convenient to set these out in full:

> 1. An unusual scenario has arisen in this proceeding whereby the respondent seeks consent orders, by email dated 4 October 2017, setting aside the decision on penalty of the [RADB] dated 10 March 2017 and that Racing Victoria pay the applicant's costs of this proceeding.
>
> 2. This is, on its face and subject to submissions, the optimal outcome in this proceeding which the applicant could achieve.
>
> 3. The question arises whether the applicant further pursuing issues in this proceeding is an abuse of process. In this circumstance, unless the parties agree consent orders beforehand, a directions hearing is required in this proceeding. It is not appropriate to at this time leave open the possibility of Racing Victoria being required to respond to a

> summons for documents, as foreshadowed the email on behalf of the applicant dated 9 October 2017.

14 It is convenient to interrupt the narrative to observe that the potential for there to be an abuse of process was first introduced by the Tribunal. Secondly, the reference to Racing Victoria seeking consent orders is not entirely accurate. As will appear, Racing Victoria did no more than indicate its position that it would not call any evidence in support of the charge and would not seek to pursue it**.** The position taken by Racing Victoria was not conditional on the appellant agreeing or consenting to anything. It was not properly seen as an offer capable of acceptance, but rather an unequivocal statement of position.

Directions hearing on 31 October 2017

15 In accordance with the directions given by the Tribunal, a directions hearing was held on 31 October 2017. Before identifying the orders that were made on that day, and the reasons given by the Tribunal, it is convenient to make reference to the course that submissions took.

16 The appellant and Racing Victoria were each represented by counsel. It was clear from the correspondence that the appellant was not content with the course proposed by Racing Victoria in its email of 4 October 2017. The appellant said that, should the matter proceed, and the instruments of appointment of the stewards be provided, she would consider whether the stewards had been properly appointed. Early on in the directions hearing, the Tribunal asked the appellant to identify what outcome — 'in the form of a bottom line outcome' — she sought from the proceeding. To that direct inquiry counsel for the appellant responded:[3]

> In the best case scenario, they produce the documents which they ordinarily won't produce, and we discover, and we convince the Tribunal, that those documents do not support the position that the stewards were validly appointed, those two stewards.
>
> Then the [Tribunal] will so find, and dismiss the charge. And cost consequences, but the issue is not as simple as the way [Racing Victoria] put it in its offer letter to the Tribunal about set aside and pay the cost. When Ms Goodrich was — her horse was withdrawn from that race in December

[3] Grammar and syntax as in transcript.

> last year, at the same time, soon afterwards, the Racing Victoria chief steward band, basically, Ms Goodrich from nominating race horses, and that was followed suit in New South Wales, under racing rule 50.
>
> And so, she basically lost more than three months of ability to earn anything. Now, and the reason I'm here making these points for Ms Goodrich is that is a person's livelihood.
>
> So, if indeed we find these stewards weren't validly appointed, the charge goes out the window, not just set aside, and the consequential matters which fall from that go all the way back to invalid suspension of nominations, so she's lost those months of racing, she has lost [owners] who have had to go away because she can't train for them.
>
> So it's not just as simple as the way the [Racing Victoria] puts it to you. 'Oh, look, she's getting what she wants'. No. She's not getting what she wants. She needs to be — she needs her position to be substantiated, so that she's exonerated.

17 Counsel went on to submit that the appellant had a right to put the prosecutor to its proof, and that a fundamental basis of that proof was the authority of the stewards. Counsel then referred to correspondence between the parties in which the appellant had sought instruments of appointment of the two stewards and evidence of any delegation to them from the board of Racing Victoria. He noted that the documentation had not been forthcoming and that Racing Victoria had required confidential undertakings in relation to the provision of any material.

18 After recounting the difficulties in obtaining the material relating to the appointment of the stewards, counsel submitted that the Tribunal was hamstrung in that, before it could make any decision let alone decide on whether the outcome proposed by Racing Victoria was an optimal solution, the Tribunal lacked the necessary information in relation to the appointment. Ultimately counsel concluded that, in the absence of that material, the appellant was not in a position to 'make [the] call' that the proposal of Racing Victoria was the most advantageous resolution potentially available to the appellant.

19 Later in the hearing, counsel for the appellant said, in the event the appellant succeeded in the Tribunal that would open up the possibility of her getting appropriate recompense for the months that she was not allowed to nominate horses. Counsel concluded his submissions by observing that the Tribunal could not

make an order setting aside the decision below and disposing of the substantive case without more.

20 In response, counsel for Racing Victoria submitted that the appellant proceeding in the face of the proposal of Racing Victoria would constitute an abuse of process because it demonstrated that the appellant was seeking to achieve a collateral purpose. In answer to a question from the Senior Member as to the types of orders that would be made by the RADB, counsel accepted that the normal order would be to find the charge not proven.

21 Counsel for Racing Victoria submitted that, if the documents were provided under summons, that would entail considerable legal argument and that, should the matter proceed to trial, it would take a two days of legal argument to determine whether the documents should be produced and the terms of production, and then a further half day to determine the appeal on its merits.

The Tribunal's orders of 31 October 2017

22 The Tribunal concluded that it did not have the power to summarily terminate the proceeding by setting aside the decision under review.[4] However, it said that it did have the power to invite the appellant to consent to an order setting aside the decision and, in the event she declined to do so, to invite submissions from the parties as to whether the continuation of the proceeding would constitute an abuse of process liable to being dismissed under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* ('VCAT Act').[5]

23 The Tribunal went on to say that even if the matter proceeded to trial and the Tribunal found that the stewards had not been properly appointed then, VCAT would 'likely, under s 51 of the VCAT Act, set aside the decision under review … and consider any application for costs'.[6]

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4 VCAT Reasons No 1 [31]–[32], citing *L v Nurses Board of Victoria* (1999) 16 VAR 125, 128.
5 VCAT Reasons No 1 [33].
6 Ibid [38].

24 The Tribunal noted that, whatever the outcome of the proceeding, it did not have the power to affect the previous decisions of Racing Victoria and Racing NSW preventing the appellant from entering horses into races.[7] The Tribunal then said that for the appellant to use the proceeding in order to obtain instruments of appointment for use in some other proceeding, would constitute an impermissible collateral purpose.[8]

25 In the result, the Tribunal made an order requiring the appellant to indicate whether she consented to orders that the decision and penalty of the RADB dated 10 March 2017 be set aside and that Racing Victoria pay her costs in the proceeding. In the event the appellant did not consent to those orders, she was directed to file written submissions concerning the question whether the Tribunal should, of its own initiative, strike out or dismiss the proceeding as an abuse of process or, under s 51A of the VCAT Act, invite Racing Victoria to reconsider the decision under review.[9] Provision was also made for Racing Victoria to file submissions in response.

The Tribunal's orders of 28 March

26 The appellant did not consent to the orders that had been proposed by Racing Victoria. The parties filed written submissions in response to the orders of 31 October 2017. Without any further oral hearing, the Tribunal made the following further orders:

> 1. Under s 50 of the [VCAT Act], Racing Victoria is joined as second respondent to this proceeding.
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> 2. Under s 75 of the VCAT Act, the proceeding is dismissed insofar as the applicant seeks to rely on whether or not relevant instruments of delegation/appointment (see reasons below) validly appointed persons purporting to be Stewards of Racing Victoria Stewards who, on 12 December 2016, came to conduct a race day stable inspection and inspect a horse racing that day.
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> 3. On or before 13 April 2018, the applicant is to file and serve advice as to whether she consents to the decision under review being set aside

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7 Ibid [39].

8 Ibid [40].

9 Although the Tribunal referred to Racing Victoria reconsidering the decision pursuant to s 51A of the VCAT Act, Racing Victoria was not the decision-maker. However, there was no argument on this point and it does not appear to be relevant.

and that Racing Victoria be ordered to pay her costs in this proceeding.

27 The Tribunal gave reasons for making those orders.[10]

28 The Tribunal set out the background to the matter and then turned to the submissions of the parties. It is not necessary to rehearse those matters, save to record the appellant's submissions on why she could do better in the proceeding than the Racing Victoria proposal. It was said:

> The potential outcome for [the appellant] if this VCAT proceeding is heard and determined in her favour is vastly better than that proposed by Racing Victoria:
>
> i. If VCAT decides the stewards had not been validly appointed, it will describe why that was so, that the charge had not been validly brought against [the appellant] and will set aside the Decision and dismiss the charge.
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> ii. Absent any valid reason to not do so, VCAT will order Racing Victoria to pay [the appellant's] costs of this VCAT proceeding and the RADB hearing, both potentially on an indemnity costs basis;
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> It was submitted VCAT would have the power to make a costs order with respect to the RADB hearing, given VCAT on review has all the powers of the decision-maker (s 51(1)(a) of the VCAT Act). Under LR 6E(1)(c) the RADB may 'give any judgement or decision or make such order as in the RADB's opinion the justice of the case requires';
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> iii. Under s 51 of the VCAT Act, VCAT has power is set aside the Decision and make another decision in substitution for it. Substituting the decision with the decision dismissing the charge against [the appellant], is preferable to an order simply setting aside the decision under review, leaving the charge in existence;
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> iv A VCAT finding that the stewards had not been validly appointed would be a basis for [the appellant] to rely on to negotiate with Racing Victoria for compensation, or failing that, to bring an action in court for compensation. In doing so [the appellant] would be relying on the VCAT decision not the Instrument presumably summonsed in this proceeding; and
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> v. Disagreed with Racing Victoria's submission … that Australian Rule of Racing AR 197 would prohibit [the appellant] from seeking compensation. It was submitted that if the stewards were not validly appointed as stewards when they came to her inspect on 12 December, they would not have been acting under the relevant rules.[11]

29 The Tribunal then referred to its role, including setting out s 51(2) of the VCAT Act

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10 VCAT Reasons No 2.

11 Ibid [19].

in unexceptionable terms.[12] Next, it referred to s 75 of the VCAT Act, including authority[13] mandating great care in the exercise of the power to summarily dismiss a proceeding.[14] The Tribunal devoted some time to the principles applicable to abuse of process, citing passages from the reasons in *Williams v Spautz*[15] to the effect that a party may not use proceedings to obtain a collateral advantage rather than the purpose for which such proceedings are designed and exist, and that a party who engages in an abuse of process is 'disqualified from invoking the powers of the court'.[16]

30 The Tribunal commenced its application of those principles by observing that the appellant had acted entirely appropriately in initiating her review in the Tribunal.[17] However, the Tribunal concluded that the 'fundamentals of the proceeding' changed when Racing Victoria offered the result she could achieve in the proceeding, namely that the decision be set aside.[18]

31 In that context, the Tribunal observed there was no substantive difference between orders that the decision under review be set aside and that the decision be set aside and substituted with a decision dismissing the charge.[19] That was because both orders would provide exoneration and vindication by the removal of the finding of guilt and the record of a penalty and that, once set aside, the charge would 'not somehow sit in isolation, still pending, as a mark against [the appellant]'.[20]

32 The appellant had submitted that two disputes would remain notwithstanding the making of an order to set aside the decision under review. First, whether or not the stewards were properly appointed at the time of the inspection; and second, whether the Tribunal should order that Racing Victoria pay the appellant's costs of the

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12 Ibid [25], [27].
13 See, eg, *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, 99.
14 VCAT Reasons No 2 [33]–[35].
15 (1992) 174 CLR 509, 528–9 (Mason CJ, Dawson, Toohey and McHugh JJ), 543 (Deane J), 556 (Gaudron J).
16 VCAT Reasons No 2 [36]–[49], citing *Williams v Spautz* (1992) 174 CLR 509, 528 (citations omitted).
17 VCAT Reasons No 2 [50].
18 Ibid [51].
19 Ibid [52].
20 Ibid [53].

proceedings before the Tribunal and the RADB.[21]

33 In considering those two matters, the Tribunal said that, by reason of her review, she was in effect facing a charge in a disciplinary proceeding and that the Racing Victoria proposal offered her the opportunity to, in effect, successfully defend the charge.[22]

34 The Tribunal concluded that there was an abuse of process because the appellant was attempting to 'switch roles' in the proceeding by pursuing the action to obtain evidence and seeking a decision of the Tribunal to found a claim for compensation from Racing Victoria.[23] The Tribunal concluded that this was 'the collateral purpose which constitute[d] an abuse of process in th[e] review proceeding'.[24] If she sought to 'pursue that collateral purpose, the courts are the appropriate venue'.[25]

35 The Tribunal held that there was no reasonable relationship between the result she sought, namely founding a compensation application, and the scope of the remedy available in the proceeding, which did not include ordering compensation.[26] Similarly, the Tribunal held that the appellant's desire to obtain a costs order in relation to the proceedings before the RADB would require her to establish that the stewards were not properly appointed.[27] The Tribunal observed that success or failure in that endeavour involved the pursuit of the collateral purpose and it was also an abuse of process to pursue costs before the RADB on that basis.[28]

36 Having found that the continuation of the proceeding would be an abuse of process, the Tribunal then turned to the orders that it should make. In this respect, the Tribunal concluded that to permit the appellant to pursue her collateral purpose would be to permit an abuse of process and that s 75 of the VCAT Act should be

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21 Ibid [55]–[57].
22 Ibid [58]–[59].
23 Ibid [60].
24 Ibid.
25 Ibid.
26 Ibid [62].
27 Ibid [64].
28 Ibid.

employed to prevent that occurring.[29]

37 The Tribunal observed that it had struck out the appellant's claim that the charges against her should be dismissed because the stewards were not properly appointed.[30] The Tribunal said that this was akin to striking out a pleading in a court proceeding and it removed from the proceeding the collateral purpose the appellant sought to pursue.[31] After precluding the appellant from pursuing the collateral purpose, the Tribunal invited the appellant to again consider whether she would consent to the orders sought by Racing Victoria.[32]

38 The Tribunal made it clear that that invitation did not extend to the making of any further submissions, which the Tribunal regarded as having been completed.[33]

Final orders — 20 April 2018

39 In response to the invitation extended by the Tribunal, the appellant said that she would not consent to the orders proposed by the Tribunal. In the result, on 20 April 2018 the Tribunal made an order under s 75 of the VCAT Act, dismissing the proceeding. The formal orders were in these terms:

> 1. Under s 75(1) of the [VCAT Act], this proceeding is dismissed as an abuse of process.
>
> 2. The second respondent must pay the appellant's costs on the County Court costs scale, to be assessed by the Costs Court, if the parties cannot agree an amount.

The Notice of Appeal

40 Section 148 of the VCAT Act permits an application for leave to appeal from decision of the Tribunal on a question of law.

41 The Notice of Appeal sought to appeal order 1 of the orders made on 20 April 2017 and set out eight questions of law in the following terms:

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29 Ibid [70].
30 Ibid [72].
31 Ibid [73].
32 Ibid [74].
33 Ibid [77].

Question 1:

Did the Tribunal misconstrue the scope of its jurisdiction and thereby fail to carry out its obligation to determine whether it could be satisfied, on the material before it, that the decision under review was the "correct or preferable" one?

Question 2:

Did the Tribunal fail to take into account a relevant consideration, namely, by refusing to require the production of, and to consider, the relevant instruments of appointment of the stewards (and other related documents — **appointment documents**)?

Question 3:

Did the Tribunal misconstrue, and misapply, s 51(2) of the [VCAT Act] in accepting the submission of Racing Victoria that setting aside the decision under review, without more, would in effect also dismiss the charge?

Question 4:

Did the Tribunal misconstrue, and misapply, s 75 of the [VCAT] Act in determining that the appellant's desire to put [Racing Victoria] to its proof as to the validity of the appointment of the stewards amounted, relevantly, to an abuse of process in circumstances in which RVL had offered to accept an order that the decision under review be set aside and that it pay the appellant's costs ([**Racing Victoria's**] **offer**)?

Question 5:

Was the Tribunal's decision to strike out the appellant's " … *claim that the charge against her should be dismissed because Stewards on 12 December 2016 were not properly appointed*" authorised by s 75 of the Act and, in particular, in the absence of the production of the appointment documents, let alone any assessment of them?

Question 6:

Alternatively, if the answer to question 6 is "Yes", the Tribunal having struck out the alleged "collateral purpose" because it amounted to an abuse of process, did there then remain any basis upon which an order might properly have been made under s 75 of the [VCAT] Act to dismiss the proceeding " ... *as an abuse of process*"?

Question 7:

Was the conduct of the Tribunal up to, and including, the making of the April order such that a fair-minded lay observer might reasonably apprehend that the Tribunal might not bring, and might not have brought, an impartial mind to the resolution of the proceeding?

Question 8:

Was the April order or, alternatively, the cumulative effect of the October

> order, the November order, the March order and the April order so unreasonable that no reasonable Tribunal could have ever … come to it?

42 The questions of law are accompanied by eight grounds of appeal, which are discursively expressed and which fail to state simply the error which the Tribunal is said to have made.[34]

43 By grounds 1 and 2, the appellant submitted that the Tribunal was bound to determine the 'correct or preferable' decision, this required it to determine whether the stewards had been validly appointed and that the failure to do so meant that the Tribunal proceeded upon an artificial or inadequate factual basis.

44 Ground 3 asserted that it was an error for the Tribunal to hold that it could set aside the decision without substituting a different decision as required by s 51(2)(c) of the VCAT Act, with the consequence that the Tribunal wrongly concluded that an order setting aside the penalty was the optimal outcome that the appellant could obtain from the proceeding.

45 Ground 4 contended that the Tribunal wrongly concluded that the 'refusal to accept [Racing Victoria's] offer' amounted to an abuse of process in circumstances where the appellant was always seeking a substantive outcome, namely to plead not guilty and seek a reversal of the penalty.

46 Grounds 5 and 6 were argued together and asserted that, without a consideration of the appointment documents, the Tribunal was not in a position to determine the abuse of process question. Further, it was contended that by Order 2 of the orders made on 28 March 2018, the Tribunal under s 75 purported to dismiss the proceeding in so far as the appellant sought to rely on the instruments of appointment and having done so there was no basis for a continuing abuse of process.

47 Ground 7 asserted that there was a reasonable apprehension of bias on the part of the Tribunal on the basis that the reasons and orders made in October 2017 provided

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[34] *Supreme Court (Miscellaneous Civil Proceedings) Rules 2018* sub–r 4.06(1)(b)(vi).

a foundation that the Tribunal had prejudged the question of abuse of process.

48 Ground 8 was an aggregation of the earlier grounds.

An overview of the appellant's submissions

49 In order to put the grounds into context, it is convenient to identify what I regard as being the relevant steps that led the Tribunal to dismiss the proceeding on 20 April 2018. First, the Tribunal accepted that the proceeding was legitimately commenced for the purpose of overturning the penalty that had been imposed by the RADB. Secondly, the position of Racing Victoria expressed its email of 4 October 2017 was the optimal outcome that the appellant could legitimately obtain from the proceeding. Thirdly, seeking the appointment documents for the purpose of demonstrating that there had been no valid charges, as a foundation for a claim for compensation, was a collateral, and therefore improper, purpose. Fourthly, the appellant's predominant purpose in maintaining the proceeding was to obtain the appointment documents. Finally, maintaining the proceeding for that purpose was an abuse of process that disentitled the appellant to any relief and warranted dismissal of the proceeding under s 75 of the VCAT Act.

50 Counsel for the appellant commenced his oral submissions by saying that the proceeding revolves around two very simple propositions: Racing Victoria, as prosecutor, had an obligation to prove the elements of the offence, to disclose all relevant material and to act fairly and impartially; and, because of s 51(2) of the VCAT Act, the Tribunal cannot set aside a decision without also substituting a new decision or remitting the matter.

51 The appellant submitted that once she had commenced a review of the decision of the RADB, which the Tribunal had accepted had been commenced for a legitimate purpose, the Tribunal was required to conduct a rehearing de novo.[35] The appellant submitted that the hearing provided an opportunity for her, if the evidence justified it, to plead not guilty and to seek to have the RADB decision set aside and the charge

[35] The appellant cited *Transport Accident Commission v Bausch* (1998) 4 VR 249.

dismissed or, alternatively, to advocate for a less onerous disposition.

52 In that context, the appellant identified the validity of the charge as a 'threshold element' which was required to be established before the Tribunal could be satisfied that the RADB's decision was the correct or preferable one. The Tribunal needed a basis before it could agree to set aside the decision under review.

53 Further, she submitted that an order setting aside the decision of the RABD was not authorised by s 51(2) of the VCAT Act, which also required that a decision in substitution be made, and was not the optimal outcome because she could have obtained an order dismissing the charges.

54 The applicant submitted that, in the event that the stewards had not been validly appointed and the Tribunal made a finding to that effect, the proceedings would be brought to a successful conclusion in favour of the appellant and enable her to take advantage of any benefit which the law gives her in that event. She also submitted the Tribunal erred in finding that there was an abuse of process because she maintained a claim to an order dismissing the proceeding and any collateral purpose was not a predominant purpose.

55 With that overview in mind, I turn to the submissions on the grounds of appeal.

Grounds 1 and 2

56 The appellant submitted that the validity of the appointment of the stewards was an issue of fundamental importance in the prosecution of the charges. She submitted that the dispute between the parties could not be resolved without the production of the relevant appointment documents. Rather than requiring their production, the Tribunal erroneously indicated it would finally determine the application for review leaving a 'threshold issue' of the validity of the charges unresolved.

57 It was submitted that in the application for review, the appellant had put the validity of the stewards' appointment squarely in issue and that the Tribunal had failed to take into account the refusal of Racing Victoria to provide copies of the appointment

documents and, as such, were in breach of their duty of disclosure as a prosecutor.

58 The respondent submitted that the email of 4 October 2017 constituted an unequivocal statement that Racing Victoria did not wish to pursue the charges, and would not adduce any evidence in support of them and, for that reason, the Tribunal had to set aside the penalty imposed by the RABD. By reason of the position taken by Racing Victoria, and from which it was unable to resile, the prosecution had come to an end and there were no longer any issues for the Tribunal to decide.

59 In that context, there was no legitimate purpose in seeking the appointment documents because Racing Victoria was not intending to proceed with the charge. It was said that it was not necessary for the Tribunal to also dismiss the charge given that Racing Victoria would inevitably be precluded from agitating the charges in the future. If the failure to make that additional order was an error, it was an error in form not substance.

Consideration of grounds 1 and 2

60 It convenient to commence by referring to the jurisdiction of the Tribunal that was engaged by the appellant.

61 The appellant, as a licensed trainer of race horses, was subject to the Rules of Racing. Those rules comprise the Australian Rules of Racing made by the Australian Racing Board and Local Rules of Racing Victoria. The former are identified by the prefix AR and the latter by LR.

62 AR 8D provided that any licensed person who refuses to obey any reasonable direction of stewards or obstructs, hinders or delays stewards in exercising their powers 'may be penalised'. LR 6A provided for the appointment and functions of the RADB which include hearing and determining charges under the Rules of Racing.

63 On the hearing of the charge, the RADB had the powers provided for in LR 6E to draw inferences of fact; penalise any person; and give any judgement or decision or

make such orders as in the RADB's opinion the justice of the case requires. As already noted, on the appellant's plea of guilty, the RADB imposed a three month suspension of the appellant's licence. This penalty was itself suspended for 12 months.

64 Section 83OH(1) of the *Racing Act 1958* provides that a person whose interests are affected by decision of the RADB may apply to the Tribunal for review of that decision.

65 An application under s 83OH(1) is within the review jurisdiction of the Tribunal. Section 51 of the VCAT Act provides that, in exercising the review jurisdiction, the Tribunal has all the functions of the decision-maker. Subsection 51(2) provides as follows:

> In determining a proceeding for review of a decision the Tribunal may, by order:
>
> (a) affirm the decision under review; or
>
> (b) vary the decision under review; or
>
> (c) set aside the decision under review and make another decision in substitution for it; or
>
> (d) set aside the decision under review and remit the matter for re-consideration by the decision-maker in accordance with any directions or recommendations of the Tribunal.

66 Relevantly, subsection 51(3) provides that a decision made by the Tribunal in substitution for a decision of the decision-maker is deemed to be decision of the decision-maker and, subject to any contrary order of the Tribunal, has, or is deemed to have had, effect from the time at which the decision under review had effect.

67 The function of the Tribunal is to review the decision on its merits. Neither the phrase 'merits review' or 'correct or preferable decision' are to be found in the VCAT Act but they are commonly, and usefully, employed to describe the function and

purpose of the Tribunal in its review jurisdiction.[36] The Tribunal reaches its conclusion, as to what is the correct decision, by conducting its own independent assessment and determination of the matters necessary to be addressed.

68 In the hearing of a charge under the Rules of Racing, the Tribunal must determine whether, on all of the material before it, the contraventions have been made out. In assessing the material, the Tribunal was required to act fairly and on the basis of relevant evidence.[37] Given the gravity of the charges and the consequences for the party facing them, the Tribunal would need to be comfortably satisfied before finding the charges proven.[38]

69 Although she was the applicant before the Tribunal, the appellant bore no onus of proof and did not need to establish her innocence of the charge nor any error on the part of the RADB. Racing Victoria had carriage of making out the charges and, in order to do so, needed to adduce evidence or material on which the Tribunal could act.

70 Once Racing Victoria had indicated both to the appellant and to the Tribunal that it did not wish to adduce any evidence in support of the charge and would not pursue the charge or penalty that had been imposed by the RADB, it was clear that the decision of the RADB could not stand and the appellant became entitled to have it set aside by the Tribunal.

71 At least in so far as the decision and penalty of the RADB were concerned, there was only one correct decision that could be made by the Tribunal, namely to set aside the decision under review. For the moment, I put to one side whether it was obliged to go on to dismiss the charge.

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36 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 327 (Kiefel J in dissent but not on the statement of principles); *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589, 591 (Bowen CJ and Deane J); *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639, 646 (Deane J), 651 (Lockhart J); *Freeman v Department of Social Security* (1988) 19 FCR 342, 345 (Davies J); *Hospital Benefit Fund of Western Australia Inc v Minister for Health, Housing and Community Services* (1992) 39 FCR 225, 234.

37 *Karakatsanis v Racing Victoria Ltd* (2013) 42 VR 176, 189 [36].

38 Ibid 189 [37]–[38], citing *Greyhound Racing Authority v Bragg* [2003] NSWCA 388 [35].

72 The position taken by Racing Victoria made it unnecessary for the Tribunal to determine whether or not Racing Victoria could prove the charge and, if so, what penalty should result. Given that no evidence was to be adduced in support of the charge, it was irrelevant whether Racing Victoria could have successfully established the contravention before the Tribunal. It had no intention of doing so and the appellant was entitled to a successful outcome on her application for review.

73 The requirement that the Tribunal reach the correct or, in respect of a discretion, the preferable decision,[39] did not mean that the Tribunal was obliged to determine whether Racing Victoria was justified in declining to proceed with the charge. Nor was the Tribunal obliged to go through the process of a trial, by requiring the production of documents or by making an assessment of the evidence to determine whether Racing Victoria was correct in not proceeding with the charge.

74 Analogies drawn from the criminal law are of limited utility, however, there is some, albeit inexact, relationship with the role of a court in a prosecution. As Gaudron and Gummow JJ explained in *Maxwell v The Queen*,[40] the independence and impartiality of the judicial process would be compromised if courts were perceived to be in any way concerned with who is to be prosecuted and for what.[41] For similar reasons, the Tribunal was not the authority with responsibility for investigating and prosecuting contraventions of the Rules of Racing. The Tribunal had no role to play in determining whether a charge should be laid under the Rules of Racing. Its role was to independently and impartially determine a charge that had been laid.

75 It would not have been open to the Tribunal to allow the matter to proceed solely, or predominantly, for the purpose of allowing a party to take advantage of its interlocutory processes that are available for the purposes of hearing and

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39 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 327 [140].

40 (1996) 184 CLR 501.

41 Ibid 534, citing *Barton v The Queen* (1980) 147 CLR 75, 94–5; *Jago v District Court of New South Wales* (1989) 168 CLR 23, 38–9, 54 (Brennan J), 77–8 (Gaudron J); *Williams v Spautz* (1992) 174 CLR 509, 548 (Deane J); *Ridgeway v The Queen* (1995) 184 CLR 19, 74–5 (Gaudron J).

determining applications. That would result in the Tribunal permitting an abuse of its own processes.

76 It is worth emphasising at this point that the facility to obtain documents, either under s 49 of the VCAT Act or pursuant to a summons issued by the Tribunal, exists only for the purpose of enabling the proper and fair determination of a proceeding in the Tribunal. The importance which the law attaches to using such documents only in the proceeding in which they are obtained is demonstrated by the fact that, in the context of court proceedings, the improper use of such documents constitutes a serious contempt of court.[42]

77 It follows that once Racing Victoria indicated that it would not call any evidence, the Tribunal was obliged to bring the proceeding to an end by making orders in favour of the appellant.

78 In my view, the appellant's submissions proceeded from a misconception about the role of the Tribunal and its obligation to make the correct or preferable decision. There was no impediment to the Tribunal bringing the proceeding to an end by making orders in favour of the appellant once Racing Victoria indicated that it would not seek to adduce any evidence or material in support of the charge. Indeed, that was the only course available to the Tribunal at that time. That is, of course, subject to the appellant seeking those orders from the Tribunal.

79 It follows that I reject grounds 1 and 2. The Tribunal was not required to satisfy itself that the charges were validly laid.

Ground 3

80 This ground contends that the Tribunal was in error in concluding that setting aside the decision was an optimal outcome in circumstances where the VCAT Act required a further decision to be made in substitution for that set aside.

81 There was no basis on which the penalty of the RADB could stand once Racing

[42] *Hearne v Street* (2008) 235 CLR 125.

Victoria irrevocably declined to adduce any evidence in support of the charge. The appellant was entitled to have the decision set aside. Subsections 51(2)(c) and (d) of the VCAT Act provide for two alternatives where the Tribunal sets aside a decision under review. The first is that the Tribunal makes another decision in substitution. The second is that the matter be remitted for reconsideration by the decision-maker in accordance with any directions or recommendations of the Tribunal.

82 The appellant submitted that s 51(2)(c) of the VCAT required that the Tribunal not simply set aside a decision, but also make a decision in substitution or remit the matter. The appellant relied on the decision of Kyrou J in the *Secretary of the Department of Justice v Yee* ('*Yee*'),[43] which held that, where the Tribunal decides to alter a decision under review, it must either vary the decision or set aside the decision and make another decision or set aside and remit. In that case, the order of the Tribunal purported to give the Secretary a direction without first setting aside the decision. Justice Kyrou found that such an order did not comply with s 51(2) of the VCAT Act.

83 In conformity with the approach taken by Kryou J in *Yee*,[44] in my view, s 51(2) requires the Tribunal, where it sets aside a decision, to take one of the further steps contemplated by sub-ss 51(2)(c) and (d). That did not occur in this case. Section 51(3) is also relevant. It provides that the decision which is made in substitution is to be taken to be the decision of the original decision-maker and takes effect from the date of the original decision. This is a strong statutory indication that the primary decision is to be of no ongoing effect or record and is to be replaced by an order of the Tribunal.

84 In my view that was an error in the reasoning of the Tribunal.

85 However, the Tribunal did not make that order — it indicated that it would make that order if the appellant consented. Consent was not forthcoming. It follows that the present application is not an appeal from such an order. An appeal under s 148

43 [2012] VSC 447.
44 Ibid.

of the VCAT Act is from an order of the Tribunal not from its reasons.[45]

86 In order to understand the consequences of any error in the reasons of the Tribunal, it is necessary to return to the issues that were presented to the Tribunal for its determination. It is convenient to do that in the context of ground 4.

Ground 4 — Abuse of process

Abuse of process in the Tribunal

87 The appellant contended that she had sought to continue with the proceeding in order to plead not guilty to the charge and to seek a reversal of the penalty. To that end, the appellant wanted to prove that the stewards were not properly appointed and, for that reason, she should be found not guilty of the charge. She contended that the Tribunal was in error in finding an abuse of process in these circumstances.

88 Section 75 of the VCAT Act provides that the Tribunal may summarily dismiss a proceeding that is, in its opinion, frivolous, vexatious, misconceived or lacking in substance or is 'otherwise an abuse of process'.

Sections 75 and 148 of the VCAT Act and abuse of process

89 It is necessary to say something here about abuse of process in the context of ss 75 and 148 of the VCAT Act.

90 Section 75 provides a power to summarily dismiss or strike out all or part of a proceeding. It is well established by authority that the power to summarily dismiss a proceeding should only be exercised in a clear case and with appropriate caution. In some cases, it is a power that may be exercised because the proceeding is doomed to fail.[46] Where the issue is abuse of process, the Tribunal must determine the question on the basis of the facts and submissions that are relevant to that question. It is not a case of finding that the claim is lacking in substance. Indeed, a case may

45 *Dodoro v Knighting* (2004) 10 VR 277, 284 [25]–[26].
46 *State Electricity Commission v Rabel* (1998) 1 VR 102.

involve an abuse of process even though the moving party has a prima facie case to relief.[47]

91 Relevantly, 75(5) provides that the question whether an application is an abuse of process is a question of law. The potential interaction between ss 75(5) and 148, which limits an appeal to an appeal on a question of law, was adverted to by Racing Victoria in a submission filed shortly before the hearing. In that submission, Racing Victoria referred to the decision of Cavanough J in *Djime v Kearnes*[48] in which his Honour expressed a provisional view that, by reason of 75(5), an appeal under s 148(1) from an order made under s 75(1) of the VCAT Act was an appeal on the merits, rather than an appeal in the nature of judicial review. Justice Cavanough raised for consideration, but did not decide, whether the real issue on an appeal under s 148(1) of the VCAT Act may be whether the Tribunal's decision was the correct or preferable one. Racing Victoria advanced a number of reasons why that approach should not be followed.

92 The relationship between s 75(5) and the 'margin of appreciation of the kind involved in a judicial conclusion of "abuse of process"' raises difficult questions.[49] In *R v Carroll*,[50] Gaudron and Gummow JJ said that an appellate review of a decision to grant or refuse a stay looks to whether the primary judge acted upon a wrong principle, was guided or affected by extraneous or irrelevant matters, mistook the facts, or failed to take into account some material consideration.[51] At least, any determination of whether there is abuse of process depends on a factual substratum and, largely, the determination of the relevant facts will be a matter for VCAT. That will likely include findings as to purpose. For that reason, the determination of whether there was an abuse of process before the Tribunal is not at large in this Court. However, it is not necessary for me to express a concluded view. That is

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47 *Williams v Spautz* (1992) 174 CLR 509, 521–2.

48 [2019] VSC 117.

49 M*inister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713, 729 [58] (Gageler J), cf *Walton v Gardiner* (1993) 177 CLR 378, 398–9; *R v Carroll* (2002) 213 CLR 635, 657 [73]; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256, 264 [7].

50 (2002) 213 CLR 635.

51 Ibid 657 [73], cited in *Connellan v Murphy* [2017] VSCA 116.

because the appellant disavowed any reliance on the reasoning in *Djime v Kearnes*[52] and submitted that her application depended on establishing one or more of the errors she had identified in her Notice of Appeal. I shall proceed on that basis.

93 Abuse of process may take many forms and it includes commencing or maintaining a proceeding for an improper purpose.[53] The improper purpose must be a predominant purpose. Issuing or maintaining a proceeding to gain a collateral advantage is an improper purpose.

94 *Williams v Spautz*[54] is authority for the proposition that to commence, or maintain, a proceeding for the predominant purpose of obtaining some collateral advantage beyond what the law offers is an abuse of process. Where an abuse is established, the court or tribunal may terminate the proceeding, generally by permanent stay, even though the appellant may otherwise have a prima facie case in the claim. An abuse should not lightly be found.

95 In deciding whether the purpose is collateral or improper, it is important to distinguish between the case where the advantage is a corollary or consequence of obtaining the relief and where the pursuit of the collateral advantage is the predominant purpose of bringing or maintaining the action. The following example given by the majority of the High Court in *Williams v Spautz*[55] serves to illustrate the point:

> an alderman prosecutes another alderman who is a political opponent for failing to disclose a pecuniary interest when voting to approve a contract, intending to secure the opponent's conviction so that he or she will then be disqualified from office as an alderman by reason of that conviction, pursuant to local government legislation regulating the holding of such offices. The ultimate purpose of bringing about disqualification is not within the scope of the committal process instituted by the prosecutor. But the immediate purpose of the prosecutor is within that scope.[56]

96 The majority observed, in respect of that scenario, that there is no abuse of process

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52 [2019] VSC 117.

53 *Williams v Spautz* (1992) 174 CLR 509; *Melbourne City Investments Pty Ltd v Myer Holdings Limited* (2017) 53 VR 709, 711 [7].

54 (1992) 174 CLR 509.

55 Ibid.

56 Ibid 526 (Mason CJ, Dawson, Toohey and McHugh JJ).

when the purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the prosecutor's favour.[57]

Application of the abuse of process principles

97 The Tribunal found that the appellant, in maintaining the action, was, from that point on, engaging in an abuse of process by pursuing the action for a collateral purpose. This conclusion is reflected in its order of 20 April 2018. The Tribunal reasoned that, because the appellant could do no better than the Racing Victoria proposal,[58] the only explanation for her wanting to go ahead with the application was to obtain the appointment documents to found an action for compensation from Racing Victoria.[59]

98 The appellant submitted that the Tribunal erred by, first, finding an improper purpose from the appellant's rejection of the Racing Victoria proposal, which the Tribunal had wrongly regarded was the optimal outcome of the review; and secondly, by failing to determine whether the collateral purpose was a predominant purpose.

99 In my view, there was no error in the Tribunal's conclusion that a purpose of the appellant in wishing to pursue the application was to obtain the appointment documents, as a precursor to a claim for compensation. Before the Tribunal, the appellant frankly conceded that a purpose of her wanting to go on with the application was for exoneration and as a step along the way to compensation.

100 Further, in this Court, the appellant accepted that if the purpose of the review proceeding was to obtain compensation for the loss caused by being unable to nominate horses for races for the relevant period of approximately three months, and this was the predominant purpose, that would constitute an abuse of process.

101 It follows that the Tribunal was correct to conclude that at least one of the appellant's

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57 Ibid.
58 VCAT Reasons No 2 [52]–[53].
59 Ibid [60].

purposes was to obtain a collateral advantage. Such a finding would not be sufficient to establish an abuse of process. It is only if that purpose was the predominant purpose, that the maintenance of the proceeding would amount to an abuse of process. On the other hand, if it was simply a desired consequence that would flow from the relief which she sought, then there would be no abuse.

102 The Tribunal said that the abuse of process was that the appellant was pursuing an action attempting to obtain evidence and a Tribunal decision to found an action seeking compensation. The Tribunal described this as 'the collateral purpose which constitutes an abuse of process'.[60] Read fairly, the reasons disclose that the Tribunal found that *the* collateral purpose of continuing with the action was to obtain the appointment documents. The use of the definite article is, to my mind, significant. It entailed a finding this was the predominant purpose.

103 It is true that the Tribunal did not refer to the need to establish a predominant purpose. However, the Tribunal concluded that the appellant was proceeding with the action to obtain evidence and a decision to found an action seeking compensation from Racing Victoria. Given the Tribunal's finding that the appellant could obtain all of the available relief by accepting the Racing Victoria proposal, the only reason the appellant was continuing with the action, so the Tribunal found, was to obtain the documents as a basis for a compensation claim. Accordingly, I am satisfied that the Tribunal's finding as to purpose entailed a finding that the collateral purpose was the predominant purpose.

104 In part, that reasoning followed from the Tribunal's conclusion that the appellant could do no better than the Racing Victoria proposal. I have already found that the Racing Victoria proposal did not, at least in form, reflect the entirety of the relief that the Tribunal could grant on the claim. Given the position of Racing Victoria that it would lead no evidence, the appellant would have been entitled to an order dismissing the charge.

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60 Ibid.

105 However, I am not satisfied that this error materially affected the conclusion that the collateral purpose was the predominant purpose for maintaining the action.

106 Most significantly, the appellant did not ask for an order dismissing the charge and the submission that she did make was inconsistent with that course. The appellant submitted that the Tribunal could not make the order, because it could not be satisfied that setting aside the decision was the correct or preferable decision unless and until the appointment documents had been produced. In that context, the appellant purposively and determinedly did not seek the termination of the proceeding but submitted that, as a necessary first step, there should be production of the appointment documents.

107 The appellant sought to delay the termination of the proceeding until she could obtain the appointment documents. Although the appointment documents would have enabled her to determine whether or not she had a defence to the charge, in circumstances where the moving party was declining to adduce any evidence in support of the charge, that exercise was purely academic.

108 The Tribunal explained in its reasons that it saw no substantive difference between an order setting aside the decision and an order setting aside the decision and ordering that the charge be dismissed.[61] In a context where, by reason of its unequivocal decision not to lead any evidence on the charge, Racing Victoria was precluded from pursuing the charge, any failure to make an order dismissing the charge would have had a negligible effect on the legal position of the appellant. Even without an order dismissing the charge, it was not capable of being prosecuted.[62] However, for the reasons given by Kyrou J in *Yee*,[63] the proposed order was formally defective without an additional order dismissing the charge as required by s 51(2)(c) of the VCAT Act.

109 The significant feature that the Tribunal fastened upon was the appellant's insistence

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61 Ibid [52].
62 *Molyneux v Victorian Civil and Administrative Tribunal* (2007) 15 VR 531.
63 [2012] VSC 447.

the matter proceed so as to enable her to establish that the stewards had not been validly appointed. From that point, the appellant was interested in the basis upon which she could succeed, rather than the ultimate relief. In my view, the Tribunal was correct to conclude that the continued pursuit of the proceeding by the appellant was for a collateral purpose. In any event, it was certainly open to the Tribunal to so conclude.

110 Moreover, after the Tribunal published its reasons of 28 March 2018, the Tribunal invited the appellant to indicate whether she sought an order setting aside the penalty. At that stage, her insistence that the matter proceed reflected the further pursuit of the action with the aim of obtaining the appointment documents.

111 In my view, the appellant has failed to establish any error in the Tribunal's conclusion that her maintenance of the proceeding invovled an abuse of process. That abuse of process disentitled the appellant to any relief on her application before VCAT.

Grounds 5 and 6

112 These grounds can be considered together. They relate to the order made on 28 March 2018, dismissing the proceeding in so far as the appellant sought to challenge the validity of the appointment of the stewards.

113 The reason for making that order was to afford the appellant an opportunity to obtain favourable orders on the review by reason of Racing Victoria's decision not to lead any evidence in support of the charge, without the distraction of the issue of the validity of the appointment.

114 There is no appeal from the orders of 28 March 2018.[64] Further, by reason of the course adopted by Racing Victoria, the validity of the appointment of the stewards was no longer an issue. There was, therefore, no occasion for the Tribunal to entertain the question whether or not the stewards were validly appointed and no

[64] The appellant's Notice of Appeal states that the appellant seeks leave against the order made by the Tribunal on 20 April 2018.

reason to dismiss that part of the proceeding.

115 In my view, the Tribunal was wrong to purport to strike out the proceeding in so far as the appellant sought to rely on the validity of the stewards' appointment. I am persuaded it was no more than an attempt to get the appellant to focus on the pursuit of the ultimate relief that she had become entitled by reason of the stance taken by Racing Victoria. It did not have that effect. Rather, the appellant maintained, and still maintains, that she was entitled to the appointment documents as a step towards relief. The problem was that, as the Tribunal found, her predominant purpose was to get the documents as a step towards an extraneous claim for compensation rather than the pursuit of final relief in the Tribunal.

116 It follows that, regardless of whether the use of s 75 of the VCAT Act to remove an aspect of the claim was available in the circumstances, it does not affect the ultimate order made by the Tribunal. Any success on grounds 5 and 6 would not overturn the order that is subject of the appeal. For that reason, I would not grant leave to appeal in respect of grounds 5 and 6.

Ground 7 — Bias

117 The principles to be applied where it is contended that a decision-maker is affected by apprehended bias are well-established.

118 In *Ebner v Official Trustee in Bankruptcy* ('*Ebner*'),[65] the High Court explained that, putting aside cases of actual bias, where a question arises as to the independence or impartiality of a judge, the governing principle is that a judge is disqualified if a fair-minded observer might reasonably apprehend that the judge might not bring an impartial mind to the exercise of power.[66] *Ebner* was a case involving judges, however, it has been clearly established that the same governing principle applies to administrative decision makers, although its application must take into account the

65 (2000) 205 CLR 337.
66 Ibid 344.

nature of the power that is exercised and its statutory setting.[67]

119 The application of the governing principle requires a two stage analysis. First, it requires the identification of what it is said might lead a decision-maker to decide a case other than on its legal or factual merits.[68] The second stage requires the articulation of the logical connection between the interest and the feared deviation from the course of deciding the case on its merits.[69]

120 The factors that might lead a decision maker to exercise a power other than on a neutral evaluation of its merits are not immutable. In *Webb v The Queen* ('*Webb*'),[70] Deane J provided a list of four relevant factors: conduct, interest, association and the receipt of extraneous information.[71] Conduct includes published statements, either in the course of, or outside, the proceedings, giving rise to an apprehension of bias.[72]

121 In *Ebner*, four members of the High Court regarded the categories set out by Deane J in *Webb* as distinct, though overlapping, and as providing a convenient frame of reference.[73] In other words, the categories are an analytical tool to be used in the application of the governing principle.

122 Prejudgment is not one of the factors that may give rise to an apprehension of bias identified by Deane J in *Webb*.[74] The apprehension of bias is a conclusion drawn in the context of one or more of the factors, most often by reference to the conduct of the decision-maker or where the decision-maker has extraneous information. In such cases, the conduct of the decision-maker, or his or her knowledge of the extraneous information, might give rise to an apprehension that the decision-maker might decide the case other than on its merits.

123 Prejudgment describes a circumstance where there is a lack of neutrality. In order to

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67 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2000) 201 CLR 488.
68 Ibid 345.
69 Ibid.
70 (1994) 181 CLR 41.
71 Ibid 74.
72 Ibid.
73 (2000) 205 CLR 337, 348–9 (Gleeson CJ, McHugh, Gummow and Hayne JJ).
74 (1994) 181 CLR 41.

determine whether there is a vitiating departure from impartial decision making, it is necessary, as Hayne J observed in *Minister for Immigration and Multicultural Affairs v Jia Legeng*,[75] to inquire 'what kind or degree of neutrality (if any) is to be expected of the decision-maker.'[76] Much will depend on the nature of the power being exercised and the identity of the repository of the power. The judicial paradigm does not provide a universally applicable yardstick.

124 Where apprehended bias is alleged, it will often be said that the decision-maker is not impartial because he or she has prejudged the issues to be decided. In those cases, impartiality does not require a mind that is free from all preconceptions. The decision-maker is not required to come with an empty mind, but must be open to persuasion. In certain contexts, for example in the professional disciplinary context, a decision-maker may be an expert in the relevant field of inquiry, and may well have very strong views about the suitability of a practice that is in issue. That does not constitute disqualifying prejudgment.

125 It is also important to acknowledge that decision-making involves a process where the decision-maker will form views along the way until he or she ultimately settles on a final conclusion. In *Johnson v Johnson*,[77] the High Court observed that:

> Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.[78]

126 Even firm views are properly seen as provisional, provided the decision-maker retains the capacity to listen to and absorb contrary arguments and material. The extent to which conduct demonstrates prejudgment will be a matter of fact and degree.

127 The appellant pointed to the fact that the issue of abuse of process had been raised

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75 (2001) 205 CLR 507.
76 Ibid 565.
77 (2000) 201 CLR 488.
78 Ibid 493 [13].

by the Tribunal itself, and contended that a reasonable observer might apprehend that each of the steps were taken in furtherance of the conclusion already reached. I reject that submission.

128 The course taken by the Tribunal did not give rise to a reasonable apprehension of bias. In circumstances where Racing Victoria had unequivocally stated that it would not lead evidence in support of the charge, it was reasonable for the Tribunal to determine what course it should take and to indicate its view that there remained nothing in dispute.

129 I am not persuaded that the course taken by the Tribunal gave rise to a reasonable apprehension that it might not decide the case on its merits and having regard to any submissions or material that the appellant advanced. This ground fails.

Ground 8

130 Ground 8 was simply an aggregation of the earlier grounds and need not be separately considered.

Conclusion

131 In my view, the appellant has not identified any error in the Tribunal's reasoning or conclusion that would justify overturning the dismissal of her proceeding by the Tribunal.

132 I return to the steps in the Tribunal's reasoning set out in paragraph [49] above. First, the Tribunal accepted that the appellant commenced the proceeding for a legitimate purpose. Second, I have found the Tribunal was in error in holding that the position of Racing Victoria expressed in its email of 4 October 2017 was the optimal outcome given that it did not include an order dismissing the charges. However, in the circumstances, this did not lead to any error in the Tribunal's conclusion that the appellant sought to maintain the proceeding to obtain documents as a foundation for a claim for compensation and that this was her predominant purpose in maintaining the proceeding. Third, there was also no error in the

Tribunal concluding that this was a collateral purpose. Fourth, the appellant's predominate purpose in pursuing the proceeding was to obtain the appointment documents. Finally, in the result, there was no legal error in the Tribunal's ultimate conclusion, reflected in its final order, that there was an abuse of process that disentitled the appellant to any relief in the proceeding.

133 The questions of law raised in the proceeding justify a grant of leave, other than in respect of questions 5 and 6, and there will be a grant of leave accordingly. However, for the reasons set out above, none of the grounds of appeal have been made out and I would dismiss the appeal. I shall hear the parties on the form of orders.
