RACING APPEALS TRIBUNAL
NSW

Mr DB Armati

Penalty Decision

10 April 2017

Severity appeal by James McDonald against a decision of the Appeal Panel of Racing NSW

AR 83(d)

Decision:

1. **Appeal dismissed.**
2. **Penalty of 18 months disqualification to commence 15 November 2016**

BACKGROUND

1. James McDonald, a licensed jockey, appeals against a decision of the Appeals Panel of Racing NSW, to impose upon him a penalty of disqualification of 18 months for a breach of AR 83 (d).

2. The Appeal Panel decision was made in respect of an appeal from a decision of the stewards of 22 December 2016 to impose upon him a penalty of disqualification of 18 months.

3. The appellant's appeal to this Tribunal is on severity of penalty only. The appellant pleaded guilty before the stewards' inquiry on 22 December 2016 and maintained that plea before the Appeal Panel. He has not contested his breach of the rule before the Tribunal.

4. The appellant was represented by Mr B Walker SC with Mr T Boyle instructed by Mr T Unsworth and the respondent by Mr J Gleeson SC instructed by Mr P Sweney.

5. AR 83 states:

> "AR 83. Every jockey or apprentice may be penalised
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> (d) If he bet, or has any interest in a bet on any race, or contingency relating to thoroughbred racing involving a race in which he is riding. For the purposes of this rule, bet includes a lay bet (as defined in AR175B(7)).

6. The particulars of the charge were as follows:

> '... that you, licensed jockey James McDonald, had an interest in a bet placed by Anthony Gardiner on the horse Astern to win race 1 the Surf Meets Turf Plate at Randwick on Saturday, 5 December 2015, being the horse that you rode in that race.'

7. The penalty provisions for such a breach are in AR 196 which, as relevant to these proceedings, is as follows:

> "(1)"Subject to subrule (2) of this Rule any person or body authorised by the Rules to penalise any person may, unless the contrary is provided, do so by disqualification, suspension, reprimand, or fine not exceeding $100,000. Provided that a disqualification or suspension may be supplemented by a fine."
> (5) Where a person is found guilty of a breach of any of the Rules listed below, a penalty of disqualification for a period of not less than the period specified for that Rule must be imposed unless there is a finding that a special circumstance exists whereupon the penalty may be reduced:
> ...
> AR.83(d) – 2 years
>
> …
> For the purpose of this sub-rule, a special circumstance is as stipulated by each Principal Racing Authority under its respective Local Rules."

8. Racing NSW has promulgated its local rules and in particular LR 108 which relevantly states:

> "LR 108.(2) For the purposes of AR196(5), special circumstances means where:
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> (a) the person has pleaded guilty at an early stage and assisted the Stewards or the Board in the investigation or prosecution of a breach of the Rule(s) relating to the subject conduct; or
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> (b) the person proves on the balance of probabilities that, at the time of the commission of the offence, he:
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> (i) had impaired mental functioning; or
>
> (ii) was under duress,
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> that is causally linked to the breach of the Rule(s) and substantially reduces his culpability.
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> (c) in the case of offences under AR178E, the medication in the opinion of the Stewards does not contain a prohibited substance, is of an insignificant nature and is for the welfare of the horse; or [paragraph added 18.11.13]
>
> (d) the person proves, on the balance of probabilities that, he did not know, ought not to have known and would not have known had he made all reasonable inquiries, that his conduct was in breach of the Rules of Racing."

9. In addition to AR 83 (d) the appellant took the Tribunal to other provisions in AR 83, and 84, namely:

> "AR 83(b) If, without the consent of the Stewards and the nominator of any horse he rides or is to ride in any race, he accept or agree to accept any pecuniary or other gift or other consideration in connection with any horse in such race, provided that he does not require the consent of the Stewards in respect of any pecuniary or other gift or consideration from the nominator of the horse he rides or is to ride; or
>
> (c) If he bet, or facilitates the making of, or has any interest in a bet on any race, or contingency relating to thoroughbred racing, or if he be present in the betting ring during any race meeting. [amended 1.8.01][amended 1.9.09]
>
> (d) If he bet, or has any interest in a bet on any race, or contingency relating to thoroughbred racing involving a race in which he is riding. For the purposes of this rule, bet includes a lay bet (as defined in AR175B(7)). [added 1.3.13]
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> AR 84. A licensed jockey or apprentice shall not own, take a lease or have any interest in any racehorse, and if he does such jockey or apprentice shall be disqualified and any person having any interest with him and the trainer of such horse may be penalised."

10. The factual issues are not in dispute and the parties are in agreement that special circumstances under AR 196(5) exist. The issue is how penalty should be calculated on the breach, in general, and after special circumstances are established.

LEGAL PRINCIPLES NOT IN DISPUTE

11. It is agreed that as this is a de novo hearing it is the function and duty of the Tribunal to determine for itself an appropriate penalty.

12. That principles governing sentencing in the criminal law are not applicable.

13. That there can be no direct application of the principles generally governing the interpretation of legislation establishing criminal offences to the interpretation of the rules. That is the regulatory scheme bears a closer relationship to professional discipline than to the general criminal law (Day v Saunders [2015] NSWCA 324 at [70].

14. That the statutory scheme and the rules impose an overriding duty and function to protect the public interest and the welfare of the horse racing industry.

15. As the Tribunal said in the appeal of Smith v Racing NSW, 15 August 2014:

> "5.In determining penalty this Tribunal emphasises that it is not imposing sentence. It in particular is not imposing sentence in a criminal law sense, therefore the adoption by the stewards and the Appeal Panel of what might be called a general sentencing approach, in this Tribunal's opinion, is incorrect. These are civil disciplinary proceedings in which it is necessary to have regard to the conduct which has been disclosed, to have regard to all the relevant facts and circumstances relating to the facts themselves and those of the individual person concerned, and then looking to the future to determine what order is required within the scope and purpose of the rules.
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> 6. To the extent that criminal law principles such as deterrence are considered, they are not relevant. To the extent that proportionality of sentencing is said to be considered, it is not relevant. In respect of the first of those, the Tribunal in determining what order is appropriate has regard to what message is to be given to this individual trainer to ensure that in the future this type of conduct is not repeated, but to ensure that there is an appropriate penalty imposed to indicate the response of the community to integrity and welfare issues. In addition, it is a question of what general message is required to be sent to the community at large to indicate to those who might be likeminded to engage in such conduct, what the likely consequences are, and, secondly, to indicate to the broader community who are not likely to engage in the type of conduct that, should it be detected, they, whether they be wagerers or people just generally interested in the individual code, will know that it is operating at the highest possible standards."

16. That the rules of interpretation that are applicable require a consideration of the text, context and purpose of the provisions in question.

17. In that regard the Tribunal is reinforced in the application of those tests by what was said in Project Blue Sky Inc and Ors v Australian Broadcasting Authority [1998] HCA 28 at 69 to 71 and 78 by McHugh, Gummow, Kirby and Hayne JJ as follows:

> "69. The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute[45]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"[46]. In Commissioner for Railways (NSW) v Agalianos[47], Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed[48].
>
> 70. A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals[49]. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions[50].
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> *…..*
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> 71. Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision[52]. In *The Commonwealth v Baume*[53] Griffith CJ cited *R v Berchet*[54] to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".
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> 78.However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction[56] may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning…..

18. Day v Harness Racing NSW [2014] NSWCA 423 at [77] provides further guidance:

> "Courts should strain against a construction which gives no work whatsoever to legal language. The rule is required to be construed purposively; a construction which gives a rule no operation at all is necessarily inconsistent with its purpose".

19. Reinforcement of the need to apply a purposive interpretation is found in section 33 of the Interpretation Act:

> "In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made)

shall be preferred to a construction that would not promote that purpose or object."

20. These cases and that statute law are relevant because the rules of racing take effect as a contract and have statutory consequences.(Golden v V'Landys [2016] NSWLR 691 at [35]):

> "The Rules of Racing are rules to which participants in racing become contractually bound; but they are also given statutory consequences, for example by s.14 of the [*Thoroughbred Racing – then called the Thoroughbred Racing Board*] Act."

21. In interpreting a rule of racing it is important to recognise that it may not have the precision of language which lawyers might find desirable. While there is no evidence in these proceedings of who drafted the particular rules in 2013 their interpretation must take into account that they may contain inexact provisions but that does not mean, if correct, that the rules are necessarily nonsensical. It may still be possible to find an interpretation that plainly accords with its purpose. A reasonable interpretation should be found. As Justice Leeming said in Day v Harness Racing NSW, supra, at 79 and following:

> "79 It is important to appreciate that the Local Rule was not drafted by Parliamentary Counsel, nor scrutinised in the way that tends to occur of a bill as it passes through Parliament and receives assent. It is legitimate to have regard to the fact that regulations are less carefully drafted, and less keenly scrutinised, than primary legislation… Their rules should be construed bearing as much in mind.
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> 80. In Porter v National Union of Journalists [1980] IRLR 404 at 407, Lord Diplock applied a similar approach in a comparable context:
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> > "I turn then to the interpretation of the relevant rules, bearing in mind that their purpose is to inform the members of the NUJ of what rights they acquire and obligations they assume vis-à-vis the union and their fellow members, by becoming and remaining members of it. The readership to which the rules are addressed consists of ordinary working journalists, not judges or lawyers versed in the semantic technicalities of statutory draftsmanship."
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> 81 Likewise, it was said in Jacques v Amalgamated Union of Engineering Workers [1987] 1 All ER 621 at 628 that:
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> > "the rules of a trade union are not to be construed literally or like a statute, but so as to give them a reasonable interpretation which accords with what in the court's view they must have been intended to mean, bearing in mind their authorship, their purpose and the readership to which they are addressed."
> > …..
>
> 83……..There is no good reason, where every other part of the language is less than exact, to conclude that its legal meaning is the nonsensical literal meaning as opposed to what plainly accords with its purpose."

22. In oral reply the respondent submitted that on the issue of purpose and the capacity of a rule maker to impose minimum punishments that the decision of Keane J in Bonang Darius Manning v The Queen [2013] HCA 40 at 105 to 106 was informative:

"105 The enactment of sentences by the legislature, whether as maxima or minima, involves the resolution of broad issues of policy by the exercise of legislative power. A sentence enacted by the legislature reflects policy-driven assessments of the desirability of the ends pursued by the legislation, and of the means by which those ends might be achieved. It is distinctly the province of the legislature to gauge the seriousness of what is seen as an undesirable activity affecting the peace, order and good government of the Commonwealth and the soundness of a view that condign punishment is called for to suppress that activity, and to determine whether a level of punishment should be enacted as a ceiling or a floor.

106 In laying down the norms of conduct which give effect to those assessments, the legislature may decide that an offence is so serious that consideration of the particular circumstances of the offence and the personal circumstances of the offender should not mitigate the minimum punishment thought to be appropriate to achieve the legislature's objectives, whatever they may be."

23. it is accepted by both parties that in determining penalty the Tribunal must still assess the appropriate penalty for the facts and circumstances. McCallum J in Dui Kol v R, NSWCCA, BC201505181 at 29 was quoted by the respondent:

" 29. Those remarks reflect an analysis which would hold that a statutory mandatory minimum sentence, while removing the power of the sentencing judge to impose a lesser sentence, does not supplant the function of assessing the appropriate (proportionate) penalty for the offending under consideration. Common to the several judgments in Magaming is an acceptance that that is exclusively a judicial function, albeit one bounded (inter alia) by statutory requirements: see majority judgment at [47]; Keane J agreeing at [100]; and per Gageler J at [61]. The exercise of that exclusively judicial function is bound but not bent by the statute."

24. While these two cases dealt with criminal law principles their general application to a civil disciplinary penalty remains appropriate.

25. A number of other legal principles were referred to in argument and are addressed below.

FACTS

26.The facts are not in dispute.

27. The evidence before the Tribunal comprised the bundle of evidence before the Appeal Panel, a chart of recent penalties in other sports with an attached table of sporting rules and a letter from the NSW Jockeys Association.

28. The parties agreed that the Appeal Panel finding of facts summarised the key matters upon which objective seriousness could be considered:

"7. The charge laid against Mr McDonald followed from an investigation opened by the Stewards into his conduct, and of his association with Mr Gardiner, who is known to the Stewards to be a substantial punter. The investigation was made by the Stewards in conjunction with the Australian Criminal Intelligence Commission.

The ultimate result of that investigation for Mr McDonald was that he admitted at the Stewards' Inquiry that he received $4,000.00 in cash from Mr Gardiner following a race at Randwick on 5 December 2015 ('the Race'). The winner of the Race was the horse 'Astern'. Astern was ridden by Mr McDonald. The $4000 in cash was the proceeds of a winning bet Mr Gardiner had placed on Astern on Mr McDonald's behalf. "

29. On objective seriousness the Tribunal is concerned by a number of other facts because they relate to the appellant's conduct up until the time he commenced to admit his culpability at the inquiry. He was on notice that the stewards were observing his conduct. That fact is established because on 3 September 2015 he was spoken to by the stewards when he was at the starting barrier because the stewards had observed him to have a brief acknowledgement contact with Mr Gardiner at the mounting yard. He was warned in respect of that association. He subsequently underwent interviews on 3 September 2016 and 15 November 2016 on his conduct and all of this was prior to the inquiry on 15 December 2016. Of course these matters have less consequence for the appellant on the issue of penalty because they post dated his conduct but they are relevant to the extent to which remorse and contrition, relevant to a civil disciplinary penalty and future conduct, can be given weight. Further however those concerns are ameliorated by the agreement of the respondent as to the discount to be given for the admission of the breach and cooperation with the stewards. His prevarication and lies at interview and at the the stewards' inquiry before he eventually made admissions are not pressed on objective seriousness nor on any loss of discounts for subjective facts.

30. On objective seriousness the respondent points out that jockeys have been banned from betting on thoroughbred races since at least 1957. That the current mandatory minimum penalty was introduced in 2013 with additional rules to cover betting on a jockey's own horse in a race. It is submitted that those changes were brought into effect as a result of disquiet about the handling of the jockey Oliver in another jurisdiction because of a perceived leniency. It is noted that a number of other mandatory minimum penalties were brought into effect other than for betting. It is submitted that the industry relies upon wagering for its very existence and there must be maintenance of the confidence of the wagering public in the integrity of racing. That confidence would be lost if jockeys could bet on a horse but do not do so. It is submitted that a jockey betting on his own mount increases his predisposition to ride outside the rules and disregard his duty of care to fellow riders. It is said that not prohibiting this type of conduct could lead to jockeys not trying especially when they bet against their own horse. It is said that a message must be given to this jockey and to the community at large that high standards must be imposed and that a breach of the rule will lead to a significant period of disqualification.

31. On objective seriousness on the facts of this case it is submitted by the respondent that the appellant acted with full knowledge and awareness of the his improper conduct. That his admissions were late. That this was not a minor contravention but a substantial disregard of the rule.

32. On objective seriousness the appellant submitted that the following should be considered:

(i) it was a single bet,
(ii) it was for a relatively small amount,
(iii) it was on his own horse,
(iv) there was no allegation that his conduct formed part of a persistent pattern of contravening conduct,
(v) there was minimal damage done to the public interest and welfare of the racing industry,
(vi) the facts do not involve corruption,
(vii) the facts do not involve tipping.

33. No issue was taken in the proceedings on the subjective factors relied upon by the appellant:

(i) It was his first relevant breach of the rules,
(ii) he was 24 years of age at the time of the conduct,
(ii) he previously had an exemplary reputation in the racing industry,
(iv) he was supported by number of character references which attested to his integrity, diligence and reputation,
(v) he has displayed a willingness to make amends for his conduct by entering an agreement with the NSW Jockeys Association to attend its Apprentice School to educate, instruct and advise, but only if the disqualification is set aside,
(vi) He has donated the proceeds of his winning bet to a children's charity

34. On the subjective facts the respondent submitted that there was no explanation from the appellant why he thought he could engage in such conduct and therefore he would need a real character reformation to ensure that he was not tempted to do it again. It was submitted that his offer to attend to assist apprentice jockeys would send the wrong message if a person in his position was seen to be assisting them.

35. An important subjective factor in considering penalty is an understanding of wrong conduct and demonstration that it will not occur again. This is often demonstrated by an admission of the breach and cooperation with authorities. The parties are in agreement as to how the Tribunal should deal with the facts in this case. Each party agree that the facts and circumstances are such that the finding by the stewards and the Appeal Panel that a discount of 25% is appropriate should not be disturbed. The appellant acknowledged the very fair concession by the respondent in oral submissions that it would be unfair to revisit that figure as the respondent had accepted it as correct. The Tribunal notes its remarks at the hearing that it was not invited to and therefore did not indicate any intention to reconsider that figure because to reduce it would require the equivalent of a Parker direction- that was not sought or given.

36. Accordingly the Tribunal will not revisit that 25% discount for an early admission of the breach and cooperation with the stewards, the Appeal Panel and on this appeal. However some remarks should be made to provide guidance for later cases. For over five years the Tribunal has expressed its opinion on discounts. That has been expressed in numerous appeal decisions and precedents need not be set out here. On many occasions a full discount has not been given because of a late admission or a lack of cooperation. This appellant was on notice that his conduct was under observation by the stewards. Before his admissions he was interviewed twice and lied and denied. For a good part of the stewards inquiry he lied and denied. Even after he commenced to make admissions he continued to lie and deny on other

points. That could not be seen to be an early admission or cooperation. Of course the eventual admissions and their maintenance on appeal had a substantial utilitarian value. Accordingly future appellants should not assume that the type of conduct engaged in by this appellant will necessarily mean that a discount of 25% will be given. Each case must be determined on its own facts and circumstances.

37. On subjective facts the appellant has relied upon a number of character references and these were common before the stewards, Appeal Panel and on this appeal. They comprise:

(i) Ron Finemore, AO, who says the industry is better served by the appellant staying in it, he has been most impressed by his development from a shy young man who has worked hard and listened and given honest feedback. He assesses him as a man of integrity with knowledge of the art of race riding. He says he is most approachable and interacts well being well mannered, enthusiastic and respectful of his profession. He assesses him as a credible ambassador. He says he will learn from this indiscretion and should not be penalised too harshly for an indiscretion that was never intended to demean or discredit. He will utilise his services in the future.

(ii) Henry Plumptre of Godolphin states he was the retained rider for that group and an integral part of its racing operation. He says that he demonstrated extraordinary skill with a natural instinct. That employer places character and integrity above ability and success. He describes the appellant as well-behaved, quiet and reflective and that his behaviour has been flawless.

(iii) Sir Peter Vela, KNZM, has known him since 2007 through family connections and assesses him as determined to succeed and is a decent boy. He retained him as a jockey and found him reliable and hard-working and never had any reason to call his integrity into question. He assesses him as a gifted and dedicated rider who has acquitted himself admirably. The appellant has told him of his devastation at his mistake and of his remorse and utter despondency. He assesses the appellant as having made a very bad mistake attributable to his youth and naivety rather than anything in his underlying character.

(iv) Chris Waller has known him for a number of years and says he is a well respected young man, very professional, extremely polite and courteous and with extremely good values in life. He says he respects his industry. He is extremely professional. Mr Waller has not had any suspicions of this type of conduct but acknowledges that as the appellant came from New Zealand where jockeys can place bets, he might have made an error of judgement. He says the appellant is deeply remorseful and embarrassed.

(v) Henry Field of Newgate has known him for years both professionally and personally and says he has unquestionably good character, integrity and decency and is a world-class jockey and an industry leader who has worked relentlessly to get on top of his game. He says he is still a decent man for whom he will vouch highly as an ambassador for the industry.

(vi) Craig Thompson of Racenet has known him for six years and has managed his career and been able to note his work ethic, commitment, determination and an ability to address mistakes and learn. He says he is approachable, professional and

impressive being a quiet and reticent young man who always presents a positive face for the industry. He describes that he has a work ethic, success, honesty and temperament as a role model. He says the appellant immensely regrets his mistake and is too aware that he has let his friends, family and supporters down. Assessing him as being aware of his lapse in professional judgement he says that he has no doubt the appellant will address it honestly and not repeat it.

(vii) Des O'Keefe of the Australian Jockeys Association says that the appellant is a strong supporter of the National Jockeys Trust. He has always found him to be a person of sound character and a fine ambassador for jockeys and the industry.

THE DETERMINATION OF PENALTY

38. The correct approach to the determination of penalty has really been the only issue before the Appeal Panel and on this appeal.

39. The respondent focuses on the penalty being determined under 196(5). The appellant says that the ultimate question for the determination of penalty is 196(1), then the application of 196(5).

40. The way in which the arguments have unfolded nevertheless raises the need to consider penalty generally.

The General Scheme of the Rules

41. Rule 196(1) provides the general range of penalties of disqualification, suspension, reprimand, or fine not exceeding $100,000. Disqualification or suspension may be supplemented by a fine. Rule 196(3), which is not relevant here, provides for cumulative orders. Rule 196(4) provides for suspension of penalties. The remaining provisions are of no assistance here.

42. Rule 196(1) applies subject to sub-rule (2) which is irrelevant but importantly applies "unless the contrary is provided". There is no express provision for a contrary. That is 196(5) does not expressly displace 196(1).

43. Rule 196(5) provides that it is applicable if specified rules are breached. Here a specified rule is rule 83(d). Accordingly rule 196(5) is engaged and there is no dispute about that by the parties.

44. Accordingly under 196(5) "a penalty of disqualification for a period of not less than the period specified for that rule must be imposed". For a breach of rule 83(d) the period specified is to two years.

45. Accordingly the appellant must suffer a period of disqualification of two years at a minimum. This is because the word "must" and the expression "not less than" are used.

46. That period of two years has been described by the parties as a mandatory minimum.

47. That mandatory minimum period of two years must be imposed "unless there is a finding that a special circumstance exists".

48 The parties are in agreement that a special circumstance exists in this case. The Tribunal will return to those special circumstances.

49. Accordingly the next test "whereupon the penalty may be reduced" is engaged. The parties are in disagreement about what that expression means and how the Tribunal should approach the further consideration of penalty. This is the issue in the proceedings. Each of the words "whereupon", "the penalty", "may" and "reduced" are separately and collectively the subject of submissions.

50. The special circumstances that have to be established are those "stipulated by each Principal Racing Authority".

51. There is no dispute that Racing NSW is the applicable Principal Racing Authority and that it introduced LR 108(2) in March 2013.

52. The parties are in agreement that LR 108 (2)(a) has been established by the appellant in that he " pleaded guilty" (terminology that troubles this Tribunal because of its criminal law connotations and which has been commented upon in numerous prior decisions) and "assisted the Stewards… in the investigation… of a breach of the Rule relating to the subject conduct".

53. The Tribunal will return to those particular special circumstances and to the application of the balance of LR108(2).

The General Arguments

54. For the respondent it is submitted that penalty is determined by applying the mandatory minimum two-year disqualification then determining what deduction should be applied to that disqualification, and only a disqualification, by consideration of the special circumstances established.

55. For the appellant it is submitted that the mandatory minimum penalty of two years disqualification no longer applies and that penalty is to be considered under general penalty considerations and by the application of 196(1).

The Respondent's Case

56 The respondent commences by emphasising the March 2013 introduction of a mandatory minimum penalty regime. That, because it is a mandatory minimum, a higher penalty can be imposed. It is submitted that that mandatory minimum would apply to a first-time offender with no aggravating factors.

57. It is then submitted that the penalty to be reduced is the mandatory minimum penalty absent the relevant special circumstance. The specific special circumstance found it to be reflected in the reduction.

58 That is it is submitted that there are four key points to support the construction.

(i) The proviso is governed by the word "whereupon" as indicating that only the special circumstance may be taken into account

. (ii) The penalty which may be reduced is the penalty of two years minimum disqualification and accordingly that mandatory minimum period of disqualification should not be set aside and a sentencing at large exercise undertaken

(iii) That proviso does not take the decision back to 196(1) and a reduction of a penalty under that rule because such a penalty could not be meaningfully reduced within the language of 196(5)

(iv) The above constructions reflect an obvious and clear meaning of the language used in the rule because of the text. In addition it is submitted there is nothing in the context or purpose of the rules which calls for the language to be interpreted in any other way. Such an interpretation reflects the protective purpose and displaces personal consequences. It is further submitted that such a construction matches purpose and context and provides a sensible, workable but confined modification to an otherwise strict rule. That is if you breach one of these rules you are in a category of seriousness and will suffer a defined minimum penalty of the most serious kind. The only reduction will come from particular special circumstances that have been identified, and nothing else about the case that would enable a reduction.

59. It is said that the words "the penalty may be reduced" are explicit language and are directed to the penalty otherwise required by 196(5) of a mandatory minimum disqualification.

60. It is submitted that the language enables a penalty, thought appropriate in all the circumstances of the case, can then be applied but limited by reference back to the mandatory minimum disqualification.

The Appellant's Case

61. The appellant commences by stating that the ultimate question is determination of penalty under 196(1).

62. It is submitted this arises because penalty must be made by reference to the rules and the application of 196(1) and that 196(5) has its meaning confined by LR108(2) rather than a generic specification of special circumstances.

63. It is said that the determination of penalty is undertaken by the process of instinctive synthesis and a number of cases are quoted. As there is no dispute about this, if it arises, these authorities need not be examined. Critically it is said that the principles in Markarian v The Queen (2005) 228 CLR 357 at [37] apply:

> "identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgement as to what is the appropriate sentence given all the factors of the case."

64. Then it is said it is necessary to determine objective seriousness having regard to the nature of the contravening conduct having regard to contravention of the rules of racing.

65. Detailed submissions are made on the need for consideration of the objective seriousness on the facts of this case. The Tribunal will return to those.

66. It was then submitted that 196(5) does not set the starting point to determine penalty. This follows because it is submitted that the text and context draw a distinction between the provision of a mandatory minimum penalty (where no special circumstances exist) and the general power to determine penalty (where special circumstances exist).

67. It is said that the text of 196(5) provides for two kinds of penalty. That is "a penalty" and "the penalty". It is therefore said that the second reference is a reference back to the general power to penalise under 196(1) because there is no textual warrant to fetter the general power when special circumstances are found to exist. Reliance is placed upon the interrelationship between AR1 and 196(1) because the definition of "penalty" incorporates "the suspension or partial suspension of any licence, disqualification and the imposition of a fine".

68. It is then submitted that such an interpretation is confirmed by 196(5)'s operation in the context of the penalty regime provided by the rules. That is LR108(2) contains a number of exculpatory matters such as "impaired mental functioning", "duress", "did not know, or to have known-etc". It is submitted that each of those special circumstances constitutes matters that significantly if not entirely eliminate the culpability of the person and each operates as a condition of the non- application of the mandatory minimum penalty.

69. It is therefore submitted that if the respondent's construction was adopted it would bind the decision-maker to a penalty of disqualification notwithstanding that this may be entirely inappropriate or unduly harsh.

70. Accordingly it is submitted that a proper construction does not confine the process of instinctive synthesis by reference to a mandatory minimum and that the breadth of penalty options under 196(1) must be applicable. The necessity for not improperly fettering the exercise of power is emphasised. Further that not all discretionary powers are removed.

71. It is submitted that the phrase "may be reduced" is best understood as facilitating the dis-application of the mandatory minimum if special circumstances exist.

72. In support of a context argument reliance is placed upon extrinsic material.

73. That extrinsic material comprises an apparent interview, not in evidence, of the Chief Steward on 25 November 2013 (obviously the previous Chief Steward) where he is purported to have said that if special circumstances exist a fine could be imposed. This is said strongly indicates that there is not a starting point of disqualification. It is said the press release announcing the introduction of the subject rule did not address its operation in the circumstances.

74. Detailed submissions are then made on principles of sentencing and errors made in determining starting points by reference to non-parole periods. The point of the submissions was to indicate it is impermissible to fetter the process of instinctive synthesis. That is it is not proper to start at a maximum and then make deductions from it because there would be a failure to assess on the objective facts. Likewise reliance is placed upon authorities dealing with mandatory minimum sentences. The principal said to flow is the necessity to find whether the offending falls in the range

between the least serious and the worst category. Accordingly the mandatory minimum sets the floor. In drawing the appropriate analogy it is submitted that the discrete function performed by mandatory minimum penalties does not inform the general sentencing discretion if it does not expressly apply.

75. Accordingly it is submitted that the proper approach to determine penalty is:

(i) determine if 196(5) applies by determining whether special circumstances exist
(ii) determine objective seriousness to identify a starting point for penalty
(iii) identify subjective circumstances and whether they aggravate or mitigate
(iv) make any adjustments by reference to the relevant rules- it is agreed there is no such relevant rule here.

76. It is further submitted that the respondent's approach would treat different cases as the same and would not differentiate between trivial and serious matters. The need for discretion will give effect to difference in-kind cases and be adequate to provide the necessary protections in the industry.

77. It is then submitted that the different special circumstances matters identified in 108(2) must be reflected in a capacity to exercise discretion to find different penalties.

78. It is also submitted that within 83(d) breaches there must be different facts leading to different penalties otherwise regulators would be considered to be a laughing stock. This would arise because there may be a case where a jockey bet one dollar and another $1 million, as one example, yet they would be subject to the same penalty. It is further submitted that the purpose of integrity will still be met allowing case-by-case differences to reflect the different matters in 83 and 84 and therefore the purpose test advanced by the respondent is not needed.

79. Therefore it is said there is no textual or contextual or purpose application which could be used to remove the exercise of such discretion.

80. Emphasis is placed upon the difference between “may" and “must" in 196(5) as indicating that the penalty decision should not be inflexible and a reason why a mandatory minimum penalty should not be applied.

81. It is further submitted that once the special circumstances are established the matter ceases to be both “mandatory” and “minimum”. Therefore if mandatory minimum goes there is a complete discretion on a starting point for consideration of penalty.

82. The use of the words “whereupon" and “reduced” when taken together must mean, literally, a diminishing below something. It is submitted that other words could have been used to express "a reduction from something”.

83. It is submitted that the application of purpose tests should not lead to an unjust outcome. It is submitted that no text in the provisions removes a beneficial purpose in interpretation.

84. It is said there is nothing in LR 108(2)(a)(b) and (d) to indicate that different tests or outcomes are not appropriate for the different circumstances.

85. It is said that 196(5) is not a source of power but a constraint on power because there can be no rider on account of special circumstances that prevents the use of the overall discretion because it is necessary to still assess actual offending.

86. It is submitted that 196(1) applies unless the contrary is provided and that in looking at the special circumstances test here no such contrary is provided.

The Finding on the Determination of Penalty Method

87. The Tribunal finds that its approach to determining penalty should be as follows:

(i) determine an appropriate penalty under 196(1) having regard to the objective seriousness of the breach and the subjective circumstances of the appellant,
(ii) determine if rule 196(5) is enlivened because the breach may involve one of the rules specified in that sub rule, here being 83(d),
(iii) If the penalty determined under (i) is not a disqualification then a disqualification must be imposed,
(iv) if the penalty determined under (i) is less than the mandatory minimum disqualification of two years then disqualification of two years is imposed,
(v) if the penalty determined under (i) is a disqualification of more than two years then that longer disqualification is imposed,
(vi) determine if special circumstances in LR 108(2) are established,
(vii) determine the reduction in penalty, if any, that will flow from the particular special circumstances established.

88. The parties appear to have approached the determination of penalty issue on the basis that the Tribunal should first go to 196(5) and determine penalty under that provision rather than go to 196(1) and then apply 196(5).

89. It is not necessary to resolve this issue in this appeal because the end result will be the same and the application of the appropriate considerations on determining penalty will be the same. The resolution of that issue was not the subject of submissions and if necessary can be dealt with on another occasion.

90. In essence therefore the principal issue in dispute is resolved in in accordance with the general thrust of the respondent's arguments.

91. The most telling factor in making this determination is the application of the purpose test and to the finding of the meaning that plainly accords with the purpose.

92. That Tribunal is satisfied that the racing authorities amended 196 by the addition of sub-rule(5) with the express purpose and intention of increasing penalties where they might otherwise be considered lenient and to address a series of rule breaches of concern to them on integrity and welfare issues. The facts in these proceedings have really only addressed the Oliver case as a reason for the introduction of the rule. The Tribunal can speculate from its own hearing of appeals that there may be other reasons but these have not been put to the parties for comment and are therefore put out of mind. The rule-makers have therefore imposed a broad policy issue of the reduction of leniency by the exercise of their power to address the seriousness of what are seen to be undesirable activities affecting the integrity and welfare of the racing industry. The rule-makers have decided that the various breaches will be so serious that consideration of particular circumstances of the

breach and the personal circumstances of the offender should not mitigate the minimum penalties considered appropriate to achieve those objectives. That perceived harsh or unfair penalties are a possible outcome.

93. That is the rule-makers have intentionally fettered part of the available discretion on determining penalty. That is not to say however that the rule-makers have supplanted the function of the Tribunal in assessing the appropriate and proportionate penalty for the breach under consideration.

94. Accordingly the text and context considerations must be made in recognition of that express purpose.

95. The text and context arguments therefore are considered on the basis that the rule-makers have set out to provide a scheme that may lead too harsh or, to the some, unfair results. Assessment of the meaning of the words in the sub- rule and their application to the facts must recognise those matters.

96. Giving consideration to every word in the sub rule leads to a conclusion consistent with that advanced by the respondent. That is on both a text and context assessment.

97. On text the Tribunal is satisfied that the word “whereupon” is interrelated to the finding of a special circumstance. No other meaning can be found to support any of the arguments for the appellant.

98. On text the Tribunal is satisfied that the expression "the penalty” is directly related to the earlier expression "a penalty”. It is an acknowledged that the rule maker could have used any number of expressions that might have provided greater certainty. There is little utility in trying to provide an exhaustive range of other expressions but some such as “that penalty”, “that “mandatory minimum penalty”, "the period”, “that disqualification” are sufficient to provide how the rule could have been more certain. It is not however so uncertain that it is meaningless or incapable of application. The words "the penalty” are quite clear and unambiguous and when considered in isolation and in the context of the sub-rule as a whole have a plain and simple meaning.

99. On text the Tribunal is satisfied that the word “reduced” has a specific and intended meaning and is directly interrelated with the earlier words “the penalty” which itself relates back to the mandatory minimum penalty. That is what is being reduced is the mandatory minimum penalty. Again other words could have been used, particularly if they were to support the argument for the appellant. For example the rule makers did not use “under sub-rule 1”, “a penalty other than disqualification”, “a penalty other than the mandatory minimum period of disqualification”.

100. On the issue of context the Tribunal is satisfied that there is nothing which calls for the sub-rule to be interpreted in any other way. The protective purpose of the sub-rule and the reason for its introduction in the setting of the rules as a whole clearly demonstrate a desire to address the various different breaches with serious and minimum consequences. Accordingly the sub-rule should be interpreted with this context in mind.

101. In respect of various arguments on behalf of the appellant it is accepted that the instinctive synthesis of the penalty determination exercise is still required to be

undertaken but that the overall discretion to consider the ultimate penalty has been intentionally fettered by the rule-maker. It is still necessary to determine objective seriousness and then have regard to subjective factors but the end result may become harsh or unfair by reason of the imposition of the intentional limitation on discretion imposed by the rule- maker.

102. It is accepted that the sub-rule does not set the starting point to determine penalty.

103. There can be no warrant to find therefore that upon special circumstances being established that the determination of penalty enlivens consideration of penalties other than disqualification as provided for in 196(1). The submissions on that argument are analysed below.

104. It is accepted that the expression “may be reduced” introduces a discretion to reduce the mandatory minimum penalty but it is not so broad, when considered alone or in conjunction with the balance of the words of the sub- rule, that it imports a return to the general penalty powers in 196(1).

105. No utility is found in considering the extrinsic material identified by the appellant. Factually it is unconvincing. In any event the expressed views of the Chief Steward, as important as they are, cannot supplant the intention of the rule-maker and cannot be used to enable a disregard of an express purpose.

106. It is agreed that in determining penalty there is no provision for commencing the consideration by looking at the mandatory minimum penalty or any other starting point.

107. Therefore the effect of this finding is that in certain circumstances, but not in all cases, that there may be no distinction between serious breaches and trivial breaches. That is an inevitable consequence of the implementation of the purpose of the rule-maker.

108. Therefore different facts will not necessarily lead to different penalties but that is a further inevitable consequence of the implementation of the purpose of the rule-maker.

109. There are no express words to link back the consideration of special circumstances to enliven the alternative penalties under 196(1).

The Special Circumstances Issue

110. Special circumstances are relevant for three reasons here. The first is whether a special circumstances exist. The second is the effect that special circumstances as a whole in LR108(2) have upon the appellant's argument that they enliven a penalty under 196(1). The third is the consideration of the established special circumstances on the actual penalty.

111. The first point is not in issue. As set out above the parties have agreed at all times that the appellant has established special circumstances. The special circumstances established are those in LR108(2)(a) that is, plea and assistance as specifically set out in the sub-rule.

112. On the second point the Tribunal has already determined that the special circumstances argument does not assist the appellant.

113. The appellant submits that a number of the special circumstances in the sub-rule refer to strongly exculpatory matters, for example, impaired mental functioning, duress, did not know et cetera. Therefore it is submitted that each of those special circumstances constitutes a matter significantly reducing, if not virtually eliminating, the culpability of a person to be penalised. It is said that each also operates as a condition on the non-application of the mandatory minimum penalties. Therefore the expression "whereupon the penalty may be reduced" applies equally to each of those cases of special circumstances. Therefore it is said that the proper construction does not confine the process of instinctive synthesis by reference to a mandatory minimum penalty. This would be an improper fettering of the discretion. Therefore it is said that the words "may be reduced" are best understood as facilitating the dis-application of the mandatory minimum penalty in cases where special circumstances exist. Therefore it is said that if special circumstances are found the mandatory minimum penalty provisions are removed. It is further submitted that to interpret otherwise would lead to absurd results. It is said that no text, context and purpose tests should lead to an interpretation which would not enable different tests and outcomes for different special circumstances.

114. In addition to the reasons earlier expressed there are three further reasons why the appellant's arguments are not accepted.

115. The first is that the rule makers have unequivocally expressed in the rule that those sort of considerations are removed. Without repeating the above matters the purpose test emphatically establishes that the penalty is to be determined within the discretionary fettering provisions of 196(5).

116. The second is that contrary to the appellant's submissions there is a broad scope in the exercise of a discretion to find different penalties for each of the different circumstances that are established in each of LR 108(2) (a) to (d). That is the penalty for each of the individual provisions can be determined on an instinctive synthesis bases and absurd results will not follow. Therefore different tests and outcomes can apply to each of the different special circumstances. There is no warrant therefore to interpret the local rule so as entirely dis-apply the mandatory minimum approach.

117. The third is that advanced by the respondent That enables a clear distinction between(a) and (b) to (d). That distinction is that in (a) the culpability is not reduced. That is the plea and cooperation take place after the completion of the facts relevant to the breach. In the remaining provisions the culpability may be seen to be reduced because of the impact of the various factors, such as duress etc, upon the acts of the party. In the former therefore the reduction which may be imposed should be limited to the discrete special circumstances established whereas in the latter the reduction which may be imposed can be greater because the culpability is reduced.

118.. The third point will be addressed in the penalty considerations.

THE PENALTY DETERMINATION

119. The Tribunal has to determine penalty having regard to objective seriousness and the subjective circumstances of the appellant. Each of the facts to support findings on those issues have been set out above.

120. The objective seriousness test cannot be determined without a clear regard to the intention of the rule-makers in introducing 196(5). It is apparent that on considerations of integrity and welfare of the industry that a breach of rule 83, and in particular (d), is considered to be a very serious matter. The potential to strike at the very heart of integrity, so far as it is assessed by the wagering public and the public generally, is patent.

121. It is accepted that a range of matters may be incorporated in conduct breaching 83(d). That is a bet on a jockey's own mount or on another mount. A bet on a jockey's own mount is less serious than a bet on another mount because the jockey is more likely to want to win. However such a bet could lead to a jockey disregarding his duty of care to other jockeys on issues of safety or lead to other rule breaches. A bet on another mount would ensure that a jockey is not complying with the rules requiring that the jockey use best endeavours to achieve the best possible position. Regardless of the type of bet the prospects of wrong conduct which might lead to aspects of corruption or wrongful interference with the proper running of the race could easily follow. It is of course accepted in this case that corruption has no part to play in this determination.

122. The Tribunal does not accept the appellant's argument that placing a bet by a jockey on a jockey's own mount creates reduced conflicts because the incentives of the jockey in riding and winning a bet are aligned. This is particularly so because, unlikely as it is, if the public found out a jockey was not betting money on a jockey's own horse there would be an impact on betting markets and integrity questions raised. It is however a less serious activity than betting on another jockey's mount.

123. No doubt these types of considerations were in the minds of the rule-makers when they expanded the rules to distinguish a bet on a race and a bet on a race in which a jockey participates. The addition of the split rule in conjunction with the other new rules obviously indicates the greater seriousness of 83(d).

124. It is accepted that the bet here was not large at $1000. Vastly larger amounts could have been wagered. The winnings were not substantial at $4000. It is accepted that the facts cover a single incident only and there was no persistent pattern of contravening conduct. There is no evidence to support a submission that there was minimal damage done to the public interest and welfare of the racing industry but also there is no evidence that there was such damage.

125. It is found therefore that the facts here can be viewed at the lower end of the scale so far as seriousness of the participation is concerned.

126. The circumstances in which the bet was placed by the use of an intermediary do not stand well on an integrity basis because the use of agents is obviously part of a subterfuge to avoid detection. The Tribunal cannot condone the use of a subterfuge. Of course it would be naive not to understand that a jockey could hardly place a bet personally without being detected. The concern is that once a jockey

starts to use an agent that others may become involved and other integrity issues enlivened.

127. In this case the bet was made by a leading professional jockey who enjoyed the privilege of a licence in the sure knowledge that the rules were being breached.

128. This was not a mere technical breach of the rules where there could be some understanding that the rule was not not known or misunderstood or misapplied. The prohibition on a jockey betting has been in place for many years and is a fundamental prohibition. On accepting the privilege of a licence and the benefits it can confer a jockey must operate on the basic premise that the right to bet has been removed.

129. The respondent has put in evidence a table of penalties imposed upon participants in cricket, Australian rules and rugby league together with the rules that applied to those participants. The appellant says they are not relevant. The Tribunal considers that the only relevance is a broader indication that sporting codes are taking a more serious line with conduct that could lead to corrupt activities or which do involve corruption. The penalties imposed are of no utility. The rules that supported those penalty findings do not provide any guidance on interpretation issues here or on assessing objective seriousness in this sport.

130. Assessing the objective seriousness as substantial the Tribunal determines, although at the lower end of the scale of seriousness, in the exercise of its unfettered discretion, applying the civil disciplinary penalty requirements for the maintenance of the integrity and welfare of the industry, that a period of disqualification is appropriate.

131. Such a determination of a period of disqualification is made in the knowledge that the rule-makers consider this conduct serious. Because of the introduction of the particular rule in 2013 the precedent cases referred to are of little utility as they predate the rule.

132. The precedent cases are Robl, Shinn,Oliver.

133. In Robl ,10 bets were placed over six races totalling $5400 and a three month disqualification imposed. In Shinn it was said to be similar conduct and a three month disqualification imposed. The appellant submits that both jockeys were older and were part of a larger process of penalty because of other breaches involving substantial amounts together with other matters.

134. In Shinn, another matter, a $2500 bet was made on an opposing horse and a six-month disqualification imposed. In Oliver, a $10,000 bet to return $11,000 on an opposing mount with an eight-month disqualification with two-months suspended. It was submitted both jockeys were older and more experienced and there was significant financial gain.

135. What however can be drawn from each of these four outcomes is that disqualification was imposed. That reinforces the Tribunal in this case in imposing a disqualification as it would not be contrary to precedent.

136. There could be an argument that a period of disqualification of greater than six months, which was the maximum in these precedents, should mean that a lesser period is appropriate here because the facts are less serious. If dealt with prior to the 2013 amendments to the rules that argument would be sustainable. However to do so here would be to ignore the message that the 2013 amendments sought to bring to the minds of jockeys who might be tempted to engage in this type of conduct. That message is a reflection of the gravity of the conduct. To give proper effect to that message heavier penalties must be considered to those that applied earlier.

137. Each of the parties agree, and as was found by the stewards and the Appeal Panel, that period of disqualification should not be more than two years.

138. The Tribunal must of course in the exercise of its unfettered discretion determine the period of the penalty for itself.

139. It would be wrong in principle to consider a starting point of greater than two years because no such possibility was put to the parties for argument because of their agreement.

140. The Tribunal considers that the message to be given for the objective seriousness of this conduct in light of the new penalty regime is a disqualification of two years.

141. That determination is made and would be the same whether the first application of the determination was under 196(5) or under 196(1).

142. Because rule 196(5) provides that the period of disqualification of two years is a mandatory minimum there can be no reduction from that objective seriousness determination for subjective circumstances. However they are assessed for completeness.

143. The Tribunal therefore does not accept the submission for the appellant that a period of suspension between six and twelve months together with a fine of $4000 would adequately reflect the objective seriousness of the conduct.

144. It is not necessary to consider whether on the facts and circumstances of this case the objective seriousness is so great that there should be no general reduction for subjective circumstances.

145. This subjective circumstances and in particular the character references have been set out earlier.

146. The Tribunal is not satisfied that the appellant should receive the benefit of any discount for his youth. He is a 24-year-old professional jockey enjoying the privilege of a licence for many years. He is hardly just an adult for whom recognition can be given that the formative years continue.

147. The Tribunal Is satisfied that prior to this conduct he was a person of good character, hard-working and diligent and of extraordinary skill with a natural talent. He is assessed as a person who was a good ambassador for the industry.

148. The appellant otherwise satisfies the Tribunal that it was his first relevant breach and he has shown contrition and remorse and suffered an expensive and salutary lesson.

149. The appellant satisfies the Tribunal that this type of conduct will not be repeated and that is an important factor in looking to the future in framing the appropriate penalty.

150. The Tribunal particularly takes into account, as a reflection of his remorse and contrition, his payment of the wagering amount received of $4000 to a children's charity and his willingness to assist apprentice jockeys.

151. There can be no double counting for plea and cooperation. Those matters are picked up in the special circumstance test.

152. Absent the special circumstances test the parties have agreed, as set out above, that a discount of 25% should be applied to the objective seriousness finding. For the reasons expressed earlier that figure is not revisited.

153. However the special circumstances test embraces the admission of the breach and the cooperation with the stewards and there remains an agreement that a 25% discount is appropriate within that test. Again for reasons set out earlier that is not revisited.

154. Therefore should it have been available or appropriate the Tribunal would have assessed the reduction for subjective circumstances at 25% for the plea and cooperation (but only because it was an agreed figure) and at a further 20% for the remaining subjective circumstances. That is a total discount of 45% to provide a disqualification period of 57 weeks, rounded down. Therefore, if that was not for the application of the mandatory minimum penalty because of the application of 196(5), a penalty of 57 weeks would have been imposed.

155. To deal with the special circumstances test generally it is appropriate to return to the differences in special circumstances in each of the sub rules of LR108(2) and to the types of discounts that may be applied.

156. It is not necessary to express precise figures in this case because only LR108(2)(a) is being dealt with. However it is obvious to the Tribunal that it could apply greater discounts to the facts covering the other matters because their impact upon the facts and circumstances of the case would be greater. For example a person who operated under duress as provided in (b)(ii) may have the period of disqualification of two years reduced to a nominal period. That nominal period could be determined in minutes or perhaps hours-precision in expression is not required.

157. But what is important is that each of the different types of special circumstances should lead, in appropriate cases, to different outcomes. That is, there is a form of gradation of reduction available.

158. However in respect of the plea and cooperation issue it is not possible to see that any reduction, when that special circumstances is activated, could be greater than that which would be otherwise determined, absent special circumstances, for plea and cooperation. That is demonstrated by the precedent determinations by the Tribunal where up to 25% has been granted.

159. As there is to be no double counting there cannot be a 25% discount for plea and cooperation and any further discount for plea and cooperation within special circumstances.

160. The Tribunal is satisfied that the existence of special circumstances, and any reduction to be applied because of them, cannot lead to a further general reduction for subjective circumstances in addition to that applicable for the particular special circumstances found, here plea and cooperation.

161. As the Tribunal particularly finds that there is no other warrant for applying any other discounts for subjective circumstances over and above that which is applicable for special circumstances those matters might have been considered on other factual findings on objective seriousness, for example, if the objective seriousness test determined that a penalty greater than two years disqualification was appropriate. If for example the facts and circumstances reflecting more serious conduct might have warranted a period of disqualification of say three years then that period would have to be reduced by an appropriate reduction for subjective circumstances. That reduction could take the calculation below two years in which case the mandatory minimum two years would apply or it might be more than two years in which case that greater amount would apply.

162. Accordingly it is determined that from the period of two years disqualification a discount of 25% is to be applied. That discount is six months. That leaves a period of disqualification of eighteen months.

163. It is noted that the stewards in their determination commenced their order from the date that the appellant ceased to exercise the privileges of a licence. There has been no submission in these proceedings that that approach should be varied. Accordingly the disqualification will commence on 15 November 2016.

APPEAL DEPOSIT

164. The Tribunal has not called upon the parties to make submissions on the appeal deposit.

165. The appellant is allowed 7 days from the date of receipt of this decision by his legal advisers to make application under Clause 8 of the Racing Appeals Tribunal Regulation 2015 for the repayment to him of the appeal deposit or any part of it. In the event of no such application being received by the Tribunal, then without further order the appeal deposit will be forfeited.

ORDERS

166. TheTribunal makes the following orders:

1. Appeal as to severity of penalty dismissed,
2. A period of disqualification of 18 months to commence on 15 November 2016 is imposed.