

RACING APPEAL PANEL, NEW SOUTH WALES

APPELLANT: MR DENNIS MITCHELL

Appeal Panel: Mr R. Beasley SC, Principal Member; Mr J. Murphy; Ms J. Madsen

Date of Appeal hearing: 5 October 2017

Date of decision: 30 November 2017

Appearances: **Appellant:** Mr A. Byrne, Counsel, instructed by Ms S. Connor of Laxon Lex Lawyers

Stewards: Mr Marc Van Gestel, Chairman of Stewards

REASONS FOR DECISION

THE PANEL

Introduction

1. On 3 March 2017 and 13 April 2017, the Racing NSW Stewards conducted an inquiry into matters concerning the conduct of employees of the Australian Turf Club (“ATC”) who are associated with the ATC’s Mounted Security Division (“the Security Division”).
2. Following the Stewards’ Inquiry three charges were brought against the Appellant, Mr Dennis Mitchell. Until 9 June 2017, Mr Mitchell held the position of General Manager, Risk and Investigations at the ATC. He had overall responsibility for the Security Division. The charge sheet, containing the full particulars for each charge, is Annexure “A” to these Reasons for Decision.
3. On 6 June 2017, Mr Mitchell pleaded guilty to each charge. He was penalised by way of a \$1,000 fine for breaches of AR 175(o)(iii), and by way of a \$3,000 fine for the breach of AR 175A. The total fine imposed on Mr Mitchell was the sum of \$4,000.

4. On 9 June 2017, Mr Mitchell's employment with the ATC was terminated. On 16 June 2017, he commenced this appeal to the Panel, seeking to challenge both the findings of guilt, and the severity of the penalty imposed on him. The Panel granted him leave to appeal out of time, and to change his plea to "not guilty" on appeal.
5. On 11 August 2017, the Panel heard argument that the Stewards did not have jurisdiction to bring any of the charges they did against Mr Mitchell.
6. In Reasons for Decision dated 22 August 2017, the Panel determined that the Stewards did not have jurisdiction to bring charges 1 and 2 against Mr Mitchell, and certain aspects of charge 3. That decision is now under appeal to the Racing Appeal Tribunal.
7. The hearing before the Panel on 5 October 2017 concerned only charge 3 brought against Mr Mitchell, and particulars (e) to (h) which were in the following terms:

Charge 3

The details of the charge under AR 175A being that you, Mr Dennis Mitchell, did commit conduct that was prejudicial to the image and/or interests and/or welfare of racing, by reason of one of, or any combination of two or more of, the general particulars and the following particulars:

...

Saddle Sores

- (e) *after being utilised by the ATC Mounted Security Division a number of horses, including Manhattan Island, Jabba Star and Turbulent Jet developed saddle sores;*
- (f) *the saddle sores resulted from ill-fitting saddles and/or excessive riding under saddle without the necessary rest or treatment.*
- (g) *On the morning of 14 January 2017, Ms Michelle Steele directed ATC Mounted Security Rider, Ms Andrea Bryce, to ride Jabba Star for a 7 to 8 hour shift at Royal Randwick Racecourse when the horse was suffering from open saddle sores.*

- (h) *Such direction resulting in Jabba Star being exposed to pain during the course of the day as the horse was not in a proper condition to have a saddle fitted to it and be ridden throughout the said shift.*

8. The charge refers to the “General Particulars” which are in the following terms:

General Particulars

- (a) *One of the divisions of the Australian Turf Club (ATC) is the ATC Mounted Security Division, which consists of ex-racehorses which have been retained to act in conjunction with the ATC Security Team as mounted security patrolling race days and major events at the ATC’s racecourses. The ATC Mounted Security Division also provides mounted security to private events such as festivals and encourages community engagement with racing through visits to care homes, schools and hospitals, as well as public appearances.*
- (b) *You are an Official as defined in Local Rules of Racing 5 as you are employed by the Australian Turf Club (ATC) as the General Manager of Security, Risk and Investigations for the purpose of conducting business and/or affairs of the Australian Turf Club.*
- (c) *In your position as General Manager of Security, Risk and Investigations with the ATC you have overall responsibility for the ATC Mounted Security Division, which included the supervision and oversight of ATC Mounted Security Stable Coordinator Ms Michelle Steele, who was responsible for the day-to-day management and supervision of the ATC Mounted Security Division. In 2015 and 2016 you also attended and rode as a mounted security rider at private events.*

Conduct of the Appeal

- 9. This Appeal to the Panel is made under the right given in s.42 of the *Thoroughbred Racing Act 1996*. The appeal is by way of a new hearing: s.43 *Thoroughbred Racing Act*.
- 10. Leave was granted to the Appellant to be represented by counsel (Mr Byrne), while the Stewards were represented by the Chairman of Stewards, Mr Marc Van Gestel. The only oral evidence called at the appeal hearing was from Dr Craig Suann, the

Chief Veterinarian of Racing NSW. Otherwise, the evidence before the Panel consisted of the exhibits at the Stewards' Inquiry (which retained the same exhibit number on appeal as they were given at the Stewards' Inquiry), and the transcript of the hearing from that Inquiry.

AR 175A

11. Before discussing the evidence before the Panel, certain aspects of the rule under which the Appellant was charged and found to have breached should be discussed.
12. For conduct to be "*prejudicial to the image, interest or welfare of racing*", the conduct first must become publicly known. In relation to the issue of mistreatment of horses generally, and the issue of "poorly fitting saddles" and saddle sores, the Panel was directed to a series of articles published in both the Sun Herald and the Sydney Morning Herald referring to these matters: see Exhibit 37. Secondly, the conduct must be "blameworthy conduct". The purpose of AR 175A is clearly to protect the interest and integrity of racing. It has been held before that blameworthy conduct that might breach AR 175A does not necessarily have to involve conduct that could also be described as either corrupt, dishonest, or intentionally misleading, or conduct of that kind.
13. The Panel has previously held that conduct which "*gives rise to a particular suspicion in the mind of a reasonable person, when that conduct is publicised, may qualify as "blameworthiness" and could constitute a breach of AR 175A*": *Appeal of Zerafa*, 6 November 2015, at [23]. In *Zerafa* the Panel relied on a judgment of his Honour Young J in *New South Wales Thoroughbred Racing Board v Waterhouse and Anor* (2003) 56 NSWLR 691 where his Honour said (discussing AR 175A) the following (at [69]):

"I would certainly not, with respect, go as far as the Tribunal in saying that if a person might reasonably suspect from the conduct of a bookmaker that he might be money laundering or avoiding income tax, that that would be enough if in fact, as would appear to be the case here, he was doing neither. However, where there was some wrong conduct or where the conduct would give rise to a suspicion in the mind of a reasonable observer when the conduct was publicised (if the

bookmaker could reasonably assume that it would be), then the offence could be made out.”

Evidence before the Panel

14. When Dr Suann was called to give evidence by the Mr Van Gestel, he was asked to provide his opinion in relation to a series of photographs of the horses Manhattan Island, Jabba Star and Turbulent Jet. These photographs were taken by an employee of the ATC in the Mounted Security Division, Ms Jessica Clark. Her evidence is that they were taken on 11 January 2017: see Exhibit 4 at pages 21-23. Photographs taken by another employee of the Mounted Security Division (Ms Lauren Bryce) were also shown to Dr Suann.
15. Consistent with the evidence that he gave at the Stewards’ Inquiry (see page 213 of the Appeal Book commencing at about line 270), Dr Suann expressed the view that the photographs seemed to indicate wounds consistent with saddle sores, and that horses with such sores should be rested rather than saddled and worked for a period of time to allow those wounds to heal.
16. He gave the same evidence in relation to further photographs of the horses Jabba Star and Turbulent Jet taken by another employee of the ATC (Andrea Bryce): see Exhibit 8 at pages 71 and 72 of the Appeal Book. The photograph of Jabba Star is in particular significant as it is a photograph said to have been taken on the day that that horse worked a full 7 hour shift during a race meeting at Randwick Racecourse: see particulars (g) and (h) of charge 3 (see also further evidence given by Dr Suann at the Stewards’ Inquiry on 13 April 2017 at T275-276). Ms Andrea Bryce also gave evidence at the Stewards’ Inquiry concerning the photographs she took of Jabba Star and the fact that Jabba Star had worked on 14 January 2017 at the Randwick races: see T274.13565-275.13630.
17. There was also evidence given by Mr Dexter Cutinha, another employee of the Security Division, whose evidence to the Stewards Inquiry was that he rode Turbulent Jet at the race meeting of 14 January 2017, while Ms Bryce rode Jabba Star: see T291.14445-292.14491.

18. The evidence before the Panel was that although Mr Mitchell had overall responsibility for the Security Division, the person with “day-to-day” responsibility was Michelle Steele, who was the Stable Coordinator for the Security Division: see Exhibit 23 at [15]-[21].
19. The evidence of Andrea Bryce was that while she raised concerns on 14 January 2017 about the condition of both Turbulent Jet and Jabba Star with Michelle Steele (see Exhibit 8, page 63 [9]-[10]), she did not raise this issue with Mr Mitchell. There was no evidence before the Panel that Lauren Bryce, Andrea Bryce or Jessica Clark raised the issue of alleged saddle sores with Mr Mitchell, nor did Ms Steele.
20. For his part, while Mr Mitchell accepted that he had overall responsibility for the Security Division, he was unaware of any issue concerning saddle sores. His evidence to the Stewards’ Inquiry was that Ms Steele was responsible for the condition of horses prior to them being ridden, for example, in order to provide security on race days: see Exhibit 36 at [24]-[28] and Exhibit 24 [19]-[22]. Further, in her evidence before the Stewards’ Inquiry, Ms Clark confirmed that she did not speak to Mr Mitchell concerning the allegations of saddle sores: see T113.5594-.5604, 128.6349-.6364.
21. Two other relevant matters of evidence were drawn to the Panel’s attention by the Appellant’s counsel Mr Byrne. These were veterinary reports that formed Exhibits 2 and 3 at the Stewards’ Inquiry. Exhibit 2 is a veterinary report dated 23 January 2017 of Dr D. Black from the Southern Highlands Equine Centre which followed an inspection he made of the horses on 22 January 2017. His inspection did not indicate that he noticed there were any saddles sores in relation to the horses Jabba Star, Turbulent Jet and Manhattan Island.
22. To the extent that the Panel needs to make a finding as to whether any of the horses were suffering from saddle sores, we are satisfied, on the basis of the evidence of Dr Suann, that the photographs of the horses referred to in the evidence above do indicate wounds consistent with saddle sores. For reasons that will become clear below, it is not necessary at this stage for the Panel to make a finding as to when particular

photographs were taken, or whether any particular horse was ridden on 14 January 2017 at the race meeting suffering from saddle sores. However, if the horses were in that condition on 14 January 2017, they should not have been worked.

Resolution of finding against Mr Mitchell

23. Consideration as to whether Mr Mitchell has breached AR 175A must commence with an analysis of the particulars to that charge. Particulars (e) and (f) of charge 3 allege that the three horses named developed saddle sores as a result of ill-fitting saddles. Particulars (g) and (h) allege that Ms Steele directed Andrea Bryce to ride Jabba Star on a 7-8 hour shift at Randwick Racecourse, despite that horse suffering from saddle sores.
24. The General Particulars note that Mr Mitchell is an official of the ATC, was the General Manager of Security, Risk and Investigations, and had overall responsibility for the Mounted Security Division.
25. Absent from the particulars is any allegation that Mr Mitchell either:
 - (a) knew that the horses were suffering from saddle sores as a result of ill-fitting saddles, or knew that Jabba Star was worked on 14 January 2017 at a race meeting while suffering saddle sores; or
 - (b) that he should have known the above matters.
26. That Mr Mitchell was not aware of any of the horses suffering saddle sores is clear from the evidence. He denies it, Ms Steele did not tell him, nor did Lauren Bryce, Andrea Bryce or Jessica Clark.
27. Further, although it can be accepted that Mr Mitchell had overall responsibility for the Security Division, that alone does not establish any “blameworthy conduct” on his behalf for the purposes of AR 175A. For example, it is not alleged that he failed to put in place some kind of system whereby the issues of saddle sores should have been

brought to his attention, or that he should have been present at the race meeting on 14 January 2017 and checked Jabba Star or any other horse for saddle sores.

28. As stated above, the evidence is that Ms Steele had day-to-day responsibility for the Security Division: Ex 24 at [6(c)]. Mr Mitchell relied on Ms Steele for matters that included obtaining necessary veterinary services for horses attached to the Security Division: Ex 24 at [20]. Ms Steele was also responsible for issues such as saddle fitting: Ex 24 at [93]; Ex 36 at [25], and Ms Steele's statement Ex 23 at [15]. Ms Steele in fact suggests in her statement that stable-hands are also responsible for seeking the services of a Vet if necessary: Ex 23 at [18].
29. There is no particular to the charges however containing an allegation that Mr Mitchell failed to ensure any system of work was put in place, or any particular training to Ms Steele (or anyone else), such that his conduct (or omission) ought make him responsible for her not informing him of the horses suffering from saddle sores. None of the particulars, whether the specific particulars at (e) through to (h), or the General Particulars, allege any failing by Mr Mitchell in his role as overall head of the Security Division which caused him not to know that the horses were suffering from saddle sores in circumstances where he should have known.
30. In the Panel's view, in order for Mr Mitchell to be found guilty of blameworthy conduct that would constitute a breach of AR 175A, there needed to be some specific matter in the particulars of the charge, or in the evidence, which pointed to some failure or error on his behalf. That might have been a failure in training; it might have been a failure in management processes. There is, however, no such particular, nor is there any evidence that has been brought to the Panel's attention of any such failure by Mr Mitchell, and the Panel does not consider that the fact that he had "overall responsibility" for the Security Division to be sufficient for a finding of breach of the rule against him in circumstances where another employee had the actual day-to-day responsibility for the horses in question.
31. Accordingly, the appeal should be allowed, and the finding of breach of AR 175A made against Mr Mitchell set aside.

The Panel makes the following Orders:

- (1) Appeal allowed.
- (2) Finding of breach of AR 175A set aside.
- (3) Penalty of a fine in the sum of \$3,000 set aside.
- (4) Appeal deposit to be refunded.