RACING APPEAL PANEL NEW SOUTH WALES

IN THE MATTER OF THE APPEAL OF LICENSED TRAINER GRANT ALLARD

Heard at Racing NSW Offices on Tuesday 21 January 2020

Date of Reasons: 21 February 2020

APPEAL PANEL: Mr T Hale SC (Convenor)
Mr C Tuck
Ms J Madsen

APPEARANCES: Mr Marc Van Gestel for the stewards

Mr Paul O'Sullivan for Appellant G Allard

REASONS FOR DECISION

1. **CONVENOR:** Grant Allard (the appellant) is a licensed trainer, who has stables in Gosford.

2. On 7 June, 2019 the Stewards conducted an inquiry into the sale, leasing and treatment of the racehorses *I Am Moses* and *Pharoah De Lago,* at which several witnesses including the appellant gave evidence. The inquiry adjourned that day and resumed on 11 October 2019. In the meantime, the Stewards charged the appellant with a breach of AR 48, which prohibits a secret commission in connection with the sale of a horse.

3. On 11 October 2019, the Stewards found the appellant to be in breach of AR 48 and disqualified him for a period of 4 months, with immediate effect. He was also fined $5,000.

4. The appellant has appealed against both the conviction and the severity of penalty pursuant to s. 42 of the *Thoroughbred Racing Act 1996*. The appeal is

by way of a rehearing. The appellant appeals against both conviction and penalty

5. On 11/10/19 a stay of the order and penalty imposed by the Stewards was granted pending the determination of this appeal.

6. The appeal was originally listed for hearing on 28 November 2019. On that occasion the appellant made an application to adjourn the hearing. This was opposed by the Stewards. This Panel granted the application. The circumstances in which the application was made and the reason for the adjournment are set out in the oral judgment I gave that day. The appeal was adjourned for hearing on 21 January 2020.

7. At the conclusion of hearing the appeal against conviction on 21 January 2020, the Panel adjourned briefly. Upon the resumption of the hearing, I announced that the Panel had determined to dismiss the appeal and confirm the conviction of breach of AR 48. I said that the Panel would deliver reasons for that decision at a later time. These are those reasons.

8. The Panel then proceeded to hear evidence and submissions on penalty. At the conclusion of those submissions, I announced on behalf of the Panel that we reserved our decision on penalty. I said that we would deliver our decision and reasons on penalty at the same time as we delivered our reasons on conviction. That decision and those reasons are set out below.

9. Mr Allard was charged with a breach of Australian Rule of Racing rule 48. The charge was as follows, which also sets the provisions of AR 48:

Licensed trainer Mr Grant Allard you are hereby charged with a breach of AR48(2) for failing to fully disclose and/or obtain consent for a benefit you received for the sale of the racehorse *I Am Moses* on or around 18 May 2018.

Division 4 – Sale or gifting of a horse

AR 48 Prohibition on secret commissions in connection with the sale of a horse

(1) This rule applies to:

(a) any person bound by these Australian Rules ("person"); and

(b) any named horse or unnamed horse (for the purposes of this rule, "relevant horse").

(2) Any person who is in any way party to or involved in the sale of a relevant horse, must not, directly or indirectly:

(a) seek or solicit from any person for himself or herself or for any other person any benefit;

(b) receive for himself or herself or for any other person any benefit,

unless the person has first:

(i) fully disclosed, in writing, to the registered owner(s) of the relevant horse that the person:

(A) will be seeking or soliciting for himself or herself or for any other person a benefit;

(B) will receive for himself or herself or for any other person a benefit; and

(ii) obtained the written consent of more than 75% of the registered ownership to seek or solicit, and/or to receive, the benefit.

(3) Any person who is in any way party to or involved in the purchase of a relevant horse, must not, directly or indirectly:

(a) seek or solicit from any person for himself or herself or for any other person any benefit;

(b) receive for himself or herself or for any other person any benefit;

(c) offer to provide, or provide, to any vendor of the relevant horse, or to any other person (including a person acting, or purporting to act, on behalf of the vendor), any benefit in connection with the sale of the horse;

unless the person has first:

(i) fully disclosed, in writing, to the prospective purchaser(s) of the relevant horse that the person will:

(A) be seeking or soliciting for himself or herself or for any other person a benefit;

(B) receive for himself or herself or for any other person a benefit;

(C) be offering to provide to any vendor of the relevant horse, or to any other person (including a person acting, or purporting to act, on behalf of the vendor), a benefit in connection with the sale of the horse; and

(ii) obtained the written consent of more than 75% of the prospective purchasers to seek or solicit, to receive and/or to provide, the benefit.

(4) Where, in the course of one transaction, a person acts, or purports to act, on behalf of both:

(a) a registered owner/s of a relevant horse in connection with the sale of a relevant horse; and

(b) a purchaser/s of a relevant horse in connection with the purchase of the same relevant horse,

that person must comply with the provisions of both subrules (2) and (3).

(5) For the purposes of the consent required by subrule (2)(ii) and (3)(ii), consent shall be deemed to have been given by a person where that person fails to provide reasonable notice of dissent in writing within 72 hours of receiving the written disclosure under subrule (2)(i) or (3)(i).

(6) For the purposes of this rule:
- *(a) "benefit" includes any valuable consideration, rebate, commission, gratuity, profit, fee, benefit or payment of any kind, whether direct or indirect, and to be provided at any time;*
- *(b) a reference to the sale and/or purchase of a relevant horse includes the sale or purchase of a share or beneficial interest in that horse.*

10. The particulars of the charge are:

The details of the charge being that you licensed trainer Mr Grant Allard did fail to fully disclose to and/or obtain consent from owner Mrs Lynette Metcalf of a benefit of $85,000 that you received for the sale of the racehorse I Am Moses on or around 18 May 2018, by reason of one of, or any combination of two or more of the following particulars;

1. *You were a person involved in the sale of the racehorse I Am Moses to Hong Kong owner, Mr Wong Siu Wah, through Bloodstock Agent, Mr Daniel Flack, on or around 18 May 2018;*

2. *On or around 18 May 2018, you entered into an arrangement with the Owner of I Am Moses, Mrs Lynette Metcalf, that I Am Moses was to be sold with the following benefits being received by you and Mrs Metcalf*
    a. *Mrs Metcalf receiving $120,000;*
    b. *you receiving $80,000,*

3. *On or around 18 May 2018, the purchaser of I Am Moses, Mr Wong Siu Wah, deposited $230,000 into the account of Mr Daniel Flack for the purchase of I Am Moses;*

4. *On or around 20 May 2018 you were aware that I Am Moses was being purchased for a total of $230,000 (with an additional contingency payment of up to $70,000 should the gelding win a Hong Kong Class 1, 2 or 3) by Hong Kong owner, Mr Wong Siu Wah, as detailed in an invoice you had received detailing to terms of the sale;*

5. *On 22 May 2018, Mr Flack deposited $120,000 into the bank account of Mrs Metcalf as her benefit for the sale of I Am Moses.*

6. *On or around 22 May 2018 Mr Flack retained $25,000 as a benefit for the sale of I Am Moses.*

7. *You received payment from Mr Daniel Flack of $90,000 by way of two payments into your bank account, one payment of $85,000 on 22 May*

2018 and a further payment of $5,000 on 7 June 2018, with $5000 of that $90,000 relating to training fees associated with Claro El Blanco and the remaining $85,000 being the benefit that you received in respect of the sale of I Am Moses;

8. *As a result of the above you,*
    a. *received a benefit of $85,000 for the sale of I Am Moses when you had only disclosed to Mrs Metcalf (verbally), and only received her consent, to receive a benefit of $80,000 and*

11. At the hearing before this Panel, the Stewards were represented by Mr Marc Van Gestel, Chairman of Stewards. With leave, the appellant was represented by Mr Paul O'Sullivan.

12. The appellant pleaded not guilty to the charge. As mentioned, he also appealed against the severity of the penalty imposed.

13. We received the Appeal Book into evidence as Exhibit A. It contained the transcript and evidence of the hearing before the Stewards, together with certain other documents. The exhibits before the Stewards are Exhibits 1 to 14 and marked as pages 1 -101 in Exhibit A before this Panel. The only oral evidence was the evidence by telephone of Matthew Gibson, an investigator with Racing NSW. About 20 minutes before the hearing re-commenced on 21 January, Mr O'Sullivan asked Mr Van Gestel if he would make Mr Gibson give evidence. Mr Gibson was not in Sydney, but Mr Van Gestel made arrangements for Mr Gibson to give evidence by telephone.

14. Ms Lynette Metcalf is an owner and breeder of thoroughbred horses. In 2017 she was the owner and breeder of the three year old geldings *I Am Moses* and *Pharoah De Lago.* In March 2017 the appellant commenced training both of those horses. According to Ms Metcalf, the arrangement with the appellant was that he would lease both horses. Under the arrangement he would receive 70% of any prizemoney earned by the horses and Ms Metcalf would receive the remaining 30%. There were to be no training fees, although Ms Metcalf was to bear the cost of the transport of the horses to the appellant's Gosford stables and the cost if the horses needed to be gelded. The arrangement was to be recorded in a written lease on lease forms provided by

Racing NSW, but the appellant never completed such a lease document.

15. According to Ms Metcalf, in May 2018, *I Am* Moses had his first trial at Wyong and the appellant mentioned that they would probably be receiving numerous offers from people wanting to purchase the horse. The appellant informed her that he thought that he could get offers around $200,000. While they were still at Wyong, the appellant told her that he had two offers from Bloodstock Agents for $200,000.

16. The appellant later telephoned Ms Metcalf to inform her that he had been contacted by 5 bloodstock agents who had clients interested in purchasing the horse and they were all offering around $200,000 for *I Am* Moses, but he thought that he could get more and he would be increasing the price. He said all the buyers were in Hong Kong.

17. Ms Metcalf said she was reluctant to sell the horse, however as a result of what she said, was pressure from the appellant, she agreed to do so. She said she was conscious of the financial pressure the appellant was under at the time. She also said that if the horse was to be sold to an overseas buyer a condition of the agreement must be that the horse would be returned to in Australia when it retired from racing. She said he assured her there would be such a condition.

18. Ms Metcalf said the appellant told her he had an offer of $200,000 for the horse and that he was going to accept it. She said he demanded $80,000 from the sale of I *Am Moses* and stated that this amount was for the care and training of *I Am Moses* and *Pharoah de Lago,* as well as *"some froth on top".* She said she reluctantly agreed to this despite not owing him any training fees. She said she consistently asked him for a copy of the contract but he did not provide a copy. She also said she asked him to confirm the ultimate sale price, but he would not confirm it. He said he would check with the bloodstock agent, but he never informed her of the ultimate sale price.

19. Ultimately, on the 22nd May 2018, $120,000 was deposited into Ms Metcalf's bank, however there was no name attached to the deposit or any other details with it. She said she later found out the sale price was $230,000 and that Daniel Flack, a bloodstock agent received a 10% commission, that is $23,000, and the appellant received another $7,000.

20. The documentary evidence establishes that:

    a. On 18 May 2018, Mr. Flack sent an invoice to Wong Siu Wah in Hong Kong for $230,000. It was described in the invoice to be for "Three year old thoroughbred gelding *I Am Moses/ She a Sure Thing*": see Exhibit 13 before the Stewards. That invoice also records a contingency agreement totaling $70,000 to be paid if the horse had a class 3 win, a class 2 win and a class 1 win.

    b. On 18 May 2018, $230,000 was transferred from the Hang Seg Bank in Hong Kong into the bank account of Mr Flack: Exhibit 11 before the Stewards.

    c. On 21 May 2019, Ms Metcalf provided the appellant with her bank account details at Westpac: Exhibit 3 before the Stewards.

    d. On 22 May 2018, $85,000 was transferred into the appellant's bank account from Mr Flack: Exhibit 9 before the Stewards.

    e. On the same day, on 22 May 2018, $120,000 was deposited into Ms Metcalf's bank account. It does not identify the transferor: Exhibit 4 before the Stewards.

    f. On 7 June 2018, Mr Flack transferred a further sum of $5,000 into the appellant's bank account.

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21. The Stewards conducted hearings into the matter on 7 June 2019, 16 August, 2019 and 11 October 2019. The appellant gave evidence before the Stewards on each occasion. In summary he said:

    a. The sale price was $230,000 but he did not tell Ms Metcalf what the sale price was;

    b. He accepted that at the time that he was under significant financial pressure and that he put pressure on Ms Metcalf to sell;

    c. The agreement was that Ms Metcalf would receive $120,000 and that the appellant would receive $80,000. He said this was what he was paid. He said that the other $5,000 of the $85,000 transferred to him by Mr Flack on 22 May 2018 was paid to him by Mr Flack for outstanding training fees for *Claro El Banco*;

    d. The additional $5,000 was paid into his account by mistake, but the appellant said he was not going to give it back to Mr Flack until he received a certificate that the horse would be returned to Australia. He has not returned the $5,000.

22. In short, the appellant denied that he received a secret commission. He said he only received the agreed sum of $80,000 from the sale and that the additional $5,000 paid to him at the same time as the $80,000 was for outstanding training fees owed by Mr Flack.

23. In his submissions on behalf of the appellant, Mr O'Sullivan submitted that the only evidence to the contrary was the evidence of Mr Flack. He referred to the various versions of the evidence of Mr Flack and submitted that this Panel should not accept the evidence of Mr Flack because he had given four different versions of what occurred and that therefore this Panel would not accept that Mr Flack was a reliable or truthful witness. Further, one of the versions of Mr Flack's evidence corroborated the appellant's account of

events. In all the circumstances, he submitted that the Panel could not be comfortably satisfied that the appellant had breached AR 48.

24. It should be noted the evidence establishes that as at May 2018, there were two invoices from the appellant to Mr Flack in respect of *Claro El Blanco* that have not been paid. One was dated 1 February 2017 for $$3,701.50 and the other dated 15 February 2018 for $2,127.40: a total of $5,828.90. The payment of $5,000 is said to be in discharge of this sum.

25. The evidence of Mr Flack therefore assumes considerable importance. So also, does the evidence of Mr Gibson who spoke to Mr Flack and obtained a statement from him.

26. The evidence of Mr Gibson was that after having spoken to Ms Metcalf he telephoned Mr Flack shortly before 16 July 2018. The details of what Mr Flack said are in Mr Gibson's report of 16 July 2018 which is Exhibit 1 in the appeal book. Mr Gibson records the following:

> I contacted Mr Flack to confirm the sale price of the horse and he stated that *I Am Moses* was sold for $230,000 to a Hong Kong buyer. Mr Flack stated that he deposited $120,000 into Mrs Metcalf's account and $80,000 into Mr Allard's account from the proceeds of the sale. Mr Flack received a 10% commission of $23,000 and the remaining $7,000 was going to be paid to the Hong Kong Trainer. Mr Flack supplied a Remittance advice showing the transfer of $230,000 from Hong Kong. The remittance advice is attached to this report. Mr Flack was asked to supply a copy of the contract for sale of *I Am Moses* and he stated that there was no contract for the sale of the horse.

27. Mr O'Sullivan draws attention to the reference to $80,000 being paid into the appellant's account from the proceeds of sale. He says that this is

confirmatory of the appellant's account. Of course, $85,000 was paid into the appellant's account. Mr O'Sullivan submits that this passage should be understood as meaning that $80,000 of the $85,000 transferred was for the appellant's share of the sale proceeds and the balance was for the unpaid training fees. The difficulty with this submission is that this is not what the passage says. It makes no mention of any payment other than sale proceeds.

28. Following Mr Gibson's first telephone conversation or conversations with Mr Flack, Mr Flack sent Mr Gibson a detailed two-page email setting out his considered recollection of the circumstances of the payment to the appellant. The email is dated 17 July 2018: Exhibit B. Mr Gibson incorporated the contents of that email in a draft statement which he emailed to Mr Flack on 18 July 2018. On 23 July 2018, Mr Flack signed that statement and returned it to Mr Gibson. The statement is witnessed, the date of the witnessing is recorded as 24 July 2018. Nothing appears to turn on this. In that statement Mr Flack said the following at paragraphs 19 and 20.

> 19. Prior to receiving funds for *I Am Moses,* I received instructions from Mr Allard which indicated Ms Metcalf had nominated her preferred account for the sale proceeds from *I Am Moses* to be deposited into. Mr Allard also stated that Ms Metcalf was aware that he was going to receive an amount of $90,000 however $5,000 of this transfer was for a previous horse I had in training with Mr Allard *(Claro El Banco*).
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> 20. In summary, Mr Allard received $85,000 from the sale proceeds, while Ms Metcalf received $120,000. I deposited these amounts directly into the bank accounts of Mr Allard and Ms Metcalf. I retained an amount of $25,000 as my commission from the sale and this amount

was going to be spilt with another party in Hong Kong, who was involved in the sale process.

29. This account confirms that Mr Flack paid the appellant $85,000 from the sale proceeds, which is consistent with the bank statements. The additional $5,000 deposited in the appellant's account on 7 June 2018 was for the training fees. Mr Flack makes no mention of any mistake or double payment. The statement signed by Mr Flack was considered and based upon a detailed email he had prepared. The is no reason to disbelieve what is contained in it.

30. Almost a year later, on 7 June 2019, Mr Flack was to give evidence by telephone to the Stewards. He rang in (T 49) but he did not actually give evidence that day.

31. On 16 August 2019 (more than a year after his statement), Mr Flack did give evidence by telephone to the Stewards: T 61-85. Mr Flack's recollection was very unclear. At T 62 he was taken to his statement, where the following question and answer appears:

> CHAIRMAN: So just taking you back to the funds. To be fair to you, in your statement paragraph 19 you said that $90,000 was transferred to Mr Allard total, however $5,000 of that was for the previous horse you just mentioned, *Caro El Banco*, where there were some outstanding funds to be paid; is that correct?
>
> D FLACK: Ah, look, honestly it was so long ago I can't remember or I can't recall. Anything in my statement, I probably wouldn't be able to give you an exact briefing of how – what, um – what the fund was for. I can't – Grant can probably give you a better idea of what was owed on the training bill.

32. At T 63 of the transcript the following appears:

> CHAIRMAN: When I look at Mr Allard's bank records there's two deposits that take place in those records. The first of those being on the 21st May were there was

$85,000 transferred into Mr Allard's account and then on the 7th June there's an additional $5,000 that's transferred from yourself to Mr Allard. What's that, about a fortnight or so later. So, a total of $90,000 was in fact transferred which seems to reconcile with the statement that you provided to commissioner Gibson in relation to the funds that you say $90,000 was transferred in total and you say $5,000 of that was for an outstanding debt for Claro El Banco. Do you stick by that evidence?

D FLACK: Well I can't - you know, the honest answer is I can't really recall it exactly, it's that long ago. I don't have time to be going over, you know, horses I've sold 18 months ago and, you know, to basically fulfil someone's need to keep it secret for the whole time.

CHAIRMAN: Just repeat that?

D FLACK: I don't time to be going over, you know, horses I've sold - you know, with a fine toothcomb horses I've sold 18 months ago to be honest with you. You know, once they are sold I couldn't care if they get their heads chopped off.

CHAIRMAN: Couldn't you? No, well, maybe there is something Mr Flack in the bloodstock code of conduct that you may need to refresh yourself on to ensure
that you meet all those particular standards. So you signed -?

D FLACK: I don't have a care of duty once they leave, you know, once they leave Australia. I love horses but I'm not going to be ringing the owner every week and saying "Is it still alive."

CHAIRMAN: No, that's not my question. My question was in respect to the sale and you said you don't have time to go back with a fine toothcomb. You provided a
statement to Mr Gibson that you signed on the 24th July where you gave that evidence. Is that evidence to your best recollection as to what took place?

D FLACK: Well, at the time it may have been but, like I said, no issues, or no - no, um - unless I went back through it again and double checked it all but that's my recollection whether that was correct.

33. In summary, the effect of the evidence Mr Flack on 16 August 2019, was that he had a very poor recollection of the relevant events. It could not be said that his evidence was inconsistent with his statement of 23 July 2018.

34. Mr Flack gave further evidence on 11 October 2019 at T 116-121. Again, it was by telephone. It was not under oath. On this occasion his evidence corroborated the evidence of the appellant and was contrary to his signed statement and to his email of 17 July 2018: Exhibit B.

35. At T 117 he said:

> Q. That's the first complaint the Stewards make. The second complaint the Stewards make is that there was a failure on the part of Mr Allard to disclose to Mrs Metcalf that in the event that the horse had won certain races in Hong Kong a further benefit may have been forthcoming. Can I take you to the first one please, in relation to the deposit of $85,000?
> A. Yes.
> Q. What do you say the deposit of the $85,000 was for?
> A. Well, that was for the part-payment of the horse and I had another horse previously worked with Grant, or Mr Allard, Claro El Banco.
> Q. Yes.
> A. And basically what happened with that bill, I don't have any facts of it but that bill
> was, you know, expediency-Q. Okay. I take it you're saying that $80,000 of the $85,000 was for I Am Moses and
> $5,000 was for training of the other horse, is that right?
> A. Correct. It was obviously the payment of I Am Moses.
> Q. The payment that followed in June of $5,000, could you tell me what that was for?
> A. That was actually for the payment of the training fees, but I think I errored in sending him $85,000 in the first instance when I should have probably sent him only $80,000.
> Q. So you basically double-dipped, is that right?

A. I sent him the training fee twice, I believe, yes, as it turned out. So I never asked for it back though, I wasn't sort of aware there was a situation like that until I was made aware.

Q. Just so I'm clear, what did you send Grant Allard for I Am Moses?

A. Well, in total he received $90,000, but, like I said, you know, that wasn't all for I Am Moses.

Q. So what you're saying is the first payment in late May $80,000 was in respect of I Am Moses, $5,000 of it was in respect to training fees, and in early June you sent another payment of $5,000 on account of training fees, which may have been
mistaken, is that accurate or not?

A. I believe the first payment was more likely mistaken, the honest answer. So I should have sent $80,000 or $85,000 including the training fees. I sent $85,000 with another $5,000.

Q. So what you're saying is that in relation to the horse I Am Moses you sent Mr Allard$80,000, is that accurate?

A. $80,000 of those funds were meant to be for I Am Moses.

36. At T119-120 the following evidence of Mr Flack appears:

Q. Why has your evidence changed now?

A. I don't, sorry, at the time I maybe gave in my recollection.

Q. You gave that evidence six weeks after the sale. We're now 12 months down the track and you've now changed your evidence. How can that be?

A. Well, like I said, I'm only going from my recollection. Maybe at the time I wasn't aware that that was-

Q. Well you were aware? I put it to you that you were aware because you put in your statement that you gave him $90,000.

A. Yes, well, maybe-

Q. Are you giving truthful evidence, Mr Flack?

A. What was that, sorry?

Q. Are you giving truthful evidence today?

A. Yes. I've given truthful evidence all along, to the best of my memory for that sort of money.
Q. And I put it to you that the truth is the evidence you gave to Mr Gibson on 23 July 2018 that you paid Mr Allard $90,000. You know that $5,000 was for Claro El Banco and the other $5,000 was to be given to Mr Allard for the sale of I Am Moses?
A. No, it's not. I don't believe that's correct.

37. Mr O'Sullivan submits that we should accept this account rather than Mr Flack's signed statement made less than two months after the relevant events. He also submits that given the inconsistencies between Mr Flack's accounts, the Panel cannot be comfortably satisfied the charge has been made out.

38. I am persuaded the account in Mr Flack's statement should be accepted and his later evidence of 11 October 2019 should not be accepted.

39. Firstly, it was a considered statement prepared shortly after his first telephone interview with Mr Gibson. It was based upon Mr Flack's detailed email to Mr Gibson. It was prepared shortly after the relevant events.

40. Secondly, this account is consistent with the documentary evidence. The sale price was $230,00. It is not in dispute that $120,000 was paid to Ms Metcalf out of the sale proceeds. Nor is it in dispute that Mr Flack retained $25,000 of the sale proceeds as his commission. The issue is: what became of the $85,000 balance of the sale proceeds? In his statement Mr Flack said he paid the appellant $85,000 from the sale proceeds. In that statement the sale proceeds are fully accounted for and in a manner that is consistent with the documentary evidence. $230,000 was paid into Mr Flack's account on 18 May 2018 and Mr Flack made payments to Ms Metcalf and the appellant out of those funds on 22 May, 2018. This left $25,000 of the sale proceeds, which Mr Flack said he retained. The documentary evidence shows that Mr Flack transferred a further sum of $5,000 to the appellant's account on 7 June 2018, bringing the total amount he transferred to the appellant to $90,000. In his

statement he said that the additional payment of $5,000 was for the training fees he owed the appellant.

41. Thirdly, in contrast to Mr Flack's statement, the appellant's account and Mr Flack's later account do not sit comfortably with the evidence. If Mr Flack only transferred $80,000 to the appellant out of the sale proceeds, then $5,000 is unaccounted for. It may be said that Mr Flack's later evidence should be interpreted as meaning that he transferred $5,000 to the appellant's account from the $25,000 commission he received from the sale proceeds. However, this is not what he said. Further, such an interpretation would be directly contrary to what Mr Flack said in this statement: "*I **retained** an amount of $25,000 as my commission from the sale" (*emphasis added*).*

42. Fourthly, not only is the explanation in Mr Flack's statement for the payment to the appellant of $5,000 on 7 June 2018 consistent with the documentary evidence, it is also convincing. By contrast, the later explanation given by Mr Flack is improbable and unconvincing. It involves accepting that after receiving the sale proceeds of $230,000 on 18 May 2018, on 22 May Mr Flack calculated he would pay the appellant $85,000 in one payment; being $80,000 in respect of the sale and $5,000 for an entirely different purpose, without in any way identifying that $5,000 was in respect of training fees; then a little over two weeks later, that he inadvertently made a double payment, having forgotten he had already paid the training fees two weeks before; and further still, having found out that there had been a double payment, that he did not seek to recover the overpayment.

43. Fifthly, in his evidence in May 2018, the applicant said he had little recollection of the relevant events. There is no clear explanation as to why his evidence on 11 October 2019 was so different from his statement. He does qualify his evidence on 11 October 2019 by saying: *" I am only going from my recollection*": T 119 line 5630.

44. For the forgoing reasons, I am therefore satisfied that the appellant received $85,000 from the sale of *I Am Moses* when he had only disclosed to the

owner of the horse, Ms Metcalf that he was to receive $80,000. The charge under AR 48 is therefore established.

45. Mr O'Sullivan submitted that having regard to the different and conflicting accounts of the relevant events in the evidence of Mr Flack, it was not open to this Panel to be satisfied on the Briginshaw test that the breach of AR 48 had been established. In coming to my conclusion that the appellant breached AR 48, I am conscious of what Dixon J said in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at p360-368.

46. The civil standard of proof applies in the present appeal. The facts must be established on the balance of probabilities sometimes phrased as on the preponderance of probability. However, as Dixon J[1] observed in *Briginshaw*: *"when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found*". In civil cases " *it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal*"[2]. Dixon J then explained:

> *But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent*

[1] (1938) 60 CLR 336 at 361.
[2] Ibid at 362.

judgment if the question was whether some act had been done involving grave moral delinquency.[3]

47. This, however, does not mean that a different standard of proof applies. The civil standard of proof continues to apply, even when in civil proceedings a criminal act is alleged, for example fraud.

> *It is often said that such an issue as fraud must be proved "clearly", "unequivocally", "strictly" or "with certainty" …….This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues".*[4]

48. For the reasons that I have explained, I am satisfied on the balance of probabilities that the charge against the appellant has been established.

49. For these reasons the Panel dismissed the appeal against conviction and confirmed the decision of the Stewards.

50. The Stewards imposed a penalty of 4 months disqualification and a fine of $5,000. The fine was clearly intended to reflect the undisclosed $5,000 that the appellant received from the sale proceeds. On behalf of the appellant, Mr O'Sullivan submits that 4 months suspension should be substituted for the 4 months disqualification. In support of this submission he points to the following matters:

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[3] Ibid at 362.
[4] Ibid p362-363.

a. The appellant has worked in the industry all his life and with the exception of two minor training offences he has a clean record.

b. He has been under some financial distress, with a mortgage secured over his parent's house. If he is unable to make those mortgage payments his parents may lose their house.

c. He is presently employed as a full-time trainer at Feale Park, with 40 horses under his management. If he were to be disqualified there is a likelihood that he would lose his job. Since he is now an employee rather than being self-employed, he is unlikely to reoffend.

d. The offence arose from his financial difficulties at the time of the sale of the horse.

e. The sale price that he obtained for the owner, Ms Metcalf, was a good one and was brought about by the appellant's efforts in training the horse;

f. A suspension of 4 months rather than a disqualification would be consistent with the penalties imposed in similar circumstances.

51. In summary, Mr Van Gestel submitted that rather than a suspension, disqualification was appropriate because:

a. The offence was a serious offence involving dishonesty. The appellant took advantage of the position of trust he had with Ms Metcalf;

b. AR 48 is a recent rule which specifically prohibits a person in the position of the appellant obtaining a secret commission. It was brought in following the matter of *Richard Callander, Liam Prior and Glyn Schofield*;

c. A suspension would not mark the seriousness of the offence and would not provide sufficient deterrence to those who might be tempted to

commit such an offence in the future;

d. The appellant had kept the $5,000 and has not repaid it to the owner;

e. A disqualification would be consistent with penalties imposed in similar cases.

52. During submissions, I raised the question of what work the appellant would be able to undertake at his place of employment if suspended rather than disqualified. Clearly, he would not be permitted to undertake the training or management of horses. He could not, for example, be a *de facto* trainer during the period of his suspension. For that reason, I do not see that the risk to the appellant's employment is significantly greater if disqualified rather than suspended.

53. We were taken to the decision of the Stewards of 10 March 2016. In that matter, Mr Callander, the managing owner of a horse, was found guilty of a charge of dishonest and/or fraudulent conduct contrary to AR 175(a), as it then was, which is in the same terms as the present AR 229(1)(a). He was disqualified for 6 months and fined $10,000. This involved the sale of a horse to Hong Kong interests. The sale price was $200,000, but other part owners believed that the horse had been sold for $140,000. Without the knowledge of the other owners, Mr Callander retained $24,000 from the proceeds of sale, in addition to his share of the disclosed sale price. He also paid $24,000 to the stable foreman and $10,000 to a licenced jockey without disclosing these payments to the owners. Mr Callander, unlike the appellant, pleaded guilty to the charge at the first opportunity. He also cooperated with the Stewards and compensated the other owners for the money that he had retained. However, like the appellant, he was of good character and had a clean record. Also, like the appellant, he was dependant on his role in the racing industry to support himself and his family. As I have mentioned, Mr Van Gestel informed the Panel that it was as a consequence of the circumstances in *Callander* that AR 48 was introduced.

54. We were also referred to the decision of this Panel in *Ricky Rohde* of 21 June 2017, which was comprised of Mr Beasley SC, Mr J Fletcher and Mr K Langby. This was also a case of a breach of the former AR 175(a). Mr Rohde pleaded guilty. The Panel confirmed the disqualification of 4 months. Mr Rohde was a trainer. He received from a client a 10% deposit ($3,600) on a horse, in circumstances in which he knew the horse had already been sold. He retained the sum and lied to his client as to why he was not refunding the money.

55. We were also referred to the more recent decision of this Panel in *Martin* of 16 October 2019, which was comprised of Mr Beasley SC, Mr J Murphy and Mr L Vellis. It concerned a breach of the present AR 229(1)(a). This Panel imposed a suspension of 4 months in lieu of the 6 months disqualification by the Stewards. Mr Martin was a trainer. He received funds from a prospective owner/client for the purchase of a filly. He failed to pass those funds onto the owner. As a consequence, the owner/breeder refused to convey ownership of the filly and the prospective owners did not have a horse to race. The Panel accepted that this was not due to any dishonest or fraudulent conduct of Mr Martin. Rather, the failure to pass on the funds received was due to Mr Martin's financial circumstances at the time.

56. In the present case, the appellant is a trainer. It is not in dispute that he was the owner's agent for the sale of the horse. He was in a relationship of trust with the owner. It was clearly a fiduciary relationship. He was her fiduciary. It was at his urging that the owner agreed to sell the horse. She trusted him to carry out the negotiations. She relied on him. He took advantage of her trust. He did not even disclose the sale price of $230,000 to her. He left her with the impression that the sale price was $200,000, which was to be shared between them. She was to receive $120,000 and he was to receive $80,000.

57. AR 48 was introduced to prohibit this very type of conduct. It is to prohibit secret commissions. The Rule requires that a person in the position of the appellant disclose in writing to the owner the benefit he was to receive and to receive the owner's written consent to this. The appellant only disclosed a

benefit of $80,000. He did not do so in writing or obtain the owner's consent to this in writing. Nothing turns on this except to the extent that it demonstrates the Rule's emphasis on the importance of proper disclosure.

58. The seriousness of the conduct of the appellant is reflected not only in the fact that AR 48 imposes a specific prohibition on such conduct, but also the seriousness with which the criminal law views the receipt of secret commissions: see the *Crimes Act 1900* Part 4A headed *Corruptly receiving commissions and other corrupt practices*.

59. As the owner's fiduciary, the appellant holds the sums of $5,000 on trust for the owner. The appellant has not refunded that sum to the owner. We, of course, have no power to order the refund. That is a matter for the civil courts. The failure to refund the sum is taken into account on penalty.

60. The penalty is to be determined in the context of the subject matter, scope and purpose of the Thoro*ughbred Racing Act* and the functions of Racing NSW established under the Act, which include in s.13(1)(c):

> *"The promotion, strategic development and welfare of the horseracing industry in the State and the protection of the public interest as it relates to the horseracing industry."*

61. *In the Matter of the Appeal of Noel Callow*, a decision of this Panel of 3 April 2017, comprised of myself, Mr Carlton and Mr Clare, I, on behalf of the Panel, emphasised the importance of deterrence in circumstances such as the present.

> *41. In professional disciplinary matters, the principles which apply to determining penalty recognise the importance of deterrence, particularly in regard to the protection of the public. In Law Society of New South Wales v Foreman (1994) 34 NSWLR 408, which concerned disciplinary action against a solicitor, Giles AJA, said at [471]:*
> *"But the object of protection of the public also includes deterring the legal practitioner in question from repeating the misconduct, and*

deterring others that might be tempted to fall short of the high standards required of them."

Mahoney JA said (at [441]):

"It has frequently been said that disciplinary procedures and the orders made in the course of them are directed not to the punishment of the solicitor but to the protection of the public. This, of course, is true. The protection of the public has been described as, for example, the primary purpose or a primary object of such proceedings…In the relevant sense, the protection of the public is, in my opinion, not confined to the protection of the public against further default by the solicitor in question. It extends also to the protection of the public against similar defaults by other solicitors and has, in this sense, the purpose of publicly marking the seriousness of what the instant solicitor has done."

42. In our view, by analogy these principles concerning deterrence are apposite to determining penalty for breach of the rules of racing. It will be noted that in Foreman the role of deterrence was considered in relation to the protection of the public. Deterrence will have a broader application in relation to the rules of racing. The principles will extend not only to the protection of the public but also the promotion of the safety or horses and jockeys as well as the integrity of racing. In determining penalty, consideration may be given to the deterrent effect that the penalty might achieve in deterring a repetition of the offence and in deterring others who might be tempted to fall short of the high standards required of them under the rules of racing. The penalty may also be seen as publicly marking the seriousness of the offence

62. The relationship between horse owner and trainer is important to the development and welfare of the horseracing industry. It is a relationship of trust. Horse owners invest capital in the purchase of a horse which they entrust to trainers. Both in the public interest and in the interest of the welfare of the horseracing industry, that relationship of trust must be promoted and protected.

63. In the present appeal, the appellant has breached that trust. He acted dishonestly towards the horse owner who engaged him. He has not refunded the undisclosed sum of $5,000 which he received from the sale proceeds.

64. The offence is a serious one. The penalty must be seen as marking the seriousness of the offence. It must have sufficient deterrent effect to deter other trainers who might be tempted to fall short of the high standards required of them under the rules of racing.

65. In my view the seriousness of the offence calls for a period of disqualification.

66. *In the Matter of Callander*, a 6 month disqualification was imposed. While the sums involved were greater than $5,000 in this appeal, a similar level of dishonesty was involved. Perhaps more importantly, it did not involve a breach of trust between trainer and owner. Further, Mr Callander, unlike the appellant, pleaded guilty to the charge at the first opportunity, he cooperated with the Stewards and compensated the other owners for the money that he had retained.

67. There is some factual similarity with the matter *Ricky Rohde,* where a 4-month disqualification was imposed.

68. In *Martin* a 4-month suspension was imposed. However, the Panel accepted that this was not due to any dishonest or fraudulent conduct of Mr Martin. Rather, the failure to pass on the funds received was due to Mr Martin's financial circumstances at the time.

69. In my view, the disqualification of 4 months and the $5,000 fine was at the more lenient end of the range of penalties that might have been imposed. In coming to that conclusion I have taken into account the personal circumstances of the appellant to which I have referred above.

70. In those circumstances the appeal on severity should be dismissed and the penalty imposed by the Stewards confirmed.

71. MR C TUCK: I agree.

72. MS J MADSEN: I agree.

73. Accordingly, the Panel makes the following orders:

1) Appeal against finding of breach of AR48(2) dismissed

2) Finding of breach of AR48(2) confirmed

3) Appeal against the severity of the penalty is dismissed.

4) The penalty of 4 months disqualification and the fine of $5000 is confirmed. The period of disqualification is to commence on 27 February 2020 and to expire on 27 June 2020. During the period 19 February 2020 and 27 February 2020, Mr Allard is not permitted to start a horse in a race.

5) Appeal deposit is forfeited.