RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTER OF THE APPEAL OF DAMIAN LANE

Appeal Panel:	**Mr T Hale SC – Convenor**
	Mr C Clare
	Mr J Murphy
Appearances:	**Racing NSW: Mr M Van Gestel, Chairman of Stewards**
	Appellant: Mr P O'Sullivan, Solicitor
Date of Hearing:	**13 April 2018**
Date of Decision:	**13 April 2018**

REASONS FOR DECISION

Mr T Hale SC – Convenor (Mr C Clare, Mr J Murphy agreeing)

Introduction

1. Damian Lane ("the Appellant") is a licensed jockey.

2. On Saturday 7 April 2018 he rode the horse, *Eldorado Dreaming* in race 6 at Randwick racecourse. Race 6 was the *Inglis Sires' Produce*, a Group 1 race over a distance of 1,400m. It was on the first day of the Championships. The total prize money on offer was $1 million. First prize was $580,000.

3. *Eldorado Dreaming* won the race at a starting price of $81, beating the favourite *Oohood* by half a head.

4. Later that day there was a Stewards' Inquiry into the running of the race. The Appellant was charged, and pleaded guilty, to a breach of AR137A(5)(a)(i) and also (ii).

5. For the breach of sub-rule 5(a)(i) he was reprimanded. For the breach of sub-rule 5(a)(ii), the Stewards suspended him from riding for a period of 7 days commencing on Saturday 15 April 2018 and expiring on 22 April 2018. In addition, he was fined $5,000.

6. The Appellant has appealed to this Panel pursuant to s42 of the *Thoroughbred Racing Act, 1996* from the decision of the Stewards but only in relation to the

breach of AR137A(5)(a)(ii). He appeals only against the decision on penalty. The appeal is by way of a new hearing.

7. At the hearing of this appeal, Mr Marc Van Gestel, Chairman of Stewards, appeared for the Stewards. Mr Paul O'Sullivan, solicitor, appeared with leave for Mr Lane.

8. A person who fails to comply with AR137A is guilty of an offence by reason of AR137(8). Although the appeal before us only concerned a breach of AR137A(5)(a)(ii), it is convenient to set out the whole of AR137A(5) which provides that:

> AR137A (1)(5) Subject to the other requirements of this rule:
>
> (a) In a race, official trial or jump-out prior to the 100 metre mark;
>
> (i) The whip shall not be used in consecutive strides.
>
> (ii) The whip shall not be used on more than 5 occasions save and except where there have only been minor infractions and the totality of the whip use over the whole race is less than permitted under AR137A(5)(a) and (b) and also having regard to the circumstances of the race including distance and context of the race, such as a staying race or a rider endeavouring to encourage his mount to improve.
>
> (iii) The rider may at his discretion use the whip with a slapping motion down the shoulder, with the whip hand remaining on the reins.
>
> (b) In the final 100 metres of a race, official trial or jump-out a rider may use his whip at his discretion.

9. The charge was in these terms:

> The particulars of the charge under AR137A(5)(a)(i) being that as the rider of *El Dorado Dreaming*, in Race 6, the Group 1 *Inglis Sires' Produce* conducted at Royal Randwick on 7 April 2018, prior to the 100 metres, (Jockey Lane) did use your whip on two separate consecutive occasions.
>
> The particulars of the charge under AR137A(5)(a)(ii) being that as the rider of *El Dorado Dreaming*, in Race 6, the Group 1 *Inglis Sires' Produce*, conducted at Royal Randwick on 7 April 2018, prior to the 100 metres, (Jockey Lane) did use your whip on that gelding on 9 occasions prior to the 100 metres, 4 more than what is permitted by the rule.

10. We received in evidence as Exhibit A, a bundle of documents relating to the appeal including the transcript of the hearing before the stewards on Saturday 7 April 2018. Also received into evidence was a document setting out the official race results of Race 6 (Exhibit B), a schedule entitled "NSW Whip Penalties" (Exhibit C), which listed all penalties imposed for whip-related offences since 11 March 2017; a scheduled entitled "Whip Offences – Group Races" (Exhibit D), which provided details of penalties imposed for whip-related offences in group races since 11 March 2017; and a document entitled "Riding Penalty Guidelines for Whip Rule Breaches" (Exhibit E). In addition, Mr Lane gave oral evidence and was cross-examined by Mr Van Gestel.

Outline of the facts

11. As I have mentioned, the Appellant, was riding *Eldorado Dreaming* in Race 6. It was not in dispute that he struck the horse with his whip on nine occasions prior to the 100m mark. On two occasions he struck in consecutive strides. It was in respect of this that he pleaded guilty and was reprimanded for a breach of AR137A(5)(a)(i). *Eldorado Dreaming* was the outside horse. Coming from the outside it narrowly beat the favourite, *Oohood,* by half a head. In his evidence before the Stewards and in his evidence before this Panel, the Appellant said he did not deliberately break the rule, rather, he said that it was a genuine mistake. In his evidence before the Stewards he said:

> *It's a Group 1. I'm going – I'm a chance of winning. It was a genuine mistake. I just got carried away and I didn't – it wasn't, as I already said, it wasn't done with intent to break the rule.*

This evidence was not challenged in cross examination, and I accept it.

12. He also explained that when he came around the turn he had the whip in his left hand, which was unusual. The Appellant did this because he had seen film of the horse racing at its last start, in which he observed that on the turn it veered out and away from the rails. The Appellant transferred the whip into his left hand to strike the horse on its left side to assist in keeping it from moving out. He said that because he was using the whip in his left hand, which was unusual for him, he got "a little bit out of rhythm on a couple of occasions. That's why I've hit on consecutive occasions".

Rule AR137A(1)(5):

(5) Subject to the other requirements of this rule:

(a) In a race, official trial or jump-out prior to the 100 metre mark;

(i) The whip shall not be used in consecutive strides.

(ii) The whip shall not be used on more than 5 occasions save and except where there have only been minor infractions and the totality of the whip use over the whole race is less than permitted under AR137A(5)(a) and (b) and also having regard to the circumstances of the race including distance and context of the race, such as a staying race or a rider endeavouring to encourage his mount to improve.

(iii) The rider may at his discretion use the whip with a slapping motion down the shoulder, with the whip hand remaining on the reins.

(b) In the final 100 metres of a race, official trial or jump-out a rider may use his whip at his discretion.

13. At the hearing before us, the Appellant maintained his plea of guilty and appealed only against the severity of sentence.

14. AR137A(5)(a)(1) and (b) are clearly expressed. Under sub rule 5(a)(i), prior to the 100 metres mark the whip must not be used in consecutive strides. Under sub rule 5(b), in the final 100 metres of a race, the rider may use his whip at his discretion. Sub rule 5(a)(ii), however, lacks the same clarity. It provides that prior to the 100 metres mark the whip must not be used on more than five occasions. That much is clear. It is the interpretation of the exception to that restriction which gives rise to some difficulty. The exception was inserted with effect from 1 February 2017, with the evident intention of softening the harshness of the sub-rule.

15. Mr O'Sullivan, on behalf of the appellant, accepted that the whip was used on nine occasions prior to the 100 metre mark and that as such, there has not been a "minor infraction" within the meaning of the sub-rule. Therefore, the exception in AR137A(5)(ii) did not apply. It is therefore not necessary to construe the exception. However, given the discussion during the appeal about how the exception should be interpreted, I nevertheless consider I should draw attention

to some of the difficulties of interpretation. This may be of some assistance in any future redrafting of the rules of racing.

16. Firstly, the words "is less than permitted" in relation to "the whip use over the whole race", suggests a numerical reference point. However, there is no numerical reference other than "5 occasions", which is the numerical standard the subject of the exception. In the final 100 metres the rider may use his whip at his discretion. As such, there is no numerical limit on whip use. There will, of course, be a practical limit on whip use in the final 100 metres as there will only be finite or limited numbers of occasions on which the rider will be able to use the whip. The "whip use over the whole race….. permitted under AR137A(5)(a) and (b)" appears to contemplate the "5 occasions" under sub rule 5(b), plus the maximum possible occasions of whip use in the final 100 metres under sub rule5(b). It does not seem that that the whip use under sub rule 5(a)(i) or 5(a)(iii) are relevant. Under sub rule 5(a)(i), the use of the whip in consecutive strides is still using the whip twice. Under sub rule 5(a)(iii), whip use is unrestricted. On this approach, the permitted whip use is to be determined by reference to an uncertain numerical standard, being the maximum number of occasions that a rider would be practically able to use the whip in the final 100 metres. Even well informed and experienced minds are likely to disagree on what that number is.

17. Secondly, it is not clear what is meant by "minor infractions". It seems to me that it is primarily intended to be a reference to the number of strikes in excess of 5, but it might also contemplate whip use of less than normal force. I think it contemplates both. Whether the infraction is a minor infraction will be informed by "the circumstances of the race", to which regard must be had. A particular number of additional strikes in a staying race might be considered a minor infraction, but the same number of strikes in a sprint may not.

18. The historical background to the rule was explained in the decision of this Panel *In the Matter of Ben Melham* dated 31 March 2007. The Panel was comprised of Mr D Campbell SC (convenor), Mr T Carlton and Mr K Langby. The Panel said at [8] about the introduction of the rule:

> "When introducing the rule for the first time in August of 2009, the then Chairman of the Australian Racing Board, Mr RG Bentley stated:

"These changes send a clear message that Australian racing is fully attuned to the contemporary community expectations. The need for change is clear and there was no point fiddling around at the edges. There is no point procrastinating where there is industry and public expectations that practices of the past are no longer condoned."

19. Mr Bentley was making the point that unrestricted use of the whip was contrary to the expectations of the public and the racing industry. To meet those expectations, a limit was to be placed on the use of the whip.

20. AR137A must be read with AR196(1) and (2). AR196(1) provides that the penalty that may be imposed includes "a fine not exceeding $100,000". AR196(2) provides for an exception in the case of a breach of AR137A. It is in these terms:

> **AR 196.** (1) Subject to sub-rule (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.
>
> (2) In respect of a breach of AR137A the Stewards may in addition to the penalty options conferred on them under subrule (1) of this Rule order the forfeiture of the rider's riding fee and/or forfeiture of all or part of the rider's percentage of prizemoney notwithstanding that the amount exceeds $100,000.]

21. This emphasises the seriousness of a breach of AR137A. *In the Matter of Ben Melham* the Panel said this at [24]:

"An examination of AR 196 reveals the seriousness with which the governing body regards breaches of AR 137A, allowing the forfeiture of prizemoney even if it exceeds $100,000, and also by allowing for a fine of up to $100,000 in addition to any disqualification or suspension that might be imposed"

22. AR196(2) seeks to ensure compliance with AR137A by deterring riders tempted to breach the rule with not only a suspension or fine if found to be in breach, but also with the prospect that all or part of the rider's share of prize money and riding fee may be forfeited. Forfeiture is not limited to $100,000, which is the maximum fine that may be imposed. The rule contemplates the possibility that in a major race a penalty of more than $100,000 may be imposed.

23. In considering a penalty for a breach of AR137, consideration is to be given to the penalty option of forfeiture. That, of course, does not mean that a penalty of forfeiture must be imposed. It need only be considered. A fine and a forfeiture order are both financial penalties. It is clear from AR196(2), that in considering the financial penalty, whether by way of forfeiture or fine, it is relevant to take into account the sum that the offending rider has received as a percentage of prize money (and riding fee). I do not read the rule as requiring such a restrictive and mechanical approach so as to only permit a financial penalty based upon the rider's financial benefit from the race to be imposed by way of forfeiture. Obviously enough, if an order for forfeiture is made, the considerations upon which it is based cannot also be taken into account in determining the amount of an additional fine.

The principles to be applied

24. Mr Van Gestel referred us to the decision of this Panel in the matter of the appeal of *Noel Callow*, 9 May 2007. The Panel was comprised of myself as convenor, Mr Carlton and Mr Clare. In particular, he referred us to paragraphs 37-43 and 44(c). Although the decision concerned the charge of careless riding, the paragraphs to which Mr Van Gestel referred us, concern the importance of deterrence as a factor in determining the appropriate penalty. After having referred to the importance of deterrence in the protection of the public in professional disciplinary matters, I said this at [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.*

25. At [44(c)] I referred to:

> *…the need for deterrence, particularly in a Group 1 race with substantial prize money. Not only is it important to deter the Appellant from repeating his breach, it is important*

that the penalty deters others who might be tempted to fall short of the standards expected of jockeys in races where large prize money is involved.

26. Mr Van Gestel submitted that these principles have particular application to the determination of the appropriate penalty in the present case. I agree. This is particularly so in the present matter, having regard to AR196(2) and that, as Mr Van Gestel emphasised, the prize money for the race was $1 million and first prize was $580,000.

Relevant matters for consideration

27. The period of suspension imposed by the stewards is seven days commencing on Saturday 15 April 2018 and expiring on 22 April 2018. That would prevent the Appellant from riding on Saturday 21 April. It is not in dispute that the Appellant has been engaged to ride in six races at Royal Randwick on that day.

28. The Appellant gave evidence, which is not in dispute, that he has been engaged to ride at Randwick on Saturday 21 April in six races. Two are Group 1 races and three are Group 3 races. If the suspension is maintained, it is likely to have a significant financial impact upon him. Mr O'Sullivan also points to the unchallenged evidence, referred to above, which I have earlier referred to, that the Appellant did not intend to breach the rule and that he did so as a result of a mistake.

29. Mr O'Sullivan, on behalf of the Appellant, rightly submitted that these were important matters to be given significant weight in determining penalty. He also emphasised that the Appellant's record in relation to whip offences has been good over the last 12 months. There has only been one offence. It was on 13 May 2017 for a ride at Morphettville in South Australia. He was reprimanded.

30. Other matters of particular relevance which we take into account and give weight to are:

    (i) the Appellant used the whip on nine occasions before the 100 metre mark compared with the five occasions permitted under the Rule;

    (ii) on two occasions he used the whip in consecutive strides;

(iii) the race was a major Group 1 race, *The Sires' Produce*, on the first day of the Championships. The prize money for the race was $1 million with $580,000 for first place;

(iv) his mount only just won. It beat the favourite by a half head.

31. In relation to the last matter, it cannot be known whether the advantage obtained by the breach of the rule, that is by using the whip on more than five occasions, contributed to the win. Mr Van Gestel points out, and I accept, the fact that any advantage from the breach might have contributed to the win affects the integrity of racing.

Penalties in other cases

32. With particular reference to these considerations, we were taken to the penalties that were imposed in other cases.

33. As has been mentioned, Exhibit C is a three page schedule setting out "NSW Whip Penalties" since 11 March 2017. Exhibit D is a schedule of whip offences in group races since 11 March 2017. It is also to be noted that in the Stewards' report for the race meeting on 7 April, it was recorded that there were nine occasions in which there was a breach of AR137A(5)(a)(ii), in which "bearing in mind the totality of whip use, no action was taken". The strikes were between six and eight. In addition, in race 10, jockey Michael Dee was suspended for a breach of the rule for one week from 22 April to 29 April 2018.

34. In his helpful submissions, Mr O'Sullivan also carefully took us through a number of previous decisions concerning similar breaches including the following:

(a) On 11 March 2017, Tye Angland breached the rule with eight strikes. It was in a Group 1 race in Sydney with the first place prize money of $348,000. He was not suspended but fined $4,000. He won the race;

(b) On 25 March 2017, Ben Melham breached the rule with 15 strikes. He came first in a Group 3 race with prize money of $84,000. He appealed to this Panel. The decision of the Panel refers to the fact that he had a very poor record. In the previous 12 months he had breached the rule on 20 occasions. The Panel considered that this evinced a contumelious

disregard of the rule. Moreover, before the race, the stewards warned him about excessive use of the whip and urged compliance by him. He was suspended for 2 weeks from 2 April to 16 April 2017 which included one of the days of the Championships. He was also fined $2,000;

(c) On 8 May 2017, Corey Brown breached the rule with 11 strikes. He came third in a Group 1 race when the prize money for first place was $400,000. He was suspended for one week from 14 to 21 April 2017 and fined $2,000.

Resolution

35. Consistency in the importance of penalties for similar offences is important. However, the principal consideration is to impose the appropriate penalty in accordance with the Australian Rules of Racing and their intent, having regard to all the relevant circumstances of the offence. In the circumstances, I and the other members of the Panel, are strongly of the view that a period of suspension is warranted and that that period is a suspension of one week. After anxious consideration I, and the other members of the Panel, also consider that a fine of $5,000 is the appropriate penalty.

36. The seriousness with which the rules regard a breach of AR137A is demonstrated by AR196(2). A fine of less than $5,000 would not publicly mark the seriousness of the breach. Having regard to the prize money on offer in this major race, a fine of an amount of less than $5,000 would not be seen as a sufficient deterrent to those who might be tempted by substantial prize money to breach AR137A. Even $5,000 is only a small proportion of the Appellant's share of the prize money in winning the race. AR136(2) contemplates that the whole of the rider's share of the prize money might be forfeited. This rule, of course, is only intended in the case of the most serious of breaches. When compared with the most serious of possible breaches, it could not be said that the circumstances of the breach in the present case are such that a fine of $5,000 and a week's suspension is excessive.

37. Mr O'Sullivan submitted that in the circumstances, such a penalty would be excessive and out of line with the penalties in the previous decisions to which

he took us. I do not think that he is correct. But if he is, then it may be that some of the penalties imposed in the past for a breach of AR137A are too lenient.

38. For these reasons, I find that the Appeal should be dismissed, the fine and suspension imposed by the Stewards and the Appeal deposit is forfeited.

MR C CLARE: I agree with the reasons and proposed orders of the Convenor.

MR J MURPHY: I agree with the reasons and proposed orders of the Convenor.

The Panel made the following orders:

1. Appeal against penalty dismissed
2. Penalty of 7-day suspension and $5000 fine confirmed. Such penalty to commence on 15/04/2018 and to expire on 22/04/2018 on which day the appellant may ride.
3. Appeal deposit forfeited.