RACING APPEALS TRIBUNAL

NSW

MR D. B. ARMATI

EX TEMPORE DECISION

10 September 2021

Appellant Licensed Rider's Agent

John Walter

Respondent Racing NSW

LR71A(a)

SEVERITY APPEAL

DECISION:

1. APPEAL UPHELD

2. PENALTY OF DISQUALIFICATION OF 5 MONTHS FROM 6 JULY 2021

3. APPEAL DEPOSIT REFUNDED

1. The appellant, former licensed rider's agent, Mr John Walter, appeals against the decision of the Appeal Panel of 6 July 2021 to impose upon him a period of disqualification of six months for breach of LR71A(a).

2. That rule in its entirety provides as follows:

> ***LR 71A.*** *- Except with the written permission of Racing NSW, any rider's agent who:*
> *(a) bets, has an interest in a bet, or facilitates a bet; or*
> *(b) provides either directly or indirectly to any person for any direct or indirect financial or other benefit (regardless of whether such benefit materialises) any tip, or any other information or advice that may influence any person to bet,*
>
> *on any NSW race in which a rider whom the rider's agent represents (in accordance with AR1) is engaged to ride, commits an offence and may be penalised.*

3. The point of reading the whole rule is to put into context the limitations that were imposed by the introduction of that local rule on 1 August 2019. The key parts of the rule relating to this appellant and the particularised breaches by him are:

> "any rider's agent who bets … on any race in which a rider whom the rider's agent represents is engaged to ride."

4. The particulars of the breach are set out in detail in a table format. In summary terms they are that on five New South Wales races the appellant effected 25 individual bets. He did so on three dates: 27 February to 2 March 2020; 14 November to 27 November 2020; and 12 December 2020. The total investment in the 25 bets was $5,109 and produced a return of $17, 940.

5. This is a severity appeal only. The appellant pleaded guilty to the Stewards inquiry, maintained that plea before the Appeal Panel and does not dispute on this appeal that he breached the rule. Because it is a severity appeal, the need to set out the evidence in greater detail falls away.

6. In summary terms, the evidence comprises the material that was before the Appeal Panel. Critically, that contains the Stewards inquiry and correspondence between the respondent and the appellant's solicitor, Mr O'Sullivan, in respect of a request to disclose information. In addition, there are two reports, one by Dr James Champion, a confidential psychological report, and the second by Roslyn Phillips of Tranquility Counselling Services of 29 June 2021. They were additional exhibits available to the Appeal Panel and not before the Stewards.

7. The Appeal Panel hearing also contained evidence from the two jockeys that the appellant had been representing, Mr Josh Parr and Mr Tim Clark. That part of the evidence can be disposed of on the basis that the Stewards were not able to find, and Messrs Parr and Clark confirmed, that there was nothing of an integrity nature in respect of the individual races in which they were engaged and upon which the appellant bet.

8. The rule as stated was introduced on 1 August 2019 and the evidence establishes that it was introduced in New South Wales only and was done so for integrity reasons. Integrity being to ensure that there was not a perception within the industry and by its observers that rider's agents were using information for their own betterment, that is, in engaging their own bets – LR71A(a) – or, alternatively, conveying inside information gleaned by them to others by way of tipping – LR71A(b).

9. That integrity issue has said to have arisen in New South Wales as a result of a ride in which Parr was engaged in November 2018 and an inquiry was conducted. It was the submission for the respondent, contested on an evidential basis, that the appellant was involved in that incident. The inquiry found no reason to effect charges against the jockey Parr or others in respect of his ride, which had aroused suspicions. The evidence does establish that at the time the appellant was the rider's agent for Parr, but that is not an aspect of objective seriousness by reason of his direct and improper involvement in that race being established on the evidence. It was, however, a reason for the introduction of the rule.

10. The facts are that the appellant has been associated with the racing industry in various forms of employment his whole adult life. Essentially, it is his industry. He had an engagement of some years with the jockeys Parr and Clark, each of whom are leading riders and with whom he formed very close friendships involving their families and children as well. In addition, the appellant effected a tipping agency through which he was engaged by subscription by punters to provide to those punters his tips. It is obvious that the Local Rule 71A had an impact upon his capacity to do that. Indeed, the evidence establishes that his tipping business income dropped by 70 per cent as a result of the introduction of the Local Rule.

11. He has given to the stewards, nevertheless, that he elected, by reason of his friendships and loyalty, to continue to be the rider's agent for both Parr and Clark. At or about this time he suffered substantial financial loss by reason of the downturn in his tipping business, as described, of 70 per cent. It appears that that had a substantial effect upon his mental health. In addition, there was a family illness of his mother, which subsequently had a substantial impact upon him and, subsequently, in the course of all of these events his mother died.

12. The impact of all of those matters caused him to consult, in June 2020, with Ms Phillips, psychotherapist. She diagnosed him, it appears the evidence establishes, with ADD and PTSD. The symptoms of presentation that he continued to exhibit were 11 in total and they are set out in her report. It is not necessary to read those on to the record. She was satisfied that those symptoms were exacerbated by the impact of Covid-19 and generally, and the loss of his mother, coupled with the financial and emotional impact that he then was experiencing. This led him, and this is the critical point of her report, to "poor decision-making due to the inability to focus and think things through rationally when in an elevated state of mind," and this was "exacerbated due to the ADD".

13. Noting that those matters occurred in June 2020, it is apparent that it is able to be concluded, without taking expert evidence but an aspect of judicial notice, that when he engaged in the conduct that is alleged against him, those conditions were in existence. The relevance of that is the impact upon his decision-making processes.

14. The appellant had a number of betting accounts. He did not use them. He was residing then in the Gold Coast area of Queensland and he went to local hotels to effect the bets as stated, five races and 25 individual bets. He did so in cash. Nothing turns upon that. His wife was asked to collect his winnings, and the evidence establishes that nothing adverse is to be found by that. It is simply that it was, as described in the submissions, an unsophisticated scheme. It was not one in which there was subterfuge in betting and the like, for example, using a third party to effect the bets so that he could be not found out directly should, for example, his betting accounts be examined. As stated, the total of the five bets was $5,109 and it returned to him $17,940.

15. The respondent states that there are aggravating factors contained in two of those matters: the 14 November 2020, an isolated bet, an occasion on which he placed a bet on a horse ridden by Clark, but also in the same race on a horse ridden by another jockey, that is, an opposing horse. That is said to be an aggravating factor and the Tribunal is satisfied that it is. The second incident said to be aggravating was a 2 March 2020 involvement in which Parr had engagements to ride two horses. It is the gravamen of the aggravation point of the respondent that the appellant knew that one of those would be scratched and, therefore, when he took his bet, he did so as a double knowing that with the scratching he would be able to get a better win and place bet than would otherwise be the case.

16. The evidence does not establish, because the appellant could not recall at the Stewards inquiry, actual knowledge at the time he placed the bet, and that is the critical time, of the actual scratching of the horses. It has not been expressed, but the issue remains open whether another jockey might have been engaged on one of the horses, but that is speculation by the Tribunal and not part of evidence or submissions. In any event, it is not sufficient to establish actual knowledge, although the implication is a reasonable one.

17. It is said, therefore, that the gravamen of that conduct goes to the perception that he had inside information, not as to whether he actually did or did not. As to the 14 November matter, the perception, of course, is one quite unfavourable of betting on opposing horses when his jockey was engaged to ride on another horse.

18. Those then are the key facts. Some other facts will come out in the analysis.

19. The first issue to determine is the legal principles to be applied.

20. They are not in issue in this appeal. In essence, in the decisions of *Smith 15 August 2014* and *Atkins*, of which the Tribunal does not recall the date, each set out a number of principles. In essence, the key matters to be distilled are from those two decisions as well as the many times in which the Tribunal has reflected upon these matters.

21. Relevant to this case is that it is necessary in this civil disciplinary proceeding to find a protective order having regard to the objective seriousness of the conduct and, in particular, the message to be given to this individual and to the industry and outsiders at large as to the consequences that flow from integrity-related issues and perceptions of integrity, such as arose here.

22. The Tribunal has touched upon the conduct. Assessing, therefore, and that is not said to be an exhaustive assessment of the principles being considered, those matters in relation to this conduct, great reliance is placed by the respondent upon the fact that the appellant knew about this rule, and he does not hide from that. He, quite frankly, expressed to the Stewards, and it was apparent from correspondence sent by Mr O'Sullivan on his behalf earlier, of his knowledge of the rule, that he could not do that which he engaged in. This was no error of misunderstanding. It was a series of conduct, five only, and the submissions touch upon the fact that he could have done it many more times. But the Tribunal does not place a great deal of weight upon that because it is that the fact he elected to have a licence that carried with it privileges, and one of the duties associated with the benefit of that privilege was to know the rules and comply with them.

23. There is a very, very strong integrity issue to be found in the fact that a licensed person knowingly acted in disregard of the rules. It is, as the respondent has submitted, that the appellant is not blameless and he has engaged in deliberate and intentional conduct in the sure knowledge that he was breaching the rules. It is a further fact that whilst he could have done it on many occasions, he did it on

three separate groups of occasions, as set out in the facts earlier, and did so on 25 occasions, that is, that on 25 times knowing he was acting in breach of the privilege of his licence and the rules he elected to place bets, and he did so for financial benefit. That conduct must be the subject of a condign penalty.

24. There is, therefore, in addition the perception fact, not only a perception in the community generally that a civil disciplinary protective order must clearly reflect that a person who deliberately breaches the rules on a number of occasions in the sure knowledge of those rules must lose privileges; there is the general perception that the conduct is capable of it being engaged in on what is known as insider information. Of course, there are criminal sanctions for such conduct under the New South Wales law in any event and that is a reflection of the gravity of the conduct.

25. The Tribunal is satisfied that the integrity of the industry is at risk if this type of conduct is not the subject of a loss of privilege. Objectively, therefore, the facts in favour of the respondent are serious, but some matters are able to lessen the gravity of that objective seriousness. The Tribunal is satisfied that this was, as earlier expressed, not part of a sophisticated scheme. Critically, there is no evidence that in any of the 25 bets there were actual issues involving the integrity of the race itself and, in particular, in respect of the integrity of the individual jockeys.

26. In addition, there is the fact that the bets were relatively modest, although some $5,100 when it was divided across 25 bets and the winnings when divided across 25 bets do not make them simply token bets; they were more than that. They were designed to provide financial benefit and they did. Of course, a person who is a tipping agent would expect to have a greater capacity to bet and, therefore, the fact that there was a profit made itself is not one which gives an adverse implication. It has not been submitted, but it is apparent also, that no-one else was adversely affected by the conduct of the appellant.

27. The results are this in respect of objective seriousness. In assessing the message to be given to this appellant, and that is part of the civil disciplinary

protective order required, it is necessary to have regard to what else was in his mind; what other affectation of the mind was occurring with this appellant. The Tribunal has referred to the diagnoses and the conditions to which he was subject at the time. The Tribunal particularly notes, and returns to the statement of Ms Phillips, of an inability to focus and think things through rationally when in an elevated state of mind.

28. The Tribunal is satisfied that that reduces the objective seriousness of the conduct in which the appellant engaged because the necessity for a message diminishes. There is the fact also on that diminution of message of the financial impact of the appellant's conduct. In that regard it is noted also it is a subjective factor that the appellant when approached by the respondent in respect of betting elected from that time of disclosure to cease his involvement with Parr and Clark voluntarily.

29. Two aspects go to the message. The first is the financial impact of that severance, and it was prior to any loss of privilege; and, secondly, the loss of friendships, to which reference has been made. There is reflection also on the necessity for a message to this individual of the fact that he set out to assist Parr and Clark with the former jockey Angland, who had become a rider's agent, and he voluntarily provided assistance to Angland in various ways, which do not need description in detail, to establish himself with both Parr and Clark as his new clients. It is apparent, therefore, from that good conduct that the message for this appellant diminishes.

30. This is the first occasion, it appears, on which a rider's agent has been dealt with for breaches of the Australian Rules of Racing. There is no evidence to the contrary. It is the first occasion on which the Local Rule has been considered for the determination of an appropriate starting point on penalty. It is to be noted that it is not one of those rules for which mandatory minimum penalties are prescribed.

31. The respondent has drawn from AR115(1)(e), a local rule, which provides mandatory minimum disqualification periods and, in particular, for a jockey betting on a race in which a jockey is engaged, a mandatory minimum disqualification of

two years is apt to consider how some thought might be given to determining a starting point.

32. The appellant strongly opposes that on the basis that there are strong distinctions between the actions of a jockey before, during and after a race, and also in respect of the actions of numerous other people engaged in the racing industry as against a rider's agent, and the limited role that a rider's agent takes.

33. In respect of the jockey first, the Tribunal agrees that that can simply be an indication of what would be a much higher starting point mandatory minimum by reason of the actions of a jockey in a race and engaging potentially with other jockeys and the like to affect the outcome of a race. A rider's agent cannot do that directly for obvious reasons.

34. In respect of the others, such as trainers, foremen, stablehands, trackwork riders, vets farriers and owners, it is suggested that they all are capable of betting as against a rider's agent, who is not. In respect of that group of people, their privileges as such, where licensed, or their rights when not licensed, have not been reduced by an equivalent local rule. The Tribunal agrees that those people are all capable of having inside-type information and using it potentially adversely. That does not exculpate them from it and, as reflected, it would engage in criminal conduct in any event, and in other cases breaches of the rules, which need not be particularised. However, the Tribunal sees no great benefit in that because a specific local rule has been put in place to affect this licensed agent.

35. The starting point, therefore, must be less than two years. In this matter, the starting point has two key factors, a knowing breach of the rule and the perception on integrity. The former elevates what would otherwise be a lesser starting point that the Tribunal would otherwise consider appropriate. In passing, the Tribunal notes that before the Appeal Panel, Principal Member Mr Beasley, found the starting point of six months, and members Murphy and Nicholson did not express a starting point, but merely determined an end point of six months, although they did indicate that they applied a discount for the plea, unspecified. It is noted also in passing that Principal Member, Mr Beasley, found a six-month starting point from

which he gave a discount for plea and cooperation to find a penalty of four months and two weeks. But the six months of the majority is that which was put in place.

36. The Tribunal is of the opinion that a starting point of nine months disqualification is appropriate for this breach. It is also of the opinion, for the two reasons expressed on gravity, namely, knowing an intentional breach of a rule by a licensed person and the strong aspects of perception of integrity are such that that is an appropriate starting point.

37. It is then a question of whether any discount should be given. This is becoming in the industry, on regulators' views, such that less weight might be given to these subjective factors than would otherwise be the case in other fields.

38. The Tribunal remains, however, of the opinion that in respect of messages and the like, a person is entitled to expect that factors in their favour can lead to a discount. In some cases the objective seriousness is so grave, and the Tribunal has determined this in a number of matters recently, that no discount be given at all. It is not of the opinion that that is appropriate here.

39. Whilst not giving a double discount, there are the mental health issues that have been identified, which stand in his favour. They are in this case, in the Tribunal's opinion, substantial factors. The reports were not before the stewards.

40. There is also the fact that he has at all times admitted a breach of the rule and has cooperated with the Stewards. It is the case in New South Wales at the moment that when those two facts exist, a discount of 25 per cent is appropriate. In some cases it might not. The Tribunal is of the opinion that it is appropriate here. Without further analysis there will be a discount of 25 per cent.

41. This case, however, contains some slightly different facts within what might be described as the aspects of cooperation. The Stewards found out something and in January 2021 there was correspondence with the appellant, which sought information about his betting. The Stewards, not surprisingly, were not prepared to tip off what they knew. Accordingly, the appellant went away and himself examined

his records and came up with the details of the bets, which were potentially in breach of the local rule. In further correspondence, he actually identified the bets placed by him in breach of that rule.

42. The appellant emphasises, and the respondent acknowledges, there is a utilitarian value in that assistance. It goes beyond that which would be normally cooperating in the sense of attending inquiries and the like. It is not self-reporting because he was approached by the regulator to self-disclose. However, he did self-disclose. The Tribunal is more than strongly satisfied that the effect of that disclosure by the appellant reflects, firstly, favourably to him on the message to be given to him but, critically, has an extraordinarily high utilitarian value.

43. Of the thousands of possible bets that might have had to have been researched and the numerous venues at which the regulator may have had to have inquired, and the numerous betting agencies with which he was registered that would have to have been inquired, and the possibility of telephone records being examined by him and others and the like, has been eliminated by the voluntary disclosure. That utilitarian value, in the Tribunal's respectful opinion, was not adequately reflected by either the Appeal Panel or the Stewards. It was, of course, given weight, but not, in the Tribunal's opinion, sufficient weight.

44. The other facts are financial loss. That is, however, an inevitable consequence of breaching the privilege of a licence. It is not entirely disregarded; it is taken into account. There is the fact also, reflected upon already, of the assistance provided to Tye Angland and the voluntary severing of the appellant's relationship with Parr and Clark. There is also the 70 per cent loss of income of real occasion to him, which led in part to his mental issues.

45. There were only five occasions on which he bet and they were spread not over 11 months in that sense but in two batches, as set out in the dates. That is a lesser series of conduct than he might otherwise have engaged in, although he must face up to those in which he has engaged.

46. There is the fact also that the appellant has a good record. Whilst a rider's agent is perhaps one of the least likely people to come under adverse notice, he, nevertheless, has been in the industry for some 20 years and he is entitled to have that taken into account, but it is a very minor factor here.

47. Those then are the subjective factors. The Tribunal has expressed it is of the opinion that those matters should lead to a reduction in the starting point of nine months.

48. The Tribunal does not have to express discounts with mathematical exactitude, but in the circumstances has determined that in addition to the 25 per cent an approximate further discount of 20 per cent is to be given. That would equate to some 45 per cent, but in calculating periods in months, weeks and days, it becomes difficult to calculate precisely. So the Tribunal does not say it is a 45 per cent discount but, in the circumstances, gives a four-month discount on the nine months.

49. The Tribunal has to determine is whether it should be a disqualification, a suspension or a fine. The Tribunal has not analysed those submissions. It now does so. The Tribunal considers the objective seriousness far outweighs any possibility of imposing a fine upon this appellant. The Tribunal agrees with the submissions of the respondent that a suspension of a person who has voluntarily surrendered their licence would be no penalty at all. The Tribunal does not agree with the submissions for the appellant that the imposition of a fine plus time served to date of some two months and four days would adequately reflect the protective order that is required.

50. In the circumstances, however, the effect of the Tribunal's order is that the totality of the penalty is less than that imposed by the Appeal Panel.

51. The orders of the Tribunal are that the appeal against severity is upheld.

52. The Tribunal imposes a period of disqualification of five months to commence on 6 July 2021.

53. This was a severity appeal. The severity appeal has been successful. The appellant seeks a refund of the appeal deposit and the respondent did not wish to be heard on that application.

54. In those circumstances, the Tribunal orders that the appeal deposit be refunded.