RACING APPEAL PANEL NEW SOUTH WALES

APPEAL OF LICENSED JOCKEY ANDREW GIBBONS

Appeal Panel:	**Mr R. Beasley SC – Principal Member; Mr S Skeggs; Mr K Langby**
Date of Hearing:	**8 March 2019**
Date of Decision:	**11 March 2019**
Representatives:	**Appellant – Mr P. O'Sullivan, Solicitor**
	Racing NSW – Mr Marc Van Gestel, Chairman of Stewards

REASONS FOR DECISION

Mr R Beasley SC

Introduction

1. The appellant rode the horse Chewbacca in the SERA Country Championships Qualifier 1400m race at the Goulburn Racecourse on 2 March 2019. Following the race, the Stewards conducted an inquiry into interference caused to the horses Common Purpose and Manzana at about the 1000m mark. During that inquiry, the appellant was charged with, and pleaded guilty to, a breach of the careless riding rule under the Australian Rules of Racing: AR 137(a).

2. The particulars of the appellant's breach were that at about the 1000m mark of the race, he allowed Chewbacca to shift in when insufficiently clear of Common Purpose (which had to be steadied), and then further permitted Chewbacca to continue to shift in when insufficiently clear of Manzana, causing that horse to be checked and lose its rightful running: see T8 of the Stewards' Inquiry, L370-379, Ex A.

3. Following his plea, the appellant was penalised by having his licence to ride suspended for 4 meetings. The number of meetings of the suspension was reached by an application of the careless riding penalty guidelines ("the Guidelines"). His level of carelessness was graded as "medium", and the consequences were assessed as

"checked and or lost rightful running". This results in a 7-meeting suspension. However, the appellant received a discount of 25% for his good record, 10% for his plea, and a further 10% as his suspension covered some important race meetings. The 7-meeting 'base' penalty was therefore reduced by 45% to reach the 4-meeting penalty imposed. The start date for the penalty is Monday 11 March 2019, and the resume riding date is Tuesday 19 March 2019. This is because the suspension covers the following meetings:

- Goulburn 14/3
- Berrigan 16/3
- Bathurst 17/3
- Queanbeyan 18/3

4. The appellant has appealed the severity of the sentence imposed on him, but does not seek to change his plea of guilty to breach of AR 137(a). At the appeal, he was represented by Mr P O'Sullivan, solicitor. The Stewards were represented by Mr Marc Van Gestel, Chairman of Stewards.

5. The following two issues were raised on the appeal:

(a) Mr O'Sullivan submitted that the carelessness should have been graded as low, not medium. This is significant to penalty, as a low grading would result in a base penalty of 6-meetings, not 7. With the discount the appellant was entitled to, a low grading would result in a 3-meeting suspension, in lieu of 4.

(b) Mr O'Sullivan also submitted that the selection by the Stewards of the four meetings outlined in [3] above results in the penalty being unfair, and in excess of a 4-meeting suspension. This is because in truth, the appellant was not intending to ride in these meetings. Rather – supported by evidence given by the appellant in a Statutory Declaration that was not challenged in a relevant way (Ex. 1) - he intended to ride in the following races:

- Hawkesbury on 11 March
- Coffs Harbour on 12 March
- Kembla Grange or Taree on 15 March
- Gosford on 16 March

It is these meetings that the appellant says he should be suspended from, which would allow him to ride at Grafton on 17 March, and Scone on 18 March. By suspending him for the meetings outlined in [3] above, the appellant claims he is "in effect" being suspended for 6 meetings, not 4.

6. At the appeal hearing, the appeal book containing the transcript of the hearing was admitted as Ex A, and the film of the race as B. The appellant's Statutory Declaration concerning his riding intentions was admitted as Ex 1, and a letter from licensed trainer Kris Lees was admitted as Ex. 2. This letter corroborated the intention of the appellant to ride in the meetings outlined in [5(b)] above. Also admitted into evidence, and marked as Ex C, was a document prepared by Mr Van Gestel containing a map of NSW divided into 10 regional racing areas. This map was an aid to explaining why the meetings covering the suspension were chosen by Stewards.

Grading of carelessness

7. Mr O'Sullivan submitted that the carelessness involved in the appellant's admitted breach of AR 137(a) was 'low'. He did not challenge that the consequences, at least for the horse Manzana, were that it was "checked and or lost its rightful running". His contention that the carelessness was low was founded on the following matters and submissions:

(a) From the commencement of the race, until the time of interference, the appellant looked to his inside perhaps as many as 13 times before shifting in. He called out and warned the jockeys of Common Purpose and Manzana that he was shifting in.

(b) The breach of what is described as the "2-length rule" was minor. The appellant asserts he was 1 and 3/4L clear of the other two horses when he shifted in.

(c) Manzana's race manners contributed to the interference it suffered. It pushed up into Chewbacca, or raced 'fierce' (T8 L345), a matter that Manzana's rider gave evidence about at the inquiry: T5 L195.

8. Mr Van Gestel submitted that the carelessness probably was low in relation to the interference suffered by Common Purpose. The appellant did look attentively, and made a relatively minor error of judgement. This was not the case with the interference

suffered by Manzana however. Mr Van Gestel submitted the appellant continued to shift in when he should not have, and was no longer looking or alert to the danger. He shifted in when only fractionally more than a length clear of Manzana. This, therefore, was a medium level of carelessness.

Finding on grading

9. The carelessness involved in the check to Manzana should be graded as 'medium'. The appellant was no longer looking to his inside when he shifted in on that horse. Further, while there is sometimes debate as to camera angles and whether they accurately show the space between horses, the margin between the appellant's horse and Manzana when he crossed in front of that horse and checked it appears from the film to be no more than a length and a quarter, if that. This is supported by the evidence of Manzana's rider: T4 L171-182. Leaving aside the film, that rider was probably in the best position to assess how much room there was.

10. The unsafe margin between the appellant's horse and Manzana when he shifted in – noting that he was continuing a shift that had already caused some inconvenience to another horse - and the lack of a final look, clearly supports a 'medium' grading.

Meetings issue

11. This matter presents a serious and difficult issue to resolve. It is within the Panel's jurisdiction, as the Panel is empowered to vary the penalty imposed, obviously including the length of the penalty, which means that the Panel is empowered to make an order varying the penalty imposed on the appellant such that it expires on 17 March, in lieu of 19 March. This would see the penalty covering the 4 meetings set out in [5(b)] above, rather than [3]. This is the course urged upon the Panel by Mr O'Sullivan, as he submits the penalty currently imposed works an unfairness, and is in effect a 6-meeting suspension – a matter that should not be the outcome from the application of the Guidelines.

12. Mr Van Gestel provided the Panel with an explanation as to why the penalty imposed covers the meetings it does. This was not given as sworn evidence, but is background matters of history that should be accepted unless seriously challenged. The important background matters are these:

   (a) In May 2006, the Guidelines were established, and ratified by the Board of Racing NSW, following consultation and negotiations between Stewards and the Jockeys Association. Mr Van Gestel was involved himself in these negotiations, and played

a lead role in drafting what became the agreed Guidelines. It would appear that the Guidelines were in fact endorsed by the Jockeys Association: see *The Appeal of Timothy Bell*, RAP NSW, 2 July 2010.

(b) Part of what was agreed at the time the Guidelines were endorsed by the Jockeys Association, and then ratified by the Racing NSW Board, was the means by which race meetings would be selected as forming the meetings covered by a particular suspension.

(c) To use the current appeal as an example, when a jockey is suspended from riding following a ride at a racecourse in a particular regional area – in this case the South East region, marked 10 on the Ex C map – a 4 meeting suspension such as the one imposed covers the next meetings in that region, plus any adjoining regions. In this case, the relevant adjoining regions are the Southern Districts region (9 on the map), and the Central Districts region (5 on the map). This is why meetings in those regions form the 4-meeting suspension imposed (see [3] above), and not the meetings outlined in [5(b)] above that the appellant actually intended to ride in. The Panel was told that this method was agreed as it was a means of avoiding some alleged 'gaming' of the suspension process by jockeys who made assertions they were going to ride in race meetings that they were not going to.

13. The Panel is not bound by the Guidelines. They are, however, a highly relevant consideration in the Panel's deliberations on penalty for careless riding. They have the huge advantage of bringing consistency and predictability to the imposition of penalty for careless riding. They are a means by which 'eccentric' decisions can be avoided, and of ensuring similar offending results in jockeys being similarly penalised. There are no doubt many forms of words that could be used, but suffice to say that the Guidelines should not be departed from unless there are very good reasons for doing so. Unless they are given significant weight by the Panel in its deliberations, they would cease to have efficacy.

14. The means by which race meetings are selected for suspensions, as explained by Mr Van Gestel through Ex C, does lead to the appellant being suspended until 19 March 2019, whereas if the meetings included those he intended to ride in, he would be free to ride on 17 March. Mr O'Sullivan submitted this is unfair, and the Panel should accordingly vary the penalty imposed.

15. I accept that the appellant intended to ride at the race meetings outlined in [5(b)] above. I also accept, that as the Stewards have chosen to apply the matters outlined in [12(b) and (c)] above, the four meetings selected mean the appellant cannot ride until 19 March, and hence cannot compete in the race meetings on 17 and 18 March that he understandably wants to.

16. I fully understand why the appellant feels aggrieved, and why he feels he may be suffering a penalty of greater than 4-meetings. This is a serious issue, and I understand why the submission is made that the Guidelines, in this case, result in an unfairness, and the Panel should depart from them.

17. However, in my view, the Guidelines should be followed by the Panel, including the race-meetings covered by the penalty imposed by Stewards. Based on the matters outlined to explain the background as to how meetings are selected to fall within a particular penalty (with the aid of Ex C), I accept that the approach that has been applied since May 2006 is one that was adopted so as to ensure penalties imposed were not 'claytons' penalties, and hence actually serve the main purpose for which penalties are imposed – upholding the image, interests and integrity of horse racing. While the method of selecting what meetings apply may not be absolutely 'perfect' – a view the appellant no doubt would agree with – there are a number of reasons why the Guideline should be followed, even in this appeal:

(a) The manner in which meetings are selected is logical.

(b) It results in all jockeys being treated in a consistent fashion.

(c) As stated above, it avoids 'clayton' penalties.

(d) It has been applied for nearly 13 years. The Panel has to exercise some caution in departing from that application, even if not bound by it.

(e) The Guidelines may not always work perfectly, but that does not of its own establish unfairness or absurdity. There are no doubt instances of careless riding that is graded as medium that might be very close to conduct that constitutes a high level of carelessness. Equally, there might be instances of medium carelessness that are close to a low grading. Under the Guidelines, both attract the same penalty.

That does not make the Guidelines unfair, or absurd. They remain a considered and agreed approach to gaining consistency of penalty, a highly desirable matter.

18. While the matters outlined in the appellant's Statutory Declaration demonstrate that, in this instance, he will be penalised beyond the meetings he says he was going to ride in, I am not convinced that this is sufficient reason to depart from the Guideline method for selecting the meetings that apply to a penalty that was agreed and adopted in May 2006, and has been applied in the nearly thirteen years since. To take a different view – while that is open to the Panel – would undermine the Guideline method chosen for the imposition of penalty for careless riding.

19. Accordingly, the appeal against severity of penalty should be dismissed, and the penalty imposed by the Stewards confirmed.

20. Finally, I note that Ms Skeggs would have allowed the appeal. While the matters raised by Ms Skeggs do not ultimately persuade me that the appeal should be allowed, she has highlighted how the Guidelines will operate differently for certain riders regarding what meetings apply to a suspension. Whether some refinements – with the aid of accurate information as to how some riders actually manage their riding commitments in various regions - either can or should be made to the Guidelines, is something that no doubt can be the subject of discussion between the Jockeys Association on the one hand, and the Stewards and Racing NSW on the other.

21. The Orders I would make are as follows:

    1. Appeal against severity of penalty dismissed.

    2. Penalty of a four-meeting suspension upheld. Such suspension is to commence on Monday 11 March 2019, and concludes on Tuesday 19 March 2019, on which day the appellant may ride.

    3. Appeal deposit forfeited.

Mr Langby

1. I am in agreement with the reasons of the Principal Member, and consider the orders outlined in [21] of his reasons should be made.

Ms Skeggs

1. In relation to the first ground of the appeal, I agree with the Principal Member – for the reasons expressed by him – that the proper grading of the carelessness of the appellant was "medium".

2. However, I would uphold the appeal against penalty in relation to the second ground for the following reasons.

3. First, I accept the matters outlined in the appellant's Statutory Declaration. That is, I accept that but for the suspension imposed upon him, he would have ridden in the race meetings listed in [5(b)] of the Principal Members reasons. Instead, by application of the Guidelines, he has been suspended for the meetings outlined in [3] of those reasons.

4. Secondly, as a result of this, in my view the Guidelines work a real unfairness to the appellant. As he states in his Statutory Declaration, instead of being penalised for four meetings – which I accept is the proper penalty to be imposed upon him – he is in effect penalised for six meetings, simply because he is a rider whose ridding commitments take him beyond the regions that are bordered by the region of the race meeting he was penalised in.

5. Thirdly, while I accept that the Guidelines have been in place for 13 years, I do not consider they should operate as a 'straight jacket' on the Panel in circumstances where it is clear – from unchallenged evidence – that they operate unfairly to a particular appellant as they do here. In this regard, I did not find the 'swings and roundabouts' argument of the Stewards very persuasive. In my opinion, the Panel has to seek to make the correct orders on the individual appeal it is dealing with.

6. As the Guidelines are not binding on the Panel, in my view they should not be applied so as to achieve an unfairness, which I think their strict application does in this case. As far as how the base 7-meeting suspension applies, and the subsequent reduction to 4-meetings, I consider the Guidelines should apply as drafted in this appeal. In other words, the 4-meeting suspension should still apply. However, as the appellant has satisfied me he would have ridden in the meetings outlined in [5(b)] of the Principal

Members reasons, these are the 4-meetings he should be suspended from, and not the meetings dictated by the Guidelines. I would therefore have varied the suspension such that the appellant could resume riding on 17 March, in lieu of 19 March.

7. As I am in the minority, I urge the Jockeys Association and the Stewards to have discussions to seek to avoid the unfairness that in my view arises in this appeal.

Orders of the Panel (By Majority - Mr Beasley SC, Mr Langby; Ms Skeggs disagreeing):

1. Appeal against severity of penalty dismissed.

2. Penalty of four-meeting suspension upheld. In order to reflect a suspension incurred on 9 March 2019, and by agreement between the Stewards and Mr O'Sullivan on behalf of the appellant, such suspension to commence on Thursday 21 March 2019, at the expiration of a careless riding suspension incurred at Newcastle 9 March 2019, and to expire on Monday 25 March 2019 on which day the appellant may ride.

3. Appeal deposit forfeited.