RACING APPEAL PANEL OF NEW SOUTH WALES

IN THE MATTER OF THE APPEAL OF NOEL CALLOW

Heard at Racing NSW Offices on Monday 3 April 2017

APPEAL PANEL: Mr T Hale SC - Convenor
Mr T Carlton
Mr C Clare

APPEARANCES: Mr Marc Van Gestel for the Stewards
Mr Paul O'Sullivan for Mr Callow

HEARING: 3 April 2017

DECISION AND ORDERS: 3 April 2017

REASONS FOR DECISION ON APPEAL AGAINST SEVERITY: 9 May 2017

1. **CONVENOR**: At a hearing before the Stewards on 25 March 2017 Noel Callow (the Appellant), a licensed jockey, was found guilty of offences under *Australian Rules of Racing* AR 137(a) of both reckless riding and careless riding. The Appellant had pleaded not guilty to the charge of reckless riding and guilty to the charge of careless riding.

2. In respect of the careless riding charge, the Appellant was suspended for 14 meetings, being the period Wednesday, 23 March to Sunday, 23 April, on which day he may ride, and was fined $15,000. In respect of the reckless riding charge, he was suspended for the same period and the same fine was imposed. The sentences were to be served concurrently. The fine of $15,000 was the total fine.

3. The Appellant appeals to the Appeal Panel pursuant to s.42 of *Thoroughbred Racing Act 1996*. He appeals against conviction and penalty in respect to the reckless riding charge. He appeals against the severity of penalty in respect to the careless riding charge. Pursuant to s.43(1) the appeal to the Appeal Panel is by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence on which the decision appealed from was made, may be given on the appeal.

4. The charges arise out of the running of the Vinery Stud Stakes at Rosehill, a Group 1 race over 2000 metres. AR 137(a) provides:

Any rider may be penalised if, in the opinion of the Stewards,

(a) He is guilty of careless, reckless, improper, incompetent or foul riding

5. The charge of reckless riding is in these terms:

> *That at the Australian Turf Club meeting held at Rosehill Gardens on 25 March 2017 that in race 7, the Vinery Stud Stakes, that over the concluding stages of that event you did permit your mount to shift out whilst riding it along vigorously when insufficiently clear of Foxplay, resulting in Foxplay losing its rightful running and having to be severely checked by its rider Hugh Bowman.*

6. In the alternative, the charge of careless riding is in these terms:

> *That at the Australian Turf Club meeting held at Rosehill Gardens on 25 March 2017 that in race 7, the Vinery Stud Stakes, that over the concluding stages of that event you did permit your mount to shift out whilst riding it along vigorously when insufficiently clear of Foxplay, resulting in Foxplay losing its rightful running and having to be severely checked by its rider H Bowman.*

7. At the hearing Mr Van Gestel appeared for the Stewards and Mr O'Sullivan, with leave, appeared for the Appellant.

8. At an early stage in the hearing we raised with Mr Van Gestel the potential difficulties that arise in having two charges brought under AR 137(a) in respect of one incident. Mr O'Sullivan raised much the same concern. Mr Van Gestel confirmed that the careless riding charge should be understood as being in the alternative to the charge of reckless riding and that he would not suggest there could be two convictions in respect of the one incident. He said that, were the charge of reckless riding confirmed by the Panel, he would withdraw the charge of careless riding, being the alternative charge. The hearing proceeded on this basis.

9. As the particulars of the charge identify, the incident the subject of the charges occurred in the closing stages of the race, in approximately the last 80 metres. At approximately 80 metres from the finish, the Appellant's mount shifted out a width of approximately five horses across Harlow Gold and Foxplay. Foxplay was checked. There was some debate about whether or not Foxplay was severely

checked. We need not stop to discuss this for present purposes. Harlow Gold was not checked.

10. What the Appellant said occurred was that his mount was leading when it shifted to the left, that is, it shifted out. Rather than stop riding and straighten, the Appellant continued riding hands and heels, although he did put away his whip. The horse continued to shift outwards. This caused Foxplay, the horse ridden by Hugh Bowman, to be checked. The Appellant accepted that he did not look to the left before continuing riding. He accepted that he should have sought to straighten the horse earlier and that he should not have continued riding until he straightened the horse. To his credit, the Appellant accepted that in the circumstances he was guilty of careless riding. For this reason he pleaded guilty of the charge before the Stewards and before us.

11. What constitutes reckless riding has been considered on a number of occasions. Mr Van Gestel provided us with a copy of the decision of the Victorian Racing Appeals and Disciplinary Board (Appellate Jurisdiction) in the matter of Luke Nolen, jockey (25 August 2006 No 35 of 2006). In that judgment, Judge Lewis, the Chair of the Panel, said that, "The Board finds that he, (Mr Nolen), was indifferent to the consequences of his action." Mr Van Gestel submitted, and we consider correctly, that this is a useful definition of reckless riding, namely riding in a manner in which the jockey is indifferent to the consequences of his actions.

12. At the hearing before us we were greatly assisted by the evidence of Mr P C Dingwall, the Deputy Chairman of Stewards, who was formerly a jockey. We were also greatly assisted by the evidence of Mr Jim Cassidy, the well- known former jockey who gave evidence on behalf of the Appellant. It should be recorded that two members of the Panel are also former jockeys. Their assessment of the evidence was informed by their experience.

13. In their evidence, both Mr Dingwall and Mr Cassidy were taken through the footage of the closing stages of the race from various angles and commented upon various aspects of it to support their contending conclusions that the Appellant's riding was or was not reckless. Mr Cassidy accepted that the Appellant rode carelessly but not recklessly.

14. Although this is a serious case of careless riding, we are not satisfied on the evidence that the charge of reckless riding has been established. Such a serious

charge would require that we are comfortably satisfied to that conclusion and we are not in the circumstances so satisfied.

15. Looking at all the circumstances, it appears to us, as we have just said, that this is a serious case of careless riding. The fact that the Appellant ceased using his whip immediately after his mount shifted out, in our view, strongly tells against recklessness. His mount was in the lead and close to the finishing post, yet he ceased using his whip. It is not suggested that he did this because he was in an unbeatable position.

16. The consequence of this finding is that we would allow the appeal in respect to the reckless riding charge and there will need to be formal orders to give effect to that.

    1. Appeal allowed.

    2. The decision of the Stewards finding the Appellant guilty of reckless riding is set aside and the charge is dismissed.

    3. Appeal deposit to be refunded.

17. In relation to the careless riding charge, the Panel then heard submissions on penalty and then adjourned. Upon resumption of the hearing, the Convenor gave the decision of the Panel in relation to the appeal against severity.

18. **CONVENOR**: As mentioned before the adjournment, detailed reasons on the question of penalty will be given at a later time. We are prepared, however, at this stage to give our decision and make orders.

19. We take the view that in the circumstances of this case and having regard to the nature of the race it is appropriate there should be a monetary penalty in addition to the period of suspension. We are not, however, persuaded that it should be as high as the $15,000 that was imposed by the Stewards. Rather, we take the view that it should be reduced by 50 per cent to $7,500.

20. The formal orders with regard to the appeal on penalty will be:

    1. Appeal allowed.

    2. Penalty of $15,000 is set aside and in lieu thereof there will be a penalty of $7,500, together with confirmation of the period of suspension.

    3. Appeal deposit to be refunded.

REASONS IN RELATION TO THE APPEAL AGAINST SEVERITY ON CARELESS RIDING CHARGE

21. **CONVENOR**: On 3 April 2017 this Panel made orders allowing the Appellant's appeal against the severity of the penalty imposed in respect of the careless riding charge. In summary, we reduced the fine of $15,000 that had been imposed by the Stewards to $7,500. The period of suspension imposed by the Stewards was confirmed. In making those orders we gave very brief reasons for doing so and said that we would provide more detailed reasons at a later time. These are those reasons.

22. On the careless riding charge, the Stewards imposed a penalty of suspension of 14 meetings commencing on Wednesday 23 March and expiring on Sunday 23 April, together with a fine of $15,000. This was the same penalty that was imposed for the reckless riding charge. The two periods of suspension were to be served concurrently. The Stewards also held that the fines were to be served together or concurrently; that is only one fine of $15,000 was imposed.

23. We have allowed the appeal on the reckless riding charge and set aside the findings. We are therefore now only concerned with the penalty in respect of the finding of careless riding, to which the Appellant has pleaded guilty.

24. We do, however, see that the penalty imposed in relation to the reckless riding charge, now set aside, does have a relevance to determining the careless riding charge. The penalty imposed by the Stewards for careless riding is the same as the penalty that was imposed for reckless riding. A finding of reckless riding is, of course, more serious than a finding of careless riding. All things otherwise being equal, a penalty for reckless riding should be greater than for careless riding and, conversely, the penalty for careless riding should be less than a finding of reckless riding.

25. This, of itself, suggests that in the circumstances, the penalty for careless riding was too severe, since it was the same as the penalty that the Stewards imposed for reckless riding.

26. In determining that a penalty of 14 meetings suspension should be imposed for the careless riding charge the Stewards were assisted by the guidance given by the Careless Riding Penalty template.

27. We should add that Mr O'Sullivan, for the Appellant, does not contend that the period of suspension is excessive. He does, however, contend that no monetary penalty should be imposed in addition to the period of suspension. Nonetheless, it is relevant to consider how the period of suspension was reached.

28. The Stewards considered the level of carelessness as high and that this carelessness had the consequence that Foxplay was severely checked. We agree with those findings. The application of the template would lead to a penalty of 12 meetings. To that there needed to be an adjustment for mitigating factors. Since the Appellant pleaded guilty the penalty was reduced by 10%. However, based upon the Appellant's record of four suspensions in the last 12 months the penalty was adjusted upwards by 15%. Also, the penalty was adjusted upwards by a premium of 15% because the offence took place during a feature race. Those adjustments had the consequence that the penalty was reduced by 10% and increased by 30%, being a net adjustment upwards of 20%. This increased the penalty by two meetings; from a suspension of 12 meetings to a suspension of 14 meetings.

29. It will be noticed that this period of suspension took into account an adjustment of 15% due to the fact that the offence took place at a feature race. The practical effect of this was to increase the period of suspension by one meeting. We take this into consideration on the question of whether a fine should be imposed in addition to the period of suspension.

30. The Careless Riding Penalty template is only a guide, albeit a very useful one to assist in the consistent application of penalties. In each case, the penalty to be imposed must be determined having regard to the particular facts and circumstances of the case.

31. The additional fine of $15,000 imposed by the Stewards was said to be due to the "win at all costs attitude" demonstrated by the Appellant. The template contains a provision for a monetary penalty when such an attitude is demonstrated.

32. Before us, Mr Van Gestel submitted that the Appellant exhibited such an attitude and as a consequence a fine of $15,000 was appropriate.

33. In addition to this, he urged upon us that a significant fine should be imposed as a matter of deterrence.

34. The offence took place during the running of the Vinery Stud Stakes. It is a significant Group 1 race with substantial prize money. In such races, jockeys have greater than usual incentives to win.

35. Mr Van Gestel submitted that in such circumstances there may be a temptation upon jockeys to take risks and lessen their standards of care, which in ordinary circumstances they might not do. The potential financial benefits of a win may be sufficient to ease the financial penalty of a period of suspension. Mr Van Gestel submitted that in such cases the deterrence factor of the prospect of a large fine may be sufficient to guard against yielding to such a temptation. He submitted that in appropriate circumstances deterrence by a large fine would promote the safety of riders and horses and the integrity of racing.

36. In the circumstances he submitted that the additional penalty of $15,000 was warranted.

37. The offence of which the Appellant has been found guilty is a breach of the Australian Rules of Racing. Those rules are adopted by the *Thoroughbred Racing Act 1996* and, inter alia, govern thoroughbred horseracing in New South Wales. The regulatory scheme under the rules bears a closer relationship to professional discipline than to the general criminal law: *Day v Sanders; Day v Harness Racing New South Wales* (2015) 90 NSWLR 764 per Leeming JA at [70] with whom Simpson JA agreed at [131].

38. Disciplinary proceedings are regarded as being *"*entirely protective … notwithstanding that [they] may involve a great deprivation to the person disciplined, there is no element of punishment involved*."* :*NSW Bar Association v Evatt* (1968) 117 CLR 177 at 183-184.

39. This panel is what JRS Forbes, *Justice in Tribunals*, 4th Edition 2014, describes at [2.17] – [2.19] as being a "hybrid tribunal". There are consensual rules of racing (see AR 2), which have statutory support under the *Thoroughbred Racing Act 1996:* see for example, s.4(1); s.13(1)(a)(e); s.14(2)(l); and ss.42,43. This

panel is a domestic tribunal invested by the legislature with the duty of disciplining persons subject to the rules of racing as defined by this Act: see *R v Wadley; ex parte Burton* [1996] QdR 286 per Wanstall SPJ at 291, in relation to the Queensland Racing Club Committee. Although it is not a professional disciplinary tribunal, this Panel bears some relationship or similarity to such a tribunal. The principles which apply to such tribunals are of assistance in determining the proper approach to penalty in the present circumstances. Both the Australian Rules of Racing and the Local Rules of Racing NSW refer to "penalty".

40. The penalty is to be determined in the context of the subject matter, scope and purpose of the *Thoroughbred 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."*

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.

43. For these reasons we consider as well-founded Mr Van Gestel's submission that deterrence is a relevant principle in determining penalty for breach of the rules of racing. We also agree with Mr Van Gestel's submission that deterrence is an important consideration in determining the appropriate penalty in this case. We agree that the additional penalty of one meeting's suspension is insufficient deterrence and that a fine should be imposed. However, we disagree that a fine of $15,000 is the appropriate fine. We consider that to be excessive. We consider $7,500 to be appropriate.

44. In reaching our conclusion that a fine should be imposed in addition to the period of suspension, we have taken into consideration:

    (a) the high degree of carelessness involved and the potential consequences of that carelessness. In the final 80 metres of the race the Appellant's mount shifted a width of approximately five horses across both Harlow Gold and Foxplay. It crossed in front of two horses. Harlow Gold was not checked but Foxplay was. The consequences could have been more severe than they were. There was a potential risk to other horses and riders. As we have recorded, and the Appellant accepts, when his mount shifted out, the Appellant should have stopped riding and straightened. He did not do so. He continued riding. At the time he was leading and he did not know the position of other horses, other than to say he could not see other horses in his peripheral vision. The potential danger of this is obvious;

(b) in causing Foxplay to be checked and deprived of its rightful running, Foxplay was denied the prospects of coming third. There was some debate about whether or not Foxplay would or would not have otherwise come third but we do not need to resolve this. It is sufficient to say that it was denied that opportunity. This had an impact on the public, more particularly those who bet on Foxplay;

(c) 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.

45. However, taking these matters into consideration, we consider a fine of $7,500 appropriate. We also take into account the additional week's suspension to reflect that the offence took place during a feature race. We take into account that although there was a high level of carelessness, it did not amount to reckless riding, which, on the view of the Stewards, would attract a fine of $15,000. Nor do we accept that the Appellant exhibited a "win at all costs attitude". That is implicit in our finding that the Appellant was not guilty of reckless riding

46. It is for these reasons we made the orders on 3 April 2017 in relation to the appeal against severity on the careless riding charge.