

RACING APPEAL PANEL OF NEW SOUTH WALES

APPEALS OF MS G. WATERHOUSE AND MR A. BOTT

Appeal Panel: **Mr R. Beasley SC – Principal Member; Mr R. Clugston; Mr J. Fletcher**

Date of hearing: **2 June 2017**

Date of decision: **9 June 2017**

Appearances **Racing New South Wales: Mr M. Van Gestel, Chairman of Stewards**

Appellants: Mr P. Beazley, Solicitor

REASONS FOR DECISION

Introduction and Background Facts

1. On the morning of Tuesday, 4 April 2017 the Australian Turf Club (“ATC”) held a track-work session at the Randwick Racecourse featuring horses due to compete on day 2 of the “Championships” Race meeting the following Saturday. The track-work gallops were advertised by the ATC as “Breakfast with the Stars”, a common means of promoting horse racing in the lead up to major race days. The Breakfast with the Stars track-work was open to the public. Media were invited and present, and the gallops were called by a race caller.
2. Licensed trainers were first notified of the Breakfast with the Stars track-work by email on 27 March 2017. On Monday, 3 April the stables of the Appellants (who train in partnership) were contacted by the ATC as they had not nominated any horses to gallop at the Breakfast with the Stars. After being contacted, ultimately the Appellants nominated four horses: Global Glamour, English, Serena Bay and Debonairly: see Exhibit 7 of the Appeal Book, page 22 at paragraph 10 of the affidavit of James Cable.

3. At the Breakfast with the Stars track-work, the horse Global Glamour galloped as nominated. However, the racehorse Fabrizio galloped in place of Debonairly, the horse Sort After galloped in the place of English and the horse Stampeded galloped in the place of Serena Bay. Fabrizio, Sort After and Stampede each galloped in the silks of the horses that they replaced.
4. The Appellants did not notify the Stewards, the ATC, or any other racing authority of their decision to replace the nominated horses with other horses. As a consequence, the race caller called the incorrect horses during the track-work gallops. Members of the press mistakenly sent out photos and track-work times of the wrong horses: see Exhibit 9 of the Appeal Book.
5. Following the Breakfast with the Stars track-work, the replacement of the nominated horses with other horses by the Appellants was brought to the attention of the Stewards. An Inquiry was held.
6. In evidence given at the Stewards' Inquiry, Ms Waterhouse gave evidence that three of the horses nominated (English, Serena Bay and Debonairly) were not fit to undertake track-work that morning. This was discovered at about 3.20 am in the morning: T-7.328 – T-8.361. A decision was made to substitute other horses. Ms Waterhouse agreed that contact should have been made with the Stewards, but with 150 horses to work, she explained the failure this way:

“We don't stop and we just didn't have time to stop and really think this out. We never realised that it would have the consequences you believe it has. I don't think it has. I think people were very happy to go there and see the colours go around. Most people would not know that Fabrizio didn't look like such and such.” (T-9.442-.447)

7. The Stewards ultimately charged the Appellants with a breach of AR 175A of the Australian Rules of Racing (“**the Rules**”). That rule is in the following terms:

“AR 175A Any person bound by these rules who either within a racecourse or elsewhere in the opinion of the Principal Racing Authority (or the Stewards exercising powers delegated to them) has been guilty of conduct prejudicial

to the image, or interests, or welfare of racing may be penalised.”

8. The particulars of the offence are attached to these Reasons for Decision as appendix “A”. In summary, however, they repeat some of the facts outlined above. The essence of the alleged breach of the rule, however, is contained in particular 10, which is in the following terms:

“10. The conduct detailed above was conduct prejudicial to the image and/or interest of racing, in that the partnership worked Fabrizio, Sort After and Stampede during the Breakfast with the Stars on the morning of Tuesday, 4 April 2017, in place of and in the colours and the signed sponsor saddlecloths of the horses nominated and approved and, as a consequence, persons who had observed the track work session or viewed social media were misled into believing that English, Serena Bay and Debonairly had competed track work during the Breakfast with the Stars session when they had not.”

9. After hearing submissions on 24 April 2017, the Stewards found the Appellants guilty of a breach of AR 175A. They imposed a penalty of a fine of \$5,000.
10. The Appellants have appealed both the finding of guilt, and the severity of the sentence imposed.

Submissions of the Stewards - Breach

11. Mr Van Gestel, the Chairman of Stewards, first drew the Panel’s attention to the judgment of Young CJ in Eq in *Waterhouse v Racing Appeals Tribunal* [2002] NSWSC 1143. This was a case which dealt with, in part, a finding by the Stewards that a bookmaker had engaged in conduct prejudicial to the image of racing. The Panel’s attention was in particular drawn to [58] of the judgment where his Honour appears to have endorsed the Tribunal’s view that three elements must be established in order for a finding of guilt to be made under what is now AR 175A. Those elements are:

- (i) that there is an element of public knowledge;

- (ii) that there is a tendency to prejudice the sport as distinct from the individual involved; and
 - (iii) the conduct in question can be labelled as blameworthy.
12. Mr Van Gestel submitted that all three elements were established here. First, what occurred has become public. The media and subsequently the public have become aware that the horses nominated by the Appellants did not in fact gallop at the Breakfast with the Stars track-work and in their place other horses did.
13. Secondly, the conduct was “blameworthy” in the sense that a deliberate decision was made by the Appellants to substitute horses, but in circumstances where they failed to notify the Stewards or anyone else in authority about this decision.
14. Thirdly, Mr Van Gestel submitted that the consequence of the Appellant’s conduct was that:
- (i) the race caller called the wrong horses;
 - (ii) racing journalists issued inaccurate reports on social media;
 - (iii) members of the public that attended the Breakfast with the Stars track-work were misled as to what horses were actually galloping.

All of these matters, Mr Van Gestel submitted, clearly had a tendency to be prejudicial to the image and interests of racing.

Submission of the Appellants – Breach

15. Mr Beazley, who was granted leave by the Panel to appear for the Appellants, in the main relied on submissions made by Mr Pesman SC, who appeared for the Appellants at the Stewards’ Inquiry.
16. The essence of Mr Pesman’s submission at the Stewards’ Inquiry was that while, as Ms Waterhouse conceded, the Appellants should have notified the Stewards or some

authority about the change of horses, the conduct was not sufficiently serious to constitute a breach of the rule. While intent was not required to be proven in order to sustain a finding of breach of the rule, the fact that the Appellants in no way intended to prejudice or damage the interests of racing, and that there was no evidence of damage, were matters which should be taken into account when assessing whether the rule had been breached. Going slightly further, Mr Beazley submitted that the Breakfast with the Stars morning was really just a “show” and the intent of the Appellants was really to have “that show go on” rather than have a gap in this promotional event as a result of the nominated horses not being fit to gallop.

Panel’s Consideration - Breach

17. Undoubtedly the Breakfast with the Stars track-work is, in a substantial part, a promotional event for racing. In the Panel’s view, however, it is important that such promotion, which is aimed at the media and the public, be an accurate promotion. Because of the Appellants’ conduct, that did not happen here. The Appellants nominated certain horses for the Breakfast with the Stars track-work. The Panel accepts that by 3.20 am on the morning of 4 April, three of those nominated horses could not gallop for proper reasons. The Appellants then made a decision to substitute other horses to gallop instead of the nominated horses, which occurred some 3 hours later, while in the meantime telling no-one about that substitution. That conduct, in our view, was wrong. The consequence of the conduct was that the race caller, the media and the public in attendance were misled.

18. The Panel accepts the Appellants did not intend to mislead anyone, but this was the direct result of their wrong conduct in not notifying anyone of the substitution of the nominated horses. Such conduct, in our view, no matter what the intent, clearly is prejudicial to the interests of racing. A central basis for the Breakfast with the Stars track-work was for the media and public to observe the horses contesting group races the following Saturday on a significant race day. They were misled as to what horses were actually galloping. That is clearly, in our view, prejudicial to the interests of racing. We are comfortably satisfied that a breach of AR175A has been established. The appeal against the finding of guilt must be dismissed.

Penalty

19. At the Stewards' Inquiry, and before the Panel, reference was made to the Panel's decision in the appeal of Brent Zerafa. Mr Zerafa was a racing journalist who was found guilty by the Stewards of a breach of AR 175A. That finding of guilt was confirmed on appeal. The Stewards disqualified Mr Zerafa for this breach for a three month period. On appeal the Panel reduced that penalty to a fine of \$1,500.
20. Mr Zerafa's offending conduct involved a combination of the following matters. At a race meeting conducted in January 2015, Mr Zerafa provided the public with an on air assessment of how the horses competing in a particular race looked in the mounting yard. He selected a horse called I am Zelady as his "pick of the yard". He was subsequently found to have placed a bet on another horse, which won the race. After the race, Mr Zerafa sent a series of texts to another person, and those texts subsequently became public after that person's phone was obtained by the Stewards in the course of a separate inquiry. In one of the texts, Mr Zerafa had said: "Like how I threw off in the yard".
21. At the Stewards' Inquiry in this appeal, Mr Pesman SC submitted that: "Whatever happened with *Zerafa* was vastly more serious than what happened here" (T-26.12-15.6).
22. This submission was no doubt made in support of a submission that the Appellants here should receive a lesser penalty than Mr Zerafa: T-26.12-27.9.
23. In the panel's view, *Zerafa* provides little assistance in relation to the penalty to be imposed on the Appellants in this appeal. One matter that requires some comment, however, is that Mr Zerafa was not found to have acted dishonestly. It would be a misunderstanding of the Reasons for Decision in that appeal to take that view. While no doubt they could have taken a more cynical view, the Stewards, when assessing Mr Zerafa's conduct, did not pursue an allegation that anything Mr Zerafa had said in the on-air broadcast was intentionally misleading: Reasons for Decision in *Zerafa* [17].

24. It was accepted then by the Appeal Panel in *Zerafa* that he had not said anything inaccurate on air, and that his texts were really stupid things to say and more of a “joke” or “banter” rather than proof of any dishonesty. The finding of guilt against Mr Zerafa was, however, sustained because his texts, which became public, had the tendency to give rise to a “harmful impression” or a suspicion which was prejudicial to the interest of racing.
25. The one thing then that the appeal in *Zerafa* and this appeal share in common is that no dishonest intent is present. That aside, the appeals differ so vastly in terms of their factual background that the decision in *Zerafa* provides little guidance in relation to what penalty should be imposed in this appeal. However, one matter that does seem consistent from the penalty imposed in *Zerafa*, and the penalty imposed for other breaches of AR 175A that have been brought to the Panel’s attention, is that where there is no dishonest intent involved, the penalty that is imposed is generally a fine.
26. As has been stated many times now, in assessing penalty for a breach of the Rules, the Panel must consider what message should be sent to the person found guilty of a breach by way of the penalty imposed, and what message should be sent to the public as an indication of an intent to uphold the interests and integrity of racing.
27. The Panel has of course also taken into account further matters, including the particular circumstances of the breach here, and circumstances specific to the Appellants. While the conduct of the Appellants was wrong, the Panel accepts that they did not intend or think through all of the consequences of their action. The Appellants have good records, and the Panel accepts and takes into account Ms Waterhouse’s long involvement in racing, which has involved significant positive promotion of the industry. The Panel accepts that harming the interests of racing was not intended.
28. As this appeal is by way of re-hearing, it is the Panel’s task to form its own view as to penalty. We have, nevertheless, formed the view that in imposing a \$5,000 fine, the Stewards showed an element of restraint. Accordingly, we are not inclined to alter that penalty and do not consider it to be in any way excessive or inappropriate. The appeal against Penalty must also be dismissed.

Orders of the Panel

29. The Panel makes the following Orders:

- (1) The appeal against the finding of guilt is dismissed.
- (2) The finding of guilt for a breach of AR 175A is confirmed.
- (3) The appeal against penalty is dismissed.
- (4) The penalty of a fine in the sum of \$5,000 is confirmed.
- (5) The appeal deposit is forfeited.

Appendix A

Licensed training partnership Gai Waterhouse and Adrian Bott you are hereby charged with a breach of AR175A, for conduct prejudicial to the image and/or interests of racing.

AR 175A. Any person bound by these Rules who either within a racecourse or elsewhere in the opinion of the Principal Racing Authority (or the Stewards exercising powers delegated to them) has been guilty of conduct prejudicial to the image, or interests, or welfare of racing may be penalised.

The details of the charge being

Mrs Gai Waterhouse and Mr Adrian Bott are a training partnership licensed with Racing NSW (**the partnership**).

On 24 March 2017 and 30 March 2017, **the partnership** received an email from Australian Turf Club Racing Official Ms Sue Hutchison advising course proper gallops for horses nominated in Group races on Saturday 8 April 2017 will be conducted between 6:30am and 8:00am on 4 April 2017 as part of Breakfast With The Stars at Randwick racecourse and that nominations for those course proper gallops closed at 11am on Friday 31 March 2017.

At 11:35am on Monday 3 April 2017, when **the partnership** had not nominated horses for Breakfast With The Stars, Australian Turf Club Racing Official Mr James Cable contacted **the partnership** by telephone to receive nominations for the Breakfast With The Stars and **the partnership** initially nominated the following four horses:

Global Glamour (Nominated for Coolmore Legacy Stakes & Arrowfield 3yo Sprint)

Serena Bay (Nominated for Percy Sykes Stakes)

Hussterical (Nominated for South Pacific Stakes)

Zepplin (Nominated for Fernhill Handicap)

During that same telephone conversation on 3 April 2017, Mr Cable informed **the partnership** that Hussterical and Zepplin were not eligible for the Breakfast With The

Stars, as they were not nominated for group races on 8 April 2017, and **the partnership** then nominated:

English (Nominated for Coolmore Legacy Stakes)

Debonairly (Nominated for Percy Sykes Stakes)

At 3.22pm on 3 April 2017, Australian Turf Club Racing Official Mr James Cable by email provided **the partnership** with a gallop schedule for the Breakfast With The Stars, which advised that it was a requirement that riders were required to wear the horses' registered colours and provided saddlecloths and detailed the following track gallops:

6:30am English & Global Glamour

6:40am Serena Bay & Debonairly

At approximately 5pm on 3 April 2017, Australian Turf Club Racing Official Mr James Cable hand delivered to **the partnership** sponsored saddle cloths representing Percy Sykes Stakes sponsor IG Share Trading and Coolmore Legacy Stakes sponsor Coolmore for the Breakfast With The Stars and a hard copy of the gallop schedule.

On the morning of Tuesday 4 April 2017, during the Breakfast With The Stars trackwork session **the partnership** worked the horse Fabrizio on the Randwick course proper in the race colours and assigned sponsor saddle cloth (IG 2) of the nominated horse Debonairly, when Fabrizio was not nominated or authorised to work on the Randwick course proper during the Breakfast With The Stars session nor was it eligible as it was not nominated for a Group race on Saturday 8 April 2017.

On the morning of Tuesday 4 April 2017 during the Breakfast With The Stars trackwork session **the partnership** worked the horse Sort After on the Randwick course proper in the race colours and assigned sponsor saddle cloth (Coolmore 1) of the nominated horse English, when Sort After was not nominated or authorised to work on the Randwick course proper during the Breakfast With The Stars session.

On the morning of Tuesday 4 April 2017 during the Breakfast With The Stars trackwork session **the partnership** worked the horse Stampede on the Randwick course proper in the race colours and assigned sponsor saddle cloth (IG 1) of the nominated horse Serena Bay, when Stampede was not nominated or authorised to work on the Randwick course

proper during the Breakfast With The Stars session nor was it eligible as it was not nominated for a Group race on Saturday 8 April 2017.

The conduct detailed above was conduct prejudicial to the image and/or interests of racing in that **the partnership** worked Fabrizio, Sort After and Stampede during the Breakfast With The Stars on the morning of Tuesday 4 April 2017 in place of and in the colours and assigned sponsors saddle cloths of the horses nominated and approved and, as a consequence, persons who had observed the trackwork sessions or viewed social media were misled into believing that English, Serena Bay and Debonairly had completed trackwork during the Breakfast With The Stars session when they had not.