RACING APPEAL PANEL OF NEW SOUTH WALES

IN THE MATTER OF THE APPEAL OF MR JAMES MCDONALD

Appeal Panel:	**Mr R. Beasley SC – Principal Member; Mr J. Fletcher; Mr K. Langby**
Date of hearing:	**13 March 2017**
Date of decision:	**16 March 2017**
Appearances	**Mr McDonald – Mr B Walker SC and Mr M Higgins, instructed by Unsworth Legal** **Racing New South Wales – Mr Mark Van Gestel, Chairman of Stewards**

REASONS FOR DECISION

Principal Member, Mr R Beasley SC

Introduction

1. Unfortunately in this appeal the Panel has not been able to reach a unanimous decision.

2. Mr Fletcher and Mr Langby both agree with the Steward's interpretation of the relevant rules, and with the penalty they have imposed. By majority then, the appeal must be dismissed.

3. While I agree with some parts of the Stewards' construction and application of the rules, I disagree on one important aspect of interpretation. For the reasons that follow, I would allow the appeal, and reduce the penalty imposed by the Stewards.

4. The Panel is unanimous in its view, however, that in the circumstances of this case (which are explained below), the drafting of AR 83(d) and AR 196(5) have resulted in Mr McDonald being penalised more severely than we consider to be fair. That view is set out below at [43] to [49] of these reasons.

Background

5. On 15 November 2016, the Stewards of Racing NSW charged the appellant, Mr James McDonald, a licensed jockey, with a breach of AR 83(d) of the Australian Rules of Racing ('the Rules'). That rule is in the following terms:

> ***AR 83***. *'Every jockey or apprentice may be penalised – ....*
>
> *(d) if he bet, or has any interest in a bet on any race, or contingency related to Thoroughbred racing involving a race in which he is riding. For the purposes of this rule, bet includes a lay bet (as defined in AR 175B(7)).*

6. The particulars of the charge were as follows:

> *'... that you, licensed jockey James McDonald, had an interest in a bet placed by Anthony Gardiner on the horse Astern to win race 1 the Surf Meets Turf Plate at Randwick on Saturday, 5 December 2015, being the horse that you rode in that race.'*

7. The charge laid against Mr McDonald followed from an investigation opened by the Stewards into his conduct, and of his association with Mr Gardiner, who is known to the Stewards to be a substantial punter. The investigation was made by the Stewards in conjunction with the Australian Criminal Intelligence Commission. The ultimate result of that investigation for Mr McDonald was that he admitted at the Stewards' Inquiry that he received $4,000.00 in cash from Mr Gardiner following a race at Randwick on 5 December 2015 ('the Race'). The winner of the Race was the horse 'Astern'. Astern was ridden by Mr McDonald. The $4000 in cash was the proceeds of a winning bet Mr Gardiner had placed on Astern on Mr McDonald's behalf.

8. On 22 December 2016, Mr McDonald pleaded guilty to the charged under AR 83(d). A finding of guilt under that Rule ordinarily attracts a mandatory penalty of a two (2) year disqualification: see AR 196(5). However, there is scope for reducing that mandatory minimum penalty if 'special circumstances' are established. The relevant part of AR 196(5) is as follows:

> *'AR 196(5) Where a person is found guilty of a breach of any of the Rules listed below, a penalty of disqualification for a*

period of not less than the period specified for that Rule must be imposed unless there is a finding that a special circumstance exists whereupon the penalty may be reduced:….

AR 83(d) – 2 years.'

9. 'Special circumstances' are defined in Local Rule 108(2) which relevantly provides:

> '***LR108(2)*** *For the purposes of AR 196(5), special circumstances means where:*
>
> *(a) the person has pleaded guilty at an early stage and assisted the Stewards or the Board in the investigation or prosecution of a breach of the Rule(s) relating to the subject conduct…'*

10. The Stewards' accepted that in light of Mr McDonald's plea, and his general assistance in the investigation, that 'special circumstances' existed in this case. They applied a twenty-five percent reduction to the two year mandatory minimum disqualification period, and imposed a disqualification of 18 months. The disqualification was taken to have commenced on 15 November 2016 (the date Mr McDonald voluntarily stood himself down from racing), and will expire on 15 May 2018.

11. On 23 December 2016, Mr McDonald lodged an appeal against the severity of the sentence imposed on him. The Notice of Appeal included six grounds upon which Mr McDonald alleges the Stewards erred in penalising him. While those grounds are a useful means of identifying the arguments for appeal, it can be noted that an appeal to this Panel is by way of a new hearing: s43(1) of the *Thoroughbred Racing Act 1996.*

12. In this appeal, the main issues raised are the correct construction of AR 196(5), and the correct approach to penalising Mr McDonald in light of the finding that "special circumstances" had been established under LR 108(2)(a).

Construction of AR 196(5)

Stewards' submissions

13. There was no dispute on the appeal that "special circumstances" existed here. The Stewards conceded that as a result of his early guilty plea, and the assistance that he gave during their inquiry, the Appellant satisfied LR 108(2)(a): see [5] above.

14. Turning then to AR 196(5), Mr Van Gestel for the Stewards submitted that the finding of "special circumstances" entitled the Appellant to a reduction in the length of the mandatory minimum disqualification period that must be imposed as a result of a breach of AR 83(d).

15. Mr Van Gestel's submission was that the text of the rule only supported a reduction to the period of time for a disqualification, and not a reduction to the nature of the penalty. That is, if special circumstances exist, the penalty must remain a disqualification, but the mandatory minimum period of two years for a breach of AR 83(d) may be reduced.

16. Further, Mr Van Gestel's submission was that the correct approach to the sentencing of the Appellant, given that special circumstances exist in this case, was to first take account of "the penalty" that should properly apply absent special circumstances, and to then reduce that penalty by reference to the special circumstances established under LR 108(2)(a).

17. Having regard to the objective seriousness of the offence, and the personal circumstances of the Appellant, the Stewards took the view that (ignoring special circumstances) the appropriate penalty was no more than the mandatory minium two year disqualification. They found that this was "the penalty" that could be subject to any reduction under AR 196(5) if special circumstances were established.

18. Because the Stewards then did find that special circumstances exist in this case under LR 108(2)(a) (early plea and assistance to the investigation), they then determined by how much "the penalty" should be reduced. The decided that an appropriate discount

was twenty five percent of the period of "the penalty". Hence the two year mandatory minimum disqualification was reduced to an 18 month disqualification.

Appellant's submissions

19. Mr Walker, Senior Counsel for the Appellant, urged upon the Panel a different construction of AR 196(5). He began by drawing the Panel's attention to AR 196(1), which is the source of power whereby a person or body authorised to impose a penalty may do so by means of either a *"disqualification, suspension, reprimand, or fine not exceeding $100,000"*.

20. He then directed the Panel back to AR 196(5) and to the crucial words: *"... whereby the penalty may be reduced"* (emphasis added). In Mr Walker's submission, the term "the penalty", in cricumstances where special circumstances are found to exist, *"is a reference back to the general power 'to penalise' by way of 'disqualification, suspension, reprimand, or fine…' conferred by AR 196(1)"*: see Appellants Written Submissions (AS) at [48].

21. In Mr Walker's submission then, once special circumstances are established, the correct approach to sentencing the Appellant involved the following three further steps:

> *"b. Secondly, determine the objective seriousness of the conduct which contravened AR 83(d) and use that determination to identify a starting point for determining penalty;*
> *c. Thirdly, identify the appellant's subjective circumstances and determine whether they aggravate or mitigate the penalty; and*
> *d. fourthly, make any adjustment necessary by reference to any relevant provision of the rules"*: AS at [60].

22. Mr Walker said the Stewards fell into error by holding that *"…AR 196(5) operated to set the starting point of the process of determining penalty when special circumstances were found to exist"*: AS at [43].

Resolution of interpretation of AR 196(5)

23. I am in general agreement with the approach taken by the Stewards to the interpretation of AR 196(5) and how it should be applied in conjunction with LR 108(2)(a), save for one very important difference discussed later below.

24. In my view, *"the penalty* [that] *may be reduced"* in AR 196(5) is a reference to the penalty that should be imposed absent special circumstances being established.

25. I agree with the Stewards' view that, absent special circumstances, Mr McDonald should be penalised by way of a two year mandatory minimum disqualification, and no more. It is this penalty that *"may be reduced"*.

26. I say " and no more" in [25] above because in my view Mr McDonald's conduct here falls a long way short of the worse kind of conduct that might be caught by AR 83(d). He placed a $1,000 bet on his own mount in a race. Such conduct might have the potential to interfere with betting markets, and perhaps does not place racing in the best light. The fact that a jockey has placed a bet on his or her own horse in a race may cause concern to the general racing public, to punters, to bookmakers, and other participants in the Racing industry. It is, however, conduct very different to that of a jockey placing a very large bet on a horse in a race other than the one he or she is riding. Such conduct squarely raises issues of conflict of interest. It is damaging to the interests of racing in the extreme, and raises the real prospect of cheating of some kind.

27. At [68] and [69] of the Appellant's written submissions, the submission is made that the objective seriousness of the Appellant's conduct is in the low range for a breach of AR 83(d). In support of that submission, reliance is placed on the fact that the Appellant placed only one bet, for a relatively small amount of money, on his own horse, in circumstances where there was no evidence of prior or ongoing offending. While I would consider a $1,000 bet to be a bet of substance (but not a huge bet), I accept the submission that while the Appellant's offence is objectively serious, it is in the low range of offending under Rule AR 83(d) for the reasons stated.

28. I have also considered the personal circumstances of the Appellant. At the hearing before the Panel Mr Walker tendered a series of references (Exhibit A) from respected and prominent people in the racing industry, attesting to his good character. Each referee indicated a sufficient understanding of the offending.

29. The Appellant is noted as a talented rider, but I have also borne in mind that he is a young rider. He was 24 years of age at the time of the offending. This is his first offence of a significant kind.

30. I have also taken into account the Appellant has demonstrated contrition and remorse. He has paid an equivalent sum to the amount that he won on the horse ($4,000) to a Children's charity. He has indicated that if a penalty by way of suspension was imposed, rather than a disqualification, he will enter into an arrangement with the Jockeys' Association of travelling to Regional Centres to help apprentice jockeys with their riding skills. I accept this as a further indication of the Appellant's contrition and remorse.

31. In my view, all of the objective and subjective matters that should be considered in assessing penalty easily persuade me that absent special circumstances "the penalty" that should be imposed on Mr McDonald is the minimum mandatory penalty of a two year disqualification.

32. Where I disagree with the Stewards is in relation to the manner in which *"the penalty may be reduced"* in AR 196(5).

33. Mr Van Gestel submits that only the length of the penalty can be reduced, and not its nature (ie, disqualification down to something else). I cannot see how that submission can be maintained in the face of the clear language of AR 196(5). If the Stewards' view prevailed, it would also produce some very strange results for persons who established "special circumstances" under LR 108 other than those releavant to Mr McDonald.

34. I have found, consistent with the Stewards' approach, that "the penalty" that "may be reduced" here is a two year disqualification. This penalty does not consist merely of a

period of time. "The penalty" is of a particular nature – a disqualification. If *"the penalty may be reduced"* then both the length of the penalty and its nature must be capable of being reduced. The plain text then of AR 196(5) gives scope for a reduction in time, and a reduction in the nature of the penalty (such as a disqualification being reduced to a suspension, or a fine, or even reprimand).

35. If the drafters of AR 196(5) intended that only a period of disqualification could be reduced, but not the disqualification itself, it would have been very easy for them to state that intention. The words *"whereupon the penalty may be reduced"* would instead have been *"whereupon the period of disqualification may be reduced".* The rule does not say this, however. In my view then, if special circumstances exist, not only the period of disqualification may be reduced, but a disqualification itself may be reduced to, for example, a suspension.

36. In further support of this view, I have considered the various matters that constitute special circumstances that Mr Walker drew to the Panel's attention to that highlight the difficutlty with the Stewards' construction. These include *"impaired mental functioning"* (LR 108(2)(b)(i)) and where *"the person proves, on the balance of probabilities that, he did not know, ought not to have known and would not have known had he made all reasonable enquiries, that his conduct was in breach of the Rules of Racing"*: LR 108(2)(d). The submission made was that it would be quite perverse in some circumstances for a person who was found to have *"impaired mental functioning"* to be penalised by any form of disqualification.

37. There is a great deal of force in this submission. It would be very odd if the correct construction of the Rules here meant that a person suffering from, say, a serious depressive illness, or some cognitive dysfunction such that they had little control or comprehension of their own acts, could be faced with a disqualification. Imposing a disqualification (of any length) on a person who had proved they were suffering from a serious mental illness would tarnish the image of racing. Properly construed, AR 196(5) would enable the nature of such a persons penalty to be reduced from disqualification to perhaps reprimand, or perhaps even no penalty depending on the circumstances.

Penalty to be imposed here

38. I agree with the Stewards' approach that in reducing the penalty here, the intent of the drafter of the Rules was that the reduction is to be made by starting with the appropriate penalty absent special circumstances, and then reducing it, if appropriate, by having regard to the special circumstances that have been established under LR 108. In this case, that means reducing the penalty by having regard to Mr McDonald's early plea, and his assistance in the investigation.

39. The Stewards reduced the penalty by way of a twenty five percent reduction to its length only. They did so by reference to various decisions of the Racing Appeal Tribunal that tend to have set that percentage as some kind of benchmark as a reduction for penalty because of early plea. It seemed to be common ground on the appeal that a twenty five percent reduction in penalty is generally appropriate for an early plea. That cannot, however, be a fixed rule. In some cases a plea might warrant a lesser reduction. In this case, however, there is no reason not to agree with the views of the Stewards or Mr Walker. Mr Van Gestel correctly pointed out that during the course of an interview conducted on 15 November 2016 by the Stewards, Mr McDonald was initially less than entirely frank with them when questioned about the events that led to him being charged. However, in the course of the same interview, he ultimately made relevant admissions, and gave assistance beyond that. If a person at the early stages of an interview with authorites says 'I didn't do it', and a relatively short time later during the course of the same interview says 'okay, I did do it', I do not consider that costs them the benefits of an early plea. Further, Mr Van Gestel conceded that Mr McDonald's plea saved the Stewards from further investigation

40. The "special circumstances" established here however go beyond – and have to go beyond – early plea. Mr McDonald's evidence assisted in a broader investigation that involved Mr Gardiner. In my view, an additional reduction should apply to "the penalty" to factor this in. For the assistance he gave by way of additional evidence to an ongoing investigation, I would further reduce the length of Mr McDonald's penalty by another ten percent, bringing the total reduction in length to thirty five percent.

41. Additionally, given the early plea of Mr McDonald, the assistance he gave in an investigation that involved another person, and that fact that this saved the Stewards'

from further investigation into his conduct, I would reduce the nature of the penalty from disqualification to suspension.

42. In lieu then of the eighteen month disqualification imposed by the Stewards, I would impose a penalty of a fifteen month suspension (rounding a thirty five percent reduction down in terms of its effect).

Penalty which would otherwise apply, and AR 83(d)

43. It is probably not always wise to "editorialise" about the Rules. This Panel, however, is invariably asked by the Stewards during appeals to ensure that the integrity and image of racing is upheld and protected by the decisions it makes. That is a perfectly proper submission. It is, however, a matter that may be difficult to achieve in some cases when an appeal involves AR 83(d) and AR 196(5).

44. If my construction of AR 196(5) is wrong, and the construction contended for the Appellant at AS [60] is correct, in my view the penalty that should be imposed on Mr McDonald is no more than a six month suspension. Without having to have regard to a mandatory minimum disqualification period as a starting point, the relevant objective and subjective matters conventionally considered in sentencing point to an offence at the low end of seriousness for an offence of its kind, by a young first offender, with many mitigating personal antecedents.

45. AR 83(d), as currently drafted, catches conduct which might involve a licensed jockey engaged in a race placing a very large bet on a horse that is not the horse that he or she is riding. No rational person would regard that as anything other than conduct that is destructive of the image and reputation of racing. It is clearly conduct that ought to attract a substantial penalty.

46. However, as also drafted, AR 83(d) applies to a jockey who might place a modest bet on his or her own horse in a race. Absent special circumstances, such conduct attracts a mandatory minimum penalty of a two year disqualification.

47. A two year disqualification is a severe penalty to impose on a licensed person. It could in some instances be career ending. It is likely, at a minimum, to cause grave

financial hardship. It has the capacity to destroy a reputation. Penalising a jockey who places a moderate bet, on one occasion, on a horse that they are riding in a race by means of a mandatory two year disqualification is a penalty out of all proportion to the conduct, and the potential harm of the conduct.

48. I accept that a jockey placing a bet on his or her own mount might potentially, in some way, disrupt the betting market. I accept there may be a number of reasons why such conduct should properly be prohibited by the Rules, and punished if such conduct occurs. It nevertheless is a long way short of the kind of cheating and corruption type offences (often involving the use of prohibited drugs) that are otherwise in the main listed in AR 196(5) and that attract mandatory minimum disqualifications. As another example, a jockey who bets on his or her own mount with a modest bet engages in conduct that is unarguably a long way short of "an act of cruelty to a horse": see AR 175(n). I cannot see any logical basis for including an offence of a jockey betting on his or her own mount in a list of cheating type offences that are by many factors more objectively serious.

49. No doubt all of this was considered by the drafter of the Rules. In my respectful view however, consideration should be given to repealing AR 83(d), and replacing it with separate Rules which differentiate between the conduct of a jockey engaged in a race who places a bet on their own horse, and the conduct of a jockey engaged in a race who places a bet on another horse. Penalising licenced persons with penalties that are manifestly excessive when considered against their true culpability, and the harm done by their conduct, arguably does not uphold or protect the integrity and image of racing.

50. The Orders I would make are as follows:

(1) Appeal against severity of penalty allowed.

(2) Penalty of disqualification for eighteen (18) months set aside.

(3) In lieu of the penalty of eighteen (18) months' disqualification, the Appellant is penalised by way of a suspension of fifteen (15) months.

(4) The fifteen months' suspension is taken to have commenced on 15 November 2016, and will expire at midnight on 14 February 2018, following which the Appellant is free to ride.

(5) Appeal deposit to be refunded.

Mr J Fletcher and Mr K Langby

51. We do not agree with the Principal Member's interpretation of AR 196(5). We agree with the Stewards' submission that if special circumstances exist (as they do in this case) then only the period of time for a disqualification can be reduced, and not the disqualification itself. We disagree then that there is the option to reduce a disqualification to a lesser penalty such as a suspension. We rely on the words *"...a penalty of disqualification ....must be imposed"* in AR 196(5) in support of our view. We believe that the drafters of the rule did not intend that the nature of the penalty could be reduced because of special circumstances, but only the period of time of the penalty.

52. We have taken into account the special circumstances here, which are the Appellant's early guilty plea and the assistance that he gave to the Stewards in the course of their inquiry. We agree with the Stewards that the reduction to be made to the mandatory minimum penalty of a 2 year disqualification is a 25% reduction, in accordance with prior authorities of the Racing Appeal Tribunal. In our opinion then, the appropriate penalty to be imposed on the Appellant is the penalty imposed by the Stewards – that is, an 18 month disqualification. For those reasons, we would dismiss the appeal and confirm the penalty imposed by the Stewards.

53. We do, however, note the criticisms of AR 83(d) that have been made by the Principal Member, and we agree with them. We are also of the view that there should be a separate Rule dealing with the circumstances where a jockey places a bet on a horse that he or she is riding in a race, and where a jockey places a bet on another horse. Both courses of conduct should be subject to a penalty, but the latter is far more serious conduct.

Orders of the Panel

By majority (Mr J. Fletcher, Mr K. Langby; Mr R Beasley SC disagreeing):

(1) Appeal against severity of penalty dismissed.

(2) Penalty of a disqualification of 18 months confirmed.

(3) Appeal deposit to be forfeited.