RACING NEW SOUTH WALES

APPEAL TO THE APPEAL PANEL OF RACING NEW SOUTH WALES

Appellant:	**Brent Zerafa**
Appeal Panel:	**Mr R. Beasley SC, Mr D. McKee, Mr T. Carlton**
Representation:	**Brent Zerafa – Mr D. Sheales of Counsel**
	Racing NSW Stewards – Mr Peter Braham SC
Date of appeal hearing:	**23 October 2015**
Date of decision:	**6 November 2015**

REASONS FOR APPEAL DECISION

Offences and Appeal

1. In January 2015 the Appellant was employed as a journalist by TVN (Thoroughbred Vision), which ran a thoroughbred horseracing television channel.

2. On 19 August 2015, following an initial inquiry hearing on 31 July 2015, the Racing New South Wales Stewards ("the Stewards") charged the Appellant with a breach of AR 175A. That rule is in the following terms:

> **AR175A** Any person bound by these Rules who either within a racecourse or elsewhere in the opinion of the committee of any club or the Stewards has been guilty of conduct prejudicial to the image, or interests, or welfare of racing may be penalised.

3. It was not an issue on this appeal that the Appellant was not a person bound by the Rules of racing.

4. The Appellant was notified of the charge against him by letter dated 19 August 2015 (Exhibit 8 of the Stewards inquiry). That letter contained a charge sheet outlining the details of charge which were as follows:

> "1. At the relevant time, you were a part owner of the racehorse Elle Snitz;
>
> 2. At the relevant time, you were employed by TVN;
>
> 3. You were at all relevant times a person bound by the Rules of Racing;
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> 4. On 17 January 2015, you were present at Royal Randwick Racecourse in the course of your employment with TVN to make on-air assessments of horses racing at that meeting for both the on-course and off-course racing audience;
>
> 5. The purpose of the parade comments being to give value added information to assist those persons who might be inclined or intend to place bets on such race;
>
> 6. At around 1.10pm, you received the following text message from Mr John Camilleri, a person you know to bet on racehorses and a person you know or suspected was privy to inside information on the winning chances of horses: ***JC**: Wonder who's been help Kav [Mr Sam Kavanagh] for the past 5 weeks.* ***JC**: I've been helping him.* ***JC**: Fuck me.* ***JC**: Watch Palazzo in race 3.*
>
> 7. At approximately 2.10pm, from the Royal Randwick "Theatre of the Horse", you provided the following assessment as to the runners in race 3, 3 year old fillies benchmark 72 handicap, to both on-course and off-course patrons:
>
> "I did like I Am Zelady, number 2. I've made her the pick of the yard, just ahead of Rule the River, number 6. She's a striking filly almost black in colour, but I thought I Am Zelady, she looked nice and relaxed. She wasn't sweating up too much as it is getting quite warm here. I think she has a little bit of class on her side. She is a big strong filly with a nice bright future."
>
> 8. At or around 2.20pm, via your iPhone, you placed a wager with Betstar of $200 on Palazzo Pubblico at odds of $6, Palazzo Pubblico being a stablemate of I Am Zelady, with both fillies trained by Mr Sam Kavanagh;

9. Following the running of race 3 conducted at around 2.20pm, won by Palazzo Pubblico and commencing at 14.26, the following exchanges of text messages took place between yourself and Mr John Camilleri: ***JC**: Shhhheee tell them to back wen there short.* ***BZ**: Like how I threw off in the yard??* ***BZ**: Couldn't stop the train.* ***JC**: I knew.* ***JC**: Don't say a word the best is yet to come.* ***JC**: Wen KM on money goes on ... that's the deal.* ***JC**: Don't say nothing to no 1 please.* ***BZ**: Won't. All sweet.* ***JC**: These galloping cunts have to wake up a week b4 to outsmart us trotting grubs.*

5. On 7 September 2015 the Stewards found the Appellant guilty of a breach of AR 175A. The Stewards' report dated 7 September 2015 making this finding of guilt is contained within the bundle of documents that became Exhibit 1A on the appeal.

6. On 21 September 2015, the Stewards imposed a penalty for the breach of AR 175A of a disqualification of 3 months.

7. On the same date, the Appellant lodged an appeal to this Panel. The document setting out the grounds of the appeal is also contained within Exhibit 1A. That folder of documents contains transcript of the Stewards hearings of 31 July 2015, 1 September 2015, 21 September 2015 and also a transcript of an interview with Mr John Camilleri dated 6 August 2015. It also contains 9 exhibits tendered at the Stewards inquiry which include a transcript of the text messages taken from the Appellant's phone, and also his relevant betting records.

8. Also admitted into evidence on the appeal, and marked Exhibit 2A, was a document prepared by the Appellant's counsel, Mr Sheales, which is titled "How Stewards obtained Zerafa text messages". This document was prepared and tendered in support of submissions made on the Appellant's behalf in relation to the remoteness issue discussed below.

9. No oral evidence was called on appeal. At the appeal hearing, the Panel was directed to various passages of transcript of the Stewards inquiry, all of which the Panel has had regard to. Mr Peter Braham SC, representing the Stewards before the Appeal Panel, in addition to making oral submissions in support of the finding of guilt and the

penalty imposed by the Stewards, subsequently filed and served written submissions dated 27 October 2015 (and reply submissions dated 3 November 2015).

10. The Appellant's counsel, Mr Sheales, also in addition to making oral submissions, filed and served written submissions dated 30 October 2015.

Nature of the Appeal

11. The appeal to this Panel is made under the right given in s.42 of the *Thoroughbred Racing Act 1996* (TRA). The appeal is "by way of a new hearing": s.43 TRA.

12. The Appellant's appeal is in relation to both conviction and penalty.

Submissions of the Appellant

13. Although four grounds of appeal were raised in the grounds as originally drafted, based on the submissions made on the Appellant's behalf at the appeal hearing, and the Appellant's written submissions, two issues were central to the resolution of the appeal in relation to conviction.

14. The first issue can be titled the "wrong conduct" issue. The second issue can be titled the "remoteness" issue.

15. In relation to the wrong conduct issue, the Appellant contends that in order to properly sustain a finding of guilt under the rule, the Stewards had to identify and find some "wrong" or "blameworthy" conduct by the Appellant. The Appellant says this finding is absent, and that the Stewards do not contend that anything contained in the Appellant's on-air broadcast on 17 January 2015 (outlined at [7] of the details of the charge) contained anything that was intentionally misleading conduct. There was in fact no allegation or proof of any conduct by the Appellant that could be described as corrupt, dishonest, fraudulent or even improper. Relying on [58]-[69] of the judgement of Young CJ in Eq in *Waterhouse v Racing Appeals Tribunal* [2002] NSWSC 1143, Mr Sheales submitted that an essential element of establishing guilt under AR 175A was missing. He drew the Panel's attention to the fact that the

bookmaker in *Waterhouse* was found to have breached another rule of racing (on 13 occasions) in relation to the placement of illegitimate bets, whereas there was no conduct of the Appellant established here by the Stewards that was wrong or blameworthy conduct (see the Appellant's written submissions at [4]-[9]).

16. Additionally, Mr Sheales submitted (correctly) that in order for a finding of guilt to be established under AR 175A, there had to be an element of public knowledge. His submission was that the finding of guilt could not stand because there was never other than a fanciful chance that the conduct identified by the Stewards in the details of the charge (specifically the text exchanges between the Appellant and Mr Camilleri) would ever become public knowledge. He also relied on Exhibit 2A to demonstrate what he says was the highly unlikely chain of events which led to the text messages being discovered and the conduct becoming public knowledge. In relation to this submission, Mr Sheales placed reliance on the judgement of Hodgson JA (with whom Santow JA agreed) in the Court of Appeal's decision in *Waterhouse*: *New South Wales Thoroughbred Racing Board v Waterhouse and Anor* (2003) 56 NSWLR 691. In particular, he drew the Panel's attention to [69] of Hodgson JA's judgment where his Honour held that conduct could amount to a breach of s.175A even if the person charged wished that conduct to remain secret "unless the possibility of discovery is remote".

Submissions of the Stewards

17. Mr Braham SC confirmed on behalf of the Stewards that they did not pursue an allegation that the Appellant's on-air broadcast made on 17 January 2015 regarding race 3 was intentionally misleading. It was submitted, however, that it was not necessary to establish any conduct of such a kind for the finding of guilt to be sustained.

18. Mr Braham SC first directed the Panel's attention to the text of AR 175A. He submitted that the first task was to identify "conduct". There was no textual requirement for the conduct so identified to be, for example, unlawful or dishonest.

19. The conduct the Stewards identify as relevant to the finding of guilt under the rule principally comprises that set out at [6]-[9] in the details of charge set out at [4] above. That is the initial text messages, the on-air assessment, the placing by the Appellant of the bet on Palazzo Pubblico and the subsequent text exchange with Mr Camilleri.

20. The Stewards' submission is that this conduct in total gives rise to a "harmful impression" in the minds of a reasonable member of the public made aware of this conduct. The impression would be that the on-air broadcast was not conducted with integrity. That is, a reasonable member of the public would think that the Appellant had deliberately not mentioned Palazzo Pubblico in his on-air broadcast to protect its betting price, or to "slow down" the flow of money onto that horse. In making the submission that conduct which would raise the suspicion referred to above, but which is not otherwise corrupt, dishonest or intentionally misleading, is conduct upon which a finding of guilt under AR 175A can be made, Mr Braham also placed reliance on parts of the judgment of Young J in *Waterhouse* which are discussed below.

21. Mr Braham also submitted that the possibility of discovery of the conduct was not remote. The texts sent by the Appellant to Mr Camilleri created permanent electronic records in Mr Camilleri's phone. Having sent the text messages to him, the Appellant had no control over what Mr Camilleri would do with the messages he had been sent. In the context of all the conduct relied upon by the Stewards to support the finding of guilt, the discovery of that conduct was not such a faint or slight chance that it should be considered remote: see generally the Stewards' written submissions at [8]-[10] (and reply at [3]-[4]).

Consideration

22. For conduct to be prejudicial to the "image, or integrity or welfare of racing", the Panel accepts that the conduct must be publicly known. It must also be conduct which is prejudicial to racing itself, and not merely to an individual such as the Appellant. The key issue to be resolved first, however, is whether the conduct needs to be of a special kind – such as dishonest, corrupt, intentionally misleading or, to

adopt the Appellant's wording, "wrong conduct" – in order to sustain a finding of guilt under AR 175A.

23. We do not accept the submission made by Mr Sheales that in order for a breach of AR 175A to be made out, some "wrong conduct" needs to be proven. The Panel has considered the judgment of Young J in *Waterhouse*, particularly at [63]-[69]. The Panel is of the view that his Honour held that conduct which gives rise to a particular suspicion in the mind of a reasonable person, when that conduct is publicised, may qualify as "blameworthiness" and could constitute a breach of AR 175A.

24. There is no doubt that the bookmaker in *Waterhouse* was actually found to have done something wrong in that he was found to have recorded bets that were not legitimate bets: *Waterhouse* at [66]. At [67] of the judgement, however, his Honour observed that "[t]he raising of suspicion which suspicion may reasonably be expected to get publicity, may qualify as blameworthiness". At [68] of the judgment his Honour observed that "blameworthiness is not the equivalent of *mens rea* ... There are situations where to create suspicion could amount to blameworthiness." At [69] of the judgement his Honour stated:

> "[69] I certainly would not, with respect, go as far as the Tribunal in saying that if a person might reasonably suspect from the conduct of a bookmaker that he might be money laundering or avoiding income tax, that that would be enough if in fact, as would appear to be the case here, he was doing neither. However, where there was some wrong conduct or where the conduct would give rise to suspicion in the minds of a reasonable observer when the conduct was publicised (if the bookmaker could reasonably assume that it would be), then the offence could be made out."

25. The last sentence of [69] seems to the Panel to set out a two-part test, with the second limb not requiring a finding of 'wrong conduct', but rather the raising of a relevant 'suspicion' in the mind of a reasonable person. The Panel considers that the thrust of what his Honour held at [63]-[69] of his judgement is that conduct can be blameworthy conduct for the purposes of AR 175A if it would give rise to suspicion in the mind of a reasonable person when that conduct was publicised. We note that the Stewards have not pursued an allegation that the Appellant's conduct was deliberately misleading. We do not consider though that this means it is not open to us to find that

there was a breach of AR175A based on the particularised conduct causing a reasonable person to have a relevant suspicion that is prejudicial to the interests of racing

26. The Panel is comfortably satisfied that the conduct detailed in the charge sheet as a whole is conduct that would give rise to a suspicion in the mind of a reasonable person that the Appellant's on-air broadcast was not conducted with integrity and that the horse that the Appellant was told to "watch" by Mr Camilleri (and that he backed) was not mentioned in the hope of directing the public's betting funds away from this horse. This is particularly reinforced by the text sent to Mr Camilleri following the race where the Appellant posed the question "Like how I threw off in the yard??", and "Couldn't stop the train". This in the Panel's view would clearly raise a suspicion in the mind of a reasonable person, made aware of all of the conduct, that the Appellant had deliberately not mentioned on air the horse Palazzo Pubblico that he was told to "watch" and that he in fact backed himself.

27. The Appellant, while conceding to the Stewards that in particular the text "Like how I threw off in the yard??" was a "bad mistake", "an error of judgment" and "probably a stupid thing to say": T 31/7/15 page 23.897-.899, otherwise contended that his texts after the race were just a 'joke' or a bit of 'banter' with Mr Camilleri. It was also submitted that the Appellant's on-air broadcast, in a general sense, involved him merely passing on his observations of certain horses in the betting yard, as distinct from any tip to punters based on form analysis. There was also no allegation that what he actually said on-air was inaccurate, or was not based on his observations.

28. Despite the Appellant's explanation of his post race texts, the Panel remains of the view that the totality of his conduct was such that it would give rise to a suspicion in the minds of reasonable persons made aware of that conduct that there was information or commentary deliberately left out of the broadcast – that is, that in a colloquial sense he "threw off" any reference to Palazzo Pubblico.

29. Further, because at least part of the conduct involved an on-air broadcast from the then television station broadcasting horse racing, and the suspicion we have found relates to that broadcast, we are also satisfied that this is prejudicial to the image and

interests of racing itself, and not just the image of the Appellant: see *Waterhouse* at [58] and *Discipline for "Bringing a Sport into Disrepute" – A Framework for Judicial Review*, Martin Kosla (2001) Melb Uni Law Review 22, page 670.

Remoteness Issue

30. Two authorities were relied upon by both parties in relation to this issue.

31. In the context of a slightly differently-worded rule of the *Western Australian Rules of Harness Racing 1999*, but dealing with the issue of the possibility of discovery of relevant conduct, we were referred first to [50] of the judgement of Steytler P of the Western Australian Court of Appeal in *Zucal, RWWA Chairman of Stewards and Ors v Harper* (2005) 29 WAR 563 where his Honour stated:

> "If a person who is prominent in the harness racing industry engages in conduct which has the potential for being made public and which, if made public, will cause people to lose confidence in his or her integrity or standards (even if the conduct is unconnected with the racing industry), then it may very well be the case that that conduct will, as a consequence, have a flow on effect as regards the manner in which the harness racing industry itself is perceived. There is consequently no justification for giving r 243 a narrow construction of the kind contended for. If a participant in the harness racing industry has a high profile in that industry, as Harper seemingly does, then misconduct by that person which is public, or which has the potential to become so, may, depending on its nature and seriousness, have a detrimental effect, if only by association, on the industry itself."

32. Further, in relation to AR 175A, we were referred to [69] of the judgement of Hodgson JA in *Waterhouse* on appeal where his Honour held:

> "[69] In my opinion, it is prejudicial to the image of racing that such conduct should become known. In my opinion, it is no answer for Mr Waterhouse to say that he did not wish this to become known. If that were an answer, even the most dishonest conduct by bookmakers, which they intended to keep secret, could not be conduct prejudicial to the image of racing. There is always a chance that improper conduct will be discovered, and at least unless the possibility of discovery is remote, the circumstances that the participants hoped that it would be kept secret would not, in my opinion, prevent such conduct, on it

becoming known, being properly characterised as conduct prejudicial to the image of racing."

33. There is some difference in emphasis between the two cases. *Zucal* is addressing the issue of the potential (whatever is meant by that term) of conduct being made public. Hodgson JA is directly addressing the issue of discovery of conduct.

34. When talking about the chance of discovery, Hodgson JA made reference to "improper conduct". We have found that conduct does not need to be improper before it might result in a breach of AR 175A based on the judgment of Young J at first instance in *Waterhouse*. There is nothing in the Court of Appeal's judgment which overrules this. Hodgson JA used the term "improper conduct" no doubt because it had been established that the bookmaker in *Waterhouse* had recorded illegitimate bets.

35. The issue in this case concerning remoteness is whether the possibility of discovery of the texts between the Appellant and Mr Camilleri was remote. This is a matter that must be assessed objectively.

36. The Appellant's evidence concerning Mr Camilleri was that he was a person known to him through his father and that he used to see him at the Penrith trots every week on a Thursday. They occasionally discussed form. He occasionally saw him socially and they obviously had each other's phone numbers. He found Mr Camilleri an entertaining character on a personal level, did not see him that often, had a joke and laugh with him but "never really took what he had to say with too much credibility": see generally pages 1-3 of the transcript of the Stewards' interview with the Appellant of 31 July 2015.

37. It is also clear that the Appellant was told by Mr Camilleri that he was helping a licensed trainer, a Mr Kavanagh, and that he was advised in a text message on 17 January 2015 to 'watch' Palazzo Pubblico. There is then the series of texts sent between the Appellant and Mr Camilleri after the race won by Palazzo Pubblico on 17 January 2015.

38. The fact that the Appellant sent a text after the race where he stated "Like how I threw off in the yard??" may be an indication that the Appellant subjectively thought his texts were private and that he did not consider that they would be discovered, or perhaps he did not consider this issue at all. One of the purposes of AR 175A however is to protect the image of racing, and the issue of remoteness needs to be considered in that context. The fact that it might have been the intent of the Appellant that his texts remain private does not answer whether the chance of them being discovered was remote.

39. Objectively, the Appellant sent his text messages to Mr Camilleri, which, having been sent, created a record of those messages in Mr Camilleri's phone. The Appellant was not in a position to control what happened to those texts having sent them.

40. Mr Sheales on behalf of the Appellant points out that there was in his submission an unlikely series of events leading to the discovery of the texts between the Appellant and Mr Camilleri. These are set out in Exhibit 2A and include a Stewards inquiry being undertaken into licensed trainer Mr Sam Kavanagh during which his iPhone was forensically imaged. This led to an interview with Mr Camilleri and his phone being handed over for forensic imaging. This in turn led to the Appellant and his phone being forensically imaged.

41. In the Panel's opinion, however, it needs to be remembered that Mr Camilleri was a person who said he was providing 'help' to a licenced trainer, was giving advice about a horse to "watch" which then firmed dramatically in betting (see Stewards interview with Mr Zerafa 31 July 2015 at L270-L420) and subsequently won the race. The Panel is of the view that the possibility of discovery of the conduct, being the texts between the Appellant and Mr Camilleri, should not be characterised as remote.

42. It may be that it was more likely than not that the texts would remain private and undiscovered. However, the texts sent by the Appellant after the race:

- were sent to a person involved in racing who said he was providing 'help' to a trainer;

- were sent to a person the Appellant did not know particularly well, even though he was on friendly terms;
- became information that Mr Camilleri could chose to do what he liked with;
- related to a horse he had been told to watch by Mr Camilleri, and that had been the subject of a betting plunge;
- were ultimately discovered by Stewards in the course of their investigation work.

43. In the context of a rule to protect the image of racing, we do not consider the discovery of this conduct to be remote in the sense of only a slight or faint chance. It was a possibility that was real. A text is not secure messaging. From the sender's point of view, the maintenance of secrecy is entirely dependent on the conduct of the receiver or what happens to the receiver's phone.

44. Further, despite the submissions made by Mr Sheales at [14] of his written submissions, we do not consider it relevant that these matters became part of the public knowledge because of a Stewards' investigation or inquiry.

45. Accordingly, we are comfortably satisfied that the conduct of the Appellant detailed in the charge:

(a) became public knowledge and the possibility of its discovery could not properly be described as remote;

(b) would create a suspicion in the mind of a reasonable person of the kind described in [26]-[28] above.

46. We also find that the conduct related to racing as a whole and not just the Appellant.

47. We are of the opinion that the conduct was prejudicial to the image and interests of racing, and we would therefore dismiss the appeal against conviction.

Penalty – Majority decision of Mr Beasley SC and Mr McKee

48. We have had regard to all of the subjective matters raised on behalf of the Appellant as outlined by Mr Sheales to the Stewards at the hearing on 21 September 2015 before they imposed their penalty.

49. We note the circumstances of this offending resulted in the termination of the Appellant's employment from Sky Channel, and that he remains unemployed.

50. The Appellant has an otherwise unblemished record, and appears to be a person of good character. It is unlikely that he will offend again, and there is no relevant prior offending.

51. The penalty imposed by the Stewards was a 3 month disqualification. In our opinion, the disqualification was not warranted in the circumstances.

52. We appreciate the need for general and specific deterrence, and to impose a penalty that upholds the intent of the rule – that is, to protect the welfare and interests of racing.

53. However, while the totality of the conduct outlined in the charge sheet would give rise to the suspicion that establishes the offence, the Stewards did not pursue an allegation that the Appellant's conduct was deliberately misleading. The penalty imposed should reflect this. Disqualification in the majority's view should be reserved for a more serious breach of AR 175A.

54. In our view, the imposition of a fine in lieu of disqualification is appropriate. We consider the fine should be in the amount of $1,500.00

55. Accordingly, we would uphold the conviction against penalty, but set aside the Stewards' order of disqualification for 3 months, and impose instead an order that the Appellant pay a fine of $1,500.00. That fine is to be paid in 28 days.

Penalty – Minority reasons of Mr Carlton

56. Mr Carlton agrees that the penalty of disqualification for three months should be set aside. However, he considers that in lieu of that penalty, a fine of $10,000 should have been imposed by the Panel. He considers that such a fine is a more appropriate reflection of the Appellant's conduct, particularly the text messaging after the race to Mr Camilleri.

Orders (by majority on penalty)

57. The orders of the Appeal Panel are:

(1) The appeal against the finding of guilt in relation to AR 175A is dismissed.

(2) The appeal against penalty is upheld.

(3) The penalty of 3 months' disqualification imposed on 21 September 2015 is set aside.

(4) In lieu thereof, a penalty of a fine of $1,500.00 is imposed.

(5) The fine is to be paid within 28 days of the date of these Reasons.

(6) The appeal deposit amount is forfeited.

6 November 2015