

APPEAL PANEL OF RACING NEW SOUTH WALES

THE APPEAL OF LICENSED TRAINER MARK GWYNNE

Appeal Panel: **Mr R. Beasley SC – Principal Member; Mr C Tuck; Mrs J Foley**

Appearances: **Mr M Van Gestel, Chairman of Stewards for Racing NSW**
Mr M Dennis, solicitor, for the Appellant

Date of Hearing: **1 October 2021**

Date of Reasons and Orders: **1 October 2021**

REASONS FOR DECISION

Mr R Beasley SC, Principal Member (for the Panel)

1. On 9 September 2021, licensed trainer Mark Gwynne (the appellant) pleaded guilty to 4 breaches of the Australian Rules of Racing, namely AR 248, AR 250, AR 252, and AR 232. All charges relate to the appellant having in his possession the prohibited substance Stanazol between 8 and 12 December 2020, and to administering this substance. The first three charges relate directly to administration and possession of this substance (which is an *anabolic androgenic steroid*). The AR 232 charge relates to giving false evidence to a Steward at an interview conducted on 8 July 2021.
2. The Administration charge (AR 248(1)(a)) particulars are that on or around 11 or 12 December 2020 the appellant administered Stanazol to the racehorse *Bartandthequeen*. A breach of this rule attracts a mandatory 2-year disqualification, unless “special circumstances” exist: AR 248(2) and AR 283(6). “Special circumstances” include assisting Stewards in their inquiries, and pleading guilty at an early stage: LR 108(2)(a).

3. The particulars of the first possession charge (Charge 1, AR250(a)) were that the appellant had in his possession a prohibited substance from Prohibited List A under the Rules (Stanazol) between 8 and 12 December 2020. The particulars of the second possession charge (Charge 3, AR 252(1)) were that also between 8 and 12 December 2020 the appellant had in his possession Stanazol when it had not been prescribed or dispensed in accordance with the *Stock Medicines Act 1989* and the *Poisons and Therapeutic Goods Act 1966*. The particulars of the charge brought under AR 232(i) were that the appellant had given false evidence about these matters on 8 July 2021 when interviewed about them by Official Veterinarian Dr Rose Bensley and Racing NSW Stipendiary Steward Mr. Ben Pearce.
4. The Stewards imposed a penalty of an 18-month disqualification for the breach of AR 248(1)(a). A 9-month disqualification was imposed for each of the possession charges, and a further disqualification of 4 months was imposed for the breach of AR232. The Stewards determined that the penalties for the Administration and Possession charges should be served concurrently, with the penalty for breach of AR 232 to be cumulative. The total penalty imposed then by the Stewards was a 22-month disqualification, which commenced on 9 September 2021, and that will expire on 9 July 2023.
5. The appellant has appealed to the Panel against the severity of the penalty imposed upon him. It can be noted that he previously sought a stay, which was refused on 10 September 2021.
6. On appeal, the appellant was represented by Mr. M Dennis, solicitor, and the Stewards were represented by Mr. M Van Gestel, the Chairman of Stewards. An appeal book containing the transcript of the Stewards' Inquiry and its exhibits was tendered in evidence. No additional evidence was tendered on appeal.

Facts

7. There were no disputed facts on appeal. Those that are key to the determination of the appeal are the following:

- (a) The appellant has been what he describes as a “hobby trainer” for many years. He has a relevantly unblemished record as a trainer. His main occupation or trade is as a plumber.
- (b) The appellants’ horse Bartandthequeen had run poorly on 28 November 2020. The horse has certain “back issues”, and as a result the appellant approached permitted veterinarian, Dr Ronald Raymer, for a treatment. On 9 July 2021 the appellant told the Stewards he asked Dr Raymer for an “anabolic steroid”. It would appear at this time – early December 2020 - that neither the appellant nor Dr Raymer were aware that administration of an anabolic steroid was prohibited by AR248 (or equivalent rule since November 2013).
- (c) Shortly after administering the Stanazol, Dr Raymer informed the appellant that it was in fact against the rules. He did not administer the steroid after this time.
- (d) In a telephone conference on 8 July 2021 relevantly held between Stipendiary Steward Ben Pearce and the appellant, the appellant:
 - (i) denied treating the horse;
 - (ii) denied obtaining Stanazol from a vet; and
 - (iii) denied treating the horse with an anabolic steroid.

These denials were false. The appellant’s evidence was that his motivation for not being truthful to Mr. Pearce was that he was trying to protect Dr Raymer, not himself.

- (e) The day following the 8 July 2021 telephone call, the appellant withdrew all denials, and admitted all relevant offending. He ultimately pleaded guilty to all breaches of the rules he was charged with on 9 September 2021.

Submissions

- 8. In relation to Charge 1, Mr. Van Gestel referred the Panel to the Supreme Court judgment of *McDonald v Racing NSW* [2017] NSWSC 1511. The appellant in this case had pleaded guilty to a breach of a rule of racing relating to betting activity that carried with it a mandatory 2-year disqualification. The mandatory period could be

reduced however if “special circumstances” existed under LR108(2)(a). Those circumstances include early plea and assistance to the Stewards. As a result of finding that “special circumstances” existed, the Stewards reduced McDonald’s penalty from a 2-year disqualification to an 18-month disqualification. McDonald appealed, seeking a reduced penalty. The appeal turned in large part on the words of what was then AR196(5) (now 283(6)) which also are relevant to this appeal, and which are as follows:

“AR196(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..”

9. Contrary to the submissions of McDonald, Rein J held that the words “whereupon the penalty may be reduced” in AR196(5) supported only a reduction of a disqualification. They did not permit the imposition of a penalty of a different nature to a disqualification, such as a suspension or a fine.
10. In light of *McDonald*, Mr. Van Gestel submitted that it was not open for the Panel to change the nature of the penalty imposed on the appellant here from a disqualification to, say, a suspension. Further, the “special circumstances” were limited to the early plea and assistance, which usually results in a 25% reduction of penalty. Such a reduction in this case for Charge 1 results in the penalty that was imposed by the Stewards – an 18-month disqualification.
11. Ultimately, Mr. Dennis accepted that *McDonald* gives this Panel no scope for changing the penalty from a disqualification to a suspension. He did however contend that a greater reduction than 6 months should be made here. He based this submission on the fact that his client was unaware he was engaged in conduct in breach of the Rules (while accepting that he should have been aware of the relevant rules), and had relied on advice from a veterinarian. Further, he submitted, there was no dishonest intent involved in the offending, corroborated in part by the appellant’s good record. For the same reasons, Mr. Dennis submitted that the penalties imposed for the

possession charges should be reduced in length and changed from disqualifications to suspensions.

12. In relation to the AR232 breach, Mr. Van Gestel relied on previous decisions of the Panel, and in particular the *Appeal of Clint Lundholm* (RAP, 7 August 2020). In *Lundholm*, the appellant was untruthful when asked by Stewards at a race-meeting about whether he knew tubes of BCAA paste were in his float, and whether he had at any time administered them. A short time later on the same day he admitted he had been untruthful, and had administered the paste to horses the day before (incidentally, not an offence under the Rules). Mr. Lundholm's appeal challenging a 4-month disqualification was dismissed. Mr. Van Gestel submitted that the circumstances in *Lundholm* were insufficiently different to those here to warrant a lesser penalty.
13. Mr. Dennis contended that the appellant had corrected his false statements within 24 hours, had been motivated only to protect Dr Raymer, and that the false evidence was so connected to the offending related to the other three charges that any penalty imposed for the breach of AR232 should be served concurrently with the penalties imposed for the charges relating to the Stanazol.

Resolution

14. The Panel is of the unanimous view that the appeal in relation to the severity of penalty for Charges 1 to 3 should be dismissed. There is a mandatory 2-year disqualification for Charge 1. It is proper to find "special circumstances" exist, given the early plea and the assistance provided by the appellant. While we are mindful of the offending on 8 July 2021 in the conversation with Mr. Pearce, the appellant at all other times offered a high level of cooperation and assistance to the Stewards. We agree then that a 25% discount is appropriate, reducing the penalty to an 18-month disqualification. There are no other circumstances that in our view warrant a further reduction in penalty. While we accept that the appellant was not aware of the prohibition on use of anabolic steroids, and that he relied on Dr Raymer, this is not a mitigating factor in the circumstances here. Licensed persons must be familiar with the Australian Rules of Racing. While there might be times where reliance on a

veterinarian's advice might be a mitigating factor, that does not apply in relation to the knowing use of anabolic steroids.

15. The Panel is also unanimously of the view that the appeals in relation to the possession charges should be dismissed. Possession of a prohibited substance like an anabolic steroid, which cannot be used at any time on horses, is very serious offending under the rules. The 9-month disqualifications imposed are in the Panel's view entirely appropriate. We also agree that the penalties for the possession charges should be served concurrently with the penalty for Charge 1, as they have all resulted from the same course of conduct.

16. The Panel members are in disagreement as to the proper penalty for the breach of AR232. While we all agree that it is a different category of offending to the first three charges, and that any penalty should be cumulative to the other penalties, we do not agree on the length of penalty. Mr. Tuck is of the view that a 2-month disqualification should be imposed in lieu of a 4-month disqualification. He has considered the Panel's decision in *Lundholm* (of which he was not a member) and considers that the penalty imposed in that matter was greater than he would have imposed. Mrs. Foley and I however cannot sufficiently distinguish the conduct of the appellant in this matter to that of *Lundholm* such that a different penalty should be imposed. By majority then, the appeal in relation to AR232 is also dismissed.

17. The orders of the Panel are as follows:

1. Appeal dismissed.
2. Penalty of a 22 months disqualification confirmed. Such penalty commenced on 9 September 2021, and expires on 9 July 2023, on which date the appellant may reapply for his license.
3. Appeal deposit forfeited.