RACING APPEALS TRIBUNAL OF NSW

Tribunal: Mr D B Armati

Friday 29 November 2019

Reserved Oral Decision

Appeal by Mr Bobby El-Issa against decision of Racing NSW Chief Executive Mr P V'landys to revoke his jockey's licence

ARR 13(1)

DECISION:

1. APPEAL DISMISSED
2. JOCKEY'S LICENCE REVOKED
3. APPEAL DEPOSIT FORFEITED

BACKGROUND

1. The Appellant appeals against a decision of the Chief Executive of Racing NSW on 6 September 2019 to revoke his licence as a jockey.

2. The exercise of that power by the Chief Executive followed a hearing by the Licensing Committee (established by the Board of Racing NSW), which conducted a Show Cause hearing, at which the Appellant was represented and gave and produced evidence.

3. The determination of 6 September 2019 contained a number of matters based upon recommendation. The actual decision was, rephrased: "Your jockey's licence is revoked" and the decision then continued, "Any new application for a jockey's licence should not be made until 2 September 2020."

4. The recommendation made by the Licensing Committee to the Chief Executive contained four paragraphs, rephrased:

> "(1) that under Australian Rule of Racing 13(c) this licence should be revoked on the basis he is not fit and proper;
>
> (2) that under Local Rule 51(6) he should not make that application for a fresh licence, as just mentioned, until 2 September 2020;
>
> (3) that counselling should be arranged for him for a period of three months through Insight Psychology and be funded by Racing NSW;
>
> (4) that he be offered a trackwork rider's licence, subject to an interim report from Insight Psychology as to his suitability."
>
> The determination did not embrace those additional matters. It is noted that the Appellant did not make an application for a trackwork rider's licence.

5. The grounds of appeal essentially are that he is a fit and proper person, that the Chief Executive's determination is unreasonable on the basis that he had served the appropriate penalties for each of the breaches - and the Tribunal will return to those - and the revocation of a licence on the

grounds of not being fit and proper is not a correct vehicle to implement a decision of that nature.

6. The evidence has comprised a bundle that was before the Show Cause Committee, which itself contains the Notice to Show Cause, the stewards' recommendations, various race results, stewards' reports and race reports, a number of inquiry reports and, in addition, it contains on behalf of the Appellant references, a statement of 2 September 2019 by him and, in addition, the Tribunal has the transcript of the Show Cause hearing of 2 September and reports by psychiatrist Brecht of 15 October and 22 November 2019 respectively. By way of additional evidence the Appellant has produced a further statement of 22 November. He has also put in evidence his analysis of the various races that are the subject of this hearing. Also in evidence is a USB stick containing a Fox media report prepared in relation to the Appellant some time ago and a number of press releases relating to him. The oral evidence has been given by the Chief Integrity Manager and Chief Steward of Racing NSW Mr Van Gestel and, in addition, the Appellant gave evidence.

LICENSING SCHEME

7. The licensing scheme to which this appeal relates is contained in the Australian Rules of Racing. No emphasis has been placed upon the Thoroughbred Racing Act as such and those relevant powers will not be referred to.

8. The Australian Rule of Racing 13 is in the following terms:

> 13. *Without limiting any other PRA powers, a PRA has the following powers in respect of licensing and registration:*
>
> *(a) to license riders, trainers and other persons on terms and conditions as it thinks fit;*
> *(b) - not relevant to this case;*

> *(c) at any time to suspend, vary or revoke any licence or registration (or the terms of any licence or registration) without giving any reason.*

9. In addition, in this matter, as already referred to, Local Rule 51 has a part to play. LR 51(1) states;

> *(1) Any person seeking a licence, permit, registration, transfer or indentureship as provided by the Rules must apply to the Board on such form as the Board may from time to time direct. Any such application must be accompanied by the prescribed fee.*
>
> *(2) to (5) - not relevant.*
>
> *(6) Any person who has had an application for a licence or registration refused, or had a license or registration cancelled or revoked, must not make a further application, or reapply for a license or registration that has been cancelled or revoked, until the expiration of 12 months from the date of such refusal, cancellation or revocation. The Board may however in its discretion reduce the said period.*

10. To be distilled from those two rules is that the PRA - relevantly, that is Racing NSW here - can suspend, vary or revoke the Appellant's licence and they can do so without giving any reason. In addition, if they do so, then under 51(6) another application cannot be made for 12 months, unless the Board determines otherwise.

ISSUES

11. The issues for determination have been common to the Show Cause hearing, the determination of the Chief Executive and on this appeal and that is, as was set out in the 16 August 2019 Show Cause Notice, the following are said to be his failures:

    "(1) A lack of due care provided to fellow riders and horses in races.

    (2) Your conduct towards fellow riders, including disparaging comments and/or allegations and threats made against those riders.

    (3) Your conduct towards Racing NSW stewards and staff."

12. It is the function of this Tribunal on this appeal to determine if the Appellant demonstrates he is a fit and proper person to be entrusted to retain a

jockey's licence and, if not, whether to exercise AR 13 and revoke the licence.

LEGAL PRINCIPLES

13. The legal principles in respect of a not fit and proper case have been stated on many, many occasions by this Tribunal. This Tribunal was taken to some of those many decisions.

14. In O'Connell v Greyhound Racing NSW, Racing Appeal Tribunal NSW, 26 October 2018 the Tribunal stated the following, commencing at 7:

> "7. The law to be applied in respect of addressing that test has been set out by the Tribunal in numerous decisions over recent years. Four decisions have been identified for consideration, three by this Tribunal. The first is a harness racing appeal of Zohn, 11 July 2013; the second is a harness racing appeal of Scott, 15 July 2015; the third is a greyhound racing appeal of Vanderburg, 13 November 2015. I n addition, the parties have put before the Tribunal a decision of the Supreme Court of Victoria, Common Law Division, in Frugtniet v The Board of Examiners, case number 4691/2005, a decision of Justice Gillard of 24 August 2005.
>
> 8. As a result of those various past determinations on the test to be applied by the Tribunal, the Tribunal will not in this matter set out all of the reasoning that led it to determine, in each of its three cases, what is to be considered, but that will be paraphrased in the following terms as applicable to the facts of this case.
>
> 9. The test is, as was identified in Hughes and Vale Pty Ltd v New South Wales [No 2] (1955) 93 CLR 127, that the question of fit and proper person requires consideration of honesty, knowledge and ability.
>
> 10. As was summarised in Vanderburg, the Tribunal has to assess the Appellant as a fit and proper person on the evidence it has available to it at the time of making its decision, and to look to the future to decide whether it should give the Appellant its imprimatur as a person able to be held out to the community, and in particular the greyhound racing community, as a person who is fit and proper. In addition, some matters for consideration include the fact that entitlement to a licence is a privilege, and not a right.
>
> 11. Importantly, in assessing fitness and propriety, the type of licence applied for must be considered. As was said by Justice Davies in New Broadcasting Ltd v Australian Broadcasting Tribunal, Treasurer partly joined, (1987) 73 ALR 420:

> The question of fitness within section 86(11)(b) is not at large but is directed, for the purpose of the regulatory regime, at the holding of a broadcasting licence. Not every aspect of a person's fitness or propriety is relevant to his fitness and propriety to hold an operator licence.

12. Whilst His Honour was there dealing with an application for a broadcasting licence, as would be apparent from that title and the quotation, the principles nevertheless are apt in this matter.

13. Also, as a result of the Frugtniet case, it is appropriate to add certain additional matters, namely, that past improper conduct will not recur has to be established; there has to be proof that the Appellant has shed a past conduct; and that it may take years of demonstrated good conduct before that can be done. Importantly, in addition, regard must be had to his history to the present time, including any pattern of conduct in which he has engaged.

15. For emphasis on those matters, the Tribunal has also taken into consideration the Australian Broadcasting Tribunal v Bond [1990] HCA 33, where Justices Toohey and Gaudron stated:

> "The expression 'fit and proper person'", standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of 'fit and proper' cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.

16. The decision of Vanderburg of 30 November 2015, paragraph 9, went on to refer to the case of Zaidi (references not given), which emphasised that the Tribunal can draw inferences from past conduct, particularly conduct which has led to previous disqualification. In paragraph 10 reference was made to the case of Bannister (references not given) that a failure to explain the past course of action may mean the Tribunal cannot be satisfied the

applicant is now a fit and proper person. Paragraph 11 referred Kotowicz (references not given) where, in considering the protection of the public, the restoration of a person by reason of rehabilitation must be considered and the reasons for that, of course, are to encourage rehabilitation. In addition, in a number of decisions reference has been made to the case of Ziems (reference not given) where it was quoted:

> "What has dealt with and, importantly, to be considered is misconduct in the vocation concerned."

17. The Tribunal was taken in the submissions also to the matter of Painting v Harness Racing NSW, Racing Appeals Tribunal NSW, 15 February 2019, where it quoted at page 7 the decision of Deputy President Coghlan in VCAT B352/2008 Pullicino, where the Deputy President said:

> "It will be seen then that the term 'fit and proper person"'
> - gives the widest scope for judgment and rejection
> -involves notions of honesty, knowledge and ability
> -depends on its own circumstances
> -may be manifested in a variety of circumstances in a multitude of ways
> -may depend on the purpose of the legislation."

18. The respondent relied on parts of the decision of ABT v Bond in the decision of the Chief Justice at 348, where his Honour said:

> "…though fitness and propriety are necessarily related to the holding of the licensee's commercial licence and to the provision of a broadcasting service pursuant to that licence (see Re New Broadcasting Ltd.), the concept should not be narrowly construed or confined . It must extend to any aspect of fitness and propriety that is relevant to the public interest."

And later:

> "…a licensee has a responsibility to exercise the power conferred by the licence with a due regard to proper standards of conduct and a responsibility not to abuse the privilege which it enjoys."

And later:

> "A licensee which is a fit and proper person in the context of s.88(2)(b)(i) must have an appreciation of those responsibilities and

> must discharge them. Conversely, a licensee which lacks a proper appreciation of those responsibilities or does not discharge them is not, or may be adjudged not to be, a fit and proper person.”

19. The Tribunal was also taken to the decision of Ebadi v Transport for NSW, ADT NSW [2011] NSW ADT 126 and it was also taken to Scott v HRNSW, Racing Appeal Tribunal NSW, 23 July 2015. However, having regard to the detail with which the Tribunal has already assessed the principles to be applied to this case, further quotations from those two cases are not needed.

THE APPELLANT

20. The Appellant’s history in relation to licensing is that he commenced riding at the age of 18 and became first licensed as a jockey in 1998. He won two apprentice championships and also has been successful in a number of other major races. Racing is his sole income. He says he has no other profession. He says that the impact of a loss of licence on him would be devastating financially and emotionally. He points out that in effect since 6 September 2019 he has not been able to exercise his licence.

21. The Appellant has not sought confidentiality for, and has participated in publicity in respect of, an illness, so it is not necessary to maintain confidentiality in this appeal on the basis of his past illness with leukaemia. That has played a substantial part in his life. He was riding as a jockey and became unwell. He was diagnosed with leukaemia very quickly. He became exceptionally unwell. He was lucky to survive. He relied upon substantial support from people in the industry, as well as family and on his own strength to overcome that illness. He was able to return to riding. The Tribunal will return to other matters about that.

FACTS

22. The key facts in this matter have been dealt with exhaustively by the Show Cause Committee and for that reason they have not been re-agitated with the same detail on this appeal. The transcript of the Show Cause Committee is before the Tribunal, as well as the evidence of the Chief Steward and, of course, of the Appellant. Importantly, of course, there is also in the bundle of evidence transcripts of the inquiries and stewards' reports in respect of these various races.

23. As stated, the issues for determination relate to his riding and his conduct directly relating to his licence as it affects other licensed persons and officials.

24. He has come under notice in respect of Rule of Racing 131 which, relevantly, provides:

> "*A rider must not, in the opinion of the Stewards:*
> *(a) engage in careless, reckless, improper, incompetent or foul riding;*
> *(b) fail to ride his or her horse out to the end of the race and/or approaching the end of the race;*
> *(c) (not applicable to this matter);*
> *(d) excessively slow, reduce or check the speed of the rider's horse and in doing so cause direct or indirect interference to any other horse in the race."*

25. In respect of that rule it is the fact that the stewards have only dealt with (a)- careless. They have not dealt with reckless, improper, incompetent or foul. It is a fair reading of that rule that the gradation of seriousness increases from reckless at the bottom end through to foul at the top end. It is, therefore, that in respect of this rule he is at the lesser end of gravity.

26. It is also to be noted that, as will be returned to, the Chief Steward has referred to the danger occasioned by the Appellant on a number of occasions, being in breach of (d), that is, excessively slowing, reducing or

checking the speed of his horse, although none of the infringements led to a separate agitation of that rule.

27. The Tribunal is dealing with 13 suspensions, which commenced with the first of them on 27 July 2018.

28. In evidence, since first licensed in 1998, he first came under notice on 22 January 1998 and through to 24 June 2015 he has been suspended for careless riding on 70 occasions. He has been reprimanded up to 6 March 2015 on an additional 95 occasions and up until 9 May 2015 he has been fined for careless riding on two occasions, a total of 167 breaches of 131(a) on careless.

29. The Tribunal notes the stewards' Careless Riding Penalty Template. The one relevant to these proceedings has been superseded. That template provides guidance to stewards at inquiries as to what is an appropriate consequence for careless riding. It ranges through six categories:

(1) hampered, crowded;

(2) checked and/or lost rightful running;

(3) severely checked;

(4) severely checked, numerous horses involved, almost fell;

(5) fall;

(6) fall, several.

The suspensions relate to categories of low, medium or high within each of those six categories and at the lowest end of the scale is a reprimand and then it increases up to 30 meetings. There are various mitigations provided. There are various supplements provided and then there is a calculation sheet. The updated table - and the date of it is not apparent on the exhibit - has added a further premium, which is that if a rider has eight

or more suspensions in the last 12 months the rider is to receive a yellow card and be referred to three compulsory sessions with a sports psychologist before being allowed to ride again. That condition did not apply to this Appellant.

30. The Tribunal is not re-hearing or re-trying each of the 13 suspension matters in question and it is not necessary to more closely examine that table and the reasons for suspension given for them and the length of them. What it does say in it is that the matters generally fall within categories 1 to 3 of those six categories and in some cases range between low, medium and high. The evidence here establishes a difference of opinion between the Chief Steward and his oral evidence to this Tribunal and the views of some of the stewards' panels and, indeed, on one occasion at least the view of the Appeal Panel.

31. Relevantly to this case and to the first issue identified in the Notice to Show Cause is a lack of due care provided to fellow riders and horses and that arose because on 13 occasions between 22 July 2018 and 30 July 2019 he was subject to 13 suspensions under 131(a) for careless riding. As a result of referrals by stewards in country regions relating to those matters, the riding of the Appellant came to the attention of the Chief Steward and the processes commenced of the Show Cause issuing.

32. It is to be noted also that the last breach was 30 July 2019 and then the Notice to Show Cause issued as soon as 16 August 2019 and it might be noted the expedition with which the Committee and the Chief Executive dealt with the matter by conducting a Show Cause hearing and having a decision made by 6 September 2019 to revoke.

33. In addition, in the documents handed up there are a further five occasions between 1 March 2019 and 29 July 2019 on which the Appellant was reprimanded for careless riding. A reprimand generally will occur if the conduct was at the lowest end of the scale and on the table it would be hampered or crowded, low level of carelessness, and the rider would be required to sign an acknowledgement of that wrong conduct. Those reprimands do not play a substantial further part in the case for the respondent. They are merely part of it.

34. Each of the races has been played to the Licensing Committee and the subject of comment by the Chief Steward and by the Appellant and, indeed, by committee member Ms Olsen, who is the Chief Jockey Coach for Racing NSW and, in addition, on this appeal the Chief Steward again has given a summary of his observations, as has the Appellant. The Appellant also, as stated, provided an analysis of each of those rides in an exhibit.

35. The Tribunal does not propose to go through each race and analyse it in detail, but in broad terms draw from each of those 13 races the comments of the Chief Steward and noting the comments as well of the stewards who comprised the panels that dealt with his actual conduct. The necessity to do so is reduced because, with a few minor exceptions, the Appellant accepts that the case against him, as identified by the stewards and as identified by the Chief Steward on both occasions referred to, is a correct analysis of his failings. Indeed, the printed analysis that he has handed up quite clearly - and this is important in this case - acknowledges those failures as well.

36. As described, there is something of an issue about the grading of the carelessness, but not a lot turns upon that. The rating could be 1 to 6. Generally these matters fell within 1 to 3 on that grading scale. Every ride is careless because the Appellant shifted in or out when insufficiently clear or there was insufficient room. On occasions, having done so, he eased back sharply. On every occasion a rider was forced to check to avoid striking the heels of the appellant's horse and in some cases other horses were also checked. Some lost their rightful running. The most serious, the second last of his breaches, involved a horse blundering. The Chief Steward noted the conduct as involving significant checks or medium checks or severe checks. One involved severe crowding of an apprentice, who was forced to check. At times the manoeuvres involved very vigorous riding when there should have been a restraint or correction of angle of the horse.

37. On each occasion of these 13 matters the stewards suspended him and the times vary in number of meetings respectively of 11, 10, 10, 12, 8 (reduced to 7 on appeal, a matter with which the Chief Steward disagrees with the assessment of Appeal Panel that it was low severity), 14, 16, 8, 14, 8 and 12 and the last ones on the same day 20 and 21. The rides in between each of the suspensions was respectively 0, of course, for the first one, then 38, 6, 2, 25, 3, 10, 69, 86, 0, 27, 14, 0.

38. The Chief Steward emphasises safety is paramount, that the two length rule is designed to ensure safe crossing so as to avoid the risk of a horse that is crossed from clipping the heels of the horse that has crossed it and of the risk of blundering and falling. In particular, the heightened risk where there are a number of runners to the rear of the horse inconvenienced, with

a risk then not only of the inconvenienced horse and rider coming down, but of numerous horses and riders behind them also being caused to blunder and possibly come down. Here on some occasions there was such a substantial risk.

39. It has not formed a substantial part of this case, but the Appellant himself made reference before the Licensing Committee Show Cause hearing of the fact that immediately prior to that hearing two jockeys had lost their lives in racing as a result of incidents in racing. That is not, regrettably, an uncommon experience. As has been submitted on behalf of the respondent, a horse is travelling at some 60 or 70 kilometres an hour, weighs 500 plus kilograms in most cases and the jockeys, of course, are only between 50 and 60 kilograms. It is not necessary in this appeal to reflect upon the courage required of riders or the understandable concern they have for their safety, as does everyone associated with the industry, and their own understanding of the necessity to look out for their fellows.

40. The consequences otherwise are not just demonstrated by that unfortunate series of events at or about the time of the Show Cause hearing, but they have been alive in the minds of everyone associated with this industry. The rules are written, and are rules to which the privilege of a licence attaches, to make safety paramount. Nothing else can be considered to be a lesser test than the highest levels of safety are to be maintained.

41. The Appellant gave evidence about his conduct. As stated, he agrees with the assessment of the Chief Steward on his conduct and the likely effect of his failings in each of those races. He did give some evidence, and it is only fair to make reference to it, about some of the facts being less serious or being explicable by reason of other things. It has to be noted that, in the

Tribunal's opinion, for a professional jockey of this length of riding all of these things must have been in his mind in respect of the individual horses he was riding and his capacity to address them and the need for him, because of safety, to address those matters in the way in which in the individual race on a particular horse he chose to ride in the fashion which occasioned the carelessness. Those matters involved the fact that he was dealing with difficult horses in relation to tractability; horses that would not respond as readily as they should to his commands; horses, in one case in particular, which was full of running and with which there was difficulty of control. That is not a criticism. It can happen to the best of jockeys when a horse acts in that way, but of course it is, as described, a known possibility and the horse must be ridden to ensure that if those circumstances do arise, because of safety, appropriate steps are taken to eliminate risk.

42. In essence, he agrees and he has stated this quite clearly in his documentation and his evidence that he fails to look about himself sufficiently; he fails to give enough room; he races too close to other horses; he fails to wait to take his opportunities; he does not straighten in time sufficiently; he seeks to preserve a horse's energy and not maintain the speed, knowing he should do so; and at times he could not hold a horse back.

43. In addition to those failures in respect to those 13 matters in his history, there are also a number of conduct related matters and that was the second issue put to him in the Show Cause, his conduct towards fellow riders, officials and staff. There are at least 15 of those relevant in recent times.

44. The first of those is a reference to fellow jockey Thompson that:

"He looks like a pygmy on a surfboard."

In relation to the particular hearing at which that comment was made he was asked this question,:

"What sort of clearance do you give Robert Thompson?"

Answer - "Enough for 900 metres",

it being noted it was a 900 metre race.

45. In the same hearing the Chairman put to him:

"I'll put you in the picture. Your careless riding record is as bad as I have ever seen."

Answer - "Yes, well, that's what happens when you try. Half of these jockeys sleep with the light on."

46. In respect of another hearing, referring to his conduct, a reflection of his approach to stewards at the time he used terms such as;

"I made him stay in, just annoying the pisser out of him"

and later:

"But I think he's made a Hollywood."

Chairman - "Sorry."

Answer - "I think he's made a bit of a Hollywood."

In the same hearing Chairman -

"What about his body?".

Answer - "Well, I haven't got an opinion on riding calibre, so it's probably a stupid question to ask me."

47. Also during the course of one hearing it was not apparent to the stewards, but it was reported that the Appellant said to Jockey Hull:

"Watch your back for the next couple of weeks."

48. The Appellant was at pains to point out that in respect of that matter Jockey Hull had accused the Appellant of wrong conduct during the race. Things had become heated. The Appellant's denials were not accepted by Jockey Hull and in the course of the inquiry it apparently became the issue that Hull accepted that the Appellant was not at fault. The words were uttered and afterwards they shook hands and the matter was thought to be finished.

49. At another hearing the Chairman said:

> "Bobby, I don't want to interrupt, but you can't put words."
>
> Answer - "Stay out of it then. I want to ask to him a question. He just put him in a pocket, so let me ask him a question. I'm allowed to do that"

and very soon after that the Appellant got up and, despite the words of the Appellant as follows:

> "You don't even care. I don't even know what I'm sitting for",

after various pleadings with him, the Chairman said:

> "Bobby, don't leave the room"

and at that point the Appellant stood up and exited the room without permission. He was penalised in respect of that. The Appellant gave evidence to the Tribunal that he felt he had been pressured in that hearing. He thought he was going to blow up, that he would lose control. At the time a lot was going on in his life. He felt it was best he leave. He did. He gave evidence that he returned to the inquiry and apologised for his behaviour.

50. At the Notice to Show Cause, having listed that history, the Chief Steward then went on to say:

> "From my recollection, from my counting of the Appellant's conducted related matters, it would be in excess of 20 breaches of misconduct, improper conduct, dishonest conduct, false statement that the Appellant has been found guilty of over the years and they have ranged from fines of $500 to $1000 and suspension in the circumstances."

He went on to say there was a breach of jockey Bobby El-Issa's conditional licence when he stole a vest from another jockey and provided false or dishonest evidence to the stewards and that resulted in a revoking of his conditional licence until when the end of licence had ceased. It might be noted the Chief Steward went on to say after those remarks that in his 30 years of stewarding the Appellant's record in that 12 month period with those 13 suspensions is unheard of.

51. His conduct continued. In Queensland he was dealt with for his conduct when he used his helmet to strike another jockey at the weigh-in. He provided an explanation for that. There had been an exchange of words in the starting gates about the Appellant's conduct towards his horse, which he felt was going to sleep, which it appears Jockey Spinks thought was having an impact upon his horse. After the race Spinks came up and shoved and pushed the Appellant then retaliated. Each of them was penalised for their conduct.

52. The Appellant's conduct not only towards stewards, as summarised, also has been directed towards employees of Racing NSW.

53. The first related to Ms Parker, who is an executive assistant of Racing NSW. She took a call from the Appellant about an upcoming appeal and an attempt to find dates for it and, whilst it is not in a legally admissible form, this being a tribunal, it is not critical, says he became increasingly agitated. As to how or what he did to lead to such a conclusion or opinion is not given, but he commenced to yell at her and she considered his conduct to be improper. He admits he did that. In fact he sent an email to Ms Parker apologising for his conduct.

54. The next one was in relation to Racing NSW administration assistant Courtney Cook, who received a phone call from the Appellant seeking to

have a refund of a deposit paid to the Appeal Panel. She describes him, again in not strictly admissible form, as “starting yelling at me”, but she went on to say he used these words, “Racing NSW is fucking ripping us jockeys off” and she then went on to say he continued to yell and became louder as the call progressed. The Appellant emailed Ms Cook with an apology for his conduct.

55. In addition, there is a matter of improper conduct towards a barrier attendant. It appears that each of them exchanged some language towards each other and each of them was subject to discipline for their conduct.

56. The last matter to which reference is made is that in March 2016 the Appellant was given conditions on his licence. That had arisen because on 3 March 2016 he had been offered a conditional jockey’s licence, requiring a number of conditions involving trackwork and barrier trials, no adverse reports, assessments of his behaviour. On 27 May 2016 there was an application to have conditions removed. He was allowed to ride at provincial meetings and later at metropolitan meetings, provided there were no adverse reports as to his conduct and he did not associate with a known person.

57. The Appellant in his evidence has provided explanations for his failure as a rider and as a licensed person. To the Licensing Committee he said:

> “Jockeys don’t go out there to do that. They just don’t. In a nutshell, I do have a problem and that’s what I’m trying to address today. That’s what I’m trying to put forward to you. I have a problem. I’m too competitive and, yes, it’s inbuilt in my nature, but I am way too prepared to get any -it’s taken me - it’s embarrassing enough to say. It’s taken me this long. I can honestly say it’s taken me until probably this year and like to a week ago, when I got this letter, to change my ways.”

He also said to the Licensing Committee:

> “It’s sheer luck I haven’t brought a rider down and especially after we’ve lost two jockeys in the game and to think that I could have contributed to one of those deaths gives me goose bumps. So I just want to put on record that I know safety is the most important in racing and I’m speaking from my heart, but I’ve been stuck in such a rut with

> my riding, being competitive, I've forgotten about safety. It just comes natural for me to get out there and win, win, when I should be thinking of riders' safety above all other things."

58. It is interesting that at times he expressed the view that he did not think he put other riders in danger. He reflects on the fact that when riding he does not think about changing his ways as a professional jockey. As just described, he is very competitive, as he himself said, way too competitive. As he also said, he rides too desperately and he tries too hard. It has been noted that his riding was not foul or dangerous and he has not been charged with those matters. He also gave evidence that in his career he had only caused one race fall, for which he received a three week suspension a few years ago. He describes how he wants to win for the owners and trainers. He agreed he has ridden carelessly and unsafely. He says at times his emotions get in the way.

59. Reference was made to his leukaemia. He says it caused him to become very tough, with a competitive outlook. He concedes he has let his competitive side obscure his ability. He describes how he was increasingly becoming bitter and angry. He acknowledged he was treading the line and trying too hard.

60. The Appellant set out to explain how he will change from those failures.

61. Firstly, he accepts he was careless and the need for safety is paramount. He will not let his emotions get in the way. He will look more. He will allow two clear lengths. He says he is a good jockey, a professional jockey and he can do those things. He describes how he will think more deeply. He says he can fix all these problems because he is a good jockey.

62. He describes how immediately after his last suspension he spoke to his partner emotionally about a need to change. It caused him to consult Rick Worthington. He describes in his statement of 22 November 2019 to the Tribunal a number of matters in this light, firstly, describing having commenced psychology sessions with Brecht on 3 September 2019 and he finds that incredibly helpful in his anger management issues and in

identifying triggers. He accepts he has taken limited responsibility for his conduct, which was reactionary and inappropriate. He has learnt how to unpack incidents in his past. His illness took its toll on his body and his mind and he had to work extremely hard, with months of dedicated hard work physically and mentally to get back to racing. He did so because of his love of racing. The pressure to get out there and start winning races became even greater and, as described, he developed a very tough and competitive outlook.

63. He acknowledges his improper conduct towards his fellow jockeys, which he himself describes as falling in the category of bullying at times, but now has a better understanding of where it all comes from. He says he has always been outspoken and a bit of a larrikin, but had not recognised these signs. He now has tools to control his outbursts and not to be over sensitive and not to project his frustrations onto authority figures. He emphasises that he has the expertise and motivation to correct all of his failures.

64. In his oral evidence to the Tribunal he emphasised that he has seen the destructive pattern in which he was engaged. He was awakened by the benefit of counselling on issues for which he had no acceptance in the past, but he can now identify his errors and he knows he has to act differently. He says he has the tools to help him to reflect and take himself out of situations. He now believes he can control his anger and, in particular, will laugh off conflicting situations. He will control his anger. He will address his lack of respect for authority and he will put things in perspective. He says the Notice to Show Cause and, indeed, all of these proceedings have been devastating for him and a wake up call. He emphasised that, as a professional jockey, he knows what he has to do.

65. In his aid he has put in evidence reports of psychologist Brecht. The first of those was 15 October 2019. He says that he has been seeing the Appellant since 3 September 2019, at the instruction of Racing NSW, to deal with anger management and developing coping skills; that he has been working continuously with the Appellant on these things and he has shown development, particularly in regard to understanding underlying causes and

triggers of his anger issues; that the Appellant has begun to develop and show improvement in his ability to monitor his anger and behaviour and that he recognises he is the one responsible for his attitude and behaviour. He now says he feels the Appellant is motivated to address his anger and committed to continuing to work with him for as long as is needed. Importantly, he is aware that developments to date are only the beginning. Weekly sessions were scheduled.

66. The second report is 22 November 2019. He has continued to engage with the Appellant, addressing his anger and attitude. He has been dedicated. He has developed further insight into his emotional triggers. He has enhanced acknowledgement and is further aligning him in the need for change. They are continually working to develop clear strategies to help him respond wisely to his emotions and maintain rational, adaptable, logical and solution focused to the problems.

67. In addition, the Appellant himself describes to the Tribunal that he has taken time to reflect. He has a need and he agrees to ongoing counselling and he told the Tribunal that he expects that will continue twice weekly until the end of this year. He says he will fix the problems. He acknowledges he has a way to go emotionally. He says he is improving in leaps and bounds.

68. Acknowledging that this was 12 weeks ago, before the Show Cause hearing, he said that his riding is something he needs to address. It is not a thing he can fix overnight. He did want to seek help and, to quote him, “This is a cry for help.” He said, “If I can change my riding tactics and my ability to control anger”, he said, “I want to change.” He said, “I know I have anger problems.” He said, “I promise to change and take the necessary steps to change.”

69. In respect of these matters, with the exception of Bowman and Clipperton, to which the Tribunal will return, there has been no evidence directly to the Tribunal from other jockeys with whom he has spoken about capacity to change from those circumstances that he has exhibited to date, not just him personally, but as a rider generally. Jockey Bowman gave a reference, but

did not refer to the issue of any changes in him. Jockey Clipperton gave a reference and describes him as working hard on some of the issues. Those references were all before the Show Cause Committee. They have not been updated.

70. The Tribunal acknowledges that since 6 September, on all of the evidence that is here, the Appellant has been applying himself in an endeavour to progress and is now able to express his need for change on these issues.

71. The Appellant gave other evidence about these things. He also said that things were going on in his life at the time. His daughter has an illness and her confidentiality will be preserved. No doubt that has played a substantial part in his thinking about life generally. There is his concern about a return of his leukaemia and, importantly, the impact that his leukaemia illness had on him and the cause for him, as it were, to toughen up.

72. He describes how the jockeys' room is very competitive. He says, however, he gets on with 95% of jockeys and, to quote him in his evidence to the Tribunal, "I am not as angry as I was" and he accepted he has lost his temper a number of times. He now relies on an insight as to that conduct and its affectation on a number of people. He agrees he was flippant, antagonistic, offensive, unhelpful and, of course, he has apologised to some of those to whom his conduct was directed.

73. To the Licensing Committee he gave a number of references.

74. The first is by Jockey Bowman, who describes him as a person, not having ridden against him recent time, but generally speaks in favour of him.

75. Jockey Clipperton, 2 September 2019, calling him a friend, having ridden with him, a confident and determined rider. He has conquered an illness. He is a caring and loving friend, working hard on some of the issues that has led him to today.

76. Brett Partelle, 1 September 2019, has known him for many years as a decent and very approachable man, someone who is working on his behavioural problems and that is something new for him. He says he has a high adrenalin marker, which has caused him to make poor decisions and behave in a manner that has caused stewards concern. He says his riding could be more careful and it is because he is trying to succeed. He says his rides for him have been as good as any jockey in the country and other colleagues have not displayed the same intensity of thought processes as the Appellant. He describes the illnesses of the Appellant and his daughter and the impact that has had on him.

77. The next is by trainer Ron Quinton, 30 August 2019. The Appellant was an apprentice with him at a time when he won he two premierships and became a successful jockey and rode very successfully, at times crossed the line, but he is a talented rider.

78. The next is by riders' agent Melissa Shield, 30 August 2019, who has been his agent for 12 years. He is friendly, cheerful, polite, courteous and respectful. He is ashamed and apologised for his conduct to her. Trainers use him because he is competitive. He looks to place his mounts in winning positions and he now acknowledges that he has to make changes that will assist him both on and off the track. Because he is extremely competitive, he will need to give greater consideration to his fellow jockeys. The Appellant has agreed with her that he does overreact, but that he is going to address his temper and seek counselling.

79. At the Show Cause inquiry the Appellant called Rick Worthington to give evidence. Mr Worthington had read the brief. He is a friend of the Appellant. He says that there is a long list of serious matters and the Appellant is at the cross roads. He says the Appellant is feeling very remorseful and that his anger management and counselling need to be processed to address this. He describes how he has had a lot of things going on in his life and, in essence, he and the Appellant have discussed, in a very sensitive, heartfelt and emotional way, the recent conduct of the Appellant.

80. The Appellant has given Mr Worthington his assurance that everything he discussed with Mr Worthington would be followed through. They have discussed the individual races. He describes the Appellant as having an emotional state and needs to check himself and take a breath to get rid of that aggressiveness. He said he needs to suck up his ego. He says there is a need for a combination of anger management and counselling and he will continue to assist him with that. Critically, he says, the Appellant knows he has to stop and has to think and listen. Mr Worthington did not update that evidence before the Tribunal. The Appellant confirmed having spoken extensively to Mr Worthington and confided in him and had discussions with him.

81. The Appellant put in evidence Fox Media material, which indicates his return to trackwork riding at that time and coming back into race riding after his recovery from the illness. Objection was taken on the grounds of relevance. That material merely demonstrates the difficult times that the Appellant suffered. Three people of relevance spoke on that media coverage. The first was Glyn Schofield, who described him as a likeable fellow. Jockey Munsie was shown in a photo with him and trainer Peter Snowden said he was a better rider for his recovery from illness and has confidence in him. He describes how he has a good family background.

82. Those matters, aged as they are, do not really assist the Tribunal in assessing the Appellant now. They do not, in essence, either through the references themselves or that particular evidence, address the key issues of riding failure and anger management, as they must be assessed now. They give no progress report.

DISCUSSION

83. Those then are the legal principles, the factual matters, the evidence upon which this decision turns. The Tribunal does not repeat the test, which it has set out at length. The main focus of this hearing has been upon riding safely, but also matters of character and his attitude, which are displayed

elsewhere, have great relevance to the way in which that character is reflected in his riding.

84. The stewards have been concerned about him. The Chief Steward, of vast experience, has been concerned about him. The Licensing Committee has been concerned about him. The Chief Executive, based upon all of those concerns and his concerns, reflecting on the true gravity of the issues and their seriousness, determined a revocation was appropriate.

85. It is not the function of this Tribunal to retry him for each of those matters. The Tribunal is dealing with his fitness and propriety, not his individual acts of breach. The Tribunal considers each of the individual matters which have been alleged against him on their own, but also collectively, that is, as it was previously summarised, on his various failures, those with which the Appellant has in essence not taken issue.

86. The Tribunal agrees that there has been a substantial demonstration of a failure by a professional jockey with the privilege of licence by displaying a blatant disregard for the safety of other riders and horses solely so he could win races. He was driven not just by his competitive nature, but by anger and a blatant disregard for safety when it suited him to do so. Prior to these recent events he has had no reflection at all. He has pushed on for his personal benefit with a disregard for the impact that his conduct has on others. His disrespect for the rules, officials, fellow professionals, even apprentices has been at a gravely serious level. There is no need to go back and summarise all those findings the Tribunal has just set out. The evidence is quite clear about it.

87. The listed conduct which was before the Licensing Committee and the Chief Executive in this Tribunal is recent, but it has occurred throughout his career. It is not conduct which has suddenly arisen and which might be explicable by something that has happened in his life, for example, the leukaemia illness. It is ingrained in him. It has taken too long for him to recognise and address those issues. The Tribunal rejects the implied criticism of the respondent that it did not reach out to him. He is a

professional. He holds himself out as a professional jockey. His failures must have truly been obvious to him. This long and unsatisfactory history has really only been addressed since 30 July when he had that emotional discussion with his partner and then went on to engage in conduct to address it. The four months that he has not been able to exercise licence, since it was revoked by the Chief Executive, must be in the context that it has only occurred after 21 years of continuously engaging in that conduct.

88. The Tribunal accepts his many remarks made to the Licensing Committee, to his referees and Mr Worthington and to the Tribunal that he understands the need for change. The Tribunal acknowledges the steps he has taken. They are set out in his two statements, his evidence to both of the hearings, his discussions with Mr Worthington and his psychologist Mr Brecht. The Tribunal accepts that he has insight into safety and anger issues. The Tribunal accepts that, as a professional jockey, he has said he can change and knows how to change.

89. However, there is no evidence, particularly from psychologist Brecht or his friend, Mr Worthington, or indeed of other licensed people to say he is cured. "Cured" is a strong term. To the extent that anger and related issues, described in detail in this hearing, can be cured, the evidence must be able to establish and support him that repetition will not occur.

90. In that sense there have been remarks which are relevant to consideration of the future. He said he can fix all these problems. He agrees he needs ongoing counselling. He will fix the problems. He acknowledges he has a way to go emotionally. He is improving in leaps and bounds. As he said to the Show Cause Committee in respect of his riding, it is not a thing he can fix overnight. As he also said there, he was engaging in a cry for help. He said there, "I want to change" and "I promise to change."

91. As the Tribunal has just stated, it does not have definitive evidence of an actual change to a level of satisfaction that he in fact has changed.

92. Fundamentally there are concerns that it may be ongoing.

93. It is unfortunate he did not take up the offer of a trackwork licence because he could have started the process of demonstrating behavioural change to officials and fellow riders, acknowledging of course that the opportunity would not address actual race riding issues, but it would have been a start. Even the Appellant does not say he has completed his change to say he is a different person. His change is ongoing. Whilst his four months out of riding has been a salutary lesson to him to cause him change, it is not complete.

94. The burden is on the Appellant in these proceedings to establish he is a fit and proper person.

95. The Tribunal considers all of the evidence it has to today. The Tribunal does not have a level of comfortable satisfaction that he has reached that state of change which he must demonstrate. To find today that he should be riding would enable him within a few days to be exercising his licence and the Tribunal struggles to be satisfied on the totality of the evidence that all of those competitive natures, those anger issues, all of those matters have in fact been so addressed that those other jockeys and horses could expect he would participate with their safety as paramount.

96. His recovery is not complete, on the evidence the Tribunal has, as of today. That leaves the Tribunal with a troubling unease that the underlying issues are ongoing, could resurface, could lead to further safety and behavioural issues.

97. It is not for the Tribunal to speculate when that level of satisfaction could be reached. It is up to the Appellant to prove that to Racing NSW.

98. What then does that mean in relation to fitness and propriety? As expressed, the test is honesty, knowledge and ability.

99. Honesty, in essence, is not an issue for further deliberation.

100. Knowledge requires a knowledge of the conduct and satisfaction that it will not recur. The Tribunal is not comfortably satisfied that he has demonstrated a complete sense of knowledge as of today. It might be close, but no one, as the Tribunal has said, states that he has reached that stage, except his own evidence.

101. As to ability, he has certainly had a successful career. He certainly had a wake up call, as he described it, but it has not, as described, yet reached a stage where he has the requisite ability at the present time.

102. This is not an exercise for punishment or re-punishment for past transgressions. The Licensing Committee exercised a protective jurisdiction. This Tribunal exercises a protective jurisdiction. The fact that he has served requisite periods of punishment for each offence does not become an issue that prevents the exercise of the protective jurisdiction.

103. The Tribunal finds that the issues of fitness and propriety are strong matters in respect of safety. They are motivating matters for Australian Rule of Racing 13. Indeed, it might be noted that no reasons at all are required to exercise AR 13, although this Tribunal has embarked on an exercise and given reasons. This appeal, these processes, the consideration of AR 13 are in fact a vehicle for considering fitness and propriety.

104. Should 13(c), therefore, be exercised? It might be noted it talks about suspension, variation or revocation. This case has not been run on the basis of a consideration of variation. The Tribunal cannot see anything it could vary in relation to his licence in any event. Nothing has been put on that.

105. This case has not been run on the basis that the Tribunal might consider a suspension. In essence, because of the way the Racing Appeals Tribunal Act matters such as this are to be dealt with, the Tribunal has to determine for itself on the evidence it has whether the determination to revoke is appropriate. Just dealing with the issue of suspension for completeness, the Tribunal, driven by an uncertainty as to when there could be comfortable

satisfaction as to fitness, could not, therefore, indicate a period of suspension, at the end of which he would be entitled to resume riding because it simply is not known.

106. That then leaves whether the aspects of lack of fitness and propriety, which have been established, are of such a level that looking to the future, looking to the protection of the industry, as it has been described in these proceedings, it is appropriate to exercise that heavy protective order of revocation.

107. The Tribunal is of the opinion, on all of the evidence, that the Appellant fails to establish he is a fit and proper person and that the only appropriate order at the present time is that he not be riding.

108. Absent the consideration of suspension, therefore, the Tribunal turns, as did the Licensing Committee and the Chief Executive, to the issue of revocation.

109. The Tribunal is of the opinion that under AR 13(c) it is appropriate to revoke the licence of the Appellant as a jockey.

110. The determination, therefore, is that the appeal is dismissed.

111. That then means the Tribunal has to consider the appeal deposit. There is no application for a full or partial refund.

112. In those circumstances the Tribunal orders the appeal deposit forfeited.