APPEAL PANEL OF RACING NEW SOUTH WALES

APPEAL OF LICENSED JOCKEY MR NASH RAWILLER

Appeal Panel:	**Mr R. Beasley SC, Presiding Member; Mrs J. Foley; Mr K. Langby**
Appearances:	**Racing New South Wales: Mr M. Van Gestel, Chairman of Stewards** **Appellant: Mr D. Kane, Solicitor**
Date of Appeal:	**13 April 2022**
Date of Orders:	**14 April 2022**
Date of Reasons:	**2 May 2022**
Rule involved:	**AR132(7)(a)(ii) – Whip Rule**

REASONS FOR DECISION

Mr R. Beasley SC, Principal Member

Introduction

1. Following the running of the Queen Elizabeth Stakes at the Royal Randwick Racecourse on 9 April 2022, Licensed Jockey Nash Rawiller (**the Appellant**) was charged with a breach of AR132(7)(a)(ii) (**whip rule**) as a result of striking his mount *Think It Over* 8 times (against the limit of 5) prior to the 100m mark of the race. As events transpired, Think It Over won the race.

2. The Appellant pleaded guilty to breach of the rule. The Stewards imposed a penalty of a two-week suspension on the Appellant's licence to ride. They also imposed a $40,000 fine. The Appellant has appealed to the Panel in relation to both the severity of the suspension imposed, and of the fine.

Whip Rule

3. The relevant parts of the whip rule to this appeal are in the following terms:

> **AR 132 Limits on the use of a whip by a rider**
>
> ……

(5) In a race, official trial, jump-out or trackwork, or elsewhere, a rider must not use his or her whip in an excessive, unnecessary or improper manner.

……

(7) Subject to the other requirements in this rule:

(a) *prior to the 100-metre mark in a race*, official trial or jump-out:

(i) the whip must not be used in consecutive strides;

(ii) the whip must not be used on more than 5 occasions except where there have only been minor infractions *and* the totality of the whip use over the whole race is less than permitted under subrules (7)(a) and (b) *and* also having regard to the circumstances of the race, including distance and context of the race (such as a staying race or a rider endeavouring to encourage the rider's horse to improve);

(iii) the rider may at the rider's discretion use the whip with a slapping motion down the shoulder, with the whip hand remaining on the reins;

(b) in the final 100 metres of a race, official trial or jump-out, a rider may use the whip at the rider's discretion.

4. It is clear enough from AR132(7)(a)(ii) that (subject to exception) prior to the 100m mark of a race, the whip may only be used on a maximum of 5 occasions. In the race the subject of this appeal, Mr Rawiller used the whip on 8 occasions prior to the 100m mark. He pleaded guilty, and so there was no need for the Panel to consider whether he should be found to be not in breach of the rule even if the number of strikes was above 5. As an aside though, based on the way the rule is drafted, it would appear that a rider who struck their mount more than 5 times before the 100m mark of a race could only be found not to have breach the rule if:

(a) the infractions were "minor" (this term is not defined, but is no doubt directed to the number of strikes used over 5, and to the "lightness" of touch or lack of force with the strikes[1]; **AND**
(b) the totality is less than permitted by 7(a) and (b) (which seems to amount to a numerical total of 5 plus "at the rider's discretion"); **AND**

[1] *The Appeal of Damian Lane* (RAP, 13 April 2018) at [17]

(c) by having regard to the "circumstances of the race", which at least include distance and the aspects of "context" referred to in the rule.

5. One matter that was submitted by Mr Van Gestel was that in considering the gravity of the offending under AR132(7)(a)(ii) in this appeal, it was relevant to take into account that inside the 100m the Appellant had used the whip on 18 occasions. The submission seemed to be made that this was relevant not only to the gravity of the offending, but perhaps also as to whether or not whip use prior to the 100m on more than 5 occasions could be considered only "minor infractions". That is not a construction I would adopt as the rule is currently drafted. AR132(7)(b) provides that in the final 100m of the race a rider may use the whip at their discretion. It seems to me therefore that the use of the whip inside the final 100m is irrelevant to a consideration as to whether the whip rule has been breached, or to how serious such a breach might be. This is particularly so given that if the Stewards had any concerns about the extent of whip use by the Appellant inside the 100m, they could have had regard to AR132(5) which prohibits use of the whip in an "excessive, unnecessary or improper manner". Given that the Stewards did not consider that the Appellant's use of the whip inside the 100m was excessive, then in my view the 18 strikes inside the 100m are of no relevance to a consideration as to whether AR132(7)(a)(ii) has been breached, or the gravity of that breach.

Precedents

6. The Panel was provided with a long list of precedent penalties for breach of AR132(7)(a)(ii). The precedents show that the penalties for breach of the rule range from relatively low fines to fines of up to $30,000, and for the imposition of suspensions. No doubt each of these penalties turned on their own facts and the records of the riders. What is clear though is that there is precedent for the imposition of both suspension and significant fines in cases where riders have breached the whip rule in what can be described as high-profile races. The Appellant, as an example, was fined $20,000 and suspended from 17 October 2021 to 29 October 2021 for breaching the whip rule for his ride on Eduardo in *The Everest* last October. As a result of using the whip on 13 occasions prior to the 100m while riding Tiger Moth in the 2020 Melbourne Cup, licensed jockey Kerrin McEvoy was suspended for 13 meetings and fined the sum of $30,000 (reduced from $50,000): *Racing Victoria and McEvoy,* Victorian Racing Tribunal, 9 November 2020. In both of these instances the

decision makers had regard to the percentage of the stake money payable to the rider for their ride.

7. In a number of the precedent decisions involving the whip rule, reference has also been made to the purpose behind the introduction of the whip rule. In *The Matter of Ben Melham* (RAP, 31 March 2017) the Panel had regard to what was said by Mr R. G. Bentley, the then Chairman of the Australian Racing Board, at the time that the whip rule commenced in August 2009. Mr Bentley said:

> *"These changes send a clear message that Australian Racing is fully attuned to the contemporary community expectations. The need for change is clear and there was no point fiddling around at the edges. There is no point procrastinating where there is industry and public expectation that practices of the past are no longer condoned."*

Mr Bentley went on to add that: *"Compliance with the new requirements must be supported by a suitable set of deterrents."* As noted by Mr Hale SC in *The Appeal of Damian Lane* at [19]:

> *"Mr Bentley was making the point that unrestricted use of the whip was contrary to the expectations of the public and the racing industry. To meet those expectations, a limit was to be placed on the use of the whip."*

8. Partly as a result of the above then, breach of the whip rule should be seen as a serious breach of the Rules of Racing. Excessive use of the whip, or use of the whip in excess of the limitation set by AR132(7)(a)(ii), should be approached as being damaging to the image and reputation of Racing. The purpose of imposing a penalty then for breach of the whip rule (as with all other penalties) is to protect the reputation of Racing, and to deter similar breaches. In regard to the general purpose of imposing penalties for breach of the Rules, regard should more fully be had to *The Appeal of Noel Callow*, 9 May 2017, at [42]. In relation to where a penalty is at the discretion of the Stewards or the Panel, regard should also be had to *The Appeal of Norman Loy* (RAT, 21 March 2022) at [66] where the Acting Head of the Racing Appeal Tribunal Mr A Lo Surdo SC said:

> "…In the exercise of [a] discretion a tribunal must ensure that a penalty:

(a) is proportionate to the gravity of the offence (see, for example, *Veen v The Queen (No 2)* (1998) 164 CLR 465);

(b) ensures that the offender is adequately punished for the offence;

(c) deters the offender and other persons from committing similar offences;

(d) takes into consideration all the conduct of the offender including that which would aggravate the offence …

(e) takes into account by way of mitigation or reduction of sanction factors such as discount for early guilty pleas, evidence of character and record and evidence of remorse or contrition."

Resolution

9. The Appellant struck his horse 8 times prior to the 100m mark. He should be penalised on the basis that he has exceeded the number of strikes allowed prior to the 100m mark by 3 strikes. I accept the submission made for the Appellant by Mr Kane that at least in relation to the number of strikes prior to the 100m, the offending here is towards the lower end of the scale. I also accept the submission made by Mr Kane that the fact that the Appellant used the whip on 18 occasions inside the 100m is of no relevance in considering the seriousness of the breach here, which solely relates to use of the whip prior to the 100m mark. Use of the whip inside the 100m is at the rider's discretion, and unless that rider is found to have used the whip excessively or otherwise in breach of AR132(5) (which the Appellant was not charged with), then use of the whip inside the 100m is not relevant to a consideration of penalty for breach of AR132(7)(a)(ii).

10. In his submissions, Mr Van Gestel asked the Panel to take into account that the Appellant's breach of the whip rule here occurred in a very prominent race. The Queen Elizabeth Stakes is a $4 million Group 1 race that takes place on one of the key dates of the New South Wales and Australian Racing calendars. Mr Van Gestel submitted that breach of the rule in such a race has at least the potential to do significant damage to the image of Racing because, in short, races such as the Queen Elizabeth Stakes are viewed and followed by a large number of people. That submission is accepted. It was also submitted by Mr Van Gestel that it is relevant to

consider that the Appellant's take from the prize money for this race was $110,000. It is necessary to have regard to that significant stake money when determining penalty in order for that penalty to have a proper deterrent effect. That submission is also accepted.

11. One matter that the Panel also takes into account is the Appellant's poor record for breaches of this rule. The Appellant has breached AR132(7)(a)(ii) in excess of 20 times since October 2019. For some of these breaches his licence to ride has been suspended. In relation to others, he has been fined, or fined as well as suspended, including fined the sum of $20,000 for his breach of the rule for his ride on Eduardo in *The Everest* referred to above. Based on his record, it would not appear that the penalties so far imposed upon the Appellant for his many breaches of the whip rule are having much deterrent effect on him.

12. Given the aggravating factors referred to above, and given the Appellant's poor record for breach of the whip rule, even though he has exceeded the number of strikes permitted by only 3 prior to the 100m, in my view, a suspension of his licence to ride for two weeks is appropriate. It has reached the stage where any lesser suspension would not be fulfilling the purpose of imposing penalties under the rules, including protection of the sport, and having a deterrent effect.

13. I am in disagreement, however, with the Stewards in relation to the fine they imposed of $40,000. While I agree that a significant fine is appropriate in order to recognise the seriousness of the offending and to have the necessary deterrent effect, I consider a fine of $20,000 on this occasion together with the two week suspension of the Appellant's licence to ride would have been the most appropriate combined penalty.

Mrs J. Foley and Mr K. Langby

14. We are in agreement with the reasons set out above by the Presiding Member. We also agree that the breach of the whip rule here warrants a penalty of a suspension of the Appellant's licence to ride for two weeks. Where we differ from the Presiding Member is that we consider that in light of the aggravating factors referred to above, and in particular the need for deterrence and to have proper regard to the Appellant's poor record, a fine in the amount of $30,000 is appropriate.

Orders

(1) Appeal against severity of the two-week suspension imposed by the Stewards is dismissed.

(2) Penalty of a two-week suspension of the Appellant's licence to ride confirmed.

(3) Appeal in relation to severity of the fine imposed allowed.

(4) (By majority) In lieu of a $40,000 fine, the Appellant is fined the sum of $30,000.

(5) Appeal deposit forfeited.