

RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTER OF LICENCED FOREPERSON TRACY RODGER

APPLICATION FOR A STAY

Appeal Panel: **Mr P F Santucci – Convenor**

Mr J Murphy

Mr C Tuck

Appearances: **Stewards: Mr S Railton, Chairman of Stewards**

Appellant: J Bryant solicitor

Date of Hearing: **20 December 2023**

Date of Reasons: **21 December 2023**

REASONS FOR DECISION ON STAY APPLICATION

The Panel

Introduction

1. This matter concerns an application for a stay of a suspension imposed by the Stewards pursuant to AR 23(a). That suspension has been in effect since 28 June 2023 when charges were laid alleging that the Appellant breached AR227(b) by being a “*party to another person who committed a breach of the Rules*” because she is alleged to have been present on 14 October 2022 when another stablehand Mr Kelly allegedly intravenously injected 20-25ml of Diurex into a horse known as *Inferno Miss* (which injection was said to be a breach of AR249(a) being a race day administration of medication to a horse). The Appellant is alleged to have held the horse while the administration took place.
2. In the unusual circumstances of this case, although the charges have been laid and interviews and an inquiry conducted, no formal finding of a breach or innocence has been made by the Stewards, and no penalty imposed. Yet the suspension pursuant to AR23 has been in place for almost six months.

3. The situation in which the Appellant finds herself is that having been suspended, having given her account of the events, she still does not know if she has been found in breach or exonerated, or what, if any penalty will be imposed.
4. The length of time in which the suspension under AR23 has remained in place absent a final hearing and determination of breach by the stewards was a source of some concern to the Panel.
5. For the reasons that follow we are minded to grant the Appellant a stay of the suspension imposed under AR 23 until 28 February 2024, in terms provided for at the conclusion of these reasons.

Procedural matters and entertaining the appeal out of time

6. By notice of appeal dated 8 December 2023 the Appellant appeals the decision and/or seeks a stay of the imposition of the suspension. Although LR 106(2)(b) requires an appeal to be lodged within 2 days of becoming aware of a decision, LR 106(2)(c) affords a discretion to the Panel to entertain an out of time appeal in “exceptional circumstances”.
7. The Stewards took no objection to the Panel exercising jurisdiction to hear the stay application and the Panel was satisfied that there were exceptional circumstances given the delay that has arisen in the matter proceeding to be finalised. We are satisfied that the interest of justice are in favour of the Panel proceeding to hear and determine the application.

Submissions of the parties

8. The appellant points to the following factors in support of her application:
 - (a) the primary prejudice she is suffering is suspension without a finding of guilt, which, if she ultimately succeeds in defending the charges would amount to irreparable prejudice;
 - (b) the appellant described the case against her as weak (a topic to which we shall return), and noted that the charges only relate to an allegation that she was a party to a race day administration and not the primary wrongdoer herself;
 - (c) the range of relevant sentences for a breach of the rules in respect of being a party to a race day administration can be six months or less. In particular attention was drawn to *Appeal of Licenced Trainer Gary White and Stablehand Ashleigh Borg* 6 April 2022 (Beasley SC, J Murphy, and J Nicholson), in which Ms Borg was charged with 2

charges of being party to injecting a horse one clear day, and received an 8 months disqualification later reduced by the Panel in that case to 6 months. Notably the Stewards had not invoked AR23 in that case;

- (d) in the absence of the appellant being able to work in a “hands-on” role for her de facto partner licenced trainer Stephen Jones, the business is suffering from lack of supervision of staff, or Mr Jones must devote more of his time to direct supervision of staff;
- (e) the Appellant says she has a position to return to immediately if the stay is lifted;
- (f) the Appellant says that the fact of the charge and suspension has been a source of deep emotional and psychological stress for her, and that she desperately wishes to return to a hands-on role with the horses. The appellant emphasises that she has worked with horses all of her life.

9. The Stewards opposed the stay and pointed to the following matters that were said to demonstrate the need for the suspension under AR23 and that steps that had been taken by the Stewards to progress the charges and determine them as quickly as possible:

- (a) The investigation was said to be complex and involved the laying of charges against additional licenced persons including Mr Jones (the Appellant’s de facto), and Mr Kelly (an employee of Mr Jones);
- (b) The Stewards explained that they had interviewed somewhere between 6 to 8 people, and that in addition to the interviews of those persons, an inquiry had taken place in August 2023 over two days where the appellant had an opportunity to see and hear the evidence of other witnesses;
- (c) The Stewards primary justification for the imposition of a suspension was that certain admissions are alleged to have been made by the Appellant in her interview on 27 June 2023, following which the Stewards suspended her under AR23. In those circumstances it was thought both inappropriate to have the Appellant continue to be involved in a hands-on role in racing, but also in Mr Jones’ stable in particular;
- (d) The nature of the admissions alleged by the Stewards was that the Appellant was present at the time Mr Kelly had injected *Inferno Miss*. However the Stewards accept

that the Appellant has now recanted her earlier account and that she rejects the characterisation of the evidence as an admission;

- (e) The Stewards allege that the Appellant's presence while the horse was either injected or attempted to be injected was corroborated by other witnesses, one of whom was Mr Kelly himself who at least admits he was present on the day when a substance was administered but says it was Ms Rodger who administered or attempted to administer the substance (an account not wholly embraced by the Stewards in the charges laid against the Appellant).
- (f) The Stewards say that following the inquiry in August 2023 it is very likely that further charges will be laid against licenced person in relation to similar or related conduct and that such charges will be laid in January. The Stewards were not yet in a position to say whether further charges would be laid against the Appellant herself, or other people currently under investigation (including Mr Kelly and Mr Jones).
- (g) The Stewards believe that the charges against the Appellant can be heard in the first half of February 2024.
- (h) Finally, the Stewards alleged that the personal prejudice to the Appellant was slight given that she was able to continue to earn an income from her work undertaking administration as part of the business.

10. The Appellant challenged a number of those submissions made by the Stewards and suggested in particular that the evidence of the corroborating witness was not cogent and was induced by either unfair or suggestive questioning, and in any event has been recanted by that witness.

11. Although the Appellant's solicitor could offer no explanation for the recantation of the Appellant's earlier evidence he noted that the matters could not be treated as unchallenged admissions. The Appellant further submitted that any evidence from Mr Kelly was motivated by ill feeling from Mr Kelly toward the Appellant. We note for completeness the Panel was not (and did not need to be) provided with a copy of the transcript, and so we have made no determination on the effect of the evidence given by any witness.

12. Finally, the Appellant's solicitor emphasised that the substance allegedly administered to the horse on race day was not a performance enhancing substance *per se*. That is to say, while it may assist a horse that has a bleeding problem to not bleed, it would not otherwise assist a

horse unaffected by such a condition. The Appellant admitted candidly that because the substance was a diuretic it did attract some concern from Stewards as a substance that may hide or mask the use of performance enhancing drugs. But no such concern was advanced by the Stewards before us.

Determination of the stay

13. Having considered the matters raised by each of the parties the Panel has determined that it will grant a stay of the suspension. The overwhelming reason for doing so is the substantial injustice of the Appellant being the subject of suspension for such a long duration without a finding of guilt, and the potential for irreparable harm if the Appellant is ultimately found not guilty.
14. The Stewards were understandably circumspect about providing details of their investigation or the possible charges that may be laid. There is no doubt that the investigations of these matters is important and time consuming work, both to ascertain the facts and to ensure that each person affected by the investigation is given sufficient procedural fairness.
15. The present difficulty for the Panel is that the Stewards indicated that they cannot confirm whether the Appellant will be the subject of any further charges, but that given the need to issue further charges at least to other persons in January and to accommodate availability of a number of parties the final Stewards inquiry and any determination of breach or innocence could not take place until mid February 2024. That is to say the suspension is likely to continue for at least another 6 weeks but possibly more.
16. Moreover, in light of the limited information that the Stewards were willing or able to provide in respect of their other investigations, there was no compelling explanation before the Panel as to why the charge having been laid in June 2023 following an interview, and an inquiry having been conducted in August 2023 could not have been finally heard and determined with of guilt or innocence by now.
17. While the risk to the image, interest and integrity of racing is a significant concern, it needs to be seen in the context of the facts presented to justify the suspension under AR23, and the duration of such a suspension absence a finding of guilt.
18. We accept the submission of the Appellant that the administration in the present case related to bleeding medication for the horse, and the case has not been advanced before us as one

concerning race day administration of performance enhancing substances. That makes it a less serious risk to the image and integrity of racing.

19. We note that in the similar case of *White and Borg* referred to above the Appellant Borg in that case was not the subject of a suspension under AR23, and only served a period of 6 month suspension (reduced from 8 months by the Panel) in respect of two charges of being a party to race day administrations. It seems that the same risk of Ms Borg continuing to be part of the stable while awaiting hearing on the charges would have been present in that case, as is alleged in this case. That means the duration of the present suspension can only be described as a lengthy one and may amount to the full duration of any penalty imposed.
20. A further and related reason to stay the imposition of the suspension in the present case is that it may have the (actual or perceived) effect of anchoring any decision making of the Stewards with respect to penalty. That is to say, if the Appellant is found guilty a disinterested bystander may perceive that in deliberating on an appropriate penalty the Stewards having themselves imposed the suspension would feel compelled to give a penalty at least equal to the time then served under suspension (which in the absence of the stay would be close to 8 months). A stay of the suspension at this juncture at least ameliorates the effect of the time served increasing in the absence of a finding of guilt.
21. For those reasons this is an appropriate case in which to grant a stay. Given the Appellant's success in obtaining a stay it is appropriate that the appeal deposit be returned.

Form of orders

22. The Appellant seeks a stay of the imposition of the suspension pursuant to LR107(1)(a). Strictly speaking the terms of LR107(1)(a) provide a power to the Panel to grant a stay "*in respect of appeals to ... the Appeal Panel*".
23. In the present case the central concern of the Appellant appeared to be to ameliorate the effect of the imposition of the suspension under AR23 rather than to attempt to challenge the decision of the stewards to impose the suspension.
24. For that reason the form of the Panel's orders will be to stay the suspension until Wednesday, 28 February 2024, and to provisionally fix a directions hearing in respect of the appeal for the same day. That will have the effect of preserving on foot an appeal and therefore preserve the

jurisdiction of the Panel to grant a stay under LR107. However, in doing so the intention of the Panel is that if the Stewards proceed to a final determination of the charges in this matter the stay will be automatically discharged and the appeal will be automatically dismissed, and there will be no need for any appearance on 28 February 2024. It will only be necessary for the parties to attend that directions hearing if there is *no* decision by the Stewards by that time.

25. If by contrast, the Appellant is found not guilty then nothing further is likely to happen. If the Appellant is found guilty sometime before 28 February 2024, it will be open to her to appeal any charge or penalty at such time by way of separate appeal proceedings.
26. Finally, two caveats about the scope of these reasons. Nothing in the reasons should be construed as a determination of any of the facts of the case, or credibility of any witness, or dealing with anything other than the Stewards imposition of the suspension under AR23 on 28 June 2023 in respect of the present charge.
27. Second, nothing in these reasons should be taken to be a prohibition on the Stewards again invoking AR23 in respect of the Appellant if further and other charges are laid that the Stewards consider warrant in the invocation of that rule to protect the image and integrity of racing. Upon any such subsequent consideration of the use of that power however, it would then be incumbent on the Stewards to have regard to the time already served by way of suspension under the rule, and the conduct of the Appellant following the stay of that suspension by the Panel to consider the gravity of any risk posed before the time for the hearing of the matter.

Orders

28. Accordingly, the Panel makes the following orders:
 1. The Panel grants a stay of the suspension of the Appellant's licence imposed under AR23 on 28 June 2023, such stay to remain in place until 5pm on Wednesday 28 February 2024.
 2. Stand over the appeal in this matter for directions at 10am on Wednesday 28 February 2024.
 3. If the Stewards make a final determination of the charge before Wednesday 28 February 2024 then:

- a. the stay in Order 1 will be automatically dissolved upon the making of such a determination;
 - b. this appeal will be automatically dismissed upon the making of such a determination;
 - c. the directions hearing listed in Order 2 will be automatically vacated.
4. The appeal deposit be returned.
