APPEAL PANEL OF RACING NEW SOUTH WALES

APPEAL OF BENJAMIN SMITH

Appeal Panel:	**Mr R. Beasley SC – Principal Member; Ms C. Tuck; Mr L. Vellis**
Appearances:	**Racing NSW: Mr Marc Van Gestel, Chairman of Stewards** **Appellant: Mr P. O'Sullivan, Solicitor**
Date of Hearing:	**6 December 2019**
Date of Reasons and Orders:	**16 December 2019**

REASONS FOR DECISION ON PENALTY

Introduction

1. On 28 March 2018, Racing NSW Stewards issued 10 charges against licensed trainer Mr Benjamin Smith ("the Appellant") under the Australian Rules of Racing ("the Rules"). Some of the charges allege more than one breach of a particular rule.

2. The charges issued against the Appellant followed from a Stewards' Inquiry which commenced on 11 September 2018. That Inquiry was established after two horses trained by the Appellant (Iron Duke and Elaborate) were found to have elevated levels of cobalt in their urine, significantly in excess of the threshold allowed under the Rules.

3. On 10 May 2019, the Stewards found the Appellant guilty of all 10 charges brought against him. In relation to some of the alleged breaches of the Rules, the Appellant pleaded guilty. Others he contested. The various charges, and the particulars of each, are annexed to these Reasons for Decision and marked "A".

4. On 11 June 2019, following evidence and submissions, the Appellant was penalised by having his licence disqualified for a period of 4 years and 6 months. That penalty commenced on 18 September 2018, and expires on 18 March 2023, on which day the Appellant may reapply for his licence.

5. At a hearing before the Panel on 26 August 2019, the Appellant challenged the findings made by the Stewards that he had breached various rules to which he had pleaded not guilty. Following that hearing, the Panel delivered Reasons for Decision dated 30 October 2019, dismissing the appeal, and confirming each finding of guilt.

6. The Appellant also appealed against the severity of the penalty imposed upon him. The hearing in relation to that matter took place on 6 December 2019. Mr Paul O'Sullivan, solicitor, appeared for the Appellant, and Mr Marc Van Gestel, the Chairman of Stewards, appeared for Racing NSW.

The charges and penalties imposed

7. The following is a summary of the findings of guilt and penalties imposed:

   (i) Charge 1 (two breaches alleged): Giving false evidence to Stewards during an investigation on 11 September 2018, in breach of AR232(i). The Appellant pleaded guilty. The Stewards imposed a penalty of a 9-month disqualification in relation to each breach.

   (ii) Charge 2: Refusing to give evidence at a Stewards Inquiry on 11 September 2018 concerning the failure to pass on the name of a supplier of certain substances, in breach of AR232(h). The Appellant pleaded guilty. The Stewards imposed a disqualification of 13 months and 2 weeks.

   The total penalty for charges 1 and 2, if served cumulatively, would have been 31 months and 2 weeks. The Stewards determined that there should be partial concurrency with respect to the three penalties, and imposed an 18-month disqualification in total for charges 1 and 2.

(iii) Charge 3: Administering a prohibited substance (cobalt) detected in a sample from a horse (Iron Duke) above the allowable limit following the running of a race on 25 August 2018 (261ug/l), in breach of AR245(1)(a). The Appellant pleaded not guilty. He was found guilty by both the Stewards, and the Panel. The penalty imposed by the Stewards was an 18-month disqualification.

(iv) Charge 4: Bringing a horse (Iron Duke) to a racecourse for the purpose of that horse starting in a race (on 25/8/18) when a prohibited substance (cobalt) was detected above the level of 100ug/l in a urine sample taken from that horse (261ug/l), in breach of AR240(2). The Appellant pleaded guilty to this breach, and was penalised by the Stewards with a 12-month disqualification.

The total disqualification period for charges 3 and 4, if served cumulatively, would be 30 months. The Stewards however determined that the appropriate penalty for charges 3 and 4 combined was a disqualification of 18 months.

(v) Charge 5: Administering a prohibited substance (cobalt) detected in a sample from a horse (Elaborate) above the allowable limit (567ug/l) following the running of a race on 26 August 2018, in breach of AR245(1)(a). The Appellant pleaded not guilty. He was found by the Stewards and subsequently by the Panel to be in breach of this rule. The Stewards penalised him with an 18-month disqualification for this breach.

(vi) Charge 6: Bringing a horse (Elaborate) to a racecourse for the purpose of that horse starting in a race (on 26/8/18) when a prohibited substance (cobalt) was detected above the level of 100ug/l in a urine sample taken from the horse (567ug/l), in breach of AR240(2). The Appellant pleaded guilty to charge 6. The Stewards imposed a 12-month disqualification

The total penalty for charges 5 and 6, if served cumulatively, would have been 30 months. The Stewards however determined that the appropriate total penalty for charges 5 and 6 should be an 18-month disqualification.

(vii) Charge 7 (breach 1): Causing medication (electrolyte paste) to be administered to a horse (Dream Charge) on a race day (5 January 2018) in breach of AR249(1)(b). The Appellant pleaded not guilty, but was found by both the Stewards and the Panel to have breached the rule. A breach of AR249(1) attracts a mandatory minimum penalty of a 6-month disqualification, which the Stewards imposed: see AR283(6).

(viii) Charge 7 (breach 2): Causing medication (electrolyte paste) to be administered to a horses (Anecdote) on a race day (9 March 2018) in breach of AR249(1)(b). The Appellant pleaded guilty to this breach of the rule. As a consequence, the Stewards reduced his penalty for this breach from 6 months, to a 4 months and 2 weeks disqualification.

(ix) Charge 7 (breach 3): Causing medication (electrolyte paste) to be administered to a horses (Elaborate) on a race day (20 July 2018) in breach of AR249(1)(b). The Appellant pleaded not guilty, but was found to be in breach of the rule by both the Stewards and the Panel. The Stewards imposed the mandatory minimum penalty of a 6-month disqualification.

(x) Charge 8 (breach 1): Attempting to commit a breach of AR249(1)(b) by instructing Emma Bickley to administer a medication (electrolyte paste) on a race day (26 August 2018) to Elaborate in breach of AR227(b). The Appellant pleaded guilty to this breach of the Rules. The Stewards imposed a penalty of a disqualification of 4 months and 2 weeks, having taken into account his guilty plea.

(xi) Charge 8 (breach 2): Attempting to commit a breach of AR249(1)(b) by attempting to cause a medication (electrolyte paste) to be administered to a horse (In Her Time) on a race day (14 October 2018) in breach of AR227(b). The Appellant pleaded not guilty to a breach of the rule, but was found by both the Stewards and subsequently the Panel to be in breach of the rule. The Stewards imposed a penalty of a 6-month disqualification.

(xii) Charge 8 (breach 3): Attempting to commit a breach of AR249(1)(b) by attempting to cause a medication (electrolyte paste) to be administered to

horses (Kyoko, Golly Miss Solly, Libertine Mist and Tabrobane) on a race day (29 October 2017) in breach of AR227(b). The Appellant pleaded not guilty to a breach of this rule, but was found by the Stewards and subsequently the Panel to be in breach of the rule. The Stewards imposed a penalty of a 6-month disqualification.

The total penalty for all of the breaches of charges 7 and 8, if served cumulatively, would be 31 months. The Stewards, however, determined that there should be partial concurrency in relation to the 6 penalties, and determined that the appropriate penalty for all of them combined was a total disqualification period of 18 months.

(xiii) Charge 9: Possession of various medications/substances/preparations that had not been registered and/or labelled and/or prescribed and/or dispensed and/or obtained in accordance with applicable Commonwealth and State legislation (the substances being formaldehyde; hyaluronic acid; levamisole; lignocaine; menthol; eucalyptol; and phenylbutazone) in breach of AR252(1). The Appellant pleaded guilty to this charge, and was penalised by the Stewards by way of a disqualification of 4 months and 2 weeks.

(xiv) Charge 10: Engaged in "improper conduct" in breach of AR228(b) by administering the carcinogenic substance formaldehyde to the horses Anecdote, Kristensen and Marksfield. The Appellant pleaded not guilty to breaching this rule, but was found by the Stewards and subsequently the Panel to be in breach of the rule. The Stewards imposed a penalty of a 12-month disqualification.

The total penalty for charges 9 and 10, if served cumulatively, would have been 16 months and 2 weeks. The Stewards, however, determined the appropriate total penalty for charges 9 and 10 combined was a 12-month disqualification.

8. The total period of disqualification was 7 years. However, the Stewards then took into account a range of matters when determining an appropriate totality of penalty. These included some of Mr Smith's personal circumstances, including issues dealing

with depression, reliance on pain medication, and alcohol abuse. They also considered his previously clean record, and the assistance that he provided to them in relation to some of the charges. They also took into account the obvious impact that a substantial period of disqualification has on a licensed trainer. As a matter of obviousness too, they took into account, as they must, the primary consideration relating to penalties imposed for breaches of the Rules – that is, rather than serving the objective of punishment, the main objective is to attempt to uphold the image and integrity of racing.

Relevant precedent penalties

9. As to some of the individual penalties imposed for various breaches of the rules, in his submissions to the Panel, Mr Van Gestel drew our attention to various decisions of both the Panel and the Racing Appeals Tribunal that he said supported the penalties imposed by the Stewards. These included the following:

(i) *Severity appeal by John Sprague* (RAT, 27 June 2018) concerning penalties imposed by the Tribunal for presenting the horse on a race day when a subsequent urine sample revealed the presence of cobalt above the legal limit.

(ii) *Appeal of David Van Dyke* (RAP) concerning both administration and presentation offences with respect to prohibited substances.

(iii) *Appeal of Poidevan* (RAT, 3 April 2019) concerning the giving of false evidence.

(iv) *Appeal of Matt Schembri* (RAP, 14 May 2019) concerning a failure to comply with directions of the Stewards.

10. Mr Van Gestel also supplied the Panel with a list of penalties imposed since 2015 on licensed persons for breaches of relevant rules relating to both the presentation and administration of cobalt, and also supplied the Panel with a list of precedent penalties for the giving of false evidence from 2002.

Appellant's Submissions

11. Mr O'Sullivan's submissions for the Appellant can be summarised as follows:

(a) Charges 1 and 2: Mr O'Sullivan submitted that the total penalty that should be imposed for charges 1 and 2 is a 6 to 9-month disqualification, with a then subsequent discount for the Appellant's guilty plea. Mr O'Sullivan's submission was that the penalties here were excessive. The penalties for breaches 1 and 2 of charge 1 did not reflect the fact that the false evidence given by the Appellant was corrected later the same day. He also submitted that the penalty imposed for charge 2 was excessive given that it flowed from essentially the same circumstances, that the Appellant had real concerns about giving Mr Costello's name as his supplier to the Stewards, but ultimately did tell them.

(b) Charges 3 to 6: Mr O'Sullivan submitted that given that the Appellant was charged with an administration offence in relation to both Iron Duke (charge 3) and Elaborate (charge 5), he should not have been charged with presentation offences from the same set of facts (charges 4 and 6). Further, he submitted that there should be complete concurrency in relation to the penalty of 18 months' disqualification imposed in respect of charges 3 and 5. He pointed to the fact that only one day separated the offending between administering cobalt to Iron Duke, and administering it to Elaborate. He also pointed to the fact that the evidence was that they had recorded high levels of cobalt as a result of essentially the exact same administration regime, which the Panel outlined at [20] of its Reasons for Decision dated 30 October 2019.

(c) In relation to charge 7, for breaches 1 and 3, Mr O'Sullivan's submission was that the Stewards should have found that "special circumstances" existed pursuant to LR108(2)(b), such that the mandatory 6-month disqualification should have been reduced to a 3-month disqualification. LR108(2) is relevantly in the following terms:

> LR108(2) For the purposes of AR196(5) [this should now read AR283(6)], special circumstances means where:

(a) the person has pleaded guilty at an early stage and assisted the Stewards or the Board in the investigation or prosecution of a breach of the rule(s) relating to the subject conduct; or

(b) the person proves on the balance of probabilities that, at the time of the commission of the offence, he:

(i) had impaired mental functioning; or

(ii) was under duress, that is causally linked to the breach of the rule(s) and substantially reduces his culpability. (Emphasis added).

AR283(6)(i) states that a breach of AR249(1) carries a minimum 6-month disqualification penalty, "unless there is a finding that special circumstance exists".

(d) Mr O'Sullivan submitted that the Appellant's evidence, and that of his treating medical specialists, establish that he had a relevant mental impairment at the time of his offending. The submission was that all of the breaches of charge 7, and charge 8 (where "special circumstances" are not relevant) should have attracted a 3-month disqualification only.

(e) Mr O'Sullivan submitted that the appropriate penalty for charge 10 was a 6-month disqualification, not a 12-month disqualification. The mitigating factors he said were that the Appellant trusted Mr Costello, who was the supplier of the brown bottle. The Appellant, he said, would clearly not have given the substance to any of his horses had he known it contained formaldehyde. There was also no evidence that his horses were affected adversely by the administration of the substance. The total penalty therefore for charges 9 and 10, Mr O'Sullivan submitted, was a total of a 6-month disqualification.

12. Mr O'Sullivan otherwise submitted that the further discounting by the Stewards (of approximately one-third of the penalty imposed) was appropriate.

Panel's Finding

13. This is an appeal *de novo.* There is no need for the Panel to identify any error by the Stewards. Having said that, while we differ on two aspects of the Stewards' approach to penalty, we have not found any error.

Charges 3-6

14. The Panel takes the same view as the Stewards did as to the appropriate penalty for these charges. The administration charges (3 and 5) are very serious breaches of the Rules. Both horses had an amount of cobalt in their urine significantly above the legal limit. It is clear to us, based on the expert evidence of Dr Koenig (given at the hearing on 26 August 2019), that cobalt was administered to both horses very close to race day, if not on race day. The Panel agrees with the Stewards that an 18-month disqualification is appropriate for both charges 3 and 5, and a 12-month disqualification is appropriate for both charges 4 and 6. We agree that the penalty for charge 4 should be served concurrently with the penalty for charge 3, and the same for charges 6 and 5. This means there is an 18-month disqualification for charges 3 and 4, with the same penalty for charges 5 and 6.

15. The Panel does not agree with the submission of Mr O'Sullivan that these two 18-month disqualification periods should be served concurrently. That would effectively mean that there would be no penalty at all for one of the administration charges. Regardless of the proximity of the administration of cobalt to Iron Duke and Elaborate in terms of time, the fact is that two individual horses had cobalt administered to them before two separate races. It is inappropriate then for the entire penalties to be served concurrently.

16. However, given the closeness in time between the two administration offences, we do consider that part of the penalty to be imposed in relation to the offences involving Elaborate should be served concurrently with the penalties involving Iron Duke. While the total penalty for charges 3 and 4 should remain an 18-month disqualification, as should the total penalty for charges 5 and 6, we consider that 6 months of the disqualification period for charges 5 and 6 should be served concurrently with the penalty imposed for charges 3 and 4. This means whereas the

total disqualification period for charges 3 to 6 imposed by the Stewards is a 36-month disqualification, the Panel would impose a 30-month disqualification.

Charges 9 and 10

17. Charge 9 attracted a penalty of a 4 month and 2-week disqualification, and charge 10 attracted a 12-month disqualification from the Stewards. The Stewards determined, however, that the penalty for charges 9 and 10 should be a total of a 12-month disqualification.

18. The Panel agrees that the penalty imposed by the Stewards for charges 9 and 10 is appropriate. The panel does not see how the fact that the Appellant would not have given the substance in the brown bottle to the horses if he knew it contained formaldehyde is a mitigating factor. We acknowledge that the horses do not appear to have been adversely affected. That is not really a mitigating factor. Had they been harmed, this would have been an aggravating factor.

19. We are of the view that a serious level of improper conduct is involved here. The bottle had no known manufacturer. There was no indication of what the substance was made of. We consider there was an element of recklessness in taking the word of Mr Costello that the substance was anti-bleeder medication. A 12-month disqualification is an appropriate penalty for charge 10. A 6-month disqualification would not properly reflect the seriousness of this breach of the rule.

Charges 1 and 2

20. We agree with the Stewards that charge 2 is more serious. The Appellant should have immediately given Mr Costello's name to them. He had some difficulty in articulating in his evidence his precise reasons for not doing so. No doubt he felt a sense of unease about it, but he did not convey, at least directly, that he was fearful of Mr Costello. Failing to give Mr Costello's name to the Stewards hampered their investigation into a serious matter. This is why the Stewards took the view that an 18-month disqualification was appropriate, and reduced it to 13 month and 2 weeks because of the Appellant's plea.

21. Although we do not consider that the Stewards' approach here is in any way unreasonable, we are of the view that the appropriate penalty is a 15-month disqualification, reduced to 11 months and 2 weeks because of plea.

22. For each of breaches 1 and 2 of charge 1, the Stewards penalised the Appellant with a 9-month disqualification. This breach involved the Appellant not being truthful about various matters concerning his knowledge of a brown bottle of liquid that the Stewards found, and associated matters. He corrected that evidence later the same day.

23. We agree with the Stewards that answering questions by them in an untruthful manner is a serious offence by a licensed person. This is even more so given the gravity of the circumstances involved here – the administration of illegal substances to horses. However, as the Appellant corrected his false answer on the same day, we consider a 6-month disqualification to be appropriate (including mitigation for plea), rather than a 9-month disqualification.

24. We agree with the Stewards' approach that there should be partial concurrency between breaches 1 and 2 of charge 1, and charge 2. Full concurrency would result in no penalty for charge 1, which would be inappropriate. We consider that the total penalty for charges 1 and 2 should be a disqualification of 13 months.

Charges 7 and 8

25. The dispute between Mr O'Sullivan and the Stewards in relation to breaches 1 and 3 of charge 7 concerns whether special circumstances should have been found pursuant to LR108(2)(b).

26. The evidence concerning this matter can be summarised this way:

    (a) Some time during 2016, the Appellant hurt his back. He was prescribed strong painkilling medication, including prescription opioids.

    (b) At about this time, or shortly thereafter, he started to suffer symptoms of extreme anxiety related to the pressures on him as a racehorse trainer,

including business and financial pressures. He started to have difficulty sleeping. He became addicted to the opioid medication, which he obtained from sources outside of those drugs being prescribed by a doctor. He was also abusing alcohol.

(c) Exhibit 103 of the Appeal Book is a report from the Appellant's general practitioner Dr C. L. Grace to Mr O'Sullivan dated 2 June 2019. Exhibit 104 is a report from the Appellant's consultant psychologist Mr Michael Bazaley dated 30 May 2019. Mr Bazaley's report records that the Appellant has been treated by him for various mental health and substance abuse issues regularly since 21 February 2018. Mr Bazaley states that in addition to other regular sessions for psychological therapy, Mr Smith attended upon him for four therapeutic sessions between 21 February 2018 and 18 September 2018. In his report, he states that:

> *"Mr Smith presented as psychologically and cognitively impaired; self-administering and addicted to pharmaceutical medication and alcohol in order to deal with his state of acute anxiety and depression and would have been of risk of making poor or impaired decisions in respect to his wellbeing, his mental state and his general health."*

27. Mr Van Gestel explained that the Stewards did not consider that special circumstances existed here pursuant to LR108(2)(b)(i) because the Appellant had largely been the architect of his own demise, and he sought to draw certain analogies with Part 11A of the *Crimes Act*.

28. For the purposes of LR108, we do not think it matters what the cause of the impairment of the mental functioning is of a licensed person or an appellant. That view is supported by the text of the rule, which does not provide any support for the view that any analysis is to be made as to the cause of the impaired mental functioning. It can be noted too that in many instances that would be a very challenging task to determine.

29. In any event, we agree with Mr O'Sullivan that it was appropriate to apply LR108(2)(b)(i) and find special circumstances existed.

30. Taking that into account, we consider that a penalty of a 4-month disqualification in lieu of a 6-month disqualification is appropriate for breaches 1 and 3 of charge 7. A base penalty of a 4-month disqualification is also appropriate for breach 2 of charge 7, reduced to 3 months because of the Appellant's guilty plea.

31. We are also of the view that a 4-month disqualification rather than a 6-month disqualification is appropriate for breaches 2 and 3 of charge 8 (even though we note that the special circumstances local rule does not apply to AR227). We would also reduce the penalty for breach 1 to 3 months because of the Appellant's plea.

32. The total penalty for breaches 7 and 8 would be 22 months if served cumulatively. We consider that a disqualification period of 14 months is however appropriate.

Total period of disqualification

33. The penalties we impose are as follows:

Charges 1 and 2: Total disqualification period of **13 months**.

Charges 3 and 4: Total disqualification period of 18 months.

Charges 5 and 6: Total disqualification period of 18 months, with 6 months of that disqualification to be served concurrently with the penalty for charges 3 and 4.

Total penalty charges 3 to 6 is **30 months.**

Charges 7 and 8: Total disqualification period of **14 months**.

Charges 9 and 10: Total disqualification period of **12 months**.

Total disqualification period **69 months: 5 years and 9 months**.

34. As the Stewards did, we have also reflected on the principle of totality in sentencing. We have considered all of the relevant personal circumstances of the Appellant,

including his significant mental health and addiction issues. We note that he has a strong desire to return to racing as a licensed trainer, and that the lengthy period of disqualification he faces has had severe financial consequences for him. However, it is of course essential that any total penalty imposed sends the message that Racing will not tolerate the use of prohibited substances by licensed persons, the administration of any race day medication, nor will it tolerate licensed persons not always being truthful with the Stewards.

35. Factoring all these matters in, we consider the total penalty should be a disqualification period of **45 months** – **3 years and 9 months**.

36. We note that the Appellant's disqualification commenced on 18 September 2018. That penalty will now expire on 18 June 2022, on which day the Appellant may reapply for his licence.

37. We make the following orders:

(1) Appeal against severity of penalty allowed.

(2) In lieu of a penalty of disqualification for 4 years and 6 months, the Appellant's licence to train is disqualified for a period of 3 years and 9 months. Such disqualification commenced on 18 September 2018, and will expire on 18 June 2022, on which day the Appellant may reapply for his licence.

(3) The appeal deposit has already been forfeited.