

# RACING APPEALS AND DISCIPLINARY BOARD

400 Epsom Road Flemington VIC 3031 Telephone: 03 9258 4773 Fax: 03 9258 4848

radboard@racingvictoria.net.au

#### **DECISION**

## RACING VICTORIA STEWARDS and

#### **STEVEN PATEMAN & JESSICA BARTON**

Date of Hearing 9, 11 & 12 December 2019

Date of Decision16 March 2020Penalty Hearing4 May 2020Penalty Decision14 May 2020

<u>Panel</u> Judge Bowman (Chair), Mr B Forrest (Deputy Chair), Mr G Ellis

(Member).

<u>Appearances</u> Mr Albert Dinelli of counsel, instructed by Ms S Foletti, appeared

on behalf of the Stewards.

Mr J Stavris of counsel appeared on behalf of Mr S Pateman and

Ms J Barton.

#### Steven Pateman

#### **Charge 1** AR 175(h)(i)

The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:

(h) Any person who administers, or causes to be administered, to a horse any prohibited substance:

(i) for the purpose of affecting the performance or

behaviour of a horse in a race or of preventing its starting in

the race:

#### Summary The Stewards allege that, prior to race one at Coleraine on 24

September 2017, Mr Pateman and/or Ms Barton administered, or caused to be administered, to *Sir Walter Scott* a prohibited substance, being cobalt at a concentration in excess of 100 micrograms per litre in urine, for the purpose of affecting the performance or behaviour of *Sir Walter Scott* in the race.

#### Charge 2 AR 175(h)(ii) [Alternative to Charge 1]

The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:

(h) Any person who administers, or causes to be administered,

to a horse any prohibited substance:

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(ii) which is detected in any sample taken from such horse prior to or following the running of any race.

Falls away

<u>Charge 3</u> AR 178 [alternative to Charges 1 and 2]

Subject to AR 778G, when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be

penalised. Falls away

<u>Plea</u> Charge 1 - Not Guilty

Charge 2 - Not Guilty [alternative to Charge 1] Charge 3 - Not Guilty [alternative to Charges 1 & 2]

<u>Decision</u> Charge 1 - Guilty

Charge 2 - Falls away Charge 3 - Falls away

<u>Penalty</u> Charge 1 - Mr Steven Pateman is disqualified for three years

Should it be necessary, Sir Walter Scott is disqualified from

Race 1 at Coleraine on 24 September 2017

<u>Jessica Barton</u>

<u>Charge 1</u> AR 175(h)(i)

The Stewards allege that, prior to race one at Coleraine on 24 September 2017, Mr Pateman and/or Ms Barton administered, or caused to be administered, to *Sir Walter Scott* a prohibited substance, being cobalt at a concentration in excess of 100 micrograms per litre in urine, for the purpose of affecting the performance or behaviour of *Sir Walter Scott* in the race.

<u>Charge 2</u> AR 175(h)(ii) [Alternative to charge one]

Falls away

<u>Plea</u> Charge 1 - Not Guilty

Charge 2 - Not Guilty [alternative to Charge 1]

<u>Decision</u> Charge 1 - Guilty

Charge 2 - Falls away

<u>Penalty</u> Charge 1 - Ms Jessica Barton is disqualified for three years

Grace Gugliandolo Registrar - Racing Appeals and Disciplinary Board Victoria 14 May 2020

## RACING APPEALS AND DISCIPLINARY BOARD (Original Jurisdiction)

Racing Victoria Stewards v Steven Pateman & Jessica Barton

#### **PENALTY**

Judge Bowman Chair

Mr B Forrest Deputy Chair

Mr G Ellis Member

Mr A Dinelli of Counsel on behalf of the Stewards.

Mr J Stavris of Counsel on behalf of Mr S Pateman and Ms J Barton

#### 1. Introduction

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We regret that we were unable to hand down our decision on penalties in these matters on the afternoon of Monday 4 May 2020 as had been foreshadowed. A large amount of material arrived both on the afternoon of Friday 1 May and the early afternoon of 4 May. In addition, counsel for Mr Pateman and Ms Barton became unavailable for a large part of 4 May because of a court commitment. Accordingly, we commenced the hearing on penalty at 4pm. It became impossible to conclude the oral submissions, pay the necessary attention to the written material that had arrived and hand down detailed and appropriate Rulings on Penalty on 4 May. Rulings with reasons to come later is an unsatisfactory and risky procedure. Accordingly, these Rulings on Penalty had to be reserved and the material given proper consideration.

We would also make the following observation. The material supplied on behalf of Mr Pateman and Ms Barton on the afternoon of 1 May included a quite lengthy report from Dr Derek Major. Dr Major gave evidence on behalf of Mr Pateman and Ms Barton on 9 December last as part of the case concerning administration. The opinions

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of Dr Major concerning cobalt, its testing and the like have already been dealt with in our judgement of 16 March 2020. We have made our findings. We do not see that Dr Major's report will assist us on the issues of penalty and special circumstances. We shall not refer to it further.

#### 2. The Decision

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#### (i) The Rules and a preliminary matter

On 16 March 2020 Mr Steven Pateman and Ms Jessica Barton were found guilty of breaching AR 175 (h)(i). For the moment we shall leave to one side alternative or other charges.

The penalty for breaching AR 175 (h)(i) is a mandatory disqualification for 3 years, unless special circumstances are found to exist. "Special Circumstances" are defined in LR 73 A. If that definition is satisfied, the Board is at large on the question of penalty. Otherwise, the period of 3 years disqualification is applicable.

- In the present case, Mr Pateman and Ms Barton are both relying upon paragraphs (c) and (d) of the definition of special circumstances. They read as follows:
  - " (c) The person proves on the balance of probabilities that at the time of the commission of the offence, he or she:
    - (i) Had impaired mental functioning; or
    - (ii) Was under duress;

that is causally linked to the breach of the Rule and substantially reduces his or her culpability; or

- (d) in the interests of justice, the circumstances may be deemed or considered to be special".
- 40 A further preliminary point in relation to these provisions is this. Mr. Stavris, on behalf of Mr Pateman and Ms Barton in the information provided on 29 April 2020 and in subsequent submissions referred to the decision of the Court of Appeal in *R v Verdins* (2007) 16 VR 269, a well-known authority in relation to the criminal law and

mental impairment. It is frequently referred to in cases where arguably such impairment may have the effect of reducing moral culpability, reducing the weight to be given to the factor of deterrence, increasing the hardship of a term of imprisonment, justifying a less severe penalty and the like.

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Whilst the general approach set out in *Verdins* theoretically may be of some use, it is to be remembered that such approach must be seen in the context of the Rules and the definition of special circumstances specifically. Some of the observations of Mr Tim Watson-Munro, forensic psychologist retained by Mr Pateman and Ms Barton, should also be seen in this context.

In relation to the reports of Mr Watson-Munro, these were filed and served on Friday 1 May. He has not treated either person. His seeing them and reporting occurred by arrangement with their legal representative. We shall later return to his reports.

## (ii) Sub-paragraph (c) of the definition of special circumstances – impaired mental functioning

We turn now to the requirements of the special circumstances set out in (c) above and particularly in relation to impaired mental functioning. We are of the opinion that, in relation to this provision, we can deal at least in part with Mr Pateman and Ms Barton collectively.

Firstly, in accordance with the Rule we must be satisfied that each had impaired mental functioning. Secondly, this must have been present at the time of the commission of the offence. Thirdly, such impaired mental functioning must have been causally linked to the commission of the offence. Fourthly, it must substantially reduce culpability. For each ingredient and overall, the standard of proof is specifically stated to be the balance of probabilities.

By way of general background, we must say that any such impaired mental functioning was never mentioned by Mr Pateman or Ms Barton, or on their behalf, either to the Stewards or to this Board prior to our Ruling that they were guilty of this offence.

In the initial lengthy telephone interview with the Stewards on 13 October 2017 there was no mention by Mr Pateman or Ms Barton of any impairment of mental functioning that was occurring at the time of the offence - that is, on 24 September 2017 - or, for that matter, leading up to it. There was no mention of it in the telephone conservation with the Stewards on 24 October 2017. There was no mention of it on the occasion of any of the preliminary hearings or discussions during the lead up to the listing of the case for hearing on 9 December 2019. There was no mention of or referral to such matters during the conduct of the case on 9, 11 and 12 December 2019 and particularly not in their evidence. Such matters did not warrant a mention in the written submissions on guilt or innocence served on their behalf on 7 January 2020.

In short, only after our finding of guilt on 16 March 2020 has there been any mention of impaired mental functioning.

We would add that, since that initial telephone discussion with the Stewards on 13 October 2017, Mr Pateman has continued in his role as a trainer. Further, and perhaps more importantly, he has continued to be Victoria's, and Australia's, leading jumps jockey. He has ridden, and ridden very successfully, in the biggest carnivals and biggest races. There has been no allegation of interference with or a downturn in his obviously great skill and judgement. Of course, for the last two and a half years he has also continued to train and school horses. Ms Barton has doubtless continued to be involved in the training and schooling of horses, along with related activities. As far as we are aware, at no time has she exhibited any outward sign of impaired mental functioning. None was exhibited or mentioned during the hearing of the case, in which she gave evidence and was cross-examined. The same could be said of Mr Pateman. The only obvious change in their lives in the last two and a half years is that they have married. Their successful careers have continued.

There has been no evidence treatment of either for any mental health condition and, on the basis of the evidence before us, no mention of it to any health professional prior to that in the last couple of weeks to Mr Watson-Munro. That was for medico-legal purposes. There is no suggestion of any relevant medication being prescribed or consumed.

Thus, there is simply no evidence, apart from the retrospective opinion of Mr Watson-Munro some two and a half years later, of either suffering impaired mental functioning at the time of the commission of the offence, as required by the Rule. Indeed, there was no evidence from Mr Pateman or Ms Barton of either suffering impaired mental functioning or appearing so to do at any time.

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Even if the retrospective opinions of Mr Watson-Munro were accepted, and they are not, there are still problems. The impaired mental functioning must be causally linked to the commission of the offence. Insofar as Mr Pateman is concerned, Mr Watson-Munro simply does not say this. Neither did Mr Pateman or Ms Barton, either when interviewed, subsequently, or in evidence. Even if Mr Watson-Munro had so opined, we would struggle with the concept. It does not explain the subsequent admission of guilt and the explanation given to the Stewards. Indeed, Mr Watson-Munro does not even refer to this. It is to be remembered that the explanation by them was of essentially forgetting to administer the substances within the permitted time, basically due to the horse schooling at Little River, and the decision to administer later. There is no reference by Mr Watson-Munro to this sequence of events or to such explanation.

In summary, insofar as Mr Pateman is concerned, on the balance of probabilities we are far from satisfied that, even if he suffered from some impaired mental function (a proposition concerning which we are also far from satisfied), this was causally linked to the commission of the offence. Ultimately there were attempts by him to blame drunkenness, tiredness and the like for the admissions made, but no attempt to blame impaired mental function for such admissions. Essentially, that remains the situation.

In relation to Ms Barton, Mr Watson-Munro does make what might be construed as a possible reference to a causal connection between what he sees as the mental impairment and the offending. Without our going into the details of her alleged emotional state or the cause of it, Mr Watson-Munro does state as follows:

"It is apparent that her emotional state impacted upon her cognition in terms of decision-making, concentration and consequential thinking. These aspects of her functioning in my respectful view are relevant to the dynamics of her behaviour leading to the charges and a finding of guilt by the Racing Appeals and Disciplinary Board".

That could be interpreted as meaning that there was a causal link to the commission of the offence, although it is far from entirely clear. If that be so, and we are far from satisfied that it is so, it still does not explain the admission of guilt made to the Stewards and the various explanations given for such admission. It does not explain the entries in the treatment books or the lack thereof.

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In addition, we would point out that the potentially traumatic events described by Mr Watson-Munro pre-date Ms Barton entering into the apparently very happy relationship with Mr Pateman that was ongoing as at the date of the offence and which ultimately resulted in their marriage.

Indeed, we are far from satisfied on the balance of probabilities that Mr Watson-Munro's evidence has established any causal link as required by the Rule in relation to either Mr Pateman or Ms Barton.

In short, if that statement of Mr Watson-Munro is an attempt to establish a causal link to the breach of the rule, we are far from satisfied that it has been made out. In summary, none of the four requirements of sub-rule (c) has been established. On the balance of probabilities, we are not satisfied that either Mr Pateman or Ms Barton suffer from impaired mental functioning and did so at the time of the offence. Even if there was such impairment, we are not satisfied that it was causally linked to the commission of the offence. Because of the above, there is no question of it reducing culpability. In addition, we would refer to the detailed findings in our decision of 16 March 2020.

#### (iii) Sub-paragraph (c) of the definition - duress

All of the above observations are equally applicable to duress. Whether it be external duress inflicted by others or perceived duress, none has ever been mentioned previously. That is also the case if the provision means duress as the result of the pressures of competition or financial matters, even assuming that the word "duress" can be so interpreted. In any event, there has been no evidence of duress, in the sense of external pressure or threats. Duress has not been made out.

In summary, in each instance we find that special circumstance (c) has not been activated and does not operate. The ingredients of it have not been made out. We have not been satisfied on the balance of probabilities.

#### (iv) Sub-paragraph (d) of the definition - the interests of justice

We turn now to sub-paragraph (d) of the definition. This is a broad "catch-all" provision - in the interests of justice, the circumstances may be deemed or considered to be special.

We are not satisfied on the balance of probabilities that, in the interests of justice, the circumstances should be deemed or considered to be special. That is so in relation to both Mr Pateman and Ms Barton. At the risk of being repetitive, we would point out the following:-

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- (a) When first interviewed, both admitted the occurrence of the offence and described the circumstances.
- (b) Subsequently, eleven days later, these admissions were said to be the result of drunkenness, hangover, tiredness, an almost overwhelming desire to get off the telephone and the like. That the original admissions were made has never actually been denied.
- (c) During the ultimate conduct of the hearing, the principal and unsuccessful attack on the Stewards' case centred on the swabbing regime carried out at Coleraine. This was despite Mr Pateman, on the day, signing a document to the effect that he was satisfied with it.
- (d) We are highly critical of the stable's record keeping. We found it to be incomplete, inaccurate and, at least in part, reconstructed.
- (e) We refer generally to our findings in relation to guilt on the part of Mr Pateman and Ms Barton as set out in our judgement of 16 March 2020.
- (f) We are far from having the requisite satisfaction that the reports of Mr Watson-Munro provide a basis for a finding that sub-paragraph (d) operates. We would refer to our earlier observations.

(g) The debate surrounding the effects of cobalt, its analysis and the Rule in relation to it seems to us to be irrelevant. Cobalt is one of a number of prohibited substances. To state the obvious, the Rule is the Rule. We do not see how breaching it can then support the assertion that therefore the circumstances may be deemed or considered to be special.

(h) Mr Pateman and Ms Barton have now each put before us a substantial bundle of particularly powerful references. This is no criticism of the references or the amount of work that has been put into them by their authors or by those who assemble them. The opposite is the case. They are singularly impressive. However, in the circumstances of these cases, they do not constitute special circumstances. Mr Pateman and Ms Barton have elected to plead "Not Guilty". They have been found to be unreliable witnesses and not witnesses of truth. Their cases and submissions have not been proven or accepted in a situation where, unless special circumstances are established, there is an automatic penalty of disqualification for three years.

Mr Pateman and Ms Barton originally admitted guilt and described the circumstances. The situation must have looked as if it was moving towards pleas of "Guilty". Had that occurred, special circumstances would have been established pursuant to the Rule. There would have been no automatic or prescribed penalty. The question of an appropriate penalty would have been at large and impressive references would have been highly relevant. However, they elected to plead "Not Guilty".

Of course, without question, Mr Pateman and Ms Barton were completely entitled, like any other person charged, to plead "Not Guilty". However, having been found guilty, the automatic penalty is operative unless special circumstances exist. In our opinion, no such circumstances have been proven to exist and the references are of limited value. They may be of assistance in relation to whether a penalty in excess of the prescribed minimum should be imposed, but the Stewards are not seeking that in any event.

We also have grave reservations as to whether the references can constitute special circumstances in themselves. This is a situation with a fixed penalty unless, in the interest of justice, the circumstances maybe deemed or considered to be special. In our opinion, references of good character and the like do not constitute such circumstance "in the interests of justice". Even if they could, given the factual matters which we have determined, we would not be finding that, in the interests of justice, an otherwise mandatory penalty should be affected.

We might add that the numerous comprehensive references, containing as they do, repeated mention of the great skills, efficiency and the like of Mr Pateman and Ms Barton, hardly paint a picture of impaired mental functioning. We appreciate that such impairment may be concealed, but nevertheless Mr Pateman and Ms Barton have obviously impressed many people with their ability and application.

#### 230 **3. Ruling**

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The penalty for being found guilty of a charge of this nature is clear, and, in the absence of special circumstances, must be imposed. That penalty is disqualification for a period of not less than three years. On the balance of probabilities, and indeed even if the standard was one of beyond reasonable doubt, special circumstances have not been proven to exist in relation to either Mr Pateman or Ms Barton. The Stewards do not seek a penalty greater than the minimum imposed for the breach of AR175(h)(i). Whilst it is entirely our decision, we agree that a penalty in excess of the minimum should not be imposed.

Accordingly, our Ruling is that Mr Pateman is disqualified for a period of three years. Ms Barton is also disqualified for a period of three years. In each case, the alternative charges fall away. As we understand it, the periods of disqualification commence immediately.

Should it be necessary, *Sir Walter Scott* is disqualified from Race 1 at Coleraine on 24 September 2017.

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