Northern Territory Racing Appeals Tribunal

DATE: 8 July 2009

MEMBERS: Chairman: Ms Susan Porter
Members: Mr David Horton and Mr Michael Stumbles

APPELLANT: Mr Rui Severino

APPEARANCES: Mr Dyson Hore-Lacy SC and Mr Bill Piper for the Appellant
Mr David De Silva for the Stewards

HEARING DATES: 8 and 11 May 2009

IN THE MATTER of: An appeal by Mr Rui Severino lodged on 23 April 2009 against the decision or order made by the Stewards on 23 April 2009 with respect to charges made against him under AR 175(a) and AR 175(b).

DECISION: **The appeal is dismissed and the decision of the Stewards of 23 April 2009 is upheld.**

REASONS FOR DECISION

The Charges

1. On 24 March 2009, after conducting an inquiry over a number of days (being 17 January 2009, 19 January 2009, 23 February 2009 and 24 March 2009) into events alleged to have taken place on 9 January 2009 at the Fannie Bay Racecourse, the Stewards charged Mr Rui Severino, the holder of a trainer's licence under the Northern Territory Local Rules of Racing, with two offences under the Australian Rules of Racing.

2. Charge One against Mr Severino was of 'improper action' under AR 175(a). The improper action being "that on the night of Friday 9 January 2009, Mr Severino entered the stables of licensed trainer Mr G Clarke, and in particular the room attached to those stables where Mr D McIntosh was staying and he removed without

permission the race gear belonging to Mr D McIntosh and placed that gear in his car" ("Charge One").

3. Charge Two against Mr Severino was of 'corruptly offering money to licensed jockey Mr D McIntosh' under AR 175(b). The particulars of that charge was "that on Friday 9 January 2009 in the car park of the Fannie Bay Racecourse Mr Severino corruptly offered money to licensed jockey Mr D McIntosh to hold up the horse Rishikesh in its race that day. Rishikesh being a horse which D McIntosh was to ride that day in race 4 at Fannie Bay Racecourse for licensed trainer Mr S Clarke" ("Charge Two").

The Stewards Decision

4. On 15 April 2009 and 23 April 2009 the Stewards conducted a hearing into the charges, to which Mr Severino pleaded not guilty. At the conclusion of the hearing on 23 April 2009 the Stewards found Mr Severino guilty of both charges and in the reasons for their decision, said:-

> "... the Stewards have considered the charges laid down under AR 175(a) and 175(b). We've considered all the evidence, your submissions and those of your legal representative Mr Hore-Lacey (sic), in relation to the matter.
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> Clearly, this is a serious matter and the Stewards are aware that a determination in these matters requires us to make finding of fact using the Briganshaw (sic) standard, working to the higher level. With this in mind, the Stewards have assessed and weighed the evidence presented in accordance with these principles in arriving at their decision.
>
> Two charges have been laid against you. ... You have pleaded not guilty to both charges.
>
> These reasons are not meant to be comprehensive reasons for the decision of the Stewards, but are in some way instructive as to the Stewards' deliberations. The credibility of D McIntosh and the reliability of his evidence was questioned during the inquiry. Whilst not commenting on his credibility in general, the Stewards formed the view that his evidence in this case was generally consistent and truthful. D McIntosh's evidence that he was offered money by Mr Severino to hold up *Rishikesh* was consistent during the inquiry.
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> His evidence is supported to some extent by the evidence of Licensed Jockey B Davis. The evidence of Licensed Trainer C Pollard supports that of D McIntosh.

D McIntosh's evidence that Mr Severino had taken his race gear from his accommodation and that he'd later retrieved it from Mr Severino's car is supported by evidence from Mr Pollard and, to some extent, so does the evidence of Mr A Barton.

Mr Pollard provided evidence, which the Stewards relied upon. Despite attempts to suggest that Mr Pollard would fabricate evidence to incriminate Mr Severino, Stewards found no reason to doubt his evidence. Mr Pollard provides evidence that Mr Severino had stated that if *Rishikesh* did not perform well in its race, he may take over the training of the mare. This is supported by the evidence of Mr Lelekis.

Mr Pollard gave evidence that on the night in question, Mr Severino stated *Rishikesh* was not supposed to win. Mr Pollard also stated that Mr Severino drove his car to the stables of G Clark, and that he removed the race gear of D McIntosh. Further, Mr Severino stated that D McIntosh was not leaving town without talking to him.

Evidence provided by Mr A Barton, a witness for Mr Severino, places Mr Severino in his car at around the time D McIntosh stated he retrieved his gear from Mr Severino's car.

Mr Lelekis, the Managing Part Owner of *Rishikesh*, gave evidence, and Stewards gave that considerable weight.

Mr Severino was, in the opinion of the Stewards, not a reliable witness. There are considerable inconsistencies in his evidence to the extent that it cannot be considered frank and honest, but rather made to suit the circumstances.

Mr Severino initially stated he could not have driven his car to the stables of Licensed Trainer G Clark and removed D McIntosh's gear because his car had no fuel and other reasons. He went to some lengths to explain why he didn't drive his car and what he did because of it. However, when evidence emerged from B Davis that indicated he did drive his car to the car park prior to the races, his evidence altered.

Mr Severino stated that he had a $10 win bet on *Rishikesh*, which appears to be an endeavour to provide some evidence that he wanted the horse to win. However TAB records prove that no such bet was made.

Mr Severino denied having a conversation with the owners of *Rishikesh* about taking over the training of the mare, yet Mr Lelekis states that Mr Severino telephoned him only a week before the race and, during that conversation when

asked if he would be interested in training *Rishikesh*, he said yes. This is supported by the evidence of Mr Pollard."

The Penalty

5. After giving their reasons and finding Mr Severino guilty of both charges, the Stewards heard submissions from Mr Hore-Lacy SC on behalf of Mr Severino as to penalty. The Stewards then imposed a penalty of suspension for a period of 3 months for Charge One and a period of disqualification for 12 months for Charge Two.

The Grounds of Appeal

6. On 23 April 2009, Mr Severino lodged a Notice of Appeal against the decision or order made against him on 23 April 2009 by the Stewards and in that Notice of Appeal Mr Severino also applied for a stay of proceedings. A stay was granted by the Chairman of the Racing Appeals Tribunal on 24 April 2009.

7. Mr Severino lodged his Notice of Grounds of Appeal on 1 May 2009. The Grounds of Appeal in that Notice were as follows:-

"1. The orders of the Stewards should be set aside for the following reasons:-

(a) The Stewards failed to give the appellant a fair hearing and/or denied the Appellant natural justice in that they:

(i) erred by not permitting the appellant to cross examine witnesses after charges were laid;
(ii) erred by not permitting the appellant to cross examine witnesses through counsel at any stage of the inquiry or hearing;
(iii) erred by not permitting the appellant to cross examine the witness Pollard before or after charges were laid in relation to a statement made by Pollard to the Stewards on 16 January 2009, but not produced until 23 April 2009;
(iv) erred in failing to provide the Appellant notice or adequate notice of allegations of Pollard made on 16 January 2009 before the hearing;
(v) erred in failing to provide material evidence before the hearing being the statement of Pollard made to the Stewards on 16 January 2009;
(vi) erred in failing to give the appellant notice of the precise allegation of the charge of corruptly offering money to a jockey;
(vii) erred in failing to give sufficient reasons for decision such as to enable him to know what it is they found, in particular, whether it was found he attempted to bribe a jockey McIntosh in the presence of Jockey Brendon

Davis in a car, or whether they found he attempted to bribe the jockey McIntosh walking from the carpark to the entrance of the racecourse;

(viii) erred in that they took the view that once the allegation was made it was up to the Appellant to prove his innocence;

(ix) erred in that they made no or no adequate attempt to obtain statements or hear evidence from potential witnesses who may have been able to give exculpatory evidence for the appellant;

(x) agreed with a witness that the appellant was a dangerous person, during the course of investigations, when the same is not true;

(xi) erred in that they told witnesses what the evidence was from other witnesses, some of which was not correct;

(xii) put words into the mouths of witnesses.

(b) The Stewards were biased

PARTICULARS

(i) The Stewards have since their decision suspended the appellant for one month in respect of an unrelated charge where it is usual industry practice to suspend a jockey only.

(ii) In relation to the charge referred to in (i) above the Stewards' finding of guilt was against the weight of evidence.

(iii) Particulars set out in para 1(a) hereof are referred to and repeated.

(c) The Stewards findings were perverse and/or against the weight of evidence

PARTICULARS

(i) there was uncontradicted evidence and admitted evidence that the accuser had a history of elaborate lying;

(ii) there was independent evidence that there were other matters in dispute between the accuser (Jockey McIntosh) and the appellant.

(iii) there was no other person that witnessed the alleged attempted bribery.

(iv) the evidence of the only possible eyewitness to the attempted bribery contradicted the evidence of the accuser, contrary to the findings of the Stewards.

(v) The Stewards failed to apply the standard of proof required by the case of Briginshaw v Briginshaw.

2. Alternatively to the relief sought in Para 1 hereof the Appellant seeks leave to have the charges against him heard *de novo*.

3. The penalty for improper conduct is excessive in all the circumstances."

The Appellant in his Notice of Grounds of Appeal sought the following orders:-

"1. The Tribunal reverse the decisions of the Stewards in relation to both charges and finds the appellant not guilty.

2. Alternatively, if the Tribunal finds the appellant guilty of the charge under s175(a), the Tribunal reduce the penalty under s 175(a)."

8. At the commencement of the Appeal, after his opening and upon clarification being sought by Mr De Silva, Mr Hore-Lacy SC sought leave to amend the Notice of Grounds of Appeal and leave was granted for the Appellant to amend the Notice of Grounds of Appeal on the basis that Mr De Silva be able to make further submissions as to same if he so required. The amendments to the Notice of Grounds of Appeal were to amend Ground 1(a)(vi), and to add Grounds 1(a)(xiii) and 1(a)(xiv) as follows:-

1(a)(vi) erred in failing to give the appellant sufficient notice of the precise allegations.

1(a)(xiii) erred in not allowing or facilitating legal representation to the appellant during the inquiry.

1(a)(xiv) the Stewards did not conduct the inquiry and/or hearing of the charges with an open mind.

Ground 2

9. As to Ground 2 (being in the alternative to Ground 1) to have the charges heard before the Tribunal *de novo*, Mr Hore-Lacy SC advised the Racing Appeals Tribunal ("the Tribunal") that he was not seeking to adduce new evidence nor was he asking the Tribunal to conduct the appeal as a new hearing into the charges with all witnesses being called and to hear the matter afresh as is usual in a hearing de novo.

10. Indeed, the Tribunal does not have the power under the *Racing and Betting Act* ("the Act") to conduct an appeal as a hearing *de novo*. Under section 145Z of the Act, "on the hearing of an appeal, the Tribunal is not able to consider any other evidence other than that adduced at the hearing in respect of the decision appealed against, unless satisfied that the evidence is relevant and that there is a good reason why it was not adduced at that hearing." An appeal to the Tribunal under the Act is an appeal by way of re-hearing with a limited power to hear evidence other than that adduced before the Stewards – refer to the Reasons for Decision of the Tribunal constituted by Mr Tom Pauling QC as chairman, and members Mr John Birch SM and Mrs Nadine Collier, *in the matter of Mr Philip Andre Johnson* dated 30 January 2004.

11. The Tribunal therefore determines this matter as an appeal by way of re-hearing based on the evidence before the Stewards at the hearing of the charges on 15 and 23 April 2009, which was stated to be the evidence taken at the inquiry [page 3 of the transcript of 15 April 2009], being part of Exhibit 2 in the Appeal, plus the transcript of the Stewards interview with Chris Pollard of 16 January 2009 [page 2 to 3 of the transcript of 23 April 2009], being Exhibit 3 in the Appeal. However, the Tribunal does so noting that in an appeal by way of rehearing, our powers are exercisable only where the Appellant can demonstrate that, having regard to all the evidence before us, the order that is the subject of the appeal is result of some legal factual or discretionary error - *Allesh v Maunz* (2000) 203 CLR 172.

Ground 1(a) – denial of natural justice – failure to give a fair hearing

The parties submissions as to the law

12. It was common ground between the Appellant and the Stewards, and indeed it is accepted by the Tribunal, that the Stewards when exercising their powers under AR 8(d) and (e) and AR10 of the Australian Rules of Racing ("the ARR") must afford persons before the Stewards natural justice and give them a fair hearing.

13. As to what is required of the Stewards in order to discharge their obligation to give fair hearing and natural justice to a person before the Stewards when exercising their powers under the ARR, Mr Hore-Lacy SC's submissions can be summarised as:-

- There is no general rule as to what the requirements are for natural justice to be observed, except that the procedure must be fair, and what is fair will depend on the circumstances of the case, 'especially the nature and importance of the subject matter, the nature and extent of the power being exercised and the seriousness and consequences of the exercise of the power' – refer Principles of Australian Administrative Law by S D Hotop, 6th Ed, at page 191 – and, Mr Hore-Lacy SC said, this is a very serious charge.
- This type of matter falls between the minimum and maximum standards of requirements of a fair hearing as stated in Principles of Australian Administrative Law (supra) at page 192. That is where the minimum is to act in good faith and listen to both sides (but not treat it as though it were a trial) and obtain information as it thinks fit but giving a fair opportunity to correct or contradict any prejudicial statement obtained - and the maximum is that standard that applies in 'a court of law or ... tribunal possessing the trappings of a court' and includes: prior notice of the charge with particulars and of the hearing time and place, 'an oral hearing, legal representation, the calling and examination of witnesses and of the cross examination of opposing witnesses,

disclosure of material evidence and a decision based on that evidence and full reasons for the decision'. Mr Hore-Lacy SC said that nobody expects the Stewards to conduct the matter as a High Court Judge would, but that the principles of fairness are obvious and that must be to give the person a fair go.

- Notice of the charges is required even for the minimum standard for a fair hearing and the reason for such notice is to allow the person affected a sufficient opportunity to make representations on their own behalf and, importantly in this case Mr Hore-Lacy SC said, 'it follows that notice must be given in sufficient time to enable such representations to be prepared' – refer Principles of Australian Administrative Law (supra) at page 193-194.
- There is no absolute right to legal representation before a domestic body, but where livelihood is at stake, legal representation should be permitted. Also, relevant factors to consider in determining if denial of legal representation is a denial of natural justice includes 'the seriousness of the matter, the complexity of the issues, factual or legal, and importantly in this case Mr Hore-Lacy SC said, the capacity of the individual to represent himself' - refer Principles of Australian Administrative Law (supra) at page 196 and *Stampalia v The Racing Penalties Appeal Tribunal of Western Australia* [2000] WASCA 24 at paragraphs 30 and 31.
- As per Principles of Australian Administrative Law (supra) at page 197-198, 'it is usually accepted that cross-examination of witnesses is basic to the eliciting of "the truth" in the common law system, but the question of whether the opportunity to cross-examine opposing witnesses is required by natural justice is doubtful. It has been said that if oral evidence is given ... the other party is as a general rule entitled to test that evidence by cross examination. ... In other cases however, it has been held that cross examination was inappropriate or not required by fairness. ... ... there is no general rule that a party is entitled to cross examine witnesses before a statutory body, but where cross-examination is necessary in the circumstances to elicit the truth and to afford the party a full or proper opportunity to present his case, it should in the interests of fairness be permitted'. Mr Hore-Lacy SC said that had he, as Mr Severino's legal representative in the hearing of the charges before the Stewards, been given the right to cross-examine all witnesses (as requested by Mr Piper in his letter to the Chairman of Stewards dated 9 April 2009 – Annexure A to the Affidavit of Bill Piper sworn 8 May 2009 – Exhibit 1), or at least Mr Pollard and Mr McIntosh (as requested by Mr McQueen in his letter to the Chairman of Stewards dated 21 April 2009 – Annexure D to the Affidavit of Bill Piper sworn 8 May 2009 – Exhibit 1), then there would have been no denial of a fair hearing to Mr Severino during the inquiry in this regard.

14. Mr De Silva's submissions on the issue can be summarised as:-

- The Stewards exercising their powers under the ARR are radically different from that of an ordinary court of law (i.e. – the judge also acting in the role of a policeman and making personal observations on the very matters to be adjudicated on, being the accuser and in many instances the principal witness for the prosecution, and entitled, if persuaded by the accuracy of his own personal observations, to act on such evidence whatever evidence to the contrary maybe adduced) – refer *R v Brewer; Ex-parte Renzella* [1973] VR 375 at para 5 on page 381, and Mr De Silva said, the Stewards acting in all such roles is an accepted practice.

- The only requirements of natural justice unaffected by the rules relating to Stewards and their inquiries ... are that:-
  - the Stewards must give adequate notice to a person charged; and
  - details of the precise charges against them, and
  - a fair opportunity after hearing the evidence against them of making their defence thereto, and
  - the Stewards must keep their minds open in the sense of being ready and willing to be persuaded by the party charged, until the party charged has been heard in his defence.

  Refer *R v Brewer; Ex-parte Renzella* supra at para 15 – 25 on page 381 and *Hall v New South Wales Trotting Club Ltd* [1977] 1 NSWLR 378 at page 388 and *Calvin v Carr* [1977] 2 NSWLR 308 at pages 332 and 334.

- The Stewards are not:-
  - required to allow the person before them to cross-examine witnesses;
  - bound to give reasons for their decisions;
  - obliged to allow the person before them to have legal representation throughout the inquiry and the hearing, as the rules of evidence do not apply in such inquiries or hearings and AR 199B states that no person (except an apprentice) before the Stewards is entitled to be represented.

The applicable principles of natural justice

➢ The basic requirements

15. It was not in dispute between the Appellant and the Stewards that the Stewards under the ARR may and are entitled to investigate or inquire, lay charges, adjudicate and impose penalties with respect to the conduct of all licensed persons attendant on or connected with a horse (AR 8(d) and AR 8(e)) and with respect to any matter in connection with any race meeting or any matter or incident related to racing (AR 10). That they may is well established, despite it appearing to offend the basic rules of natural justice – see for example *R v Brewer; Ex-parte Renzella* supra at page 381 and 383, *Riley v Racing Appeals Tribunal* [2001] VSC 259 at paras 43 to 45 and

Stampalia v The Racing Penalties Appeal Tribunal of Western Australia supra at para 28.

16. However, it is also well established and accepted by the Appellant and the Stewards, that the exercise of those powers by the Stewards do attract the principles of natural justice - *R v Brewer; Ex-parte Renzella* supra at page 379, or said another way, the ARR do not exclude the requirements of natural justice - *Calvin v Carr* supra at page 332.

17. The question is what requirements of natural justice must be observed by the Stewards in the exercise of their powers under the ARR. It is also accepted by the Appellant and the Stewards, and it is well established, that the requirements are to be determined by having regard to the 'circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth' – *Russell v Duke of Norfolk* [1949] 1 All ER 109 at page 118, as referred to and approved extensively by Australian Courts, for example see *R v Brewer; Ex-parte Renzella* supra at page 379, *Hall v New South Wales Trotting Club Ltd* supra at page 386.

18. Indeed, Mahoney JA in *Hall v New South Wales Trotting Club Ltd* supra at page 404 said:-

> "There is a tendency, ... to develop the natural justice principle into an increasingly rigid system of formal requirements. This, in my opinion, is wrong and may operate to impede the proper operation of the principle. The natural justice principle embodies the determination of the law that, in certain fields, those who may, by their acts or decisions, affect the rights of others, must observe a certain basic fairness in the exercise of their powers. This determination is carried into effect, in general, not by matters directed to ensuring that such persons will, in each case, arrive at the correct decision in fact, but by requiring that they exercise their powers according to particular rules, e.g. offer each party a fair opportunity to be heard; or that they refrain from doing particular things, e.g. displaying inappropriate bias or interest. It is not necessary to attempt to catalogue all of these requirements, for they will vary according to the powers and the context of their exercise. But it is important to bear in mind that ... the purpose of the requirements is to ensure that there be the level of basic fairness appropriate to the particular case."

19. It is the view of the Tribunal that Mr De Silva's submissions as to what the Stewards must do to afford persons before them natural justice when exercising their powers under the ARR (i.e. in the conduct of an inquiry, the laying of a charge, adjudicating on the hearing of the charge and imposing a penalty upon a finding of guilt) reflect the position of the law with respect to the minimum requirements with which the Stewards must comply. That is, the Stewards must at least:-

1. Inform the person 'of the nature of the accusations made against him and to give him a "fair opportunity to make any relevant statement he may desire and a fair opportunity to correct or controvert any relevant statements brought forward to his prejudice"' - *Hall v New South Wales Trotting Club Ltd* supra at page 388, or as expressed by Rath J in *Calvin v Carr* supra at page 334, to inform the person of 'what evidence has been given against him and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them';
2. 'Give adequate notice to a person charged of the precise charges against him, and a fair opportunity after hearing the evidence against him of making his defence thereto' - *R v Brewer; Ex-parte Renzella* supra at para 20 on page 381;
3. 'Keep their minds open in the sense of being ready and willing to be persuaded by the party charged' - *R v Brewer; Ex-parte Renzella* supra at para 15 – 25 on page 381.

20. However, contrary to Mr De Silva's submissions, compliance by the Stewards with only with the above on every occasion will not necessarily mean that on every occasion the person before them has been provided with natural justice, as it will depend on the circumstances of the case before them.

21. For example, on occasions the Stewards will need to ensure that where appropriate, a steward may need to excuse himself from the conduct of the inquiry and the hearing of the charges as in *Stollery v Greyhound Racing Control Board* [1972) 128 CLR 509, although that is not an issue that arises in this matter. However, there may also be occasions where legal representation, a right to cross examine or adequate reasons for decision are required (as raised by Mr Hore-Lacy SC) which are considered in paragraphs 22 to 40 below.

- <u>Legal Representation</u>

22. The Tribunal also accepts that the general submissions of Mr Hore-Lacy SC as to the Stewards allowing persons before them in an inquiry to have legal representation correctly reflect the obligations of the Stewards with respect ensuring a person is afforded a fair hearing.

23. That is, despite AR 199B and the general principal that 'there is no unqualified right to legal representation before the Stewards' - *Stampalia v The Racing Penalties Appeal Tribunal of Western Australia* supra at para 31, there may be occasions where the matter before the Stewards is of such seriousness, or the legal or factual issues are of such complexity that fairness requires the person before them to have legal representation – *Cains v Jenkins* (1979) 42 FLR 188 at 198, and or, in circumstances where the person is not capable of representing themself - *Stampalia*

v The Racing Penalties Appeal Tribunal of Western Australia [2000] WASCA 24 at paragraphs 29 -34, particularly at paragraph 34 in which Owen J (with whom Wallwork J and White J agreed) said "The issues of fact were of a very complex nature. Once it was accepted (as I do accept) that the technical evidence was relevant, there can be no argument that it was complex. The question then remains whether the applicant was capable of representing herself. If not, then natural justice would require that she be permitted to have representation."

24. Murray J (with whom Wallwork J and Miller J agreed) also said in *Harper v The Racing Penalties Appeal Tribunal of Western Australia* [2001] WASCA 217 at paras 53 – 54:-

> "The Stewards are bound by the rules of natural justice. There is, I think, no line of authority which elevates the capacity to be legally represented before an inferior court or Tribunal to a right which in every case forms part of the content of the rules of natural justice, but the particular circumstances of a particular case may make it clear that to be legally represented, as by counsel, would be an essential ingredient if the Tribunal was to discharge the duty to afford procedural fairness. There might be very diverse circumstances which in a particular case would lead to that conclusion, concerned with the complexity of the proceedings, the complexity of relevant matters of fact or law, the importance of the subject matter of the inquiry, the nature of the tribunal's powers and the like. It would be undesirable to attempt an exhaustive roll-call of such matters, but in the end the matter is to be judged against the ultimate touch-stone of the obligation of law, which may only be negated by the exercise of a statutory power expressed in the clearest of terms, to subject the inferior court or tribunal to the duty to afford procedural fairness to those who appear before it and are subject to its processes. ..."

and at para 58:-

> "The question was whether in the arrangements made the applicant was afforded every reasonable opportunity to test the evidence against him, to effectively present evidence on his own behalf, to make submissions to the stewards and to present arguments bearing upon the subject matter of the inquiry, to deal with the issues raised by the charge when it was formulated and to present material of an appropriate kind to the Stewards in relation to penalty upon his conviction."

25. Legal representation for the Appellant during the inquiry is clearly an issue for the Appellant in this matter – ground 1(a)(xiii).

- <u>Cross examination</u>

26. As to persons before the Stewards having a right to cross-examination witnesses,

the Tribunal accepts the general submissions of Mr Hore-Lacy SC as to the law with respect to this issue.

27. The law is clear that a denial by the Stewards to allow a person before them in an inquiry or hearing under AR 8(d) and AR 10 to cross examine witnesses is not necessarily a denial of natural justice. Indeed it appears that the weight of authority is against a right of cross examination in private tribunals – refer JRS Forbes *Justice in Tribunals* 2nd Ed at para 12.95.

28. However, once again, simply because the rules of natural justice do not as a general rule require a right to cross examine witnesses to be given by the Stewards to a person before them in order that the person obtains a fair hearing, in some cases, the circumstances of the case may require it. In *Bailey v Ahearn* (1968) 13 FLR 199, at page 213-214, Kerr J said:-

> "There can, therefore, be no universal rule that the principles of natural justice require that a person charged should be entitled to cross examine a person who has been a source of material against him. This is so because the tribunal can act on hearsay or upon the knowledge of its own members. ... It may be that there is no universal rule that a person charged can never have the right under the principles of natural justice to question a person who has provided material against him. It will depend on the circumstances.
>
> ...
>
> It can be seen ... that there may be some circumstances in which the denial of the right to question a witness conceivably might amount to a denial of natural justice, but in the present case, although the right was asked for and refused, Hurrell told his story in the presence of Carroll and Hurrell's witnesses, who covered the same ground, were questioned by Carroll and it could not be said, having regard to the nature of that questioning and the proceedings generally, that Carroll had not understood the case against him and had not had a proper opportunity of answering the charge and defending himself."

29. In *Maloney v New South Wales National Coursing Association Ltd* [1978] 1 NSWLR 161, at page 174, Glass JA (with whom Hope JA and Hutley JA agreed) said:-

> "But it is urged that the failure to cross examine per se invalidates any adjudication in which he took part. The submission however runs counter to several decisions of great authority. In *University of Ceylon v Fernando,* the Privy Council held that, since the plaintiff had an adequate opportunity to state his case, the failure of a University Commission of inquiry to tender for cross examination the essential witness against him, no request having been made in that regard, did not invalidate the proceedings. In *R v War Pensions Entitlement Appeal Tribunal: Exparte Bott*, it was held by the High Court that an applicant who had been given a fair opportunity to meet information obtained by the tribunal in the form of a medical opinion had not been denied natural justice by its refusal to allow cross examination on that opinion."

30. However, in an obiter dicta comment, Connolly J in *Murray v Greyhound Racing Control Board of Queensland* [1979] Qd R 111 said at page 116-117 that "in cases where oral testimony is presented it seems to me that the rules of natural justice will ordinarily require that cross examination be permitted", although it is noted that neither of the above two cases were cited in argument before him.

31. There is also the comment of Heerey J in *Kingham v Cole* (2002) 118 FCR 298 at page 295 that "Senior Counsel for the applicants was unable to point to any authority for the proposition that cross examination is a right always conferred by the rules of natural justice, whenever they are applicable". However, it must be remembered that the purpose of the requirements of natural justice is to ensure that there be the level of basic fairness appropriate to the particular case - Mahoney JA in *Hall v New South Wales Trotting Club Ltd* supra.

- Reasons for Decision

32. As to the requirement that in order for natural justice to be afforded to a person before the Stewards, the Stewards must give adequate reasons for their decision, the Tribunal notes that Mr Hore-Lacy SC did not refer the Tribunal to any authorities concerning the law with respect to same.

33. And while Mr De Silva's submission that there is no such requirement appears to be correct, he also did not refer the Tribunal to any authority for that proposition, nor did he make any submissions as to the legal position as to the adequacy of reasons where reasons are given. An examination of the authorities on this issue reveals that while there is no legal requirement for the Stewards to give reasons, if reasons are given then they can be examined for legal error.

34. The High Court in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 made it quite clear that the law is settled that "(t)here is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons." – per Gibbs CJ at page 662.

35. His Honour Gibbs CJ also said at page 670 that "(i)t remains to consider whether, notwithstanding that there is no general obligation to give reasons for an administrative decision, the circumstances make this a special case in which natural justice required reasons to be given. The rules of natural justice are designed to ensure fairness in the making of a decision and it is difficult to see how the fairness of an administrative decision can be affected by what is done after the decision has

been made. However, assuming that in special circumstances natural justice may require reasons to be given, the present is not such a case."

36. JRS Forbes in *Justice in Tribunals* at para 13.12 says that the above decision of the High Court 'is ample authority for the proposition that there is no right to reasons in club cases', and indeed it has been applied in a number of such cases including in *Gibbs v Racing Penalties Appeal Tribunal* WASC unreported 145 January 1997, in *Harvey v The Racing Penalties Appeal Tribunal of Western Australia* [2000] WASC 299, and in *Jerrick v Greyhound and Harness Racing Regulatory Authority* [2008] NSWSC 203.

37. However, where reasons are given, even where there is no obligation to give them, those reasons can be examined for legal error as indicated by the House of Lords decision of *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 977, which was referred to by Gibbs CJ in *Public Service Board of New South Wales v Osmond* supra at page 663.

38. There appears to be little judicial authority as to what will be considered sufficient reasons if they are given by the Stewards (in contrast to those given by a Tribunal or a Court) – see JRS Forbes JRS Forbes in *Justice in Tribunals* at para 13.16 to 13.25.

39. Of course, a decision of the Stewards can only be made pursuant to their powers under the ARR, and can only be made against those persons who agree to be bound by the ARR. Further, it must not be overlooked that the Stewards are not a Court or a statutory tribunal. As such, the comments of Sheppard J in *Bisley Investment Corporation v Australian Broadcasting Tribunal* (1982) 40 ALR 233 at page 255, are relevant, albeit made with respect to a tribunal that was required by statute to provide reasons: "s43(2) of the Administrative Appeals Tribunal Act ... obliges the Tribunal to give reasons in writing for its decision. Its reasons are to include its findings on material questions of fact and a reference to the evidence ... on which its finding are based. ... The section does not impose upon the Tribunal, which is often comprised of members who are not trained in the law, any standard of perfection. I consider the provisions of the section to be directory rather than mandatory. Substantial compliance is what is required ...".

40. If the Stewards choose to give reasons for a decision, then noting that they are not a Court or a Tribunal and there is no obligation to give reasons, and that it is accepted that "the form taken by such inquiries appears readily enough justified as a matter of practical necessity as being conducive to the interest of well-organised racing if, as usually must be the case, the inquiry should be held expeditiously ..." – *Riley v Racing Appeals Tribunal* supra at para 43, then the adequacy of the reasons will, as with the applicability or otherwise of other requirements to ensure that natural justice is afforded, depend on the circumstances of the case.

Ground 1(a) – The Stewards failed to give the Appellant a fair hearing and/or denied the Appellant natural justice in that they:-
(i) – erred by not permitting the appellant to cross-examine witness after charges were laid

41. It is quite clear that after the charges were laid on 24 March 2009, the Appellant's solicitor requested the Stewards to have witnesses available at the hearing of the charges for cross-examination, and did so on three occasions – letter from Mr Piper dated 9 April 2009 [annexure A to the affidavit of WF Piper sworn 8 May 2009 - Exhibit 1], Letter from Mr Piper dated 15 April 2009 [Exhibit 13], and letter from McQueens date 21 April 2009 [annexure D to the affidavit of WF Piper sworn 8 May 2009 - Exhibit 1].

42. The Chairman of the Stewards said in the letter of response to Mr Piper dated 14 April 2009 [annexure B to the affidavit of WF Piper sworn 8 May 2009 - Exhibit 1] that, with the information they had at hand, they did not intend to have all the witnesses available for questioning at the hearing, and that they proposed 'to deal with the matter on the evidence tendered at the previous inquiries'. However, they also said that if Mr Piper had a specific matter which he believed would require a witness to be recalled, to advise of the specific details so they could consider it before the hearing. The Chairman of the Stewards also said in the same letter that "if at the hearing any matter is raised which the stewards consider requires the recalling of a witness, the calling of a new witness or consideration of new evidence, an adjournment will be considered."

43. In Mr Piper's letter of response to the above dated 15 April 2009 [Exhibit 13] he requested the presence of only three of the witnesses (Mr McIntosh, Mr Pollard and Mr Davis) and the reason was "to permit them to be cross examined by Mr Severino's counsel." Mr Piper then acknowledged that Mr Severino did have the opportunity to ask questions of the requested persons but says "that opportunity was limited, and without the benefit of legal representation."

44. It appears that the letter from Mr Piper dated 15 April 2009 was not replied to and the hearing commenced as scheduled on 15 April 2009.

45. At the commencement of the hearing Mr Hore-Lacy SC raised the issue (page 3 of the transcript of 15 April 2009) and the substance of the exchange between him and Mr Lane, the Chairman of the Stewards, was:-

> Mr Hore-Lacy SC: ... we did ask for witnesses, and I've seen the letter declining to have them, which is understandable, but we did ask that three key witnesses be present, and I'm not too sure whether we had a response to that, and I know it's been a late request, and I apologise for that ..."

Mr Lane: Yes. The Stewards have considered it, and the Stewards intend to conduct this hearing on the evidence as already taken. It's our view that all those witnesses were previously called and Mr Severino was present when all those witnesses gave their evidence. He had the opportunity to question those witnesses, we believe ample opportunity to question them. It's our view that the hearing should proceed on this matter in relation to the evidence already taken. Now, if there is a specific part of the transcript which you're concerned with, we would be happy to consider your concerns and if we feel it's necessary, to then call that witness, but we believe that this hearing should proceed on the evidence as tendered.

Mr Hore-Lacy SC: Yes. Thank you. ...

46. After this however, an exchange took place between Mr Hore-Lacy SC and Mr Lane as to Mr Pollard being spoken to on 16 January 2009 by the Stewards and as to other persons that were or were not spoken to by the Stewards, with the exchange resulting in Mr Hore-Lacy SC requesting a copy of the record of the interview with Mr Pollard of 16 January 2009. With respect to that request, the following exchange took place [page 5 of the transcript of 15 April 2009]:-

Mr Lane: do you believe there was something that was said on that date should be in the inquiry?

Mr Hore-Lacy SC: No, but as you'd be aware, Sir, that the way, in fact, if I have an opportunity to address you, which I expect I will, the way the veracity of the story can be tested is by testing what a witness says at one time compared to what they say at another time, as you would be only too well aware. And that's the purpose of that. But, no, I've got no reason, I might say, if I answer your question as frankly as you have mine, I've got no reason other than to test the information given to you compared to the information he's given at the inquiry.

Mr Lane: All right. The Stewards will consider that then.

47. Mr Hore-Lacy SC also requested provision of the Steward's records (ie prior racing convictions) for Mr McIntosh, Mr Pollard and Mr Davis and the Stewards retired for a few minutes to consider the requests and the following was said upon their return [page 8 of the transcript of 15 April 2009]:-

Mr Lane: Gentlemen, the Stewards had given consideration to, and I think there are probably two requests for information, would that be right, Mr Hore-Lacy?

Mr Hore-Lacy SC: Yes.

Mr Lane: In relation to the Chris Pollard record of interview, there was certainly a recording made. I'm not 100 per cent sure whether it was transcribed. I'm reasonably confident it has been. I haven't checked, but I'd be reasonably confident that was done the same day as Mr Clarke's, which was transcribed, and I would presume that I've put them both on to a disk and sent them on to the typist to be done, so I'm presuming it's in the system. I'm not able to print one out tonight for you simply because we've shifted offices today and the printers are still wrapped in plastic. But in relation to it, we don't have a problem with you having a copy. If your case hinges on a copy, then we'll need to adjourn at some stage to provide it.

In relation to the records, obviously these are people's private records, so we'd expect that it's privileged information and wouldn't leave this room, but we're happy to read their records into the inquiry.

The first one is Brendon Davis, and going down the list, Brendan Davis going back to 2000 -- you tell me when you're ready Mr Hore-Lacy.

Mr Hore-Lacy SC: Yes, thank you.

48. The hearing then proceeded with the records of Mr McIntosh, Mr Pollard and Mr Davis being read out, and Mr Hore-Lacy SC thereafter proceeded to make some submissions. At the conclusion of those submissions the hearing was adjourned to 23 April 2009 to allow for the transcript of the interview with Mr Pollard of 16 January 2009 to be provided to Mr Hore-Lacy SC.

49. After the hearing was adjourned, and the transcript of the interview with Mr Pollard of 16 January 2009 was provided, McQueens solicitors wrote to the Stewards [Annexure D to the Affidavit of WF Piper sworn 8 May 2009 - Exhibit 1] and in light of the transcript of interview of Mr Pollard of 16 January, raised specific concerns and asked for Mr Pollard and Mr McIntosh to be available for cross examination at the resumption of the hearing on 23 April 2009.

50. The Stewards did not respond to that letter, but Mr Pipier spoke to Mr Lane about it on 22 April 2009 [Annexure E to the Affidavit of W F Piper sworn 8 May 2009 - Exhibit 1] and was told that the hearing would proceed on 23 April 2009 and it would not be adjourned. There is nothing in Mr Piper's file memo of the conversation in relation to the request to cross examine Mr Pollard and Mr McIntosh, or that it was denied by Mr Lane.

51. The hearing then continued on 23 April 2009 and while Mr Hore-Lacy SC made significant submissions as to the veracity of the evidence taken at the inquiry, the manner in which it was taken and from whom it was taken or not taken, he made no

request to have any witness recalled, not even Mr Pollard or Mr McIntosh as requested in McQueens letter dated 21 April 2009. Indeed, on 23 April 2009 the letter from McQueens dated 21 April 2009 was not mentioned at all by Mr Nore-Lacy SC, nor was the request to cross examine Mr Pollard and Mr McIntosh.

52. On the evidence before the Tribunal, the request by the Appellant's legal representatives made in the letter of 21 April 2009 to cross examine Mr Pollard and Mr McIntosh was not actually denied (although a request for an adjournment was), but Mr Hore-Lacy SC for some reason that is not apparent, did not ask for Mr Pollard and Mr McIntosh to be called for cross examination at the continuation of the hearing on 23 April 2009 and he simply proceeded with submissions. The transcript of 23 April 2009 reveals that at no time during the hearing on 23 April 2009, did Mr Hore-Lacy SC ask for any witness to be called for cross examination.

53. As stated in paragraphs 27 to 31 above, a denial of a request to cross examine does not of itself amount to a denial of natural justice, and whether it does depends on what is fair in the circumstances.

54. In this case, while the Stewards said they intended to proceed on the evidence taken in the inquiry as Mr Severino had, they believed, ample opportunity in the inquiry to question the witnesses, they said they were still willing to listen to Mr Hore-Lacy's concerns as to any specific part of the transcript. During the initial exchange on 15 April 2009, Mr Hore-Lacy SC said that it was "understandable" that the Stewards declined the request for "the witnesses" and he then thanked Mr Lane when Mr Lane said that the Stewards would be happy to consider his requests with respect to a specific part of the transcript with which he was concerned. Mr Hore-Lacy SC did then raise a query with respect to a specific part of the transcript which referred to Mr Pollard being interviewed by the Stewards on 16 January, and the hearing was adjourned to allow that to be provided to Mr Hore-Lacy SC.

55. Therefore, while the Stewards denied the initial request for all witnesses to be recalled for 'questioning', it was a denial that Mr Hore-Lacy SC said was understandable, and it was not an absolute denial. Mr Lane left it open for Mr Hore-Lacy SC to make a further specific request. In the circumstances, it was not unreasonable for the Stewards to have proceeded with the hearing on 15 April 2009 without recalling any witnesses as it appeared that Mr Hore-Lacy SC had agreed with their position with respect to recalling witnesses and was content to proceed on that basis.

56. Mr Hore-Lacy SC did make a further specific request (via McQueens) to cross examine Mr Pollard and Mr McIntosh in light of the provision of the transcript of interview of Mr Pollard of 16 January. That request as noted in paragraphs 50-52 was not denied, but it was also not pursued by Mr Hore-Lacy SC at the continuation of the hearing on 23 April 2009. It was therefore reasonable for the Stewards to

have proceeded with the hearing on 23 April 2009 without calling Mr Pollard or Mr McIntosh as Mr Hore-Lacy SC did not ask at that time for either of them to be called into the hearing room for cross-examination in circumstances where the request of 21 April 2009 had not been denied.

57. Therefore, the Stewards cannot be said to have denied the Appellant a fair hearing 'by not allowing the Appellant to cross examine the witnesses after the charges were laid'. The Appellant was represented by able and eminent counsel in the hearing who accepted the Stewards position on 15 April 2009, and, after not being denied the 21 April 2009 request to cross examine, did not request Mr Pollard or Mr McIntosh to be called into the hearing room for cross examination on 23 April 2009. Further, a full opportunity was given to, and taken by, Mr Hore-Lacy SC to make substantial submissions as to the veracity of the evidence taken in the inquiry, including that of Mr Pollard's with reference to the statements he made on 16 January 2009.

58. This ground of the appeal is therefore dismissed.

Ground 1(a) – The Stewards failed to give the Appellant a fair hearing and/or denied the Appellant natural justice in that they:-
(ii) – erred by not permitting the appellant to cross-examine witnesses through counsel at any stage of the inquiry or hearing

59. The first part of this ground of appeal (ie failure to allow the appellant to cross-examine witnesses through counsel at any stage of the "inquiry") relates to ground 1(a)(xiii) as to the failure to allow or facilitate legal representation to the Appellant during the inquiry and is therefore dealt with under that ground below at paragraphs 99 to 115.

60. The second part of this ground concerning cross examination of witnesses through counsel at the "hearing" is a repetition of ground 1(a)(i), as counsel did appear for the Appellant at the hearing (ie after the charges were laid). Therefore with respect to the second part of this ground, it is dismissed for the reasons set out above in paragraphs 41-57.

Ground 1(a) – The Stewards failed to give the Appellant a fair hearing and/or denied the Appellant natural justice in that they:-
(iii) – erred by not permitting the appellant to cross-examine Mr Pollard before or after charges were laid in relation to a statement made by Pollard on 16 January 2009, but not produced until 23 April 2009

61. The evidence before the Tribunal is that, despite the wording of this ground, the statement of Mr Pollard was provided to the Appellant on 17 April 2009 and not 23 April 2009 – see the letter from McQueens dated 21 April 2009 [Annexure D to the Affidavit of W F Piper sworn 8 May 2009 - Exhibit 1].

62. The first part of this ground (ie failure to allow the appellant to cross-examine Mr Pollard "before" charges were laid in relation to a statement made by Pollard on 16 January 2009) by implication must include a complaint that the statement was not provided "before" the charges were laid, as how can the Appellant cross-examine on something of which he is not aware. As set out in paragraph 19 above, natural justice does require that the person whose conduct is being inquired into be given adequate notice of the nature of the accusations made against them and that they be given a fair opportunity to correct or controvert any relevant statements brought forward to his prejudice.

63. In this case, while the Stewards did not give notice to the Appellant of the statements made by Mr Pollard on 16 January 2009 "before" the charges were laid, thereby also denying him the opportunity to ask Mr Pollard any questions about it during the inquiry, this was ultimately rectified as notice of the statements made was given during the hearing while the Appellant had legal representation (as set out in paragraphs 65 to 68 below), and the request to cross-examine Mr Pollard in relation to it was not denied (as set out in paragraphs 49-52 above). Further, a reading of the hearing transcript of 23 April 2009 reveals that Mr Hore-Lacy SC was not denied the opportunity to correct or controvert any of the statements made by Mr Pollard on 16 January 2009. For these reasons, the first part of this ground of appeal is dismissed.

64. The second part of this ground (ie failure to allow the appellant to cross-examine Mr Pollard "after" charges were laid in relation to a statement made by Pollard on 16 January 2009), is within the ambit of ground 1(a)(i). Therefore, for the reasons set out above in paragraphs 41 to 57, the second part of this ground is also dismissed.

Ground 1(a) – The Stewards failed to give the Appellant a fair hearing and/or denied the Appellant natural justice in that they:-
(iv) - erred in failing to provide the Appellant notice or adequate notice of allegations of Pollard made on 16 January 2009 before the hearing

65. On the evidence before the Tribunal it is clear that notice of the statements made by Pollard when interviewed by the Stewards on 16 January 2009 was not given to the Appellant before the hearing into the charges commenced on 15 April 2009.

66. However, once the transcript of the interview was requested by Mr Hore-Lacy SC on 15 April 2009, the hearing was adjourned and arrangements were made for a copy to be given to Mr Hore-Lacy SC.

67. A copy of the transcript was provided on 17 April 2009, being five days before the hearing was due to continue on 23 April 2009. While five days, which included a weekend, may not be a long time, the Tribunal is of the view that it was long enough for the Appellant's legal representatives to consider the transcript, which they did, by reference to the letter from Mc Queens dated 21 April 2009 and by reference to the submissions made by Mr Hore-Lacy SC at the continuation of the hearing on 23 April 2009 [pages 2-4 of the transcript of 23 April 2009].

68. Therefore while notice of allegations of Mr Pollard made on 16 January 2009 was not given before the hearing commenced on 15 April 2009, this was rectified by the Stewards and the hearing was adjourned in order for such notice to given and for the Appellant to consider those allegations over the adjournment. Accordingly, this ground of appeal is dismissed.

69. However, the Tribunal does make the comment that it would have been preferable and more expeditious if the Stewards had given notice of the allegations made by Mr Pollard on 16 January 2009 by providing a copy of the transcript of the interview at the earliest opportunity, rather than waiting to be asked for it during the hearing.

Ground 1(a) – The Stewards failed to give the Appellant a fair hearing and/or denied the Appellant natural justice in that they:-
(v) - erred in failing to provide material evidence before the hearing being the statement of Pollard made to the Stewards on 16 January 2009

70. This ground was not argued by Mr Hore-Lacy SC and Mr De Silva told the Tribunal that he was informed by the Appellant's legal representatives that the Appellant was abandoning this ground and therefore he made no submissions with respect to it. The Tribunal therefore has not considered this ground as one that was pressed, but if it was pressed, it would have been dismissed for the same reasons as those set out in paragraphs 65 to 69 above.

Ground 1(a) – The Stewards failed to give the Appellant a fair hearing and/or denied the Appellant natural justice in that they:-
(vi) - erred in failing to give the appellant sufficient notice of the precise allegations

71. The inquiry by the Stewards into this matter commenced on 17 January 2009. The opening words of the Chief Steward Mr Lane were [page 2 of the transcript of 17 January 2009]:-

> Mr Lane: Good morning Mr Severino. Come in, have a seat. Mr Severino, as I said yesterday, the Stewards received a complaint in relation to an incident which took place on Friday 9 January prior to the races. Consequently, the Stewards interviewed a number of people and now intend to open an inquiry into those events.
>
> The allegation is, Mr Severino, that in the car park on the day of the 9th of January, you approached Damion MacIntosh, Licensed Jockey, and placed cash in his hand and indicated to him that you wanted him to hold back *Rishikesh,* which he was riding on that day, and that if he did so, that more money would come his way. So that is the allegation. Do you wish to say anything in relation to it?
>
> Mr Severino: Sir, it is the first time I hear this official, Sir , and no.
>
> Mr Lane: The first time you've heard it officially, but have you heard it....
>
> Mr Severino: No, I heard it on the street, Sir, that it was a rumour that my name came up as what he said, offering money to Flash to stop a horse of Shane Clarke's. I didn't know what horse people were talking about. I obviously deny it, Sir. I didn't have money, Sir. I got paid first time my first bill for my horses last week, but I went bought some gear and some new feed. I've been living pretty – the last few three weeks been struggling, but been managing ok, just managing okay.

72. Mr Lane then provided more details of the precise allegations made against Mr Severino, upon which Mr Severino commented on [page 2-3 of the transcript of 17 January 2009].

73. Thereafter, [page 3-4 of the transcript of 17 January 2009], the following interchange took place:-

> Mr Lane: And at some stage during that night, did you go down to Gary Clarke's stables and take Damion McIntosh's race gear?
>
> Mr Severino: Myself?
>
> Mr Lane: Yes.
>
> Mr Severino: No Sir.

> Mr Lane: Well that's the allegation from both Damion McIntosh and Chris Pollard.
>
> Mr Severino: Sir, I've been here six years, Sir. I've never, ever took any gear from anybody, let alone from somebodies race gear. What would I do with race gear?

74. Mr Lane continued and more details of the precise allegations made against Mr Severino were provided [page 4-5 of the transcript of 17 January 2009], and Mr Severino named a number of people who were in attendance at the time of the alleged argument between Mr Severino and Mr Pollard on the night of 9 January 2009. Mr Severino was then given an opportunity to explain why he thought Mr McIntosh would make such allegations against him and whether he had spoken to Mr McIntosh about the allegations [page 6-7 of the transcript of 17 January 2009] and Mr Severino provided an explanation and the following was said:-

> Mr Lane: Okay, so Damion McIntosh tried to contact you, but you didn't try to contact Damion McIntosh?
>
> Mr Severino: No, Sir. Especially since yesterday. You've told me not to contact Shane Clarke, Chris Pollard or Flash.

75. The inquiry on 17 January 2009 was adjourned not long thereafter, and Mr Lane said [page 9 of the transcript of 17 January 2009]:-

> Mr Lane: What we would suggest is if any of these people who were present at the stables or any other people who can corroborate and support what you're telling us, then we would recommend that you have them present at that time, six o'clock on Monday. You should bring any witnesses that you think may be of assistance to the inquiry.

76. Mr Hore-Lacy SC submitted that the above was not sufficient notice and as Mr Severino was 'asked to respond on the spot' and that Mr Severino should have been told of the allegations before the inquiry commenced in order for Mr Severino to be able to get legal advice and 'get himself together'.

77. Mr De Silva submitted that it was adequate notice in circumstances where the inquiry was adjourned on a number of occasions and held over a 3 month period, and that Mr Severino was at all times aware of the precise allegations against him.

78. As noted in paragraph 15 above, it is well established that the Stewards may investigate or inquire, lay charges, adjudicate and impose penalties with respect to the conduct of all licensed persons attendant on or connected with a horse and with

respect to any matter in connection with any race meeting or any matter or incident related to racing. The way this process works was aptly described by Samuels JA in *Hall v New South Wales Trotting Club Ltd* (supra) at page 388:-

> "The stewards did not charge the appellant with any offence under the rules when the inquiry opened. They started by investigating what was alleged to have occurred. Morton, Pascoe and Compton gave their versions and the appellant his. Then, after deliberations, they found the appellant guilty of misconduct and charged him under r. 10(g), ... And after further deliberation they imposed a penalty. I do not think there is anything wrong with this procedure, which is often appropriate to the conduct of inquiries of this sort, and may, indeed, be the only practicable way of proceeding."

79. It is apparent (paragraph 74 above) that Mr Severino was told of the inquiry on 16 January 2009, and although there is no evidence about whether Mr Severino was told what the inquiry was to be about, there is evidence that Mr Severino was told not to contact Mr Shane Clarke, Mr Pollard or Mr McIntosh. It is also evident by reading the transcript of 17 January 2009 that Mr Severino was not surprised at the allegations (refer paragraph 71 above), and that he was already aware of them having been the subject of rumours of which Mr Severino had heard, and no doubt Mr Severino had at least some idea of what the inquiry was going to be about.

80. The allegations were squarely put to Mr Severino at the outset of the inquiry and the inquiry was conducted in the usual manner as is accepted as appropriate and practicable (refer paragraph 78). On 17 January 2009, Mr Severino was, as per *Hall v New South Wales Trotting Club Ltd* supra at page 388, informed of the nature of the accusations made against him and given a fair opportunity to make any relevant statement he may desire and a fair opportunity to correct or controvert any relevant statements brought forward to his prejudice. It is evident that the Stewards had no intention of concluding the inquiry on 17 January 2009 and indeed, no witnesses appeared before the inquiry until the adjourned date of 19 January 2009, by which time Mr Severino was well aware of the precise nature of the allegation and had time to 'get himself together'. Therefore, even if Mr Severino was not wholly given a fair opportunity on 17 January 2009 to correct or contradict the statements made against him at that time, by the Stewards adjourning the inquiry on four (4) occasions, such that it was conducted over five (5) sessions in the period 17 January 2009 to 23 March 2009, Mr Severino given fair notice and a fair opportunity to prepare himself and make his defence. Accordingly, the Tribunal dismisses this ground of appeal.

Ground 1(a) – The Stewards failed to give the Appellant a fair hearing and/or denied the Appellant natural justice in that they:-
(vii) - erred in failing to give sufficient reasons for decision such as to enable him to know what it is they found, in particular, whether it was found he attempted to bribe a jockey McIntosh in the presence of Jockey Brendon Davis in a car, or whether they found he attempted to bribe the jockey McIntosh walking from the carpark to the entrance of the racecourse.

81. As stated in paragraphs 34 to 36 above, the Stewards are not obliged to give reasons. Notwithstanding this, the Stewards did give some reasons and they are set out at paragraph 4 above.

82. This matter is not the usual type of matter that the Stewards find themselves inquiring into as it is not conduct that has occurred during the running of a race which the Stewards may witness. It relates to an allegation of conduct between two people and what was said or done by each of them. Therefore the real issue before the Stewards was who, if anyone, they believed. The reasons given address this issue and they do say why the Stewards believed Mr McIntosh over Mr Severino. Whether the Stewards were correct in their reasoning is a different issue and is the subject of appeal Ground (c), and in that regard the reasons can be looked at to see if error was made (paragraph 37 above).

83. As stated in paragraph 35 above, the rules of natural justice are designed to ensure fairness in the making of a decision and it is difficult to see how the fairness of an administrative decision can be affected by what is done after the decision has been made.

84. The fact that the Stewards did not state in their reasons whether they found that the attempt to bribe a jockey McIntosh was in the presence of Jockey Brendon Davis in a car, or walking from the carpark to the entrance of the racecourse, does not amount to a denial of a fair hearing by the Stewards to the Appellant where the particulars of the charge was that it took place 'in the car park of the Fannie Bay Racecourse' and the real issue was who was to be believed. This ground of appeal is therefore dismissed.

Ground 1(a) – The Stewards failed to give the Appellant a fair hearing and/or denied the Appellant natural justice in that they:-
(viii) - erred in that they took the view that once the allegation was made it was up to the Appellant to prove his innocence

85. Mr Hore-Lacy SC submitted, in summary, that:-
    - the extract at paragraph 75 above;

- the Stewards did not question Mr Davis about something that Mr Severino told them he said to Mr Davis; and
- the Stewards did not seek to call a number of people identified by Mr Severino as being able to support his evidence but rather they required Mr Severino to call those persons to the inquiry;

showed that the Stewards took the view that once the allegation was made it was up to the Appellant to prove his innocence.

86. Mr De Silva submitted that the Stewards were constantly seeking to give Mr Severino a fair hearing during the inquiry by giving him an opportunity to make his defence and bring witnesses (on numerous occasions with 4 adjournments and the inquiry being held over a two(2) month period) and that amounted to the Stewards making proper investigation and inquiry into the allegations so as to hear all available evidence, rather than requiring the Appellant to prove his innocence.

87. The Tribunal, having read the transcript of the inquiry held on 17 January 2009, 19 January 2009, 23 February 2009 and 23 March 2009 generally accept Mr De Silva's submissions and find that while the inquiry as conducted was not of a standard as may be expected by lawyers (in that the Stewards could have asked other questions of a number of witnesses, and or asked them in different way or order), the Stewards did speak to or call the main witnesses (who they had power to call) and that some of them were spoken to (Ms Porter and Mr Lelekis) or called (Mr Davis) after Mr Severino named them as relevant witnesses.

88. Further, bearing in mind that it was a Stewards inquiry and not a police inquiry, and was conducted by persons not trained in the law, the Tribunal also finds that the Stewards were not requiring the Appellant to prove his innocence, but were trying to encourage Mr Severino to put before the Stewards as much evidence as he was able in his defence. Therefore, this ground of the appeal is dismissed.

Ground 1(a) – The Stewards failed to give the Appellant a fair hearing and/or denied the Appellant natural justice in that they:-
(ix) - erred in that they made no or no adequate attempt to obtain statements or hear evidence from potential witnesses who may have been able to give exculpatory evidence for the appellant

89. As noted in paragraph 87 above, the Stewards did speak to or call the main witnesses (who they had power to call) and that some of them were spoken to (Ms Porter, Mr Lelekis) or called (Mr Davis) after Mr Severino named them as relevant witnesses.

90. Evidence was also taken from Ms Jami Huish [pages 4 to 7 of the transcript of 23 February 2009] and Mr Anthony Barton [pages 16 to 20 of the transcript of 23 February 2009] who Mr Severino brought to the inquiry.

91. The potential witnesses that Mr Hore-Lacy SC said the Stewards should also have called were:-

- Mr Read Robinson and Mr Dwyne Delaney as to Mr Severino saying that he said the horse should win [mentioned at page 7 of the transcript of 19 January 2009];
- Mr Black Charlie from the Parap Bottle-O where Mr Severino said he spent the winnings of his bet [mentioned at page 7 of the transcript of 19 January 2009] and who came to the stables after the races [mentioned at page 5 of the transcript of 17 January 2009];
- Mr Guy Clarke who was at Mr Pollard's stables after the races [mentioned at page 5 of the transcript of 17 January 2009];
- Mr Flanagan of the TAB.

and Mr Hore-Lacy SC submitted that the Stewards had a duty to call them as the principles set out in *R v Apostelidies* (1984) 153 CLR 563 applied equally to the Stewards in such an inquiry.

92. Mr De Silva submitted that Mr Hore-Lacy SC's submission as to the Steward's obligation to call witnesses being like that of the prosecutor (ie as per *R v Apostelidies* (supra)) was in error, but notwithstanding that, when the Stewards were given a lead as to a potential witness, they did follow it (ie Mr Davis, Mr Barton, Mr Lelekis and Ms Porter). Further, Mr De Silva submitted that in light of the evidence of those spoken to by the Stewards, (ie Mr Lelikis re his conversations with Mr Severino as to taking the horse back to train and as to his likely win that day, and Ms Porter and Mr Barton re the events at Mr Pollard's stables after the races where it is clear that significant quantities of alcohol had been consumed) would not have added anything to the evidence already obtained.

93. None of the persons listed in paragraph 91 above are licensed persons under the ARR [page 14-15 of the transcript of 23 April 2009] and as such, the Stewards have no power to call them to an inquiry held under the ARR. Further, the Stewards are not bound by the rules of evidence in the conduct of an inquiry, but notwithstanding this, the Tribunal finds on a reading of the transcript of the inquiry held on 17 January 2009, 19 January 2009, 23 February 2009 and 23 March 2009, that as per paragraph 87 above, the Stewards did speak to or call the main witnesses (who they had power to call) and that some of them were spoken to (Ms Porter and Mr Lelekis) or called (Mr Davis) after Mr Severino named them as relevant witnesses. Further, that the Stewards also actively encouraged Mr Severino to bring any witnesses that he thought could corroborate and support what he was telling the Stewards or could assist in the inquiry [page 9 of the transcript of 17 January 2009, page 37 and 39 of the transcript of 19 January 2009, page 23 of the transcript of 23 February 2009] and

as such, Mr Severino was given a fair hearing in this regard and this ground is therefore dismissed.

Ground 1(a) – The Stewards failed to give the Appellant a fair hearing and/or denied the Appellant natural justice in that they:-
(x) - agreed with a witness that the appellant was a dangerous person, during the course of investigations, when the same is not true;

94. The Tribunal accepts the submissions of Mr De Silva as to this ground. That is, a reading of the transcript of the Stewards interview with Mr Pollard on 16 January 2009, does not support the contention, and that Mr Lane's comment that 'I understand', was as to Mr Pollard being made a sitting duck. The relevant exchange is as follows [page 5 of Exhibit 3]:-

> Mr Pollard: Yes. I don't want to be made a sitting duck out of this, Sir. He's a very dangerous bloke.
>
> Mr Lane: I understand that. I understand that completely.
>
> Mr Pollard: Shane rang up and said: 'I owe you one' and all that, and I said 'No you dont. You dont owe me nothing'.
>
> Mr Lane: the reality is - and we dont want to make a sitting duck out of anybody, either – but the reality is that if this has in fact taken place, then we certainly can't condone it and we'll be – I haven't discussed this with the other Stewards at this point in time, but we'll be interviewing Mr Severino about it. It's going to be certainly not possible to keep people's names out of it, so it may be that you are called to an inquiry to give evidence.

The Tribunal therefore dismisses this ground of appeal.

Ground 1(a) – The Stewards failed to give the Appellant a fair hearing and/or denied the Appellant natural justice in that they:-
(xi) - erred in that they told witnesses what the evidence was from other witnesses, some of which was not correct; and
(xii) - put words into the mouths of witnesses

95. A review of the transcript of the inquiry held on 17 January 2009, 19 January 2009, 23 February 2009 and 23 March 2009 and some of the records of interview of the witnesses reveal, as Mr Hore-Lacy SC submitted, that some of the questions the Stewards asked were leading questions, and that some of the information told to

some of the witnesses may not have been said in the exact words as was initially conveyed to the Stewards.

96. As noted in paragraph 87 above, the inquiry as conducted was not of a standard as may be expected by lawyers, in that the Stewards could have asked other questions of a number of witnesses, asked them in different way or order and perhaps, although it is a thing easier said than done, to have repeated what had been said to them by others word for word.

97. As stated in paragraph 15 above and accepted by both parties, the process of inquiry that the Stewards engage in pursuant to the powers under the ARR is a long accepted and established process, which it is acknowledged, is not conducted by persons trained in the law. As such, rarely will the process have been conducted in a manner that lawyers would consider to be the requisite standard. The issue therefore is whether the manner in which it was conduct was so deficient (ie such questioning) that it resulted in Mr Severino not being given a fair hearing.

98. In the view of the Tribunal, while the inquiry may have been conducted with a higher standard of questioning, a review of the transcript of the inquiry held on 17 January 2009, 19 January 2009, 23 February 2009 and 23 March 2009 shows that Mr Severino was present at all times during all questioning throughout the five (5) sessions of the inquiry, and was invited by the Stewards at each stage of the inquiry to ask questions of the witnesses or to make any comment as to their evidence. That is, during the inquiry, Mr Severino heard all the evidence and was given a fair opportunity to correct, controvert or contradict any of the evidence given against him, and indeed he did so. Accordingly, this ground of appeal is dismissed.

Ground 1(a) – The Stewards failed to give the Appellant a fair hearing and/or denied the Appellant natural justice in that they:-
(xiii) erred in not allowing or facilitating legal representation to the appellant during the inquiry

99. Mr Hore-Lacy SC submitted that it was apparent from reading the transcript of the inquiry that Mr Severino was 'totally in-equipped to question or cross examine witnesses' and that 'on a number of occasions he sought legal assistance, such assistance being denied', and Mr Hore-Lacy SC referred us to a number of transcript references at pages 10, 28.3, 29.6, 30.5 and 32.3 of 19 January 2009, with a specific refusal at page 30.

100. Mr De Silva submitted (on objection by Mr Hore-Lacy SC) that despite the application of ARR 199B, the Stewards had never refused a request for legal representation in any matter before them.

101. Mr De Silva also submitted that Mr Severino never actually made a request to be represented at the inquiry by a lawyer (which Mr De Silva say was confirmed by Mr Severino's letter to the Stewards dated 30 March 2009 – ie after the charges were laid [Exhibit 11]), but that Mr Severino had lawyers involved at the outset and that Mr Severino's requests to obtain legal advice about the matter were consistently agreed to and assisted by the Stewards. In that regard, Mr De Silva referred us to transcript references at pages 30, 32, 37 to 38 of 19 January 2009 and the letter from the Stewards to Mr Severino dated 12 February 2009 [Exhibit 8].

102. The Tribunal however is of the view that Mr Severino, in the exchange set out below on 19 January 2009 [pages 29 to 30], did ask for legal representation at the inquiry, and although the request was not explicit, no reasonable person could consider it anything other than such a request:-

> Mr Severino: Well, Sir, I am just saying to you this is what I would like to do at the moment because there is an issue – I haven't got nothing to hide, Sir. If you want to cross-examine, cross-examine us, but I'll consider the content of Damion McIntosh's allegations, the contents of Chris Pollard's allegations - I'm absolutely shocked. I don't even know if I want to answer anything else, Sir, until I seek further legal advice about how I should go about this because this can have serious repercussions on my career, I have no doubt. Like, when I have allegations like pretty much these almost like race fixing and theft of property and threaten violence to a person, Sir, I've had serious cases last year with my partner. I'm a bit aware of the seriousness of these cases, so I know you say the wrong thing on the wrong way, even though I might mean that the right way, and it can get them into trouble. And I am innocent, Sir, so that's why I'm asking you if it is appropriate to ask you - I need to speak with my solicitor, Sir.
>
> Mr Lane: Okay.
>
> Mr Severino: I'm only asking if it is appropriate to ask you, Sir, you know.
>
> Mr Lane: Yes.
>
> Mr Severino: I have no problem in coming at any time.
>
> Mr Lane: At this point in time, we have Damion McIntosh here from Alice Springs. The Stewards brought him here because we thought he was an integral part of the inquiry and we indicated on Saturday that you should bring any witnesses that you believe appropriate.
>
> Mr Severino: I think I even said, on Saturday if there was need for me - I think I did ask you - I don't know if I asked on the phone or if I asked you when I

came to the inquiry on a Saturday morning if there was - no, I think did ask that you at your office, Sir, was there any need to bring solicitor or something like that, and you said: 'At this stage, you don't need to'. But I'm just saying now that I'm facing the content of the allegation, I don't feel really safe continuing with the inquiry, Sir.

Mr Lane: Well, at this point in time, Damion McIntosh is here at the inquiry. Now given that Brendon Davis' evidence relates to Damion McIntosh's evidence, we would obviously want Damion McIntosh present when Brendon Davis gives his evidence.

Mr Severino: Wouldn't that be denying my natural Justice, Sir?

Mr Lane: What?

Mr Severino: Of seeking legal advice.

Mr Lane: You can seek legal advice at the end of the inquiry. At this point in time, all the Stewards are doing is asking questions.

Mr Severino: Okay.

103. Despite Mr De Silva's submission that the above was not a denial by the Stewards for Mr Severino to have legal representation at the inquiry as Mr Lane's words 'at the end of the inquiry', really meant 'at the end of today', as evidenced by the exchange that took place shortly before the inquiry on 19 January 2009 was adjourned to a date to be fixed, the Tribunal is of the view that if that is what Mr Lane meant, it is not what was conveyed and indeed the above exchange is a clear discouragement to Mr Severino to have a lawyer with him during the conduct of the inquiry as, 'all the Stewards are doing is asking questions'. The Tribunal is also of the view that the exchange that did take place shortly before the inquiry was adjourned on 19 January 2009 as set out below [pages 38 to 38 of the transcript], does not clarify the impression given to Mr Severino as to his need or desire to have a lawyer with him in the inquiry and amounts to a denial of the request:-

Mr Lane: You've questioned the Stewards about whether you can seek legal advice and get a transcript. Is there anything further you wish to put to the Stewards in relation to – do you want to formally apply for a transcript and adjournment to get transcript?

Mr Severino: Yes, Sir. A transcript - he told me to ask for the statements of the witnesses involved in the matter.

Mr Lane: Who is your solicitor?

Mr Severino: Barrister Mr Brian Cassells.

Mr Lane: Brian Cassells, okay. That is the case and the Stewards have already considered, giving your earlier comments, we will adjourn the matter to have the transcript typed up.

Mr Severino: Oh, sorry, Sir. Also maybe given time to also - because there's other allegations and statements that Mr Pollard done and Mr McIntosh made regarding the night after the races.

Mr Lane: Yes.

Mr Severino: And I have witnesses that I believe that can be in my favour.

Mr Lane: That's fine. What the Stewards will do at this stage is adjourn to get the transcript typed up. When we've got the transcript typed up, we will give you a copy of the transcript and we'll then set down a date for another hearing of the inquiry at which stage you can bring witnesses if you so desire.

Mr Severino: You'll tell me when?

Mr Lane: Yes. It will take a week or two, probably, to get the transcript typed up. It's quite a substantial job for the typist to type it up.

Mr Severino: Fair enough.

Mr Lane: So we'll get her to type up the transcript and then we'll give you a copy and at the time we give you the copy, we'll then come up with a convenient time for the resumption of the inquiry, okay?

Mr Severino: Yes.

Mr Lane: At that stage, in the meantime, between getting the transcript and the second inquiry - - -

Mr Severino: Seek some advice.

Mr Lane: - - - seek some legal advice if you so desire and then organise what witnesses you think - - -

Mr Severino: But also, Sir, I am a bit lost here, Sir, because I've never been at an inquiry. At this stage, it's only allegations.

Mr Lane: Yes.

Mr Severino: When I go to my solicitor, I'm just going to pretty much say these are the statements of the other witnesses that made statements because he asked me before: 'Did they charged with anything?' I said: 'No, at the moment I haven't been charged with nothing; it's just the Stewards asking the questions'. Is that?

Mr Lane: That's correct. The Stewards haven't - - -

Mr Severino: That's correct. Facing the allegations that have been made against me.

Mr Lane: Yes, well we're faced with allegations that people have made and we're inquiring into those and the Stewards won't give consideration to that evidence until such time as we have completed taking evidence.

Mr Severino: Good.

Mr Lane: Now, that might mean one more adjourned inquiry. It might mean 10. Who knows? At this point in time, if evidence keeps coming to light, then we'll keep adjourning to ensure that we've got all the evidence possible so we can consider all the evidence before we make any decision as to whether we should proceed down the path of, indeed, a charge not.

Mr Severino: Okay.

104. The issue therefore is whether the Stewards denial of Mr Severino's request to bring his solicitor with him to the inquiry resulted in Mr Severino not being given a fair hearing.

105. As stated in paragraphs 23 and 24 above, the general principal is that there is no unqualified right to legal representation before the Stewards, either in the inquiry before the charges are laid, or in or the hearing of the charges once they are laid. However, there may be occasions where the matter before the Stewards is of such seriousness, or the legal or factual issues are of such complexity, or the person is not capable of representing themself, that fairness requires the person before them to have legal representation. That is, the question is whether in the arrangements made, the appellant was afforded every reasonable opportunity to test the evidence against him, to effectively present evidence on his own behalf and to make submissions to the Stewards and to present arguments bearing upon the subject matter of the inquiry.

106. The transcripts of 17 January 2009, 19 January 2009, 23 February 2009 and 23 March 2009 show quite clearly that during the inquiry (which was unquestionably of a serious nature), Mr Severino was encouraged to get legal advice from his legal representatives and he was offered every opportunity to ask questions of all persons who attended the inquiry, to bring any witnesses he wanted and to make any comment or explanation that he wished in relation to what was said by any other person who attend the inquiry. The issue then is whether Mr Severino was capable of taking advantage of this, or whether he couldn't as he was not capable of representing himself and the Stewards ought to have known that, and if as a result, Mr Severino was denied a fair hearing.

107. The only way that the Tribunal can determined Mr Severino's capability is to consider the transcript.

108. Mr Hore-Lacy SC referred us to a number of occasions in the transcript where the Stewards asked Mr Severino if he had any questions of a number of the witnesses and his responses clearly indicated that he did not know what to do, that is, Mr Severino did not know that he should or could cross examine the witnesses. These appear at pages 25, 33, 34, 35, 36, 37 of the transcript of 19 January 2009.

109. It also apparent though that on other occasions Mr Severino did ask questions of witnesses, and those questions were clear, direct and relevant.

110. Mr Severino asked several clear and direct questions of Ms Huish, who came to the inquiry at Mr Severino's request [page 4 of the transcript of 23 February 2009], and while it appears that Mr Lane continued the questioning, at the end of Mr Lane's questions, Mr Lane asked Mr Severino if he had any further questions, but he said 'no. I dont have any more questions for Ms Huish' [page 6 of the transcript of 23 February 2009]. However, it is clear that before then Mr Severino was satisfied with the evidence of Ms Huish as he said [page 6 of the transcript of 23 February 2009]:-

> "Sir, I just wanted the inquiry to see that. And that's just one example. It was very recent and almost in the week of the events of the allegations, but that's really how everyone up and down the street knows how Damien carries on, whether its' a bit more serious – like ...".

111. Mr Severino also asked questions of Mr Barton [page 16 of the transcript of 23 February 2009]. Initially Mr Severino asked one question, but a relevant and comprehensive question, which was followed by a series of questions from Mr Lane and the other Stewards. Mr Lane then asked Mr Severino if he had any more questions for Mr Barton and Mr Severino said 'No, no more questions'. However, Mr Severino then went on to comment about the evidence of Mr Barton [page 20 of the transcript of 23 February 2009], which shows that Mr Severino clearly understood the evidence given and the ramifications of it, that is, that it contradicted something Mr Severino had said earlier.

112. Earlier in the inquiry, on 19 January 2009, despite Mr Severino declining the offer to ask the witnesses questions (as per paragraph 108 above), he did make comment at times during Mr Lane's questioning, which led to a further avenue of questioning from Mr Lane. For example, Mr Davis gave evidence that Mr Severino came up to Mr McIntosh in the car and Mr Lane then asked some questions of Mr McIntosh about this and the transcript, at page 43 is as follows:-

> Mr McIntosh: Mr Severino came up to me in the car and, when I got out of the car, then Brendon parked his car.
>
> Mr Lane: Okay.
>
> Mr Severino: Before I heard – before early in the inquiry I heard McIntosh was saying that Brendon was walking a few metres away from him and that I approached him and gave him the money and he gave it straight back to me. Now I'm hearing Mr Davis saying that I approached Mr McIntosh in the passenger's side and gave him some money. All I did was like this, like clap him on the hand like that and I said: 'Eh, ride some winners today; shout me drinks later,' you know. I had no money Sir.

There is a similar exchange at page 35 and such interjections and comments by Mr Severino indicate that Mr Severino understood the evidence of the different witnesses, how it was inter-related and was able to express his concerns and ask questions about it.

113. Other instances of Mr Severino asking cogent and relevant questions can also be found at pages 5, 8, 10, 13 and 15 of the transcript of 24 March 2009.

114. The Tribunal is therefore satisfied, upon a review of the transcript of the inquiry that Mr Severino was capable of representing himself in that he clearly understood the issues, the relevance of what various witnesses said and was able to ask them appropriate questions. That is, he understood the case against him and took advantage of the proper opportunity to answering the allegations and defend himself

115. This ground of appeal is therefore dismissed. The dismissal of this ground also effectively dismisses the first part of ground 1(a)(ii) in paragraph 58 above.

Ground 1(a) – The Stewards failed to give the Appellant a fair hearing and/or denied the Appellant natural justice in that:-
(xiv) - the Stewards did not conduct the inquiry and/or hearing of the charges with an open mind

116. Mr Hore-Lacy SC submitted that

- the way the Stewards dealt with Mr Pollard on 16 January 2009 (ie as to what Mr Clarke and Mr McIntosh had said)
- the Stewards request on 17 January 2009 for Mr Severino to bring witnesses;
- the Stewards not promptly speaking to Mr Davis who Mr Severino said was present when the bribe was alleged to have been made, and that he should have been the first person to be called;
- the Stewards not speaking to or calling other witnesses identified by Mr Severino as per paragraph 91 above;
- the manner in which Mr Severino was dealt with by the Stewards in relation to the production of his Telstra telephone records (ie being charged under ARR 175(f) for failing to to give evidence at an inquiry, being found guilty and suspended for 2 weeks [pages 11-16 of the transcript of 24 February 2009])

indicated the Stewards attitude toward the inquiry was that of a closed mind, and furhter that Mr Hore-Lacy SC not being permitted to cross examine witnesses in the hearing, indicated the Stewards attitude toward the hearing was also that of a closed mind.

117. Mr De Silva submitted that by regard to the transcript it is apparent that the Stewards constantly kept an open mind and were ready to be persuaded throughout the inquiry and the hearing, and he referred to the number of adjournments throughout the inquiry and the hearing, and to numerous transcript references where:-
    - during the inquiry Mr Severino was:-
        - encouraged to get legal advice from his legal representatives;
        - asked for his view or explanation of what various witnesses had said;
        - offered the opportunity to ask questions of persons who attended the inquiry; and
        - requested or encouraged to bring witnesses.
    - during the hearing, Mr Lane said “we’re happy to consider anything Mr Hore-Lacy. We’re here to hear all the evidence we can” [page 23 of the transcript of 15 April 2009].

118. The Tribunal generally accepts Mr De Silva’s submissions in this regard and on a reading of the whole of the transcript (from 17 January 2009 to 23 April 2009) and noting that the inquiry was adjourned on four (4) occasions to allow for further evidence to be brought before the Stewards and the hearing was adjourned on one occasion to allow for the transcript of Mr Pollard’s interview of 16 January 2009 to be provided to Mr Hore-Lacy SC, the Tribunal cannot see that the Stewards had closed their minds during the inquiry or the hearing.

119. It ought to be noted that a lack of nicety in proceedings will not invalidate them - *Hall v New South Wales Trotting Club Ltd* supra at page 389- 390 and *Calvin v Carr* (supra) at page 351 and that ‘the law does not impose ... upon such a tribunal ... a

requirement that, at and during the course of the inquiry it shall not have, or shall not express views, even strong views, as to a party's conduct', and just because they may, does not lead to the inference that the stewards are 'lacking in the required degree of objectivity or that before the point of decision', they had closed their mind to a proper consideration of the matter before them - *Hall v New South Wales Trotting Club Ltd* supra at page 396 and the Tribunal, notes that at times Mr Lane did appear to lack some nicety when dealing with Mr Severino, but the transcript reveals that it was not such that it could be said that Stewards were not willing to listen, take relevant evidence and submissions, and be persuaded. This ground of appeal is therefore dismissed.

Ground 1(b) The Stewards were biased

(i) The Stewards have since their decision suspended the appellant for one month in respect of an unrelated charge where it is usual industry practice to suspend a jockey only

(ii) In relation to the charge referred to in (i) above the Stewards' finding of guilt was against the weight of evidence

(iii) Particulars set out in para 1(a) hereof are referred to and repeated

120. Particulars (i) and (ii) above were abandoned by the Appellant.

121. Neither party referred the Tribunal to any legal authority as to the test to be applied with respect to bias in the case of a stewards inquiry (ie a domestic body). However a review of the authorities referred to by the parties reveals that it is not settled as to whether the the test is of actual bias or of a reasonable apprehension of bias - *Stampalia v The Racing Penalties Appeal Tribunal of Western Australia* (supra) at para 46, and the Tribunal therefore proposes to presume, as did the Full Court of the Supreme Court of Western Australia in *Stampalia v The Racing Penalties Appeal Tribunal of Western Australia* (supra), that the reasonable apprehension of bias test applies.

122. That test is that set out by Deane J in *Webb v R* (1994)181 CLR 41 at 46, as referred to by Balmford J in *Riley v Racing Appeals Tribunal* (supra) at paragraph 56:-

> "In a series of recent cases, the Court has formulated the test be applied in this country in determining whether a judicial officer ("a judge") is disqualified by reason of the appearance of bias, as distinct from proved actual bias. That test, as so formulated, is whether in all the circumstances a fair minded lay observer with knowledge of the material objective facts "might entertain a reasonable apprehension that [a judge] might not bring an impartial and unprejudiced mind to the resolution of the question" in issue. The test is an objective one and the standard to be observed in its application is that of a hypothetical fair-minded and informed lay observer. That being so, it is

convenient to frame the test itself in terms of reasonable apprehension on the part of the particular inhabitants of the common law."

But which was clarified by Balmford J in paragraph 27 as follows:-

"In *Re Refugee Review Tribunal; Ex Parte H* (2000) 75 ALJR 982 the High Court, ... had cause to consider the applicability to Tribunal proceedings of the rule as apprehended bias. Their Honours said ...

'It was held in *Re Refugee Review Tribunal; Ex Parte Aala* (2000) 75 ALJR 52 that administrative decisions may be reviewed in this Court for failure to observe the rules of natural justice. Further, it was accepted in *Minister for Immigration and Multicultural Affairs v Jia* (2001) 75 ALJR 679 ... that such a failure would extend to cases in which apprehended bias is established. However, the rules with respect to apprehended bias, as it has developed in relation to the judicial process, is not based solely on the concept of natural justice. Its development is also referable to the need to maintain confidence in the judicial process. Thus, the rule as to apprehended bias, when applied outside the judicial system, must take account of the different nature of the body or tribunal whose decision is in issue and the different character of its proceedings. ..."

123. Bias was raised as a ground in the matter before Rath J in *Calvin v Carr* (supra) at page 332-333, and he had this to say about it:-

"Bias is a concept that does not necessarily involve turpitude or indeed any element, in itself, of unfairness. In the case of *Re Watson; Ex Parte Armstrong* in the joint judgment of Barwick CJ, Gibbs, Stephen Mason JJ it is said 'The question is not whether there was a real likelihood that Watson J was biased. The question is whether it has been established that it might reasonably be suspected by fair-minded persons that the learned judge might not resolve the questions before him with a fair and unprejudiced mind'. Earlier their Honours had said: 'It is of fundamental importance that the public should have confidence in the administration of justice. If fair-minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision.' These observations were made in the case of a judge of a superior court exercising strict judicial functions. Similar observations were made in respect of the Commonwealth Conciliation and Arbitration Commission in the *R v Commonwealth's Conciliation and Arbitration Commission; Ex Parte Angliss Group* ... there it was said; 'those requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal clear and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or

inclination of mind upon with respect to it.' The observation in this last sentence is important here when it is remembered that stewards are initially a fact-finding tribunal. Even after the charge was made, they were still entitled, if I understand the authorities correctly, to obtain information in any way they thought best."

124. In this appeal, as in *Hall v New South Wales Trotting Club Ltd* (supra) the Appellant has relied solely on the transcript of the inquiry and the hearing in support of the allegation of bias, and Mr Hore-Lacy SC submitted that his submissions on the transcript with respect to Ground 1(a) sufficiently indicated bias, or at the very least would give a reasonable person an apprehension of bias.

125. Mr De Silva repeated and relied on his submissions with respect to Ground (1)(a), and further submitted that:-
    - throughout the inquiry and the hearing, the Stewards were not biased and gave every opportunity for all the evidence to be before them to allow them to give full consideration;
    - there is no evidence of the Stewards failing to bring an open mind to evaluating the evidence before them;
    - there is no evidence to support apprehended or actual bias specifically, in that there is no evidence which shows that matters external to those raised by the evidence in the inquiry and the hearing was relied upon by the Stewards;
    - a complete an overall reading of the transcript as a whole, shows that the Stewards were eminently fair towards the Appellant.

126. The Tribunal accepts the submissions of Mr DeSilva. Having read the full transcript of the inquiry and the hearing and while noting that at times Mr Lane lacked nicety in his dealings with Mr Severino [for example at pages 30-31 of the transcript of 19 January 2009 and pages 12-13 of the transcript of 24 February 2009], and that Mr Lane may have been able to deal with some of the witnesses differently and ask questions in different way or order, bearing in mind the different nature and character of a proceeding in which the Stewards exercise their powers under the ARR, the Tribunal is of the view that the matters raised by Mr Hore-Lacy SC certainly do not show actual bias, and in our view are also not sufficient to amount to an apprehension of bias on the part of the Stewards. This ground of appeal is therefore dismissed.

Ground (c) The Stewards findings were perverse and/or against the weight of evidence as:-
(i) there was uncontradicted evidence and admitted evidence that the accuser had a history of elaborate lying

127. Mr Hore-Lacy SC did not make any specific submissions on this point, but instead made submissions as to 'inconsistencies' of the evidence as to the circumstances surrounding the alleged bribe attempt and the reason for the Appellant being angry.

128. Mr De Silva submitted that:-
    - The Stewards were aware of Mr McIntosh's credibility as is seen in their reasons for decision, but the Stewards found that his evidence in this case was consistent and truthful;
    - The 'elaborate lies' were made in informal situations and not in the context of an inquiry before the Stewards, in that they were inconsequential and akin to skiting;
    - a review of all evidence given by Mr McIntosh through the transcript shows his evidence did not change in any material way;
    - Mr McIntosh was the first witness called and despite the fact that other witnesses were called after him, his evidence did not change in any material way;
    - If, as Mr Hore-Lacy SC submitted, Mr Severino was not a sophisticated person, neither then was Mr McIntosh or indeed a number of the other witnesses.

129. The Tribunal has considered the evidence given by Mr McIntosh in the transcript of 19 January 2009 and 24 February 2009 and is of the view that it was open to the Stewards to make the finding they did with respect to his evidence. That is, that Mr McIntosh's evidence was generally consistent.

130. While the evidence of Ms Jamie Huish did support Mr Severino's evidence as to stories told by Mr McIntosh, the fact that Mr McIntosh may have exaggerated some of his exploits does not of itself lead to an inference that Mr McIntosh is in all respects a liar and therefore his evidence given in the inquiry must as a consequence be untruthful or unreliable.

131. The Tribunal therefore dismisses this ground of appeal.

Ground (c) The Stewards findings were perverse and/or against the weight of evidence as:-
(ii) there was independent evidence that there were other matters in dispute between the accuser (Jockey McIntosh) and the appellant

132. Mr Hore-Lacy SC informed the Tribunal that this was not relied upon as a separate ground in the appeal and the Tribunal therefore makes no finding in relation to it.

Ground (c) The Stewards findings were perverse and/or against the weight of evidence as:-

(iii) there was no other person that witnessed the alleged attempted bribery

133. Mr Hore-Lacy SC took the Tribunal to the evidence of Mr McIntosh, Mr Severino and Mr Davis as to what each of them said took place in the car park at the Fannie Bay Racecourse on 9 January 2009 and submitted that it was insufficient to make a finding that Mr Severino offered the bribe.

134. Mr De Silva submitted that the Stewards did not make a finding that Mr Davis witnessed the bribe and further, that one would not expect a bribe to be offered in front of other witnesses, particularly a witness who was nominated to ride a horse in the same race.

135. The Tribunal is of the view that the absence of any witness to the alleged bribe does not, of itself, mean that the Stewards were unable to make a finding with respect to whether the bribe took place or not and find that it was open to the Stewards to make a finding based on an assessment of the credibility of the witnesses who gave evidence before the inquiry.

136. This ground of appeal is therefore dismissed

Ground (c) The Stewards findings were perverse and/or against the weight of evidence as:-
(iv) the evidence of the only possible eyewitness to the attempted bribery contradicted the evidence of the accuser, contrary to the findings of the Stewards

137. The Tribunal has considered this ground and the transcript of the evidence of Mr Davis [pages 32 to 37 of the transcript of 19 January 2009 and pages 4 to 10 of the transcript of 24 February 2009] and finds that the evidence of Mr Davis is not conclusive with respect to what occurred in the car park at the Fannie Bay Racecourse on 9 January 2009. That is, while it does not specifically corroborate the evidence of Mr McIntosh, neither does it contradict it. The Tribunal therefore dismisses this ground of appeal.

Ground (c) The Stewards findings were perverse and/or against the weight of evidence as:-
(**v) the Stewards failed to apply the standard of proof required by the case of Briginshaw v Briginshaw**

138. Mr Hore-Lacy SC's submission was basically that as the charge against Mr Severino was so serious, the inconsistencies he says were in the evidence (as per the document handed to the Tribunal and expanded upon) could only mean that the

Stewards could not have applied the standard of proof as per the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336.

139. Mr De Silva submitted that the Stewards were well aware of the the standard of proof required by *Briginshaw v Briginshaw* (supra) as evidenced in their reasons for decision where Mr Lane said [page 24 of the transcript of 23 April 2009]:-

> "Clearly, this is a serious matter and the Stewards are aware that a determination in these matters requires us to make findings of fact using the Briganshaw (sic) standard, working to the higher level. With this in mind, the Stewards have assessed and weighed the evidence presented in accordance with these principles in arriving at their decision."

140. The accepted standard of proof is that set out by Dixon J in *Briginshaw v Briginshaw* (supra) at page 361 to 362 as follows:-

> "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of the mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite graduations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of the given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences."

141. It is quite clear by the Stewards reference to *Briginshaw v Briginshaw* (supra) in their reasons, that they were well aware of the standard of proof required in assessing the evidence. At the end of the hearing, the job of the Stewards in this matter came down to assessing the evidence and determining who, if anyone to believe. It must be remembered that the Stewards had the benefit of hearing the evidence and seeing the witnesses while they were speaking, which does not translate into a transcript.

142. The Stewards in their reasons, which were stated not to be comprehensive, but in some way instructive as to their deliberations, clearly stated why they preferred Mr

McIntosh's evidence over that of Mr Severino and in the view of the Tribunal, it was open for the Stewards to make those findings.

143. It was open to the Stewards to make the findings they did in their reasons as the transcript clearly does reveal that Mr Severino's evidence changed from day to day, or even from page to page, depending on what had been said by other witness at the time. However, the evidence of the other witnesses while not totally consistent throughout, were generally consistent and in some manner or other, did tend to support the evidence of Mr McIntosh and Mr Pollard.

144. This ground of appeal is also therefore dismissed.

Decision of the Tribunal

145. The decision of the Tribunal is as follows: -

1. The Tribunal having dismissed each ground of appeal, does not embark upon a re-hearing on the evidence before it, and under section 145ZE of the *Racing and Betting Act* upholds the decision of the Stewards dated 23 April 2009.

2. The Appellant is to be refunded the filing fee on appeal.

3. The Tribunal makes no order as to costs.

DATED the Ninth day of July 2009

SUSAN PORTER	MICHAEL STUMBLES	DAVID HORTON
Chairman	Member	Member