RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

PENALTY DECISION

5 AUGUST 2020

APPELLANT SHAUN SIMIANA

RESPONDENT HARNESS RACING NSW

AHR196A(1)(i) x 3 and AHR 190A(1)(a) x 5

DECISION:

1. Charges 5,6,8:

1.1 Severity appeal dismissed.

1.2 Disqualification in each of the three charges of 10 years to be concurrently

2. Charges 1,2,3,4,7:

2.1 Severity appeal upheld

2.2 Disqualification in each of the five charges of 5 years to be concurrently.

3. Disqualification periods for charges 1,2,3,4,7 to be served cumulatively to disqualification for charges 5,6,8.

4. Directions issued on costs and submissions on commencement date of the disqualifications.

1. On 16 June 2020 the Tribunal dismissed the appellant's appeal against the findings that he had committed eight breaches of the harness racing rules.

2. That decision comprised 43 pages and 314 paragraphs and this penalty decision is to be read as incorporating that decision and that decision will not be repeated in detail in this penalty decision.

3. In determining penalty, the Tribunal is required to make a determination for itself using the general penalty provisions provided for in the harness racing rules but also applying the Harness Racing Penalty Guidelines ("Penalty Guidelines") as necessary.

4. At the request of the parties this penalty decision has been made upon written submissions and without an oral hearing.

5. No additional evidence was led, but the Tribunal does take into account the references which were tendered on the question of whether the rules were breached in determining penalty.

6. Each party made penalty submissions in their detailed submissions on the issue whether the rules had been breached. Those submissions are taken into account.

7. The submissions are: respondent 11 March 2020; appellant 18 May 2020; respondent 18 May 2020; appellant 2 July 2020; respondent 9 July 2020; appellant 22 July 2020.

8. The Tribunal notes that the stewards imposed a period of disqualification of 16 years backdated to 28 July 2016 comprising five concurrent periods of six years' disqualification for breaches of AHR 190A, and a further three periods of disqualification to be served concurrently for the breaches of AHR 196A, but those 196A matters to be served cumulatively to the AHR 190A matters. The Tribunal notes disqualification of the horses, which it has not been asked to disturb, and an order for costs of analytical testing which, by agreement of the parties, will be dealt with after this penalty determination.

9. In its submission of 9 July 2020, the respondent submitted that the penalties imposed by the stewards should be confirmed by the Tribunal and the penalty appeals dismissed. The appellant quite fairly has not suggested a possible penalty, but in detailed submissions makes it clear that a lesser penalty is sought.

10. These are civil disciplinary proceedings in which the function of the Tribunal is to determine a protective order, and not impose punishment, and in doing so, have regard to the objective seriousness of the conduct

militated, if practicable and permissible, by subjective circumstances and then determine a protective order looking to the future.

11. In considering penalty, the Tribunal is required to consider what message is to be given to this individual licensed person so as to ensure that his conduct in the future will be in accordance with the privilege of a licence, but also to have regard to the message to be given to the harness racing industry generally as well as to the public who are interested in it, whether as wagerers or otherwise, that the type of conduct identified here will attract a penalty that reflects its objective seriousness.

12. Regard must be had to the integrity of the sport and the message that is required to be given to ensure that the highest standards of integrity, and welfare, are maintained.

13. In determining penalty and the objective seriousness, it is necessary to focus upon the actual conduct of the appellant and the facts and circumstances surrounding that conduct.

14. It is first necessary to determine objective seriousness.

15. The respondent submits that the conduct of the appellant in intentionally administering the prohibited substance was to affect the performance of the horses, there not being any legitimate therapeutic purpose for administering such a substance. It is further submitted that the offending involved a level of sophistication and planning. Therefore, it is submitted that the offending is at the high end of the scale of objective seriousness and accordingly the penalties considered appropriate by the stewards were neither too harsh nor excessive in all the circumstances.

16. The submission of 9 July 2020 continues by submitting that it was open to the respondent to seek higher penalties because of a 2020 breach of the prohibited substance rules. That is, that this matter cannot be dealt with as a first offence. However, the totality of the submissions for the respondent do not invite a higher penalty and it is not necessary to seek submissions on issues which might be described as the equivalent of Parker submissions upon which the equivalent of a Parker direction might be required.

17. There have been no recent cases in which the Tribunal has had to consider the administration and out of competition finding in respect of these prohibited substances.

18. The parties have referred to a number of other cases involving administration and presentation as a means of finding guidance, or parity.

19. In New South Wales the regulator has adopted the Penalty Guidelines. It is necessary to consider the Penalty Guidelines as they were at the time of

the commission of this conduct, which is a document dated 2013, and not to have regard to the current Penalty Guidelines.

20. The Tribunal has indicated its approach to those guidelines in dozens of cases and a lengthy repetition is not necessary. They will be treated as guidelines and not tramlines, but, as so often stated, they must be considered to ensure that the regulators and the stewards and licensed persons are able to understand the likely outcomes from various types of conduct.

21. An issue has arisen in this case as to whether these breaches are to be treated as first offences or second offences.

22. That arises because, whilst waiting for this appeal to be heard, the appellant has been dealt with by the stewards for a prohibited substance presentation for Meloxicam. In 2020, this appellant, in those subsequent proceedings, pleaded guilty to a breach of the presentation rule for that prohibited substance Meloxicam in a horse of his presented to race. He was disqualified in respect of that breach, appealed, but withdrew his appeal. He had been suspended under AHR 183 pending that disqualification. In that matter the stewards imposed a period of disqualification of four and a half months to commence on 2 February 2020 and treated that matter as a first offence under the Penalty Guidelines. Meloxicam is a Class 3 prohibited substance under the guidelines.

23. In its submission of 9 July 2020, the respondent submits that these matters cannot now be treated as first offences for the purpose of the Penalty Guidelines. In addition, reliance was placed upon the fact that the appellant was enjoying the benefit of a stay when that breach occurred.

24. In its submission of 18 May 2020, the respondent submitted that the commission of this 2020 breach would be the equivalent of an interim offence and whilst it is not an aggravating factor could be used to deprive the appellant of a lesser penalty to which he might otherwise have been entitled.

25. The appellant in his submission of 2 July 2020 says that the subject breaches should be treated as first offence matters. On the facts of the 2020 offence, it was submitted that it was contamination by way of a veterinary prescribed product from a gelded stable pony which was present in minute levels with no performance-enhancing effect in unique circumstances relating to a neighbour clearing a firebreak after bushfires.

26. The importance of the consideration of whether these matters comprise first offences or second offences is that for these Class 1 prohibited substances here a first offence carries a period of disqualification of a

starting point of not less than five years and a second offence of not less than 10 years.

27. This is the first occasion on which the Tribunal has had to consider the application of Penalty Guidelines to circumstances where an appellant, whilst waiting to be dealt with for a possible first series of breaches, is dealt with for a second breach. The further complication is that in respect of the second matter the stewards and the appellant elected to proceed with the matter prior to the finalisation of this appeal. The next complicating factor is that the stewards, quite properly, treated the second breach as a first offence. The Tribunal also notes that the first series of penalties the subject of these proceedings were imposed in July 2016 for breaches in 2016. The Tribunal also notes in respect of this issue that the stewards in determining penalty in these matters determined that higher starting points were appropriate having regard to objective seriousness.

28. The Penalty Guidelines are silent on how it might otherwise be assessed and they are not tramlines nor statutory rules upon which mandatory minimum periods of disqualification are required. The words “no less than” have not been applied by the stewards nor the Tribunal in past cases so as to prevent a lesser period being considered appropriate.

29. The approach, therefore, is not to make a formal determination of whether these matters are first breaches or second breaches with consequences under the Penalty Guidelines but to determine objective seriousness, with guidance from the Penalty Guidelines,. In determining that objective seriousness having regard to the fact that the message to be given to this appellant is a more serious one in seeking a protective order than would otherwise be the case if the second breach had not occurred. The reason for that is that this appellant has not taken the opportunity, with the privilege of a licence he continued to enjoy under a stay, to ensure that he did not breach the prohibited substance rules while enjoying that stay. The protective order must be a more serious one.

30. As stated, the parties have dealt at some length in their submissions with other prohibited substance cases and whilst this is the first on which a peptide has had to be considered, they are nevertheless of some guidance.

31. In its submission of 11 March 2020 the respondent first raised the case of Donohoe, a decision of the RAD Board in Victoria in October 2009, where a six-year disqualification was imposed by HRV for five administration events involving a DPO. On appeal, a four-year penalty for each of the five offences was imposed. There was a plea of guilty.

32. The appellant in his submission of 2 July submitted that Donohoe had multiple prior convictions and that the EPO offending persisted over many months with five different horses.

33. The next matter relied upon by the respondent in its 11 March 2020 submission is Mifsud v HRV [2012] VCAT 1438. That case travelled with a matter of Walters. The prohibited substance was DPO. Mifsud was disqualified for four years and Walters for three years and six months. The respondent submits that VCAT referred to the performance-enhancing effects of DPO and that it was a serious offence. These were single presentation offences and can be distinguished from the present case, it is submitted, but that here the stewards' decision to impose concurrent periods of disqualification of six years falls within the appropriate range. In respect of Mifsud it was submitted he also pleaded not guilty and had a prior matter as well.

34. The appellant in the 2 July 2020 submission relies upon the 29 October 2009 HRNSW stewards' decision in Walters to impose a penalty for an experienced trainer, with three prior breaches including an EPO matter, with a starting point of 5.5 years.

35. In its reply submission of 9 July 2020, the respondent points out that the Walters appeal is subject to an undetermined appeal. It is submitted there were no additional administration offences. It is submitted that in Walters the stewards imposed a cumulative disqualification of seven years and nine months, including a disqualification for VNFYAWK of five years and six months. This, however, was a presentation and not an administration breach as is the case here, it is submitted. Walters at the stewards' level had no finding of intent to affect performance. Walters pleaded guilty. Walters involved one horse only. Walters involved two sample dates compared to the present case of three sample dates. Walters gave evidence at the stewards' inquiry. There were strong subjective factors of hardship. It was also submitted that Walters' prior offences were historical. Therefore, the respondent submits that if Walters is relevant, then it establishes that the six-year disqualification for presentation offences was well within the range, but that here the conduct is more serious.

36. In respect of administration offences, the respondent in its submission of 11 March 2020 referred to Hughes, a 196A(1)(ii) matter involving a race day administration, a plea of guilty, strong subjective factors and a penalty of four years was imposed.

37. In his submission of 4 May 2020, the appellant submits that Hughes involved a race day administration of a Class 1 substance which was much more serious. The appellant correctly points out that the four years referred to by the respondent was the starting point for a disqualification which was a reduction from the Penalty Guidelines starting point of five years and that the Tribunal determined, having regard to subjective factors, a disqualification of two years and two months was appropriate.

38. The respondent in its further submission of 9 July 2020 deals with Hughes in some detail.

39. It is submitted that Hughes involved a Class 3 commonly used vitamin and mineral product which had a legitimate therapeutic use being administered on race day. There were presentation and administration offences. The presentation offence had a penalty of one year and one month and the administration, two years and two months. As pointed out, Hughes pleaded guilty at the earliest opportunity. There was no adverse finding about planning. There was no finding of potential to affect performance in Hughes. The respondent acknowledges the seriousness of race day offending. In Hughes there was also a strong factor of self-reporting. It was also submitted that in Hughes the starting point for the administration was double that for the presentation offence. There was also concurrency because of the high degree of commonality of conduct on the same day involving one horse.

40. The respondent contends in that submission that in contrast to Hughes, in the present case there has been no plea of guilty, it is a Class 1 substance, there are three administration charges, there is no explanation of the circumstances of the administration, there has been substantial planning, there was an intention to affect performance, administration was for wrongful purposes, there was no self-reporting, and there is limited commonality between the breaches.

41. In his reply of 22 July 2020, the appellant correctly points out that the prohibited substance in Hughes was specifically categorised as a Class 1 substance and was so considered for the purposes of penalty.

42. In his submission of 4 May 2020, the appellant relies upon the HRNSW matter of Wonson where the licensed harness racing person received a three-year disqualification for an EPO offence.

43. In his further submission of 2 July 2020, the appellant submitted that Wonson was also a race day breach but for a Group 2 race.

44. In its further submission of 9 July 2020, the respondent submitted that Wonson was of little assistance, with a single race day breach and no prior offences, with a plea of guilty in a positive race day swab. The appeal against the stewards' decision was withdrawn.

45. The Tribunal notes two matters in respect of the Penalty Guidelines.

46. They are that the guidelines do not distinguish in a Class 1 substance between an administration offence, a presentation offence and an out of competition offence.

47. The next matter is that the Penalty Guidelines to be applied here are those that existed in 2013. In 2013 those guidelines did not contain the now included detailed introduction to the Penalty Guidelines which set out the rationale for the imposition of penalty under those guidelines, and matters which are described as aggravating factors and mitigating factors. In addition, under the specific guideline for prohibited substances, in 2013 there were many less mitigating factors set out.

48. The Tribunal is of the opinion that in assessing a starting point for a particular breach, it is necessary to have regard to the facts and circumstances of that breach. Simply put, an administration offence is more serious than a presentation offence, and a presentation offence is more serious than an out of competition offence. For that reason a starting point must differentiate the nature of the breach alleged.

49. The next matter is that the increase of a starting point beyond the specified starting point for a Class 1 first offence of “no less than five years disqualification” does not specifically embrace aggravating factors, but does allow for some movement for objective seriousness on particular facts and circumstances to a penalty that is greater than that starting point of five years.

50. The next matter on objective seriousness and the application of the Penalty Guidelines is that the various drugs that are incorporated in Class 1 have “built in” the fact that they are already assessed as the most serious type of drug. There is, of course, still room to move, however, on the “no less than five years disqualification” specification to embrace drugs which might have a more serious impact upon integrity or welfare.

51. The Tribunal now turns to assess a starting point for each of the three administration offences and each of the five out of competition testing offences.

52. The administration offences are, as just set out, objectively serious. Here, the administration was effected with an intent to affect the performance of the horse in a race. That is, the appellant set out to cheat. The drug can only be administered for the purposes of cheating, because it is non-endogenous and there is no legitimate therapeutic purpose for it being administered in the circumstances in which it was. Because it was done for the purposes of cheating, it was done for the purposes of financial gain.

53. While relevant to the issues of totality and cumulative/concurrency, the Tribunal cannot lose sight of the fact that there were three separate acts of administration, although two effected at or about the same time. There was therefore not less than two unlawful administration occasions on which the

appellant has deliberately, and for the purpose of cheating, chosen to ignore the privilege of a licence for his own benefit.

54. The Tribunal accepts that only a small quantity of the drug was detected.

55. The Tribunal determines that that objective seriousness, absent the Penalty Guidelines requirement, warrants that the appellant forfeit the privilege of a licence and that means that a disqualification must be imposed and there has been no submission from the appellant to the contrary.

56. The message to be given to this appellant and to the industry and community at large must be strong, serious and salutary to make it quite clear that a trainer acting in such circumstances must receive a substantial protective order.

57. On the facts of this matter there can be no comfort that the appellant will not reoffend. Whilst waiting to be dealt with on this appeal, the 2020 breach occurred. The appellant is not to be subject to the equivalent of being punished again in this appeal for that 2020 breach, but its occurrence whilst waiting to be dealt with provides the Tribunal with no comfort that, if he had the privilege of a licence, he would not reoffend. Accordingly, the message to be given to him because of those facts must be a greater protective order than would otherwise be the case.

58. The Tribunal has reflected upon the issues of parity from the cases set out above and advanced by the parties. As is so often the case, they are not of great assistance. Factual differences occur in relation to pleas of guilty compared to not guilty, priors or the lack thereof, the actual facts and circumstances surrounding the breach and the number and type of them and the like.

59. However, what those parity cases do make clear is that a disqualification of something in the order of five to six years for a first administration of this particular drug with no priors and absent a plea of guilty is a minimum likely outcome. Those cases can only provide guidance.

60. Accordingly, the Tribunal agrees with the respondent’s submissions, and as determined by the stewards, that, in accordance with the guidelines, and in accordance with the appropriate protective order absent the guidelines, a starting point greater than five years must be imposed in respect of each of these breaches.

61. The stewards determined to double that five-year starting point to 10 years.That is a very substantial protective order starting point.

62. The Tribunal absent certain facts in this case would not have agreed that a doubling of the starting point was appropriate as a protective order.

Absent those facts, a starting point of some seven and a half years would be seen as necessary. However, and again avoiding any suggestion that the determined starting point carries with it a period of double penalty for the 2020 matter, that 2020 matter, when taken on its own, but also having regard to all the facts and circumstances that are here, means that the Tribunal cannot be satisfied that this appellant will not reoffend, has forfeited considerations that might go with remorse and contrition and there is no evidence which would give the Tribunal some comfort he would not reoffend. in those circumstances a starting point of 10 years is considered appropriate.

63. In respect of each of the three administration matters the Tribunal determines that there be a starting point of 10 years' disqualification.

64. The Tribunal now turns to the five out of competition breaches.

65. As reflected earlier, an out of competition matter is less serious than an administration matter and less serious than a presentation matter. Notwithstanding that conclusion, the guideline does provide for a starting point of not less than five years' disqualification.

66. The facts and circumstances here indicate that the testing that was conducted was very proximate to race times and that there was, in respect of the 17 April testing, the fact that each of the horses ran in races on 19 April, and in respect of the 3 May testing, one was nominated to race on 5 May.

67. The gravamen of the breach and the necessity for a protective order is found in the fact that, having cheated with an intention to obtain an advantage in a race which was soon to take place, the drugs were detected.

68. These matters also require a consideration of the seriousness of the drug, the 2020 further breach, and the number of occasions on which the conduct occurred, although each matter must be considered separately for penalty purposes.

69. Absent those factors, the Tribunal would have been of the opinion that a starting point of four years was necessary. However, having regard to the fact that the Tribunal cannot be satisfied he will not reoffend by reason of the 2020 matter, and having regard to the seriousness of the drug in question, the Tribunal determines that the starting point in each matter be a disqualification for five years. The Tribunal does not share the views of the stewards that a starting point of six years is appropriate.

70. In each of the five out of competition matters there will be a period of disqualification of five years.

71. The Tribunal now turns to consider the subjective factors of the appellant and whether any reduction in the respective starting points is appropriate.

72. The first and most serious factor is that the appellant has chosen not to give evidence to the Tribunal in respect of his conduct nor in respect of the issue of penalty. The Tribunal is unable to assess him in any fashion by personal observation. He has not expressed to the Tribunal remorse or contrition for his conduct and that is also not reflected in an admission of the breaches.

73. The respondent submits that the appellant has conducted his appeal in an obstructionist fashion, but it is not necessary to make such a determination.

74. The respondent submits that the appellant is not entitled to any discount by reason of cooperation because cooperation by simply attending an inquiry and behaviour during it does not carry with it ingredients of self-reporting, pleading guilty or expeditiously conducting his appeal. There is of course no discount to be given for any plea of guilty, which when coupled with the necessity for cooperation with the stewards, might have entitled the appellant to a discount of up to 25 percent.

75. The respondent says that the way in which the appellant conducted his appeal by seeking to establish material flaw and taking some years to accumulate the evidence to support it and then abandoning it in submissions and after evidence is not a factor which subjectively entitles him to any discount.

76. The respondent submits that as the appellant has not given any evidence to the Tribunal, the Tribunal is not able to assess his personal development from the time these breaches were detected until the present time and therefore there is nothing on a subjective factor that can be taken into account in that field.

77. The appellant submits that he should receive a 25 percent discount for an extremely good prior offence history, and the Tribunal accepts there were no priors when this conduct occurred, and a further deduction for his attending, cooperating and behaving at all times with the stewards' interview and inquiries. In addition, it is submitted he should receive a discount for his other subjective circumstances as set out in the evidence from the stewards' inquiry.

78. The evidence that is said to arise from the previous transcripts of a subjective nature has not been identified. The Tribunal declines to embark on that exercise absent any assistance from the appellant. For reasons set out by the stewards in their determination of 15 February 2017 there were

no subjective factors identified by submissions by the previous legal representatives of the appellant.

79. The Tribunal now turns to consider the references and notes that in paragraphs 208 to 214 of its decision of 16 June 2020 the Tribunal set out the comments made by the referees. While they were taken into account, on the question of whether the rules were breached, they of course are relevant in respect of subjective factors.

80. The Tribunal accepts that those referees referred to him as an honest and devoted family man who is very hard-working and is an upstanding member of the industry who would not resort to the conduct alleged against him. He assists in mini-trotting. He has been assessed by referees as being very distressed by these proceedings.

81. The Tribunal notes that none of those references was prepared after the 2020 breach and thus the Tribunal is not able to assess those referees as to what they would now think of the appellant.

82. Not surprisingly, the respondent says the references should carry no significant weight, particularly as they do not refer to direct discussions with the appellant about the charges.

83. The respondent also submits that it is apparent the appellant has been identified by his referees as a person who earns a livelihood outside the harness racing industry. That presumably goes to hardship matters.

84. The respondent did take issue in its submission of 18 May 2020 that the references were only tendered on the question of guilt and there was no indication they were tendered on the issue of subjective factors. However, the Tribunal is satisfied that they are in evidence, are character references and must be considered.

85. In its submission of 9 July 2020, the respondent also identified the point set out by the Tribunal above that the referees have not been called in aid since the 2020 offending.

86. The appellant is entitled to have taken into account that prior to the commission of these breaches he had a clear relevant offence history. There is no case of hardship advanced.

87. Perhaps the most critical factor in respect of subjective circumstances is that the appellant is entirely unable to satisfy the Tribunal that there are any matters in his life that would give any comfort in respect of the necessary protective order required. It is accepted that outside of the harness racing industry and the egregious conduct in which he has engaged here that he is

otherwise well-regarded and hard-working. Those matters, however, do not carry a great deal of weight for the reasons set out.

88. In many cases, the protective order that is required must be based upon objective seriousness alone because the facts and circumstances to establish the objective seriousness finding are so grave that subjective circumstances cannot lead to any further reduction.

89. The only subjective factor that is established is that there were no priors in 2016.

90. On the facts and circumstances of this case, as determined by the stewards as well, the Tribunal is of the opinion that the subjective factors do not entitle the appellant to any further reduction in the determined starting points. The conduct was just too serious so far as the administration charges are concerned, and the totality of the facts and circumstances on the out of competition matters cause the Tribunal to form the same conclusion.

91. The next issue is whether the eight penalties should be served cumulatively or concurrently or partially for each.

92. Rule 257 mandates that the penalties be cumulative unless otherwise determined.

93. If each penalty is cumulated there would be a period of disqualification of 60 years. Patently that is excessive and the totality principle would obviously confirm that.

94. The respondent submits that the stewards' approach to concurrency and accumulation is appropriate. The respondent accepts a commonality in the offending. The respondent otherwise submits that there should be a distinction between the administration and the out of competition matters to properly acknowledge the distinct nature of the offences under the rules and that the administration offences are particularly serious.

95. The appellant makes reference to recent changes to sentencing law in Victoria but notes that the "instinctive synthesis" of a penalty determination continues. It is submitted that the "presentation offences" are subsumed within the administration offences. Emphasis is placed on the fact that it was not race day testing. Other analogies to sentencing principles for possession of drugs are given.

96. The appellant relies upon Hughes where at 251 to 257 the Tribunal reflected upon the difference between administration and presentation as to seriousness and then reflected upon the high degree of commonality in that

case on the facts and circumstances being breaches on the same day with one horse.

97. The Tribunal has reflected upon the fact that there was conduct on more than one day for both the administration and out of competition matters and whether therefore there should be a lesser concurrency in respect of both of those groups of breaches. That, however, has not been put to the parties and the respondent in particular does not seek it. Having regard to what was said in Kavanagh v Racing NSW [2019] NSWSC 40 at 69-73 that it would be a denial of procedural fairness for the Tribunal to embark upon such a course without going back to the parties. In view of the submissions and the time taken to bring this matter to this stage, the Tribunal has determined it shall not.

98. The Tribunal agrees with the approach adopted by the stewards as requested by the parties that each of the three administration charges be served concurrently and each of the five out of competition matters be served concurrently.

99. While the respondent seeks a cumulation of the two groups of matters, the appellant does not.

100. The Tribunal is of the opinion that whilst there is a commonality here, the otherwise objective seriousness of these matters, coupled with the necessity to consider an appropriate totality of penalty for all of the conduct is such that the accumulation, which the stewards found to be appropriate, is also that which the Tribunal determines to be appropriate.

101. The Tribunal therefore orders that each of the three administration penalties be served concurrently and each of the five out of competition penalties be served concurrently. But that the out of competition matters be served cumulatively to the administration matters.

102. The Tribunal notes that the stewards reversed the order of accumulation but the effect of that determination makes no difference to the ultimate outcome here. The Tribunal is otherwise of the opinion that the administration matters are more serious and should be imposed first and the out of competition matters accumulated to those. That arises regardless of the order of the charges.

Determination

103. For charges 5,6 and 8 the severity appeal is dismissed. For charges 1,2,3,4 and 7 the severity appeal is upheld.

104. In respect of charges 5, 6 and 8, in each charge there be a period of disqualification of 10 years. That each of those 3 periods of disqualification be served concurrently.

105. In respect of charges 1, 2, 3, 4 and 7, in each charge there be a period of disqualification of 5 years. That each of those 5 periods of disqualification be served concurrently.

106. That the penalties for charges 1, 2, 3, 4 and 7 be served cumulatively to the penalties for charges 5, 6 and 8.

107. The precise calculation of the date on which those disqualifications should commence and end is not able to be determined by the Tribunal on the facts available to it. The Tribunal notes that the original order was to operate from 29 July 2016 but the appellant had the benefit of a stay for a period of time and that precise period when he enjoyed the privilege of a licence after it was ordered to be granted to him is not known to the Tribunal.

108. The Tribunal has to reconvene to take submissions in respect of costs and, if required, upon submissions being made by the parties will determine the dates over which the periods of disqualification are to operate.

Directions

109. The Tribunal notes that two issues remain for determination in respect of costs and they are the respondent's application for costs of the proceedings, set out in its submissions, and the issue whether a costs order should be made under Local Rule 256A. In addition, there is now identified the issue of whether the Tribunal is required to set out a calculation of the dates upon which the periods of disqualification will operate.

Accordingly, the Tribunals directs:

1. The respondent to notify the Tribunal and the appellant within seven days of receiving this decision whether it wishes to make further submissions on the issues of costs and commencement date of the disqualifications.

2. If the respondent wishes to make further submissions, then in the notification it must set out whether it wishes to have a hearing or make written submissions and, if the latter, a suggested timetable.

3. The appellant is invited to reply as necessary within seven days of that notification.

4. The Tribunal will then fix a hearing date or a timetable.

5. Liberty to apply.
