JUDICIAL CONTROL AUTHORITY
FOR RACING
TE MANA WHAKAHAERE Ā-TURE MŌ TE PUREI

Non Raceday Inquiry RIU v M P Kerr - Reasons and Penalty Decision Dated 13 April 2021 - Chair, Hon J W Gendall QC

Rules:

Repondent(s)/Other parties:

Name(s):

Decisions:

BEFORE A JUDICIAL COMMITTEE OF THE JUDICIAL CONTROL AUTHORITY

Information Numbers: A11694, A11696, A11698, A11699

In the matter of the New Zealand Rules of

Harness Racing

BETWEEN

RACING INTEGRITY UNIT

S A Irving, Investigator

Informant

AND

MITCHELL PAUL KERR

Licensed Trainer and Open Driver

Respondent

Inquiry held at Addington Raceway, Christchurch on 25 March 2021

REASONS, and PENALTY DECISION DELIVERED 13 APRIL 2021

Judicial Committee:

Hon J W Gendall QC - Chair

Ms F Guy Kidd QC - Member

Present:

Mr D Jackson – Counsel for Informant

Mr S Irving – Informant (RIU)

Mr D Bates – Witness for the Informant

Ms K Williams – Registrar

On 25 March 2021 there were other persons present including Harness Racing and press representatives.

1. The Informant RIU charged Mr Kerr with 4 Serious Racing Offences as provided in Rule 1001, alleging that he on each of the occasions, or during the periods defined, committed dishonest or fraudulent acts connected with harness racing.

2. The Informations allege that he offended, by acting in breach of New Zealand Harness Racing Rule 1001(1)(p) and subject to penalties pursuant to Rule 1001 (2) in the following ways:

CHARGE 1: Information A11694

“Between September 2019 and November 2020, fraudulently sold a horse and charged training fees and expenses to the owners of the said horse that did not exist, for the purpose of his own financial gain…”

[Although perhaps inelegantly worded, the charge was understood to mean, in its first line that he purported to sell a horse that did not exist, and later charged training and other fees to the owners when such did not arise for the non-existent horse]

CHARGE 2: Information number A 11696

"Between 2017 and 2020 dishonestly syndicated ownership in horses "A Taste of Honey" and "Come Together" for the purpose of his own financial gain…"

CHARGE 3: Information Number 11698

"Between 2019 and 2020 fraudulently over syndicated ownership of the horse "California Dreaming" for the purposes of his own financial gain…"

CHARGE 4: Information Number 11699

"Between 2018 and 2020 dishonestly charged owners for insurance premiums on horses when no policies were purchased, for the purpose of his own financial gain…"

3. Rule 1001 (1) in its relevant provision, states:

"*Every person commits a serious racing offence …who….*

(p) commits any dishonest or fraudulent act connected with harness racing".

4. The penalty provisions for a Serious Racing offence are contained in Rule 1001(2), an offender being liable to

(a) a fine not exceeding $30,000 and/or

(b) Suspension from holding or obtaining a licence for any specific period or for life, and /or

(c) Disqualification for a specific period, or for life.

5. We record some of the background process leading up to the hearing as follows:

• After complaints had been made, and Mr Kerr had surrendered his Trainer's Licence, he refused any interview with the RIU Investigator.

• The Informations (originally 5 but one was later withdrawn) were lodged with the JCA on 21 December 2020 and Mr Kerr was served with them on 22 December 2020. Receipt acknowledged by Mr Kerr on 12 January 2021.

• He was requested on 13 January 2021 to advise the JCA and RIU whether he admitted or denied any or all of the charges and whether he had legal representation.

• He sought time to engage counsel and advise of his plea(s). This was granted.

• On 12 February 2021 his counsel advised the Committee had he had received initial instructions to act but there had not been sufficient time to advise as to any plea(s).

• Consequently the Committee accorded the Respondent a further indulgence, and asked him to advise by no later than 22 February 2021 whether Mr Kerr proposed to admit or deny any or all of the charges.

• No response was forthcoming.

• The JCA then fixed the hearing date for 25 March 2021 at Addington and advised the parties. Over 2 months had elapsed since Mr Kerr was served and further delay was unacceptable given his silence.

6. Then, on 15 March 2021, the JCA was advised by Counsel that Mr Kerr had dispensed with the services of Counsel and that "Mr Kerr will now be representing himself in this matter".

7. The Executive Officer of the JCA at the direction of the Committee advised Mr Kerr that he was required to attend at the hearing on 25 March 2021. He has not attended.

8. Mr Kerr at 8.53am on the morning of the hearing sent an email to the JCA Executive Officer. He said he "could not afford to attend" because of cost and "mental health" issues. He gave no particulars and we cannot see cost of attendance was an issue given that he was representing himself. He said, "I dispute the allegations". He apologised to the JCA. He added: "I would ask that any material that is prejudicial to me is to be suppressed as it is likely that I will be facing police charges and therefore I would like to protect my fair trial rights".

9. We heard Submissions on that issue from Counsel for the Informant and a Press Representative present. The application for suppression was declined (Fifth Schedule, Rules of Practice and Procedure for the Judicial Committee and Appeals Tribunal)

• Under R 20.1 all hearings are open to the public unless the Committee makes an order that it or any part be held in private. Members of the public are present, and in any disciplinary hearing it is inevitable that "prejudicial material" will be presented to support charges. The profession and public are entitled to know if there has been misconduct through breach of the Rules of the profession.

• No criminal proceedings are pending.

• Issues of admissibility of evidence and standards of proof are specifically different.

• What the Respondent does not want is publicity but that has in a large measure already occurred in Media articles since the Respondent handed in his Trainer's Licence in late 2020.

• Even if later criminal charges were to occur, a Judge (if trial before a Judge alone) will well understand which evidence or material can be admitted. If, which is unlikely, a jury trial occurred – as is always the case, the Judge can properly direct a jury on only using evidence heard in court, and to ignore and put aside anything they may have heard earlier.

• Respondents in professional disciplinary proceedings – whether in Racing or other professions – cannot expect a cloak of secrecy to prevent embarrassment when other community and industry interests prevail.

• Finally, any decision of the Judicial Committee shall be published by the JCA on its website, unless there is otherwise a direction – Rule 30.2

10. Given the non-attendance of the Respondent, and he clearly had notice of it, he chose to dispense with Counsel and maintain the cloak of silence, we have had to proceed under R. 24.1. Rule 24.2 provides that evidence of fact or opinion which could have been given orally may be given by way of written statement or affidavit and that the Committee has the same power to deal with the Respondent as if he had appeared.

11. We received written statements, properly certified as required, from 7 witnesses together with 39 Exhibits. The evidence which we accepted as persuasive, and which was relevant to the Informations to which it applied, established to our comfortable satisfaction, that is on the balance of probabilities (as required by Rule 31.1 Fifth Schedule) that each Information was proved. Indeed, we concluded by a wide margin, well beyond what the Rule required, that the charges were established.

12. Having delivered our findings as to liability we heard Submissions from the Informant's Counsel as to penalty. We also heard oral evidence or Statements from Mr D Bates, and Mr P Varcoe (by telephone from Queensland), in the form of victim impact statements.

13. We have since accorded Mr Kerr a further opportunity to submit any penalty submissions he wished us to consider. These were to be received by 5pm Tuesday, 6 April 2021. He has not responded.

14. We now record our reasons for the findings on each Information and deliver the penalty decision.

15. At the outset we need to make it clear that Mr Kerr cannot escape a disciplinary hearing and possible sanctions by relinquishing his Trainer's Licence. Apart from the fact that his serious misconduct occurred when he held a licence, in any event the long-established law (as early as 1934 by the Privy Council in Naylor v Stephen and the New Zealand Supreme Court in Caddigan v Grigg [1958] NZLR708), any person who so acts as to bring himself within the ambit of the Rules of Racing is liable to the sanctions provided in those Rules. Indeed the NZ Rule of Harness Racing, in Rule 102(1)(o) specifically provides that the Rules apply to "every person who acts so as to bring himself within the purview of these Rules".

That proposition has been applied in several New Zealand cases of discipline for those who infringe against a Racing Code.

16. Information 11694 – Dishonestly or fraudulently selling a "horse" and charging training fees and expenses to the owner, for his own financial gain, when the horse did not exist.

17. Mr P Varcoe is a businessman residing in Queensland. His evidence was that he had been involved in the NZ Harness Racing Industry for many years and he had 3 horses with the Respondent whom he regarded as a friend. In September 2019 he was telephoned by the Respondent. His evidence was that he was told:

a) He had a horse brought to his stable and that he had "driven the horse and it was that good that I had to buy it".

b) He was told the price was $40,000 but he only had $20,000. A persuasive salesman, the Respondent said it was by "Bettor's Delight" (a colt or gelding) and "it's too good to miss, you've got to buy it".

c) Mr Varcoe talked a good friend, John Beverley, into buying the other $20,000 half share in the horse. He advised the Respondent the next day, who told him that the "horse was good to go and it would be ready to run in 3-4 weeks". An invoice for $40,000 was sent to Mr Varcoe and partner, and paid.

18. Over the next 9 months the Respondent sent monthly invoices to the "owners", which have been produced as exhibits, for incidental expenses, shoes, vitamins, winter and summer covers, hopples, bridle, herpes injection, training fees, grazing fees, massage and the like. These totalled $26,175.75 over the 9 months.

19. The "horse" was given the stable name of "Beaver" as that was Mr Beverley's nickname.

20. Mr Varcoe and Mr Beverley telephoned the Respondent monthly to inquire as to progress that their "horse" was making over those 9 months as they had not been able to sight it at workouts, given they had been told it was likely to run 3-4 weeks after October 2019. The Respondent deflected inquiries by saying he would take the horse to workouts "the next week".

21. By 9 November 2020, the parties' concerns increased and Mr Beverley emailed the Respondent to say that since purchasing the horse on 27 September 2019 they had received no proof of ownership; he had seen his solicitor; they would like a copy of the "vendor/purchaser document and would like to see a photo of the horse with brand neck visible; and a copy of "insurance papers which has expired".

22. Mr Beverley concluded:

"If we don't have these documents within 7 days my solicitor will be contacting NZ Harness as well as Christchurch police. Cheers, Beaver."

23. The Respondent's email reply was immediate. He said:

"No worries Beaver. I will get all this through to you within 7 days. I've had nothing but a challenge with this horse and it's very frustrating as I'm trying to do the best I can for you guys; it certainly hasn't worked out like I thought it would ….. I am hopeless with the paperwork side but understand your frustration. I will get you what you are wanting, that is fine and hopefully we can get a result soon".

24. Next, within a week, on 16 November 2020, the Respondent sent an email to the "owners", in which he said:

"Hi guys. I will call you both today to discuss the future of this boy but he is not shaping up at all and I don't think he is going to make the grade. He has really failed to progress like he should have and I expected, his attitude has certainly slipped and his work on Saturday morning was very ordinary and he is failing to impress me. Enough is enough he either goes for a break and try again next year, give him away as a hack or I will try and sell him to someone else for you guys (this will be hard but I'll do my best and is the best option I feel). There's not enough money in the game at the moment for a horse like him … Anyway will call you both today …"

25. The deception and pretence continues. Mr Beverley is not to be fobbed off. Within 8 minutes on 16 November 2020, he sent an email to the Respondent. He said:

"I am very disappointed in your email reply you have not answered one of my requests Theirfor (sic) you give me no option but to take legal action. You have continually avoided sending any photos or ownership documents this is why you give us no other option but to take this action".

26. The fat is now well in the fire. But the Respondent continues the pretence. He emailed back the next day on 17 November 2020, and said:

"For God sake!!! I sent an email yesterday outlining my thoughts around the horse and ask for you to get back to me. A: What you wanted to do and B: if you still wanted me to register him now that you had my views and that it would be a waste of money.

Now that clearly is all you want is this. I will get this organised, give me a couple of days and it will be done.

….

However, I will get an email away to the old owner and get that side sorted hopefully today. I'm really upset that you both think you don't have a horse, this is insane! I agree paperwork is not a strong point but gee whiz I'm certainly not like that!

….

Now please hold off on whatever your thinking as you are way off the mark. Leave it with me."

27. The stance of a professional Trainer is breath-taking. He endeavours to demean those who he has cheated by saying how upset they have made him by the "insane" belief they did not have a horse. It reflects a continued betrayal.

28. The Respondent is now desperate. The evidence is clear that:

a) He immediately sought to acquire a 4yo Bettor's Delight gelding that a Senior and highly respected Canterbury Trainer had (or he thought he had).

He desperately wished to buy this horse but was honestly and responsibly told by the Trainer that "he was no good and I've sacked him". His evidence was "the horse was simply not good enough and I could not recommend him". His evidence was that the Respondent was "insistent that he wanted to buy" the horse. So he referred him to the owner so as to ask if it could be leased. "No, (said the Respondent) I want to buy him".

b) Two days later the Trainer was told by that Owner that she had "the most bizarre call ever from Mitchell Kerr … he had offered her $20,000 to buy (the horse) but she wouldn't sell as it was not worth that."

c) The Senior Trainer's evidence was that he was really surprised "how Mitch was so desperate to buy him after I told him he was no good".

29. It is obvious, now that the full facts are known, why there was such desperation to find a horse so as to perpetuate his deception.

30. Undeterred, the Respondent, then approached the Spreydon Lodge training operation on 19 November 2020. The evidence of Mr McRae, which we accept, was:

• The Respondent, by phone, asked if Mr McRae had an unraced Bettor's Delight for some owners of his.

• He was told there was an unraced 4 year old (Franco Lebanon) spelling in a paddock (nearby).

• The Respondent said he would go out and have a look at it that day.

• Later that day the Respondent rang back to say he "had just looked at the horse, and he'd take it."

• Price was discussed and he agreed to pay $25,000.

• The whole thing was "really unusual and he was in a real hurry. Buying and selling horses is never done like this and it's just not normal".

31. The $25,000 was never paid so the horse never left the property.

32. But, the Respondent had something of what he wanted; a photograph of a Bettor's Delight horse. He immediately sent to the Australian clients the photo of Franco Lebanon, which he obviously took, with the message:

"Hopefully it works this time, if it doesn't I'll try a different method.

If you cannot read the brand –

Breeding

Bettor's Delight/Lucca Bromac. Ring today with what you decide with, regarding me training for free and scraping (sic) the bills and taking a share. We've come this far so now I'm invested as well and want a result for us all".

33. Mr Varcoe's further inquiries revealed that he was certain the Respondent had "deceived, defrauded and lied to me about this horse for over a year." The partners had paid out $66,175.75 for a horse that did not exist. The Respondent further has not said how they might be repaid and restitution has not occurred.

34. The evidence was overwhelming. There had been not only one act of deceit in securing the purchase price of $40,000 but 9 further and separate frauds on the clients in obtaining monthly payments for expenses that did not, and could not, exist. There had been multiple acts of dreadful betrayal. The serious Racing offence, and corruption, involved multiple dishonesty.

Information A11696 – Between 2017 and 2020 dishonestly syndicated ownership in the horses "A Taste of Honey" and "Come Together" for the purpose of his own financial gain.

35. Mr Don Bates was a retired mature person who owns a standardbred horse breeding business. He has spent all his life involved in the Harness Racing profession/industry. He bred a filly by Art Major out of the mare from a family that he had developed and loved over many years. It was named "Taste of Honey". He was a friend and client of the Respondent.

36. In 2017, when the filly was a yearling, she was offered to the Respondent on a "50/50 deal". This is a common arrangement in the Racing Industry – where the owner pays no training fees, and 50% of incidental expenses are shared, as is any stake money earned split 50/50. But Mr Bates' evidence, which we accept, was that he explicitly told the Respondent he was not to sell his share as he did not want to have anyone else in the racing of the horse.

37. Despite those clear directions, the Respondent proceeded to try to syndicate his "share" in the horse. It came as a complete surprise to Mr Bates, about 6 months later, when he was told by a stranger that he had a 10% share in the filly. He went to see the Respondent to tell him, again, that he had given him a half share to train, not to sell. The Respondent said that there were no other owners.

38. The next development was about 2 days prior to the horse's first race on 12 April 2019, when the Respondent presented Mr Bates with change of ownership papers which showed that 40% of the 50% share of the Respondent had been sold, the Respondent retaining 10%. Mr Bates, a compliant and kindly man, thought it was a fait accompli and did not want the horse prevented from racing because of an ownership dispute.

39. It was later on 2 July 2020 that the Respondent told Mr Bates that he "had a real problem that I'm like the only one that can help him out, he said he had sold 60% of Taste of Honey and he only had a 50% share" … he said it was a genuine mistake. He said he had sold 6 shares for $10,000 each, having valued her at $100,000.

Mr Bates said the Respondent should have to pay him the $10,000 he had received for his 10% he had sold. The Respondent said he did not have the money but if Mr Bates would agree to be shown as having only 40% of his filly, he would make up the deficit from any stakes thereafter won. Mr Bates was very unhappy about this yet felt he had to reluctantly agree so that this promising filly could continue to race. There was never any such payment made by the Respondent to Mr Bates.

40. There were other matters of concern to Mr Bates including the non-payment of insurance premiums (although paid by him to the Respondent) for the filly, and this is dealt with under Information A11699.

41. Mr Bates also bred a filly by Art Major named “Come Together”. It was given to the Respondent to train, on the same 50/50 deal and he had no agreement or consent to dispose of his share. Within 10 days, on 10 December 2019 the Respondent had, unbeknown to Mr Bates, emailed his other clients as follows:

“Hi ….

Here is an awesome opportunity to get involved in a beautiful 2yo filly called “Come Together”. “She is an Art Major out of Blackbird Fly

I’ve done everything with her from day dot and she is very nice! She will be all set to race in February.

There is a 25% share available for $12,500

10% $5,000

I own 25%

Don Bates 40% [this was false]

Mark … 10%

Really nice guys…”

42. Mr Bates confronted the Respondent and told him that he did not have to honour any sales, but he was told that “he had to”. On 26 November 2020 the Respondent told Mr Bates that he had sold shares to 5 persons for percentages of 25%, 25%, 10%, 12%,25%, and it was not difficult for Mr Bates to conclude that with his 50%, the total ownership shares was 147%. So, whoever was to be the loser, the Respondent was obtaining 97% on his half share. Mr Bates was adamant that he would not agree to any change of ownership and has advised those persons from whom the Respondent has obtained funds to seek refund from the Respondent.

43. The evidence, which we accept, overwhelmingly establishes Information 11696 that the Respondent dishonestly over syndicated (and indeed oversold), for his own financial gain, ownership in the 2 horses, and seriously breached his duty of good faith to his owner and friend.

Information A11698 -Between 2019 and 2020 fraudulently syndicated ownership in the horse “California Dreaming” for the purpose of his own financial gain.

44. California Dreaming was a $20,000 purchase at the 2019 sales and owned by a Nelson client of the Respondent. He gave the horse to the Respondent on the usual 50/50 deal. Mr Bates was offered and took a 15% share for $8,000, but later found out that the Respondent had “oversold” his 50% share to 14 persons. He had obtained $92,300 payment for what represented 152.5%, without the knowledge or permission of the original 50% owner. Exhibit “6”, a message from a financial advisor to those who “invested”, confirms that figure. It appears that there were actually 29 “shareholders” who became victims, as some smaller shares were secured on behalf of groups. The Advisor says:

“As for the debt Mitch has with us ….. It may be a good idea that we issue a request for payment of the $92,300 he has taken off us before we consider setting up any syndicate with the proper owner so that he has the chance to pay or face the consequences. Does anyone not wish to chase him for their share?”.

45. As with his actions under Information A11696, the evidence clearly establishes that the Respondent for his own financial gain corruptly obtained funds from others by selling that to which he had no entitlement. His modus operandi as used with Mr Bates’ horses was repeated. He has offered no explanation or information to illustrate that he has any answer to what on its face is apparent.

Information A11799 – obtaining funds from several owners for insurance premiums for hoses he trained when he did not obtain policies and pay those premiums

46. This was a representative charge. The evidence before us was that, at the very least, despite invoicing clients and receiving payments, for insurance premiums the Respondent did not take out any insurance policies and pay premiums on the following:

Taste of Honey

The Major

William Wallace

Come Together

California Dreaming

Manhatten

47. This has been confirmed by NZB Insurance and Crombie Lockwood. And the Respondent has provided no answer. There are likely to have been other horses not insured and premiums unpaid, although paid by owners to him. There is ample evidence to prove the representative charge. Amounts in excess of $20,000 have been obtained. And, seriously, some of the horses had calculated insurance values, (upon which premium were invoiced) at levels as high as $150,000, $100,000, $120,000. So, the owners were, unbeknown to them, having to carry the uninsured risk.

48. This charge was proved.

49. The Committee received expert evidence which may have relevance to each of the 4 charges as it relates to possible financial issues of the Respondent. It is evidence of B D Payn, an expert Betting Analyst employed by the RIU. The essence of his evidence was

(a) Between 2009 and 2016 the Respondent had opened and closed a number of accounts with the New Zealand TAB

(b) In November 2020 information had been received that the Respondent had been betting with accounts with the Australian based corporate bookmaker Ladbrokes. On 27 November 2020 Ladbrokes was (under its formal agreement with the New Zealand TAB) requested to provide betting details for the Respondent’s account for 2019 and 2020,

(c) The account was opened on 9 November 2016 and spreadsheet detailing all activity encompasses over 60 pages and was produced to the Committee.

(d) expert analysis of the spreadsheet data is that the Respondent’s account showed betting on New Zealand and Australian harness, thoroughbred, and greyhound racing and;

in the 2019 year it lost approximately $320,000

in the year 2020 it lost approximately $630,000

50. That evidence naturally does not prove any of the allegations but might be seen to provide a background to the fact that the Respondent, a horse Trainer, needed access to some source of funds to accommodate, in 2020, a net deficit of about $50,000 per month.

PENALTY OUTCOME

51. The various considerations that ought to be taken into account in the exercise of the sentencing/sanctioning exercise are well known. We have been referred to the comments made by an Appeal Tribunal in RIU v Lawson (13 May 2019) (in particular in paras [26] – [33] as to the general purpose of disciplinary sanctions . We need not repeat all that was then said. Suffice if we say that factors may include:

• punitive outcomes on a transgressor

• the professional body marking its condemnation and disapproval of the offending conduct

• the gravity of any transgressing conduct

• the need to protect the public and profession and those who participate in it

• the need to maintain or restore public confidence in the profession

• the upholding of proper standards of conduct and behaviour

• protection of the reputation of the profession and Trainers

• deterrence both personal, but also crucially in a case such as this, general deterrence. That is that others who might be tempted to offend in similar ways will know the sanction that they will face if they offend. Other offending is to be deterred so as to protect others and the Industry/profession.

52. We have been referred to comments by the Supreme Court in Z v Complaints Assessment Committee [2009] 1 NZLR 1 as to the purpose of professional disciplinary proceedings which essentially marry with remarks made in Lawson.

53. The Respondent’s conduct as illustrated over the 4 Informations, reaches in its cumulative sense the highest level of serious misconduct. We find it to be seriously corrupt as mentioned in Rule 1001 (1). The interests of Harness Racing requires that the Respondent be subject to an order for disqualification, he has by his repetitive actions forfeited any right (which there is none in that sense, as rather it is a privilege) to be involved in the Harness Racing profession or enjoy any of the benefits of horse racing.

54. As mentioned, the need to deter others who might choose to deceive owners or others in the misguided view that they are entitled to operate in similar ways is crucial. The confidence of owners and others in the absolute integrity of Trainers in whom total trust is

vested, is vital. The Sport cannot endure if owners cannot trust Trainers. We heard somewhat poignant evidence from Mr Bates when he said that he found it hard now to trust other Trainers any more having felt cheated and defrauded. He has spent 50 years in the Code that was part of his life. Disturbingly, he said that he has been subject to adverse comments from some sections of the Canterbury Harness Racing community, in a sense ostracising him, and blaming him, he feels, for daring to make his complaints about the Respondent. If that is correct, it is lamentable. So as a consequence he has had to remove his horses to race in Southland and no longer in Canterbury. The significance of that is, if there should be any Trainers or others who might breach these Rules, the general deterrence following from this sanction may prevent similar abuse and deceit of, helpless, owners. It is that general deterrence principle to which we give special weight, in the sentencing balancing exercise so that any Trainer who might tend to forget to whom their duty lies, are aware of possible sanctions they might face if they transgress in similar ways to their owners' detriment.

55. The confidence of owners in Australia who invest in the New Zealand Harness Racing Industry, must have taken a serious impact, with significant harm to the Code.

56. The Respondent must be disqualified. The only question is for what period. The aggravating features of his offending are many. They include:

• dishonest betrayal of many clients over a lengthy period

• multiple separate deliberate deceptions of the Australian clients over a year with the reputational harm to New Zealand Harness Racing that must follow

• the amounts of funds in excess of $60,00 extracted from the Australians

• his blatant actions and attempts to hide his actions and continued self-entitled demeaning of their legitimate concerns

• the degree of harm, financial and otherwise, he has caused to those who paid him large sums for shares in horses that could not be supported

• his leaving the owners of valuable horses uninsured without their awareness, but took the premium payments for which he rendered invoices

• the cumulative impact of the four Informations with the estimated loss to others is in the region of $250,000 which might be greater if smaller syndicate members and owners, and close associates of the Respondent are included

• The multiple individual victims – as many as 50 – although precise number are to ascertain

• The emotional impact, apart from financial, on many who have been betrayed by the professional they believed they could trust.

• Mr Bates' emotional harm and loss of many thousands of dollars, after 50 years in the sport he has loved is immeasurable

• the Respondent has a previous historical offence in 2015 for betting in a race, on a horse which he was driving, for which he was fined $650

57. There are no mitigating factors. All the Respondent has said was that:

he has "mental health issues", but provides nothing in support. It may be that, as a result of the proceedings and disclosure of his grievous wrongdoing, he has developed anxiety, worry, depression and the like (who would not in the circumstances). But there is nothing to suggest intellectual incapacity or compromise over the lengthy period of his offending

he says that he has no financial means to meet any financial or costs orders.

58. He cannot call in aid an early, or any guilty pleas. He has continually declined to cooperate and as recent as the day of hearing maintained a denial. Sadly, he has never expressed any remorse or contrition to his victims or the RIU or the JCA. This attitude of self-entitlement illustrates no genuine remorse or sorrow for his victims or the serious harm that has been done to the Harness Racing Code to erode the trust all persons must have in Trainers. We allow the possibility that he has been so embarrassed and traumatised by the discovery of his actions that he cannot "face the music". But he cannot call in aid as mitigation on sentence any claim of remorse, contrition, apologies (of which there have been none), guilty pleas.

59. The seriousness of the totality of the Respondent's actions over an extended period, affecting multiple owners/clients, involving very substantial amounts of money, with egregious, appalling breaches of duties of faith and fiduciary obligations, (the ghost horse, the taking of insurance premiums, and the deliberate overselling of syndicate shares), require disqualification for life. Where there is egregious corrupt practice, over an extended period, life disqualification should follow. No other sanction can meet the need to uphold the objectives to which we have already referred in para (51). He is unfit to be involved in any way in the Racing Industry or profession. He can access the provisions of the Rules (Rule 1303,1205) to see the effect of a disqualification order.

OUTCOME

60. The Respondent is disqualified for life commencing, in terms of Rule 1301 immediately today the 13th day of April 2021.

61. Somewhat benevolently, the RIU did not seek an order for costs, despite what we gather had to involve vast expenses incurred in investigating and prosecuting the charges.

62. So too, the costs incurred by the JCA have increased expotentially only because of the actions, or inaction, of the Respondent. They now amount to very significant amounts and have arisen only because of the Respondent's actions. He is ordered to pay a small contribution towards those expenses. We fix that sum as $3,000. It may be that he will not meet that order but under Rules 1401 – 1410 the JCA requests the Board of Harness Racing NZ to direct that Mr Kerr be put on the Unpaid Forfeit List.

63. Likewise, those many victims who have sustained financial loss, are entitled to act under Rule 1403 and request the HRNZ Board to direct that the debts (arrears) owing to them by Mr Kerr be recorded on his Unpaid Forfeit List.

By the Judicial Committee. Dated this 13th day of April 2021.

Hon J W Gendall QC

Chair

Ms F Guy Kidd QC

Member

Penalty: