



**25 October 2022**

**STEWARDS REPORT**

*Inquiry into the conduct of licensed stable foreman and registered owner Mr Benjamin Cleary in the offer and sale of shares in the three thoroughbred horses Here Comes Kermit, Baby Elise and Kosciuszko Express and the invoicing of training fees of the three horses and the subsequent sale of Kosciuszko Express to other interests.*

**Inquiry conducted SERA/CRC Offices at Thoroughbred Park**

**Committee of Stewards: J D Walshe (Chairman), K E Blanch & G E V Hargraves**

Stewards today concluded an investigation into a complaint made by registered owner Mr Jim Stafford against licensed stable foreman and registered owner Mr Benjamin Cleary concerning his conduct in the offer and sale of shares to him in the three thoroughbred horses *Here Comes Kermit, Baby Elise* and *Kosciuszko Express* and the invoicing of training fees of the three horses and the subsequent sale of *Kosciuszko Express* to other interests. The inquiry also considered evidence pertaining to Mr Benjamin Cleary's conduct towards Mr Stafford on the evening of 11 September 2020, as determined by the Queanbeyan Local Court on 18 January 2021.

The inquiry was opened on 16 August 2022. Evidence was taken from registered owner Mr Jim Stafford and licensed trainers Mr Frank Cleary and Mr Joe Cleary. A lengthy exhibits bundle was also tendered into evidence which included transcripts of interviews of a number of persons relevant to the Stewards investigations. The inquiry was continued on 20 September 2022 after twelve (12) charges were issued in writing to Mr Benjamin Cleary on 2 September 2022 on which date further evidence was obtained from Mr Jim Stafford and Mr Frank Cleary. During that inquiry sitting, Mr Benjamin Cleary was found guilty of each of the twelve charges issued against him. Despite written notices being provided at each relevant stage of the inquiry, Mr Benjamin Cleary failed to attend the inquiry during any of the above-stated inquiry dates. The inquiry was in effect conducted in his absence although some material was forwarded to Stewards by Mr Benjamin Cleary which was considered in evidence.

Today, and again, when Mr Benjamin Cleary failed to attend the continued inquiry to consider submissions on penalty and when he also failed to make submissions in writing as invited, Stewards considered the matter of penalty in his absence.

**CHARGE AND PENALTY**

**CHARGE 1 – FAIL ATTEND INQUIRY**

*AR 232 Failure to observe processes and directions of PRAs or Stewards*

*A person must not:*

- (h) refuse or fail to attend or give evidence at an interview, investigation, inquiry, hearing or appeal when directed or requested to do so by a PRA, the Stewards or a person authorised by a PRA or the Stewards;*

Particulars:

- 1) You Mr Benjamin Cleary are a registered owner.
- 2) On 1 August 2022 you were directed by SERA Chief Steward Mr Jim Walshe to attend a Stewards inquiry commencing at 9:30am on Tuesday 16 August 2022 at Thoroughbred Park into a complaint made against you by registered owner Mr Jim Stafford.
- 3) On 1 August 2022 you were given a further direction by Chairman of Stewards Mr Marc Van Gestel to attend the above-mentioned inquiry.
- 4) You did fail to attend the above-mentioned Stewards inquiry as directed.

### **PENALTY CHARGE 1 - 6 months disqualification**

#### **CHARGE 2 – FRAUDULENT ACTION**

*AR 229 Corruption, dishonesty and misleading behaviour*

*(1) A person must not:*

*(a) engage in any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing;*

Particulars:

That you Mr Benjamin Cleary being a registered owner and foreperson did during 2018, fraudulently obtain from Mr Jim Stafford the sum of approximately \$30,900 by promoting and representing to him that you had purchased a Wanted – We’ve Got Issues yearling filly (DOB 27/8/16) for the sum of approximately \$75,000 and sell to him a half share in the said filly when you were in the knowledge that you paid only approximately \$13,200 for the filly.

### **PENALTY CHARGE 2 - 2 years disqualification**

#### **CHARGE 3 – FRAUDULENT ACTION**

*AR 229 Corruption, dishonesty and misleading behaviour*

*(1) A person must not:*

*(a) engage in any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing;*

Particulars:

That you Mr Benjamin Cleary being a registered owner and foreperson did during 2018, fraudulently obtain from Mr Jim Stafford the sum of approximately \$42,500 by promoting and representing to him that you had purchased a Zoffany – Lolita Star yearling filly (DOB 31/10/16) for the sum of approximately \$90,000 and sell to him a half share in the said filly when you were in the knowledge that you paid only approximately \$5,000 for the filly to resolve the outstanding balance for the filly’s agistment at Highpoint Lodge, MOYHU, to secure ownership rights for the filly.

### **PENALTY CHARGE 3 - 2 years disqualification**

#### **CHARGE 4 – FRAUDULENT ACTION**

*AR 229 Corruption, dishonesty and misleading behaviour*

*(1) A person must not:*

*(a) engage in any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing;*

Particulars:

That you Mr Benjamin Cleary being a registered owner and foreperson did during 2019, fraudulently obtain from Mr Jim Stafford the sum of approximately \$7,500 by promoting and representing to him that you had purchased Kosciuszko Express (DOB 3/10/14) for the sum of approximately \$25,000 plus GST and sell to him a half share in the said mare when you were in the knowledge that you paid only approximately \$12,500 for the mare.

#### **PENALTY CHARGE 4 - 1 year disqualification**

##### CHARGE 5 – FRAUDULENT PRACTICE

*AR 229 Corruption, dishonesty and misleading behaviour*

*(1) A person must not:*

*(a) engage in any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing;*

The particulars of the charge being that you registered owner and foreperson Mr Benjamin Cleary did engaged in an improper practice in connection with racing by reason of one of, or any combination of two or more of the following:

- 1) That you Mr Benjamin Cleary are a registered owner and licensed foreperson.
- 2) That during 2018 you did fraudulently obtain from Mr Jim Stafford the sum of approximately \$30,900 by promoting and representing to him that you had purchased a Wanted – We’ve Got Issues yearling filly (DOB 27/8/16) for the sum of approximately \$75,000 and sell to him a half share in the said filly when you were in the knowledge that you paid only approximately \$13,200 for the filly.
- 3) That during 2018, you did fraudulently obtain from Mr Jim Stafford the sum of approximately \$42,500 by promoting and representing to him that you had purchased a Zoffany – Lolita Star yearling filly (DOB 31/10/16) for the sum of approximately \$90,000 and sell to him a half share in the said filly when you were in the knowledge that you paid only approximately \$5,000 for the filly to resolve the outstanding balance for the filly’s agistment at Highpoint Lodge, MOYHU, to secure ownership rights for the filly.
- 4) That during 2019 you did fraudulently obtain from Mr Jim Stafford the sum of approximately \$7,500 by promoting and representing to him that you had purchased Kosciuszko Express (DOB 3/10/14) for the sum of approximately \$25,000 plus GST and sell to him a half share in the said mare when you were in the knowledge that you paid only approximately \$12,500 for the mare.
- 5) That by committing the actions detailed in particulars 2), 3) and 4), you did engage in a fraudulent practice in connection with racing.

#### **PENALTY CHARGE 5 - 4 years disqualification**

##### CHARGE 6 – FAIL DECLARE SHARE AND / OR INTEREST IN HORSE

*AR 62 Failure to provide information etc in relation to interests in a horse*

*(1) A person must not, in the opinion of a PRA or the Stewards:*

*(a) fail to declare any share or interest in a horse;*

Particulars:

That you Mr Benjamin Cleary being a registered owner and foreperson did, on 5 June 2019 lodge with Racing Australia, a transfer of ownership application declaring that you held a 100% share of the ownership in Kosciuszko Express (DOB 3/10/14) and did fail to declare at any time after, that Mr Jim Stafford in fact held a 50% share in the ownership of the said mare.

**PENALTY CHARGE 6 - \$1500 fine.**

**CHARGE 7 – IMPROPER CONDUCT**

*AR 228 Conduct detrimental to the interests of racing*

*A person must not engage in:*

*(b) misconduct, improper conduct or unseemly behaviour;*

Particulars:

- 1) That you Mr Benjamin Cleary are a licensed foreperson and were, at the relevant time, a part owner of Kosciuszko Express (DOB 3/10/14).
- 2) On or about 1 November 2019 you did engage in improper conduct in that you did sell Kosciuszko Express (DOB 3/10/14) on the Inglis Digital Online Auction for the sum of approximately \$4,500 without the knowledge and consent of Mr Jim Stafford, who held a 50% share in the said mare.
- 3) You did engage in improper conduct in that you did retain the proceeds of the sale of Kosciuszko Express (DOB 3/10/14) as detailed in particular 2).

**PENALTY CHARGE 7 - 1 year disqualification**

**CHARGE 8 – FRAUDULENT PRACTICE**

*AR 229 Corruption, dishonesty and misleading behaviour*

*(1) A person must not:*

*(a) engage in any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing;*

Particulars:

That you registered owner and foreperson Mr Benjamin Cleary did engage in a fraudulent practice in connection with racing in that you did claim and/or invoice training fees from registered owner Mr Jim Stafford as detailed below when you were in the knowledge that the relevant horses were not actively in work with a registered trainer and the invoices issued to Mr Stafford were fictitious by reason of one of, or any combination of two or more of the following:

- 1) Invoice #65 issued 1/2/19: (Wanted – We’ve Got Issues) 70 days full work at \$65 per day totaling \$2252.25 for Mr Jim Stafford’s share in the filly.

- 2) Invoice #67 issued 31/3/19: (Wanted – We’ve Got Issues) 10 days full work at \$75 per day with additional associated training costs totaling \$821.70 for Mr Jim Stafford’s share in the filly.
- 3) Invoice #73 issued 31/5/19: (Wanted – We’ve Got Issues) 15 days full work at \$75 per day with additional associated training costs totaling approximately \$725.18 for Mr Jim Stafford’s share in the filly.
- 4) Invoice #79 issued 6/8/19: (Wanted – We’ve Got Issues) 31 days full work at \$80 per day with additional associated training costs totaling \$1603.80 for Mr Jim Stafford’s share in the filly.
- 5) Invoice #68 issued 31/3/19: (Zoffany – Lolita Star) 21 days full work at \$75 per day totaling approximately \$866.25 for Mr Jim Stafford’s share in the filly.
- 6) Invoice #73 issued 31/5/19: (Zoffany – Lolita Star) 31 days full work at \$75 per day with additional associated training costs totaling \$1559.25 for Mr Jim Stafford’s share in the filly.
- 7) Invoice #80 issued 31/5/19: (Zoffany – Lolita Star) 31 days full work at \$80 per day with additional associated training costs totaling \$1980.00 for Mr Jim Stafford’s share in the filly.

### **PENALTY CHARGE 8 - 1 year disqualification**

#### CHARGE 9 – FRAUDULENT PRACTICE

*AR 229 Corruption, dishonesty and misleading behaviour*

*(1) A person must not:*

*(a) engage in any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing;*

Particulars:

That you registered owner and foreperson Mr Benjamin Cleary did engage in a fraudulent practice in connection with racing in that you did claim and/or invoice training fees from registered owner Mr Jim Stafford as detailed below when you were in the knowledge that following fees listed in the relevant invoices were fictitious by reason of one of, or any combination of two or more of the following:

- 1) Invoice #73 issued 31/5/19: (Zoffany – Lolita Star) 1 x course proper jump-out @ \$82.50 charged to Mr Jim Stafford for his 50% share in the filly.
- 2) Invoice #80 issued 6/8/19: (Zoffany – Lolita Star) 1 x course proper @ \$82.50 charged to Mr Jim Stafford for his 50% share in the filly.
- 3) Invoice date unknown: (Zoffany – Lolita Star) 1 x jump-out @ \$82.50 charged to Mr Jim Stafford for his 50% share in the filly.

### **PENALTY CHARGE 9 - 3 months disqualification**

#### CHARGE 10 – FRAUDULENT ACTION

*AR 229 Corruption, dishonesty and misleading behaviour*

*(1) A person must not:*

*(a) engage in any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing;*

Particulars:

That you registered owner and foreperson Mr Benjamin Cleary did engage in a fraudulent action in connection with racing in that you did dishonestly obtain from registered owner Mr Jim Stafford, the sum of \$3000 being for a 2019 VRC Oaks nomination fee for Zoffany-Lolita Star (DOB 31/10/16) as invoiced by you on 31/3/19 when you were in the knowledge that the said filly was never nominated for that race and those monies were never repaid to Mr Stafford.

### **PENALTY CHARGE 10 - 6 months disqualification**

#### **CHARGE 11 – IMPROPER CONDUCT**

*AR 228 Conduct detrimental to the interests of racing*

*A person must not engage in:*

*(b) misconduct, improper conduct or unseemly behaviour;*

Particulars:

That you registered owner and licensed foreperson Mr Benjamin Cleary did engage in improper conduct by reason of one of, or any combination of two or more of the following:

- 1) That at about 6:30pm on 11 September 2020 you did contact by telephone registered owner Mr Jim Stafford's secretary and threaten to hurt Mr Jim Stafford and his family.
- 2) That at 8:11pm on 11 September 2020 you did contact by telephone registered owner Mr Jim Stafford and threaten him by saying to him "I'm coming to get ya"
- 3) That on the evening of 11 September 2020 you did leave the following threatening voicemail on Mr Jim Stafford's phone: "You're a fucking coward cunt, I'm comin".
- 4) That on or around 18 January 2021, at the Queanbeyan Local Court, a conviction was recorded against you for the criminal offence 'did use a carriage service, namely a telephone service in such a way that reasonable persons would regard that use as being menacing, harassing or offensive, contrary to subsection 474.17 (1) of the Criminal Code Act'.

### **PENALTY CHARGE 11 - 6 months disqualification**

#### **CHARGE 12 – FAIL TO NOTIFY OF CONVICTION OF CRIMINAL OFFENCE**

*LR 51 (2) The Board may grant any licence or permit upon such terms and conditions and for such period and for such locality as they may see fit, and may refuse to grant any such licence or permit without assigning any reason for such refusal, and may at any time cancel or suspend or vary without giving any reason any such licence registration or permit before the termination of the period for which such licence or permit was granted.*

*(a) It is a condition of any Licence that the licensee must notify Racing NSW within 14 days if the licensee is:*

*ii) convicted of a criminal offence, or*

*(b) Any licensee who fails to comply with sub rule (a), or fails to comply with the other terms and conditions of their licence may be penalised, may have his or her licence suspended, varied or revoked and/or be stood down from his or her licensed rights and/or privileges.*

Particulars:

- 1) That you Mr Benjamin Cleary were at the relevant time a licensed foreperson.
- 2) That on or around 18 January 2021, at the Queanbeyan Local Court, a conviction was recorded against you for the criminal offence 'did use a carriage service, namely a telephone service in such a way that reasonable persons would regard that use as being menacing, harassing or offensive, contrary to subsection 474.17 (1) of the Criminal Code Act'.
- 3) That you did fail to notify Racing NSW within 14 days that you had been convicted of a criminal offence as detailed in particular 2)

**PENALTY CHARGE 12 - 3 months disqualification**

**CONSIDERATION OF PENALTY**

Stewards considered the following matters in respect to penalty:

- 1) Mr Cleary's history in the thoroughbred racing industry as a licenced person and registered owner, as known.
- 2) Mr Cleary's disciplinary record, which contains the following convictions:
  - 25/5/12 (AR175(j)) – Improper behaviour towards Stewards (fined \$200)
  - 25/7/12 (AR175(f)) – Refused to give evidence (disqualified 6 months)
  - 25/7/12 (AR175(a)) – Fraudulent conduct (disqualified 6 months). Penalty mitigated following Mr Cleary repaying monies to complainant.
  - 30/6/22 (AR175(j)) – Improper behaviour towards a Steward (18 months disqualification)
- 3) Criminal conviction recorded on 18/1/21 (Queanbeyan Local Court) 'did use a carriage service, namely a telephone service in such a way that reasonable persons would regard that use as being menacing, harassing or offensive, contrary to subsection 474.17 (1) of the Criminal Code Act'.
- 4) The principle of specific and general deterrence and what message is sent to the industry as set out in DP Smith - Reasons for Decision 15th August 2015 Point 6 at P3:

*“To the extent that criminal law principles such as deterrence are considered, they are not relevant. To the extent that proportionality of sentencing is said to be considered, it is not relevant. In respect of the first of those, the Tribunal in determining what order is appropriate has regard to what message is to be given to this individual trainer to ensure that in the future this type of conduct is not repeated, but to ensure that there is an appropriate penalty imposed to indicate the response of the community to integrity and welfare issues. In addition, it is a question of what general message is required to be sent to the community at large to indicate to those who might be likeminded to engage in such conduct, what the likely consequences are, and, secondly, to indicate to the broader community who are not likely to engage in the type of conduct that, should it be detected, they, whether they be wagerers or people just generally interested in the individual code, will know that it is operating at the highest possible standards. “*
- 5) The purpose for issuing penalties as a protective measure for the image and interests of the thoroughbred industry.
- 6) The particularly serious nature of the offences pertaining to charges 1, 2, 3, 4, 5, 7, 8, 9, 10 and 11.
- 7) Mr Cleary's failure to co-operate with the inquiry process.

### **FINAL DETERMINATION OF PENALTY**

The combined penalties applied for the twelve breaches of the Rules by Mr Benjamin Cleary is thirteen years (13 years) disqualification and the imposition of a fifteen hundred dollar (\$1500) fine. However, in giving consideration to the totality principle, Stewards order that the penalties imposed for charges 2, 3, 4, 5, 7, 8, 9 and 10 be served concurrently and the penalties imposed under charges 1, 11 and 12 be served cumulatively. Therefore, it is the decision of Stewards that Mr Benjamin Cleary be **disqualified for a period of five years and three months (5 years and 3 months) in total and that he be fined the sum of \$1500.**

Consequently, Mr Benjamin Cleary's disqualification is to commence **on 26 November 2023 at the expiration of a disqualification imposed against Mr Benjamin Cleary by Racing NSW Stewards at an inquiry on 30 June 2022 and therefore to expire on 26 February 2029.**

### **RIGHTS OF APPEAL**

Mr Benjamin Cleary was notified of his rights of appeal.

JD Walshe  
Chief Steward – South-East Region Racing NSW