Appeal decision

Date: 2 December 2014

Code of racing: Harness

Appeal panel: Mr B Miller (chair), Mr P James and Mr D Kays.

Appearances: Mr J Murdoch QC appeared on behalf of trainer Justin Abbott.

Ms A Freeman, barrister, appeared on behalf of the stewards.

Decision being appealed: Suspension of licence to train and drive from 21 March 2014 and subsequent disqualification of licence on 16 September for a three-year period – relating to multiple charges under the Australian Harness Racing Rules.

Appeal result: Refer to individual charges in extract of proceedings below.

Extract of proceedings – in the matter of an inquiry into the overall performance of Foldem subsequent to its winning performance in Race 6 at Albion Park on Monday, 17 March 2014. Trainer: Justin Abbott

THE CHAIRMAN: This appeal has been lodged by the trainer Justin Kent Abbott against the determination of the stewards of Racing Queensland made on 28 August 2014 in respect to guilt and on 16 September 2014 in respect to penalty following a series of inquiries undertaken by the stewards that resulted from an initial incident that occurred at Albion Park Paceway on Monday 10 March 2014. That incident concerned the performance of Foldem, which was trained by the appellant and which raced in the Atlas Copco Construction Pools Pace on that date. The transcript of that inquiry identified concerns expressed by the stewards as to how the favourite in the race Foldem had performed. The explanations proffered by the trainer were accepted by the stewards.

The stewards then convened a further inquiry on Monday 17 March 2014 following the performance of that same horse Foldem, which participated in and won Race 6 on that date. During the course of that inquiry, the stewards were concerned at the difference in tactics used or adopted by the drivers of the horse in question. As a result of inquiries made by the stewards on that date and on subsequent dates, the trainer was charged with eight separate offences on 23 June 2014 and was offered the opportunity of responding to such charges, which he did by way of submissions prepared by Mr JE Murdoch QC and his solicitors, Gabriel Ruddy & Garrett.

Racing Queensland considered all of the submissions and on 28 August 2014 by way of formal letter in respect thereto, accepted the pleas of guilt to charges 3, 4, 5 and 6 and confirmed that the matter of penalty would be addressed subsequently. The stewards found the trainer guilty in respect of the charges numbered 1, 2, 7 and 8 (to which the trainer had pleaded not guilty) and provided reasons therefor in that letter of 28 August. Again, the question of penalty was adjourned for further consideration.

On 16 September 2014, the stewards finalised the inquiry in respect to all eight charges and made findings as to the penalty on each charge. It was as a result of those findings that the appeal to this board on seven of the eight charges was lodged.

When this appeal was convened a number of significant documents were tendered by both counsel for the appellant and respondent. In that respect, we acknowledge the significant time that was expended in preparation for argument by both Mr Murdoch QC and Ms Freeman of counsel for the respective parties. The issues that the stewards addressed were significant and involved a great deal of investigative enquiry. The eight separate charges were addressed by each counsel separately and in order and those charges will be addressed in the same way.

It should be noted that as and from 21 March 2014, the stewards suspended the licence of the appellant who has appealed against the conviction on charges 1, 2, 7 and 8 and against sentence on charges 4, 5 and 6. The appellant pleaded guilty to charge 3 pursuant to Rule 275(5) and has not lodged any appeal in respect thereto.

Charge 1 under Rule 44(1) related to a failure to notify stewards of a change in tactics contrary to the usual racing pattern. He was convicted and fined $100. The essential element of the rule is that there must be an intention to adopt tactics different to that observed previously. The evidence is clear that the trainer had never started the horse prior to 10 March but that the horse's previous form in Victoria showed that it raced near the front or led in its races. On 10 March the horse failed to lead the race notwithstanding that the instruction given by the trainer to the driver was to "come out of the gate as best you can." No alternative evidence was advanced to suggest that the trainer did not give those instructions. Those instructions can carry no meaning other than to suggest to the driver that the horse be allowed to go forward. There was no evidence before the stewards or this board that the driver prevented it from leading although the stewards noted that it failed to lead, which is distinctly different from alleging any restraining action by the driver. There is no doubt that after racing on 10 March, certain different training methods were instrumented by the trainer, which together with the race being run over a different distance, resulted in an improved performance and in the view of this board, one would have expected that to have been the anticipated and likely result. It may well have been a requirement that the trainer was obliged to advise of those different training circumstances to the stewards pursuant to Rule 89(1). The stewards, however, in specifying that circumstances capable of producing an improved performance required notification pursuant to Rule 44(1), were in error. In the

absence of an intention to change tactics, any obligation pursuant to Rule 89(1) is not relevant to Rule 44(1). In the circumstances, it is the opinion of this board that the appeal should be upheld and the conviction quashed.

Charge 2 was pursuant to Rule 273(5) which alleged that there had been a change of registered gear without approval of the stewards, with the trainer presenting the horse to race in an open bridle when registered gear indicated blocked blinkers. The trainer alleged that he attempted to make the necessary change by accessing the website of Harness Web. It is apparent, however, that there is no specific evidence that he did so although there is conjecture that Harness Web may have been defective at differing points in time when other trainers were canvassed about its operation. Notwithstanding that evidence, the simple fact is that the trainer did not comply with the rule in question and notwithstanding the supposed mitigating circumstances submitted by him, he failed to take, in the opinion of this board, all necessary steps to ensure that the change of gear was so notified. In the circumstances, his appeal is dismissed and the penalty imposed stands.

Charge 3 was also pursuant to Rule 273(5) and on almost identical terms. However, the appellant, as stated, pleaded guilty to that charge and no appeal against the sentence was lodged.

Charges 4, 5 and **6** were all instigated pursuant to Rule 235A(1). That section or rule deems it an offence for any person in whose care, control or supervision a horse has been placed within the preceding 21 days and who lays such horse not to win or be successful in placing in a race. These are three significant charges and much time was devoted by counsel for the respondent and the stewards to identify the circumstances in which sums of money were placed upon the horse, betting that the horse either not win or not run a place. There is no doubt, and in this respect both the stewards and counsel for the appellant submitted that, the offences are a serious matter. The cumulative penalties that were imposed by the stewards resulted in a three year disqualification being imposed upon the trainer. There are circumstances where one can envisage significant long term disqualifications being imposed. However, those circumstances would demand that there be unmistakably serious contraventions involving significantly large amounts of money that had been wagered and won. That is not the situation in the matters that are currently under review by this board. The three amounts of money that had been wagered and won are all below $1,000. The precedent cases that were advanced by counsel for the respondent reflected a number of charges imposed on trainers and jockeys that varied from between eight months to many years. The circumstances relating to all of those matters are, however, most assuredly significantly different to those which exist in this matter.

Much has been said about whether the penalty should have been served cumulatively. The counsel for the stewards went to great lengths to propose that cumulative sentences are certainly an appropriate deterrent in circumstances such as where the issues are definitive and reflect a course that has been contrived to bring about differing results. This is not what

has happened in our opinion and we do not believe there is anything to be gained by imposing cumulative sentences in circumstances where all of the salient features are very similar and were all offences committed in a short space of time.

In respect to each of the instances in question, the trainer pleaded guilty with an early acknowledgement that the conduct was improper and he provided assistance throughout the inquiries. There were modest sums of money involved and there was certainly no evidence of the result of the race being contrived which, if that could have been proved, would have attracted a significant penalty. All of the matters to which the trainer made acknowledgement should in the circumstances have attracted significant reductions of any penalty that was likely to be imposed by the stewards. This board notes that it is now some eight months since the appellant's licence was originally suspended by stewards on 21 March 2014 and subsequently disqualified as a result of the further decision by stewards on 16 September 2014. It is the view of this board that there should be a period of disqualification imposed on each of the charges to reflect the seriousness of the offences but that each charge and penalty should be served not cumulatively but on a concurrent basis. As stated, the trainer has been without his licence since 21 March 2014. The board believes that the disqualification period hereby imposed should be backdated from 21 March 2014 until the date of publication of this judgment so that the penalty be deemed a concurrent penalty on each of the three charges with the period of disqualification to expire on the date that this judgment is delivered.

Charge 7 was made pursuant to Rule 243 and sought to identify behaviour which was prejudicial or detrimental to the industry between 9 March 2014 and 18 March 2014. The appellant pleaded not guilty and he was convicted and disqualified for two years from 21 March 2014 to be served concurrently with disqualification on the charges numbered 4, 5 and 6. It was in that period that the horse Foldem raced twice, losing on the first occasion and winning on the second occasion and during which evidence was provided suggesting that associates of the trainer had also wagered similar bets of laying the horse on 10 March to lose but backing the horse on 17 March to win. Once again, the sums of money invested and the returns gained were modest. The cornerstone of any conviction pursuant to the charge under this rule must *inter alia* show the deliberate intention that Foldem not race on its merits on 10 March or as was submitted on behalf of the stewards, there be "the irresistible inference that can be drawn from these facts is that Mr Abbott deliberately caused the horse to race inconsistently…".

In the opinion of this board there is no evidence that there was any such conduct on the part of the trainer or the driver. If inappropriate conduct was suspected, then the stewards would have been obligated to enquire into possible breaches of Rule 147(1) – a driver shall race a horse on its merits, and/or Rule 63(5) – a trainer shall take all reasonable measures to ensure that the racing performance of a horse is consistent, and, if satisfied that an offence occurred, take the appropriate action.

Contravention of either or both of these rules could give rise to the conduct being a specific of the charge under review but such is the gravity of the charge and resultant penalty, that compelling evidence placing the matter beyond a reasonable doubt, not just an irresistible inference of the alleged conduct, must be present and sustained. We do not accept that there is any possible basis upon which this charge can be sustained as there is nothing to support the contention that the trainer has behaved in a way which was prejudicial or indeed detrimental to the industry. In the circumstances, the appeal against charge 7 is allowed.

Charge 8 was under Rule 247 suggesting that the trainer in attending before the controlling body, its members or employees, the stewards, officials or at any proceeding under these rules shall not speak or behave in a malicious, intimidatory or otherwise improper manner. The trainer pleaded not guilty to the charge but was convicted and disqualified with a penalty of two years' disqualification imposed cumulative on the periods of disqualification imposed by stewards pursuant to Charges 4, 5 and 6. The appeal is against both conviction and sentence.

The stewards have alleged that there were two areas of intimidation. The first that occurred was in the presence of stewards Farquarhson, Hackett and Torpey when those stewards attended at the stables of the trainer seeking information and documentation and then secondly, during the course of his examination before the stewards. In the opinion of this board, the allegation of intimidation directed towards the stewards does not stand up to scrutiny. Firstly, clearly at the times of discussions with stewards Farquarhson, Hackett and Torpey, the trainer/appellant was indicating that he was prepared to accept a fair punishment for what he referred to as his stupid conduct relative to his Betfair activities. In statements by those stewards, no allegations of intimidation or threats were made or suggested. In fact in his statement, steward Farquarhson stated "This admission was not recorded as it was a frank admission towards the conclusion of our visit."

At the stewards' inquiries, comments by the appellant repeating those remarks were purely in response to matters put to the appellant by the stewards and therefore not being remarks pointedly directed at the stewards conducting the inquiry. As such, the remarks could not be deemed to be in any way intimidatory of those stewards conducting the inquiry. Further, given the state of mind of the appellant, he, having assisted the enquiry, described his conduct as being stupid and the silliest thing he ever did believing that "If I'm given a penalty consistent with everyone else that has ever done this I'll walk out the door and there is no appeal. But if Mr Hackett says 'The bloke, I don't like him. Let's give him five years' and everyone else is getting one or six months then I have to appeal it." The appellant was merely stating the obvious, namely, that if he believed he would be treated unfairly, then he would undoubtedly be lodging an appeal and that was his right. It was not, in the view of this board, a threat or an intimidation to compel the stewards to grant a more lenient penalty.

Reference by the appellant to the term "leverage" was in relation to its use in any appeal that might subsequently lie to QCAT and is not relevant to any alleged offence pursuant to the

relevant rules. Further, given the state of mind of the appellant, the stewards should have been aware that this was not an attempt to intimidate either the stewards when they visited his stables or those stewards who were undertaking the inquiry themselves.

To advance the proposition from what may be a remark in the course of normal discussions with stewards to the state of such remark being grossly intimidatory thereby attracting a penalty more in keeping with major offences resulting in a penalty comprising a very lengthy disqualification, warrants a level of compelling evidence that just does not exist in this matter. On the evidence presented to this board, the charge cannot be maintained and the appeal in respect thereto is upheld and the penalty is quashed.

Further right of appeal information: The appellant and the stewards may appeal to the Queensland Civil and Administrative Tribunal (QCAT) within **14 days of the date of this decision**. Information in relation to appeals to QCAT may be obtained by telephone on (07) 3247 3302 or via the Internet at www.qcat.qld.gov.au