

CITATION: *Grylls v Queensland Racing Integrity Commission* [2017] QCAT 49

PARTIES: Bridget Ellen Grylls
(Applicant)
v
Queensland Racing Integrity Commission
(Respondent)

APPLICATION NUMBER: OCR187-16

MATTER TYPE: Occupational regulation matters

HEARING DATE: 25 November 2016

HEARD AT: Brisbane

DECISION OF: **Member Browne**

DELIVERED ON: 20 February 2017

DELIVERED AT: Brisbane

ORDERS MADE:

1. **The original decision (as amended) of the Queensland Racing Integrity Commission made on 20 September 2016 that Apprentice Bridget Ellen Grylls is guilty of a charge pursuant to Rule 135(b) of the Australian Rules of Racing and that a penalty of three (3) weeks suspension be imposed is set aside and the following decision is substituted:**
 - a) **Apprentice Bridget Ellen Grylls is not guilty of a charge pursuant to Rule 135(b) of the Australian Rules of Racing for Race 3 at Doomben Racecourse on 10 September 2016.**

CATCHWORDS: PROFESSIONS AND TRADES – LICENSING OR REGULATION OF OTHER PROFESSIONS, TRADES OR CALLINGS – Thoroughbred Racing – Apprentice Jockey – where the applicant has been found guilty of a breach of Rule 135(b) of the Australian Rules of Racing – whether charge is substantiated on review – whether rider of the horse took all reasonable and permissible measures

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 19, s 20, s 24
Racing Integrity Act 2016 (Qld), s 240, s 246, Schedule 1

In the matter of Jockey: Damian Browne, unreported, Queensland Racing Disciplinary Board, 18 March 2014

In the matter of Licensed Jockey Chris Munce, unreported, Racing Appeals Tribunal of New South Wales, 5 June 2003

Briginshaw v Briginshaw (1938) 60 CLR 336

Kehl v Board of Professional Engineers of Queensland [2010] QCATA 58

Racing Queensland Ltd v Cassidy [2012] QCAT 31

Radecker, MS v Queensland Racing [2008] QRAT 4

REPRESENTATIVES:

APPLICANT: Bridget Ellen Grylls represented by Mr M Tutt, Solicitor, Fowler Lawyers

RESPONDENT: Queensland Racing Integrity Commission represented by Mr W Kelly, in-house counsel

REASONS FOR DECISION

- [1] On 10 September 2016, apprentice jockey Bridget Grylls rode a thoroughbred horse, 'Ranked', in Race 3 at Doomben Racecourse over a distance of 2200 metres.
- [2] Ms Grylls was completing the fourth year of her apprenticeship. She would be eligible to apply to become a senior jockey in mid-December 2016.
- [3] Another apprentice jockey, Joshua Oliver, was riding a thoroughbred horse 'Black Jag' in the same race. Mr Oliver was also completing the fourth year of his apprenticeship.
- [4] The horses Ranked and Black Jag finished second last and last respectively after leading the race for most of the distance.
- [5] The stewards watching Race 3 opened an inquiry into the riding tactics adopted by Ms Grylls and Mr Oliver. The stewards found Ms Grylls and Mr Oliver guilty of a charge pursuant to Rule 135(b) of the Australian Rules of Racing. Rule 135(b) provides as follows:

The rider of every horse shall take all reasonable and permissible measures throughout the race to ensure that his horse is given full opportunity to win or to obtain the best possible place in the field.

[6] The stewards found that the riding tactics adopted by Ms Grylls and Mr Oliver were culpable in the circumstances of the race and '*had a direct bearing on their respective mounts weakening so noticeably in the home straight.*'¹ The stewards imposed a penalty on Ms Grylls and Mr Oliver being a one (1) month suspension.²

[7] The particulars of the charge concerning Ms Grylls, as detailed in the steward's report and the transcript of the hearing conducted by the stewards, is as follows:³

From the 1200 metres, after being challenged for the lead by Black Jag from the 1500 metres, Apprentice Grylls failed to attempt to restrain Ranked when Black Jag continued to challenge for the lead until passing the 900 metres when the pace was fast and it was reasonable and permissible to do so. This failure, in the opinion of the Stewards, resulted in Ranked not being given full opportunity to win or obtain the best possible place in the field.

[8] Ms Grylls applied for an internal review of the stewards' decision. On 17 October 2016, the Queensland Racing Integrity Commission confirmed the stewards' decision in relation to the charge concerning Ms Grylls but amended the penalty to a three (3) week suspension '*in line with the minimum penalty scope*'.⁴

[9] Ms Grylls wants to review the decision in relation to the finding that there has been a breach of Rule 135(b). Ms Grylls seeks an order that the stewards' decision be set aside and the penalty of a three (3) week suspension be quashed.⁵

[10] It is important to note that Mr Oliver also applied for an external review of the stewards' decision after applying for an internal review. At the review hearing, the Tribunal directed by consent that Ms Grylls' matter be determined at the same time as Mr Oliver's review application.⁶

¹ Exhibit 4, see stewards' report dated 20 September 2016, p 2.

² The suspension to commence at midnight on 29 September 2016 and to expire at midnight on 29 October 2016.

³ Ibid, see stewards' report dated 20 September 2016, p 1 and the transcript of proceedings dated 20 September 2016, p 21, L5-14.

⁴ Ibid, internal review decision dated 17 October 2016, p 3. See s 245(5) of the *Racing Integrity Act 2016* (Qld).

⁵ Outline of submission of the applicant dated 25 November 2016 and written submissions in reply dated 9 December 2016.

⁶ Direction dated 25 November 2016. On 20 October 2016, the Tribunal stayed the internal review decision of the Queensland Racing Integrity Commission pending the hearing of the review application.

What is the role of the Tribunal?

- [11] The Tribunal on review stands in the shoes of the respondent decision-maker to arrive at the correct and preferable decision.⁷ The Tribunal must decide the review by way of a fresh hearing on the merits. It is not necessary to establish any error in either the process or the reasoning that led to the decision and there is no presumption that the reviewable decision was correct.⁸
- [12] In the review proceeding, the respondent decision-maker has a duty to assist the Tribunal so that it can make its decision.⁹ This includes cross-examining Ms Grylls and her witnesses giving evidence in the proceeding. The respondent decision-maker must also ensure that all material relied upon in making the decision being reviewed has been disclosed.
- [13] The Tribunal on review must be satisfied to the required civil standard on the balance of probabilities, that the charge or allegation as particularised is proven. In *Briginshaw's* case, commonly referred to as the '*Briginshaw principle*',¹⁰ Dixon J (as he then was) said that the allegation must be made out to the reasonable satisfaction of the Tribunal and should not be '*produced by inexact proofs, indefinite testimony, or indirect inferences*'. The relevant extract from *Briginshaw's* case is as follows:¹¹

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

- [14] In conducting a proceeding, the Tribunal on review is not bound by the rules of evidence,¹² but must observe the rules of natural justice and, amongst

⁷ Queensland Civil and Administrative Tribunal Act 2009 (Qld) (the QCAT Act), s 20.

⁸ *Kehl v Board of Professional Engineers of Queensland* [2010] QCATA 58, [8].

⁹ QCAT Act, s 21.

¹⁰ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 to 362.

¹¹ *Ibid.*

¹² Section 28(b) of the QCAT Act provides that the rules of evidence do not apply other than to the extent that the tribunal adopts them.

others, *'ensure, so far as is practicable, all relevant material is disclosed to the tribunal to enable it to decide the proceeding with all the relevant facts.'*¹³

- [15] In this case, the respondent has filed material including transcripts of the stewards' hearings held after the race, the stewards' original decision, the race footage, the internal review decision, Ms Grylls' disciplinary history, and a summary of relevant comparatives. The respondent also relies on the evidence of Daniel Paul Aurisch, Deputy Chief Steward Thoroughbreds, employed by the Queensland Racing Integrity Commission.¹⁴
- [16] At the review hearing, both parties agreed to Ms Grylls presenting her evidence first. Ms Grylls relies on her oral evidence and the evidence of Michael Pelling, a former jockey. It is non-contentious that Mr Pelling is a person who is recognised in the racing industry as having considerable experience as a jockey.
- [17] In closing written submissions, the respondent submits that the issue before the Tribunal on review is whether the stewards have proven the charge as particularised to the required civil standard.¹⁵ The respondent submits that the Tribunal *'should believe'* Mr Aurisch over that of Ms Grylls and Mr Pelling.¹⁶ The respondent submits that the transcripts show that the trainer of the horse, Ranked, (Mr J Wallace) made various statements during the stewards' hearing that (in effect) agreed with Mr Aurisch that Ms Grylls did not give her horse the full opportunity to win or obtain the best possible place in the field.¹⁷
- [18] In closing written submissions in reply, Ms Grylls' legal representative, Mr Tutt, says that the evidence of Mr Pelling should be preferred over the evidence of Mr Aurisch.¹⁸ Mr Tutt contends that Ms Grylls' horse finished in the position the betting public expected it to finish and Ms Grylls was not expected (by the betting public) to finish in any better position than she did. Mr Tutt contends that Ms Grylls did not restrain her mount at the 1200 metres position because had she done so, she would have been behind a horse that was inevitably going to lose ground suddenly. Mr Tutt says that the purpose of Rule 135(b) is not what a rider should do with the benefit of hindsight, but what the rider did at the time.

What is the relevant law – the Australian Rules of Racing, Rule 135(b)?

- [19] Rule 135(b) requires the Tribunal on review to adopt an objective test in determining whether the steps taken and decisions made by the jockey

¹³ QCAT Act, s 28.

¹⁴ Exhibit 4.

¹⁵ Outline of submissions on behalf of the respondent filed on 2 December 2016.

¹⁶ Ibid, [15].

¹⁷ Ibid.

¹⁸ Outline of submissions on behalf of the applicant in reply to the respondent's submissions dated 9 December 2016.

satisfy the obligations set out in the Rule.¹⁹ The purpose of Rule 135(b) is not to punish a jockey who makes an error of judgment.

[20] In the matter of *Damian Browne*,²⁰ the former Queensland Racing Disciplinary Board said that the core focus of Rule 135(b) is the quality of the jockey's ride and whether she or he fails, given the circumstances of the race, to take all reasonable and permissible measures throughout the race to ensure that the horse is given a full opportunity to win or obtain the best possible place in the field. *Browne's* case said that if the jockey fails then there is a breach of the Rule and the jockey is liable to penalty.

[21] In applying an objective test to Rule 135(b), *Browne's* case said that one must make an objective assessment of the jockey's ride given all of the relevant circumstances of the race and, in particular, the quality of the jockey's ride having regard to the facts and circumstances of this race.²¹ *Browne's* case considered earlier decisions involving a breach of Rule 135(b) and captured emerging principles from those cases set out below as follows:²²

- (1) It is the quality of the ride in the circumstances of the particular race which has to be judged;
- (2) That judgement must be based on an objective assessment of the jockey's ride in [the] particular race;
- (3) A mere error of judgment by a jockey is not a sufficient basis for an adverse finding that [Rule 135(b)] has been breached;
- (4) The rider's conduct must be culpable in the sense that, objectively judged, it is found to be blameworthy.

[22] In *Racing Queensland Ltd v Cassidy*²³ the Tribunal said that Rule 135(b) does not exist to punish a rider simply because she or he does not win the race or secure a place that is consistent with the trainers, bookkeepers or betting public's expectation. The Tribunal said that something more is required to offend the Rule such as the availability of a measure to improve the horse's success in the race and an unreasonable failure to take that measure. The relevant extract from *Cassidy's* case is as follows²⁴:

However, AR 135(b) does not exist to punish a rider simply because he does not win, or does not achieve a place consistent with the trainers, bookkeepers or betting public's expectations. Even a decision which appears poor with the benefit of hindsight will not offend the Rule without more. What is needed to offend AR 135(b) is the availability of a measure to

¹⁹ *Racing Queensland Ltd v Cassidy* [2012] QCAT 31.

²⁰ *In the matter of Jockey: Damian Browne*, unreported, Queensland Racing Disciplinary Board, 18 March 2014, 2.

²¹ *Ibid.*

²² *Ibid.*

²³ [2012] QCAT 31.

²⁴ *Ibid.*, [7].

improve the horse's success in the race and an unreasonable failure to take that measure...

[23] *Cassidy's* case outlined the factors relevant to a charge under Rule 135(b) and referred to the decision of the former Racing Appeal Tribunal in *Radecker, MS v Queensland Racing*.²⁵ The factors outlined in *Cassidy's* case and *Radecker's* case were factors identified at first instance in the matter of *Chris Munce*.

[24] *Munce's* case was an unreported decision of the Racing Appeals Tribunal of New South Wales.²⁶ *Munce's* case said that the task of administering Rule 135(b) is not always easy and that the Rule is not designed to punish (a jockey) unless the conduct of the jockey falls below the objective judgment reasonably expected of a jockey in the position of the person charged in the particular race. The relevant extract from *Munce's* case is as follows:²⁷

The task of administering the rule is not always easy. One must keep it clearly in mind that on its true interpretation it is not designed to punish a jockey unless on the whole of the evidence in the case the Tribunal [in] considering a charge under the rule is comfortably satisfied that the person charged was guilty of conduct that in all the relevant circumstances fell below the level of objective judgment reasonably to be expected of a jockey in the position of the person charged in relation to the particular race.

[25] *Munce's* case identified relevant circumstances as being '*numerous*'. These same circumstances were identified in *Radecker's* case and include the seniority and experience of the person charged, the competitive pressure under which the person charged was riding in the particular race, and any practical necessity for the person charged to make a sudden decision between alternative courses of action.²⁸

[26] *Munce's* case said that Rule 135(b) is not '*designed*' to punish jockeys who make errors of judgment '*unless those errors are culpable by reference to the criteria [sic] described*'.²⁹

What does Ms Grylls say?

[27] The oral evidence of Ms Grylls is that this was the first time she had ridden Ranked. Mr Wallace, her trainer, gave instructions to ride her horse '*positively*' out of the gates and that it is '*fine*' if she ends up in the front leading. In giving her oral evidence, Ms Grylls explained that to ride positively means to '*urge*' herself along out of the gate.

²⁵ [2008] QRAT 4.

²⁶ *In the matter of Licensed Jockey Chris Munce*, unreported, Racing Appeals Tribunal of New South Wales, 5 June 2003.

²⁷ *Ibid.*

²⁸ *Radecker's case*, p 4.

²⁹ *Ibid.*

- [28] Ms Grylls stated that her horse finished sixth out of seventh in the race and her horse's odds for the race were the sixth worst odds of the seven runners.³⁰ Ms Grylls also stated that her horse's '*race form*' was in summary 26 starts for four wins, three second places and four third places.³¹
- [29] Ms Grylls stated that from 1200 metres Mr Oliver's horse Black Jag was directly '*outside*' of her. Ms Grylls stated that her horse was travelling well, stating '*he's travelling comfortably*'. Ms Grylls gave evidence about why she did not restrain her horse at 1200 metres to 900 metres when another horse continued to challenge for the lead. Ms Grylls stated that Mr Oliver had drawn a '*wide barrier*' and had really urged his horse along to get around her, stating that to pull her horse back in behind his horse it (the horse) has '*done all that work*' would probably be the first horse to stop. Ms Grylls was questioned about which of the other six runners is the least likely horse that she would want to be (travelling) behind. Ms Grylls stated '*his horse*' meaning Mr Oliver's horse because, as stated, '*it's done all the work*'. Ms Grylls also gave evidence about her experience as a jockey. She has ridden in over 100 races and has had approximately 160 wins.
- [30] During cross-examination, Ms Grylls stated that she had looked at Ranked's form prior to the race and stated that Ranked had an advantage over Black Jag in the barrier start because the horse had drawn a '*good gate*'.
- [31] It is Ms Grylls' evidence that the horses, Ranked and Black Jag, were eyeballing each other between the 1200 metre and 900 metre mark and that she expected Mr Oliver to go forward and around her when he put his horse slightly in front (at 1200 metres).
- [32] At the oral hearing, Ms Grylls was questioned about her earlier evidence given to the stewards in relation to her horse being '*eyeballed*' by Black Jag. Ms Grylls was questioned about what she meant by '*eyeballing*'. Ms Grylls stated that Mr Oliver's horse came up '*head to head*' and was eyeballing (Ranked) referring to their horses being '*right beside each other*'. Ms Grylls stated that this (eyeballing) '*fires*' the horses up stating '*they want to race each other*'. Ms Grylls stated that in races when someone sets off, the horse in front relaxes and travels comfortably and the horse behind will also travel comfortably because they are not looking at each other in the eye.
- [33] Ms Grylls accepted when questioned that the horses were eyeballing each other in the early stages of the race. When questioned about whether she thinks it would have been appropriate to try and relax her horse a bit more given the distance she had to run, Ms Grylls stated that she had established her lead and was comfortably holding her horse. Ms Grylls stated that Mr Oliver has done all this work to come up outside of her. She stated that it was Mr Oliver's decision to go forward in front of her which she said she gave him an opportunity to do or Mr Oliver could pull his horse back.

³⁰ Exhibit 1.

³¹ Exhibit 2.

- [34] Ms Grylls was questioned about when she gave Mr Oliver an opportunity to '*pull in front*'. Ms Grylls stated that it was about the 1200 metre mark. She stated that she did not urge her horse forward and Mr Oliver's horse could have gone forward but Mr Oliver has decided he was not going to go and has '*pulled back*' and sat right beside her.
- [35] When questioned about whether Ms Grylls knew how far behind the other horses were positioned in the race, Ms Grylls stated '*No*' because she cannot see behind. Ms Grylls stated that Ranked and Black Jag did not actually go that fast stating that '*it looked a lot worse*' because the horses behind were going '*pretty slow*'.
- [36] Ms Grylls accepted when questioned that Black Jag is a horse that likes to lead. Ms Grylls did not accept that it would have been appropriate when her horse was challenged (by Black Jag) to '*ease up*' to give Ranked a better opportunity to lead. Ms Grylls stated that the horse, Black Jag, has done more work than any other horse in the race and she did not want to be stuck behind the horse because she knew that the horse would stop quickly. Ms Grylls gave evidence about why she did not pull back (at 1200 metres) and stated that she had already established a lead and it is up to Black Jag to go forward or come back. She stated that it was not her decision (to make). She again stated that she could not see the runners behind her and was travelling on the bridle comfortably.
- [37] Ms Grylls was questioned about the hearing before the Stewards and her statement that the horse Black Jag sat beside her and did not try to go forward and, as stated by her, she '*sat there coasting the horse*'.³² Ms Grylls stated in regards to the word '*coasting*' that she was sitting there not urging and not going backwards, stating '*I was just comfortable where my horse was racing or how my horse was racing*'.

The evidence of Michael Pelling

- [38] Mr Pelling's evidence contained in his affidavit is that, had Ms Grylls restrained her horse to let Mr Oliver's horse cross her at the back straight (i.e. 1400 metres to 900 metres), she would have found herself in a position behind Mr Oliver. Mr Pelling states that Mr Oliver's horse was likely to stop quickly given its position and Ms Grylls could have found herself '*locked in behind him and dragged through the field*'.³³
- [39] At the review hearing, Mr Pelling gave oral evidence about the race footage. Mr Pelling stated that Ms Grylls has gone to the lead, stating '*a dominant position*'. Mr Pelling stated that it was '*quite surprising*' given the speed that they (the horses) were going on a rain-affected track when Mr Oliver's horse came up to her outside. Mr Pelling stated that there is '*probably a chance*' that when Mr Oliver came up beside her she could have, had she known what was going to happen later, pulled up then and let Mr Oliver go to the

³² Exhibit 4, transcript dated 10 September 2016.

³³ Exhibit 3.

lead. Mr Pelling stated, however, that when looking at the video footage Mr Oliver did not actually look like he wanted to lead.

- [40] Mr Pelling gave oral evidence about the horses '*eyeballing*' each other in the race. He stated that the effect of this referring to two horses side-by-side would be to '*eyeball*' each other and the horses will try to compete against each other as if they are in a '*gallop*'. Mr Pelling stated that Ms Grylls' ride was more a '*lack of confidence*'.
- [41] Mr Pelling was cross-examined about the riding tactics adopted by Ms Grylls in the race. Mr Pelling accepted that around the back straight that if Mr Oliver took the lead, Ms Grylls could have eased up, sat behind him, and waited for the horse to come out.
- [42] Mr Pelling was cross-examined about other tactics (at the back straight) that could have been adopted by Ms Grylls in the race. Mr Pelling was questioned about dropping back (to allow Mr Oliver to lead) as the other horses are a fair distance behind and this would allow her horse to go back around. Mr Pelling stated that Mr Oliver has to get two lengths in front to cross over and he (Mr Oliver) will start slowing down. Mr Pelling stated that it would put Ms Grylls '*outside*' him because she would know that if she sits there, she is going to be '*locked in*'.
- [43] When questioned about whether Ms Grylls could go '*one wide*', Mr Pelling stated that he would imagine the riders behind, as soon as they saw this happening, would '*put her in a box*'. Mr Pelling agreed during cross-examination that Ms Grylls could have eased up and let the outside horse (Ranked) go to the lead and then wait for the horse to come out so she can '*pop out*' again.
- [44] Mr Pelling stated that it was too late for any sort of tactics like that. Mr Pelling stated that Ms Grylls would have been '*better off*' remaining where she was. Mr Pelling accepted during cross-examination that both Ms Grylls and Mr Oliver have run their race too fast in the early stages of the race and stated that the leading horse (ridden by Ms Grylls) was a victim of circumstance.
- [45] Mr Pelling accepted, when questioned, that a jockey must follow instructions given by the trainer about how the horse should be ridden. Mr Pelling was questioned about whether he agrees that there was an opportunity from 1600 metres to pull the horse back. Mr Pelling stated, '*yes*', referring to when Mr Oliver came up beside her the first time. Mr Pelling stated that when you are riding, you have to read the body language of the other rider stating, '*you look at his action*'. Mr Pelling stated that if he is going to lead, you '*let him go*'. Mr Pelling stated that in this race Mr Oliver's body language did not show that, stating '*he's just seemed to be almost as though he just wanted to be near the leader*'.
- [46] Mr Pelling stated that Mr Oliver's horse is the last horse you want to be behind by the time you get to the back straight. Mr Pelling stated that you would not want to be behind that (Mr Oliver's) horse.

What do the stewards say?

- [47] Mr Aurisch, Chief Steward, witnessed the race from the Stewards Tower on the outside track after the winning post. In his affidavit, Mr Aurisch states that the track rating on the day was a soft seven. He states that he observed Ms Grylls' horse, Ranked, race on a number of occasions previously and the form provided to the stewards indicated that Ranked would settle towards the rear of the field.³⁴
- [48] Mr Aurisch states that Ranked began well and was in the lead soon after the start. The horse, Black Jag, ridden by Mr Oliver crossed the field to race to the outside of Ranked passing the 1600 metres. Mr Aurisch states that Ranked was challenged for the lead by Black Jag between 1500 metres and the 1200 metres, stating '*when it seemed evident from my observations that Apprentice Oliver was trying to take the lead on Black Jag*'.³⁵
- [49] Mr Aurisch states that Black Jag was unable to safely clear Ranked by the 1200 metres and continued to race during the middle stages of the race '*resulting in both horses setting a fast tempo and being a considerable distance, in front of the other five horses in the race*'.³⁶
- [50] Mr Aurisch states that Ranked weakened noticeably over the final 400 metres of the race to finish sixth beaten by 12.9 lengths. Ranked started at the odds of \$13.00.³⁷
- [51] Mr Aurisch states that his concerns about Ms Grylls' riding on that day are that she (Ms Grylls) did not attempt to restrain Ranked in the back straight when continually challenged by Black Jag, stating that '*these tactics had a direct bearing on the capacity for the horse to finish the race off competitively*'.³⁸
- [52] Mr Aurisch states that the trainer of Ranked, Mr John Wallace, gave evidence during the inquiry and he (Mr Wallace) '*expressed disappointment with the riding tactics adopted by Apprentice Grylls*'.³⁹
- [53] It is Mr Aurisch's oral evidence in chief that he was satisfied with the riding tactics adopted by Ms Grylls up until the 1600 metres when Black Jag joined her horse, Ranked. When questioned about what he observed from 1600 metre to 1200 metres, Mr Aurisch stated that he observed Mr Oliver increase the speed to the outside of Ranked referring to him trying to challenge Ranked for the lead but did not have the necessary speed to do that.

34 Exhibit 5.
 35 Ibid, [13].
 36 Ibid.
 37 Ibid.
 38 Ibid.
 39 Ibid.

- [54] Mr Aurisch stated that he was not surprised that the horse, Black Jag, challenged the horse, Ranked, referring to the '*speed maps*' and the horse Black Jag as being '*the leader*'. Mr Aurisch stated that from when the horses turned into the back straight (near the 1300 metres) down to the 900 metre or 850 metres, he felt that both riders had to show a judgment '*to take hold of their mount*' so that both horses could finish the race.
- [55] Mr Aurisch gave evidence about the charge presented against Ms Grylls. He stated that Ms Grylls can maintain her position if it is in the best interests of her horse. He stated that the stewards felt that it got to a point down the back straight where she had an opportunity to slow the speed of her horse to conserve some energy.
- [56] When questioned about whether there was any danger to Black Jag or the horses behind the field if Ms Grylls slowed the speed of her horse he stated, '*No*'. Mr Aurisch stated that the horses (Ranked and Black Jag) had already put some distance between them and the other horses, stating that there would have been an opportunity for Ms Grylls to '*restrain*' and come to the outside of Black Jag and by virtue of that action there would have been a reduction in the pace of the race.
- [57] Mr Aurisch accepted during cross-examination that Ms Grylls is not obligated to accommodate other riders in the race. Mr Aurisch also accepted during cross-examination that it was from the 1200 metre to 900 metre mark that he had concerns about Ms Grylls' ride and accepted when questioned that she should have restrained '*her mount*' to allow Black Jag to go in front of her from 1200 metres to 900 metres.
- [58] Mr Aurisch stated that Ms Grylls could have given her horse some respite in the middle part of the race and stated that he is not suggesting Ms Grylls stays behind Black Jag and stated that Ms Grylls could have raced to the outside.
- [59] Mr Aurisch was questioned about the charges presented against Mr Oliver. When questioned about whether it was reasonable for Mr Oliver to restrain Black Jag, Mr Aurisch stated '*Yes*'. Mr Aurisch stated that turning into the back straight it became apparent that Black Jag was not going to get past Ranked but it continued to race to the outside. He stated that both apprentices had a responsibility to slow the speed.
- [60] Mr Aurisch was questioned about the fact that the stewards want Mr Oliver to restrain his mount and want Ms Grylls (from 1200 metres), after being challenged from 1500 metres, to restrain her mount when Black Jag continues to challenge. Mr Aurisch accepted that it is not for Ms Grylls to accommodate other riders if it is in the best interests of her horse and accepted that Ms Grylls is not '*pushing*' Ranked along but rather it (the horse) maintains its position. Mr Aurisch stated that there were two riders out there and either one of them could have made the decision (to restrain) and neither one of them did.

- [61] Mr Aurisch also accepted when questioned that Mr Oliver's riding tactics were far more culpable. He stated that the work Mr Oliver's horse has done in the early part contributed to his horse weakening earlier than Ms Grylls' horse.

What is the correct and preferable decision?

- [62] The particulars of the charge concerning Ms Grylls are that from 1200 metres after being challenged by Black Jag, Ms Grylls failed to restrain Ranked when Black Jag continued to challenge and the pace was fast and it was reasonable and permissible to do so.
- [63] It is non-contentious that Ranked finished its race in the position the betting public expected it to finish. Based on the form provided to the stewards, Ranked would settle towards the rear of the field and the horse, Black Jag, was a leader. It is common ground that Ms Grylls is not obligated to accommodate other riders in the race.
- [64] Immediately after the race, the stewards held an inquiry into the riding tactics of Ms Grylls and Mr Oliver. Ranked's trainer, Mr Wallace, told the stewards that Ms Grylls and Mr Oliver went '*too fast*' and that they went '*too quick*'.⁴⁰
- [65] Mr Aurisch's evidence given at the review hearing on behalf of the stewards is that they had concerns with Ms Grylls' riding tactics from 1600 metres when Ranked was joined by Black Jag. Mr Aurisch's evidence is that Ms Grylls, from 1200 metres to 900 metres, should have restrained her mount to allow Black Jag to go in front of her, suggesting she could have raced to the outside. Mr Aurisch says that from the back straight (near 1200 metres) Ms Grylls should have changed her riding tactics, such as restraining her horse.
- [66] Ms Grylls gave evidence in the review hearing. Ms Grylls says that Ranked was 'eyeballed' by Black Jag which made the horses (Ranked and Black Jag) want to race each other or run '*keenly*'. Ms Grylls says that from 1200 metres to 900 metres she did not urge her horse forward. Ms Grylls says that between 1200 metres and 900 metres, she expected Mr Oliver to go forward and around her.
- [67] Ms Grylls gave evidence about her instructions on the day of the race. Ms Grylls stated that her instructions were to ride her horse positively and that it is '*fine*' if she ends up in the front leading. Ms Grylls also gave evidence about her riding tactics adopted from 1200 metres to 900 metres. The Tribunal found Ms Grylls to be honest and open in giving her evidence.
- [68] Ms Grylls' evidence that her horse was 'eyeballed' by Black Jag and that she expected Mr Oliver to go forward and around her is consistent with her evidence given to the stewards at the hearing on 10 September 2016 and

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Exhibit 4, transcript dated 10 September 2016, page 3.

20 September 2016. The relevant extract from the stewards' hearing immediately after the race on 10 September 2016 is as follows:

THE CHAIRMAN: Apprentice Oliver and apprentice Grylls and trainer Mr Trevor Whittington – he is the trainer of Black Jag. Apprentice Oliver, you rode that horse, and apprentice Grylls, you were the rider of Ranked in Race 3 at Doomben today.

APP. JOCKEY GRYLLES: Yes, sir.

THE CHAIRMAN: The stewards wish to question you regarding your riding tactics that you adopted, particularly from the 1400 metres down to the 800 metres, where you seemed to set a fast tempo. You were some conservatively 6, 7 in front of the main body of the field, and watching the race live I wasn't surprised when you weakened before the home turn – both of you.

Firstly, Bridget Grylls, can you explain your ride and your instructions?

APP. JOCKEY GRYLLES: Yes, sir. I was told to ride my horse positively, so when ended up in front I was pretty happy to be there. Just coming into the first turn, apprentice Oliver's horse, he sort of eyeballed me and I have given him opportunity to cross me and lead and he hasn't really taken that opportunity. He just sort of eyeballed my horse the whole way, which has made my horse run a bit keenly.

But I didn't realise that we were that far in front, sir, but I just – my horse was just running a bit keen, but he didn't actually cross me. I was quite happy to let him go but he just got to that point and (inaudible) any further.

- [69] The transcript shows that Ms Grylls did not change her evidence in relation to her riding tactics when questioned by the stewards. Ms Grylls stated that she gave Mr Oliver time to cross and that her horse wanted to race '*a bit keen*'.⁴¹
- [70] Ms Grylls maintained her evidence that the horses were running head to head and that she thought Mr Oliver was going to go ahead of her horse when giving evidence at the further hearing on 20 September 2016. Ms Grylls stated that '*we didn't realise that we were that far in front because we didn't think that we were going quite that fast*'. The relevant extract from the transcript is as follows:

APP. JOCKEY GRYLLES: Yes, it was just the way it panned out. We just ended up head and head and making each other go keener and keener. Like both Josh and I said we didn't realise that we were that far in front because we didn't think that we were going quite that fast, and there was a stage where I thought that Josh was going to go ahead of me and I was quite happy to sit there, but then we were too far down the back straight and we just ended up staying in that head-to-head position in which our horses were racing quite keen.

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Exhibit 4, transcript dated 10 September 2016, page 3.

- [71] I have also considered the evidence of Mr Aurisch given at the review hearing during cross-examination when he was questioned about a horse being 'eyeballed' in a race. Mr Aurisch did not dispute, when questioned, that when two horses are side by side so that they are '*eyeballing*' each other that the horses will try to compete as if they are in a gallop. Mr Aurisch's evidence is that in relation to 'eyeballing', the horses will work harder than they normally do.
- [72] Ms Grylls' evidence given about her riding tactics in the race, in particular, her decision to maintain her position is supported by Mr Pelling's evidence. The Tribunal found Mr Pelling to be honest and open in giving his evidence at the review hearing. Mr Pelling was cross-examined about the riding tactics that could have been adopted by Ms Grylls in the race, particularly from 1200 metres. Mr Pelling says that there was an opportunity when Mr Oliver came up beside Ms Grylls (at 1600 metres) had she (Ms Grylls) known what was going to happen, to pull up then and let Mr Oliver go to the lead. It is Mr Pelling's evidence that at the back straight it was too late for any sort of tactics such as easing up to allow Ranked to take the lead. Mr Pelling's evidence is that Ms Grylls was better off remaining where she was in the race. The Tribunal accepts Mr Pelling's evidence.
- [73] I accept Ms Grylls' evidence that she was comfortable holding her horse having established her lead and that she did not urge her horse forward at 1200 metres. I accept Ms Grylls' evidence that she did not make the tactical decision to ease up or restrain her horse because Black Jag had done more work than any other horse in the race and she did not want to be behind the horse, Black Jag.
- [74] I accept Ms Grylls' evidence that Mr Oliver's horse was '*head-to-head*' with Ranked and '*eyeballed*' Ranked. It is open to me to draw the reasonable inference, having accepted Ms Grylls' evidence, that because Ranked was '*eyeballed*' by Black Jag, Ms Grylls' horse (Ranked) has, as stated by Ms Grylls, run '*a bit keenly*'. I also accept Ms Grylls' evidence that at about 1200 metres she did not urge her horse forward, and Mr Oliver's horse sat right beside her.
- [75] I have had the benefit of seeing the race footage and hearing oral evidence from all of the witnesses including Mr Oliver in relation to his review proceeding. I am not satisfied having considered all of the evidence and the relevant circumstances that the charge as particularised has been proven. The relevant circumstances I have considered include the distance and pace of the race, the position of the horses that were racing at one point in the race 'head to head', and Ms Grylls' instructions to ride her horse '*positively*'.
- [76] The purpose of Rule 135(b) is not to punish a jockey who makes an error of judgment. As said in *Browne's* case, the Tribunal must make an objective assessment of Ms Grylls' ride given all of the circumstances of the race and

the quality of her ride.⁴² I accept Mr Aurisch's evidence that there was a tactic available to Ms Grylls in this race, such as restraining Ranked from 1200 metres. I am not satisfied, however, based on the evidence before me and having considered all of the relevant circumstances that Ms Grylls' failure to restrain Ranked from 1200 metres was unreasonable and that the riding tactics adopted by Ms Grylls in Race 3 offend Rule 135(b).

- [77] In this race, the horse, Ranked, secured a leading position before it was joined by Black Jag at about 1500 metres. The evidence shows that the horses were running '*keenly*' because during one part of the race Black Jag was running head to head with Ranked. Ms Grylls made a decision in the fast pace of the race to not restrain Ranked and to maintain her position. Ms Grylls acted on an assumption that Black Jag would go forward and around her. Ms Grylls' assumption that Black Jag would go around her in the race was wrong because Black Jag raced head to head with Ranked before quickly losing its speed and place in the race. Ranked also lost speed quickly and lost its place in the race.
- [78] I find based on the evidence before me that by 1200 metres, it was not unreasonable for Ms Grylls to maintain her position and remain where she was in the race. I am not satisfied that Ms Grylls' actions in this race are blameworthy and that the charge as particularised is substantiated. The correct and preferable decision is that Ms Grylls is not guilty of a charge pursuant to Rule 135(b) of the Australian Rules of Racing for Race 3 at Doomben Racecourse on 10 September 2016.

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Browne's case.