

CITATION: *Oliver v Queensland Racing Integrity Commission* [2017] QCAT 50

PARTIES: Joshua Oliver
(Applicant)
v
Queensland Racing Integrity Commission
(Respondent)

APPLICATION NUMBER: OCR189-16

MATTER TYPE: Occupational regulation matters

HEARING DATE: 24 November 2016 and 30 January 2017

HEARD AT: Brisbane

DECISION OF: **Member Browne**

DELIVERED ON: 20 February 2017

DELIVERED AT: Brisbane

ORDERS MADE:

1. **The original decision of the Queensland Racing Integrity Commission made on 20 September 2016 that Apprentice Joshua Oliver is guilty of a charge pursuant to Rule 135(b) of the Australian Rules of Racing and that a penalty of one (1) month suspension be imposed is set aside and the following decision is substituted:**
 - a) **Apprentice Joshua Oliver 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:

Joshua Oliver represented by Mr J E Murdoch of Queens Counsel instructed by O'Connor Ruddy & Garrett Solicitors

RESPONDENT:

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

REASONS FOR DECISION

- [1] On 10 September 2016, apprentice jockey Joshua Oliver rode a thoroughbred horse 'Black Jag' in Race 3 at Doomben Racecourse over a distance of 2200 metres.
- [2] Mr Oliver was completing the fourth year of his apprenticeship. He would be eligible to apply to become a senior jockey in mid-December 2016.
- [3] Another apprentice jockey, Bridget Grylls, was riding a thoroughbred horse 'Ranked' in the same race. Ms Grylls was also completing the fourth year of her apprenticeship.
- [4] The horses Black Jag and Ranked finished last and second 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 Mr Oliver and Ms Grylls. The stewards found Mr Oliver and Ms Grylls 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 Mr Oliver and Ms Grylls 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 Mr Oliver and Ms Grylls being a one (1) month suspension.²

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

After riding Black Jag along in the early stages to settle outside of the leader Ranked passing the 1600m, Apprentice Oliver continued to pressure Black Jag between the 1500m and the 1200m and challenge Ranked. Furthermore, Apprentice Oliver continued to challenge Ranked and set a fast tempo in the middle stages when both horses were considerable distance ahead of the main body of the field when it was reasonable and permissible to restrain Black Jag. These tactics, in the opinion of the stewards, resulted in Black Jag not being given full opportunity to win or obtain the best possible place in the field.

[8] Mr Oliver 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 and penalty.⁴

[9] Mr Oliver wants to review the decision in relation to the finding that there has been a breach of Rule 135(b). Mr Oliver seeks an order that the guilty finding be set aside and that in the alternative the penalty be reduced.⁵

[10] It is important to note that the internal review decision has been stayed pending the hearing of the review application.⁶ Ms Grylls also applied for an external review of the stewards' decision.

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

¹ Exhibit 7, 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 Exhibit 7, see the stewards' report dated 20 September 2016, p 1 and Exhibit 5, the transcript of proceedings dated 20 September 2016, p 16, L30-41.

⁴ Ibid, internal review decision dated 17 October 2016.

⁵ Application to review a decision filed on 20 October 2016. Outline of submissions of the applicant dated 16 November 2016.

⁶ Direction dated 21 October 2016.

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

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 Mr Oliver and his 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 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, the stewards' original decision, the race footage, the internal review decision, Mr Oliver's disciplinary history, and a summary of relevant comparatives. The respondent relies on the evidence of Daniel

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.

¹³ QCAT Act, s 28.

Paul Aurisch, Deputy Chief Steward Thoroughbreds, employed by the Queensland Racing Integrity Commission. Mr Aurisch presented his evidence before Mr Oliver.

- [16] Martin Frederick Lenz, Chief Thoroughbred Veterinary Surgeon and Director for the Queensland Racing Integrity Commission, gave evidence on the second day of the hearing after Mr Oliver had given his evidence.¹⁴ Dr Lenz examined Black Jag after the race and found '*slight soreness*' on flexion of the left fore fetlock joint with no evidence of lameness.¹⁵
- [17] Mr Oliver relies on his own evidence and the evidence of Paul Daily, professional punter. It is non-contentious that Mr Daily is a person who has experience in race analysis.
- [18] It is common ground that Black Jag is a horse that normally leads. The instructions given to Mr Oliver by the trainer, Mr Trevor Whittington, on the day of the race were '*to lead*'. It is also common ground that Black Jag was retired from racing after having one more race start on 8 October 2016.
- [19] In closing oral submissions, Mr Kelly for the respondent submits that Black Jag's trainer, Mr Whittington, expressed disappointment about the tactics adopted in the race by Mr Oliver. Mr Kelly submits that the evidence of Black Jag's trainer contained in the transcript of the stewards' hearing and the race footage are '*compelling*'.
- [20] Mr Kelly submits that it was clear to the stewards that Mr Oliver did not give his mount the best possible chance to win in the race. Mr Kelly submits that, based on the evidence before the Tribunal, there was no genuine attempt by Mr Oliver to restrain Black Jag at around 1600 metres and he had ample opportunity to withdraw or pass but the mount did not have the tempo to get in front. Mr Kelly contends that at that stage of the race there was an opportunity to change tactics to allow Black Jag to finish off the race in the home straight.
- [21] Mr Kelly contends that Dr Lenz gave evidence in relation to his examination of Black Jag after the race and he (Dr Lenz) explained the meaning of '*soreness*' and the results of the examination conducted by him. Mr Kelly submits that the evidence of Dr Lenz is that Black Jag led the race on the opposite leg to where the soreness was detected and that races in Queensland go clockwise so it is typical for a horse to lead that way.
- [22] Mr Kelly submits that Dr Lenz was forthright and professional in giving his evidence and weight should be placed on his evidence in particular that the horse (Black Jag) was not suffering any major injury but had some soreness that could be attributed to age and the number of races that it has run.

¹⁴ Exhibits 1 and 12.

¹⁵ Exhibit 12, [7].

- [23] Mr Kelly submits that the Tribunal on review must consider the evidence and determine whether it is satisfied, based on the test in *Briginshaw's* case, that the charge has been proven.
- [24] In closing oral submissions in reply, Mr Murdoch QC contends that there is no factual basis for the proposition that Black Jag went too fast based on the times and sections of the race for the horses in the field. Mr Murdoch QC contends that the evidence of Dr Lenz is that post-race Black Jag had soreness in the near front fetlock joint when Dr Lenz flexed it after the race. Mr Murdoch QC submits that Black Jag being an eight-year-old horse with 80 race starts was sore in that critical joint and Dr Lenz accepted that the horse might have been favouring the other leg to lead in the race because of the soreness.
- [25] Mr Murdoch QC submits that it is accepted by the stewards that Black Jag was not racing up to its peak form and this is consistent with the horse being an old thoroughbred with 80 starts. Mr Murdoch submits that it is open to the Tribunal to draw the reasonable inference based on the evidence before it that Black Jag's performance in the race may have been inhibited by the fact that it was an eight-year-old thoroughbred that had one more race start before being retired and was not in its peak form. Mr Murdoch QC submits that it is open to the Tribunal to find that it is more likely than not that the horse's poor performance in the race was attributed to it having slight soreness in the left fore fetlock joint and was not in its peak form.
- [26] Mr Murdoch QC says that Mr Oliver rode to lead consistent with his instructions. Mr Murdoch QC says that Mr Oliver had a three kilogram allowance (so carrying three kilograms less) and this is an acknowledgement that he does not have the same level of experience and that you cannot have the same level of expectation of Mr Oliver. Mr Murdoch QC contends that the stewards say that Mr Oliver should have departed from his instructions to lead but this asks a lot from a '*claiming*' apprentice that is to make an alternate plan (to the instructions given) in the race.

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

- [27] 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 satisfy the obligations set out in the Rule.¹⁶ The purpose of Rule 135(b) is not to punish a jockey who makes an error of judgment.
- [28] In the matter of *Damian Browne*,¹⁷ 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

¹⁶ *Racing Queensland Ltd v Cassidy* [2012] QCAT 31.

¹⁷ *In the matter of Jockey: Damian Browne*, unreported, Queensland Racing Disciplinary Board, 18 March 2014.

possible place in the field. *Browne's* case said that if the jockey fails then there is a breach of the Rule and is liable to penalty.

[29] 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.¹⁸ *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:¹⁹

- (1) It is the quality of the ride in the circumstances of the particular race which has to be judged;
- (2) That judgment must be based on an objective assessment of the jockey's ride in [the] particular race;
- (3) A mere error of judgement 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.

[30] In *Racing Queensland Ltd v Cassidy*²⁰ 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 follows²¹:

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

[31] *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*.²² The factors outlined in *Cassidy's* case and *Radecker's* case were factors identified at first instance in the matter of *Chris Munce*.

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

¹⁹ Ibid.

²⁰ [2012] QCAT 31.

²¹ Ibid, [7].

²² [2008] QRAT 4.

[32] *Munce's* case was an unreported decision of the Racing Appeals Tribunal of New South Wales.²³ *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:²⁴

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.

[33] *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.²⁵

[34] *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*'.²⁶

What do the stewards say?

[35] Mr Aurisch, Chief Steward, witnessed the race. He was positioned in 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 Black Jag race before on 27 August 2016 and that the normal racing pattern of the gelding is to lead.²⁷

[36] Mr Aurisch states that Black Jag did not begin very well and was '*ridden forward vigorously*' soon after the start until it settled outside of the leader, Ranked, passing 1600 metres.²⁸

[37] Mr Aurisch states that Mr Oliver pressured Black Jag to challenge Ranked for the lead between 1500 metres and 1200 metres stating that '*he attempted to take the lead*'.²⁹ He states that Black Jag was unable to get

²³ *In the matter of Licensed Jockey Chris Munce*, unreported, Racing Appeals Tribunal of New South Wales, 5 June 2003.

²⁴ *Ibid.*

²⁵ *Radecker's* case, p 4.

²⁶ *Ibid.*

²⁷ Exhibit 1.

²⁸ *Ibid.*, [11].

²⁹ *Ibid.*, [12].

'sufficiently in advance of Ranked to safely cross that runner by 1200 metres'.³⁰

- [38] Mr Aurisch states that Black Jag continued to race to the outside of Ranked during the middle stages of the event resulting in both horses setting a fast tempo and *'being a considerable distance'* in front of the other five horses in the race. Black Jag weakened *'noticeably'* from 600 metres and finished last beaten 17.6 lengths from the eventual winner. Black Jag started at odds of \$7.00.³¹
- [39] Mr Aurisch states that his concerns about Mr Oliver's riding were that he had *'asked Black Jag to do too much work in the early and middle stages of the race'* and these tactics had a bearing on the horse's capacity to finish *'the race off competitively'*.³²
- [40] Mr Aurisch states that the trainer of Black Jag, Mr Trevor Whittington gave evidence during the inquiry and he (Mr Whittington) *'expressed disappointment... with the riding tactics adopted by Apprentice Oliver'*.³³
- [41] It is Mr Aurisch's oral evidence in chief that Mr Oliver had to ride quite vigorously in the early stages to get outside of Ranked. Mr Aurisch stated that he observed Mr Oliver apply *'more pressure'* to Black Jag to challenge Ranked for the leading position to try to get that position off Ranked.
- [42] Mr Aurisch stated that as Black Jag and Ranked got down towards 1500 metres Mr Oliver rode continually forward in an attempt to try and get the lead position and that was when the distance between the main body of the field and the horses (Black Jag and Ranked) got wider referring to one and a half lengths to four or five lengths.
- [43] Mr Aurisch was questioned about his concerns in relation to the horses having *'that much lead'*. Mr Aurisch referred to the amount of work that Black Jag had done from the barrier to be outside of Ranked when they were increasing the margin or the tempo in the middle part. Mr Aurisch stated that he was concerned with the speed they were going and that the tactics they (referring to Mr Oliver and Ms Grylls) were adopting as *'[not] being in the best interests of the horse'*. Mr Aurisch stated that from his experience he did not think they could maintain that speed and distance and *'be competitive'* in the race. Mr Aurisch stated that from 1500 metres to 1200 metres it became apparent that Black Jag did not have the *'necessary speed'* to cross Ranked and he had a considerable amount of time to *'take action'* referring to slowing down the horse's speed *'to give it every chance'*.
- [44] Mr Aurisch stated that Mr Oliver had sufficient time to make a *'proper assessment'* of what was happening. Mr Aurisch stated that Black Jag was *'losing ground noticeable from the 600 metres'*. Mr Aurisch stated that Black

³⁰ Exhibit 1, [12] to [15].

³¹ Ibid.

³² Ibid, [16].

³³ Ibid, [18].

Jag got within 50 to 100 metres down the straight and was '*weakening so badly*' Mr Oliver sat up stating that we (the stewards) do not take issue with that for horses that are '*legitimately spent*'.

- [45] During cross-examination, Mr Aurisch accepted that prior to the barriers releasing, he thought Black Jag would lead stating '*as it has done upon numerous occasions in the past*'. Mr Aurisch also accepted that Ranked was assessed as being one of the '*back markers*' stating '*we had it fifth of seventh in the race.*'
- [46] Mr Aurisch was questioned about the particulars of the charge and the way Mr Oliver rode Black Jag in the straight (the first time). Mr Aurisch stated that Mr Oliver has asked Black Jag to do a significant amount of work to get to a position where prior to the race the stewards thought he would be. He stated that Mr Oliver has '*quickenened the tempo*' from the 1500 metres to the 1200 metres in an attempt to take the lead from Ranked.
- [47] Mr Aurisch gave evidence that Black Jag, after being ridden in the early stages and not beginning well to '*just be in front*' had to work to get to the position of Ranked. Mr Aurisch's evidence is that Mr Oliver's riding in the early stages, meaning from the barriers, '*goes to the totality of the ride*' and the '*relevance of the charge*'. Mr Aurisch stated that as the race went on Mr Oliver's riding tactics became more blameworthy. He stated that if what Mr Oliver did from the barrier to the winning post on the first occasion '*stood alone*' then his riding would not be blameworthy.
- [48] Mr Aurisch accepted that Mr Oliver's riding instructions on the day were to lead. Mr Aurisch also accepted when questioned that Mr Oliver encouraged the horse to go forward in a way that was consistent with him '*endeavouring to get to the lead*'.
- [49] Mr Aurisch accepted that it would be detrimental to Mr Oliver's horse to attempt to go around the track between 1600 metres and 1300 metres with his horse (Black Jag) in a '*three-wide position*' meaning two horses on his inside. Mr Aurisch also accepted that when Mr Oliver got to the back straight he was able to '*launch a challenge*' but Ranked demonstrated a '*desire to hold the lead*'.
- [50] Mr Aurisch was questioned about the middle stages of the race, that is from 1200 metres to 800 metres. Mr Aurisch maintained his evidence that from 1200 metres it is the opinion of the stewards that Mr Oliver continued to challenge (for the lead) and set a fast tempo.
- [51] Mr Aurisch was questioned about whether he agrees that from 1200 metres Mr Oliver attempted to make a forward move but Ranked '*pushed up inside him*', to which Mr Aurisch stated, 'Yes'. When questioned about whether it was obvious he (Mr Oliver) could not clear two lengths to cross the fence, Mr Aurisch accepted that Black Jag did not have the necessary pace to get across the other horse, Ranked.

- [52] Mr Aurisch was questioned about whether he accepts that Black Jag, after having made an attempt to 'advance', has settled on the horse and travelled to the outside of Ranked without persisting with the attempt to cross. He stated that both horses in that middle stage were still racing stating they were '*still head and head*'. Mr Aurisch stated that Mr Oliver was not expected to try to pull back behind Ranked. He stated that Mr Oliver had had a course of action to take to reduce Black Jag's speed, referring to sitting behind Ranked for a period and then getting to the outside when Ranked started giving ground, or to come back to sit at the hind quarters of Ranked referring to both horses not having to work as hard. Mr Aurisch stated that Mr Oliver should give his mount some respite in the middle part (later referring to reducing its speed) to give it the opportunity to finish the race off, referring to the rule that deals with reasonable permissible measures.
- [53] Mr Aurisch did not dispute when questioned that passing the 1200 metres, Mr Oliver would have been in a position to slow the pace but this assumed he (Mr Oliver) succeeded at 1200 metres in taking the lead and he got two lengths clear and crossed the fence. Mr Aurisch accepted when questioned that Ranked was not going to let him get the two lengths clear to cross because Ms Grylls kept pushing up on his inside. Mr Aurisch stated that the stewards say Mr Oliver had the back straight, stating he had '*a shot for the lead*' and it was evident by 1100 metres and 1000 metres at the latest that he was not going to be successful (in taking the lead). Mr Aurisch stated that we (meaning the stewards) then ask the riders to make a judgment and attempt to give the horse a breather.
- [54] Mr Aurisch was questioned about the examination and report prepared by Dr Lenz after the race and whether Black Jag would be allowed to start if the horse was found to be slightly sore in the near front fetlock before the race. Mr Aurisch stated that he would have questioned Dr Lenz as to his opinion. Dr Aurisch stated '*no, [we] don't let them run*'. Mr Aurisch was questioned about Black Jag's previous races and performance. Mr Aurisch accepted that its best performances were behind it.
- [55] During re-examination, Mr Aurisch stated that in this race the stewards were not advised of any pre-race soreness of Black Jag. Mr Aurisch stated that there are veterinarians at the starting barrier in a race and that the veterinarian has a look at the horses in the mounting yard and will assess (referring to a visual assessment) the horses behind the gate as to their suitability to race.
- [56] Mr Aurisch stated that Black Jag has raced more than most thoroughbreds. Mr Aurisch's evidence is that careers (for thoroughbreds) normally span from two to five or six years.
- [57] When questioned about Mr Oliver's experience as a jockey, Mr Aurisch stated that he (Mr Oliver) has had a significant amount of experience but accepts that Mr Oliver still claims three kilograms which is the largest claim for the Brisbane metropolitan area and accepted that Mr Oliver was on the bottom rung of the metropolitan area.

What does Mr Oliver say?

- [58] Mr Oliver's evidence is that his instructions on the day of the race were to lead. Mr Oliver had ridden Black Jag on one previous occasion on 27 August 2016 in a 2000 metre handicap at Doomben.
- [59] In his affidavit, Mr Oliver states that having drawn the wide barrier he had to get his horse '*out of the barriers quickly*' to be able to cross the field and lead.³⁴ He states that as he travelled at about the 1700 metres, he made the decision to keep his horse '*balanced*'. Mr Oliver states that it was his intention to make a move to get to the lead '*on straightening in the back straight*'.³⁵ He states that as he approached the 1200 metres soon after entering the back straight, he could not get past Ms Grylls' horse stating '*[i]t kept pushing up inside and keeping me out*'.³⁶
- [60] Mr Oliver states that he could not get two lengths clear of Ms Grylls' horse and that he must get two lengths clear before he can cross the other horse.³⁷ He states that at about 1000 metres as he could not cross Ms Grylls' horse, he '*slid back about a half length behind her to give Black Jag a break*'.³⁸ As he approached 900 metres, Mr Oliver states that he gave Black Jag '*a bit more rein*'; however, the horse did not respond and by 800 metres the horse had '*nothing more to give*'.³⁹
- [61] Mr Oliver states that in his opinion, had he been able to get to the lead in the back straight and '*run in his comfort zone*', Black Jag may have '*finished closer*' than he did on the day. Mr Oliver states that had he '*taken hold*' of Black Jag between 1500 metres and 1200 metres and taken him behind Ranked, this would '*in his judgment*' have deprived Black Jag of any chance of winning or placing as it was contrary to his racing pattern.⁴⁰
- [62] It is Mr Oliver's oral evidence-in-chief that he got to the back straight without being vigorous, referring to using his hands to give the horse a nudge and the horse doing it on '*his own feet*'. Mr Oliver's evidence is that from 1500 metres to 1300 metres he wanted to keep his horse balanced and then '*put a head in front*' of Ranked when he turned into the back straight; however, Ms Grylls kept pushing up the side. Mr Oliver stated that Black Jag is the sort of horse that likes to set a good tempo. Mr Oliver stated that from 1000 metres to 600 metres he was '*balanced*' and stated that he gave Black Jag a little bit of a '*squeeze*' approaching the home turn. He stated that from 600 metres, he '*tested*' his horse referring to two cuts with the whip and from 400 metres onwards, he stated that he was being a bit soft on Black

34 Exhibit 10, [6].

35 Ibid, [10].

36 Ibid, [12].

37 Ibid, [13].

38 Ibid, [14].

39 Ibid, [15].

40 Ibid, [18].

Jag and from 200 metres to the finishing post, he has '*literally done nothing on him*'.

- [63] Mr Oliver gave evidence about the race footage viewed in the hearing. He stated that at 1000 metres he has let his horse '*be balanced*', referring to just sitting off Ranked. Mr Oliver stated that it was about 800 metres when he gave Black Jag '*a slight niggle*' referring to '*nothing aggressive*'. Mr Oliver stated that running down the home turn (at 600 metres), he was '*probably*' a neck behind Ranked and he has put the pressure on referring to, as stated, '*two with the stick*'. Mr Oliver clarified this to mean that he applied the whip once at 600 metres and again at 400 metres.
- [64] During cross-examination, Mr Oliver gave evidence about his instructions from the trainer and stated that he was told there is no speed in the race and Black Jag was likely to be the leader. Mr Oliver stated that he also read the speed maps a couple of days before the race. Mr Oliver stated that it was a bit of a surprise that Ranked was up there referring to the speed of the race.
- [65] Mr Oliver was questioned about his riding tactics around the back straight and whether he accepts that the two horses are '*neck and neck*' down the back straight. Mr Oliver stated that he was a head behind Ranked. Mr Oliver maintained his evidence that he was going to try to lead when he got around '*that straight*' meaning the back straight. When questioned about why he did not '*come back a bit more*' to give his horse a better opportunity coming into the straight, Mr Oliver stated that he did not '*feel we were going that quick*' so he was not going to bring his horse back too much. Mr Oliver referred to the comfortable pace of his horse, stating that his horse was on a nice reign, he was on the bit, and it was not until he let him go that there was, as stated '*a problem*'.
- [66] Mr Oliver did not dispute when questioned that he had a look at where the other riders were in the field when he was in the back straight and stated '*yeah, when I got around there*'. Mr Oliver stated that the horses behind were going a '*very slow tempo*'. Mr Oliver was questioned about why he continued to apply pressure after he had seen that he was some distance in front of the other horses. He stated that he only applied pressure at the one point and stated that he thought he was giving Black Jag every opportunity referring to the horse '*not going to sit*' and being '*comfortable*' where he was (positioned).
- [67] Mr Oliver was questioned about the stewards' hearing and the evidence given by his trainer Mr Whittington, in particular, that he (Mr Whittington) stated that the race was ridden like '*a sprint*'. Mr Oliver maintained his evidence that the instructions given were to lead and he did not accept when questioned that the horses were ridden like a sprint.
- [68] When questioned about whether he had made an error on the day, Mr Oliver stated that he '*rode the horse how he would be happy for it to be ridden*'. Mr Oliver stated that the horse had not been able to perform. Mr

Oliver was questioned about whether Black Jag '*did not quicken*' because of an error on his part. Mr Oliver referred to the horse being '*sore*'.

- [69] Mr Oliver was further questioned about Black Jag's performance in the race. Mr Oliver stated that there are multiple times that he has ridden a horse that has pulled up sore and no one has told him about it. Mr Oliver also stated, in relation to whether there is an indication of soreness in a horse, that it is hard to tell when the horse is in full gallop.

The evidence of Paul Daily

- [70] Paul Daily is a professional punter who works with a sophisticated horse racing database to produce detailed analysis of sectional times and analysis tools to make accurate comparisons between horses more effectively.
- [71] It is Mr Daily's evidence that the riding tactics employed by Black Jag's riders show that the horse '*performs best when allowed to sit pace/lead*' and make the race a '*test of stamina*'.⁴¹ Mr Daily did not attend the race but stated in giving his oral evidence that he viewed the race footage. Mr Daily stated that the track played out as if it was a rating five and that this is a firmer track than the track rating on the day that is a soft seven.

The evidence of Dr Lenz

- [72] Dr Lenz examined Black Jag after the race and recorded '*SL. Sore N/F Fetlock*' on the horse incident/examination report completed by him after the race.⁴²
- [73] At the hearing, Dr Lenz gave oral evidence about his examination. He stated that the '*near front fetlock*' is a vital part of the anatomy of a galloping horse and slight soreness may well have been felt by Black Jag in the race.
- [74] Dr Lenz stated that it is apparent from the race footage that Black Jag is leading on the right foreleg that is the opposite leg to where he found pain. Dr Lenz stated that there is a brief change to Black Jag's leading leg which is '*common*' and he would expect the leg to be tired so the horse briefly changes back (to the other leg) and this coincides with the rider (Mr Oliver) sitting up.
- [75] Dr Lenz stated that his finding of pain on flexion would not be '*out of the ordinary*' given the age of Black Jag, stating that there are not too many eight-year-old horses that are still racing.
- [76] Dr Lenz also stated that the Chief Steward in charge of the race meeting requested that he examine Black Jag after the race because (as he was told) the horse performed below expectation.

⁴¹ Exhibit 8.

⁴² Exhibit 7, Horse Incident/Examination Report.

- [77] During cross-examination, Dr Lenz stated that he recorded on the examination card after the race that Black Jag was '*slightly sore [in the] near fore fetlock*' and stated that he is referring to the joint and that there was soreness on flexion and no lameness.
- [78] Dr Lenz accepted when questioned that the area of soreness being the near front fetlock is a vital part of the anatomy of a galloping horse. When questioned about the leg that will take the load at a particular part of the galloping sequence, Dr Lenz stated that only the leading leg takes the full weight and quite often there is a change in stride. Dr Lenz stated that Black Jag led in Race 3 on the right foreleg and only changed running position to the near foreleg in the last 100 metres when the jockey (Mr Oliver) was inside the post '*sitting up*'.
- [79] When questioned, Dr Lenz accepted that if a horse has soreness in one of its front joints, it will favour it meaning it will not want to lead with it (the sore leg). Dr Lenz stated that in Queensland the horses race in a clockwise direction so the horses tend to favour the right foreleg and if the horses tire they will change legs.
- [80] When questioned about whether the non-leading leg still bears significant pressure but not as much when the horse is racing, Dr Lenz stated obviously much less significant pressure.
- [81] When questioned about whether slight soreness may have been felt by Black Jag in the race, Dr Lenz stated 'Yes' and referred to Black Jag being an eight-year-old horse with 80 race starts and '*some degree of arthritic change in the joints*'. Dr Lenz stated that this is not unusual for a horse of that age and a number of race starts. Dr Lenz stated that he would be more surprised if he found the horse to have no response and stated that it is part of fair wear and tear to get a process of arthritic change.
- [82] When questioned about the likelihood of Black Jag having arthritis in the joints, Dr Lenz stated that without the aid of diagnostic equipment he could not predict that (arthritis) with any accuracy.
- [83] When questioned about whether Black Jag may well have felt soreness in the near front fetlock during the race, Dr Lenz stated that he cannot refute or accept that. Dr Lenz stated that Black Jag was off the sore limb for most of the race referring to the horse having minimised the effects by staying on the right foreleg. Dr Lenz also referred to the race footage and stated that there was '*little impression*' of how the horse was responding. He stated that there was no head dipping by the horse and it was difficult to make an assessment. When questioned about whether '*head dipping*' by a horse would be associated with lameness and whether soreness in a horse may indicate an arthritic condition in a horse, Dr Lenz stated '*in an older horse*'.

What is the correct and preferable decision?

- [84] The particulars of the charge concerning Mr Oliver are that in the early stages of the race passing 1600 metres, Mr Oliver continued to pressure

Black Jag between 1500 metres and 1200 metres and challenge Ranked. Mr Oliver is alleged to have continued to challenge Ranked and set a fast tempo in the middle stages when the horses were a considerable distance ahead and it was reasonable and permissible to restrain Black Jag. Mr Oliver's riding tactics are alleged to have resulted in Black Jag not being given a full opportunity to win or obtain the best possible place in the field and offend Rule 135(b).

- [85] It is non-contentious that Black Jag likes to lead in a race and its best performances were behind it when it ran on 10 September 2016. After the race, Black Jag was found to be slightly sore in the left fore fetlock joint when Dr Lenz, veterinary surgeon, flexed it during an examination. The near front fetlock is a vital part of the anatomy of a galloping horse.
- [86] Mr Oliver is an apprentice jockey and although he has considerable experience and has ridden a number of winners, he claims three kilograms which is the largest claim for the Brisbane metropolitan area. It is non-contentious that an apprentice jockey who has a three kilogram claim is on the bottom rung (of jockeys) in the metropolitan area.
- [87] Immediately after the race, the stewards held an inquiry into the riding tactics of Mr Oliver and Ms Grylls. Black Jag's trainer, Mr Whittington, told the stewards that Black Jag has had 80 starts and has led in 79 of its races.⁴³ Mr Whittington told the stewards that the first half mile of the race was '*ridden like...a sprint*' and said that '*it's just ridiculous...[g]ave no horse either chance...*'.⁴⁴ Mr Whittington also told the stewards that Black Jag was '*working too hard outside the leader*'.⁴⁵
- [88] Mr Aurisch's evidence given on behalf of the stewards at the review hearing is that Mr Oliver has asked Black Jag to do too much work to get to a position where prior to the race the stewards thought he would be. It is Mr Aurisch's evidence that from 1500 metres to 1200 metres Mr Oliver has quickened the tempo of the race in an attempt to take the lead from Ranked. Mr Aurisch says that as the race went on Mr Oliver's riding tactics became more blameworthy. Mr Aurisch says that Mr Oliver had a course of action to take.
- [89] Mr Aurisch gave evidence about riding tactics available to Mr Oliver in the race. Mr Aurisch says that Black Jag's speed could be reduced so that it can sit behind Ranked for a period and then get to the outside when Ranked starts to give ground or to come back to sit at the hind quarters of Ranked. Mr Aurisch says that Mr Oliver should have given his mount some respite in the middle stages of the race to give it an opportunity to finish the race off.

⁴³ Exhibit 5, p 4, L22-26.

⁴⁴ Ibid.

⁴⁵ Ibid, p 6, L30-31.

[90] Mr Aurisch does not dispute that Ranked pushed up inside Black Jag from 1200 metres and that Black Jag did not have the necessary pace to cross Ranked. Mr Aurisch says that it was evident by 1100 metres and 1000 metres that Black Jag was not going to be successful in taking the lead and that is when riders should give the horse a breather.

[91] Mr Oliver's evidence given to the stewards after the race is that he was always going to go forward and try to lead. He told the stewards that both riders were finding it hard to find the lead. The relevant extract from the transcript is as follows⁴⁶:

I was always going to go forward and try to lead. I don't think she [Ms Grylls] realised we were as far in front as well. I just came around this corner and I just thought I would stay balanced around and try to make my move around the back, but he is not a horse that finds a lot, and you know, he usually gets the lead and keeps – keeps finding the line, but I think both of us riders were – you know, just finding it hard to find who the leader was going to be.

[92] Mr Oliver told the stewards that Ms Grylls '*hasn't really slowed down inside me*' and that is when he knew he was not going to be able to get in front stating that the horse has '*always led*'.⁴⁷ Mr Oliver told the stewards that he has sat a half a length in front and has not been able to cross because the horse has done too much so he has '*slid back and just come back half a length behind [Ranked]*'.⁴⁸

[93] When speaking to the stewards at the further hearing on 20 September 2016, Mr Oliver maintained his evidence that the trainer's instructions were to lead.⁴⁹ Mr Oliver told the stewards that Black Jag is always a leader, that he has been able to set his own tempo and that he and Ms Grylls got '*head-to-head*' stating '*that's when we got a little bit too keen*'.⁵⁰ Mr Oliver told the stewards that '*it looks a lot worse*' referring to the field behind going '*quite slow*'. He said that '*we were going fast*' but that makes it '*look a bit worse as well*'.⁵¹ The relevant extract from the transcript is as follows⁵²:

Well, at that top corner I – I went to let him roll, and then – I was never going to be able to get past her so, so that's when I thought probably, you know, nick back from her, and that's just when we were – we have been stuck. But I had to give it a little bit of a dig just down the first straight, and I've only just cleared from the 3-wide position coming to the first corner, so I – he's always a leader, and when you do ask him to come back de doesn't give you like – he is always a clear leader in every race. He is always just been able to set his own temp, and [sic] never learnt to relax properly.

⁴⁶ Exhibit 5, p 4.

⁴⁷ Ibid, p 6.

⁴⁸ Ibid.

⁴⁹ Exhibit 6, p 14.

⁵⁰ Ibid, p 15.

⁵¹ Ibid, p 16.

⁵² Ibid, p 15.

I just feel when we got head-to head [sic] that's when we got a little bit too keen. I reckon it looks a lot worse because the field behind us, I – I reckon they are going quite slow, and we have probably just picked up a little bit too much. I do think it looks worse because of how slow they were going behind us as well. I know we were going fast, but I just think that makes it look a bit worse as well.

- [94] Mr Oliver gave evidence in the review hearing about his riding tactics in the race. The Tribunal found Mr Oliver to be honest and open in giving his oral evidence. Mr Oliver's evidence given in the review hearing is not inconsistent with his evidence given to the stewards. Mr Oliver confirmed that his instructions were to lead. Mr Oliver said that from 1500 metres to 1300 metres he wanted to keep his horse balanced when he turned into the back straight but Ms Grylls kept pushing up the side. Mr Oliver maintained his evidence that he was going to try to lead when he got around the back straight. When questioned about why he did not come back a bit to give his horse a better opportunity coming into the back straight, Mr Oliver stated that he did not 'feel' that they were going that quick. Mr Oliver referred to the comfortable pace of the horse, he was on the bit, and it was not until he let the horse go that there was, as stated, 'a problem'.
- [95] Mr Oliver's evidence is that had he taken Black Jag behind Ranked between 1500 metres and 1200 metres this would have deprived Black Jag of any chance of winning or securing a place as it was contrary to his racing pattern.
- [96] When questioned about why he continued to apply pressure after he had seen that he was some distance in front of the other horses behind (at the back straight), he stated that he thought he was giving Black Jag every opportunity referring to the horse as being comfortable. When questioned about whether the horse did not quicken because of an error on his part, Mr Oliver referred to Black Jag as being sore.
- [97] I accept Mr Oliver's evidence that his instructions were to lead in the race and from 1500 metres to 1300 metres he wanted to keep his horse balanced and when he turned into the back straight Ms Grylls kept pushing up the side. I accept Mr Oliver's evidence that from 1000 metres to 600 metres, he was balanced and made attempts to pressure his horse and his horse has not been able to perform.
- [98] I have also had the benefit of seeing the race footage and hearing oral evidence from all of the witnesses, including Ms Grylls in relation to her review proceeding. I am not satisfied having considered all of the evidence and the relevant circumstances that the charge as particularised has been proven. I have considered the distance and pace of the race, the position of the horses that were racing at one point in the race 'head to head', Mr Oliver's ranking as an apprentice jockey with a three kilogram claim, and Mr Oliver's instructions 'to lead'.
- [99] I have also considered the evidence relevant to Black Jag's performance in the race including the age of the horse and the fact that it had 80 race starts.

It is noncontroversial that Black Jag was sore in a vital part of its anatomy after the race. Dr Lenz found slight soreness in the left fore fetlock joint (on flexion) after the race. Dr Lenz says his findings were not unusual given the age of the horse and its number of race starts. Dr Lenz's evidence is that Black Jag did not lead with its sore leg and that horses racing in Queensland tend to favour the right foreleg because they race in a clockwise direction. However, Dr Lenz could not confirm or deny, when questioned about his findings, that Black Jag may have felt soreness in the near fetlock joint during the race. I accept Dr Lenz's evidence in relation to his findings.

[100] The purpose of Rule 135(b) is not to punish a jockey who makes an error of judgment. As determined in *Browne's case*, I must make an objective assessment of Mr Oliver's ride given all of the circumstances of the race and the quality of his ride.⁵³ The relevant circumstances in this race include the fact that Mr Oliver was an apprentice claiming three kilograms, Mr Oliver's instructions in the race were to lead, Black Jag was not in its peak form having had 80 race starts, Black Jag was an older horse, and Black Jag was retired from racing after one more race start. Black Jag also had slight soreness after the race in the near front fetlock that is a vital part of the anatomy of a galloping horse.

[101] I accept Mr Aurisch's evidence that there was a tactic available to Mr Oliver in this race. That is, to reduce the horse's speed in the middle stages of the race so that Black Jag and Ranked did not have to work as hard and could have some respite so it (Black Jag) had an opportunity to finish the race. I am not satisfied, however, based on the evidence before me and all of the relevant circumstances of this race that Mr Oliver's failure to take an alternative course of action, such as to reduce Black Jag's speed to give his horse some respite in the middle stages of the race, was unreasonable and that his riding tactics in Race 3 offend Rule 135(b).

[102] It is open to the Tribunal to draw the reasonable inference based on the evidence that Black Jag's performance in the race may have been inhibited by the fact that it was an older horse with 80 race starts and was retired after one more race and was, therefore, not in its peak form. I find that on balance it is more likely than not that Black Jag's poor performance in the race was attributed to it not being in its peak form and having (as found) slight soreness in the left fore fetlock joint, a vital part of the anatomy of a galloping horse.

[103] In this race, the horse, Black Jag, worked hard to secure a position beside the leading horse Ranked. The evidence shows that the horses were running keenly because during one part of the race the horses, Black Jag and Ranked, were head to head. Mr Oliver, in keeping with his instructions to lead, made the decision to attempt to take the lead turning into the back straight but Ranked kept pushing up the side. Mr Oliver has made attempts

53

Browne's case.

to test his horse but the horse, Black Jag, did not respond and quickly lost speed in the race. Ranked also lost speed and its place in the race.

[104] I find based on the evidence before me that by the middle stages it was not unreasonable for Mr Oliver to maintain his position and remain where he was in the race in keeping with his instructions to lead, and that on balance Black Jag's poor performance in the race was not attributed to Mr Oliver's riding tactics. I am not satisfied that Mr Oliver's riding tactics in this race are blameworthy and that the charge as particularised is substantiated. The correct and preferable decision is that Mr Oliver 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.