

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *McGillivray v Queensland Racing Integrity Commission*  
[2018] QCAT 158

PARTIES: **MATTHEW McGILLIVRAY**  
(applicant)  
v  
**QUEENSLAND RACING INTEGRITY  
COMMISSION**  
(respondent)

APPLICATION NO/S: OCR145-17

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 18 May 2018

HEARING DATE: 15 February 2018

HEARD AT: Brisbane

DECISION OF: Member Allen

ORDERS: **1. The decision that Matthew McGillivray breached Australian Rule of Racing 137(d) in race 2 at Townsville Turf Club on 20 June 2017 and that a penalty of an 11-day suspension be imposed, is set aside.**

**2. Matthew McGillivray is not guilty of the charge that he breached Australian Rule of Racing 137(d) in race 2 at Townsville Turf Club on 20 June 2017.**

CATCHWORDS: PROFESSIONS AND TRADES – LICENSING OR REGULATION OF OTHER PROFESSIONS, TRADES OR CALLINGS – OTHER PROFESSIONS, TRADES AND CALLINGS – thoroughbred racing – jockey – where applicant found guilty of a breach of Rule 137(d) of the Australian rules of racing – whether charge is substantiated on review – whether rider excessively slows his mount, causing interference, directly or indirectly to any other horse in the race

*Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 19, s 20, s 21  
*Racing Integrity Act 2016* (Qld), s 240, s 246

*Briginshaw v Briginshaw* (1938) 60 CLR 336  
*Kehl v Board of Professional Engineers of Queensland*  
[2010] QCATA 58

APPEARANCES &  
REPRESENTATION:

Applicant: M Tutt, solicitor of Miller Sockhill Lawyers

Respondent: E Turner, legal counsel of the Queensland Racing Integrity Commission

**REASONS FOR DECISION**

- [1] Mr McGillivray was the jockey riding HARJAKA in race 2 at Townsville Turf Club on 20 June 2017. The Stewards opened an enquiry following the race and determined that Mr McGillivray was guilty of a charge under Australian Rule of Racing 137(d), which states:

Any rider may be penalised if, in the opinion of the stewards, he excessively slows, reduces or checks the speed of his horse thereby causing interference, directly or indirectly, to any other horse in the race.

Mr McGillivray was penalised with a 10-day suspension.

- [2] The Stewards had particularised the charge against Mr McGillivray as follows:

He excessively reduced the speed of his mount approaching and passing the winning post on the first occasion, resulting in ROBABANK (B. Thomson) improving onto that horse's heels and being checked and causing RAMSDEN STREET (J. Woodhouse), which was following onto the heels of ROBABANK and being checked. In the incident MAJOR MAJOR improved onto the heels of RAMSDEN STREET and was severely checked.

- [3] Mr McGillivray sought an internal review of the decision in the Commission. The Commission treated the application as a review on penalty only. The decision of the Commission was to confirm the original decision in regard to the charge and amend the decision on penalty to an 11-day suspension.
- [4] Mr McGillivray has now applied to the Tribunal to review the Commission's internal review decision.<sup>1</sup> I note that one of the grounds of review is that the original review request was in respect of the charge as well as penalty.
- [5] The Tribunal's role in the review of the decision is to stand in the shoes of the Commission, deciding the review in accordance with the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* ('QCAT Act') and the enabling Act and exercising the functions of the decision maker,<sup>2</sup> and to make the correct and preferable decision after hearing the review by way of a fresh hearing on the merits.<sup>3</sup> 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 reasoning of the Commission

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<sup>1</sup> *Racing Integrity Act 2016 (Qld)*, s 240, s 246.

<sup>2</sup> QCAT Act, s 19.

<sup>3</sup> QCAT Act, s 20.

that led to the decision and there is no presumption that the reviewable decision was correct.<sup>4</sup>

- [6] The role of the Commission is to use its best endeavours to assist the Tribunal to make its decision. This includes providing the Tribunal with a statement of reasons for the decision and a copy of any document or thing relevant to the decision.<sup>5</sup>
- [7] The Commission has filed its statement of reasons and copies of video footage in respect of the race in question and the affidavit of Stipendiary Steward James Williamson. I note that the video files provided to the Tribunal were not time stamped and could only be viewed by playing or pausing the footage. An audio file of the Steward's enquiry was also filed. Unfortunately, when references were made to this audio file in the review decision, there was no reference to the point of time on the recording to which these references related. This meant that it was not possible to usefully access the audio file at the hearing, in particular, when the Commission's representative wished to question Mr McGillivray in regard to statements he made at the enquiry. For this reason, it was determined that the audio file would not be referred to for the purpose of the decision, and Mr McGillivray would not be examined.
- [8] The Tribunal is required to be satisfied of the charge in accordance with the civil standard as expressed in *Briginshaw v Briginshaw*,<sup>6</sup> that is, the charge must be made out to the reasonable satisfaction of the Tribunal and should not be produced by inexact proofs, indefinite testimony or indirect references. The concept of reasonable satisfaction is also dependant on the seriousness of the allegation made, the inherent unlikelihood an occurrence of a given description, or the gravity of the consequences.
- [9] Ms Turner in her outline at the commencement of the hearing stated that it was a very narrow point to determine the cause of Ms Thomson's check on Robabank. And, that it was due to the excessive slowing pace of Mr McGillivray that he obtained the lead in the race. Once Mr McGillivray obtained the lead after riding out hard from the barrier he seriously restrained his mount which excessively slowed the pace of the race. This occurred directly in front of Ms Thomson which has caused her to improve, move up onto the heels of Mr McGillivray's mount, and that has caused her to check on Robabank.
- [10] Mr Tutt in his outline of submissions states that:
- (a) his witnesses will say that Mr McGillivray got to lead position early and maintained a slow tempo;
  - (b) the race was running at a slower than normal pace;
  - (c) Mr McGillivray's mount was racing ungenerously and intractably;
  - (d) Mr Hayse, winning jockey in the race, noted Ms Thomson was looking to direct her mount behind Mr McGillivray and she did that and her horse was up onto the heels of Mr McGillivray and she had to check her mount;

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<sup>4</sup> *Kehl v Board of Professional Engineers of Queensland* [2010] QCATA 58, [8].

<sup>5</sup> QCAT Act, s 21.

<sup>6</sup> (1938) 60 CLR 336, 361-362.

- (e) Mr Lucas, a retired jockey, agrees with Mr Hayes in regard to Ms Thomson and that there was no excessive slowing of the race; and
  - (f) it was a slow tempo race and any slowing of the tempo was very gradual which will be clear from the video.
- [11] The evidence took the form of the various witnesses narrating the video footage filed in the Tribunal and then being cross-examined. The first witness was Mr James Williamson, Stipendiary Steward, who in his affidavit,<sup>7</sup> stated that:
- (a) Mr McGillivray obtained the lead easily and began steadyng the tempo of his mount approximately 150m prior to passing the winning post;
  - (b) approximately 100m prior to the winning post, Jockey Thomson shifts behind Mr McGillivray and, shortly after this, Mr McGillivray slowed the speed of his horse excessively;
  - (c) the three horses following Mr McGillivray are all forced to check as a consequence of the speed being slowed excessively; and
  - (d) the front on vision of the incident also showed that when attempting to avoid the heels of Mr McGillivray's mount, Jockey Thomson attempted to shift out away from this horse's heels and was not able to do so due to the Jockey having positioned his mount in close proximity to the inside runners.
- [12] Mr Williamson in describing the first video, lateral from grandstand camera, at the hearing stated that:
- (a) this was a distance race at Townsville and the issue the Stewards took was when field approaching winning post 150m from post, Mr McGillivray restrained his horse, which can be seen in his hands; rather than his hands being down on the horses neck they moved away from his neck and restrained him;
  - (b) 100m from the post the horse responded by resenting being restrained and that Mr McGillivray continued to restrain the horse after the winning post when horse started to have difficulties;
  - (c) it would be unreasonable to say that what occurred were as a result of Jockey Thomson's actions; and
  - (d) Mr McGillivray had directly and intentionally caused the incident by restraining his horse.
- [13] Mr Williamson agreed in cross-examination that the leader dictates race and he can slow the race if in a gradual way. This could be done over 200m and he would not want to see it occur unless over 200m. Mr Williamson agreed that 2 lengths is a safe distance. In regards to Jockey Thomson moving behind Mr McGillivray, he said that Mr McGillivray came back to Jockey Thomson rather than her improving.
- [14] When reviewing the second video, head on view, Mr Williamson stated that you are able to see when Jockey Thomson elects to shift in behind. He explained that it was an ideal position to go in behind the leader because you obtain cover so your horse is

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<sup>7</sup> Exhibit 1, [4].

not doing as much work cutting the breeze. Mr Williamson stated that Jockey Thomson was clear to go in behind Mr McGillivray at 200m from the winning post but then he continued to slow with 11 restrains between 100m and the winning post. She attempted to shift from Mr McGillivray but was blocked by Jockey Hayse. Mr Williamson stated that s 137(d) was demonstrated by the video in that Mr McGillivray excessively restrained his horse's head.

[15] Mr Williamson was asked if the restraining commenced at 150m from the winning post how it was not gradual. Mr Williamson stated that:

- (a) to steady as he did was excessive;
- (b) Jockey Thomson should be able to get behind horse and expect it would not restrain excessively;
- (c) it was not gradual because it became worse when Mr McGillivray restrained significantly at 100m; and
- (d) the actions become more significant after this by placing pressure on his mount's neck.

[16] Mr Hayse in his affidavit noted that:<sup>8</sup>

- (a) he rode the winning horse in race 2 at Townsville;
- (b) Mr McGillivray's horse got into the leading position and was racing adjacent to the running rail;
- (c) Mr McGillivray's horse was racing at what he would describe as a slow pace;
- (d) the horse was racing with its head up;
- (e) at the point where Jockey Thomson was looking to direct her horse behind Mr McGillivray's mount that the pace of the race was very slow;
- (f) when Jockey Thomson put her horse directly behind Mr McGillivray's it had raced up onto the heels of Mr McGillivray's horse. When she did this, she caught up with Mr McGillivray's horse and had no other option but to check off Mr McGillivray's horse's heels. That is, she had to grab the reins as if to stop the horse; and
- (g) the other horses had to check off each other because of the concertina effect from Jockey Thomson's initial check off the heels of Mr McGillivray's horse.

Mr Hayse stated that, as a rider of many years' experience, if he is ever in a situation where there is a slow tempo and he is forced to check his horse off the heels of other runners, it is his responsibility to go around the slow horses and to set the pace for the race.

[17] Mr Hayse in his description of the first video stated that:

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<sup>8</sup> Exhibit 2.

- (a) he had ridden the winner and had jumped out of the barrier slowly;
- (b) he had watched Mr McGillivray's actions from behind;
- (c) from his point of view the race was run at slow speed out of the barrier;
- (d) the race was extremely slow and Mr McGillivray let his horse ride quicker than the others though he wasn't going quickly. Mr McGillivray was in lead and moved across he was three lengths in front. He then took his hands off the horse's neck, restraining. At that point Mr McGillivray had his brake lights on;
- (e) it was 4 to 5 seconds before Jockey Thomson was in trouble. He could have got in behind. He could see what was happening. He said the leader does not dictate his speed. No one was blocked in behind Mr McGillivray;
- (f) the race was excessively slow but not slowing;
- (g) Jockey Thomson had time to react but she looked behind. She wanted to get in behind;
- (h) anyone could tell what Mr McGillivray was doing was not excessively slowing;
- (i) three lengths to one in 10 metres is excessive; and
- (j) five seconds was not a short time in a race.

[18] Mr Hayse agreed in cross-examination that:

- (a) Mr McGillivray and everyone else was going slow and that he moved ahead of the field and the rest did not speed up;
- (b) Mr McGillivray had slowed but not excessively as people had time to read him; and
- (c) if he did this over 10 metres then it would be a hazard because quicker than people can react, to read, no time for people behind to act.

[19] When asked how you can know what Mr McGillivray was going to do, Mr Hayse noted that the he could see the horse's head in the air and the jockey's hands were off. He agreed though, that the jockey behind would not have seen this. When asked how Jockey Thomson knew what Mr McGillivray was doing when she had looked behind four times to see if she had sufficient space to move behind Mr McGillivray, Mr Hayse stated that: when she moved into position she should have been watching what the horse in front was doing and if she was not focussed on what the horse in front was doing she should not have done it. He said he was not saying that Jockey Thomson did not have a right to be in that position but she had made a bad decision.

[20] Mr Hayse stated that:

- (a) Jockey Thomson could have gone around Mr McGillivray when she was one off and she chose to move in when there was no impediment to her moving on as all horses were going at a slow pace; and

- (b) himself, Jockey Thomson and Jockey Cullen were dictating the speed of the race as they were clear behind Mr McGillivray and dictating race run at that speed.

[21] Mr Hayse stated in regard to the second video that:

- (a) it was fairly clear that Jockey Thomson, himself and Jockey Cullen could make the speed of the race, as they could see what Mr McGillivray was doing;
- (b) he would not always be looking to go behind in slow paced race; and
- (c) any reasonably competent rider would not make the decision to go behind a slow leader in the race, which is why he did not do it, and Jockey Thomson did, and caused problems.

[22] Mr Lucas in his affidavit noted that:<sup>9</sup>

- (a) he is a retired jockey with 40 years' experience;
- (b) that Mr McGillivray began well and obtained the lead position easily. After about 150m his horse got its head up and appeared to over-race. At this point Jockey Thomson was racing in a position outside of Mr McGillivray's mount and 2.5 lengths behind and she appeared to be intent on positioning her mount behind Mr McGillivray's horse;
- (c) as a rider, he would never position his horse behind a horse that appeared to be over-racing and going at a slow pace because there is a high likelihood that you will have to check off heels;
- (d) the interference suffered by Jockey Thomson was a result of her own actions in what he would describe as precarious position which also caused the interference to the horses behind her; and
- (e) interference was not attributable to Mr McGillivray. He appeared to be setting a constant slow temp, there was no excessive slowing of the pace.

[23] Mr Lucas in his evidence reviewing the first video stated that:

- (a) at 200m Mr McGillivray had gone to the front with his horses head up;
- (b) Jockeys Hayse, Thomson and Cullen had ample opportunity to make a decision;
- (c) Jockey Thomson was intending to get behind;
- (d) the race was not excessively slow;
- (e) the horse had its head up and had a gradual slowing of pace;
- (f) the Jockeys had options, they could see what Mr McGillivray was doing; and
- (g) if Jockey Thomson had not gone in, it would not have caused a problem.

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<sup>9</sup> Exhibit 3.

- [24] Mr Lucas agreed in cross-examination that it was a common thing for a rider to go in behind. While he could see Mr McGillivray was slowing the field down he did not think he had excessively slowed. Mr Lucas said Mr McGillivray went out, obtained lead, and then slowed, and that his intentions were clear.
- [25] Mr Lucas, when viewing the second video, stated that he agreed with Mr Hayse that Jockey Thomson had ample time to take her horse outside the slow pace and that he thought it was a bad decision to go behind. It was 150m from when Mr McGillivray started restraining, which was a long way. She made a bad decision to go behind in the early part of a stayers race.
- [26] Mr Tutt in summing up said the question is whether the slowing was excessive. The Commission says restrained at 150m with interference at the winning post. Mr Hayse said that Jockey Thomson had other options and could have elected to go around. Mr Hayse said excessive slowing is 1–3 lengths in 10m, and there is no evidence beyond what is contained in the film. The evidence is that slowing was done over a gradual period and was not excessive.
- [27] Ms Turner summed up by stating that:
- (a) in the opinion of Mr Williamson, the excessively slowed pace of the race resulted in Jockey Thomson immediately checking;
  - (b) we [Ms Turner and Mr Williamson] say elements of s 137(d) excessively slowed;
  - (c) Mr McGillivray excessively slowed causing interference with one horse Robabank and then indirectly with others;
  - (d) Mr McGillivray, as observed by Mr Williamson, came out of the gate with his hands on his mount's neck intending gain speed to forward position resulting in him settling 2-3 lengths in front, and then visibly restrained his horse with his hands on its reins;
  - (e) Jockey Thomson looked on four occasions to take run directly behind Mr McGillivray;
  - (f) Jockey Thomson was not aware, and could not have had any knowledge of, Mr McGillivray's intention to slow pace; and
  - (g) Jockey Thomson's riding tactic of positioning herself behind the leader is approved by the Stewards.
- [28] Ms Turner submits in regard to the contrasting evidence from Mr Hayse and Mr Lucas that:
- (a) Jockey Thomson at no time had trouble restraining her horse;
  - (b) it was only when Mr McGillivray restrained did she need to take action and shift out;
  - (c) Mr Hayse was on the outside when she attempted to shift out

- (d) Mr McGillivray lost significant amount of ground. He slowed pace and field caught up as an alternative for them making up ground;
  - (e) Mr Williamson's opinion that the slowing of the pace of the race was excessive;
  - (f) Mr McGillivray coming back to the others as a result of him restraining his horse; and
  - (g) Jockey Thomson could not have anticipated what Mr McGillivray would have done.
- [29] There is some difficulty in this matter as the physical evidence in terms of the video which shows the relevant part of the race in approximately 30 seconds is not timestamped and is not able to be manipulated apart from pausing and restarting the footage. It is therefore difficult to interpret. Mr Williamson relies on the interplay of actions between Mr McGillivray's hands and the horse wither with them on its neck to increase speed or the reins to slow it. In his opinion, while the slowing of the pace started 15m from the winning post, there was second restraining at 100m and it was this which resulted in the excessive slowing causing Jockey Thomson to check her horse.
- [30] Mr Hayse and Mr Lucas on the other hand, consider that the pace of the race was slow, and any slowing by Mr McGillivray was gradual. In the case of Jockey Thomson, it was her decision to go behind Mr McGillivray when she knew the pace of the race was slow and, due to her actions, she was required to check her mount.
- [31] Rule 137(d) requires me firstly to be reasonably satisfied that Mr McGillivray excessively slowed the speed of his mount. That is, not that the race was excessively slow, but that he had by his actions excessively slowed his mount. It may be that while the race was slow, or even excessively slow, this could have occurred gradually. That appears to be Mr Hayse and Mr Lucas's evidence.
- [32] In perusing the video file, it is clear that Mr McGillivray went to the lead and then slowed his pace and that Jockey Thomson placed herself behind him. It is harder to determine whether Mr McGillivray slowed excessively at around the time Jockey Thomson was manoeuvring behind him, as Mr Williamson would have it. Or, whether having regard to the slowed pace of the race, she was required to check her horse when she moved in behind as a result of her decision and not due to any excessive slowing by Mr McGillivray, in accordance with Mr Hayse and Mr Lucas's view.
- [33] It was made clear by all of the witnesses that Jockey Thomson had the right to go in behind Mr McGillivray, as that was an acceptable decision. Was the requirement for her to check her horse a result of Mr McGillivray excessively slowing his mount, or as a result of going in behind a slow leader?
- [34] Ms Turner did not provide real guidance on what would constitute excessive slowing of a mount. Mr Williamson's opinion was that the action taken by Mr McGillivray 100m from the winning post constituted excessive slowing. He related this to Mr McGillivray's actions in regards to the horse; there is no indication of distance and time over which this slowing may have occurred. Mr Hayse's view was that slowing from a 3 to 1 length lead in 10 metres would result in excessive slowing as this would create a hazard because other horses would not have time to react. Speed is directly related to distance travelled and time taken. Therefore, a slowing would require that

the distance travel over a particular time would be reduced. Mr Hayse's indication provides a reasonable explanation of what would be constituted by excessive slowing. Ms Turner did not cross-examine Mr Hayse in regard to that evidence.

- [35] Again unfortunately, the video did not allow such a precise calculation of what occurred. It was clear though that Jockey Thomson had come in behind Mr McGillivray and that it is at this point that she was required to check her horse. Mr Hayse and Mr Lucas say that the slowing of pace by Mr McGillivray was gradual over the 150m before the winning post. While Mr Williamson opined that Mr McGillivray excessively slowed his mount, he did not explain how the actions of Mr McGillivray constituted excessively slowing.
- [36] Based on my viewing of the video, what I observed is better reflected in the opinion of Mr Hayse and Mr Lucas, that Mr McGillivray gradually slowed his mount over the distance of 150 m after gaining the lead. I am not persuaded that there was any one point where Mr McGillivray excessively slowed the pace of his mount as Mr Williamson would have it.
- [37] The actions of Jockey Thomson in checking her horse are not necessarily the result of Mr McGillivray excessively slowing his mount. I must first be reasonably satisfied that Mr McGillivray has excessively slowed the speed of his horse. While the checking of a mount may indicate when the excessive slowing may have occurred, it does not prove that he excessively slowed his mount.
- [38] I am not reasonably satisfied that Mr McGillivray excessively slowed his mount having regard to the evidence including the videos, affidavits and oral evidence.
- [39] The decision of the Commission on internal review is set aside. Mr McGillivray is not guilty of the charge that he breached Australian Rule of Racing 137(d) in race 2 at Townsville Turf Club on 20 June 2017.