

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Dixon v Queensland Racing Integrity Commission* [2018]
QCAT 183

PARTIES: **GRANT WILLIAM DIXON**
(applicant)
v
**QUEENSLAND RACING INTEGRITY
COMMISSION**
(respondent)

APPLICATION NO/S: OCR299-17; OCR036-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 22 June 2018

HEARING DATE: 10 May 2018

HEARD AT: Brisbane

DECISION OF: Member Hanger AM QC

ORDERS: **IN OCR299-17:**
Appeal allowed. Decision of stewards set aside.

IN OCR036-18:
Appeal allowed. Decision of stewards set aside.

CATCHWORDS: PROFESSIONS AND TRADES – LICENSING OR
REGULATION OF OTHER PROFESSIONS, TRADES
OR CALLINGS – OTHER PROFESSIONS, TRADES
AND CALLINGS – trotting races – where alleged failure
to improve positions of other racing horses in two separate
races – where two charges brought by stewards under
Australian Harness Racing Rules – whether simply an
error of judgment, or culpability and blameworthiness, on
the part of the applicant – whether applicant drove in an
unacceptable manner

Racing Act 2002 (Qld), s 4, s 111

Racing Integrity Act 2016 (Qld), s 10

McMullen v Racing Queensland Ltd [2012] QCAT 286

Misfud v Racing Victoria Stewards [2007] VRAT 6

Queensland Racing Ltd v McMahon [2010] QCATA 73

APPEARANCES &
REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented

REASONS FOR DECISION

- [1] The issue in these appeals is whether Mr Dixon drove in two trotting races in an unacceptable manner.
- [2] The main purpose of the *Racing Act 2002* (Qld) is to provide for control bodies to manage, operate, develop and promote codes of racing in a way that ensures public confidence in the racing industry in Queensland.¹
- [3] Section 111 of that Act obliges a control body to have rules of racing for the good management of each of its codes of racing.
- [4] The *Racing Integrity Act 2016* (Qld) establishes a Racing Integrity Commission for the purposes of maintaining public confidence in the racing of animals in Queensland. Under section 10 of the *Racing Integrity Act* one of its functions is to oversee the integrity of race meetings, and to make decisions about disciplinary matters.
- [5] Mr Dixon was prosecuted in respect of two (2) races on different days on different horses. They were entirely separate prosecutions but by agreement were heard on this appeal together. The parties are to be congratulated for taking such a course because it saved time and expense. The matters were easily capable of being dealt with at the same time. While the facts in each case are different, the applicable legal principles are the same.
- [6] In each case, the charge is that the riding was unacceptable to the stewards.
- [7] There are three levels of offence.
- [8] The first level is that set out in the *Australian Harness Racing Rules*, rules 147(1)-(2), which provides that a driver shall race a horse on its merits and any action or non-action by a driver during the course of a race which prevents or impedes the horse from racing on its merits constitutes an offence. That rule has been discussed by the Racing Disciplinary Board led by Judge Carter in the matter of *Quest Breakfast Creek*.²
- [9] The second level of offence is contained in rule 149(1) which provides that a driver shall take all reasonable and permissible measures during the course of a race to ensure that the horse driven by that rider is given full opportunity to win or obtain the best possible placing in the field. That section was also considered by the same board in

¹ *Racing Act 2002* (Qld), s 4.

² Appeal decision in the matter of *Quest Breakfast Creek*, Queensland Racing Disciplinary Board, 18 March 2014.

the above case and that board said that the leading statement of principle was that of Mr Tom Hughes QC who said in respect of the equivalent rule:³

The task of administering this rule is not always easy. One must keep 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 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. The relevant circumstances in such a case may be numerous. They include the seniority and experience of the person charged. They include the competitive pressure under which a person charged was riding in the particular race. They include any practical necessity for the person charged to make a sudden decision between alternative courses of action. The rule is not designed to punish jockeys who make errors of judgement unless those errors are culpable by reference to the criteria that I have described.

- [10] The tribunal headed by Judge Carter, after reviewing other authorities, concluded as follows:⁴

The question for us is: should we accept that the jockey's failure to take the run earlier and to advance his horse at that point was an error of judgement only on his part, or was it, objectively assessed, culpable and blameworthy and deserving of conviction and penalty?

- [11] The third level of offence is that contained in rule 149(2) and involves driving in a manner which in the opinion of the stewards is unacceptable.
- [12] In *Queensland Racing v McMahon*,⁵ this tribunal held that an appeal of this nature required a rehearing *de novo*. I am therefore in the position of having to decide whether in the opinion of this tribunal the driving was unacceptable.
- [13] This tribunal had to consider what was necessary to prove an offence of this nature in *McMullen v Racing Queensland Limited*.⁶
- [14] The tribunal adopted what was said by Judge Williams sitting in the Victorian Racing Appeals Tribunal in *Misfud v Racing Victoria Stewards*.⁷

The rule in question is as I have stated, a person shall not drive in a manner which in the opinion of the stewards is unacceptable. This rule is not intended to penalise what might be described as mere errors of judgement or split-second mistakes. The tribunal is well aware of the authority constituted by the previous decision in 1983 by Judge Goran in a case of Honan where it was thought desirable to bring into focus the sort of considerations that lie behind such rules as rule 149 (1) and (2) and Judge Goran made a number of observations.

It is certainly relevant to restate here that the first, second and fourth of the observations that he made apply. I will read those:

³ Ibid 2.

⁴ Ibid 4.

⁵ [2010] QCATA 73.

⁶ [2012] QCAT 286.

⁷ [2007] VRAT 6 (Williams J).

“(a) the rule does not permit the mere substitution of the stewards view as to how a particular horse should have been ridden for the view of the rider;”

of course in the harness racing world we would substitute “driven for the view of the rider”

“(b) the rule does not seek to punish a mere error of judgement during the race on the part of the driver; and

...

(d) the driver’s conduct must be culpable in the sense that objectively judged it is found to be blameworthy;”

I will not include (c) here because it is more relevant to a breach of rule 149(1) and we are dealing with 149(2).

...

Perhaps to throw my own interpretation into the mix I might view it this way, that the sort of culpable action that is required to amount to a breach of this rule might be such that in normal circumstances a reasonable and knowledgeable harness racing spectator might be expected to exclaim with words to the effect, “What on earth is he doing?” Or “My goodness look at that” or some such exclamation.

[15] These comments have been referred to with approval in a number of cases cited in *McMullen*. I think there is good sense in applying the test that the conduct must be blameworthy or that the spectator might comment ‘what on earth is he doing?’

[16] I approach the evidence on that basis.

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[17] The charge in this case was made pursuant to section 149(2) which provides:

...

A person shall not drive in a manner which in the opinion of the Stewards is unacceptable.

The specifics of the charge being that:

Mr Dixon’s failure to improve the position of Fire One, around Betonthebay, between 1000 M and 800 M of Race 4 at Redcliffe on 9 November 2017 when there was an opportunity to do so, was in the opinion of the Stewards unacceptable.

[18] I had the advantage of watching the race numerous times on video and being talked through the relevant parts of the race by both the driver Mr Dixon and by the chief steward. I also had as an exhibit the transcript and decision of the stewards’ enquiry held at the conclusion of the race.

[19] In *Green v Racing Queensland Tribunal*, Member Dodds said:⁸

⁸ [2012] QCAT 269, [22].

[Racing stewards] embody a considerable deal of knowledge and experience about racing and their opinion about penalty is I think, deserving of considerable weight unless that decision is plainly affected by error.

In this case their evidence was tendered, and amounts to, expert evidence which went unchallenged. The problem is that, while they may be experts, they are also the decision makers against whom the appeal is brought. In this case their written report was supported by the chief steward when he viewed the transcript of the race. In my opinion, this approach is somewhat unsatisfactory. It would be more appropriate to call as a witness an independent expert who is not associated with the decision making process. In saying that I make no criticism of the stewards or the chief steward. It would, however, be of more assistance to the tribunal if an expert who is not a steward was called to give expert evidence.

- [20] As it is, I will take account of the transcript and decision of the stewards, in conjunction with the evidence given orally by Mr Dixon and Mr Farquharson whose evidence is consistent with that of the stewards' decision.
- [21] This race was marred by a false start which resulted in the horses travelling an extra lap and Mr Dixon gave evidence that his horse was somewhat disturbed by this event and that he had to choke her perhaps to a greater extent than was necessary during that preliminary lap. She wears a pulling bit because she is somewhat difficult to control. The video does show the horse throwing its head to the side somewhat. The chief steward pointed out that other horses behaved in a similar fashion. Mr Dixon said that the mare was pulling particularly hard in this lap necessitated by the false start and that he had to cut her wind to restrain her. To calm her down he took her to the outside of the track prior to the start and then moved into position just before the race began. Prior to the 1100 metre mark Mr Dixon said the horse had not settled down and was not taking up to the horse in front properly. It did settle down at about this point.
- [22] Between the 1000 metre and 800 metre marks there was an opportunity to improve the position of the horse by overtaking Betonthebay.
- [23] At about the 1100 metre mark Mr Dixon felt that the horse was not going to finish the race off very well and so he was trying to leave his move until as late as possible. He knew that once he initiated his final sprint by pulling out from behind the horse in front she would have to maintain that sprint for the rest of the race. That prompted him to delay what I will describe as the final sprint to the finishing line. He did not feel confident that if he started his sprint earlier and overtook Betonthebay when the opportunity presented, the horse would be able to sustain the speed until the finish. He attributed the failure of the horse to win the race to the false start in which he thought he partially cut her wind. He commented also that at the conclusion of the race her heart rate was much higher than its normal post-race pulse. He also said that the horse slacked off in the last 50 metres. That seems to be consistent with his earlier concern that the horse would not have been able to maintain its top pace all the way to the finishing post. The evidence before me is that the mare actually made up 25 metres in the final 800 metres, but Mr Dixon said that that she made up that space in 750 metres but lost speed in the last 50 metres.
- [24] The suggestion put to Mr Dixon is that at about the 1000 metre mark he should have gone around the next horse but he pointed out that the trade-off is that you have to travel a bit further. He therefore had to make a decision as to whether to stay where

he was at that stage or go around another horse and cover that extra distance. If you time the run too early the horse will be tired before the end of the race.

- [25] Mr Farquharson, chairman of the stewards, gave evidence after watching the video of the race. He gave evidence that from his experience any horse subjected to a false start will be inconvenienced and that it depends on each horse as to how much that inconvenience affects it. He said that he did not observe any particular behaviour of the mare resulting from the false start. To that extent his evidence is inconsistent with that of Mr Dixon.
- [26] Mr Farquharson's concern relates to the mare as she entered the home straight. He said that the driver in front, Ms Kendall, was urging her horse to go and it just would not go. He pointed out that there was a gap that had developed placing Mr Dixon at some inconvenience. He said that a driver of Mr Dixon's experience should have got closer to the leading horses. He said that Mr Dixon needed to get his horse around Betonthebay to have a chance of winning the race.
- [27] I have listened to the evidence, viewed the video from each angle and searched for conduct that might be described as blameworthy on the part of Mr Dixon. I take into account that he is the person who knows the horse; the fact that he formed the opinion that the extra lap plus the horse's personality had placed it at a slight disadvantage, the fact that at the end of the race its pulse was much higher than it would normally be at the end of a race and the fact that it is Mr Dixon who must make the split second-decisions that are required in the course of a race. I am not comfortably satisfied that Mr Dixon drove in an unacceptable manner.
- [28] I allow the appeal and set aside the decision of the stewards.

Case number – OCR036-18

- [29] The charge in this case was made pursuant to section 149(2) which provides: 'A person shall not drive in a manner which in the opinion of the stewards is unacceptable'. The specifics of the charge were that:
- Approaching the 800 metres Mr Dixon failed to improve the position of Baron Jujon from a one wide trailing position behind Bob Gage to a three deep trailing position behind Arbit Major when there was opportunity to do so which, in the opinion of the stewards was unacceptable.
- [30] In this matter the allegation is that the horse Arbit Major made a move to go up and around the horse Bob Gage, Baron Jujon could have followed it at the 800 metre mark. The argument is that Mr Dixon failed to shift Baron Jujon to a three wide trailing position at the 800 metre mark when he had the opportunity of doing so.
- [31] Mr Dixon said that approaching the 800 metre mark he observed Arbit Major making the move out and considered following it but he did not think that it could hold on to its position and thought that with the tempo of the race it would be particularly hard for it to lead up the three wide line. It was not a horse that often did that. Mr Dixon said that that horse was in moderate form like his horse and that he was hoping that one more of the horses would come out at the two wide line and enable him to get through the field. That did not eventuate but that was the reason that he stayed in and did not follow Arbit Major. He said that had he taken that step he might have finished 6th whereas, as it was, he ran 8th. He also said that he was probably

affected on that day by the fact that his horses had not performed up to expectations and he had some concerns about their general health. Subsequent tests on their mucus indicated that they were not completely 100% fit. Mr Dixon had not mentioned this possible ill-health of his horses to the stewards immediately after the race but while it was a suspicion he did not at that point have evidence of it. He did however know that from his point of view his horses had not done well on that afternoon and he admits to lacking in confidence to some extent.

- [32] Mr Farquharson also gave evidence in these proceedings. He is critical of Mr Dixon not having caused Baron Jujon to follow Arbit Major's lead as soon as possible. He said Mr Dixon remaining in the position he did lost what he would describe as a good advantage to get 3-wide cover in the final lap on a horse that had done little work at that point. He was also critical of the fact that no complaint was made of any possible ill-health of the horse at the time of the Stewards Inquiry. Mr Farquharson described Mr Dixon as a brilliant tactician and one of the best drivers in Australia and he regarded the error made by Mr Dixon as a fatal error in not taking the opportunity presented. In cross examination he conceded that Mr Dixon had had to make 3 split-second decisions during the course of the race. He may have made the wrong decision. Indeed Mr Dixon conceded that he probably would have done better by going on the inside.
- [33] Mere errors of judgement in the running of the race should not be penalised unless the conduct can be described as blameworthy. Having listened to Mr Dixon, and Mr Farquharson and considering the transcript of the Steward's Inquiry and decision, I am not comfortably satisfied that the conduct of Mr Dixon can be considered worthy of blame.
- [34] I allow the appeal and set aside the decision of the stewards.