

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Day v Queensland Racing Integrity Commission* [2021]
QCAT 428

PARTIES: **NATHAN DAY**
(Applicant)

v

**QUEENSLAND RACING INTEGRITY
COMMISSION**
(respondent)

APPLICATION NO/S: OCR090-20

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 17 December 2021

HEARING DATE: 22 September 2021

HEARD AT: Brisbane

DECISION OF: Member Bertelsen

ORDERS: **1. The correct and preferable decision is to set aside the decision of the Queensland Racing and Integrity Commission dated 6 April 2020 and substitute a decision that Nathan Day is not guilty.**

2. The stay granted 15 April 2020 is lifted.

CATCHWORDS: PROFESSIONS AND TRADES – LICENSING OR REGULATION OF OTHER PROFESSIONS, TRADES OR CALLINGS – OTHER PROFESSIONS, TRADES AND CALLINGS – thoroughbred racing – where charges of failing to capitalise on opportunities – whether charges substantiated on review – whether rider of the horse took all reasonable and permissible measures

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 20

Kehl v Board of Professional Engineers of Queensland (2010) QCATA 52,(8)

Briginshaw v Briginshaw (1938) 60 CLR 336, 361-362

Goldsbury v QRIC (2018) QCAT 309

Racing Queensland Ltd v Cassidy 2012 QCAT 31

APPEARANCES &
REPRESENTATION:

Applicant: Mr W Tutt solicitor for Nathan Day

Respondent: Mr W Kelley principal legal officer

REASONS FOR DECISION

- [1] On 16 January 2021, the Applicant Nathan Day rode the horse Helsun in race 2 at Doomben racecourse. Helsun finished third out of a field of eleven with the horses Zofgold winning and Stamen second. The race was a maiden handicap (for horses that had not won previously) for four year-olds and up over 1350 meters. Shortly after the meeting officiating QRIC Stewards conducted an inquiry into Mr Days ride in that race. Mr Day was charged with a breach of AR129(2) of the Australian Rules of Racing as follows

AR129 Running and handling

- 2 A rider must take all reasonable and permissible measures throughout the race to ensure that the rides horse is given full opportunity to win or obtain the best possible place in the field.

- [2] Stewards considered
- (a) That when rounding the home turn Mr Day failed to show sufficient vigour and purpose to improve into a run between the horses Zofgold and Arcing Hard when it was reasonable and permissible to do so.
 - (b) After shifting to the inside near the 250 metre mark until altering course leaving the 100 metre mark Mr Day failed to show sufficient vigour and purpose to improve to the inside of the horse Stamen when it was reasonable and permissible to do so the result being Helsun not being given full opportunity to win or obtain the best possible place in the field.
- [3] Mr Day pleaded not guilty but was found guilty with a six week suspension imposed. An internal review of that decision of 6 April 2020 confirmed the Stewards inquiry decision. Mr Day seeks review of that decision to be found not guilty of the two charges, the suspension to be quashed.

Helsun's history

- [4] Dan Markey trainer and Frank Mills bought the horse Helsun it seems probably early 2019. Helsun was well bred but prior to being trained by Dan Markey had been through two prior trainers in southern states who apparently found him difficult to handle. There had been a warning put out on him in Victoria for running off the track. As Mr Markey put it, he took on Helsun to rebuild his racing career as a distance runner.
- [5] The Stewards examined race footage of two prior races in which Helsun had started.
- (a) Race 4, Gold Coast 30 November 2019 a 1400 metre maiden handicap. Mr Day rode Helsun for second place.
 - (b) Race 7, Caloundra 20 December 2019 a 1400 metre maiden handicap. Mr Day rode Helsun for seventh place.
- [6] The Gold Coast start was a relatively successful second placing, with Mr Day following Mr Markeys instructions to “just drop him out, get him settled, try and get him travelling and then see how he finishes the race off”. Mr Markey stated he told Mr Day “Nathan just ride him steady behind, make him travel and let him get home”. Mr Day said Helsun was a climber not a bashing horse; that “if you bash him or wrestle him in a race or if he bumps that’s it”.

- [7] That led to the approach at the next start at Caloundra to jam Helsun out (that is go hard from the very start and all the way). The Caloundra start according to both Mr Day and Mr Markey as well as part owner Mr Mills was somewhat of a disaster. Coming out of barrier 2 Helsun hit himself. He apparently gashed his nearside front fetlock. He was reshod with fast brake shoes and a bandage was applied to his nearside front fetlock for protection. He was walked, galloped and swum. Some three and a half weeks after the Caloundra ride, when Helsun was deemed fully fit, Mr Day was given Helsun to ride in race 2 at Doomben.
- [8] The Stewards inquiry is peppered with statements commentary and opinions by all who took part. The Stewards, Mr Day, Mr Markey, and Mr Mills. Mr Day made numerous references to the horse he was dealing with including
- (a) Transcript page 3 “climbing and ducking around, that’s him sir. He’s not a crash and bash ... he’s not a push and shover. I know the horse. See here. That’s what – if I was to bash him, that’s what he does, he’d run last”
 - (b) Transcript page 4 “if I do that crash and bash style it doesn’t work for him.”
 - (c) Transcript page 18 “it is not a wrestling horse ... he’s a climber”
 - (d) Transcript page 20 “if you bash it around which we did at Caloundra it goes no good”
- [9] Mr Markey’s references were generally similar.
- (a) Transcript page 7 “you can’t be vigorous on this horse.” Then “we’ve learnt if you hustle and bustle this horse in his track work or in his race he’ll either hit himself or he’ll completely get himself off balance”
 - (b) Transcript page 8 “he’s a horse that has got to have a lot of galloping room because of his extravagant action”
 - (c) Transcript page 21 At the Gold Coast “Nathan just ride him steady behind make him travel and let him get home which he did”.
 - (d) Transcript page 31 “he’s a distance horse not a quick up and go horse.”
- [10] Mr Markey bet \$350.00 for a win and Mr Mills bet \$300-400 for a win.
- [11] Mr Day stated Helsun was a distance horse not a quick up and go horse. When opportunity arose to improve into a run between Zofgold and Arcing Hard he was going as fast as he could at that point but does not make it.

Oral evidence of Mr Aurisch Stewards Panel Chairman

- [12] Mr Aurisch as well as chairing the Stewards inquiry forming part of the evidence in this review gave evidence. With respect to the first charge Mr Aurisch agreed Helsun after a slow start took up position in the first half of the race towards the rear of the field.
- [13] He considered Mr Day having conserved energy in the first half of the race and up to the 600 metre mark approximately it would be expected he would ride hard. He said room between Zofgold and Arcing Hard opened up providing an opportunity to move up into a run between those two horses. The gap that opened up could have accommodated two horses, but that did not occur. Rather Mr Days hands & heels action was soft; that Mr Days elbows were tucked in, other riders’ elbows were out

or hands right up on the horses head. Mr Day used his whip sparingly. Mr Aurisch and his panel felt the run was available, opportunity there for the horse to perform at its best but no vigorous, hands-on movements. Mr Aurisch said he had seen Mr Day put his arms out and really push a horse.

- [14] Moving on to the second charge Mr Aurisch considered Mr Day did not persevere with the inside run available from at least the 250 metre mark to approximately the 100 metre mark. Rather he followed the lead horse Stamen. There was an opportunity to go between Stamen and the rails but because that opportunity was not taken in decisive matter the opportunity diminished. There was insufficient urging into the inside position.

Oral evidence or Nathan Day jockey

- [15] In evidence Mr Day said he had been associated with Helsun for two and a half to 3 months. The horse had peculiar tendencies, but he thought he rode well. There was no difference between soft hands & heels and hard hands & heels. He said you get the same speed out of the horse. You either restrain a horse or let it go i.e. hands & heels. He said his hands & heels riding style was as depicted in this race.
- [16] With respect to the first charge Mr Day stated he rode conservatively in the first part of the race. Then approaching the home turn he was some three lengths behind Zofgold. The reason why he could not take the run to the outside of Zofgold and inside Arcing Hard was because Helsun was not travelling fast enough, was flat footed. But he continued to urge the horse forward with hands & heels and whip sparingly. The opportunity however was lost.
- [17] After that lost opportunity Mr Day made the decision to go inside Stamen to win the race. Stamen was 2 off the fence. There was room there when he elected to go through. As he made that decision Stamen rolled into half off the fence (rails). Room to move through on the inside diminished. If he continued it would be dangerous. By this stage the leading group was about 50m from the post. He was using hands & heels as well as whip. He moved out and in behind Zofgold (which was also moving in at this point). Tracking the winner Zofgold at this very late stage was the correct decision in his view. These latter circumstances, that is not being able to take the inside running in between Stamen and the rails cost him the race.

Conclusions

- [18] QRIC Stewards conducted a lengthy inquiry. The two failures as found by the commission are independent of one another occurring at different stages of the race though consequentially one might be said to follow from the other.

- [19] The Tribunal on review stands in the shoes of the respondent decision maker to arrive at the correct and preferable decision.¹ The Tribunal must decide the review by way of a fresh hearing on the merits. There is no presumption the decision under review was in error nor that it was correct.² The Tribunal must also be satisfied on balance that the charges are proved. *Briginshaw v Briginshaw*³ sets out the basis on which the charges must be made out to the satisfaction of the Tribunal. The relevant passage as oft quoted and as was quoted in *Goldsbury v QRIC*⁴ a case dealing with similar type issues is as follows:

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...

- [20] The relevant races at Gold Coast, Caloundra and Doomben were all well viewed at hearing.
- [21] Mr Days response to the first charge “when rounding the home turn he failed to show sufficient vigour and purpose to improve into a run between Zofgold and Arcing Hard when it was reasonable and permissible to do so” was to effectively admit the opportunity was there but that Helsun was flat footed at that moment and that Helsun failed to accelerate under hands & heels and some whip. The jockey riding intuitively is the best person, really the only person, who can gauge whether a horse can go faster.
- [22] In other words Helsun being a stayer not a sprinter could not take advantage of the opportunity presented. Moreover on any reading of the evidence Helsun was at least a couple of lengths behind Zofgold and Arcing Hard. Anyone who has ever ridden a horse knows, and particularly jockeys are acutely aware, they have to deal with the mood and temperament of their given mount on the day. A common theme on the part of both Mr Day and Mr Markey is that a crash & bash style doesn't suit Helsun and that if he is hustled & bustled he will get himself off balance.
- [23] The QIRC's assertion of culpability here lies primarily in Steward's observation of Mr Days hands & heels style being soft, elbows tucked in, no hands right up on the horses head. Mr Day said “there was nothing unusual or out of the ordinary about his riding style on the day. Even if that translates into a perceived softly softly

¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 20.

² *Kehl v Board of Professional Engineers of Queensland* (2010) QCATA 52, (8).

³ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-362.

⁴ *Goldsbury v QRIC* (2018) QCAT 309.

approach, that is not an error of judgement rather it speaks to how to handle this particular horse with a view to getting the best out of him in the race.

[24] In *Racing Queensland Ltd v Cassidy*⁵ the Tribunal said that

Rule 135(b) (*the predecessor rule to rule 129(2)*) 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 follows:

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...

[25] There was no poor decision or error of judgement here to attract culpability to the required threshold.

[26] Mr Day's response to the second charge "failing to improve to the inside of Stamen when it was reasonable and permissible to do so" was clear enough. Having been unable to take the first opportunity presented, Mr Day now had to make up sufficient ground on Stamen and make the move to the inside. Perhaps he could have been more decisive, thought more quickly, made a bold inside run. Taking into account the speed, the pressure at the business end of the race, Stamen's move to the inside as well as Zofgold's at much the same time and a looming, perceptible safety issue, not to mention Helsun's failure to respond moments before it is little wonder Mr Day then instead pulls out around Zofgold and goes all out to the finish line.

[27] There was no poor decision here nor an error of judgement. Even if there was an error of judgement that is not a sufficient basis of itself for a finding of a breach of the rule. To be clear, the Tribunal accepts Mr Day's evidence as to what transpired during the race. Mr Day came across as a straightforward truthful no nonsense experienced jockey with an undisputed exceptionally good record for one who has ridden racehorses over so many years. Mr Day's explanations underline the difficult decisions jockeys make in the course of a race often perceived in hindsight as not particularly strategic. Mr Day's explanations, the decisions and moves that Mr Day made were with a view to winning the race. There is no culpability on the part of Mr Day here.

Orders

1. The correct and preferable decision is to set aside the decision of the Queensland Racing and Integrity Commission dated 6 April 2020 and substitute a decision that Nathan Day is not guilty.
2. The stay granted 15 April 2020 is lifted.

⁵ *Racing Queensland Ltd v Cassidy* (2012) QCAT 31.