

RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTER OF THE APPEAL OF CHAD LEVER

Appeal Panel: **Mr T HALE SC – CONVENOR**
Mr P Losh
Ms J Madsen

Appearances: **Racing NSW: Mr M Van Gestel, Chairman of Stewards**
Appellant: Mr W Pasterfield, Solicitor

Date of Hearing: **16 November 2018**

Date of Reasons **16 November 2018**

REASONS FOR DECISION

Convenor:

Introduction

1. Chad Lever (the appellant) is a licensed jockey. He is a senior rider. He has ridden for 22 years. He rides most weeks. On Sunday 23 September 2018 he rode the horse *Streets of Dubai* in Race 4 at Port Macquarie. The race was the Lear & Smith Rexel Group Benchmark 58 handicap over a distance of 1506m. *Streets of Dubai* was unplaced and finished at the back of the field. It started at \$15. Later that day, the Stewards held an inquiry into the appellant's ride. As a result of the inquiry, the appellant was charged with and found guilty of a breach of rule AR135(b). The appellant was suspended for a calendar month from 7 November 2018 to 7 December 2018. A stay of the penalty was granted until further order of this Panel.
2. The appellant appeals against both conviction and severity of penalty pursuant to s.42 of the *Thoroughbred Racing Act, 1996*.

3. The charge brought against the appellant is attached as Annexure "A". The charge (but without the particulars) is:

AR135. (b) *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.*

4. At the hearing before this Panel, the Stewards were represented by Mr Van Gestel, Chairman of Stewards. The appellant was represented by Mr Pasterfield, solicitor.
5. During the hearing, we received into evidence the transcript and evidence before the Stewards as Exhibit "A". The appellant, Chad Lever, also gave evidence brought before us. He was cross examined by Mr Van Gestel.
6. At the conclusion of the hearing, I announced the unanimous decision of the Panel, which was that the appeal be allowed and the charges against the appellant be dismissed. I said that the Panel would publish its reasons for its decisions at a later time. These are those reasons.

The factual background

7. The appellant, as I have said, has been a licensed jockey for 22 years. He rides most weeks. He said in evidence that he is and always has been a careful rider. He said he tries to avoid interference and tries not to get into trouble. That this is so, is borne out by the fact that he has not been suspended in 11 years. In his evidence, he said that it was this approach to racing that led him to the decisions he made on the three instances the subject of the particulars of the charge. The first particular concerns the appellant's riding in the early stages of the race, between the 1300m and 1000m mark. The second particular

concerns what occurred between the 1000m and 800m mark. The third particular concerns the appellant's riding on the home turn. The evidence in relation to each particular will be examined in turn.

Particular 1

8. Particular 1 is in these terms:

After establishing a forward position in the early stages of the event behind the leader One More in accordance with your instructions, between approximately the 1300m and 1000m the you rode with insufficient purpose to maintain that advantageous position behind One More when it was reasonable and permissible for you to do so.

9. The evidence of the appellant was that although he was in an advantageous position following and behind *One More*, ridden by Laura Cheshire, he considered that *One More* was over racing. He had ridden *One More* before and it hanged (although it did not hang in this race). He did not want to get too close up on its heels. He anticipated that *One More* would come back. He thought he should keep a safe distance. He said that this was not a case of him riding with insufficient purpose. Rather, in the circumstances, he was riding with an appropriate degree of caution.

10. I have no reason to doubt the appellant's evidence and I accept it. The appellant gave his evidence in a careful, thoughtful and credible fashion. I accept that this was the judgment that he made at the time. This, of course, is not to say that others would not have taken a different decision. Undoubtedly, many more aggressive jockeys would have. However, this was the judgment that the appellant made at the time.

Particular 2

11. Particular 2 is in these terms:

Between approximately the 1000m and 800m you continually restrained your mount which allowed Urban Royal to cross into the running which

you had established behind One More, resulting in your mount being disadvantage by losing 3 lengths and racing behind Urban Royal, when it was reasonable and permissible for you to maintain the advantageous position that you had established in the early stages behind One More.

12. The appellant's evidence of what occurred and the decisions that he made at this point in the race may be summarised this way. *Urban Royal*, ridden by Darryl McLellan was on the appellant's outside and in front. He began to encroach on the appellant's line. The appellant slightly steadied for one stride. At the same time, *Newton*, ridden by Ben Looker, came around the outside of *Urban Royal* at a greater pace, leading to the other horses increasing their pace just as the appellant steadied. This led to a gap opening for Daryl McLellan on *Urban Royal*, enabling him to cross in front of the appellant. The appellant said he had not been expecting *Urban Royal* to come in. He said that he did not "continually restrain" his mount, as the particulars allege. He said that the other horses increased their pace and got away from him just as he steadied. Again, I accept the appellant's evidence.

Third particular

13. The third particular is in these terms:

That making the home turn, you failed ride your mount with purpose and vigour to shift to the outside of Urban Royal and to improve forward into a run which was available between Urban Royal and I've Got This, which would have resulted in Streets Of Dubai obtaining clear running and commencing to improve into the event, when it was reasonable and permissible for you to do so.

On entering the home straight, failed to ride your mount with purpose and vigour and shift to the outside of Urban Royal to improve forward into a run which was available between Urban Royal and I've Got This, which would have resulted in Streets Of Dubai obtaining clear running and commencing to improve into the event, when it was reasonable and permissible for you to do so. Such failure resulting in Streets Of Dubai being badly held up behind One More and inside Urban Royal over the

final 200m of the event and not tested when unable to secure clear running.

14. The Stewards submit that in entering the home straight, the appellant should have moved to the outside. The appellant's evidence was that he shifted off the rail to move to the outside, but just as he did that, Daryl McLellan on *Urban Royal* also moved to the outside and "beat him to the punch". This is evident from the film. The appellant said that a gap then opened up inside. He decided to take that gap and go inside to the rail to "ride for luck". The luck was not forthcoming. Again, I accept the truthfulness of his evidence.

AR135

15. AR135 provides:

- (a) Every horse shall be run on its merits.
- (b) 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.
- (c) Except where the safety of any horse or rider in a race requires otherwise, every horse must be ridden in such a manner to benefit only its own best interests and not to the advantage of other horses or riders.
- (d) Any person who in the opinion of the Stewards has breached, or was a party to breaching, any portion of this Rule may be penalised, and the horse concerned may be disqualified
- (e) Any person who:
 - (i) in the opinion of the Stewards, has breached, or was a party to breaching, subrule 135(a); and
 - (ii) (ii) has a lay bet or an interest in a lay bet on the subject horse and/or has a bet or an interest in a bet on another horse in the subject race, must be penalised in accordance with AR.196(5)

16. A number of observations should be made about establishing a breach of AR135(b). Firstly, the rule provides that the rider “shall take all reasonable and permissible measures...”. To establish a breach of the rule, the Stewards must establish that on the *Brigenshaw* onus the rider did not “take all reasonable and permissible measures”.

17. Secondly, in the present circumstances, AR135(b) must be read with AR137(a) which provides that:

Any rider may be penalised if, in the opinion of the Stewards,

(a) He is guilty of careless, reckless, improper, incompetent or foul riding.

Permissible measures within the meaning of AR135(b) means measures which, amongst other things, do not involve careless or reckless riding within the meaning of AR 137(a). This is consistent with ARAR 135(c). Thus, in the present circumstances, to establish a breach of AR135(b), it would be necessary to establish that taking the course that the Stewards submitted the appellant should have been taken, would not have amounted to careless or reckless riding.

18. Thirdly, AR135(b) provides that every horse shall be run on its merits. This goes to the protection of the integrity of racing. The industry and the public expect that every horse will run on its merits. The requirement of AR135(b) is in aid of achieving that purpose. AR135(c) and (d) recognise the possibility that a rider might breach the rule as part of an arrangement with another party, and might do so as part of a financial arrangement to lay bets on the race knowing that the horse will not run on its merits. In short, a form of race fixing.

19. Fourthly, this rather emphasises that AR135(b) is not so much concerned with incompetent riding, to which AR137(a) is directed, but rather is concerned with

the intention of the rider and whether the rider's intention was to comply with AR135(b). If on the objective facts the rider does not appear to have taken all reasonable and permissible measures to ensure that the horse is given full opportunity to win or obtain the best possible place, an inference may very well arise that the rider did not intend to do so. However, where the rider gives evidence of the decisions made in the race, which are consistent with an intention and endeavour to comply with the rule and that evidence is accepted, the charge is unlikely to be sustained.

20. In determining whether on the objective facts the rider does not appear to have taken all reasonable and permissible measures to ensure that the horse is given full opportunity to win or obtain the best possible place, the decision of this Panel in the Matter of the Appeal of Jockey Chris Munce dated 5 June 2003 is apposite. It has been followed by this Panel on many occasions, and in particular where Mr T. E. F. Hughes AC QC — Principal Member said:

The task of administering this 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 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 the 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 judgment unless those errors are culpable by reference to the criteria that I have described.

21. What is a reasonable measure must be determined from the perspective of the rider, who may need to make sudden decisions between alternative courses of action, in which he or she will need to balance the objective of winning against competing safety considerations and the obligation not to ride carelessly, recklessly or improperly.

22. In the present case, I have accepted the truthfulness of the appellant's evidence of the reasons he took the decisions that he did, on the three occasions identified in the particulars. In those circumstances, I cannot be comfortably satisfied that a breach of AR 135(b) has been established.

Mr P Losh: I agree

Ms J Madsen: I agree

The Panel gave the following orders:

1. Appeal against finding of breach of AR135(b) allowed.
2. Finding of breach of AR135(b) set aside.
3. Penalty of one-month suspension set aside.
4. Appeal deposit to be refunded.

