RACING APPEAL PANEL OF NEW SOUTH WALES

APPEAL OF HUGH BOWMAN

Panel: Mr R Beasley SC, Principal Member; Mrs J Foley; Mr C Tuck

Appearances: For the Stewards: Mr M Van Gestel.

For the Appellant: Mr M Einfeld QC

Date of Hearing: 24 September 2020

Date of Orders: 24 September 2020

REASONS FOR DECSION

Mr R Beasley SC, Principal Member

Introduction

1. On 17 September 2020, licensed jockey Hugh Bowman was found by the Racing NSW Stewards to have breached **AR 129(2)** of the Australian Rules of Racing when he rode the horse Farnan in Race 6 (Run to the Roses) at the Randwick Racecourse over 1200 m on 12 September 2020.

2. AR 129(2) is in the following terms:

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

3. The Stewards alleged, and then found, that the appellant failed to take all reasonable and permissible measures on Farnan to ensure that horse was given full opportunity to win or obtain the best possible place in the Run to the Roses race by reason of the following particulars:

   (a) That from near the 1100 metres, when positioned forward and to the outside of Peltzer, and when Rothfire was holding an advantage on Farnan, he rode Farnan along to cross and lead Rothfire until near the 1000 metres which resulted in Farnan setting a very fast early pace when it was both reasonable and permissible to maintain a more favourable position to the outside of Rothfire.

   (b) After clearing Rothfire approaching the 900 metres and when Farnan continued to set a very fast early pace, he failed to make sufficient endeavour to restrain Farnan between approximately the 900 metres and 500 metres in an attempt to set a slower and more sustainable pace, when it was both reasonable and permissible to do so, which ultimately resulted in Farnan continuing to set a very fast pace through that section of the race.

   (c) Between approximately the 500 metres and 350 metres, when holding a four length advantage on Rothfire, he rode Farnan along when it was both reasonable and permissible to ride Farnan more conservatively having regard to the very fast pace set by Farnan during the early and middle sections of the race.

4. The appellant pleaded not guilty to the alleged breach of the rule. Having been found in breach, the Stewards imposed a penalty of a 20-day suspension of the appellant's licence to ride. That suspension is to commence on Sunday 27 September 2020, and expires on Saturday 17 October 2020, on which day the appellant may ride. The appellant has appealed both the finding of breach of the rule, and the severity of penalty imposed upon him. He was represented at the appeal today by Mr M Einfeld

QC. The Stewards were represented by Mr Marc Van Gestel, the Chairman of Stewards.

5. The appeal book, containing transcript of the Stewards' Inquiry, was admitted into evidence as Exhibit A. Included in Exhibit A were documents showing the sectional speeds, including the speeds comparable to average sectionals, that were exhibits at the Steward's Inquiry (and have retained the number given to them at the Inquiry). Film of the race was admitted as Exhibit B. Oral evidence was given for the Stewards by Mr W Birch, the Deputy Chairman of Stewards. The appellant gave oral evidence concerning his ride on Farnan, and Mr M De Montfort, a former successful jockey of many years, and now a trainer, gave opinion evidence regarding the appellant's ride.

Construction of AR129(2)

6. Before discussing the evidence, something should be said about the rule. The leading appeal reasons about how to construe and apply this rule remains the *Appeal of Munce* (5 June 2003). In this appeal the then Principal Member, Mr TEF Hughes QC, said that a rider should not be found to be in breach of the rule unless the Panel is "comfortably satisfied that the person charged was guilty of conduct that, in all the relevant circumstances, fell below the level of objective judgement reasonably to be expected of a jockey in the position of the person charged". As to the relevant circumstances, Mr Hughes said they would include:

   (a) the seniority and experience of the rider charged;

   (b) the competitive pressure they were under in the race; and

   (c) whether they had to make a sudden decision between alternative courses of action.

7. These should be considered to be inclusive factors, not exclusive. Further, the Panel in *Munce* noted that the rule is not designed to find jockeys to be in breach of the rule "who make errors of judgement unless those errors are culpable by reference" to the various circumstances relevant to the race and the conduct. In that sense Mr Hughes was adopting a construction of the rule that was not literal. Any error by a rider might as a matter of logic - even a minor one - mean that the rider has not taken "all

reasonable and permissible measures" to ensure a horse is given full opportunity to win or obtain the best possible placing. But not every error is caught by the rule. It requires the application of judgment, common sense, and a reasonable consideration of all the factors that are relevant to a particular error or lapse of judgment in deciding whether that error is culpable under AR 129(2). While it is therefore crucial to the sport that riders ride in a manner that does give full opportunity to their mount to win or obtain its best place in a race, it is also important that this Panel show appropriate restraint and judgment in making determinations about whether AR 129(2) has been breached. Riders, like other sportsmen and women, are going to make errors. That is inevitable. Not all of these errors should be judged to be errors that result in a finding that the rule has been breached. The error has to be a bad one, or too many jockeys will be penalised under the rule. A suspension of a licence to ride is not a trivial penalty – it deprives a person of the ability to make their living for a period.

8. Two further things should be stated about AR 129(2). This rule, but its nature, is one where two reasonable people, who have both diligently considered the same evidence, may rationally reach different conclusions as to whether it has been breached or not. Secondly, the onus of persuading the Panel that the rule has been breached is on the Stewards, to the standard of balance of probabilities, but with what is known as the "Briginshaw"[1] gloss: the Panel must be comfortably satisfied that the rule has been breached. This is a rule where, in my view, the burden of proof is higher than that relevant to, for example, the careless riding rule (a rule in relation to which safety is a paramount consideration).

9. While the parties have very different views about whether the appellant's ride constitutes a breach of the rule, there are some matters of fact – of differing relevance and significance – that are not controversial, or that the Panel accepts:

   (a) The appellant Mr Bowman is a very experienced rider, at the top of his field. He has won nearly 100 GP 1 races, and has been a licenced rider for about 20 years. He has not been found to be in breach of AR 129(2) before.

[1] *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336

(b) The horse Farnan was one of the best 2-year old's last Autumn, having won, amongst other races, the Golden Slipper. The race relevant to this appeal was its first run as a 3-year-old. Its form to then was 6 Starts, 5 wins and one unplaced run.

(c) Farnan, despite its short career, is considered a horse that likes to lead, or run near the lead. The Panel was told and accepts that its trainers, Ms Waterhouse and Mr Bott, generally prefer their horses to lead or race near the lead.

(d) Farnan started a $2.50 favourite in the race.

(e) The Race is a Group 2 sprint over 1200m, on a Good 4 track.

(f) Only 7 horses started in the race.

(g) The race resulted in a fast time (1m 8.52 seconds)– only 0.2 seconds outside the track record for 1200m.

(h) Analysis of betting activity revealed nothing unusual, or warranting further inquiry.

(i) Statistical evidence showed that between the 1200m and the 400m Farnan ran 12.8 lengths faster than is the average for all 1200m races run at Rosehill since 1995.

Evidence of the Stewards and the Appellant.

10. Mr Birch's evidence can be summarised this way:

(a) In his opinion, from the 1100m to the 1000m of the race, the appellant rode Farnan too aggressively. He pointed out from the film of the race the appellants vigorous use of his arms in pushing the horse forward and in advance of Rothfire in this section of the race. He considered that this vigorous riding was sustained for so long it was a culpable error under the rule.

(b) Relating to the second particular, from the 900m to the 500m, Mr Birch's opinion was that, having ridden the horse so aggressively earlier, the appellant should have made at least some attempt to restrain the horse and slow it, rather than riding it "passively". He conceded that some effort was made by the appellant, but insufficient. He considered that the appellant should have used more endeavour to slow the horse, and gave examples such as shortening the reign and using more force. Based on his significant experience as a senor steward, Mr Birch felt it was incumbent on the appellant to at least make a greater attempt to slow the horse so as to give it its best chance in the race.

(c) As for the third particular, in Mr Birch's opinion it was not reasonable, given the fast early pace and the horses 4 length lead, for the appellant to begin riding again with such aggression from the 500m to the 350m. The appellant did not need to stop riding, but he should have ridden more conservatively and "cushioned" the horse through this part of the race to try and conserve what energy the horse had left, again to give it its best chance in the race.

11. Before coming to the appellant's evidence, one matter should be clarified about the weight the Panel has given to Mr Birch's evidence. It is sometimes said that the evidence and opinions of riders should be given more weight than that of the Stewards when it comes to analysing rides. That is not the default position of the Panel. An experienced Steward has watched thousands of races. In the course of that they develop an expertise that means appropriate weight should be given to their opinions. Sometimes their opinions will be preferred to a rider's view – and sometimes overwhelmingly so. Sometimes the reverse will apply. That depends on a range of evidence and circumstances, including, often most importantly, the film of the race. In this appeal, Mr Birch, given his experience, was not in any particular or significant disadvantage to a rider in relation to either his observations, or the opinions he formed from them.

12. Mr Bowman's evidence in relation to the first particular was, in essence, that he did ride his horse with a fair amount of vigour between the 1100m to the 1000m. How quickly Farnan ran after that he said surprised him. He said he had an open mind about leading but thought that would suit his horse best. How hard he had to ride, and

how hard his horse had to work to get the lead, also seems to have taken him by surprise.

13. As to the second particular, Mr Bowman rejected the suggestion he could have or at least should have made a greater attempt to restrain his horse and slow it. He felt to change his grip and shorten reigns would be counterproductive. Even briefly releasing the pressure by doing this would send a message to the horse to go even faster. He felt that the horse was at least running in a good rhythm, and more restraint on his behalf was not what he thought was the best option for how to ride this horse. By "rhythm", Mr Bowman explained that this is vital in his view to a horse performing at its best – it includes things like consistency of stride and breathing. His view is that rhythm can be disrupted if a rider applies too much force into attempting to restrain a horse. His evidence about particular 2 is linked to 1. He wanted to lead, and having got to the lead, he though his horse would relax more. That was his experience with this horse. To his surprise, it did not. While Farnan did not relax as he expected, Mr Bowman thought the horse at least maintained a reasonable rhythm.

14. As for the final particular, Mr Bowman considers that riding the horse conservatively as the Stewards required would have been counterproductive too. It would have meant surrendering what lead he had.

15. Mr De Montfort's evidence really amounted to the opinion that the actions of Mr Bowman that the Stewards criticise in each particular were all reasonable, and in relation to particulars 2 and 3, also entirely appropriate and the best course of conduct.

Submissions

16. Mr Van Gestel's submissions can be summarised very briefly this way:

    (a) The appellant worked the horse too hard between the 1100m and the 1000m, and rode with too much vigour to fight the lead off Rothfire. The reasonable measure he should have taken was to stop riding with such vigour when it was apparent, as it should have been to Mr Bowman, that he was likely to be ruining the horse's chances in the race.

(b) As to particular 2, actions could have been attempted by Mr Bowman to slow the horse from a pace that he should have known was not sustainable if the horse was going to have full opportunity for achieving its best possible placing. More obvious attempt to restrain with both arms, shortening of the reigns, and use of the body were mentioned.

(c) As to particular 3, in essence it is alleged that Mr Bowman should have kept riding the horse from the 500m to the 350m in the manner he did from the 900m to the 500m, rather than increasing his vigour. This would have given the horse a better chance of finishing the race off.

17. Mr Einfeld submitted that the evidence did not support a finding of culpable error in relation to any particular. He conceded no error at all. He agreed the horse was ridden vigorously between the 1100m to the 1000m, but said that this did not establish breach of the rule. Mr Einfeld submitted that Mr Bowman had two choices at the beginning of the race: race wide next to Rothfire, but not spend as much energy, or ride to take the lead as he did. Neither approach was unreasonable. Mr Einfeld also submitted that there was no evidence before the Panel upon which it could form the view that the appellant's conduct complained of in any particular had harmed the horse's chance of finishing in the best place it could.

18. Mr Einfeld made a further submission of some weight in relation to particular 1 – that was, it should be seen with the allegations in particular 2. In adopting the tactic of riding with vigour to take the lead, Mr Bowman – reasonably and based on his prior experience with the horse – still thought Farnan would relax more than it did once the lead was achieved.

19. As to particular 2, Mr Einfeld submitted that the evidence of Mr Bowman and Mr De Montfort overwhelmingly supports the view that the manner of the appellant's riding was reasonable. For this particular, and particular 3, the submission was made that it would have been counterproductive to ride the horse in the manner suggested by the Stewards.

Resolution

20. The Panel has not reached a unanimous view. By majority, the appeal is allowed.

21. All three Panel members are of the view that in relation to particular 1, Mr Bowman has made an error. What we find has occurred is that he felt he would get to the lead more easily than he did. Perhaps because of Rothfire's natural speed, Mr Bowman had to ride with considerable vigour for maybe just more than 100m to get to the lead. That was an error of judgment. The decision and the desire to lead on this horse was not an error, but how hard Mr Bowman had to ride the horse, and for how long, was. A lot of energy was clearly spent by Farnan getting to the lead.

22. Mrs Foley is of the view that this error of judgment is a culpable one, and cost the horse its opportunity to achieve its best placing. Mr Tuck and I – and this in part turns on the burden of proof - are not comfortably satisfied that it is a culpable error warranting a finding of breach. In finding it not to be a culpable error, we also rely on our finding that it was a perfectly reasonable decision to attempt to lead on the horse, and it was reasonable for the appellant to consider – based on his experience with this particular horse, and its racing record - that he might get to the lead with less effort than it took him. The error was in persisting for so long with vigour to take the lead. That decision itself though requires us to also take into account Mr Bowman's view – again, based on prior rides and trials on this horse – that Farnan would relax more than he did once he took the lead. Mr Birch and the Stewards might be right as to why the horse likely did not relax: it was fresh, and the vigour of Mr Bowman's ride in the early stages counted against the horse settling as desired. Accepting that, and accepting that an error of judgment was made, Mr Tuck and I consider that this error falls marginally short of an error that in all the relevant circumstances should be considered a culpable error under this rule and attract a penalty.

23. The Panel is unanimously of the view that error has not been demonstrated in relation to particular 2. We accept the evidence of Mr Bowman in this regard as to his ride, and his reasons for it. There was considerable evidence in relation to this particular concerning where the reigns are griped and could be regripped, body position, and the amount of force being exerted by Mr Bowman. The Panel is sympathetic to the view

of the Stewards that they expected to be able to see an obviously greater effort from Mr Bowman to restrain the horse. However, Mr Bowman's evidence was that he had a strong enough hold on the horse, using his arms and core strength, and going beyond what he did would have been unwise, as it might have made the horse lose what rhythm it had. Mr De Montfort said much the same thing in his evidence. It will not be in every appeal that the evidence of a rider is accepted, or opinion evidence in support of his or her ride. However, in this appeal there is no proper basis not to accept the sincerity of Mr Bowman's evidence, nor to find that the manner of his ride between the 900m to the 500m was not reasonable. He chose keeping what rhythm the horse had over pulling harder on the reigns or taking any other action to potentially slow the horse. The totality of the evidence is such that there is no rational basis for the Panel to find Mr Bowman made an error or that how he rode the horse in this section of the race was not reasonable.

24. As to particular 3, the Panel is unanimously of the view that some error of judgment was made by the appellant in increasing his vigour at the 500m. Riding slightly more "quietly", for slightly longer, would likely have been more advantageous to the horse. In the circumstances of this race, we do not consider this to be a sufficiently serious error to warrant a finding of breach of the rule, and we are not certain to the degree required that this altered the opportunity for the horse to finish in the best place it could.

25. A majority of the Panel have found that Mr Bowman has not breached AR129(2) for his ride on Farnan on 12 September 2020. The appeal must therefore be allowed, and the penalty set aside. It should be noted though that all members of the Panel, as well as the Stewards, felt that Mr Bowman erred to some degree in relation to particulars 1 and 3. Mrs Foley and the Stewards considered the error they found in relation to particular 1 was a culpable error under the rule. Mr Tuck and I consider the view of Mrs Foley and the Stewards to be entirely rational, and based on the evidence. Our only disagreement is that we do not think the error should be considered a culpable one under the rule.

26. Orders: By majority:

1. Appeal allowed.

2. Finding of breach of AR 129(2) set aside.

3. Penalty of a 20-day suspension of the appellants licence to ride is set aside.

4. Appeal deposit to be refunded.