

RACING APPEAL PANEL OF NEW SOUTH WALES

APPEAL OF KATHY O'HARA

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

Appearances: For the Stewards: Mr M Van Gestel.

For the Appellant: Herself

Date of Hearing: 25 March 2021

Date of Orders: 25 March 2020

REASONS FOR DECISION

THE PANEL

Introduction

1. On 17 March 2021, licensed jockey Kathy O'Hara was found by the Racing NSW Stewards to have breached **AR 129(2)** of the Australian Rules of Racing when she rode the horse Sippity Sup in Race 5, the New Zealand Bloodstock Maiden, at the Newcastle Racecourse, which was run over 1400 m on 18 February 2021.
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 Sippity Sup to ensure that horse was given full opportunity to win or obtain the best possible place in the race by reason of the following particulars:

Particular 1: That after riding your mount aggressively from shortly after the start you then, contrary to the instruction issued, continued to ride Sippity Sup aggressively until a point near the 1250m, when it was both reasonable and permissible to refrain from riding Sippity Sup aggressively and take a position trailing Ugly Nicos and Not A Choice in accordance with the riding instructions by trainer Chris Waller.

Particular 2: That shortly after being crossed by Crystal Waters near the 1200m you then again rode Sippity Sup aggressively until near the 900m when it was both reasonable and permissible to maintain your position to the outside of Ugly Nicos, having regard to the aggressive manner in which you rode, and the effort required of Sippity Sup from the start to the 1200m.

Particular 3: Between the 800m and the 600m after Sippity Sup had established a clear margin on the remainder of the field you then failed to make sufficient effort to restrain Sippity Sup and slow the mare to set a sustainable speed, particularly having regard to the aggressive manner you had ridden Sippity Sup from the start to the 900m.

Particular 4: As a result of your failure to ride Sippity Sup in a manner as detailed in particulars 1, 2 and 3, Sippity Sup was not given full opportunity to win or obtain the best possible place in the field.

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 suspension of the appellant's licence to

ride from 26 March 2021 until 15 April 2021. The appellant has appealed both the finding of breach of the rule, and the severity of penalty imposed upon her. She represented herself at the appeal today. 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 that 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 T Moxon, a Stipendiary Steward of 17 years' experience, who chaired the Stewards' Panel for the Inquiry into the appellant's ride. The appellant made submissions with the assistance of the film of the race.

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. As the Panel said in *The*

Appeal of Bowman (24 September 2020), Mr Hughes adopted 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 integrity of 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. 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. 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 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).

Facts

9. The following are matters of fact that are either not controversial, or that the Panel accepts:
 - (a) The appellant is an experienced and capable rider. She has not been found to be in breach of AR 129(2) before.
 - (b) The horse Sippity Sup is a 4-year-old mare, who is a maiden. She often does not begin well in races.

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

- (c) The appellant says the horse was the fittest in the race, which seems a fair observation on the evidence.
- (d) The horse started at \$9, and drifted out marginally in betting to \$10. There was no suspicious betting activity.
- (e) The Race was run on a soft 7 track.
- (f) There was evidence that in the prior 4 races, horses at or near the lead had won.
- (g) Sippity Sup ran from the 1400M start to the 800m at a speed that was 1.75 lengths faster than the average for this track and distance.
- (h) The instructions given to the appellant by the horse's trainer, Mr Chris Waller, were as follows: *"She does have a habit of being slow away so help her begin and settle where she is comfortable. If she jumps with them, she could settle 3rd 4th getting the run of the race if not she will be in the second half of the field. Help her switch off and relax before working her through her gears to be strong in the finish."*
- (i) The horse ran a very long last, about 50 lengths from the winner

Evidence of the Stewards and submissions

10. Mr Moxon's evidence can be summarised as really setting out the particulars of the alleged breach of the rule. For particular 1 he said that the reasonable course that should have been adopted by the appellant was to take a position trailing Ugly Nicos which had been to Sippity Sup's inside. As to Particular 2, he said – adopting Mr Van Gestel's description in submissions – that the appellant again rode aggressively almost "chasing" the lead when the appellant should have maintained her position, albeit a 3-wide position. As for particular 3, his evidence was that having ridden so aggressively twice by the time the horse had reached the 800m, it was incumbent on the appellant to restrain her horse somewhat, or at least attempt to.

11. The appellant has asked the Panel to consider these factors in her ultimate submission that she has not breached AR 129(2):

- (a) The horse began fairly, and she felt it would be most advantaged by getting to either the lead or at least in the first 4. She felt this suited the horse, and was consistent with how other horses had won the prior four races. She felt there was a leader's bias to the track. She therefore felt her approach was correct in response to particular 1.
- (b) Having then been near the lead, she wanted to get her horse's head in front of Ugly Nicos, force that horse to the rails, and take the lead herself. That is why she rode aggressively again. She did not want to get trapped 3 wide, and notes that Mr Waller's evidence was that he does not like his horses ridden 3 wide, particularly at Newcastle.
- (c) As to the third particular, the appellant felt that once her horse got to the lead it settled sufficiently, and it would have been counterproductive, or could have been, to attempt to restrain it.

Resolution

12. The Panel's view is that particular 3 is not made out. We accept the appellant's submission that the horse had settled reasonably by the 800m, and it might not have been in the best interests of the horse to attempt restraint or further restraint.

13. However, we are of the unanimous view that the appellant has made errors of judgment relevant to the first two particulars. These are honest errors, but they are of a kind that we consider a breach of the rule has been established. As to particular 1, some aggression out of the barriers is of course permissible and perhaps advisable, but we feel that the appellant "burnt" the horse for too long in an attempt to get to the lead or to have a leading position. There was a real opportunity to take a spot behind Ugly Nicos which would have advantaged Sippity Sup far more. As to the second particular, again the horse was in our view "set alight" again by aggressive riding for too long in an attempt to lead or be near the lead. Sitting 3 wide is not ideal, we agree, but the option taken by the appellant was in our view a bad error, and one we are comfortably satisfied is in breach of the rule. In saying that, we would not describe the error as horrendous or egregious, or in that category. The errors identified by the

first two particulars are however sufficiently serious that we think there is culpability under the rule. The appeal against the finding of breach of the rule is dismissed.

Penalty

14. Mr Van Gestel indicated that he supported an exercise of discretion by the Panel under LR107(2)(c), such that any suspension is to commence on Sunday 28 March 2021, so that the appellant can honour booked rides in the Golden Slipper meeting. With no reduction in the penalty imposed by the Stewards, the appellant's penalty would commence on Sunday 28 March 2021, and expire on Saturday 17 April 2021.
15. Having considered penalties imposed for breaches of this rule on other occasions, by both the Stewards and the Panel, and noting that particular 3 was not made out, the Panel is of the view that a slight reduction in the suspension imposed by the Stewards is appropriate. In our view the appellant's suspension should commence on 28 March 2021, and is to expire on 14 April 2021, on which day the appellant may ride.

16. Orders:

1. Appeal against finding of breach of AR 129(2) dismissed.
2. Finding of breach of AR 129(2) confirmed.
3. Appeal against severity of penalty allowed.
4. In lieu of the suspension imposed by the Stewards, and exercising discretion under LR107(2)(c), the appellant's licence to ride is suspended from 28 March 2021 until 14 April 2021, on which day she may ride.
5. Appeal deposit to be forfeited.