

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS AND DETERMINATION OF MR D MOSSENSON
(CHAIRPERSON)

APPELLANT: SUSANNAH HOPPMANN

APPLICATION NO: A30/08/726

DATE OF HEARING: 25 NOVEMBER 2010

DATE OF DETERMINATION: 25 NOVEMBER 2010

IN THE MATTER OF an appeal by Ms SUSANNAH HOPPMANN against the determination made by the Racing and Wagering Western Australian Stewards of Thoroughbred Racing on 30 September 2010 imposing a fine of \$2,000 for breach of Rule 143 of the Rules of Thoroughbred Racing.

Mr T F Percy QC with Mr G Yin of D.G. Price & Co. appeared for the appellant.

Mr R J Davies QC appeared for Racing and Wagering Western Australian Stewards of Thoroughbred Racing.

This matter came on for hearing on the 25th of November 2010 when the appeal was upheld and the conviction quashed. The appellant sought reimbursement of the cost of the transcript of the Stewards' inquiry and was given leave to file written submissions in support of that application.

Background

Ms Susannah Hoppmann is a licensed trainer with Racing and Wagering Western Australia (RWAA). Ms Hoppmann trained BATTLE SCENE which won at Kalgoorlie on 1 August 2010. Apprentice jockey Andrew Castle who rode BATTLE SCENE weighed in after the

race at 56.1kg after having weighed out at 57kg. As the discrepancy exceeded the one half kilogram tolerance which is allowed the Stewards immediately convened an inquiry into the matter. At the end of the inquiry the Stewards declared correct weight for the race. This did not however prove to be the end of the matter.

Charge and conviction

The Stewards subsequently revisited the issue and conducted an inquiry into the circumstances of the official weigh in. That led to Ms Hoppmann being charged with a breach of Rule 143(b) of the Rules of Thoroughbred Racing. Australian Rule 143 specifies that:

'If a horse carries less weight than the weight it should carry-

- (a) it shall be disqualified for the race, provided that a rider shall be allowed by the Clerk of the Scales a half kilogram for the weight of his bridle; and*
- (b) notwithstanding paragraph (a), the rider and/or any other person at fault may be penalised.'*

The particulars of the charge were:

'...as the person responsible for presenting BATTLE SCENE to race on this day, you failed to ensure that all the riders gear as weighed out and collected by yourself was placed on BATTLE SCENE at the time of saddling.' (T75)

The Stewards found Ms Hoppmann guilty of the offence. Their reasons for doing so were:

'The Stewards have considered submissions presented in support of the plea of Not Guilty to the charge laid today by the Stewards and all of the evidence relevant to this matter. A consideration in a matter such as this, requires to make findings, fact (sic) and of course the principles of the Briginshaw Standards as they apply to a panel such as ours. The rules and process of weighing and the saddling of a horses (sic) is a common activity in racing and well understood by all experienced persons. As experts in our field, the task before us to determine

where a fault may lie when it becomes apparent that a horse has carried less weight than it should is therefore a straightforward exercise, as these matters are routine activities undertaken on a race day. It is worthwhile, to once again to repeat for construction, the relevant Rule 143(b), which is a precedent of the following terms: (sic)

If a horse carries less weight than the weight it should carry

(b) notwithstanding paragraph (a) ... the rider or any other person at fault will be penalised.

The exercise of weighing is a regulated activity designed to ensure that horses carry correct weight in races. The entire handicapping system is based on the weights allocated to horses. Thus systems and procedures are in place to preserve the integrity of this exercise as a consequence of a horse carrying incorrect weight ... are potentially severe. It is not by chance that riders of horses make correct weight. In fact it is the result of a carefully designed detailed process to ensure that it is so. When the process is followed correctly, it becomes virtually impossible for a horse or rider to fall foul of Rule 143(a). When a horse carries less weight than the weight it should carry then clearly something has happened, which has caused that to be so. The process by the records created as the activity was undertaken has within it the ability to detect where the problem arises from. Pertinent to this case, we are able to know as a fact, what the rider weighed out with and compare that to what he returned to the scales with. In this instance there is an immediate and obvious discrepancy. In the present case, Apprentice Castle did not make correct weight when first returning to scale. It was clear from the evidence before us that he weighed out with a towel, but has returned to the scale without it. Knowing as we do, that there was a towel included in the packing gear, it should have returned, with the saddle and other packing. Clearly in this case it did not.

The Stewards officiating in the area, where the horses return after the race, who observed Apprentice Castle en route to the weighing area, did not report that he'd dropped a towel. Indeed it was the evidence of Mr Borovica that this did not occur or it would have become immediately apparent if it had. The evidence heard, indicates to us that he did not have a towel with him at any time after dismounting and unsaddling his horse. It was not to be found in the discarded saddle cloth or anywhere in the vicinity shortly after the race. The pictures taken shortly after him unsaddling show no towel, with either the horse or the strapper. Your strapper, Ms Hoppmann (sic) who led the horse away, has admitted that no towel was located at the time and that the subsequent story about there being a towel found, with or near the horse, was a fabrication. On the evidence before us, we are satisfied that this horse did not carry the towel in question and that there is no explanation that satisfactory (sic) accounts for the absence of the towel when Apprentice Castle first returned to the scale other than the fact that the horse was not saddled with the towel in the first place. The evidence of Mr McDonald on the day, as to what he thought to the best of his recollections, he saw, when checking the horse's lead bag does not overcome the other evidence which serves to support the conclusion that this horse was saddled without a towel. Consequently there had clearly been a fault, occurred with the saddling of this horse. That fault being the omission of the towel, which ultimately resulted in the return of Apprentice Castle to scale at the initial weigh in below the required weight. The saddling of a horse on race day is fundamentally the responsibility of the Trainer. Whilst he or she may have a staff member engaged to assist them in the preparation of their horses to race, the onus is always on the Trainer to ensure that the horse carries all proper weight, which requires them to ensure they (sic) saddled correctly, with all gear being used in the weighing out exercise. Ms Hoppmann gave indication to the Stewards on Page 27 that she understood and accepted this well established principle and understanding that it was her responsibility. Trainers with multiple runners at race meetings, often have others

assisting, but it is always done under the direction, supervision and authority of the Trainer. The Trainer has an active responsibility in these matters, one does not cease on the mere fact that they allow someone else to assist them in this regard. Whether the saddling is done by them or not, a Trainer must ensure their horses are correctly saddled. When a fault such as the one apparent in this case occurs, a Trainer cannot seek to absolve themselves from their responsibilities in this regard. It was Ms Hoppmann who collected the saddle, conveyed it to the stalls area and would appear to have become distracted from that task at hand, when she chose to leave in the hands of someone other than herself, the actual fitting of the saddle onto the horse, to ensure it was fitted with all gear. Thereafter, apparently, no proper check was made to ensure anything had been omitted. As the principle person of the stable, the onus lies with Ms Hoppmann to ensure that all the gear which her rider weighed out with is included with the saddle and placed on the horse. A check as late as legging the rider on her runner, could have detected the mistake and averted a potential disaster. No such check took place. In all the circumstances, we are satisfied that Ms Hoppmann has breached the rule as alleged and consequently find her guilty as charged.’ (T106-109)

When one reads the transcript of the inquiry and considers the approach adopted by the Stewards as to their application of the Rule it reveals this outcome was not at all surprising. Firstly, the Steward who chaired the initial inquiry had stated early on in the proceedings ‘... the relevant rule ..., is one that you would say is an absolute rule in these matters ...’ (T14). Much later in the proceedings the Chairman of Stewards stated:

‘ ... that ultimately Miss Hoppman (sic) it is your responsibility. You can have whatever staff you like licensed staff helping you but the Stewards maintain that it’s your responsibility to ensure that your horse goes out there with the correct gear’. (T85)

One can reasonably interpret these observations to mean that two of the officiating Stewards at least were of the opinion, irrespective of the circumstances, it is always the responsibility of the trainer to ensure a horse carries all of its gear in a race. This interpretation is reinforced by the following proposition, contained in the reasons given by the Stewards when addressing penalty, when they stated they:

'... accept that this was an honest mistake and by no means designed to deceive by leaving off the packing towel. ... The Stewards, however, do not reconcile from holding you responsible for the ultimate error. Whilst we acknowledge you've had the assistance of two competent, experienced trainers, ultimately you as the principle of the stable, are responsible for ensuring that runners under your name, carry the correct gear. You collected the saddle from the rider and it was your responsibility to check and ensure that all that gear was placed on BATTLE SCENE ...' (T110)

Clearly the Stewards believed the Rule required trainers in all circumstances to be held liable personally for any omission in regard to the saddling process prior to racing. In addition to this interpretation it is relevant to point out the transcript of the inquiry below also reveals a misquotation of Rule 143(b) contained in the reasons for convicting. Whilst the Rule actually states '*... may be penalised*' in the reasons the Stewards wrongly quoted the provision as '*... will be penalised*'. (T107).

The issue

The question that had to be determined in the appeal was whether it could be said that Ms Hoppmann was '*at fault*' in respect of the significant weight discrepancy which was detected in the race which BATTLE SCENE won. If Ms Hoppmann was held to be culpable for the missing towel which the Stewards held caused the problem, should she be punished for the error? Accordingly the issue to be resolved was whether Ms Hoppmann was at fault and should be liable to be punished for the missing towel because she was the trainer, even though she was not present when the horse was saddled up.

It is clear from the evidence presented to the Stewards Ms Hoppmann did not even start to put the saddle on BATTLE SCENE herself. Rather, she gave instructions to two other persons to do so after having taken the saddle down to the stalls and placed it on the rails. Subsequent to that Ms Hoppmann was required to depart to load SUGAR FIX, another horse for which she was also responsible, onto someone's truck. Before leaving to attend to this other duty Ms Hoppmann requested two of her employees Paul Rowe and Cliff Smith to saddle BATTLE SCENE in her absence.

Grounds of appeal

Ms Hoppmann appealed on the grounds that:

- 1 *In convicting the appellant, the stewards erred by adopting what was effectively an interpretation of AR143 Australian Rules of Racing that imposed strict liability on the appellant.*

PARTICULARS

- (a) *the offence was not complete without some evidence of fault on the part of the appellant.*
 - (b) *the obligation of the appellant under the rules extended only to delegating the saddling of the horse to a reasonably competent and licensed person.*
 - (c) *there was no evidence that the delegation had been made improperly made to those entrusted by the appellant with the saddling of the horse.*
 - (d) *In the absence of any evidence of any palpable fault on the part of the appellant, it was not open to the stewards to convict her.*
- 2 *The findings of the stewards was not supported by the evidence and was against the weight of the evidence.*

PARTICULARS

- (a) *there was no evidence of any fault on the part of the appellant in the discharge of her duties as a trainer on the day in question.*
- (b) *the obligation of the appellant under the rules extended only to delegating the saddling of the horse to a reasonably competent and licensed person.*
- (c) *there was no evidence that the delegation had been made improperly made to those entrusted by the appellant with the saddling of the horse.*
- (d) *In the absence of any evidence of any palpable fault on the part of the appellant, it was not open to the stewards to convict her.*

Reasons

The evidence which emerged from the Stewards' inquiry revealed on the race day in question Ms Hoppmann had thirteen horses engaged to run at the meeting. As a consequence she was assisted by Messrs Rowe and Smith, both licensed trainers, as well as two strappers. That evidence clearly established Ms Hoppmann was entirely confident Messrs Rowe and Smith were able to competently saddle horses. They both not only enjoyed many years of experience in doing so they were Ms Hoppmann's usual helpers at almost every race meeting. Ms Hoppmann had not applied to the Stewards for permission to delegate. However, the only time she had submitted any such delegation to the Stewards was on those occasions when she was not actually present at the racecourse when horses she trained were racing.

It is also clear from the uncontradicted evidence given by Ms Hoppmann the Stewards had never queried this delegation of the task of saddling. In fact Ms Hoppmann would normally only personally saddle about half the horses she brought to race each meeting. The saddling of the other horses was delegated to the two men in question. On the day of the race which was under review the Stewards did not query the competence of Messrs Rowe

and Smith to saddle the horse. Further, there was nothing to cause Ms Hoppmann to doubt that BATTLE SCENE was not properly saddled up by competent people in her absence.

I was satisfied that on the evidence it could not be said that there was any fault in relation to the missing towel which could be attributed to Ms Hoppmann. In my assessment Ms Hoppmann had properly discharged her duties as the trainer in the circumstances of this case. As already stated this was achieved by delegating responsibility for saddling BATTLE SCENE to two competent and experienced persons. In fact both of those assistants were licensed with RWWA and regularly performed that role. There was no evidence that the delegation had been improperly made, that there was anything unusual or unsatisfactory regarding it or that it was unreasonable or unsatisfactory in any way.

I was satisfied that each of the particulars referred to in ground one was established on the evidence and therefore the Stewards had erred by adopting what amounted to a strict liability approach to the application of Rule 143. As previously stated (at T85 of the transcript) the Chairman of the inquiry had asserted:

'... that ultimately Ms Hoppman (sic) it is your responsibility. You can have whatever staff you like licensed staff helping you but the Stewards maintain that it's your responsibility to ensure that your horse goes out there with the correct gear.'

The wording of Rule 143 did not support that proposition in a case like this one. Nor would it in circumstances, such as those argued by senior counsel for the appellant, where a trainer was viewing the day's races from the stands. The interpretation which the Stewards placed on the Rule and applied to the facts could be appropriate in respect to rules which are worded quite differently to Rule 143, such as in the case of various of the prohibited substance rules (AR177A, LR177A, AR178). These prohibited substance rules make it an offence in every case where a prohibited substance is present in a horse whether or not the trainer had personally administered or otherwise been responsible for administering the

substance. In every case where a prohibited substance is found in a horse's system liability may attach with or without there being any fault on the part of the person in charge of the horse at the time. This arises because the wording of the prohibited substance rules referred to above is different from the wording of Rule 143. For there to be an offence relating to the weighing issue there must first of all be established there is a '*person at fault*'. On the facts and evidence of this case I was satisfied no fault lay with Ms Hoppmann as she had properly delegated her responsibility to others. Ms Hoppmann was not in charge of the horse at the relevant time.

I was satisfied there was merit in the proposition contained in particular 2(a). The obligation which was on the appellant only extended to delegating the saddling to a reasonably competent and licensed person. As previously stated there was no evidence that the delegation was inappropriate or that it had been made improperly. As there was an absence of evidence of any fault on the part of Ms Hoppmann it was not open to the Stewards to convict her. The evidence did not support the Stewards' finding.

For these reasons I was persuaded both grounds of appeal succeeded and consequently I dismissed the appeal.

The cost of the transcript

After I announced Ms Hoppmann had won the appeal Mr Percy QC, counsel for the appellant, sought an order reimbursing his client the \$528 paid to the Stewards to obtain the transcript of their proceedings. The transcript comprised 120 pages plus exhibits.

As far as I am aware this is the first time that such an out of pocket expense has been sought to be reimbursed by an appellant before the Tribunal. I am satisfied there is power, pursuant to the provisions of s17 of the *Racing Penalties (Appeal) Act 1990*, for such an order to be made. That provision states:

(9) *Upon the determination of an Appeal the Tribunal may –*

...

- (e) *make such other order as the member presiding may think proper including an order for the total or partial refund of any fee paid or, subject to subsection (10), an order that all or any of the costs and expenses of the Tribunal or any party to the appeal shall be paid by a specified person;*

The fee paid to obtain the transcript meets the description of being a *'cost or expense capable of being ordered to be paid by a specified person'* in terms of ss(9)(e) of the Act.

In order to determine this issue it is appropriate to look at the reasons for upholding the appeal and other relevant circumstances. Clearly the appeal succeeded because the Stewards fell into error in regards to the interpretation which they placed on the Rule under consideration. As a consequence of that error Ms Hoppmann was put to the expense of not only having to pay the filing fee to institute the appeal, but, in order to be properly represented, of obtaining a copy of the transcript of the inquiry. The transcript was essential to enable an initial assessment of the position, for the appeal grounds to be formulated and for the appeal to be argued. As already explained the transcript reveals the error on the part of the Stewards. Significantly the transcript also reveals Mr Percy appeared, with leave, at the inquiry before the Stewards. During the course of the proceedings Mr Percy presented detailed submissions and legal argument to the adjudicators. Senior Counsel made it clear to the Stewards that Rule 143 did not create an absolute offence. Rather he argued fault had to be established. It was asserted the facts did not establish Ms Hoppmann was at fault. Mr Percy's argument in the proceedings below fell on stony ground although he did at least persuade the Stewards of the need to reformulate the charge. Mr Percy's argument is encapsulated in the following submissions he made to the Stewards:

- *'... this is not an absolute offence, that is, someone weighs in light, the trainer is responsible, equals guilty. You've got to show where they fell down' (T73)*

- *'Some rules are strict, some require fault. The presentation these days doesn't require fault. A trainer brings a horse to the races and subsequently found to have a prohibited substance in its system, that's it. It's strict liability. Once upon a time the rule was different, there was another exculpatory section which says, that unless he shows that he took all reasonable and proper precautions, that was an excuse. In other words it was element of fault. Now this is a rule which has to be construed along the same way. If a person is shown to have taken all reasonable and proper precautions, the fact that someone else is at fault does not attract the same liability on them. If Gai Waterhouse has a strapper, who while she's drinking champagne in the Members Bar after winning the Derby, saddles up her next runner incompetently, it doesn't attract liability to her. The liability attracts to the person who saddles it up, because they were 'quote' "at fault" 'unquote' That fault is not vicarious, that is, it doesn't attach by mere virtue of the fact that the offence occurred.'* (T87)

Mr Percy repeated this argument before me and I accepted it. Ms Hoppmann was entirely vindicated in taking the matter on appeal. The Stewards chose not to accept this cogent legal argument and consequently fell into error. In those circumstances I am satisfied that it is appropriate to order reimbursement of the transcript costs. However, at the same time as I make the order on this occasion I do make it entirely clear that this decision should not be taken to mean that in every case a successful appellant can expect such reimbursement. In this particular case I am prepared to make the order only due to the somewhat exceptional circumstances.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

