TASMANIAN RACING APPEAL BOARD

Appeal No 1 of 2013/14

Panel:	**Mr T Cox (Chair)** **Ms K Cuthbertson** **Mr R Foon**	**Appellant:**	**Mr R Hillier**
Appearances:	**Mr G Richardson on behalf of the appellant** **Mr A O'Connell on behalf of stewards**	**Rules:**	**Australian Harness Rule AR149(1)**
Heard at:	**Launceston**	**Penalty:**	**A 4 race date suspension**
Date:	**5 December 2013**	**Result:**	**Upheld**

REASONS FOR DECISION

1. The appellant, Mr Hillier, was the driver of *Truly Blissfull* which raced in race 7 in the Show Cup over 2200 metres at the Launceston Pacing Club on 6 October 2013. Following an inquiry into his drive, which was conducted on 6 October and 20 October 2013, the stewards found Mr Hillier had breached AR149(1), which provides:

> *"Drivers should take all reasonable permissible measures during the course of a race to ensure that the horse driven by that driver is given full opportunity to win or obtain the best possible placing in the field".*

2. Mr Hillier was suspended for 4 race dates. A stay was granted over the operation of that penalty pending the determination of this appeal.

3. There is a preliminary matter of some significance which must be dealt with. It was common ground at the appeal that the stewards, in their determination that the appellant had breached AR149(1), failed to give any reasons for their determination. It was also apparent that the Stewards heard evidence in the absence of the appellant.

4. Whether the appellant was afforded natural justice at the inquiry has brought into focus the true nature of an appeal to this Board. This is particularly so for there is no duty at common law that the stewards must provide reasons for decision (see *Public Service Board of New South Wales v Osmond (1986) 159 CLR 656*), nor is there any contractual duty under the rules of racing that the stewards provide reasons. The hearing of appeals for this Board is prescribed by statute. Relevantly, s.30 of the *Racing Regulation Act 2004* provides:

> *(6B) An appeal is to be heard and determined upon the evidence at the original hearing when the decision or finding appealed against was made, but, if the presiding member considers it to be proper, expert or other evidence may be required or admitted.*
>
> *(6C) The appellant may request the TRAB to admit any expert or other evidence that the appellant considers necessary.*
>
> *(6D) The TRAB -*

(a) *is to make a full and thorough investigation in open court, without regard to the forms, requirements or solemnities that might have been appropriate in legal proceedings; and*

(b) *may inform itself on any matter in such manner as it think fit, and admit any evidence considered by the presiding member to be relevant notwithstanding that that evidence would not be admissible in a court of law; and*

(c) *may take into account any matters relating to, or to the administration of, racing that are within the knowledge or experience of a member of the TRAB or which have arisen in or as a result of other proceedings or appeals before the TRAB.*

5. In our view, the following propositions may be drawn from this statutory scheme:

(a) An appeal from the stewards to this Board is not an appeal in the strict sense, nor is it an appeal *de novo*.

(b) The appeal is in the nature of a re-hearing with this Board exercising its own discretion.

(c) The appeal is decided upon the materials before the stewards, together with any further evidence the Board may see fit to receive.

(d) The Board has full power to receive further evidence and, in deciding whether or not to do so, will be guided by what it considers to be the interests of justice in the particular circumstances.

(e) The power or discretion to receive further evidence, whatever its form, is unfettered.

(f) No error on the part of the stewards need be demonstrated before an appeal can succeed.

(g) It will remain for the Board to be comfortably satisfied, having regard to the evidence before it, that the appellant was in breach of any particular rule or rules (See *Briginshaw v Briginshaw (1938)* 60 CLR 336).

6. With these principles in mind this Board has set about a full and thorough investigation and informed itself upon the evidence at the stewards' inquiry and the evidence admitted before this Board, notably the race patrol footage and the evidence of the appellant and the chairman of stewards, Mr Adrian Crowther.

7. The particulars of the charge laid against the appellant following the stewards' inquiry were as follows:

> "*..after contesting for the lead in a lead time of forty three point nine seconds, which is four point four seconds faster than the average lead time, and in stewards' opinion it was unreasonable to then work forward and race wheel to wheel with RUN RIPALONG at the turn out of the back strait on the first occasion and then when an opportunity presented to take a trail behind BIGGERNBETTERMAX you again elected to push forward and hold that horse out. Further then when BIGGERNBETTERMAX had restrained, you again pushed forward. TRULY BLISSFULL then gave ground from the six hundred metres and finished last beaten by twenty nine metres."*

8. During the inquiry held on 6 and 20 October 2013, stewards considered evidence from the following:

(a) The appellant;
(b) Zeke Slater, the trainer of *Run Ripalong*;
(c) Nathan Ford, the driver of *Run Ripalong;*
(d) Geoff Smith, the trainer of *Truly Blissfull;*
(e) Todd Rattray, the driver of *Biggernbettermax.*

9. The film of the race shows *Run Ripalong* and *Truly Blissfull* contesting for the lead from the outset of the race. There was no dispute that the lead time was 43.9 seconds which is 4.4 seconds faster than the average lead time. *Run Ripalong* maintained the lead with *Truly Blissfull* sitting on the wheel in the one out position. The appellant stated that he ceased putting pressure on *Run Ripalong* from the 1900 metre mark. With approximately a lap and a half left of the race, Rattray, the driver of *Biggernbettermax,* then commenced a challenge for the death from the three wide position. The appellant did not hand up to Rattray, who dropped back. The appellant again pushed forward briefly, hitting his horse with the reign to get it back on the bit. In the latter stages of the race, *Truly Blissfull* then tires, finishing last by some 29 metres. The evidence was that the first quarter was run in a time of 30.9 seconds, the second quarter in 31.3 seconds, third in 31.5 seconds and the fourth at 29.4 seconds which were consistent with or slower than the average sectionals.

10. The appellant told stewards that his race plan was to try and take the lead. His evidence was that he had discussed with Mr Smith that he felt *Truly Blissfull* performed best when allowed to run along and that Mr Smith agreed that the horse could lead. Further, the evidence given at the inquiry, which was not disputed, was that *Truly Blissfull* had lead in his last race, which was over 2600 metres and run well, finishing third. The appellant's evidence was that he expected a similar performance on this occasion.

11. According to the appellant, he ceased putting pressure on *Run Ripalong* at the 1900 metre mark, and sat in the death. He explained that he did not hand up his position to *Biggernbettermax* as Mr Rattray did not persist with the move. His own move forward at that point and after Mr Rattray had restrained occurred in the context of average to slow sectional times. His evidence was that *Truly Blissfull* performed below expectations.

12. During the initial stage of the inquiry, Mr Smith was critical of the appellant's drive. He stated:

> *"I got the shock of me life when the horse came out and sat out… I don't know why he didn't hand up to Barry or drop in behind the leader. They know the horse can't sit in the death and I thought he coulda won that race tonight. ..*
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> *We thought he coulda led but then when they run that lead time, that was a blistering lead time and he sits out in the death. Where he had room to drop in behind the leader or hand up to BIGGERNBETTERMAX when he come round."*

13. By contrast, on 20 October 2013, Mr Smith noted that *Truly Blissfull* runs fast lead times and that he would have driven him in exactly the same way. He explained his changed view was due to having looked at the film a second time and that he no longer had concerns about the appellant's drive.

14. Stewards contend that the film supports a conclusion that the appellant asked the horse for effort on four occasions over a distance of 1200 metres against the background of the fast lead time. Stewards do not fully accept the assertion that *Truly Blissfull* is a horse that needs to lead. In their view, the appellant had an opportunity when he formed the view that he could not contest the lead to restrain the horse and look for a trail. Stewards also contend that the appellant should have given up the lead to *Biggernbettermax*, which was the race favourite, in order to earn respite. The

failure to do so was at the expense of the *Truly Blissfull* obtaining the best possible position in the field.

15. The scope of rule 149(1) is well settled. In the decision of *Honan* (NSW Harness Racing Appeals Tribunal, 26 October 1983) Justice Goran stated the following:

> "*In the first place the rule does not permit the mere substitution of the steward's view as to how a particular horse should be driven for the view of the driver. Secondly, the rule does not seek to punish a mere error of judgment during a race on the part of the driver....*
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> *The rule attempts to ensure not merely that the horse has a winning chance in a race but that, given its inability to win, it will still do the best it can in the circumstances...*
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> *The rule demands that the measures of the driver must be "reasonable and permissible". Obviously it is not expected that a driver would be permitted to interfere with another horse in order to win with his own horse, but his failure to take a permissible measure to win or to secure the best possible place in the field must be a reasonable failure. It is for this reason that I have said that a mere error of judgment is not a breach of the rule because a mere error of judgment may be reasonable in the circumstances....*
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> *There are an infinite number of possibilities when this present rule will apply.... In short, however, the unreasonableness of the driver's tactic must be culpable, - that is blameworthy... Each case will turn upon its own merits, but overall if in taking into account all the circumstances the actions of the driver are unreasonable then he may be considered in breach of this particular rule."*

16. Mr Richardson on behalf of the appellant submitted that the evidence showed the following:

(a) *Truly Blissfull* is a quick starter and leader;
(b) The appellant contended for the lead and did not get it;
(c) The appellant then sits in a position where he can control the race;
(d) He is briefly challenged by the favourite who does not persist and backs off;
(e) He momentarily has to shake the horse up to get it back on the bit;
(f) The horse simply does not go on to win.

17. He submitted that giving up the lead to the favourite in the circumstances where Mr Rattray did not persist with the challenge was not an error of judgment. Overall, the decisions taken by the appellant could not be characterised as errors of judgement let alone culpable or blameworthy.

18. The Board has considered the evidence given at the stewards' inquiry, the submissions during the appeal and the footage of the race. The Board is not satisfied that the appellant's manner of driving could be regarded as culpable. The lead-time was quick, but the appellant's drive could not be considered culpable on that basis. *Run Ripalong* was the lead horse and pace-setter. The appellant could have taken cover behind that horse, but would likely have given up any opportunity to contest for the lead. The previous form of the horse suggested it would be able to race the distance. The challenge from the favourite was not persisted with.

19. The Board is not satisfied that *Truly Blissfull's* poor performance was the result of the appellant's driving tactics. With the benefit of hindsight, the tactics adopted by the appellant may not have given the horse the best opportunity to obtain the best possible placing in the field, however, in light of his previous form over a longer distance, it is not clear that the appellant ought to have expected that *Truly Blissfull* would not be able to maintain a close to average pace over the latter stages of the race. The Board is not satisfied that the tactics adopted by the appellant were so unreasonable as to be considered blameworthy or culpable.

20. The appeal is upheld and the stewards' decision is quashed.

21. Pursuant to s34(2)(e) of *the Racing Regulation Act 2004*, the whole of the prescribed deposit is to be refunded to the appellant.