

**REASONS FOR DETERMINATION
OF THE RACING PENALTIES APPEAL TRIBUNAL**

APPELLANT: MALCOLM BYAS (as owner of the
racehorse SYDNEY BUSINESSMAN)

APPLICATION NO: A30/08/741

PANEL: MR D MOSSENSON (CHAIRPERSON)

DATE OF HEARING: 24 APRIL 2012

DATE OF DETERMINATION: 24 JULY 2012

IN THE MATTER OF an appeal by Mr Malcolm BYAS as owner of the racehorse SYDNEY BUSINESSMAN against the determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 23 January 2012 disqualifying SYDNEY BUSINESSMAN pursuant to Rules 47(3) and 53A(5) of the Racing and Wagering Western Australia Rules of Thoroughbred Racing.

Mr T F Percy QC represented the appellant.

Mr RJ Davies QC represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

FACTS

There is no dispute as to the following key facts of this matter:

- 1 Mr T Knotts formerly trained and owned the racehorse SYDNEY BUSINESSMAN.
- 2 Whilst under his care and control blood appeared at both nostrils of SYDNEY BUSINESSMAN on two separate occasions.

- 3 Subsequent to the second showing of blood the horse was sold and transferred to
trainer Mr M Byas.
- 4 Mr Byas was not informed of the bleeding.
- 5 Mr Byas entered SYDNEY BUSINESSMAN to race in Bunbury on 18 December
2011.
- 6 SYDNEY BUSINESSMAN was accepted and it won Race 6.
- 7 The Racing & Wagering Western Australian Stewards of Thoroughbred Racing
were subsequently informed anonymously of the horse's bleeding condition.
- 8 Following an investigation and an inquiry the Stewards formed the opinion that
SYDNEY BUSINESSMAN had suffered its second attack of bleeding prior to it
winning in Bunbury.
- 9 As a consequence the Stewards invoked Australian Rule of Racing 47(3). The
Stewards disqualified the horse and amended the placings in relation to Race 6.
- 10 Mr Byas appealed on the basis that the Stewards erred in holding SYDNEY
BUSINESSMAN was ineligible to start Race 6 and in having disqualified the horse.

The Stewards' inquiry referred to at point 8 above commenced on 29 December 2011, some eleven days after the Bunbury race. The inquiry continued on 20 January 2012 when it was again adjourned. At its conclusion on 23 January 2012 the Stewards announced their findings as follows:

After full consideration, we therefore determine that SYDNEY BUSINESSMAN bled from both nostrils at Bunbury Trackwork on 26 November 2011 which was not caused by any external trauma and consequently it is now deemed by the Stewards to be a second time bleeder and is ineligible to race. (T260)

... I say we've now determined that in our view the horse did bleed in both nostrils and as such it was ineligible to race on the day that it won at Bunbury.
...

Because Australian Rule of Racing 47(1) says; (sic) no horse shall be entered for or run in any race except for one for which it is eligible under these the Rules and part (3) says; (sic) any horse that runs in a race for which is was ineligible, or in which it carried less than the weight prescribed by the conditions of the race, shall be disqualified for the race and then if you go to Australian Rule of Racing 53A(5) it says; (sic) if a horse suffers more than one attack of bleeding such horse shall be ineligible to start in any race. So given that we have determined, the Panel's determined that it bled from both nostrils, it was ineligible to race at Bunbury on Sunday, 18th and the placings from that race would need to be amended, from that particular race that it won. (T261)

RELEVANT RULES

With the facts being agreed between the parties the only issues for determination in the appeal are the interpretation and application of Rule 47 read with Rule 53A to those facts. It is worth quoting both these rules in full.

AR.47 (1) No horse shall be entered for or run in any race except for one for which it is eligible under these Rules.

(2) A horse shall be eligible for any race only if it possesses the qualifications (if any) imposed by the conditions of the race.

(3) Any horse that runs in a race for which it was ineligible, or in which it carried less than the weight prescribed by the conditions of the race, shall be disqualified for the race.

(4) Any person who enters or runs a horse in a race for which it was ineligible may be penalised.

AR.53A (1) An attack of bleeding shall be the appearance of blood at both nostrils, irrespective of quantity, unless in the opinion of the Stewards such bleeding was caused by external trauma.

(2) If a horse suffers an attack of bleeding at any time the fact of such bleeding shall be reported by the Trainer without delay to the Stewards.

(3) If any Principal Racing Authority advises in writing that any horse has suffered an attack or attacks of bleeding such advice shall be prima facie evidence that such horse has suffered an attack or attacks of bleeding.

(4) A horse which has in the opinion of the Stewards suffered an attack of bleeding shall not without permission of the Stewards –

- (a) *be trained, exercised or galloped on any racecourse for a period of two months thereafter;*
 - (b) *start in any race for a period of three months, and then only after a satisfactory gallop of at least 1,000 metres in the presence of a Steward.*
- (5) *If a horse suffers more than one attack of bleeding such horse shall be ineligible to start in any race.*
- (6) *If a horse displays blood at one nostril, the trainer shall without delay report such occurrence to the Stewards.*
- (7) *Unless the Stewards are satisfied that the presence of blood provided for in subrule (6) was attributable to external trauma, the horse shall before racing again be required to undergo a satisfactory gallop of at least 1,000 metres in the presence of a Steward.*

APPELLANT'S ARGUMENTS

Put very briefly, it was argued for the appellant that:

- 1 Bleeding bans only operate prospectively to penalise a horse's connections following the making of a banning order.
- 2 Many of the Rules of Thoroughbred Racing refer to "eligibility" in the context of racing a horse. The various Rules which prescribe eligibility and address ineligibility of a horse participating in racing activities are not uniformly drafted. As a consequence some of their meanings and applications do vary depending on the context.
- 3 On 18 December 2011 SYDNEY BUSINESSMAN was eligible "to start" in the race in question. When SYDNEY BUSINESSMAN raced in Bunbury, there was no issue about the horse's eligibility to do so.
- 4 The provision in the Rules dealing with being "ineligible to start in a race" must be construed to be effective only from the date of a determination that a second attack of bleeding had occurred.

5 The bleeding Rule has nothing to do with fairness to the field or the merits of a race.

6 In the absence of a specific power to impose a retrospective ban for bleeding, the 23 January 2012 finding of the Stewards as to the bleeding attack on 26 November 2011 could only apply prospectively following that finding.

IMPLICATIONS OF BLEEDING

The phrase “an attack of bleeding” means the appearance of any blood at both nostrils which the Stewards consider was not caused by external trauma (AR.53A(1)). Consequently, to meet the definition, there firstly needs to be established that a physiological event (ie the appearance of blood at both nostrils) has occurred. If that is established then a consideration and further exercise of the minds of the Stewards is required, namely their determination as to whether the blood show was caused by external trauma. In dealing with such a matter the Stewards must make a finding as to the possibility that the blood emission was caused by a physical event. Should a horse experience an appearance of blood at one nostril the obligation is on the trainer to report it to the Stewards without delay (AR53A(2)). For a horse which has bled to be adjudged ineligible to race again there must be a second finding that an attack of bleeding had occurred.

It is clear the Rules treat very seriously any situation where a horse has been found to have had an appearance of nostril blood. Significant consequences flow from this which impact on the horse’s ongoing ability to be trained, compete and generally continue to be a participant in racing. I understand the reasons for this serious approach are concerns for the safety of all of those participating in a race or trial involving such an animal as well as the welfare of the animal in question. The motivation behind the stringent consequences would appear to have nothing to do with the question of the fairness to the other competitors. In this particular case the provisions of the Rules were avoided or circumvented by those responsible for SYDNEY BUSINESSMAN prior to its sale to the appellant having failure to

discharge their duty to disclose the condition.

OTHER 'ELIGIBILITY' PROVISIONS

The appellant's argument to some degree relies on the differences in the wording and application of the various rules which address eligibility and ineligibility to participate in a race. It is clear for practical reasons the application of these rules does alter from situation to situation depending on which particular consideration or issue is being addressed.

For example, Rule 6 is in part similar to the Rules under review. Rule 6 outlaws races or race meetings which are not held under the Rules. Should any horse have competed in a race or a meeting which was not held under the Rules, unless otherwise determined by the Principal Racing Authority, then any such horse "shall *ipso facto* be disqualified" and any person who participated shall be ineligible to enter a horse for a race or continue to be licensed. For these consequences to flow the status of the race or meeting in question and its lack of conformity under the Rules need to be determined. If and when those questions are resolved adversely to the participant the horse automatically is disqualified. Such a provision can be contrasted with the way Rule 47(3) operates in dealing with incorrect weight. A decision as to correct weight is dependent on the weigh in which automatically occurs immediately following a race. The outcome of this simple process is known as soon as the weigh in procedure is completed. A horse in this situation would either be entitled to enjoy the fruits of its performance or be declared ineligible. Such a declaration made in respect of a horse that finished first would immediately result in its disqualification rather than it being declared the winner. In other words, this is an example of a determination of a horse's eligibility which does not occur at some later time after the declaration, thus requiring an earlier winning declaration to be subsequently revoked.

It is also useful to contrast the prohibited substance Rules as to the consequences of an adverse Stewards' finding, but not the process, with the relevant provisions of Rules 47 and 53A. Breaches of the prohibited substance rules, whether they be for administration or presentation, are not known or determinable at the time a horse comes to the course and

participates in a race, save possibly for rare exceptions. After a horse has presented to race the samples must be taken and then be sent off for processing. Only subsequent to the analysis and any consequent adjudication process based on the results can a decision be reached regarding the status of such a horse's run. The relevant provisions are Rules 177 and 177B which state that:

AR.177 *Any horse that has been brought to a racecourse and a prohibited substance is detected in any sample taken from it prior to or following its running in any race must be disqualified from any race in which it started on that day.*

AR.177B *... The horse may be disqualified from any race in which it has competed subsequent to the taking of such a sample where, in the opinion of the Stewards, the prohibited substance was likely to have had any direct and/or indirect effect on the horse at the time of the race.*

These Rules clearly create the situation where some time after the race has been run and only when the offence has been established at an inquiry can the disqualification from the race which has been run some time earlier occur. This scenario is different, in my opinion, to the situation which is contemplated by the wording of Rule 47(3). Contrast this process which must unfold with the weigh in scenario. Prohibited substance offences are similar to the bleeding situation in respect of a horse which has no prior record of having bled. The only exception might be in the rare case of a horse which was already known to have bled and which was actually observed to bleed again by the Stewards at the course. However, it would be unlikely for such a situation to happen and for a finding or determination to be made on the spot.

It is also worth examining some of the Race Meeting Rules as they are couched or operate differently to the specific Rules under review. For example, Australian Rules 45A and 45B as well as Local Rules 45 deal with situations where horses are "not...allowed to start in any race" due to their young or old age. These provisions do not require a subsequent fact finding exercise to be undertaken leading to a determination in order to trigger eligibility or ineligibility.

Rule 47(1) places an onus on the relevant person proposing to enter a horse for a run in a race not to do so if it is ineligible. A horse must possess the necessary qualifications at the time of the processing of the entry up to the point of the race starting. SYDNEY BUSINESSMAN duly met the conditions precedent. The horse was properly entered in Race 6. There was nothing before me to suggest the horse's nomination to enter had not been approved by the Committee or Stewards (refer to AR.50). No direction had been made pursuant to Rule 53 that the horse was not eligible to run in Race 6. In cases where there is such a direction the horse may not run until permission by the Principal Racing Authority is forthcoming. Sydney Businessman also met the "qualifications (if any) imposed by the conditions of the race" (Rule 47(2)). According to the wording of Rule 47(2) it was "*...eligible for any race...*". There is no dispute between the parties that at the time it ran in Race 6 it was appropriate to allow it to run.

CONCLUSION

The unchallenged evidence establishes that the appellant brought SYDNEY BUSINESSMAN to the course to compete without prior knowledge of the horse's indisposition. Mr Byas did not know and could not be expected to know of the adverse condition of the horse. Mr Byas came with "clean hands". Clearly no racing official knew of the blood shows prior to the tip off received after the race which then led to the matter being investigated. Until the Stewards who conducted the inquiry into this matter had made their finding nearly two weeks after the race there was no question as to SYDNEY BUSINESSMAN's fitness to run and its potential to be judged on its performance.

SYDNEY BUSINESSMAN ran in the race at a time when it was considered to be eligible. The Rules do not specify it "*...must be disqualified...*" automatically once a bleeding finding was made, as does the provision dealing with prohibited substances (Rule 177). Why then should the horse be disqualified and the trainer/owner penalised for something in respect of which he was entirely innocent, both he and the officials knew nothing about and which only not came to light later after the finding was made by the Stewards? There clearly was no error, omission or mischief on the part of the trainer/owner. The outcome of the race was

unaffected by the horse's prior condition. In these circumstances I do not consider the trainer should be penalised by someone else's impropriety.

I agree with the appellant's arguments. I am persuaded the appropriate interpretation of ineligibility in this appeal is that it be construed to operate only from the date of a determination that the horse has suffered its second attack of bleeding. To quote from the words of the Stewards' determination at the conclusion of their inquiry:

... SYDNEY BUSINESSMAN bled from both nostrils ... which was not caused by external trauma and consequently it is now deemed by the Stewards to be a second time bleeder and ineligible to race. (T260)

There can be no argument that the horse was deemed to be a second time bleeder prior to the time when the Stewards reached that conclusion.

Accordingly, I find SYDNEY BUSINESSMAN was not "ineligible", pursuant to AR.47(3) at the time it raced. Rather, it was ineligible to start in races only from 23 January 2012.

I am satisfied, as argued for the appellant, in the absence of a specific power to impose a retrospective ban for bleeding, the finding of the Stewards as to the bleeding attack on 26 November 2011 could only apply prospectively and once the finding was made. Any other conclusion in this case would not be made according to "equity and good conscience and the substantial merits of the case" as required by s 11(1)(b) of the Racing Penalties (Appeals) Act.

Should it be intended the bleeding rule operate retrospectively it can easily be amended to achieve that outcome.

In the light of this interpretation of the Rules, I find the Stewards erred on 23 January 2012 in declaring retrospectively that SYDNEY BUSINESSMAN was ineligible to start in the race on 18 December 2011 and in amending the placings.

I therefore uphold the appeal and confirm SYDNEY BUSINESSMAN won Race 6 at Bunbury.

Dan Mossenson DAN MOSSENSON, CHAIRPERSON

