



APPEAL of MICHAEL McDUFF – AR 137A and 85B

Appeal Committee: Mr John Stewart (Chairman), Mr Charles Burkitt and Mr Justin Coleman

Date of Hearing: 11 July 2012

REASONS FOR DECISION

On 31 December 2011 Stewards charged Jockey McDuff with a breach of AR 137A(3) in using the whip on "Pilos" at Fannie Bay races that day. AR 137A(3) proscribes excessive use of the whip. Particulars of the charge as presented to the rider were that "you commenced to use your whip prior to straightening, you continued to use it all the way to the line, albeit prior to the 100 metres you didn't use it in consecutive strides."

Jockey McDuff pleaded not guilty. At the end of their inquiry the Stewards found him guilty and, acting under AR 196(2), ordered that his riding fee be forfeited.

On 7 January 2012 Stewards conducted an inquiry into an alleged breach of AR 85B which is in these terms:

"Any jockey or apprentice jockey may be penalised if, in the opinion of the stewards, he fails or refuses to fulfil a race riding engagement."

Stewards alleged that jockey McDuff had accepted two engagements to ride in races later that day. After riding in an earlier race, he said he did not intend fulfilling those later engagements. He left the Stewards' inquiry before it concluded. In his absence Stewards imposed a fine of \$1,000.

Jockey McDuff appealed against the finding of guilt and against the penalty on both charges. We heard both appeals together.

AR 137A(3)

Stewards submitted that Jockey McDuff used the whip on "Pilos" 9 times (4 backhand, 5 forehand) from just before the final turn (about 350 metres out) to the 150 metres mark, another 5 times (backhand) to the 100 metres mark then every stride (backhand) to the line. Aside from disputing the forehand use before the 150 metres mark (Jockey McDuff admitted to 4 forehand strikes) the Stewards' count was not contested.

Jockey McDuff argued that:

- a) A rider can hit the horse every stride while in contention.
- b) "Pilos" was in contention and made up 1.5 lengths in the last 100 metres to finish third.

The argument was along similar lines as Jockey McDuff's submissions at the Stewards' inquiry: "I'm in contention and only just got beat. The Australian Rules of Racing, it says you can hit a horse backhand as many times as you like."

Both submissions are incorrect.

It is true that sub-rule (4) gives the Stewards power to penalise a rider who uses his whip when out of contention. But it is a mistake to imply that a rider is allowed unlimited use of the whip when in contention. Quite apart from the specific restrictions on forehand use in sub-rule 5(a), there is the broad requirement of sub-rule (3) to refrain from excessive use.

In an appeal decision involving this same jockey on 27 October 2011 we explained that a rider must pay due regard to sub-rule (3) when exercising the discretion to use the whip in a backhand manner prior to the 100 metre mark: see sub-rule (5)(a)(iii). The discretion is not unfettered and has to be exercised responsibly.

As we have explained in other decisions, a good deal of controversy was aroused by the tighter restrictions on the use of the whip which resulted from the various amendments of AR 137A. Many owners, trainers and followers of the sport, as well as riders, were confused and resisted the reforms. The extent to which backhand use is permitted under the new rules has been a particularly troublesome pressure point in the Northern Territory.

The pressure was relieved by the introduction of the "Less is Best" Guidelines ("the Guidelines") on 4 April 2012. Thoroughbred Racing NT adopted the Guidelines to make it easier for all stakeholders to understand how riders are expected to observe the restrictions on the use of the whip. As has already been mentioned, when he rode "Pilos" Jockey McDuff should have been well aware of the requirements of sub-rule (3); they were fully explained to him 2 months earlier in our appeal decision of 27 October 2011. However, it is important to

note that, unlike some recent cases where riders have been charged under this rule, Jockey McDuff did not have the benefit of the practical advice contained within the Guidelines.

It has been particularly difficult to decide this appeal without reference to the Guidelines. We were troubled by Jockey McDuff's use of the whip about 25 times from about the 350 metre mark and pondered whether to use the whip so many times may of itself be excessive. But we also noted that this was not a case of sustained, relentless use of the whip as had been observed in Jockey McDuff's ride that was the subject of our appeal decision of 27 October 2011 and in the Appeal of Oakford (also decided on 27 October 2011).

These factors were weighed in favour of the rider:

- (a) The horse was genuinely in contention at all times;
- (b) Stewards conceded that Jockey McDuff used the whip to a lesser extent than was his practice in the past (ie there were signs of improvement); and
- (c) We were able to observe Jockey McDuff breaking up his use of the whip prior to the 100 metres (though not to an extent as would be sufficient to comply with the Guidelines that were adopted after this event).

In the end, we regard this as a borderline case and, therefore, we consider that Jockey McDuff should receive the benefit of a significant doubt. That said, it would certainly have been appropriate for Stewards to have reminded him of his obligations in relation to the whip. In other words, although a case for greater restraint could be put forward we were unable to be comfortably satisfied that the use was excessive having regard to the prevailing standards at the time.

The particular difficulty in applying sub-rule (3) to cases such as this one has been dispelled by the Guidelines which provide a point of reference for a clearer, more consistent application of the sub-rule. We expect that their influence will continue to instil more widespread confidence in the sub-rule.

In his submissions Jockey McDuff gave examples where Stewards had spoken to jockeys for conduct that came close to a breach of AR 137A. Sometimes this action had been taken without recording any mark on the jockeys' records as would have been the case if they were officially reprimanded. While we agree that it can be useful for Stewards to deal with marginal conduct by providing a warning rather than a penalty, we consider that every warning should at least be noted in the Stewards' report of the race if not on the rider's record. This procedure should enable all concerned in the sport to come to a better understanding of how the whip may be used without breaching the rules.

AR 85B

At the stewards' inquiry on 7 January 2012 Jockey McDuff said he was handing in his licence. He said it was "because I can't ride under these rules. ... I get beat with the whip rules here." He told the Stewards: "Fine me, do whatever you want, I'm not a jockey no more anyway." Stewards accepted his invitation and fined him \$1,000.

In his notice of appeal Jockey McDuff complained: "My grounds of appeal are natural justice because I wasn't present when the charge was given out so I didn't have a chance to defend myself."

We do not consider that these grounds can be sustained. Jockey McDuff walked out of the Stewards' inquiry after being notified that he would be liable to be charged under AR 85B. He was given the opportunity to be heard and declined. Moreover, having been informed of the requirements of the rule, he announced that he would not comply with it and, as has been mentioned, actually invited the Stewards to penalise him.

Even if there was any just cause for the complaint as expressed in his notice of appeal, it was redressed at our appeal hearing when he again had every opportunity to present his case.

We accept the Stewards' submissions that:

- (a) There is no previous experience with this type of offence in the Northern Territory. Suspension has been the usual penalty for interstate breaches.
- (b) The connections and the public are disadvantaged when a rider fails to fulfil a riding engagement;
- (c) A significant penalty is required to operate as a deterrent; and
- (d) Jockey McDuff flagrantly disregarded his obligations.

We also accept Jockey McDuff's submissions that his difficulties with the whip rules left him frustrated and distressed, and that there was no trouble getting replacement riders for his mounts.

The most important point is that people who invest in the sport (owners, trainers and punters) are entitled to expect that a jockey who is declared as the rider will actually fulfil the engagement unless prevented from doing so by ill-health, injury or some other reasonable cause. A breach of AR 85B is a very serious matter.

We take account of the fact that Jockey McDuff's appeal against the finding of guilt under AR 137A has been successful. But we also emphasize that even if a rider considers that he has been unjustly dealt with, it provides absolutely no excuse for his failure to honour his obligations. In this case, as we have mentioned, it was not surprising that Jockey McDuff's ride on "Pilos" attracted

the attention of Stewards. Having lodged an appeal, his correct response on 7 January would have been to ride his mounts and rely on due process to take its course.

Penalties

7 January 2012 ultimately produced another penalty for Jockey McDuff. Stewards alleged that he failed to provide a urine sample. On 14 January 2012 they found him guilty of a breach of AR 81A(1)(b) and suspended his licence for 2 years.

Jockey McDuff appealed to the Racing Appeals Tribunal. We understand that on 28 March 2012 the Tribunal upheld the period of suspension but otherwise varied the penalty such that Jockey McDuff was allowed to resume riding trackwork after completing the initial 9 months of the suspension (ie on and from 7 October 2012). We are not aware of the Tribunal's reasons for its decision.

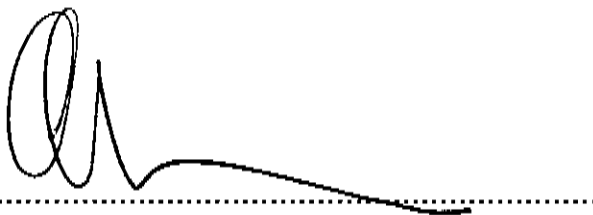
We mention the above matter only so Jockey McDuff's current status can be properly understood. Giving effect to the Tribunal's decision, and apart from the dispensation to ride trackwork, his licence as a rider remains suspended until January 2014.

Suspension of a rider's licence is the appropriate penalty for a breach of AR 85B. In this instance we substitute a suspension of 3 months for the penalty imposed by the Stewards.

We make these orders:

- 1) Jockey McDuff is not guilty of a breach of AR 137A(3).
- 2) Jockey McDuff's licence is suspended for 3 months for the breach of AR 85B, the penalty to be served concurrently with the suspension ordered by the Stewards on 14 January 2012. [We confirm that, in effect, the suspension for the breach of AR 85B has been served.]
- 3) The appeal deposit is forfeited.

Dated 1 November 2012



John Stewart
Chairman