

Non Raceday Inquiry RIU v A Lowe - Written Decision dated 20 December 2017 - Chair, Prof G Hall

Rules:

Repondent(s)/Other parties:

Name(s):

Decisions:

BEFORE A JUDICIAL COMMITTEE OF

THE JUDICIAL CONTROL AUTHORITY

UNDER THE RACING ACT 2003

AND IN THE MATTER of the New Zealand Rules of Harness Racing

BETWEEN RACING INTEGRITY UNIT (RIU)

Informant

AND MR ALISTAIR LOWE

Open Horseman/ Licensed Trainer

Respondent

Information: A5543

Judicial Committee: Prof G Hall, Chairman

Mr D Jackson, Member

Appearing: Mr N Ydgren, Chief Stipendiary Steward, for the Informant

The Respondent in person

Date of hearing and oral decision: 11 December 2017

WRITTEN DECISION OF JUDICIAL COMMITTEE

[1] The informant, the RIU, has laid an information with respect to the respondent, Mr A Lowe.

[2] This information alleges that the tactics Mr Lowe adopted on SANDRA KEITH during the running of race 3 at Forbury Park TC race meeting on 26 October 2017 fell below the standard of a competent horseman and thus were in breach of r 869(3)(a).

[3] Rule 869(3)(a) provides: "No horseman in any race shall drive incompetently".

[4] Mr Ydgren produced a letter dated 7 November 2017 from Mr M Godber, General Manager of the RIU, authorising pursuant to r 1108(2) the laying of the charge under r 869(3)(a).

Informant's submissions

[5] Mr Lowe is the holder of an open horseman's licence and a licence to train.

[6] SANDRA KEITH is a 6-year-old mare, which is owned and trained by the respondent. She has had 17 lifetime raceday starts. Mr Lowe has driven the horse in 10 of these races. Mr Lowe was prevented from driving SANDRA KEITH in the other 7 due to his being suspended.

[7] SANDRA KEITH has run in 24 official trials. In all but one of these trials Mr Lowe has driven the horse. SANDRA KEITH has run in 43 workouts. Driving statistics are not available for some of these races but Mr Lowe had driven her in the majority of these races as well. These statistics were said to demonstrate that Mr Lowe knows the horse well.

[8] SANDRA KEITH at the time of racing was a rating 40 horse. This is the bottom rating for a horse. She was the equal lowest rated horse in the field and this was reflected in Totalisator odds. She was the 8th win favourite and the 9th place favourite in a field of 9 horses.

[9] The form of SANDRA KEITH leading in to the race at issue was 00X00.

13th of 14 (20L)

10th of 12 (103L)

14th of 14 (27.6L)

14th of 15 (31.8L)

9th of 12 (30.9L)

[10] Thus, all things being equal, Mr Ydgren said, the pre-post chances of SANDRA KEITH featuring in the finish were low. When this was combined with the horse's wide barrier position, those chances were further diminished.

[11] SANDRA KEITH drew barrier seven. There were horses drawn to the inside of Mr Lowe which had previously shown speed from the mobile and it would be expected that these runners would take up forward positions. Mr Ydgren submitted that this information would have been reasonably accessible to anybody who had put some effort into field analysis.

[12] Mr Ydgren submitted that Mr Lowe's tactics and actions in the race at issue had fallen below what should be reasonably expected of a competent horseman in the circumstances. Mr Lowe had made bad decisions, which had adversely affected his chances. He had not made a competent assessment of his surroundings.

[13] Mr Ydgren reviewed the race.

[14] In the score up it appears as though SANDRA KEITH does race slightly keenly, however once the field is released, the horse shows no inclination to over-race. It appears relaxed and tractable and there is no film that shows otherwise. Mr Lowe is not having any discernible difficulty with the mare.

[15] Mr Lowe can be seen to look inwards on several occasions in the opening stanza. The Stewards assume from this that he is looking to take up a position closer to the rails, as would be expected, and Mr Lowe confirmed this in the interview.

[16] When the field enters the first bend, Mr Lowe has not shifted inwards to any significant degree and remains in a position that Mr Ydgren described as 5 wide. Importantly, he said, the field has taken up its pattern and no other horse is wider than 2-wide. This is a very unusual tactic from Mr Lowe. Whilst only very rarely seen, it is always reserved for situations where a horse is uncontrollable, in an incorrect gait or there is broken gear. None of these situations have arisen here. Mr Lowe should have been no wider than 3-wide.

[17] At the entrance to the back straight SANDRA KEITH was continuing to race in a position far wider than expected. The horse is still placed at least 5-wide.

[18] Mr Ydgren said that when questioned as to the horse being 5-wide, Mr Lowe's position was somewhat contradictory. His first comment to the Stewards was that he had been stuck out that wide. He then went on to explain that he was so intently focused on trying to restrain and control his horse he did not realise he was this wide. He conceded in the interview that he should not be out that wide and made an attempt to shift her in, however he then said that he was only able to get her in once she was "a bit stuffed" from all the work she had done.

[19] Aside from the contrasting comments provided, the Stewards had an issue with the fact that through the back straight on the first occasion SANDRA KEITH appears to be laying inwards. The alternative to this is that SANDRA KEITH is being directed outwards. Clearly from viewing the back straight film, the horse's head does not track straight. It is for one of those reasons.

[20] Stewards also believed it was equally as important to view Mr Lowe's position in relation to the leaders and those placed at the back of the field. Mr Lowe makes no real decision in the early stages. He does not have a plan as to whether he should race forward or back and instead lands out of the gate in a neutral position.

[21] Mr Ydgren said there is no discernible effort or action on Mr Lowe's part to either restrain SANDRA KEITH to the rear or to encourage her forward. There is nothing in the horse's disposition that would suggest that at this stage of the race she is not capable of doing so, if asked. It is only near the 1600 metres (600 metres after the start) where Mr Lowe appears to make a decision to improve. That was a decision that had to be made in a far timelier manner and in every race is done so by nearly every driver. Mr Lowe has failed to make a competent assessment of the situation and for this reason failed to make a positive move, to either restrain or go forward. This has led him to racing at least 3-wide for far longer than what should be expected.

[22] When Mr Lowe does make the decision to move forward he is racing to the outside of the second last horse. When considering the pre-start chances of his runner and the work the horse has been required to do in the early stages the Stewards accepted and expected that SANDRA KEITH would be restrained to race at the back of the field. Instead, Mr Lowe makes a sharp move forwards to pressure for the parked position. It is only at the time that Mr Lowe nearly takes up this position, that he makes an attempt to restrain SANDRA KEITH.

[23] This action of applying pressure to the reins, Mr Ydgren said, was what the Stewards would have expected to see of Mr Lowe in the early stages to gain a more beneficial run. This attempt from Mr Lowe lasts for a short time and Mr Lowe resumes racing 3-wide showing no desire to improve his position. Stewards accept that any action from the 900 metres onwards would not have helped the chances of SANDRA KEITH. Her race had been run and by that stage her finishing position was “a mere fait accompli.” However, she should not have been in that position.

Respondent's submissions

[24] Mr Lowe commenced his submissions by stating that SANDRA KEITH was pulling very hard. He was a very strong person and he was having difficulty stopping her shifting out on the track. He said he had a strong hold of her and was doing his best to restrain her. She was “a funny old horse and was in a mood”.

[25] Mr Lowe said he had drawn out wide on the mobile and his intention was to see what the other drivers were doing. He made a decision early to go back. However, “the horse took hold, pulled and wanted to race everything”. She was running out, her head was round, and she was hanging in. She made the decision to run out. He could not get her to shift in. However, he felt it was best not to let her go as if he did he would not be able to stop her running out.

[26] The respondent said it was “very embarrassing” to go round the track that wide. He was aware that anyone who had invested on his horse would be upset.

[27] At one point he thought if he could get up outside the leader and get her to relax, he might have had a show. But she would not relax and he had no control despite the fact he believed he had her under a strong hold on both reins. This was the first time she had ever run out. She had done a few other things in her races, though. She tried hard but had no commonsense. He added she was uncontrollable on the day and had given him a very difficult drive. If the pace had slackened, he believed he would have had a tough job to stop her running into the cart in front.

[28] Mr Lowe said he owned the horse and had now sacked her from racing. The statistics of the horse showed she had had 17 starts for no placings. She had never been in the first 4, and her best finish was sixth.

[29] Mr John Morrison, gave evidence on behalf of Mr Lowe. He spoke to his experience driving the horse. He said the horse had issues and was uncontrollable at times. She would take off and trying to restrain her was difficult.

[30] Mr Morrison said he had driven her in her first four race starts. He had had problems pulling her back and steering her. She was okay if she was following another horse but on her own she could be difficult to steer. He believed she had got worse over time.

[31] Mr Morrison said he had viewed the video of the race and he believed the respondent was trying to restrain the horse and that SANDRA KEITH was fighting him. Mr Morrison said he had trouble when he drove her in her first start at Oamaru on 22 May 2016. He had difficulty in getting her in when she was 3 or 4 wide early.

[32] Mr Ydgren played the video of the Oamaru race. SANDRA KEITH had drawn 7 at the mobile. He demonstrated that Mr Morrison had been able to restrain her back to sit in the 2 wide line. He emphasised the horse was not sitting 4 or 5 wide in that race. Mr Morrison agreed he had been able to restrain her and that he was leaning back in the cart to do so.

[33] Mr Morrison said when the horse had galloped for him on one occasion it was one of his worst driving experiences. She had been very difficult to control. He said SANDRA KEITH lacked ring craft and was harder to hold in open spaces. He said his assessment was also based on seeing her perform in workouts and race at Forbury Park.

[34] Mr Lowe said SANDRA KEITH had been co-operative at Oamaru, as that had been her first raceday start. In the race at issue, SANDRA KEITH was in a foul mood and he could not do anything with her. He emphasised he was an experienced driver, having been involved in the industry since the 80s. He had never been stuck outside the field as no horse had ever run out before, including her.

[35] Mr Lowe said he could not get on to the back of another horse and he had enough control to not be going forward but not enough to get her back. He said he had not steered her out. She had simply decided to go out on the corner. He agreed it was not an abrupt shift. It was her decision that she would “take the world on”. She was out of control.

[36] When questioned as to why he had not let SANDRA KEITH go forward and sit outside Mr Chmiel, he said Mr Chmiel had indicated he would not pull back and he believed he would then be 3 wide without cover. Instead, he was trying “to draw her back and get her to relax”. Mr Ydgren said at this point in the race it was evident that the respondent was making some effort to restrain SANDRA KEITH. He asked Mr Lowe, for example, why he had not leaned out the back of the cart earlier. Mr Lowe said he was only successful at that point in the race because SANDRA KEITH had done a lot of work and had used herself up. She had wasted a whole lot of energy and was now slightly more controllable.

Summing up

[37] Mr Ydgren submitted that an accepted and common definition of incompetent is “not having or showing the necessary skills to do something successfully”. The RIU believed that in this instance Mr Lowe had not shown the necessary skills and requirements of a competent horseman and instead had made poor decisions. This had led to him not doing his job successfully.

[38] Mr Ydgren believed in the circumstances that unfolded Mr Lowe should have taken up “an economical run as early as possible and hope[d] for the best.” Instead he set the horse an impossible task and “the result was quite unsuccessful and unspectacular”. His style of driving had cast “a poor light over Harness Racing”. Horsemen work hard to portray themselves and their industry in a positive manner, and a drive like this being broadcast across TV undid a lot of that work. The industry had to promote itself as professional and one that warranted investment. To turn on trackside and see a demonstration such as this would have had the exact opposite effect.

[39] Mr Ydgren submitted Mr Lowe should have made a decision earlier than he did. This would have ensured he could have enjoyed a far more economical run. He should have raced in a far tighter position closer to the field instead of covering a considerable amount of extra ground. There was no discernible effort by Mr Lowe to restrain SANDRA KEITH until the horse was outside Mr Chmiel. The horse just appeared to have landed in the position it did in the race and stayed there.

[40] Mr Lowe reiterated SANDRA KEITH was a very difficult horse to drive. He was restraining her. He was very strong and fit. Mr Morrison had had problems with her and he was not as strong as him. The horse had no brains and drawing 7 was the worst place for her. She took control and he could not stop her. He had had “a heck of a job to get her back in”. It took a strong hold to stop her going forward. She was not in the right mood to race.

Decision

[41] Mr Lowe is an experienced horseman. Sitting 4 and 5 wide for a distance of some 600 metres before making a decision to press forward is not the action we would expect from a competent and an experienced horseman. The respondent has contended repeatedly that SANDRA KEITH is a difficult horse to drive and she was in “a foul mood” on the day. We have studied the videos intently and can find no evidence of anything untoward in the behaviour of SANDRA KEITH. There is certainly no abrupt outwards movement at any time. This may be because, as Mr Lowe has said, he had a strong hold on the horse. However, we cannot see any action on Mr Lowe’s part to either restrain SANDRA KEITH to the rear or to encourage his horse forward until just after the 1600 metres mark in the 2200 metres race.

[42] In addition, there is no evidence until this time of Mr Lowe attempting to bring SANDRA KEITH closer to the field, in say a 3-wide position, rather than sitting 4 and 5 wide in a position that is to the outside of the body of the field. When the horse does eventually land up outside Mr Chmiel, who was racing 2 wide without cover near the front of the field, there are the first discernible actions of Mr Lowe to restrain the horse. We accept his explanation that trying to cross Mr Chmiel may have simply resulted in his sitting outside that horse 3 wide if Mr Chmiel kicked up. However, the damage to SANDRA KEITH’s chances have occurred prior to this time through the horse sitting outside the field 4 and 5 wide for a distance, as we say, of around 600 metres. The horse then continues to race 3 and 4 wide for another 400 metres although it is then being restrained towards the back of the field. The horse eventually tires and drops out of the race.

[43] Mr Morrison has given evidence that SANDRA KEITH is a difficult horse to drive. We observed his drive at Oamaru, to which he specifically referred, resulted in his being able to restrain the horse 2-wide at the rear of the field shortly after the start. There is nothing in SANDRA KEITH’s performance on that day that was similar to Mr Lowe’s drive that is at issue before us. Nonetheless, we accept his evidence that SANDRA KEITH is a difficult horse.

[44] Our concern is that the respondent has sat 4 and 5 wide and has not made any effort to progress forward or to restrain SANDRA KEITH to the rear of the field for the first 600 metres of the race. He has then been out 3 and 4 wide for the next 400 metres, although at this time he is making an effort to restrain and does eventually restrain the horse. We are satisfied, despite factoring in the fact that SANDRA KEITH can be a difficult horse to drive, that Mr Lowe’s actions in race 3 at Forbury Park on 26 October last have fallen well below the standard we would expect of a competent horseman. We thus find the charge proved.

Submissions as to penalty

[45] The penalty guide provides a starting point of an 80 drive suspension or a \$4000 fine for a breach of r 869(3)(a).

[46] Mr Lowe has had 376 lifetime drives for 6 wins. So far this season Mr Lowe has had 9 drives. Last season he had 19 drives and the season before he had 8. Mr Ydgren said it was apparent that it would take Mr Lowe a very long time to achieve even the starting point number of drives. Mr Lowe has had a previous breach of this rule. On 20 December 2015 he allowed a trotter to pace for 2000 metres and was suspended for just over 7 months and was fined \$400. Prior to that Mr Lowe had twice failed to return a trotter promptly to its proper gait.

[47] The Stewards classed the breach as mid-range and Mr Lowe’s penalty record as “worse than neutral”. Whilst in the past year he has not been charged with a breach of this rule, it was only 28 drives from the date of this hearing that Mr Lowe faced his last incompetent charge. From the day of his drive it was 26 drives since he was found to be in breach.

[48] Mr Ydgren observed that our penalty jurisdiction is restricted by r 1003(1) in that the maximum suspension is one of 12 months.

[49] An 80 drive suspension for Mr Lowe would take approximately 6 seasons to serve. For that reason the RIU submitted that the penalty should be one of a lengthy term of suspension combined with a fine. Their recommendation was that a suspension of 10 months and a fine of \$600 be imposed.

[50] The RIU made no submissions as to costs.

[51] Mr Lowe submitted that the penalty be less than that submitted by Mr Ydgren. He emphasised he continued to believe he was not in breach of the rule and would appeal our decision no matter what.

[52] Mr Lowe said he was in a position to pay a fine, if that was part of the penalty that we imposed.

Decision as to penalty

[53] The starting point in the JCA Penalty Guide is an 80 drive suspension or a \$4000 fine.

[54] We are clearly constrained by the infrequency with which the respondent drives and the one year maximum term of suspension provided in r 1003(1). A combined penalty is thus appropriate.

[55] We believe the breach itself is at the higher end of mid-range. Mr Lowe was 4 and 5 wide for a considerable distance. Were the horse not difficult to drive, we would have categorised the breach as high end.

[56] Mr Lowe's record under this rule unfortunately evidences a previous breach in December 2015. He had only driven 26 times before again being in breach. A fine itself is insufficient to hold the respondent accountable and to denounce and deter him and others.

[57] Mr Lowe's failure to admit the breach is of course not an aggravating factor but, in contrast, is the absence of a mitigating one.

[58] The 5th schedule of the Rules of HRNZ states:

5.1 The purpose of proceedings before a Judicial Committee or Appeals Tribunal includes:

- (a) to ensure that racing is conducted in accordance with the code rules;
- (b) to uphold and maintain the high standards expected of those participating in the sport of racing and the racing industry;
- (c) to uphold and maintain the integrity of the sport of racing and the racing industry; and
- (d) to protect the participants in the sport of racing, the racing industry, and the public.

[59] These principles are clearly applicable in this case.

[60] Doing the best we can in the circumstances we have outlined, and not wanting to impose a penalty on Mr Lowe that is crushing, we fine him the sum of \$1000 and suspend his horseman's licence for a period of 8 months, commencing on 12 December and concluding on 11 August 2018.

[61] The RIU do not seek costs and there is no award of JCA costs on this occasion.

Dated at Dunedin this 20th day of December 2017.

Geoff Hall, Chairman

Penalty: