

APPEAL RESULT

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FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 4 October 2011

SUBJECT: **APPEAL HEARING RESULT – JOCKEY: BEN MELHAM**

Panel Judge Russell Lewis (Chair), Mr Geoff Ellis, Mr Darren McGee.

Appearances Mr Paul O’Sullivan of O’Sullivan Saddington Lawyers appeared on behalf of Mr Melham.
Mr Dayle Brown appeared on behalf of the Stewards.

At a Stewards inquiry on Friday, 23 September 2011, jockey Ben Melham was found guilty of a charge under the provisions of AR 135(b) for failing to take all reasonable and permissible measures throughout the race to ensure his mount was given full opportunity to win or obtain the best possible place in the field. The charge relating to his ride on *Numen Lumen* in Race 6 the *Ted Bull Funerals 0-58 Handicap* at Mornington on Monday, 19 September 2011.

The particulars being that he failed to improve his position after leaving the 800m mark where, in the opinion of the Stewards, there was ample opportunity to do so, and that at the entrance to the straight he again failed to improve his position to the inside of *Naringaling* where, in the opinion of the stewards, there was room to do so.

Ben Melham had his licence to ride in races suspended for a period of two months - commencing at midnight on Sunday, 25 September 2011 and expiring at midnight on Friday, 25 November 2011. In arriving at this penalty Stewards took into account all relevant matters including the upcoming Spring Racing Carnival and that this was Ben Melham’s third offence under this Rule.

A Notice of Appeal against **the decision and severity of the penalty** was lodged on Monday, 26 September 2011.

A stay of proceedings was granted effective until midnight Monday, 3 October 2011.

DECISION: **Appeal dismissed.**

Penalty to remain standing – taking into account the stay of proceedings the period of suspension to now expire at midnight on Saturday, 3 December 2011.

TRANSCRIPT OF PROCEEDINGS

RACING APPEALS AND DISCIPLINARY BOARD

HIS HONOUR JUDGE R.P.L. LEWIS, Chairman
MR G. ELLIS
MR D. McGEE

EXTRACT OF PROCEEDINGS

DECISION

**IN THE MATTER OF THE TED BULL FUNERALS HANDICAP
OVER 1223 METRES AT MORNINGTON ON 19/9/11**

JOCKEY: BEN MELHAM

MELBOURNE

TUESDAY, 4 OCTOBER 2011

MR D. BROWN appeared on behalf of the RVL Stewards

MR P. O'SULLIVAN (instructed by O'Sullivan Saddington Lawyers) appeared
on behalf of the Appellant

CHAIRMAN: On Friday, 23 September 2011, Ben Melham was found guilty by Racing Victoria Ltd Stewards of a charge laid under Australian Rule of Racing 135(b). The rule is in the following terms:

The rider of every horse shall take all reasonable and permissible measures throughout the race to ensure that his horse is given full opportunity to win or to obtain the best possible place in the field.

Details of the charge were as follows: that Ben Melham, as the rider of Numen Lumen, in the Ted Bull Funerals 0-58 Handicap at Mornington over 1223 metres on 19 September 2011 failed to improve his position after leaving the 800-metre mark when there was ample opportunity to do so and at the entrance to the straight, he failed to improve his position to the inside of Naringaling where there was room to do so.

Ben Melham has now appealed to the Racing Appeals and Disciplinary Board against the conviction and penalty imposed by the Stewards, the penalty being a suspension of two months commencing at midnight on 25 September 2011. The Appellant was granted a stay of proceedings until midnight, Monday, 3 October 2011.

The onus of proof, the standard of proof and the test to be applied have been accurately set out in the written submissions to the Board tendered by the Stewards. Those matters have had the acquiescence of counsel for the Appellant, Mr O'Sullivan.

I now turn to the circumstances on the day. On the day of the race, the track was rated a good 3 and the rail was out seven metres. Numen Lumen was a three-year-old colt and prior to the race was a six-start maiden with three placings. He was a short-priced favourite and had firmed from \$2.60 to \$2.15 in the betting. He ran 3rd, the margins being one length by .2 of a length. The race was one by Heavenly Dreams ridden by Dan Nikolic which ran second favourite, drifting from \$3.10 to \$4.60 in the betting.

At its previous run, which was a 0-58 Handicap over 1200 metres at Mornington, Numen Lumen, ridden by the Appellant, had knuckled at the start, thereby losing ground. According to the race summary, he came from 9th at the 400 to finish 2nd, beaten two lengths. He had firmed in the betting on that day from \$6.50 to \$3.40. Both the trainer and the jockey regarded this run as probably the horse's best run to that point in his career. At his previous run, the horse had run 3rd in a 1200-metre maiden at Geelong synthetic track, beaten by two lengths after leading from the 800 metres.

As to the pre-race instructions, there were no specific instructions but they were more general in terms. The trainer had acknowledged that the Appellant knew the horse, having ridden him previously, and simply said at page 3, line 4, "Just let him roll and let him breathe."

The Stewards' case is set out in the written submissions tendered to the Board in paragraphs 20 to 23 and I do not intend to repeat them. The Appellant's case

is that the films tendered and shown to the Board were inconclusive. The explanation in relation to the first limb of the charge was that Nikolic's horse was shifting in and racing fiercely. It was conceded that there may have been half a run for the Appellant but he thought that Nikolic may have been taking his line. The Appellant conceded that he did ease when Nikolic crossed him. He said that his situation was compounded by the fact that the horse had breathing problems and inferred that it would have been detrimental to his mount's chances if he had dug him up, running the risk of the horse racing ungenerously. He also explained that if he had maintained and improved his position, he may have been caught in a pocket with Nikolic on his outside.

As to the second limb of the charge, the Appellant's explanation was fourfold. He conceded that there was a run on the inside at the entrance to the straight and that it had been there before a neat run appeared between Dale Smith's mount and Nikolic's mount. The Appellant did not take the inside run earlier because he thought that because the rail was out seven metres, that run would close; further, that his horse was claustrophobic and therefore it was preferable to go for the neat run which would have been wider had Nikolic's mount had a better kick.

Turning now to the evidence, the Stewards' relied on the evidence of Mr Reardon, a deputy chairman of Stewards and chairman on the day of the race, and in particular on his evidence before this Board, including his evidence relating to his interpretation of the films which were tendered in evidence. In essence, the Appellant relied upon the evidence of trainer Binaisse which, it

was said, supported the explanations given by the Appellant at the Stewards' inquiry. The Appellant's counsel, Mr O'Sullivan, submitted that not only was the vision tendered inconclusive but there was conflict between the footage as viewed from tower 2 and what was viewed from tower 3.

The Board does not accord a great deal of weight to Mr Binaisse's evidence, much of it being based on assumption and speculation as to what may have been going through the Appellant's mind.

Contrary to Mr O'Sullivan's submissions, it is the Board's opinion that the films of the race are strongly supportive of the Stewards' allegations and not at all helpful to the Appellant's cause. In the Board's opinion, the films demonstrate that after leaving the 800 metres, the Appellant's mount was travelling nicely and was quite capable of taking a run on the inside of Nikolic's mount, thereby improving its position without much effort. Indeed, it was the obvious thing to do in the circumstances.

In so finding, the Board rejects the explanation that Nikolic was crowding the Appellant and accepts Mr Reardon's evidence on this point. Instead, the Appellant passed up that opportunity and allowed Nikolic, who was riding the second favourite, to go forward of him and obtain an advantage.

The Board rejects the Appellant's argument that his mount was racing fiercely and regards his statements that his mount was panicking and that he had safety concerns as fanciful. The Board rejects the Appellant's alleged concern that if

he had maintained or improved his position inside Nikolic, he may have been boxed in.

As for what occurred at the entrance to the straight, the Board finds it difficult to understand why the Appellant would look for a run between horses where none existed and when a clear run was available to the inside of Naringaling, a run which he ultimately took. There is no doubt that had the Appellant taken the run when it appeared, he would have at least run 2nd, if not troubled the winner.

The Appellant conceded to the stewards that his decision not to take the run earlier was simply an error of judgment, in effect arguing that it is easy to be wise after the event.

In conclusion, the Board is satisfied that the Appellant's riding at the designated points in the race were not mere errors of judgment, rather, errors of judgment of a kind which may only be characterised as culpable or blameworthy. Objectively considered, the Appellant failed to make a sufficient effort to improve his position after leaving the 800 metres when, on the evidence before the Board, he had clear running for a considerable distance and could easily have improved his position by letting his mount roll. Further, that at the entrance to the straight, the only reasonable option was to take a run on the inside of Naringaling well before he did.

In each case, the Appellant, an experienced and talented rider, departed from the standard of riding expected. In the Board's view, his failure to improve his position in the race in the ways alleged meant that the horse was not given full opportunity to win or obtain the best possible place in the race. Accordingly, the appeal against conviction is dismissed. It follows that the appeal against sentence is also dismissed.

MR BROWN: Thank you.

MR O'SULLIVAN: If the board pleases.

CHAIRMAN: Yes. The parties may retire, thank you. Did you want to make any submissions on that aspect, Mr O'Sullivan?

MR O'SULLIVAN: Yes, but it appears the board might have formed a view.

CHAIRMAN: We've formed the view that having regard to Mr Melham's past and to the fact that he has two priors that three months would have been the most likely outcome but the stewards were being reasonable in taking into account the Spring Carnival and he's lost that in his two months. But if you want to argue to the contrary - - -

MR O'SULLIVAN: If that's the view the board has formed, I don't wish to argue it.

CHAIRMAN: Yes, thank you.

END OF EXTRACT