

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

APPELLANT: SYMON BREWIS-WESTON ON BEHALF OF THE OWNERS OF A FOGGY NIGHT

APPLICATION NO: A30/08/255

PANEL: MR D MOSSENSON (CHAIRPERSON)
MR J PRIOR (MEMBER)
MR J SYME (MEMBER)

DATE OF HEARING: 8 AUGUST 1995

IN THE MATTER OF an appeal by Mr Symon Brewis - Weston on behalf of the owners of "A Foggy Night" against the decision of the Western Australian Turf Club Stewards on 5 June 1995 in relation to a protest following the running of Race 6 at Belmont Park on that date.

Mr T F Percy, instructed by MacKinlay & Co, appeared for the appellants.
Mr Sweetman, as trainer and past-owner of "Mr Zemindar", represented himself.
Mr R J Davies QC appeared for the Western Australian Turf Club Stewards.

Background

On the 6 July 1995 the appellants were granted leave to appeal in relation to the decision of the Western Australian Turf Club Stewards made on 5 June 1995 regarding a protest following the running of Race 6 at Belmont Park on that date in which "A Foggy Night" finished first in Race 6, the Winter Cup. The rider of the fourth placed horse, "Mr Zemindar", Mr Phil Alderman, protested the outcome of the race, claiming that "A Foggy Night" had caused interference during the running of the race. After holding a hearing the Stewards upheld the protest.

On 6 July 1995 the appellant applied for leave to appeal to the Tribunal alleging that a denial of natural justice by the Stewards occurred during the objection hearing. As the Tribunal was satisfied that this allegation amounted to special or unusual circumstances it concluded that it was appropriate to grant leave to appeal to the Tribunal.

The appeal was heard before the Tribunal on 8 August 1995. The Tribunal reserved its decision on 18 September 1995. Subsequent to the hearing of the appeal, the solicitors for the appellants forwarded to the Tribunal a copy of a recent decision of the New South Wales Supreme Court which was said to be relevant to the proceedings.

The grounds of appeal are as follows:

1. *The Stewards erred in upholding the protest on the Winter Cup ("the protest") for the following reasons:*

(a) *The Stewards failed to afford the Appellants procedural fairness and to observe the principles of natural justice in the hearing of the protest.*

PARTICULARS

(i) *The Appellants were not invited to be heard at the hearing of the protest.*

(ii) *The Appellants were not given a reasonable opportunity to properly instruct trainer Harrison whom the Stewards took to be the Appellants' representative at the hearing of the protest.*

(iii) *the Appellants were not afforded a reasonable opportunity to call witnesses or make submissions at the hearing of the protest.*

(b) *The Stewards failed to provide adequate notice or particulars to the Appellants or their representatives prior to the hearing of the protest.*

PARTICULARS

(i) *The official announcement of the protest gave the grounds of objection as being interference over the last 100m of the race.*

(ii) *The grounds of upholding the protest were subsequently held to be interference at the 150-200m mark of the race.*

(c) *The Stewards dealt with the protest on grounds other than those which formed the basis of the objection.*

PARTICULARS

(i) *The protest was for interference over the final 150m of the race.*

(ii) *The decision of the Stewards to uphold the protest was essentially for interference at the 250-200m point of the race.*

(d) *The findings of the Stewards in determining the hearing were against the evidence and the weight of the evidence.*

PARTICULARS

There was no evidence, or no sufficient evidence upon which the Stewards could have come to the finding that the appellants' horse had directly or indirectly caused any interference at the 200m, 100m or 50m points of the race.

2. (a) *The decision of the Stewards to uphold the protest was accordingly void and should be set aside and the placings of the judge reinstated.*

(b) *Alternatively the decision of the Stewards should be remitted to the Stewards to be dealt with according to law.*

Relevant Facts

Following the finish of Race 6 at Belmont Park on 5 June 1995 the jockey, Mr Phil Alderman, protested the outcome of the race. The official announcement of the protest occurred approximately 20 minutes after the end of the race.

The evidence given by Mr Brewis-Weston before the Tribunal was that on hearing the announcement of the protest he approached one of the Stewards, a Mr Carpenter, and requested that he be allowed to attend the objection hearing before the Stewards on behalf of the owners of "A Foggy Night". He was informed that this was not possible as the hearing had already begun. Mr Carpenter's evidence before the Tribunal was that he could not recollect the conversation at all, but that he would never have said those words because he knows differently.

At the objection hearing the Stewards called the following people to be present:

- Mr P Alderman - the rider of "Mr Zemindar"
- Mr R Sweetman - the trainer and part-owner of "Mr Zemindar"
- Mr B C Morris - a part-owner of "Mr Zemindar"
- Mr D Miller - the rider of "A Foggy Night"
- Mr D Harrison - the trainer of "A Foggy Night"
- Mr P Dyson - the rider of "Firing Range"

At the beginning of that hearing the Chairman of Stewards, Mr F J Powrie asked Mr Harrison, the trainer of "A Foggy Night", if he did "...accept responsibility on behalf of all the owners." Mr Harrison responded in the affirmative.

The Stewards heard evidence from Mr Alderman, the jockey of "Mr Zemindar" as the person who had made the objection. Mr Miller, as the rider of "A Foggy Night" was then given an opportunity to respond to the details of Mr Alderman's objection. At this stage a video of the relevant incident was shown to all those attending the hearing. Mr Sweetman and Mr Harrison as the trainers of the two horses concerned were asked to make any comments they felt were relevant. Mr Alderman and then Mr Miller were then given the opportunity to comment further on the incident in response to the playing of the video. Mr Dyson, the rider of "Firing Range" was called into the hearing at that point to give evidence as to the incident in question. The other parties were given an opportunity to question Mr Dyson in relation to his evidence and the inquiry was adjourned while the Stewards considered the objection.

The Stewards upheld Mr Alderman's objection and amended the placings in the Winter Cup to take "A Foggy Night" from first place and move it to the fourth placing. The Stewards' reasoning for this decision was that "A Foggy Night" was responsible for bumping the horse on its inside, Lochanora, which affected the horse "Firing Range" and in turn "Mr Zemindar".

Ground 1 (a) - Failure to observe Natural Justice

It is well established that the principles of natural justice or procedural fairness will be implied in the absence of statutory provisions to the contrary (Stollery v The Greyhound Racing Control Board (1972) 128 CLR 509; Lee-Steere v. Slater, unreported decision of the Full Supreme Court of WA, 29 September 1983, SCL 5083). The rules of natural justice do apply to any decision made by the Western Australian Turf Club Stewards to the extent that they are not excluded by the Western Australian Turf Club Rules of Racing. The Rules of Racing do not attempt to abrogate the rules of natural justice, and procedural fairness must therefore be held to be a necessary implication, by

operation of law, to all decisions made under the Rules of Racing. In fact, it was not disputed by Mr Davies QC that the Stewards were obliged to observe the rules of natural justice in deciding the outcome of the objection.

Precisely, what the rules of natural justice do require of administrators is extremely flexible, varying according to the circumstances of each case. The content of procedural fairness can therefore range across a wide spectrum. It has been held that in a hearing before racing authorities, the Stewards can choose to run the hearing and their inquires in any way they chose, so long as the person facing the allegations knows exactly what he has to face and is given a proper opportunity to answer the allegations (Fagan v Coursing Association (1974) 8 SASR 546 at 571).

What then was the requirement of procedural fairness in these circumstances?

The Tribunal accepts the submissions of Mr Davies QC that it was not material that the Stewards did not invite Mr Brewis-Weston to attend the objection hearing. The Stewards had specifically asked and been told by Mr Harrison that he, being the trainer of "A Foggy Night" accepted responsibility on behalf of all the owners. The concept of natural justice depends greatly upon the circumstances. The flexibility and expedition which were required in this case justified the Stewards acceptance of Mr Harrison's answer at face value. The trainer of a horse is the representative of the owner of that horse in most aspects of racing. This fact is clearly recognised in the Rules of Racing. The Stewards were therefore entitled to be satisfied that they were dealing with the duly authorised representative of the owners.

The Tribunal does not believe that it was necessary or appropriate for the owners to give specific instructions to their trainer, in representing them at the hearing. The trainer of a horse would most likely be well equipped with the knowledge and expertise necessary for an objection hearing. As the objection was in regard to the actions of "A Foggy Night" during the course of the race, it is highly unlikely that the trainer would need to be instructed in such matters which are his direct responsibility.

Further and importantly the appellant failed to demonstrate that there was any more evidence which could have called or submissions which could have been made which may have influenced the outcome of the objection hearing. Both the trainer and the rider were present at the hearing. Both were offered a reasonable opportunity to participate in the hearing. In the absence of anything else that the owners could have brought to the objection hearing their attendance would have amounted to no more than a mere formality.

There was reference made by the appellant to a potential witness, Mr Carbery, who was another jockey riding in the race. However, as the Tribunal did not hear from Mr Carbery, this fact must be ignored.

The Tribunal notes and has examined the authority of Tippet v. The Harness Racing Authority of New South Wales, No 30013 of 1994, Supreme Court of New South Wales, which was forwarded by the solicitors for the Appellant after the decision was reserved. In that case, Mr Tippet, a trainer, alleged interference by another horse during the final 100m of a race. Mr Tippet was not able to get to the Stewards' room until the hearing had finished and claimed that the Stewards had failed to observe the rules of natural justice in not inviting him to attend.

The Supreme Court of New South Wales upheld Mr Tippet's appeal. The judge concluded that as Mr Tippet was the trainer of the horse and the person who had instigated the complaint, he could have made an important contribution to the proceedings, and that it would have been a fairly simple matter for the Stewards to ensure that Mr Tippet was present at the hearing.

This set of circumstances can be distinguished from the case before us in that it concerned a trainer who was not present at a protest hearing that he himself had initiated, and to which he could make an important contribution. This is entirely different from this appeal where the trainer was present at the hearing, and it was only the owners who were absent and unable to show that they could have offered anything new to the proceedings by their presence.

For these reasons this ground fails.

Ground 1(b) - Failure to provide adequate notice or particulars

Although the official announcement of the protest specified the grounds of objection as being interference over the last 100 metre of the race, the protest was upheld for interference at a different point in the race. The appellants submit that the Stewards therefore failed to provide adequate notice of the exact particulars of the protest.

There was no express reference to the precise location at which the interference occurred in the reasons for upholding the objection. Any mention of this fact in the public announcement is not relevant to these proceedings. One simply cannot rely on such a public announcement to provide the exact particulars of an offence or protest.

For these reasons this ground fails.

Ground 1(c) - Failure to limit the protest to grounds specified in the objection

It is submitted on behalf of the appellant that although in the public announcement the protest was for alleged interference caused over the last 150 metres of the race, the Stewards finally upheld the objection for interference at the 250-200 metre mark of the race. It was therefore impossible to ascertain exactly at what point in the race the incident took place at, and therefore prepare a proper defence to the allegations.

It is clear from the transcript of the objection hearing that everyone present was clear as to which part of the race was being examined in detail. There is no evidence of any confusion between the various stages of the race. The Tribunal is satisfied from the transcript that the Stewards finally upheld the protest for interference initially caused by "A Foggy Night" which then affected the horses "Lochanora", "Firing Range" and "Mr Zemindar", in addition to further interference at a later stage of the race where "A Foggy Night" was responsible for crowding out the horse Mr Zemindar.

This ground therefore fails.

Ground 1(d) - The findings of the Stewards were against the evidence and the weight of the evidence

The assertion is that there was no evidence, or no sufficient evidence upon which the Stewards could have come to the finding that "A Foggy Night" had directly or indirectly caused any interference at the 200 metre, 100 metre and 50 metre mark. Against this there was in fact a specific finding made by the Stewards as to the exact location when the interference occurred. In order for

this ground of appeal to be made out, the appellants must show that there was no logically probative evidence from which the Stewards could come to the finding that "A Foggy Night" had caused interference during the latter stages of the race (Minister for Immigration & Ethnic Affairs v Pochi [1980] 4 ALD 139).

The Tribunal is satisfied that this fourth ground of appeal is not made out. The transcript of the objection hearing provides an account of both Mr Alderman's and Mr Miller's evidence as to the events surrounding the relevant incident. In addition, the video tape of the event was available to the Stewards. The discrepancies between the evidence of Mr Alderman and Mr Miller together with the video material means that it can not be said that the Stewards' decision was unreasonable in the circumstances. The Tribunal is satisfied that the Stewards did have some evidence upon which to base their decision.

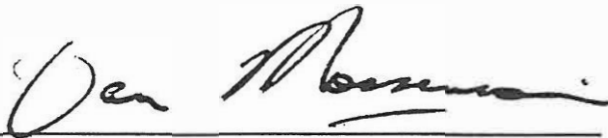
Ground Two - Whether the decision of the Stewards is void or should be remitted

It is not necessary for the Tribunal to consider this ground as the appeal has not been successful and the decision of the Stewards in upholding the protest will therefore stand.

Determination

The Tribunal is satisfied that the appellants have not made out any of their grounds of appeal. The appeal is therefore dismissed.

The fee paid on lodgement of the appeal is forfeited.



DAN MOSSENSON, CHAIRPERSON



JOHN PRIOR, MEMBER



JOHN SYME, MEMBER

20/12/95

