

THE RACING PENALTIES APPEAL TRIBUNALREASONS FOR DETERMINATION OF MR D MOSENSON
(CHAIRPERSON)APPELLANT:

BARRY McPHERSON

APPLICATION NO:

A30/08/415

DATE OF HEARING:

8 APRIL 1998

DATE OF DETERMINATION:

20 APRIL 1998

IN THE MATTER of an appeal by Barry McPherson against the determination of the Stewards of the Western Australian Greyhound Racing Association on 21 March 1998 imposing a one month disqualification of greyhound DESIRED INCOME for a breach of Rule 169 of the Rules Governing Greyhound Racing in Western Australia.

Mr C Harrison was given leave to appear on behalf of the appellant.

Mr D Borovica appeared for the Stewards.

This is an appeal made by Mr McPherson in respect of the greyhound DESIRED INCOME arising out of its running in Race 2 at Cannington Greyhounds on the 21 March 1998. The Stewards '*... received a report that the greyhound had failed to pursue the lure keenly during the race...*' As a result the Stewards inquired into whether the greyhound should be disqualified under Rule 169 of the Rules of Greyhound Racing.

Mr McPherson attended the Steward's inquiry. The transcript of the inquiry does not specify what Mr McPherson's relationship to the greyhound is. This fact was not clarified at the appeal hearing.

Rule 169(1) of the Rules Governing Greyhound Racing in Western Australia states:

'Where in the opinion of the Stewards a greyhound fails to pursue the lure in any race or qualifying trial, or mars the true running of a race or a qualifying trial, the Stewards shall require that the greyhound concerned be examined by the veterinary surgeon or if no veterinary surgeon is in attendance, by a person approved by the Board to be competent, for the purpose of determining the greyhound's physical condition'.

The inquiry was quite brief. During the inquiry the Stewards played a video of the race in question. It appears from the transcript that the inquiry was conducted under time constraints. Stewards not uncommonly are obliged to work very quickly when conducting their investigation and adjudication functions during the holding of a race meeting.

Mr Cuffe, one of the Association's Stewards who viewed the running of the race, was called as a witness. He gave evidence of his observations of the incident which he described in these terms:

'...on the second turn, I did see the 1 stop, prop and turn its head and, in my opinion, at that time, failed to pursue the lure keenly.'

In response to that evidence Mr McPherson stated to the inquiry that it looked like the dog had hit the rail. In answer to a question from the Chairman of the inquiry Mr Cuffe acknowledged that after the incident he did go to look at the relevant area near the fence where the dog propped in order to check whether the animal had put its leg underneath. Mr Cuffe explained that he did that *'..because I thought it was out of the dog's nature'*. Mr McPherson agreed with that description and stated *'...he's never done it before... he's never even looked like doing that...'.*

Mr McPherson told the inquiry that he believed the dog had hit the fence and that a pattern had developed of this having occurred. According to Mr McPherson this was the third occasion when the greyhound had hit the fence. This explanation is consistent with what is next stated in the transcript

where Mr Cuffe gave evidence that '*There is a big chunk out of the dog's leg...*' Mr Cuffe however claimed in relation to the incident which he had observed '*There was no way that the dog was near the fence*'.

After the race the greyhound was vetted on 2 occasions and it was reported not to be injured. Apparently the written report of the vetting was not available to the Stewards at the time of their inquiry. On this aspect the transcript reveals that '*The papers have gone walkabout*'.

In arriving at the decision the Stewards stated that they '*....have considered all the evidence and it is a bit of a difficult one given the way it's happened, but Mr Cuffe's adamant that it didn't hit the fence and if it didn't hit the fence and did that then it's we see it as failing to chase...*'

In support of the appeal Mr Harrison argued that there were a number of anomalies in the evidence presented to the Stewards. The first is that Mr Cuffe gave evidence that he '*... was stationed at... the... 638 tower*' when in fact Mr Cuffe was not at that tower. Secondly, there was no direct head on camera as alleged. Mr Harrison also challenged the fact that Mr Cuffe had stated that '*...but the incident I observed, there was no way that the dog was near the fence*'.

I have had the opportunity of viewing the video both during the hearing of the appeal and again subsequently. It does not appear to be the case from my examination of the video that DESIRED INCOME actually turned its head.

During the inquiry Mr McPherson did endeavour to explain away the incident as best he could based on the past performances of the greyhound. Mr McPherson showed some diffidence and lack of experience in arguing his cause. For example he failed to pick up on the evidence regarding the '*big chunk out of the dog's leg*'. He did not himself vet the greyhound after it raced. In fact Mr McPherson contributed very little else having stated when asked if he had anything to add '*I'll keep quite (sic)*' and '*I'm in enough trouble*'.

In many appeals which have dealt with the respective rules of each of the three racing codes which are expressed in terms of '*in the opinion of the Stewards*' the Tribunal has referred to the fact that it is a difficult matter for an appellant to succeed and discharge an appellant's onus of proof. The relevant aspects surrounding this present appeal are considerably different to the other appeals which have been concerned with the rules which employ that particular terminology due to the special facts and circumstances of this appeal.

Rule 170 of the Rules Governing Greyhound Racing is worth looking at in order to help explain the decision I have come to in this matter in the light of those facts and circumstances. Rule 170 states:

- (1) *Where in the opinion of the Stewards a greyhound fights during a race the Stewards shall submit a report of their findings to the Board and shall disqualify the greyhound in accordance with this Part of these Rules.*
- (2) *Any question as to what constitutes the act of fighting shall be determined by the Stewards.'*

In Gerard O'Keefe's appeal (205 heard 6 July 1994) there is reference to the fact that the Stewards met and agreed that when a greyhound attempts to attack '*another greyhound and actually makes contact with its muzzle on any part of the body or the greyhound, it will be deemed to have fought. If there is any doubt in the Stewards' opinion that the greyhound fought, the greyhound would always get the benefit of the doubt.'*

I am not surprised after having studied the transcript of Mr McPherson's inquiry, the video of the relevant race and the submissions made to me that in announcing the outcome of the Stewards' deliberations in relation to DESIRED INCOME Mr Borovica states:

'...it is a bit of a difficult one given the way its happened.'

I am satisfied from carefully viewing the film of the race on a number of occasions and after perusing the transcript closely in the light of the submissions that DESIRED INCOME should be entitled to receive the benefit of doubt. Considerable uncertainty does clearly exist in this particular case. In

view of that uncertainty, the doubt and the anomalies the Stewards were in error in forming their opinion.

Accordingly, the appeal is allowed. The disqualification of DESIRED INCOME is quashed. The lodgment fee is forfeited.

Dan Mosenson

DAN MOSENSON, CHAIRPERSON

