

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

APPELLANT: PAUL JAMES HARVEY
APPLICATION NO: A30/08/547
PANEL: MR D MOSSENSON (CHAIRPERSON)
DATE OF HEARING 25 SEPTEMBER 2001
DATE OF DETERMINATION: 5 OCTOBER 2001

IN THE MATTER OF an appeal by Mr PJ Harvey against 2 determinations made by the Stewards of the Western Australian Turf Club on 6 September 2001 both imposing 18 day suspensions from riding for breach of Rule 137(a) of the Australian Rules of Racing.

Mr TF Percy QC appeared for Mr Harvey.

Mr RJ Davies QC appeared for the Stewards of the Western Australian Turf Club.

BACKGROUND

On 6 September 2001, Mr Harvey and 5 other riders were called to a Stewards' inquiry into 2 incidents which occurred over the final 200 metres of Race 1 conducted that day at Belmont Park. The inquiry followed an objection hearing before the Stewards. Mr Harvey's mount CHASSEUR won the race. After taking evidence and reviewing the film of the race the Stewards charged Mr Harvey with 2 offences of careless riding in breach of Australian Rule of Racing 137. That rule states that:

'any rider may be punished if, in the opinion of the stewards;

(a) he is guilty of careless, improper, competent or foul riding.'

The first charge related to an incident which occurred whilst racing to the 175 metre mark, in that Mr Harvey *'allowed CHASSEUR to shift inwards carrying the, PIENODZE inwards causing Mr Brown's ride PANDA and GRAND TIMING ridden by Apprentice Lam Leong to be checked'*. The particulars of the second charge were that *'racing to the 100 you have allowed CHASSEUR to continue inwards carrying PIENODZE inwards onto ENTREPRENEURIAL ridden by Mr Paul King which has been buffeted with Mr Carbery's ride DON'T SAY DANNY which has shifted inwards resulting in NORTHERN BEAU, ridden by Mr Staples, to be checked'*.

Despite Mr Harvey's pleas of not guilty, the Stewards found him guilty on both charges. Two penalties, each of 18 days suspension from riding to be served concurrently, were imposed.

THE OBJECTION TRANSCRIPT

At the outset of the appeals senior counsel for the appellant sought the transcript of the Stewards' objection hearing in relation to the same race. The objection hearing had preceded the inquiry the subject of these appeals. The objection transcript had been requested by Mr Harvey's solicitors prior to the appeal hearing but was not produced by the Stewards as a matter of principle. Senior counsel for the Stewards sought a ruling as to the need to provide such a transcript because of the trouble and expense which the Stewards are put to in producing this material. I was satisfied that the objection proceedings were not relevant to Mr Harvey's appeals and I did not order production of the transcript. Despite that the transcript was in fact handed up and supplied to the other side after senior counsel for the Stewards explained his clients' attitude to the matter. As it happened the transcript was not in fact referred to again during the course of the appeals.

There may be some cases coming before the Tribunal where reference to an objection transcript does have some relevance. For example, in an appeal involving argument as to an alleged breach of natural justice an objection transcript could assist in throwing some light on whether or not the Stewards had predetermined the inquiry following the protest and conducted the inquiry into an incident with a closed mind. Whether or not an objection transcript is actually

relevant will depend on the facts and circumstances of each separate case as well as the grounds of appeal relied on in the particular matter.

GROUND ONE - ONUS

The first of the amended grounds states:

- '1. *The Stewards erred in their consideration of the charges against the Appellant by reversing the onus of proof.*

Particulars

- (a) *The onus of proof was for the Stewards to be satisfied on the balance of probabilities that the Appellant had ridden carelessly within the meaning of Rule 137 of the Rules of Racing.*
- (b) *There was no onus on the Appellant to satisfy the Stewards that he had not ridden carelessly.*
- (c) *There was no onus on the Appellant to satisfy the Stewards that he had taken sufficient measures to prevent his mount shifting inwards.*
- (d) *The Stewards' assertion that the Appellant was required to satisfy them that he had taken sufficient efforts to keep his mount on a straight course was erroneous and constituted a complete reversal of the onus of proof.'*

In support of this ground Mr Percy QC tabled a schedule of evidence which listed 9 places in the transcript where the Chairman of Stewards and another Steward clearly stated to Mr Harvey that he had to satisfy the Stewards of certain matters. They were:

- that it was the horse's fault and that Mr Harvey had done everything he could to correct the problem (p7 para5)
- that he had done sufficient to try and keep the pressure off the inside horses (p10 para 7)
- that he had made sufficient effort to correct the inwards shifting (p11 para 4)
- that he had made every effort (p12 para 3)
- that every effort was made to correct the horse's problem (p14 para 4)

- that sufficient endeavour was taken to try and pull the horses off the inside (p16 para 3)
- that sufficient effort was made to correct his mount going inwards (p18 para 6)
- that he had made every effort or every reasonable effort (p19 para 3)
- that he had done sufficient (p19 para 7).

Looked at in isolation it certainly appears as though the Stewards had shifted the onus to Mr Harvey by putting this series of propositions to him.

I agree with the propositions contained in particulars (a) and (c). Clearly in this type of case the ball was in the Stewards' court. Riding offences can be contrasted with some of the other breaches under the Rules where the onus clearly shifts, such as in the case of an offence under Australian Rule 177A. However, as Mr RJ Davies QC pointed out, all of these statements which were made by the Stewards are taken out of context. They all appear after the early part of the transcript where Mr Harvey had clearly admitted having caused interference to the inside runners. Mr Harvey stated *'My horse shifted in, yeah there's no doubting it's caused interference to the runners inside me'* (p2 para 7). That admission appears to apply at least to the first incident because in the very next passage the Chairman stated *'Okay further on from this incident, Apprentice Leong you were checked. What can you put forward?'* Later, at p5 the Chairman put to Mr Harvey *'Okay you say CHASSEUR was shifting in and you said there was no doubt that it caused the interference and that's quite evident from the film. Would there be an explanation for CHASSEUR shifting in to the extent that it did?'* Mr Harvey went on to offer a possible explanation but in doing so he did not deny the proposition put to him that he had said that his horse was shifting in and that it caused the interference.

Later on p5 when the Chairman of Stewards asked whether Mr Harvey was doing everything he could to keep his horse out and then it was put to him by the Chairman:

'Are you not continuing to push the horse inside the 200m when its, when its shifting inwards, when it, when the initial crowding first comes?'

Mr Harvey replied '*...I knew it was going to shift in.*'

Subsequently on p6 Jockey King stated that '*...yours come in about six or seven*' (para 6) to which Mr Harvey replied '*...I haven't disagreed with that Paul. There's not a moment I've sat here and disagreed that the horse hasn't shifted in.*' This led the Chairman of Stewards to state '*But you have acknowledged throughout the inquiry that CHASSEUR has caused interference to riders on the inside?*' (p7 para 4), to which Mr King responded '*Oh yeah, I think he's probably the key, the key player in the interference.*' From this point on the Stewards' 9 statements identified earlier which were put to Mr Harvey begin to appear in which Mr Harvey was invited to advance an explanation to exonerate that situation. The first of these is the statement of the Chairman of Stewards immediately after the passage from Mr King on p7:

'Well okay, we're taking it the logical step from there, it's then up to you I guess to satisfy us, that it's entirely CHASSEUR's fault and that you have done everything in your power to, to endeavour to correct the problem.'

When looked at in the light of Mr Harvey's early concession and what actually transpired during the early stages of the hearing it cannot be said that the Stewards have in any way reversed the onus of proof. I am satisfied the Stewards carried the onus of proving guilt to the requisite standard (*Errol Warren Bartlett-Torr v John Graham Madgen* WASC Appeal No 1081 of 1993). The Stewards by putting the series of propositions to Mr Harvey were simply agitating an issue as part of the fact finding process. In so doing they were, if anything, being helpful to Mr Harvey. They were simply inviting responses which may have assisted Mr Harvey's position in the course of the deliberative process. The way the Stewards conducted the matter was entirely appropriate in the circumstances. There is no merit in the first ground of appeal.

GROUND TWO - REASONS

The second amended ground of appeal reads:

- '2. *The Stewards erred in failing to give any, or any sufficient reasons, for their decision to convict the Appellant or the Penalty imposed.*

Particulars

- (a) *The charge of careless riding is not necessarily made out by a simple failure to take sufficient measures to keep a horse on a straight track.*
- (b) *Failure to take such sufficient measures may result from carelessness, but may not.*
- (c) *The Stewards gave no reasons as to what findings they made in this regard.*
- (d) *The Appellant had raised two distinct issues, which the Stewards acknowledged needed to be resolved, namely:-*
 - (i) *the degree to which the horse having its tongue over the bit had affected its behavior, and*
 - (ii) *What further measures the Appellant could have reasonably attempted to prevent his mount shifting inwards.*
- (e) *The Stewards were required to give at least perfunctory reasons as to why they reached the conclusions they did in respect of each charge, particularly in respect of the matters referred to in (a) and (b) above.*
- (f) *The Stewards further erred in failing to give any reasons whatever in relation to the question of penalty, and in particular what allowance had been made in respect of:*
 - (i) *the erratic behavior of the horse having regard to the fact that it got its tongue over the bit,*
 - (ii) *the efforts taken by the Appellant to straighten the horse,*
 - (iii) *what penalty might have been appropriate absent the matters referred to in (i) and (ii) above, and*
 - (iv) *what effect the balance of the previous record had on the determination of the penalty in the present case.'*

The reasons as to conviction are to be found at pp23 and 24 and are in the following terms:

'Mr Harvey, given that the only issue is whether or not you made sufficient effort to correct CHASSEUR from shifting inwards, it's our opinion that there is little value in granting your request for an adjournment and we intend to continue with the inquiry. It is our opinion that the video indicates you continuing to urge CHASSEUR whilst the gelding is shifting inwards from the 200m. Accordingly we are satisfied that you have made insufficient effort to correct CHASSEUR and therefore have allowed it to shift in. We find you guilty as charged on the first charge. We also find you guilty as charged on the second charge.'

As to the aspect of the horse's tongue, Mr Harvey raised the issue relatively early in the proceedings when he stated:

'Well I, I think I have, but how do you put, this horse has got its tongue stuck between the ring of the ring bit and the actual bridle. I mean how,

how do we measure what degree this has had on the interference?' (p11 para 5)

The Chairman of Stewards asked him at what stage was he aware that was the case, to which Mr Harvey replied:

'Well when we were going out, the girl leading it said "this horse is playing with its tongue. Check it at the barriers." I didn't, didn't get it checked, I just forgot about it, but then when we come back, Danny and Jodie the girl who was strapping the horse, said he had his tongue jammed up between the bit and ring bit. Whether it, whether it was doing it at the time, I, I don't know. But certainly when the horse has come back to scales, I I didn't even see it. Danny brought it to my attention that the horse had had its tongue where it's not supposed to be, I guess.' (p11 para 7 – p12 para 1)

Mr Harvey was then asked:

'Does that explain why you appeared to continue to ride? Albeit, not with your usual vigour as you've pointed out? But you've still continued to urge, urge it forward?' (p12 para 1)

The answer was not directed to the issue of the horse's tongue. Later in the proceedings when asked if he had experienced 'tractability problems' Mr Harvey said 'no'. He was then specifically asked regarding tractability in relation to the horse's mouth, to which he replied:

'No and even while he was following the horses in the straight when I had the whip on him, I said I hit him two or three times, looking at the video I probably hit him more than half a dozen and he was going straight until he went by Shaun McGruddy's mount and that's when the first indication that he was going to do something wrong, and that's, that's when I stopped riding the horse and done what I thought was enough and I thought I was riding cautiously.' (p13 para 1)

Further discussion on Mr Harvey's riding ensued before the charges were laid. After pleading not guilty Mr Harvey sought the adjournment:

'...so I could take Danny Morton here the trainer of the horse and maybe even an experienced trainer such as Buster O'Malley to get his opinion on this incident.' (p18 para 3)

The Chairman of Stewards then went on to state:

'I think what we've tried to do throughout this inquiry is, or towards the latter end of this inquiry, is to indicate that, that what you need to do is satisfy us that you've made sufficient effort to correct CHASSEUR'S tendency to get inwards and to this stage of the inquiry, obviously to the

fact that we've laid a charge, you have so far failed to satisfy us that that was the case. So it, it's a matter of record that CHASSEUR returned with its tongue between the, the ring and the bit, that is a matter of record.' (p18 para 6)

In the light of all of this I am satisfied the Stewards afforded Mr Harvey a reasonable opportunity to deal with the tongue question during the course of the inquiry. Mr Harvey had neglected at the outset to check the situation regarding the horse's tongue. The evidence does not establish there was a problem with the horse's tongue at the time the incidents occurred. Mr Harvey as an experienced rider did not offer any opinion or explanation as to the possible or actual affect the position of the horse's tongue had at the relevant times. In all of the circumstances the opinions of the trainer of CHASSEUR and another experienced trainer would not have been appropriate.

Senior counsel for the appellant asserts that '*absolutely no reasons were given in this case*', there are only findings of fact and there are no findings with regards to carelessness. The criminal case of *Betts v Hardcastle* [2001] WASCA 35 is relied on. In that case Justice Roberts-Smith states:

'A court of summary jurisdiction cannot realistically be expected to produce lengthy or detailed reasons dealing with all of the evidence, every issue and every principle of law arising in the particular case – and even less so can that be reasonably expected when judgments are given ex tempore.

Justice in Courts of Petty Sessions may be summary and that is as it should relieve from the obligation of in fact addressing those issues of fact and law upon which the decision turns as a proper exercise of judicial adjudication and being seen to do so.' (pp570 and 571)

Clearly the Stewards, in conducting inquiries pursuant to the Rules of Racing, are not acting as courts of summary jurisdiction. Nor are they equivalent to justices in Courts of Petty Sessions. This question of the failure to give reasons and the special role of Stewards dealing domestically with contractual disputes has been dealt with before in some detail in *SJ Miller Appeal* 413 at pp 12-15. I adopt my comments in that earlier matter for the purposes of the current appeal

The decisions of Stewards however can have very serious consequences. Usually their decisions affect the livelihood of participants of the sport of racing. Stewards' decisions can also impact on owners, the betting public and the industry generally. The *Racing Penalties (Appeal) Tribunal Act* establishes a process to

scrutinise those decisions in certain circumstances by way of independent appeals. In order for Stewards decisions to be scrutinised and for such appeals to be able to be determined it is incumbent on the Stewards to provide some enunciation of their thought processes in arriving at the conclusions as to both guilt and penalty. As a bare minimum the Stewards should in every case provide the appellant with sufficient material in the form of their reasons for the appellant to know the basis upon which the adjudication has been made. By doing so it affords an appellant the opportunity of having the matter properly adjudicated by way of an appeal. Depending on the seriousness of an offence and other circumstances of a case, including whether the proceedings are being conducted between races or under less pressure at some other time, the Stewards should be encouraged in appropriate matters to give carefully prepared and detailed reasons containing findings of fact particularly when dealing with complex evidential issues.

I am satisfied that what has been stated at the top of p24 of the transcript by the Stewards in relation to the first incident, namely that the actions of persisting with urging his mount whilst it was shifting inwards from the 200 metre in all the circumstances constituted insufficient action on the jockey's part to address the situation which followed a short distance thereafter. I interpret that the Stewards have formed the opinion that it was this lack of effort that was the reason for the horse having continued to shift in and interfere with other horses. Consequently, Mr Harvey can be said to have been careless in having employed insufficient effort at that stage in the race. That same failure in the light of all of the surrounding circumstances was sufficient to make out the charge. I am satisfied that so far as the first incident is concerned the Stewards have, albeit very superficially, addressed appropriate issues upon which their decision turned. Although, obviously, the reasons could have been more detailed and precise, they are sufficient to enable an evaluation of the process of reasoning. Accordingly I determine the appeal in their favour as to the first conviction.

However, for the Stewards to simply then to proceed to state, having concluded addressing the first charge, '*We also find you guilty as charged on the second charge*' does not in my opinion amount to a satisfactory discharge of their obligations in regard to that second matter. I agree no reasons have been given for the second charge. The particulars of the second charge identify a number of factual matters which are in no way addressed by the Stewards in handing down their finding on

that charge. No process of reasoning is revealed at all. There is no way of knowing whether they exercised their collective mind on those things that were particularised in the charge and if so with what result. In those circumstances I am satisfied they have fallen into error in the opinion forming process. On the basis of the evidence of the riders at the inquiry, it would be inappropriate for me to adjudicate on the quality of the riding at the point of racing to the 100 metre mark.

For these reasons I would dismiss the second ground of appeal as to the first conviction but uphold it in relation to the second conviction.

Ground 2 alleges in the alternative a failure in giving reasons for the penalty imposed. On the last page of the transcript in regard to the penalty the Stewards state:

'Mr Harvey we have given considerable thought to the matter of penalty and we've taken the opportunity of reviewing the record and your most recent suspension was on the 14th of July this year where you were suspended for 14 days. We've taken all the factors into account here this afternoon and we believe the appropriate penalty in relation to the first charge is a suspension of 18 days. In relation to the second charge we believe the appropriate penalty is a suspension of 18 days. Both those penalties to be served concurrently, that is, you serve a total of 18 days.'

The Stewards again in relation to penalty have been more than unusually brief and unclear as to the basis upon which they have arrived at their conclusions. This must be looked at in the context of the particular offence, the circumstances of this rider including his experience and other offences of a similar nature in which he has been involved. The Stewards should identify the range of possible penalties and demonstrate the appropriateness of the particular penalty imposed, based on all relevant circumstances. In most cases it will be sufficient for this to be done very simply and briefly. In this case Mr Harvey's record was referred to in passing by Mr Harvey late in the inquiry. Further, Mr Harvey's record is briefly referred to in part in the findings as to penalty. The fact that these occurred have some relevance to the outcome.

Mr Harvey's full record was produced to me in the printout from the Turf Club Racing Information System after I sought clarification of the number of similar

previous offences for which he had been convicted. I was told there were 4 previous careless riding convictions. The record shows a string of offences since 1996 ranging from 9 days' suspension to 3 months and 2 days. Unfortunately, the printout that was handed up to me was without explanation and it does not indicate under which part of sub-rule (a) any of these offences occurred. Careless riding is at the low end of the scale of riding offences. Included in the printout are many other jockeys' riding offences. It appears that only 3 offenders were fined. Most of the rest have been suspended for 1 week at the very least.

This was Mr Harvey's fifth such offence for breach of this Rule. I have come to the conclusion that no error has been demonstrated despite to the paucity of reasons regarding the first penalty. From what I saw of the incident whilst viewing the video and from what has been described and conceded on Mr Harvey's behalf there clearly was severe and ongoing movement inwards which went unchecked. This carelessness warrants a penalty in the order of that which was imposed by the Stewards. No error has been demonstrated in relation to the 18 day suspension from riding. I therefore do not uphold this ground in relation to the penalty.

GROUND THREE - ADJOURNMENT

The third amended ground states:

- '3. *The Stewards erred in failing to grant the Appellant an adjournment.*

Particulars

- (a) *The Appellant was entitled to call evidence to explain the effect on its behavior and tractability that might have been caused by the fact that it had got its tongue over the bit.*
- (b) *Notwithstanding the fact that the Stewards accepted that the horse had its tongue over the bit, the precise effect of that occurrence was a matter in respect of which the appellant was entitled to call evidence.*
- (c) *Notwithstanding the Stewards having acknowledged that the fact that the horse got its tongue over the bit may have contributed to it racing ungenerously the Appellant was still entitled to call evidence as to the degree to which it might have racing (sic) ungenerously and the degree to which it would have made a rider's job more difficult.*
- (d) *Given that this aspect of the case was at all times a live issue and a serious matter of contention, the Appellant ought to have been allowed to call evidence in that regard.*
- (e) *There was no detriment or prejudice to the Stewards in the adjournment of the inquiry at that stage at (sic) it had only*

been convened that day and there was no urgency about its completion.'

I have already dealt with the aspect of the horse's tongue in relation to ground 2.

This appeal is distinguishable from *Hanson v Huffa* (1976) 15 SASR 36 where an adjournment was refused by a special magistrate in a court of summary jurisdiction where witnesses had not arrived and the unrepresented defendant was convicted and taken into custody. Equally I am satisfied *Callo v Avins* [2001] WASCA 234, involving convictions and fines for traffic offences where a refusal to grant an adjournment resulted in a substantial miscarriage of justice as the evidence may have resulted in a different ruling, is also distinguishable. *Holz v Klahn* WASC Appeal No 1197 of 1992 is also of no help to the appellant. That appeal related to Road Traffic prosecutions where an adjournment was refused despite the unavailability of counsel. It is factually quite a different case.

I am satisfied Mr Harvey was not unfairly deprived of any right resulting in an injustice to him arising out of the refusal by the Stewards to adjourn the matter. I am inclined to agree with senior counsel for the Stewards that the adjournment request simply smacks of playing for time.

GROUND FOUR – EXCESSIVE PENALTY

The final ground is that the sentence imposed was manifestly excessive in all the circumstances. I have already addressed some comments on penalty. I have not been persuaded that the penalty was inappropriate. The infringement was serious. The interference was not denied by Mr Harvey at the inquiry or by senior counsel at the appeal. I dismiss ground 4.

SUSPENSION OF OPERATION OF THE PENALTY

Mr Harvey was granted a stay on 10 September 2001 until midnight on 25 September 2001 or as otherwise ordered. At the time of reserving my decision on 25 September I indicated the decision could not be handed down until the then following week. Senior counsel for Mr Harvey immediately advised no application for a continuation of the stay was sought. This brought a cross reaction from the Stewards. Mr Davies QC complained that this '*smacked of taking the penalty as to convenience*' and it '*was not good enough*'. Mr Percy QC responded

