

THE RACING PENALTIES APPEAL TRIBUNAL

**REASONS FOR DETERMINATION OF MR D MOSSENSON
(CHAIRPERSON)**

APPELLANT: ALLEN CHRISTOPHER LEWIS

APPLICATION NO: A30/08/721

DATE OF HEARING: 25 MARCH 2010

DATES OF DETERMINATION: 25 and 31 MARCH 2010

IN THE MATTER OF an appeal by ALLEN CHRISTOPHER LEWIS against the determination made by the Racing and Wagering Western Australian Stewards of Harness Racing on 10 March 2010 imposing a suspension of six weeks for breach of Rule 149(2) of the Rules of Harness Racing.

Mr T F Percy QC with Ms L M Timpano appeared for the appellant.

Mr R J Davies QC appeared for Racing and Wagering Western Australian Stewards of Harness Racing.

BACKGROUND

This matter was heard on 25 March 2010 when I dismissed the appeal against conviction. I adjourned on the question of penalty to allow the Stewards to supply details regarding the list they supplied of other penalties imposed for the same offence. This information was quickly provided as were some brief submissions on the new information made on the appellant's behalf. On 31 March 2010 I published my determination of the appeal against penalty. I allowed the appeal against penalty and reduced the period of suspension of Mr Lewis' driver's licence from six weeks to three weeks. I now publish my reasons in relation to both aspects of the appeal.

THE STEWARDS' INQUIRY

Mr A C Lewis was called to an inquiry by the Racing and Wagering Western Australian Stewards of Harness Racing following his drive of OUR MERCURIO NZ in Race Six at Gloucester Park on 15 January 2010. Five Stewards were empanelled for the purpose. The Chairman of the inquiry was Steward W J Delaney who stated at the outset the purpose of the inquiry was to investigate:

'... the reason for IMA ROCKET STAR being able to gain a position in the one wide line racing towards the back straight on the first occasion and that was in advance ... It did appear as though there was a position for Mr Brown to – he'd been racing three wide – there was a position for him to ease into the one wide line in advance of you .. didn't appear to be contested by you at all.' (T.1)

Mr Delaney had viewed the race from the Stewards' box at the finishing line. Mr Lewis responded with his explanation including the comment *'... I wasn't fussed with the way my horse was going and what'd happened'*. (T.1)

Both OUR MERCURIO NZ and IMA ROCKET STAR were trained by Mr G Bond as were a couple of other horses in the race. Mr C Brown, driver of IMA ROCKET STAR, briefly gave evidence. Mr Brown told the Stewards:

'... I was applying ... I was tight on runners to my inside to get into the position – I was applying a bit of – not pressure – but I was very tight as I come back into the spot'. (T.2)

The films of the race were then viewed, after which Mr Lewis stated:

'The only thing I'd say like my horse when Mr Browns (sic) came back and down he has hung down at that point and like I said I could've kept tippy toes in there and tried to hold the position – I'd nothing inside me at that point – I didn't feel it was in the best interests of the horse to actually keep pushing him up or even – it wouldn't matter who it was – if they were down in that position and I'm tippy toes I'm not going to just hold that position'. (T.3)

The Stewards then adjourned to review the evidence and continue with their inquiries. They resumed the hearing on 4 February 2010. At the resumption the panel continued to take evidence and invited Mr Lewis to make further comment. After going into some detail regarding his personal and family history Mr Lewis stated:

'My record is probably better than any other driver in Australia, 2 suspensions in the last 10,000 drives. I've driven over 3,900 winners over 1,000 more than any other drive in WA ever, I've won numbers WA Driver's Premierships 35 plus Group 1 winners, 2 Inter Dominions. I've driven Grand Circuit races in every mainland state and winners on three continents. The lessons I've learnt from the 2 men in my family was safety first, play fair, be honest and integrity can only be earned not bought I've tried my best to honour those ideals, so you can imagine after 25 to 30,000 drives to be questioned for the first time ever I'm giving advantage to another runner that I would feel totally offended and disappointed in the panel in front of me today for ever thinking that of me. It wouldn't matter what financial reward I was offered, to do something untoward in a race I would have

no hesitation in knocking it back. I also feel I'm a role model and have high standards in all areas.' (T.5)

It is apparent from the transcript of the inquiry the Stewards did not dispute of any of these personal assertions. Indeed, at the appeal hearing senior counsel for the Stewards was at pains to acknowledge and recognise Mr Lewis as a fine role model for the industry, describing him as an *'ornament'* to the industry.

After giving a detailed explanation of his discussions with the trainer and what transpired during the course of the race further videos were shown. Mr Lewis was given every opportunity to dissect the race and to make his observations on a frame by frame basis. In the course of this exercise Steward C Coady offered his comments on the films and engaged in some brief debate with Mr Lewis as to how one should interpret the films. The Chairman of the inquiry then observed that:

'You know when you've got, when you've got the second favourite and a stable mate in a disadvantageous position racing three wide, ... you know how it looks?' (T.13)

Mr Lewis responded that because he was wearing the same colours it did make things look more pronounced and he understood that there could be some concern. Lengthy discussion took place, largely between Mr Lewis and Mr Coady, as to how one should interpret what had unfolded in the race.

After retiring to consider the position the Stewards laid a charge pursuant to Rule 149(2) of the Rules of Harness Racing. The Rule specifies that:

'A driver shall not drive in a manner which in the opinion of the Stewards is unacceptable.'

The specifics of the charge were:

'... when driving OUR MERCURIO NZ you failed to drive competitively from racing in the latter stages of the front straight on the first occasion until racing towards the back straight on the first occasion and as a result did not make sufficient effort to fully retain a trailing position in the one wide line behind SMOKING AGAIN. Your failure to do so enabled IMA ROCKET STAR driven by Colin Brown to gain that position. Your failure to drive competitively at that point being in our opinion unacceptable.' (T.19)

Mr Lewis pleaded not guilty and then sought an adjournment to review the evidence and to organise witnesses and his evidence to defend the charge. The matter was adjourned until 18 February 2010 when the Chairman of the inquiry stated:

'... Mr Lewis, as you were granted the adjournment to prepare your defence I guess we're pretty much guided by how you want to go from here.' (T.22).

Mr Lewis exercised a free hand in presenting his case from then on. An exchange ensued regarding the television equipment used by the Stewards which resulted in Mr Lewis expressing misgivings regarding his earlier discussions with the Chairman concerning the type of television employed at the inquiry by the Stewards. Consequently Mr Lewis brought his television equipment to the inquiry as he claimed it provided a superior picture.

Mr Bond was called as a witness by Mr Lewis and was asked a range of questions including his opinion regarding the race and whether or not any inducements were offered if one of his other horses won the race. The inducement question was categorically denied. This was followed by the Chairman denying there was any suggestion of any collusion prior to the race or in relation to the running of the race. Mr Bond had no issue with how the race was run and went on to state:

'... but I'm firmly of the view that Mr Lewis did everything and got my horse to finish in the best possible position he could during the running of the race and that that he did his best for my horse and the connections of that horse who are, some are different connections in IMA ROCKET STAR so it's not all the same ownership.' (T.32)

Mr Lewis then sought clarification as to the location of each Steward as they viewed the race. The Chairman was at the winning post. Mr Sumner was in Tower Two at the beginning of the home straight. Mr Kearns was at the 400 metre mark. Mr Franklin was at the 600 metre mark in Tower Four. Mr Lewis asked questions regarding observations from those respective positions. Mr Franklin stated:-

'... I just noticed that Mr Brown's horse had shifted from a three wide position to the running line ... and that was about all. I just found it very peculiar that a horse could get in on a bend ... to be honest.' (T.34)

Mr Kearns stated:

'... I've noticed you restrain whether you were being tightened by Mr Brown I'm not sure looking across, but definitely, you've restrained and Mr Brown has got that position you're clearly inside Mr Brown at that stage.' (T.35).

Mr Sumner stated:

'... I observed Mr Brown shifting to a position from a three wide position to a position in the two wide line.' (T.35)

Mr Coady made the observation that he saw:

'... as the horses went past our tower Mr Brown was out wide and looking to find a spot one off ... at that stage he'd eased back to a position in front of you, but outside you, and then he found himself one off the fence, and you've given a trail on his back'. (T.36)

Whilst being closely questioned Mr Delaney stated:

'... he had a good view of it ... looking at it the whole time.' (T.37)

Further detailed discussion ensued regarding OUR MERCURIO NZ's position in relation to IMA ROCKET STAR after Mr Lewis' copy of the video of the race was run. The Chairman of Stewards made it clear Mr Lewis was not charged with the more serious offence of failing to take all reasonable and permissible measures throughout the race.

At the resumption of the hearing on 4 March 2010 Mr Fred Kersley was called by Mr Lewis to give evidence as an expert witness based on his having viewed the video replay of the race. Mr Kersley made his observations as follows:

'... I ... formed the following opinion that from my interpretation of the race as it unfolded was there was a lot of speed early in the race, that most horses were struggling to hold down their position, that because of the speed. I was mindful of the fact that I think it was Mr Brown's horse caught three deep and at a point in time decided it was futile (sic) to be pressing forward and started to come back looking for a position in the ... in ... wherever he could get it, which as it turned out was going to be in the one wide line, just in advance of Mr Lewis. At a point ... just into the corner, I thought that the ... it was subtle pressure from the three wide horse Mr Brown's drive down toward ... very close to the front legs of Mr Lewis's drive and I thought there was enough pressure from the outside to influence the positioning of Mr Lewis's drive to a point where I thought in my own mind could have been considered dangerous to push hard into that position because contact could have been made. Another point I called on my experience of race driving and my knowledge of horses and it's probably not well understood, but horses you know do have a blind spot from about the point of their nostril to the ground where they cannot see the ground, they have no vision whatsoever, now a lot of horses in those circumstances when anything invades that space, are going to move away from, from that, that perceived object or whatever because given that it's a blind spot they are not able to ... to see at all, not ... not ... well not even vaguely, it's ... it's just a spot where their vision is not only impaired, but in actual fact they cannot see it. And so, that in that situation from what I could see on the film I thought that Mr Brown's sulky wheel got into about that position, where Mr Lewis's ..., horse would not be able to clearly see, and would have a tendency to move away, and I think under the circumstances, there was nothing Mr Lewis could have done to have changed the ... the result of Mr Brown occupying that position.' (T.78 and T.79)

Mr Kersley went further and stated he did not think it was possible for Mr Lewis to hold the position, it would have been *'... unwise to persevere into that position and ... probably bordering on dangerous, not only to the driver himself, but any horses trailing, if the horse were to make a break.'* (T.80)

Shortly after that evidence Mr Lewis raised what he described as *'... a serious allegation of an incident that occurred on 12 February 2010, after the running of Race 6'*. That race was won by Mr Lewis' horse.

The allegation was expressed as follows:

'It is alleged by Shane Loone that after running of Race 6 the City of Perth Pace he had a conversation with you, Mr Coady and it went like this: ..On 12 February 2010 following the running of the City of Perth Pace at Gloucester Park won by DONT TELL PORKIES, this is Mr ... in Mr Loone's words: 'I was ... I approached Mr ... Mr Carl Coady in the passageway to the right of the Stewards room. I expressed my concern at the tactics of STAGE COACH KID and a significant gear change. I said: 'I felt it was a boat race if I'd ever seen one', to which Mr Carl ... Carl Coady replied. 'Don't worry, we've got Lewis for the McInerney anyway.' (T.81)

Mr Loone was called to the inquiry. In addition to giving evidence, Mr Loone's affidavit was read into the transcript. The affidavit contained the same allegation regarding the reply allegedly made to Mr Loone which is quoted in the previous passage.

When Mr Coady was asked to provide an explanation, after denying there was any mention of Mr Lewis at all in the conversation with Mr Loone, Mr Coady volunteered for the sake of fairness he should stand down from the inquiry. The other Stewards took some little time to consider the position and then resolved, as the Chairman stated:

'... to avoid any reasonable apprehension and bias it's the decision of this Panel that Mr Coady will no longer form part of the investigation ... Is there anything further you want to put forward at this stage Mr Lewis?' (T.89)

At the resumption of the inquiry on 10 March 2010 the Chairman of Stewards confirmed Mr Coady had ceased sitting on the panel and would take no further part in any deliberations. This action was taken to enable the rest of the panel to continue to properly consider the matter with entirely open minds and it was made clear the determination on the credibility of either Mr Loone or Mr Coady was to be considered at a different time in different forum. The Chairman also clarified the fact that no decision in relation to Mr Lewis had to that stage been made nor could it be made until the completion of the evidence. The remaining four panel members expressed confidence they could consider the totality of the evidence with open and clear minds. The Chairman went on to state:

'Mr Coady's evidence will remain in the transcript and will be given such consideration, in the normal course of proceedings, as the stewards determine along with all the other evidence that has been tendered in the inquiry. Mr Coady, whilst no longer a member of the panel hearing this matter, will be called to give evidence.' (T.91).

Mr Coady was then called to the inquiry and asked whether he had read the transcript of the evidence which he had previously presented. After also being asked whether he had anything to add he said he did not. He stated he stood by the evidence which he had presented and was then excused.

Mr Lewis presented some further evidence regarding the incident and commented on Mr Kersley's evidence. Once the Stewards had considered the matter their reasons for convicting were delivered in these terms:

'We have given a great deal of consideration to the evidence that has been presented over the five sittings of this inquiry. You have placed considerable emphasis on stopping the various vision angles at specific times to make your points. Essentially you have asked us to consider a series of still pictures in making our determination. Our view is that a race is a fluid, dynamic entity and needs to be properly viewed in that context. During the inquiry we also heard evidence from Mr Brown at the first sitting, Mr Bond at the third, Mr Kersley at the fourth and Mr Coady at the fifth. Mr Loone's evidence presented at the fourth sitting had no direct relevance to this matter and has not been considered. Mr Brown said that he was tight on runners to his inside but clarifies that he was not applying pressure as he came back into the spot. Mr Bond clearly expressed his opinion and appeared to read from prepared notes. Whilst we were mindful of his comments we were also mindful that he was the trainer of both horses involved in this incident. In addition Mr Bond's evidence was from the position of having become further aware of OUR MERCURIO'S racing characteristics after three racing performances subsequent to the race in question. Mr Kersley gave his opinion from a replay of the video that he had viewed prior to attending the inquiry. He did not have the benefit of a live viewing. There is no doubting Mr

Kersley's experience or standing in the harness racing world. Whilst we were very mindful of both Mr Bond's and Mr Kersley's wide experience as horsemen and Mr Coady's evidence, ultimately it is the opinion of the stewards sitting on an inquiry that determines these matters and only after proper consideration of the evidence in its entirety. We are of the opinion that you have not driven competitively at the stage of the race specified in the charge. We consider that you were sufficiently advanced in the one wide line to have resisted any attempt by Mr Brown to cross in advance of you. We do not accept that it would have been a case of you trying to hold the position with, in your words, tippy toes. You have acknowledged that there was only a three quarter position at one stage. We also do not accept that Mr Brown had applied pressure to you in an effort to fill the position. Referring to your comment regarding the duty of care requirement placed on drivers, it needs to be borne in mind that a race is a contest and drivers are expected to comply with all rules from the basic ones such as exercising due care through to the most serious: driving horses on their merits. In addition, we do not accept that OUR MERCURIO'S race manners were a factor in the incident. In our opinion, it did not hang inwards at that point to the extent that you were unable to remain one wide or retain your position. Your evidence that the horse became very wary after the early severe check, in our view, is not an explanation for this incident. In our opinion your assessment of the incident that occurred on the last bend also does not assist. In our assessment in that incident OUR MERCURIO reacted entirely consistently with any horse placed in that situation. Perhaps the situation you found yourself in can best be summarised by your comment at the bottom of page 1 – 'I thought well probably not too bad. I might get a trail up behind Mr Brown any rate so I wasn't fussed with the way my horse was going and what'd happened'.

Considering all the evidence Mr Lewis this Panel finds the charge sustained ...'
(T. 98 – 99)

After the Stewards had entertained and considered submissions on penalty their reasons for imposing the penalty which they ultimately arrived at was stated as follows:

'Mr Lewis in determining penalty Stewards have considered the nature of the offence. Whilst not being in our opinion pre-meditated your failure to drive competitively at that stage of the race has resulted in a stable mate being able to obtain a favourable position in the one wide line after being caught three wide in the early stages. The message in this situation, not just to you, but to the industry at large is that such actions cannot and will not be allowed to go unchallenged. The integrity of this industry is paramount to its ongoing success. We are not without considerable competition for the wagering dollar in this economic time. Therefore it is imperative that we are seen to be a fully competitive sport. Offences under this sub rule in recent years have resulted in periods of suspension ranging from 4 weeks to 10 weeks. This sub rule, however, covers a wide variety of breaches and each case needs to be determined on its unique circumstances. Fortunately, we do not have many precedents for this specific type of offence. In recent times in this State there has been one driver dealt with for having shifting wider to assist another runner gain clear running. We acknowledge that the circumstances of that offence were different to what we are dealing with here, but there is sufficient similarity for the penalty imposed on that occasion to assist us in our deliberations. In that instance the appropriate base

penalty was determined to be a suspension of 12 weeks due to what the Stewards considered to be a high degree of culpability. The driver received a two week reduction in penalty for his guilty plea, driving record and personal circumstances. In assessing this incident we have determined that in all the circumstances this offence warrants the imposition of a base penalty of 10 weeks suspension. Your personal circumstances have been considered. Your driving record in this regard has been exemplary and is readily acknowledged. You drive in your own words: 'a lot of horses and in a lot of races'. As a high demand driver you will always have significant upcoming engagements. You have advised us that race driving is your major source of income. Any period of suspension will significantly impact on your income. During this inquiry you tendered a number of references from people prominent in this industry attesting to your character. Mr Lewis, your character has never been in question. The issue throughout this inquiry has been restricted to one small section of this race only. We have not and will not make any finding detrimental to your character. Taking all these factors into account we consider the appropriate penalty is suspension of your driver's licence for a period of 6 weeks. We are permitting you the maximum 9 day stay of penalty allowable under the rules. This means at this stage your suspension will commence from midnight Friday, 19 March 2010'. (T103 -105)

COMMENTS ON THE EVIDENCE

I have gone into more than the usual detail in relation to the evidence partly because senior counsel on both sides took me to many passages in the transcript.

It has also been useful to refer to so much of the evidence to highlight the fact that the inquiry progressed with Mr Lewis being afforded every opportunity to review the way the race was run, digest and evaluate all of the evidence presented and to challenge the observations of the Stewards as to what they claimed had transpired at the relevant time during the course of the race. I was completely satisfied Mr Lewis was afforded a fair and appropriate hearing. I reached this conclusion despite the fact it was apparent there was the unusual feature to this case of Mr Loone's allegation and this subsequently became the basis of the amended ground of appeal two.

The outcome of the appeal depended on:

- the evaluation of the incident by the decision making Stewards which was based on their collective live observations together with their assessments of the race films;
- Mr Coady's evidence;
- the appellant's evidence; and
- the evidence of Mr Lewis' witnesses.

Once all of that was assimilated and evaluated it was necessary to consider whether it was reasonably open to the Stewards to reach the opinion of the incident which they did in the light of all of that material. Rule 149(2) is so worded the appeal could only succeed and the conviction consequently be overturned if it could be established the Stewards could not reasonably have reached their ultimate conclusion that Mr Lewis drove in an unacceptable manner by having failed to drive competitively whilst racing towards the back straight on

the first occasion. At the conclusion of the appeal hearing, as I had not been persuaded that the Stewards had fallen into error on that point, I dismissed the appeal as to conviction.

GROUND OF APPEAL

I now address each ground of appeal in turn.

A. CONVICTION

Ground 1 The Stewards erred in failing to accept or act on the evidence of the witness Kersley.

PARTICULARS

- (a) *the witness was undoubtedly an expert in the relevant area and his credentials were unchallenged by the Stewards.*
- (b) *the evidence given by the witness was unchallenged by the Stewards.*
- (c) *the Stewards erred in discounting or devaluing the evidence of the witness on the basis that he had not seen the race live.*
- (d) *the Stewards appeared not to appreciate the nature of the role of expert witnesses generally, and the fact that their opinions should be considered as substantive evidence in its own right.*
- (e) *in the absence of any challenge to the credentials or the evidence of the witness, the decision to convict the appellant was unreasonable and unsafe.*

I was not persuaded the Stewards erred in relation to Mr Kersley's evidence. Rather, I was persuaded by the argument of Mr Davies QC in relation to this ground. Whilst I acknowledge Mr Percy QC has identified some passages where there were queries relating to the nature or description of the evidence of this witness in terms of whether he was an expert or giving opinion evidence I was not convinced this issue was of any substantive moment.

As has repeatedly been stated in appeals which involve rules creating offences containing the words '*in the opinion of the Stewards*', any assessment provided by others, including any of the drivers in the race and independent observers however qualified, may well be admissible and highly relevant, but such evidence cannot necessarily determine an outcome. The Stewards must reach their ultimate conclusion as to guilt or innocence based on the totality of the evidence. It is their decision that counts. I totally agree with the statement on this point contained within the Stewards' reasons which is quoted above:

'... ultimately it is the opinion of the Stewards sitting on an inquiry that determines these matters and only after proper consideration of the evidence in its entirety.'
(T.99)

The Stewards must provide the ultimate opinion and decide a matter as to guilt or innocence. In doing so they must take into account and evaluate their own live observations of the race, any video replays shown, what the other riders may tell them as

to what happened in the race as well as any relevant and credible opinions and evidence expressed by any others. In the course of an inquiry, and usually early on, the Stewards must inform a party appearing before them what their observations and initial conclusions are having watched the race unfold as well as their observations on any videos shown of the incident. The Stewards are obviously able to ask questions of witnesses and are entitled to be answered. Equally, a party may question the Stewards as to their observations and initial conclusions.

The four Stewards in question were entitled to reach their combined opinion after evaluating their personal observations of the incident together with all of the evidence provided in the inquiry including their own. During the course of an inquiry Stewards are not obliged to enter into the arena as an opposing counsel would in a contested case and undertake adversarial discussion or debate with any of the witnesses. To do so in most cases would be inappropriate. Stewards are obliged to have an open mind at all stages of their investigations. They must reach a decision objectively after a proper evaluation of all of the evidence and material before them. They may give greater weight to some witnesses' evidence than others and may reject some of the evidence whilst accepting other evidence in whole or in part. Being both the investigators, some of the witnesses, the prosecutors and the ultimate decision makers there is an evolution and overlap of roles performed by Stewards during their inquiries. The Rules of Harness Racing make it abundantly clear that the final role of the Stewards in relation to conducting inquiries is to make the ultimate decision as to guilt or innocence. In that respect it can only be the Stewards who decide whether to dismiss the charge or not. Clearly there is the need for the Rules to so specify and operate this way.

The mere fact that a highly credentialed and respected witness of the calibre of Mr Kersley may have formed a view of an incident which did not find favour and differed from the Stewards' collective assessment, is not, without more, proof of any error. As already stated it is the opinion of the Stewards only that ultimately counts. The Stewards were not obliged to accept Mr Kersley's evidence in preference to their own observations and assessment of the race on all of the admissible evidence. Nor were they obliged to exhibit hostility to that evidence and challenge it or attack the credentials of that witness.

Ground 2. The Stewards erred in relying or acting to any extent on the evidence or observations of the recused panel member Coady.

PARTICULARS

- (a) the member Coady had stood down from the inquiry pending resolution of the serious allegations against him by the witness Loone.*
- (b) if true, the allegations against Coady would have disqualified him from having any part in the inquiry at any level.*
- (c) in the absence of the allegations being resolved it was inappropriate that Coady have any part in the proceedings as a witness or at any level.*
- (d) the decision to recuse Coady as an adjudicant in the proceedings did not cure the problem having regard to the nature of the allegations and their unresolved status.*

(e) to the extent that any participation by the witness Coady was preserved following the allegations by Loone, the proceedings were a nullity.

I am satisfied the Stewards were entitled to treat Mr Coady's contribution to the inquiry as admissible evidence. That evidence was able to be taken into account and given such weight as they considered appropriate in the light of all of the evidence. Granted the situation that developed in view of Mr Loone's evidence was unusual, but that in itself does not mean that Mr Coady's evidence was inadmissible. The other four Stewards decided the matter without Mr Coady. It was the proper course to take for Mr Coady to play no role in the actual decision making. Mr Coady clearly was not one of the decision makers but simply a witness in the proceedings. Even without Mr Coady's evidence I believe the remaining four Stewards were entitled to come to the conclusion which they did of Mr Lewis' drive.

As to the second particular, if Mr Loone's allegations were true, this would severely if not most likely totally tarnish credibility. In such event the evidence could remain admissible even if it carried no weight.

I did not accept the propositions contained in the other particulars of this ground.

Ground 3. The Stewards erred by:

(a) failing to articulate the onus or standard of proof adopted by them in their determination of the charge; and

(b) reversing the onus of proof in relation to the appellant's case.

I acknowledge, as senior counsel for the appellant argued, in many if not most cases the Stewards do identify the standard of proof. The mere fact that did not occur on this occasion cannot of itself demonstrate an error. Nothing in the reasons suggests a higher standard or burden was applied to the evidence than the Brigenshaw standard.

I was not persuaded the Stewards reversed the onus of proof. As previously indicated Mr Lewis was afforded every opportunity to present his case. The Stewards allowed him a great deal of latitude which he utilised. Although the Stewards did not descend into adversarial argument with the appellant's case it was not demonstrated they failed to listen to all of it with an open mind. In the end they simply preferred the collective version of the incident based on their observations and interpretation of it to that of Mr Lewis and his witnesses.

Ground 4 The finding of guilt was not reasonably open to the Stewards on the totality and the weight of the evidence before them.

I was not persuaded this ground had any merit. The finding of guilt was in my assessment reasonably open to the Stewards based on their combined evidence. The Stewards are highly qualified or experienced and are employed to apply and enforce the Rules because of their undoubted knowledge and expertise. They not only had the opportunity to view the race live from their elevated positions but also to study the videos, hear the appellant's extensive case and consider all of the facts and circumstances. The inquiry was decided

on what in effect was the unanimous view of the four Stewards as supported by the evidence of yet another Steward. In view of their evidence the four officials deciding the matter were entitled to reach their conclusion and form their opinion that the drive was unacceptable. This was despite the undoubted quality of the opposing viewpoint which was presented and the acknowledged quality of the opposing witnesses.

B. PENALTY

Ground 5 The Stewards erred by imposing a penalty which was manifestly excess (sic) and that was commensurate with an act deliberately calculated to affect the result of a race. Any such allegation had been specifically abandoned by their choice of charge and by their conduct and comments during the course of the hearing.

As already stated I adjourned on penalty to enable the Stewards to supply more information of the circumstances of previous offences and penalties under the relevant rule. The range of penalties for unacceptable driving since 2003 was 27 days to 10 weeks. The details provided related to the period from 2007 through to 2010. This supplementary material proved most helpful in assessing whether the six week suspension imposed on Mr Lewis was justified.

I reached the conclusion that the circumstances of this case were distinguishable from the others referred to in the supplementary material and an error was demonstrated to have occurred in the sentencing process. However, I remained satisfied that a suspension was appropriate, rather than 'a small fine' as suggested on behalf of the appellant.

The reasons for coming to the conclusion that the penalty was too severe and should be reduced were the combination of factors which may have been either overlooked or given insufficient weight in my opinion. Specifically I was influenced to amend the penalty by the following factors:

- the driving did not compromise OUR MERCURIO NZ's prospects, indeed it may even have improved them.
- Mr Lewis' impeccable record, which appears to be second to none.
- Mr Lewis' consummate skills as a driver and his sincere conviction that he had a good arguable defence based on his skill and judgment, as credibly supported by Mr Kersley. Whilst Mr Lewis was not entitled to the usual mitigation in the case of a guilty plea I was satisfied it was appropriate for him to defend the matter in the manner in which he did with expert evidence as this was not an open and shut case.
- the incident occurred very quickly and, as senior counsel for the Stewards described it, over the space of only 50 to 60 metres. In that respect it can be contrasted with virtually all of the other offences which involved prolonged, protracted or perpetuated unacceptable driving. In Mr Lewis' case it was far from blatant or glaring, although admittedly the other horse involved was a stablemate.
- the Stewards having acknowledged there was no element of premeditation or collusion.

In reaching the conclusion that the appropriate penalty was a three week suspension I was conscious of the fact that such a period was less than the lower end of the range of suspensions. Whilst the penalty has been cut in half the conviction and its resultant penalty as amended will remain a significant blot on Mr Lewis' exemplary record. Further, by being embargoed from driving for three weeks, it will have a substantial impact on this heavily sought after driver's earning capacity.

In my assessment this was an adequate penalty to provide a message both personally to Mr Lewis and to the industry as a whole that this example of unacceptable driving has in fact resulted in substantial adverse consequences to the offending party.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

