

DETERMINATION AND REASONS FOR DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: Maki MORITA

APPLICATION NO: A30/08/700

PANEL: MR D MOSSENSON (CHAIRPERSON)

DATE OF HEARING: 2 December 2008

DATE OF DETERMINATION: 15 December 2008

IN THE MATTER OF an appeal by Maki MORITA against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 19 November 2008 imposing a 12 day suspension for breach of Rule 137(d) of the RWWA Rules of Thoroughbred Racing.

Mr G Donovan was granted leave to represent to Mr Morita.

Mr D A Hensler appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

BACKGROUND

Mr M Morita is an experienced apprentice jockey who rode in his first race in Western Australia at Pinjarra on 19 November 2008. As a consequence of the way Mr Morita rode the Stewards conducted an inquiry. The heading to the transcript of the inquiry proceedings states:

'Stewards' inquiry into an incident which occurred where after obtaining the lead apprentice M. Morita (ETERNALLY LUCKY) did reduce the speed of his mount

leaving the 1000m resulting in RAISE A LIGHT (S. O'Donnell) which was following, having to be restrained and further causing EXTRA GRAND (B. Parnham) having to be restrained and checked near the 900m.'

The three jockeys mentioned in the heading were called to the inquiry. Mr D Harrison, the apprentice master of Mr Morita also appeared. Mr O'Donnell gave evidence that he was leading but had to check after Mr Morita's horse had moved across the track in front of him as the '*... pace did slow up a bit ...*' (p 2 of the transcript). Mr Morita explained that after he had gained the lead at the 1000 metre mark and was two lengths clear he '*... didn't take hold, I slowed down, I stopped pushing forward. The horse relaxed too well.*' (p 2) and that '*I realised this when I heard a few calls from behind, I started to ride forward.*' The Chairman of the inquiry put to Mr Morita that the horse relaxed more than Mr Morita had expected but when he heard the call he started to ride again. The Steward on duty at the 800 metre mark gave evidence that Mr Morita:

'... crossed over relatively clear of any runners with very little interference that I could observe. Shortly after, approximately 2-300 metres I then noticed him stop encouraging his mount and actually start to restrain slightly. This resulted in a slacking of the pace and easing of the pace and I noticed Jockey O'Donnell getting into a problem and having to slow back and that in turn caused EXTRA GRAND ridden by Brad Parnham getting into a lot of difficulty. ...' 'Shortly after my tower the pace did then start to speed up again and it seemed to alleviate itself' (p 3).

After viewing the film of the race the Chairman of the inquiry stated:

'.. Apprentice Morita when you, you go to lead you're clear of the riders but when you get there you do seem to change your style, you're riding forward and you seem to take hold and whilst you certainly don't overly restrain your mount you do appear to relax on it and that results in it reducing the speed of your mount and as a result Mr O'Donnell has to restrain from your heels ...' (p4).

Mr Harrison commented on the film that Mr Morita had ridden hard to get across from the outside barrier, that he kept checking on the inside to see if he was two lengths in front and '*once he was two lengths in front and crossed them he just relaxed on the horse and the horse, and the horse come (sic) back underneath him for probably three of four strides that's about all. He didn't actually stand up and restrain the horse ...*' (p 4). Mr Harrison argued on behalf of Mr Morita that Mr Morita never stopped pushing and Mr Morita gave the horse every chance to win the race. He further submitted that Mr Morita couldn't keep riding the horse all the way for the 1400 metres. '*He rode him hard early and then he relaxed on the horse before it came back underneath him for three of four strides, and once he got a call he increased the pace. I don't think he's done anything wrong. You can't keep pushing them for the entire race*' (p 5). When Mr Harrison then put the proposition that '*he didn't restrain the horse at all*' (p 5) the Chairman of Stewards responded that he agreed and stated '*... we're not suggesting he does that but the obligation is to set a reasonable pace.*' The argument that Mr Harrison pressed was that '*he just stopped pushing it and the horse relaxed underneath him.*' (p 5).

Mr O'Donnell did acknowledge in his evidence that Mr Morita '*hasn't checked at all...*' (p 5), '*He eased it, pretty much but all I know is that the pace slowed up a little bit for two or three strides or four strides ...*' (p 5), Mr Parnham contributed by acknowledging that the pace '*... slackened off but like's been said it's only for about three or four strides and then he, he started to ride the horse along a little bit more. I think the horse just probably relaxed too*

well' (p 6). Mr Harrison then explained this was the first local ride and the Apprentice Jockey was not used to the pace of racing in this state.

The Stewards concluded that a charge should be laid which they duly did in the following terms:

'... Apprentice Morita, we believe you should answer a charge and that's under Australian Rule 137(d) which reads:

Any rider may be punished if in the opinion of the Stewards he excessively slows, reduces or checks the speed of his horse thereby causing interference directly or indirectly to any other horse in the race.

And we allege that in Race 9 today when you rode ETERNALLY LUCKY, that after obtaining the lead you did reduce the speed of your mount leaving the 1000m resulting in Shaun O'Donnell RAISE A LIGHT, which was following being restrained and Brad Parnham on EXTRA GRAND being restrained and checked at the 900m. So that's, that's the charge of slowing the pace of your mount causing the interference behind those two runners' (pp 6 and 7) (underlining added).

Mr Morita pleaded not guilty. Mr Harrison argued that he *'... didn't ride the ears off it all of the way and once he got two in front ... he stopped pushing it as most Jockeys do ...'* (p 7). The Chairman of the inquiry went on to assert in response to Mr Harrison that the Stewards did not allege that *'... he stood in the irons and restrained it and come right back, we've said that he reduced the speed of his mount, so he's he's slowed, he's slowed the pace of his mount'* (p 8) (underlining added).

Mr Harrison continued the exchange by arguing that *'... he gave the horse every chance to win the race by stopping pushing it at one stage in order to give it a rest'* (p 8). Later the Chairman asserted that *'... we're not saying that he's checked it, checked it back, he's slowed the pace of his mount which has caused that interference, that's the charge'* (p 10) (underlining added). Mr Harrison immediately replied it was *'... the horse which slowed the pace, not the jockey'*. Later in the inquiry, after Mr O'Donnell was asked to return following a short break, the Chairman of Stewards made the following statement:

'Mr O'Donnell the Stewards have seen fit to charge Apprentice Morita with a breach of 137(d) which is in relation to any rider who excessively (sic) and we've stated that he reduced the speed of his mount which resulted in the interference to both yourself and Mr Parnham's mount' (p 12) (underlining added).

The Stewards concluded the matter in the following terms:

'... we believe that the charge can be sustained. We acknowledge that you don't stand up in the iron so to speak and restrain your mount overly, but we do believe that you allow your mount to relax, you're riding forward to take up, take up the lead and then you relax and reduce the speed of your mount. The Stewards believe you should have been aware of that, that as happening in running and as a result that caused the interference to the rider's (sic) behind you so we believe that charge can be sustained' (p 14).

The Stewards went on to address penalty and concluded proceedings after announcing the imposition of a 12 day suspension.

THE APPEAL

The amended grounds of appeal state:

- ~~1. The Stewards erred in preferring a charge that was not known under the Rules of Racing; there being no prohibition on slowing the pace of a race provided that it was not slowed "excessively".~~
2. The Stewards erred in dealing with the charge on the basis that proof of the offence was complete once a rider slowed his mount and thereby caused inconvenience or interference to other riders; when the rule specifically requires that any slowing of the race be "excessive" before an offence is committed.
3. The finding of guilt was contrary to the weight of the evidence and was not reasonably open to the Stewards given their finding at pages 4 and 19 of the transcript that the Appellant did not restrain his mount "overly" or "excessively" nor excessively slow the pace of the race.
4. The Stewards failed to take into account or adequately take into account the fact that the race slowed in part as a result of the horse relaxing itself of its own volition rather than as a result of the actions or the intention of the rider.
5. The penalty imposed by the Stewards was excessive in all the circumstances of the case; in particular:
 - (1) The Appellant's age and record.
 - (2) The fact that it was the Appellant's first ride in WA.
 - (3) The fact that the pace of the race was slowed only for a few strides.
 - (4) The low level of interference which resulted.'

At the conclusion of the appeal proceedings I reserved my decision. I also ordered an extension of the stay of proceedings which I had granted previously, until the decision was handed down in the matter.

DETERMINATION

This appeal requires interpretation of the provisions of RWWA Rules of Thoroughbred Racing 137(d). Rule 137 in full reads:

- AR. 137. Any rider may be punished if, in the opinion of the Stewards,
- (a) He is guilty of careless, reckless, improper, incompetent or foul riding.
 - (b) He fails to ride his horse out to the end of the race and/or approaching the end of the race.
 - (c) He makes any celebratory gesture prior to his mount passing the winning post.

- (d) *He excessively slows, reduces or checks the speed of his horse thereby causing interference, directly or indirectly, to any other horse in the race.'*

One of the issues that was discussed in the course of the appeal was whether the word 'excessively' in the sub-rule under consideration qualifies only the word 'slows' only or whether it also qualifies the other two key words 'reduces' and 'checks'. *R v Spooner* (6LR (NSW) 191) is authority for the proposition that grammatically an adverb may modify a number of verbs but a court must look to the manifest object of the Act, and interpret the clause accordingly. As is stated by D C Pearce and R S Geddes *Statutory Interpretation in Australia* (5th Edition at 4.18 on p.103):

'The assumption the words will be read in context often leads to the omission of words, particularly adjectives, in an endeavour to make a document less verbose. Drafters of legislation, perhaps unwisely, usually try to present a document that is readable as well as accurate – and often this results in their relying on context to convey meaning also. So in Richardson v Austin (1911) 12 CLR 463, the High Court read the phrase 'streets, lanes, entries or other public passages or places' as if the word 'public' were also included before the word 'places'. From the context it was clear that the drafter had chosen not to repeat the word 'public' but had expected that a reader would supply it.'

In the case of Rule 137(d) the context clearly suggests to me that the word 'excessively' is only intended to apply to the first of the three offences. Each of the three different concepts of slowing, reducing and checking in this rule involve different degrees, qualities or types of actions taken by a rider. The word 'checks' means '1. to pause or cause to pause, esp abruptly. 2. to restrain or control' (*Collins Australian Dictionary* 7th Ed p 290). It would not make good sense for that word to be qualified by the word 'excessively'.

Sub-rule (d) specifies separate offences which increase in the severity from least to greatest. A clue to this progression is to be found in sub-rule (a) of Rule 137 where the seriousness of the offence clearly goes from least, in the case of careless riding, through to foul riding being the most serious of the offences there specified.

Appeal ground one asserts that there is no offence of causing interference simply by slowing the pace of a race. For an offence to be created under this part of the Rule a jockey must be shown to have 'excessively' slowed the speed of his horse. I agree with the proposition contained in the second part of ground one. The way the charge was formally framed and attempted to be qualified and clarified along the way by the Stewards it is clear that Mr Harrison, in defending Mr Morita's position, argued the matter differently from what the Stewards most likely intended. The Stewards at the appeal hearing appear to have tried to make it clear they intended to charge Mr Morita with a breach of the second of the three offences contained in the sub-rule. The second offence is that of reducing the speed of ETERNALLY LUCKY which caused interference to other horses in the race. The transcript of the inquiry reveals however, despite their efforts, this in fact was anything but clear to the appellant's mentor. The Stewards in several places during the exchanges with those present in the inquiry, and even at the outset in the formal laying of the charge, confused the matter by employing the words 'slowing', 'slowed' and 'excessively' as is apparent from the underlining above. In the

circumstances Mr Harrison and Mr Morita could be excused for thinking they were defending a charge against the first and lesser offence under the sub-rule.

Merely by going slowly during the course of a race without infringing any other rule is not of itself a problem. An offence under AR 137(d) is only committed when interference by the slow riding is caused as a consequence of the degree of slowness, that is it must be shown to be 'excessive'. The word 'slow' is defined (Collins supra at p 1519) as 'performed or occurring during a comparatively long interval of time. 2. Lasting a comparatively long time ... 20. To decrease or cause to decrease in speed, efficiency, etc. ...' The word excessive means 'exceeding the normal or permitted extents or limits; immoderate; inordinate' (Collins p570). The framer of the Rule by combining the words 'excessively' and 'slows' in my interpretation clearly intended to make it an offence to ride in a manner which results in interference to others due to going at less than an appropriate pace for more than simply a brief period or short distance. An excessively slow riding offence is, in a physical sense, in terms of the actual conduct and riding technique employed by a jockey, less pronounced or not as severe as the second offence created under this sub-rule, that of reducing the speed of the horse. To be guilty of the first offence it would seem necessary for the action or inaction on the part of a jockey to have actually been the cause or result in the deceleration of the pace rather than simply a continuing at a slow but less than satisfactory pace.

As already stated whilst the Stewards most likely intended that the charge that of reducing speed rather than having excessively slowed, the words employed in framing the charge did not make that fact entirely clear. This situation was further complicated by using the word 'slowing' in connection with the description of the pace of the mount in the reiteration of the particulars in the last sentence of the charge. Had a different word been employed then one would have been less likely to have room for doubt.

As the Rule proscribes several things it was the responsibility of the Stewards to make it entirely clear to the jockey precisely which was the relevant one and which offence he was charged with. An offence must be clearly identified without ambiguity or room for confusion when a charge is laid. Nothing should be left to guesswork in disciplinary proceedings where a person's livelihood and career is at stake. In this case the particulars that were supplied rather than clarifying precisely what the offence was actually confused matters by using terminology which created uncertainty.

Ground two asserts that the Rule requires slowing of a race to be excessive for an offence to be committed yet the Stewards dealt with this matter on the basis that it was sufficient only for a rider to slow his mount and cause inconvenience or interference. I agree with the proposition contained in this ground which is the correct approach to the interpretation of the first part of the Rule 137(d).

Having reached these conclusions I am satisfied the appeal should succeed. I uphold grounds one and two.

Although it is not necessary to deal with the other grounds it is worth making some observations regarding ground three and in particular the issue as to the weight of the evidence. Rule 137 is qualified by the introductory words '... in the opinion of the Stewards ...' As has been stated in this Tribunal on many prior occasions the reason for specifically referring to the opinion of the Stewards in relation to riding offences is entirely logical and appropriate. The Stewards are the duly appointed industry experts who are best qualified to judge and assess the quality of rides and due to their

knowledge and experience. Further they are usually ideally positioned around the track supplement their observations with studying of videos of races. The Tribunal has made it clear many times previously that the opinion which counts in these riding offence cases is that of the Stewards and not that of the riders participating in the race, representatives on behalf of appellants or indeed the Tribunal. Unless it can be demonstrated that no reasonable Stewards could have made the finding that these Stewards did armed with all of the information which lead these Stewards to reach their conclusions and form their opinions then it is inappropriate for the Tribunal to interfere and substitute its own assessment of the quality of the ride. Whilst Mr Harrison in the course of the inquiry put forward an entirely plausible interpretation of the quality of the ride by Mr Morita that interpretation obviously was his own subjective opinion which as it happened differed from that of the Stewards. ~~Equally it should be noted that Mr Donovan in the course of~~ arguing the matter before me presented a convincing argument why the ride in question was not problematic. Both arguments on behalf of Mr Morita were largely predicated on the fact that the appellant was clear after he had passed the other riders and had moved to the inside position and through no action on his part, having ceased to ride the horse strongly, albeit momentarily, the horse itself had relaxed too much and caused its reduced rate of travel to impede those horses behind it. Indeed this factual aspect of the matter is largely encaptured in ground four. Had it been necessary to decide that ground I would not have been satisfied however that it was demonstrated that Stewards could not reasonably have reached the conclusion which they did despite what was pressed on them in the course of the argument before them.

It is not necessary to consider the severity of the penalty as I have grounds relating to conviction. The appeal as to conviction has succeeded for the reasons set out. The conviction is quashed.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

