

**RACING PENALTIES APPEAL TRIBUNAL DETERMINATION**

**APPELLANT:** SYTKA PTY LTD, KJ JEAUVONS AND HS KING

**APPLICATION NO:** A30/08/830

**PANEL:** MS KAREN FARLEY SC (CHAIRPERSON)

**DATE OF HEARING:** 13 FEBRUARY 2020

**DATE OF DETERMINATION:** 12 MARCH 2020

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IN THE MATTER OF an application for leave to appeal by Sytka Pty Ltd, KJ Jeavons and HS King against the determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 29 November 2019 to relegate SHOCKWAVE from first to second place in the Race 5 meeting at Gloucester Park, pursuant to Rule 153 of the RWWA Rules of Harness Racing.

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Mr T Percy QC represented the appellant

Mr Davies QC with Mr D Borovica represented the respondent

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**Introduction**

1. Following the running of Race 5 at Gloucester Park on Friday 29 November 2019 (the Simmonds Steel 4YO Classic), the trainer of the second finisher SANGUE REALE, Mr Michael Brennan, lodged a protest against the winner, SHOCKWAVE. The official margin between first and second place getters was half a head. The race was a major race as the difference in prizemoney between first and second was \$60,000.

2. The protest hearing was held in the Stewards Room at Gloucester Park after the running of the race. The transcript records those “present” and those “called” at the hearing. Those present, it transpired at the hearing before me, were the panel of Stewards, comprising of Ms Barbara Scott (Chief Steward and Chairperson), Mr R Chappell (Deputy Chairman), Mr T Davies (Stipendiary Steward). Mr N Friend (Cadet Steward) and Mr T Styles (Form Analyst) were also present. Neither Mr Friend nor Mr Styles (or for that matter Mr Chappell or Mr Davies) actively participated in the hearing of the protest.
3. At the conclusion of the hearing and having heard from those “called”, being Mr Voak and Mr De Campo (the reinsmen of SANGUE REALE and SHOCKWAVE respectively), Mr Brennan and Mr Jeavons (part owner of SHOCKWAVE), Stewards adjourned the hearing to consider the matter. It appears Mr Friend and Mr Styles remained in the Stewards Room with the panel members.
4. Upon resumption, the protest was upheld with the effect that SANGUE REALE was declared the winner of the race.
5. Subsequently, Mr De Campo, the reinsperson of SHOCKWAVE, appeared at a Stewards inquiry on 20 December 2019. As a consequence of that inquiry, he was found, inter alia, to have a charge to answer under Rule 162(1)(www) of the Rules of Harness Racing in relation to the 29 November incident. That rule reads:

*“A driver shall not allow his horse to shift ground in a manner which impedes, hinders or advantages another horse.*
6. Stewards particularised that it was alleged that Mr De Campo had allowed SHOCKWAVE to shift ground in a manner that impeded SANGUE REALE.
7. Mr De Campo pleaded guilty to the charge. He was fined \$300. No appeal has been lodged in the Tribunal regarding that charge.
8. On 13 December 2019, the Applicants lodged a Notice of Application for Leave to Appeal (pursuant to section 13(3) of the *Racing Penalties (Appeals) Act 1990*) in relation to the Stewards decision to uphold the protest of 29 November and to relegate SHOCKWAVE from first to second place in the fifth race of that meeting, pursuant to Rule 153 of the RWWA Rules of Harness Racing.
9. The application for leave was heard before me on 13 February 2020.

### **The Grounds of the Application**

10. There are two grounds relied upon in the Application for Leave to Appeal:
  - i. The decision to relegate the horse, SHOCKWAVE, from first to second pursuant to Rule 153 of the RWWA Rules of Harness Racing was contrary to the evidence and against the weight of the evidence before the Stewards; and
  - ii. The decision-making process of the Stewards denied procedural fairness to the Appellant resulting in a miscarriage of justice.

11. These grounds were expanded upon by way of written submissions filed in support of the Application for leave to appeal against the protest decision filed by the Applicants by email on 11 February 2020.

### The Statutory Provisions Governing Appeals Against a Protest

12. The statutory provisions governing appeals against a protest are set out at sections 12 and 13 of the *Racing Penalties (Appeals) Tribunal Act 1990*:

“12. *Appeals which are not to be heard by Tribunal*

- (1) *Subject to section 13(2) and leave of the Tribunal, the jurisdiction of the Tribunal does not extend to a determination of a steward, a racing club or a committee, in so far as that determination relates only to —*
- (a) *any protest or objection against a placed runner arising out of any incident occurring during the running of a race; or*
  - (b) *the eligibility of a runner to take part in, or the conditions under which a runner takes part in, any race; or*
  - (c) *any question or dispute as to a bet,*
- where, in respect to that determination, the prospective appellant has, under the rules of racing, a right of appeal to RWWA.*
- (2) *An appeal under subsection (1) to RWWA shall be heard and determined in accordance with the rules of racing.*
- (3) *The determination of RWWA with respect to the subject of an appeal to which subsection (1) applies —*
- (a) *shall be taken to be, and given effect to as though it had been, also the determination of any club, or of any committee or stewards, from which the appeal was made; and*
  - (b) *subject to section 13(2), is final and binding on the parties to that appeal and not subject to further appeal or review.*

13. *Appeals which shall be heard by Tribunal*

- (1) *A person (in this Part referred to as the **appellant**) who is aggrieved by a determination, or a finding comprised in or related to a determination, of RWWA, of a steward, of a racing club, or of a committee —*
- (a) *imposing any suspension or disqualification, whether of a runner or of a person; or*
  - (b) *imposing a fine; or*
  - (c) *which results, or may result, in the giving of a notice of the kind commonly referred to as a warning-off; or*
  - (d) *in relation to any other matter, where the Tribunal gives leave to appeal,*
- may, within 14 days after the making of the determination, or in the case of a notice of warning-off the giving of the notice, appeal to the Tribunal.*

- (2) *An appeal —*
- (a) *that by reason of section 12 would not lie to the Tribunal were it not for this subsection, but is an appeal that in the opinion of the Chairperson may arise out of the same incident, or incidents, as an appeal which could have been or has been made to the Tribunal; or*
  - (b) *that by reason of the public interest, the Chairperson has determined may be an appeal to which this subsection should apply,*

*may be made to and heard by the Tribunal, by leave of the Tribunal.*

- (3) *An application, to refer to the Chairperson any question as to whether or not an appeal which would otherwise not lie to the Tribunal is an appeal to which subsection (1)(d) or subsection (2) applies, may be made to the Registrar —*
- (a) *if the case is one of urgency, ex parte on affidavit; and*
  - (b) *in any other case, in such manner and on giving such notice, as the Registrar may require,*

*and shall be determined in the first instance by the Chairperson, and if the Chairperson is of the opinion that the leave of the Tribunal should be sought may be heard by the Tribunal by way of preliminary argument.*

- (4) *On an application made under subsection (3), the Chairperson may give directions as to the further proceedings in the matter, including directions of a kind to which section 17(7) refers or as to the effect to be given to any determination, and effect shall be given to any such direction by any person to whom the direction applies.”*

### **The Statutory Provisions Governing Appeals Against a Protest**

13. At the hearing on 13 February 2020, the parties provided me relevant previous decisions of the Tribunal relating to applications for leave to appeal against a protest.
- a) Cooper and Baker v W.A.T.A Stewards (Application No. 66, heard 6 May 1992) was an application for leave to appeal following a successful protest by a fourth placed runner against the third placed runner. The application was unsuccessful.

In its decision, the Tribunal found that leave should only be granted where it can be demonstrated that there are special or unusual circumstances.

Examples of such circumstances were said to be:

- i. where there is an application alleging and demonstrating a denial of natural justice;
- ii. where the Stewards may be demonstrated to have been biased; and
- iii. where it can be shown that the Stewards panel has in some way been improperly constituted.

The Tribunal found (p. 2 Cooper and Baker) that

*“Leave should not be granted in any run of the mill matter, or in a case where an aggrieved appellant disagrees with the view adopted by the Stewards and seeks to have his own perception or interpretation of an incident adopted by the Tribunal and substituted for that of the Stewards.*

*It is clearly not appropriate to grant leave where the Tribunal is simply being asked to substitute its own opinion...for that of the Stewards. As the Stewards are the experts in their own field in relation to the proper running of a race their decisions on placings should not be lightly interfered with by this Tribunal."*

It should be noted that the "examples" that the Tribunal cited in Cooper and Baker are necessarily not an exhaustive list of instances where the Tribunal's discretion to grant leave would be enlivened.

- b) In *Scarvaci v WA Turf Club Stewards* (Application No 330, heard 20 November 1996), Mr Patrick Hogan, the Presiding Member, found that it was also appropriate, because the granting or refusing of leave is an exercise of discretion, for the Tribunal to take into account the prospects of success, should leave be granted. Leave to appeal was refused.
- c) In *Gerard Peterson (as agent for the connections of HE'S REMARKABLE v RWWA Stewards of Thoroughbred Racing* (Application no. 737, heard 24 January 2012), Chairperson Dan Mossenson, considered an application for leave to appeal in relation to a successful protest second against first in the Railway Stakes, a Group One Thoroughbred race. A protest fourth against first in the same race was dismissed and was not subject to the application for leave to appeal. The margin between first and second placegetters, as in this matter, was very small. The rider of HE's REMARKABLE, Mr McEvoy, was, like Mr De Campo in this matter, later charged with breaching the Rules of Thoroughbred Racing AR137(a) (careless riding) for allowing his mount to shift out, causing interference to the second placegetter and thereby preventing that horse winning the race. Like Mr De Campo, Mr McEvoy pleaded guilty to a charge laid following the successful protest.

Mr Mossenson refused the application for leave to appeal the protest. He found no ground upon which the Applicant could establish a lack of natural justice. The composition of the Stewards panel was not in any way improper and there was no finding of bias. It was open to the Stewards on the evidence to reach the conclusion that they did. At p.10 of the decision, Mr Mossenson concluded (inter alia) "*The Stewards are the best judges of the significance and consequences of interference so far as the end result or outcome of a race are concerned.*"

#### **The Evidence Before the Panel on 29 November 2019**

- 14. Evidence before the panel comprised of:
  - i. vision of the race from various angles; and
  - ii. oral statements from Mr Brennan (trainer of SANGUE REALE), Mr Voak (reinsman of SANGUE REALE) Mr De Campo (reinsman of SHOCKWAVE) and Jeavons (part owner of SHOCKWAVE).
- 15. Mr Brennan lodged the protest. His claim was that "*Shockwave is one cut off the rail turning into the straight, it ends up probably three to four off the rail. With, I believe (that with) an unimpeded run or momentum my horse given the very, very narrow margin would've won the race.*" The allegation was one of interference.

16. After watching various footage of the race, Mr Brennan was invited to comment. He states:

*"It's obviously very clear that Mr Voak doesn't stop driving the horse however the fact that we've turned into the corner, coming into the straight at least probably one and a half carts off the rail, we've ended up I would say conservatively five...and you can also see halfway up the straight Mr Voak's has to check him off once. That one stride is enough...to stop his momentum and then not be able to get over the top of the horse."*

17. Mr Voak was asked by the Chairman of Stewards what he had to say. Mr Voak contended that Mr De Campo had an obligation to maintain a straight line in the run to the finish. He contended that Mr De Campo did not maintain his line. He said *"The only time I had to stop driving and check was...see I've had to take my horse on the right rein otherwise I'd risk locking stays with Mr De Campo."*

18. Mr De Campo contended that Mr Voak had a clear path to run past him. The stays did not interlock. Mr Voak had never had to stop driving his horse. He said he felt that his horse was *"going to hold him"* (i.e., Mr Voak's horse).

19. Mr Jeavons was asked if there was anything he wished to add. He was of the belief that neither reinsman stopped driving.

20. The Chairman of Stewards inquired whether there was *"anything further"*. Mr Voak maintained that although Mr De Campo and Mr Jeavons *"said I never stopped driving"*, neither did Mr De Campo maintain his line in the run to the finish. He went on to say:

*"I would emphasise the check. If he (Mr De Campo) has to hold his line and take his horse on left rein, it severely checks his horse's momentum...that right there has cost me I reckon a head...But if Mr De Campo fulfilled his obligation, held his line in the run to the finish, he loses another head. We win it by a head."*

21. Mr De Campo, in reply, suggests that Mr Voak's horse has a tendency to *"get in"* and that he had held his position. He says *"as he's checked off, then we've kinda got up the track as we continue to go, go on."*

22. Mr Voak denies he had shifted down. He tells the Stewards *"The reason I had to take a right rein is because he's (Mr De Campo) shifted up the track."*

### **The Stewards Decision**

23. The Stewards adjourned to give the protest consideration. Presumably a short time afterwards, the hearing resumed. It appears that although those called left the room, the panel, plus Mr Friend and Mr Styles, remained.

24. Upon resumption, the Chairman of Stewards advised the parties:

*"Thank you. Stewards have considered all the evidence and watched the replay several more times and taking into account that Mr De Campo, you came round the home turn approximately two-wide and ended up at the finish a very loose four-wide and as a result you carried Mr Voak from his three-wide position up to a five-wide position and that Mr*

*Voak had to check his runner mid-way down the home straight. Bearing in mind the margin of a half a head, Stewards believe that had that interference not occurred that SANGUE REALE would have finished ahead of SHOCKWAVE. So we are upholding the protest and changing the numbers to 5, 11, 12, 7 and 10. Thank you, we'll see you after this for the continuation."*

25. This decision is the basis upon which the Application for leave to appeal to this Tribunal was made.

### **The Hearing of the Application on 13 February 2020**

26. At the hearing on 13 February 2020 I raised with the parties the issue of my ability to hear the Application sitting alone. This issue was raised in an email from Mr Borovica to the Registrar of the Tribunal dated 20 January 2020. Senior Counsel for both parties indicated they had no difficulty with me hearing the Application sitting alone, notwithstanding that the circumstances of the Application are not covered by Regulation 9 of the *Racing Penalties (Appeals) Regulations 1991*.
27. As section 13(2) – (4) of the *Racing Penalties (Appeals) Act 1990* refers specifically to the Chairperson, and as the two most recent decisions of the Tribunal were decided by the Chairperson (or in the case of Scarvaci, the Presiding Member) I perceived no difficulty in proceeding to hear the matter myself.
28. Mr Percy QC for the Applicants played video footage of the race from various angles to suggest that there was no evidence of any “check” of SANGUE REALE in the home straight, or any interference caused to that horse by SHOCKWAVE.
29. He argued that the decision of the Stewards in this matter was clearly vitiated by error of fact and that in those circumstances the public interest would indicate that the Tribunal should interfere and not allow the error to stand.
30. The video did not show that SANGUE REALE was obviously pulled up, that there was any collision or contact between the two pacers or their sulkies, or that Mr Voak was forced to restrain his horse. In fact, both horses appear to be being driven vigorously. There is however clear vision of both horses drifting out across the track, with SHOCKWAVE on the inside of that drift.
31. The Stewards tendered two still photos (Exhibits 1 and 2) at the hearing which show Mr Voak leaning to the right in his sulky and pulling on his right rein. In his evidence to the Stewards, Mr Voak states:
- “...see I've had to take my horse just on the right rein otherwise I'd risk locking stays with Mr De Campo. Now if Mr De Campo had of corrected his horse here that results in a momentum loss of his horse. No momentum loss of my horse. It could've been us by a neck, you know?”*
32. When Ms Scott stated in her reasons for the Stewards decision that Mr Voak “*had to check his runner mid-way down the home straight*”, it must be said that she was not the first person in the inquiry to use the word “check” to describe how Mr Voak had to “*take a right rein.*” Mr Brennan stated (page 3 of the inquiry transcript) that “*halfway up the straight Mr Voak's had*

to check him off once” and that had interfered with the horse’s momentum. Later on the same page Mr Voak himself states that “the only time I had to stop driving and check was...right about now.” He then explains that that was when he had to take his horse just in the right rein. Later, on page 5 of the transcript, Mr Voak “emphasises” the check. Mr Jeavons on page 5 of the transcript also refers to a “check”.

33. Even Mr De Campo (page 4 of the transcript) refers to Mr Voak “checking off” but says “I don’t know why he did.” He repeats that Mr Voak has “checked off” at page 5 of the transcript.
34. Protest must be decided on quickly and urgently for the sake of all parties involved, and for those betting on the outcome of the race. The finishing order and therefore the dividends payable need to be finished as soon as possible following a protest being lodged at the end of the race.
35. The Stewards must deal with a protest in accordance with Part 10 of the RWWA Rules of Harness Racing. Rule 176 states:

*“Lodgement of protests*

- (1) *A person who considers that a horse is not entitled to be placed in a race as the judge has decided, may lodge a protest with the All clear steward.*
- (2) *A protest can relate only to an incident which occurred during the running of a race.*
- (3) *A protest must state the grounds.*
- (4) *A protest must be made before the declaration of all clear.*
- (5) *For the purposes of this rule “person” means a steward, the starter of the race, a connection or driver of any horse competing in the race or an authorised agent.*
- (6) *Where a protest has been lodged in accordance with this Rule and a horse or its driver causes interference to another horse or its driver and the Stewards are of the opinion that the horse interfered with would have finished ahead of the first mentioned horse had such interference not occurred they shall place the first mentioned horse immediately after the horse interfered with.”*

36. In this important race, Mr Brennan was the person who lodged the protest.
37. The grounds of the protest were clear – that interference had been cause to SANGUE REALE by SHOCKWAVE shifting across the track, which cause SANGUE REALAE to lose the opportunity to win what was a very close finish.
38. All involved has the opportunity to explain clearly to the Stewards their version of events. They did so. There was no realistic suggestion that the Stewards panel was not properly constituted. In their opinion (pursuant to Rule 176(6)) Stewards found that SHOCKWAVE had caused interference to SANGUE REALE and, were it not for that interference, SANGUE REALE would have won the race. They proceeded, as they are entitled to do following such a finding, to uphold the protest and declare SANGUE REALE the winner of the Simonds Steel 4YO Classi MS Pace (2130M).

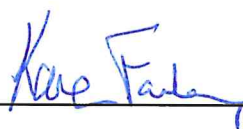


39. In finding that Mr Voak had to “check” his runner, the Chairman of Stewards choice of words was vigorously criticised by Senior Counsel for the Applicants in this matter. His submission was that the use of that word indicated that the Stewards had made a fundamental error that was not reasonably open on the evidence.
40. The word “check” used by the Chairman at page 6 of the transcript must be interpreted in light of the use that the same word was put to by the parties to the inquiry. It is clear that whilst there was not a “check” insofar as that term may mean a pulling up of a horse, rather, it appeared in the context of Mr De Campo drifting up the track, causing Mr Voak to take his horse by the right rein. This was the “check” that affected his momentum and deprived him of the opportunity to win the race. This was the finding of the Stewards when read in context. It was open for them to so find on the evidence.
41. I also note that at a further Stewards Inquiry on 20 December 2019 Mr De Campo pleaded guilty to a charge under Rule 162(1)(www) of the RWWA Rules of Harness Racing of allowing his horse to shift ground in a manner which impedes another horse.
42. It should be mentioned that Mr De Campo entered a reluctant plea to the charge. He contended (page 3 of the transcript dated 20 December 2019) *“I still don’t believe I did impede because we never actually bumped or anything like that.”*

### **Conclusion**

43. In light of the foregoing comments and summary of events, I am of the considered view that neither of the Applicant’s grounds have any reasonable prospect of success were I to refer them, with leave, to the Tribunal.
44. As discussed above, there was evidence available which, if accepted by the Stewards, was capable of establishing that SANGUE REALE was impeded in the race, and that were it not for the interference, SANGUE REALE would have won the race. Stewards accepted that evidence. The protest was upheld.
45. There will always be those who will disagree with the findings of the Stewards. They will say that the Stewards were wrong. It is a vastly different argument whether the finding were against all the evidence, or in the circumstances perverse.
46. I am also not persuaded that there is any merit in the proposed ground 2, that the Stewards’ decision making process denied procedural fairness to the Applicants, or, for that matter, to any interested party.
47. Given the exigency of the circumstances of the protest, all parties were given the opportunity to be heard and close consideration was given to video footage. There was no suggestion of bias. It would appear that some confusion arose after the event as to the composition of the Panel of Stewards. Stewards clarified that the panel comprised Ms Scott, Mr Chappel and Mr Davies. Stewards refused to divulge whether the panel were unanimous, on inquiry from the Applicant’s solicitors. They are, of course, under no obligation to so advise. In any event, a majority decision, rather than a unanimous one, would have effected no different decision.

48. I am of the view however that it would be helpful (and prevent this issue arising in future) for future transcripts to reveal the composition of the panel, rather than simply recording those "Present" (including the panel) and those "Called" and I would encourage the Stewards in future to record the Stewards panel as a separate category.
49. Finally, I would comment on the public interest in this matter. I am not persuaded that there is anything special or unusual about this case. Whilst there may have been some controversy around the upholding of the protest in these circumstances, the real issue is of a personal nature to those connections of the two placegetters in this race.
50. Whilst it was an important race with higher than usual prizemoney, that of itself does not elevate such a race to the level that protest herein should be the subject of scrutiny by the Tribunal.
51. For these reasons, leave to appeal is refused.



**KAREN FARLEY SC, CHAIRPERSON**

