APPLICATION 330

DETERMINATION AND REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPLICANT: **JULIE SCARVACI**

APPLICATION NO: **A30/08/330**

PANEL: **MR P HOGAN (PRESIDING MEMBER)**

DATE OF HEARING: **20 NOVEMBER 1996**

IN THE MATTER OF an application for leave to appeal by Mrs J Scarvaci under section 13(1)(d) of the Racing Penalties (Appeals) Act against the determination made by Western Australian Turf Club Stewards on 12 October 1996 in relation to a protest following the running of Race 7 at Belmont Park on that date.

Mr T F Percy, instructed by McKinlay & Co, Barristers & Solicitors, represented the applicant.

Mr R J Davies QC represented the Western Australian Turf Club Stewards.

The applicant is the owner of the horse *GO THE GREY*, which ran in The R S Crawford Stakes at Belmont Park on 12 October 1996. *GO THE GREY* was first past the post.

The horse *POWER PLUS* also ran in the race. *POWER PLUS* was second past the post. Jockey P Barnett, the rider of *POWER PLUS*, lodged an objection against *GO THE GREY* alleging interference in the first 150 metres. An inquiry was held. The Stewards upheld the objection. Acting under the provisions of Rule 136 of the Australian Rules of Racing, the Stewards "reversed the placings". *POWER PLUS* was declared to be the winner and *GO THE GREY* second.

The applicant now seeks leave to appeal against the decision. There are two proposed grounds of appeal should leave be granted. They are:

1. The Stewards failed to afford the applicant natural justice/procedural fairness; and

2. The finding was against the weight of the evidence.

FACTS

At the Stewards' hearing, there were present the trainers of both horses and the riders of both horses. At the very outset of the hearing, the following exchange took place between the Acting Chairman of Stewards and Mr Wolfe, the trainer of *GO THE GREY*:

> "*CHAIRMAN:* *Mr Wolfe, you're the Trainer of GO THE GREY and accept responsibility on behalf of the owner.*

WOLFE: *Yes Sir."*

Both Jockeys gave their evidence. The race film was shown. Jockey J Hustwitt, the rider of *BLOCK SONG*, also gave evidence.

In summary, Jockey Miller (*GO THE GREY*) denied responsibility for the interference to *POWER PLUS*. He attributed the interference to another horse, *WILLOUGHBY*, shifting out. Mr Wolfe supported that view.

No further evidence was received. The Stewards invited those present to ask questions of anyone present at the hearing.

An examination of all of the evidence presented at the hearing reveals the following facts:

- In the first 150 metres, *POWER PLUS* received interference. (This much appears to have been conceded by Jockey Miller and Mr Wolfe, the only question being whether *WILLOUGHBY* interfered as well.)
- *POWER PLUS* was checked and lost ground.
- Later, at the 750 metre mark, *POWER PLUS* was "inconvenienced" yet again, veering outwards in dramatic fashion.
- Both *GO THE GREY* and *POWER PLUS* were placed, thus bringing into operation the provisions of Rule 136(2).
- It is implicit in the Stewards decision that but for the interference, *POWER PLUS* would have finished ahead of *GO THE GREY*.
- None of the horses involved in the second incident, at the 750 metre mark, was a placed horse, other than *POWER PLUS*.

LAW - NATURAL JUSTICE

Section 12(1)(a) of the Racing Penalties (Appeals) Act precludes an appeal being brought against a determination of the Stewards relating to an objection against a placed runner arising out of a race incident. That prohibition does not apply, if it be determined that there is a public interest in the appeal being heard.

Leave should be granted in special or unusual circumstances. Further, an allegation of denial of natural justice can amount to special or unusual circumstances. *COOPER and BAKER v WATA STEWARDS - APPEAL NO. 066; SIMON BREWIS-WESTON ON BEHALF OF THE OWNERS OF A FOGGY NIGHT v WATC STEWARDS - APPEAL NO. 255.*

The rules of natural justice and procedural fairness do apply to Stewards' inquiries. *KIOA v MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS (1985) 159 CLR 550; STOLLERY v THE GREYHOUND RACING CONTROL BOARD (1972) 128 CLR 509.*

It is a requirement of a fair hearing that the parties whose interests may be adversely affected be afforded an opportunity to be heard. *KIOA v MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS (op cit).*

The requirements of natural justice depend on the whole of the circumstances. What is required in one case may not necessarily be so in another. This can extend to giving the parties the opportunity to call relevant witnesses. If necessary, the decision making body should call the witnesses itself.

LAW - AGAINST THE EVIDENCE

In order for a ground of appeal of this type to be made out, an appellant must show that there was no logically probative evidence from which the Stewards could come to their finding *MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS v POCHI (1980) 4 ALD 139; SIMON BREWIS- WESTON v WATC STEWARDS (opt cit).*

THE APPLICATION FOR LEAVE

At the hearing of this application, the applicant's counsel outlined the evidence expected to be led should leave be granted. In summary, this was:

- The applicant was not invited into the hearing, in circumstances where she was readily available.
- The rider of *WILLOUGHBY*, N Rudland, was a material witness, not called into the hearing, in circumstances where he was readily available to give evidence.
- Mr Wolfe was not instructed to act on behalf of the applicant.
- Mr Wolfe was not asked by the Stewards whether he had authority to act on behalf of the applicant.

CONCLUSIONS

In my view, this application falls to be determined under section 13(1)(d) and section 13(2)(b) of the Act.

Because the granting or refusing of leave is an exercise of discretion, it is appropriate to take into account the prospects of success, should leave be granted. Thus it is appropriate to consider the proposed grounds of appeal and the evidence to be called in support of those grounds.

In my view, the proposed ground of appeal relating to denial of natural justice must fail. This case is on all fours with the "A FOGGY NIGHT" case. There, the owners were not invited into the hearing, and the trainer accepted responsibility on behalf of the owners. In that case, the Tribunal said at page 4:

> *"The flexibility and expedition which were required in this case justified the Stewards acceptance of Mr Harrison's answer at face value. The trainer of a horse is the representative of the owner of that horse in most aspects of racing. This fact is clearly recognised in the Rules of Racing. The Stewards were therefore entitled to be satisfied that they were dealing with the duly authorised representative of the owners."*

Once it be accepted, as a matter of law that the trainer is the agent of the owner, then the requirements of natural justice have been met.

Specifically, I am satisfied that the question put to Mr Wolfe at the beginning of the proceedings was in fact a question and not an assertion. Further, I am mindful that the applicant's proposed evidence (see written submissions) would have been to the effect that Mr Wolfe was not her agent. However, in all the circumstances of this case, I remain of the view that the binding affect of the "*A FOGGY NIGHT*" case leads to the conclusion that this proposed ground of appeal would in all probability fail.

As to the alleged breach of natural justice by not calling witnesses including Jockey Rudland, I am not convinced that this particular ground of appeal will be made out. It matters not whether the allegation is that the Stewards failed to call witnesses or that Miller and Wolfe were not given an opportunity to call witnesses. In either circumstance, it is apparent that Jockey Miller (*GO THE GREY*) admitted shifting in.

Finally, I am not persuaded that there is any particular public interest in the hearing of this proposed appeal before the Tribunal. I accept that this was an important race, indeed the feature race on the day. Individual persons no doubt have a particular private interest in the outcome. However, when all is said and done, it was a Stewards' decision on placings in a race. There was evidence on which the Stewards could come to the conclusion which they did. There was and is an equal public interest in finalising the proceedings quickly.

For these reasons, leave to appeal is refused.

The fee paid on lodgement of this application is forfeited.

P J Hogan

PATRICK HOGAN, PRESIDING MEMBER

2/12/96

Seal of the Racing Penalties Appeal Tribunal of W.A.