

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON
(CHAIRPERSON)

APPELLANT: DAVID ANDREW O'HEARE
APPLICATION NO: A30/08/376
DATE OF HEARING: 20 AUGUST 1997
DATE OF DETERMINATION: 20 AUGUST 1997
DATE OF REASONS: 30 SEPTEMBER 1997

IN THE MATTER of an application by Mr DA O'Heare seeking leave to withdraw an appeal against the determination of the Western Australian Turf Club Stewards on 20 July 1997 imposing a 12 day suspension for breach of Australian Rule of Racing 137(a).

Mr D Price, on instructions from DG Price & Co, appeared for the appellant.

Mr RJ Davies QC appeared for the respondent.

The appellant seeks leave to withdraw his appeal in this matter and failing that asks for it to be dismissed. Ordinarily such a request would be readily dealt with and acceded to by the Tribunal. However, senior counsel for the Stewards indicates that this is a matter of great concern to the Stewards which should also be of concern to the Tribunal. In order to understand and deal with this proposition it is necessary to summarise the background to the matter.

Background

The Stewards of the Western Australian Turf Club conducted an inquiry into an incident which occurred near the 350 metre mark in Race 1, the St John Ambulance Maiden, over 1,000 metres at Northam on Sunday 20 July 1997.

Mr O'Heare, an apprentice rider, rode SPECIAL CONNECTION in the race. The Stewards took evidence from jockey P Farrell who apparently stated he received a bump near the 350 metre mark. One of the Stewards who viewed the race gave evidence. Films of the incident were shown and other evidence was presented. The Stewards ultimately charged Mr O'Heare under Australia Rule of Racing 137(a) for careless riding in relation to his outward movement which caused his horse to bump heavily with the horse which Mr Farrell was riding and resulted in the other horse becoming unbalanced. Although Mr O'Heare pleaded not guilty he was convicted and suspended from riding in races for a period of 12 days from midnight 20 July 1997 to midnight 1 August 1997.

Rule 137 states:

'Any rider may be punished if, in the opinion of the Stewards:

(a) He is guilty of careless, improper, incompetent or foul riding, ...'

On 21 July 1997 the solicitor for Mr O'Heare signed a notice of appeal which was filed with the Tribunal. The grounds of appeal stated are:

'A. In relation to conviction the findings of the stewards was against the evidence and unsafe and unsatisfactory.

B. In relation to penalty, the penalty imposed was manifestly excessive in all the circumstances.'

At the same time an application for a suspension of operation of the penalty was made. The accompanying explanatory letter from Mr O'Heare's solicitors sets out the basis for seeking the stay as follows:

'(a) We need time to obtain a copy of the transcript of the enquiry and hearing.

(b) We need time to brief counsel, and in this regard;

(i) Counsel will need time to consider the brief.

(ii) We will need to arrange a conference with counsel and our client.

- (iii) *Counsel will need to prepare amended grounds of appeal and an outline of submissions in support of the appeal.*
- (c) *The effect of our clients appeal would be rendered nugatory if the appeal is successful and our client is not granted a stay. If our clients appeal is unsuccessful he would still serve the same amount of time.*
- (d) *The failure to grant a stay will have severe implications for our client in that;*
 - (i) *Our client is a third year apprentice and is currently equal third in the apprentices premiership. If a stay is not granted our client will have no chance to win the apprentices premiership.*
 - (ii) *Our client will be unable to ride at race meetings in the next 12 days where he has the choice of numerous rides.'*

The Stewards did not oppose the stay application on the basis that, through inadvertence, the tape recording of their inquiry was erased. By letter dated 21 July 1997 the Stewards sent to the Registrar of the Tribunal '*...a summation of the Stewards' Inquiry and a video tape of the incident*'. The summation which was issued by Mr B Zucal, Deputy Chairman of Stewards, briefly sets out details of the persons who were present at the Stewards' inquiry, the evidence presented by the various witnesses and what transpired at the inquiry.

On 21 July 1997 the appellant was granted a suspension of operation of the penalty pending determination of the appeal or as otherwise ordered.

The matter first came on for hearing before me on 29 July 1997 for a directions hearing. At that directions hearing Mr TF Percy appeared as counsel for the appellant and sought to have the conviction quashed on the basis of the problems associated with the transcript. Counsel sought an order that the appeal be upheld without consequential orders or at worst the matter go back for rehearing before the Stewards. The application was opposed by the other side. The argument for the appellant did not find favour and the only order which I made was that within 14 days the appellant do file a written factual

response to the material set out in Mr Zucal's summation of the Stewards' inquiry.

In due course a response was filed on the appellant's behalf. It is clear from the response that there was in reality no dispute as to any of the material facts regarding what had transpired at the Stewards' inquiry.

Counsel's Submissions

In response to the application for leave to withdraw or to have the matter dismissed Mr Davies QC for the Stewards made the following statement:

'Mr Chairman, there are matters in the sequence of events in relation to this matter which are of grave concern to the stewards and it is submitted, with respect, ought to be of considerable concern to this Tribunal. On my instructions and assessment I make it perfectly clear to you, sir, the stewards are very conscious of the fact that they are here dealing with an apprentice who incidentally, despite assurances to the contrary, is not here tonight. If this were a matter of a senior jockey or a trainer then the stewards would be very strongly putting submissions to you, but conscious of the fact that it is an apprentice we make it perfectly clear before I deal with any of the matters in question that the stewards do not seek dramatic results in relation to this matter but they certainly seek, with the greatest of respect, your support, Mr Chairman, as to the undesirable nature of the course that this has taken and probably, because it may be the only way that it can be done under the Act, some "nominal" but salutary order as to costs as a condition of the granting of leave to withdraw. We say that for these reasons Mr Chairman; have you, may I ask rhetorically, seen the film which was provided as part of the materials?'

As I had not seen the video of the race in which the incident occurred I then viewed it. The film very clearly revealed the incident and the role played by Mr O'Heare in causing the heavy bump to occur which unbalanced Mr Farrell's horse. Senior counsel then continued:

'...you have all the appearances of an apprentice who was given a concession, given a penalty which was substantially less than that that he would have got, in view of his earlier penalties in his record, for careless riding. As a special concession to an apprentice, and I hardly need indicate to you how important a

race on the calendar for all apprentices would be the Apprentices Cup,...

The stewards went out of their way to accommodate that. What do you now have; you have an appeal put in, based on flat grounds of appeal which involve no examination of the materials or assessment of them whatever, not even a worthwhile, a good discussion, with the appellant as to what he thought had occurred in the evidence, with a film available which shows a dramatic clear-cut incident of careless riding; you have a stay granted without opposition from the stewards because they knew that there was to be no transcript and could hardly then complain about the stay because there were questions to be resolved and potential delay while directions were given and the like; you have an apprentice who now wants to serve his 12 days at a time that suits him by withdrawing the appeal.

It has to be withdrawn, Mr Chairman, because in our submission it is quite untenable once you see his version of the evidence and once you see the film. Now, in those circumstances the clear impression to people involved in the industry would be one of manipulation of the procedures of this Tribunal. I take you then, if you please to section 18 of the Act:

On an application for leave to withdraw an appeal an application shall be made in writing and lodged with the Registrar. It shall not be withdrawn without the leave of the Chairperson. In granting leave to withdraw an appeal conditions may be imposed: (a) notwithstanding section 17(10) as to costs -

and 17(10) would have limited you to vexatious or frivolous appeals and we do not want to go down that line, Mr Chairman, because it is clumsy and unnecessary. You have a clear power to make an order as to costs without the need for such a finding when you grant leave to withdraw, and you have a clear - under paragraph (b) - power to lay down other conditions as to the granting of leave to withdraw. Now, I find it very difficult to suggest to you how you might resolve the question of what would have been the penalty had it not been structured so as to finish at midnight on the Friday night before the running of the Apprentices Cup, which was regarded as a significant mitigatory fact.

It may be that the best way, if you agree of course, with respect, sir, to record the Tribunal's disapprobation, if I can use that word, of the benefit that the appellant gains as a result of this course, is to record that in the most forthright terms and indicate that although because it is mechanically difficult you are not urged by the stewards to go down the path of hearing viva voce evidence from Mr Zucal as to what would have been

the penalty of the stewards had it not been for the date frame involved and the Cup, but that anyone who embarks upon a similar course, where the effect of serving the penalty at a time other than the time it was assessed in relation to pending races - and it is not just Apprentices Cups, it could be Perth Cups or whatever - anyone who takes an appeal in order to get a stay for a carnival time or for a particular purpose and then does not pursue it when it turns out that it really was hard to pursue anyway could probably expect the Tribunal in the future to embark, if urged, upon an examination of just what penalty ought to be substituted for the one imposed to reflect the true penalty intended.

In our submission, with respect, you ought to order that a condition of the granting of leave be payment by the appellant of costs. You do have the power, if it were a determination, to fix an amount, and that is the only tidy way to do it, and I have already indicated we are not going to suggest that it be the total cost thrown away by the stewards and if you would bear with me for a moment I will come up with a suggested figure, sir.'

...May we suggest, with the greatest respect, conscious of the fact that it is meant to be nominal and salutary, if I can put it that way, but nevertheless it is up to you, that the conditions of the granting of leave be that the payment lodged be forfeited, that is the \$200, and that the appellant pay an amount of \$250 towards the costs thrown away by the stewards, noting if you so wish, Mr Chairman, that that of course is a relatively nominal amount in relation to what it has cost the stewards to prepare for and brief counsel to be down here on two separate occasions in relation to the matter. They are our submissions, if you please, sir. The stewards saw it as a matter of considerable importance because the appearance of manipulation is patent, if you please, sir.'

Mr Price, counsel for the Stewards, replied by denying that there had been '*...any attempt to manipulate the time at which the appellant is to serve his penalty*'. He explained that a transcript is not available unless a notice of appeal is filed and then stated:

'The video shows the incident but it does not show the whole Inquiry, the summary of the evidence is merely a summary, it is a snapshot as to what occurred, it does not say or show whether or not the stewards prejudged the appellant, it does not show whether or not the stewards applied the right test in determining whether the relevant rule had been breached. We still do not know that; we are not in a position to make an assessment of that because, for reasons which are known to you, Mr Chairman, a transcript was not available.

The reality of the system as it is set up is that on most occasions the jockey, when convicted and penalised, is not armed with the personal knowledge to determine the merits of appealing. He goes to a solicitor for legal advice, at that point in time the solicitor does not have a good idea as to whether there is merit in appealing, what he can tell the client is that we need to file an appeal to get a copy of the transcript and we need to get a copy of the video. Once we have the transcript and the video we will be in a position to advise you as to the merits of appealing. Now, what we would say is that it would be against the spirit of the system if a jockey was not at liberty to file an appeal with a view to obtaining a transcript so he could receive proper legal advice as to whether or not there was merit in the appeal.'

In response senior counsel for the Stewards made the following further submissions:

'Mr Chairman, I do not wish to prolong this any further than necessary, but may I be heard further on that. That is a startling admission for a practitioner to make: it is the only advice we can give is to put in a notice of appeal which puts in blanket holding grounds which say it is against the weight of the evidence, with no knowledge whatsoever as to whether it is or is not, against the possibility of finding something in there that might suggest that Mr Zucal had prejudged it or applied the wrong test as to the interpretation of the careless riding rule, which is the one that they use most of all and know inside out, when you know that the effect of filing such a notice - and there are after all 14 days in which to appeal and take instructions on the matters in question - you know that the effect will be that you can then apply for a stay of proceedings because you have appealed.

Now, in our submission, that is a startling admission to make, that you simply can advise them to put in blanket holdings grounds, my word, and take it from there and see whether there is anything in it down the track, and perhaps that epitomises why it is that you later on always get these detailed pernickety grounds of appeal that the stewards have to keep complaining about. You are told that there is the pious hope that if they had a transcript they may have found some in this one, and that really reinforces what we say is wrong with what occurs, appeals going in willy-nilly with no knowledge of whether it is or is not against the weight of the evidence and stays of proceedings being granted pursuant to that. Now, in our submission, that just reinforces the fact that this Tribunal ought to disapprove the practice.'

I was persuaded that the concerns expressed by senior counsel were justified and that the relief sought on behalf of the Stewards was warranted. Accordingly, leave to withdraw was granted to the appellant upon the condition that the appellant pay \$250 towards the costs thrown away by the Stewards. Mr O'Heare's appeal lodgment fee was forfeited. The suspension of operation of his penalty automatically ceased.

Reasons

This is the first occasion in its 61/2 year history so far as I can recall that the Tribunal has been invited to make a ruling which is intended to send a message to the industry as to its attitude on the manner in which appeal proceedings are embarked upon. In view of the importance of the matter it is worthwhile to refer briefly to the role of the Tribunal and the nature of the proceedings that come before it.

The Tribunal is constituted by the Racing Penalties (Appeals) Act 1990 to deal with appeals against penalties imposed in disciplinary proceedings arising in relation to greyhound, horse and harness racing. The Tribunal which is made up of legal practitioners (ss 5 and 6), must act according to *'equity, good conscience and the substantial merits of the case'* and must observe the principles of natural justice. Appeals are heard and determined upon the evidence at the original hearing where the determination appealed against was made. Power exists to require or admit expert or other evidence where it is considered to be proper. There is a requirement to make a full and thorough investigation in open court at any proceedings of the Tribunal. The forms, requirements or solemnities appropriate to legal proceedings need not be followed. The power to inform itself and admit relevant evidence may be exercised without regard to rules of admissibility of evidence before a Court (s11). Collectively these provisions are intended to create a practical environment which is designed to be conducive to doing justice to parties in a relatively relaxed and informal process. The Tribunal deals with important issues which not only affect the livelihood of appellants but also have consequences to the whole of the racing industry and the section of the public involved in betting and otherwise following the outcome of races.

Appeals must be instituted by lodging a written notice of appeal with the Registrar accompanied by the prescribed fee within 14 days after the determination or finding appealed from was made. Notices of appeal shall set out clearly details of the matter including '*the grounds of appeal*' (s16). There is power to direct a suspension of operation of any penalty arising from any determination until the right of appeal is exercised or has lapsed and, if exercised, the appeal is determined (s17). The institution of an appeal requires a deliberate act and a compliance with certain formalities on the part of prospective appellants.

The Tribunal has the power in determining appeals to order refund or repayment of stake moneys, refer the matter back for rehearing, confirm vary or set aside determination and recommend further action be taken. In addition the Tribunal may:

- (e) *make such other order as the member presiding may think proper including an order for the total or partial refund of any fee paid or, subject to subsection (10), an order that all or any of the costs and expenses of the Tribunal or any party to the appeal shall be paid by a specified person; and*
- (f) *where the payment of costs or expenses is ordered, fix the amount to be paid.*
- (10) *An order for the payment of costs shall not be imposed save where the member presiding is satisfied that the appeal, or the aspect of the appeal to which the order relates, was vexatious or frivolous.' (s17).*

With regard to withdrawal of appeals the Act specifies:

- (1) *An application for leave to withdraw an appeal shall be made in writing and lodged with the Registrar.*
- (2) *An appeal duly lodged shall not be withdrawn without the leave of the Chairperson, or of the member presiding at the Tribunal as constituted for that appeal.*
- (3) *In granting leave to withdraw an appeal conditions may be imposed -*
 - (a) *notwithstanding section 17 (10), as to costs; and*
 - (b) *otherwise,*

as the Chairperson or member presiding thinks fit.' (s18).

Practice Direction No 1 of August 1993 sets the principles which generally apply to the granting of suspension of operations of penalties. The Directions give some insight into the philosophical approach to some matters by the Tribunal.

In particular

Direction 9 says:

'Although it will usually not be a ground for a stay that the appellant simply wishes to drive or ride in coming meetings, there may be exceptions to this rule, if, for example, the appellant has commitments to drive or ride in an event of particular importance and the appellant's inability to drive or ride is likely to cause hardship to others.'

To return to the issue before me, I do agree with the proposition put by senior counsel for the Stewards that this is an appropriate case for the Tribunal to lend support to the Stewards in view of the undesirable nature of the course that these proceedings have taken. I am satisfied from having viewed the video and taking into account other material before me that the incident in question involved a clear case of careless riding on Mr O'Heare's part. I am further satisfied that the Stewards properly took into account the fact that Mr O'Heare is an apprentice and that the opportunity to ride in the Apprentices Cup was of a particular importance to him. I can well understand the submission that when one properly considers all of the circumstances of this matter that people in the industry would be likely to be left with a clear impression that the procedures of the Tribunal have been manipulated. It was entirely appropriate for the Tribunal's attention to be drawn to this matter. It was equally appropriate for the Tribunal to be invited to '*record... its disapprobation*' with a view to sending a signal to anyone contemplating embarking upon a similar course of going through the motions of an appeal in order to change the effect of the time for serving of the penalty to one different from the time when it was assessed in relation to pending races.

In the face of the material presented by Mr Davies QC it would have been undesirable to have simply allowed this appeal to be withdrawn or dismissed.

To have done so would have been tantamount to condoning a practice of allowing the use of the appeal process and remedies associated with the instituting of an appeal to be used for ulterior motives. Clearly, it is not in the interest of the industry for the Tribunal to allow the valuable time of the Tribunal as well as that of the Stewards and their advisers to be involved in proceedings, which upon reasonable and proper evaluation at the outset, would not be likely to result in an appeal being instituted. In these difficult financial times for the racing industry any unnecessary costs that can be avoided by the industry in relation to non- meritorious appeals should be encouraged.

This matter involved a very straight forward incident as the film clearly revealed. The prospects of success before the Stewards were remote. The prospects of the appeal succeeding were even less likely. As senior counsel argued in the circumstances of this matter there would be *'the clear impression to people involved in the industry ... one of manipulation of the procedures of this Tribunal'*.

The institution and pursuit of appeals are actions which should not be taken lightly by appellants and their advisers. Much time of the Tribunal is spent in adjudicating matters which are brought in regard to offences created by Rule 137(a) or equivalent rules. That and other rules are couched in terms of *'in the opinion of the Stewards'*. As the Tribunal has had occasion to say so many times over the years and with increasing frequency more recently, for all offences against rules which are couched in such terms appeals may only succeed where appellants can demonstrate that no reasonable Stewards would reasonably have formed the relevant opinion based upon all of the material which was before the Stewards against whose decisions the appeals are being made. In cases of this type particular care and consideration must be given to the prospects of the appeal and the burden of proof cast on the appellant. Very few appeals against *'the opinion of the Stewards'* can hope to succeed where the only real argument raised is that it is against the weight of the evidence. Any practice of putting in blanket holding grounds of appeal in order to set up a possibility of applying to the Tribunal at the outset and of obtaining a suspension of operation of the penalty and then subsequently of employing clever drafting of grounds of appeal designed to give some aura of legitimacy to

an otherwise hopeless appeal is not to be condoned. I acknowledge in this case that matters were somewhat complicated due to the unusual situation of the record of the Stewards' proceedings having been erased.

The amount which was asked on behalf of the Stewards to be awarded in relation to costs and the orders sought in this matter do take into account the fact that Mr O'Heare is an apprentice jockey. In the words of senior counsel for the Stewards such an outcome is '*nominal and salutary*'. Hopefully, however, the outcome in this matter will send a clear message which will be heeded in the future by others.



DAN MOSSENSON, CHAIRPERSON

