APPEAL 403

DETERMINATION AND REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPLICANT:	**GEORGE LIONEL WAY JNR**
APPLICATION NO:	**A30/08/403**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)**
DATE OF HEARINGS:	**23 & 25 FEBRUARY 1998**
DATE OF DETERMINATION:	**25 FEBRUARY 1998**

IN THE MATTER OF an application by Mr G L Way Jnr seeking a suspension of operation of the warning off under By-Law 77(b) of the By-Laws of the Western Australian Turf Club imposed by Western Australian Turf Club Committee on 30 January 1998.

Mr M J McCusker QC assisted by Mr R Sceales, instructed by Sceales & Company, represented the appellant.

Mr R J Davies QC assisted by Mr T van Merwyk, instructed by Freehill Hollingdale & Page, represented the Western Australian Turf Club Committee.

Dealing firstly with the request for the particulars, I am persuaded by the submission advanced by Mr Davies QC that it is inappropriate for me to order those particulars be supplied in the circumstances of this particular matter. I do agree that it is not a proper request or a request that I do have power to order. I therefore refuse to so order.

As to the invitation on behalf of Mr Way to adjourn the application for the suspension of operation of the penalty proceedings on the basis it is necessary for Mr Tillett to give evidence in the proceedings I have already indicated that I will not receive into evidence an affidavit from Mr Tillett. I am persuaded by Mr Davies QC that the nature of the evidence contemplated to be presented through the witness Tillett is not relevant to the present matter for determination. I agree with the proposition that it would be a misconception. On that basis, I refuse to adjourn the stay application.

The stay application is made by Mr Way seeking to suspend the operation of the penalty which was imposed by the Committee of the Western Australian Turf Club on 30 January 1998 when Mr Way was warned off under By-Law 77(b). It is clear that the background to this matter is rather complex. There is a neat summary contained in Mr van Heemst's affidavit in paragraphs 3 to 14 inclusive. There appears to be no dispute as to any of those matters summarised in those paragraphs, and for the purposes of this determination, it is unnecessary for me to spell out that background.

The power to grant a suspension of operation of a penalty is to be found in section 17(7) of the Racing Penalties (Appeals) Act. It specifies that the Tribunal may direct the Committee to suspend the operation of any order in relation to which a person has a right of appeal until that right of appeal is exercised or has lapsed, and if exercised until the appeal is determined.

Practice Direction 1 of August 1993 of the Tribunal deals with the matter of the suspension of operation of penalties. As is stated in the introductory comments to that practice direction the relevant provision of the Act gives an unfettered discretion to grant a stay, but does not specify the basis upon which the applications are to be dealt with. There are no other provisions in the Act which affect this discretion and no regulations or rules have been promulgated on this aspect of the Tribunal's function. I bear in mind the various provisions contained in the practice direction in arriving at my determination of this stay application.

In support of the application Mr McCusker QC for Mr Way relies amongst other things on the following propositions:

1. that the first three matters which are referred to in the notice issued by the Committee of the Turf Club had previously been dealt with and that Mr Way had already been punished for those offences by means of a disqualification rather than the penalty of warning off;

2. the alleged strength of the appeal and its prospects of success;

3. the real prospect that in the event of the appeal succeeding that Mr Way will have been prejudiced and there will be no way that one will be able to restore him to his former position should the stay have been granted in the meanwhile;

4. as Mr Way's affidavit spells out, the fact that there is more than simply economic loss involved as the prejudice goes to family, health and other considerations; and

5. that it may take some time ultimately to hear and determine the appeal.

In reply to those propositions, Mr Davies QC emphasises the underlying point that all of the matters alleged in the notice from paragraph four onwards were matters which occurred whilst Mr Way was under disqualification. Further, Mr Davies QC asserts that Mr Way's behaviour involves a series of incidents which were totally contrary to the concept of a disqualification and, in effect, amount to a blatant challenge to the administrators of the sport by a person serving a term or terms of disqualification. It was also put to me that the Committee had in fact gone out of its way to inform Mr Way of the nature of the assertions that were being made against him. The Committee had been accommodating by adjourning the proceedings initially and had so gone about the business of investigating the matter that it had properly informed itself before making a discretionary judgement in the matter.

A strong argument was put to me by Mr Davies QC regarding the likely prejudice to the racing industry in the particular circumstances of this matter. It was suggested that there was evidence of a blatant challenge by Mr Way amidst a sea of publicity and a flaunting of the spirit of disqualification, the involvement of others and getting others into trouble due to having associated with them and consequently a pernicious effect on the industry. Indeed it was put as highly as there having been the potential for a disaster to the industry created by the spectacle of Mr Way participating again in the racing scene, with the likely consequence that it might put off decent people from attending at the racecourse or participating in racing.

I was not inclined to be influenced by that line of reasoning without the benefit of some supporting evidence to substantiate it. An affidavit has subsequently been filed, sworn by Mr van Heemst, the Chairman of the Committee of the Western Australian Turf Club, in which Mr van Heemst speaks of his perception of the likely adverse consequences of Mr Way being enabled to participate again in racing or to be part of the racing scene as a consequence of the granting of this application.

I am persuaded by some of the contents of that affidavit, even though I acknowledge, as Mr Sceales put to me, it contains an expression of a personal opinion. I am satisfied that there is sufficient justification for that opinion to be expressed by the deponent in the circumstances of this matter bearing in mind the role that he plays at the Turf Club currently and his background in the racing industry as spelt out in that affidavit.

Since the matter first came before me on Monday evening, I have had the opportunity to consider the potential merits of the appeal and the other matters which were impressed on me by Mr McCusker QC, including the circumstances personal to Mr Way and the prejudice to Mr Way if the suspension of operation of the penalty were not granted.

I am conscious that the matter at least can proceed to commence to be heard relatively quickly. I am also influenced by the fact that in the circumstances confronting Mr Way, that Mr Way has been excluded for many years from participating in the racing industry. The circumstances are to be contrasted with a person who, until the commission of a particular offence and the imposition of a penalty as a consequence, has been involved heavily in the industry and that involvement would be significantly disrupted if a stay were not granted pending an appeal in regard to that particular penalty. It is not the case that Mr Way has been relying on racing for his livelihood over the recent period.

In all of the circumstances, I am satisfied that the stay application should not be granted. I refuse to order the suspension of operation of the penalty and refuse the application.

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of WA