

DETERMINATION AND REASONS FOR DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPLICANT: DAVID SHEEHY
APPLICATION NO: A30/08/448
PANEL: MR P HOGAN (PRESIDING MEMBER)
DATE OF HEARING 18 MAY 1999
DATE OF DETERMINATION: 18 MAY 1999

IN THE MATTER OF an application for leave to appeal by Mr D Sheehy against the determinations made by the Western Australian Trotting Association Stewards on 27 December 1998 imposing disqualification of SPRING WELL and a fine of \$100 for breach of Rule 439(b) of the Rules of Harness Racing.

Mr B Whiteman was granted leave to appear for the applicant.

Mr W Delaney appeared for the West Australian Trotting Association Stewards.

Following the running of Race 2 at Gloucester Park on 27 December 1998, the Stewards opened an inquiry into SPRING WELL, driven by Mr D Sheehy, making contact with several marker pegs when racing towards the front straight on the final occasion.

As a result of their findings, the Stewards disqualified SPRING WELL pursuant to Rule 439(b) of the Rules of Harness Racing. The Stewards also fined Mr Sheehy \$100 for breach of the same rule for careless driving.

The Notice of Application for Leave to Appeal and the Notice of Appeal were lodged with the Registrar on 26 February 1999. The statutory time limit for lodging a Notice of Appeal had expired by approximately six weeks.

The grounds for the application are as follows:

- “1. *New evidence has recently become available to me (19 February 1999) which evidence was not available to me at the original hearing before the Stewards held on the 27 December 1998.*
2. *The new evidence clearly establishes my innocence.*

I therefore request that the RPAT order the Stewards to reconsider the case in light of the fresh evidence."

Should leave be granted, the proposed grounds of appeal are:

"Evidence now available clearly establishes that I was not guilty of the charge in that the evidence clearly establishes that 'Social Aspect' has taken the ground of 'Spring Wells' cart to go over the two marker pegs and not the careless driving of the Applicant."

Rule 439 of the Rules of Harness Racing states:

"439. Notwithstanding the provisions of sub-Rule 438(d) at any track where no inside running rail exists;

- (a) any person who in the opinion of the Stewards allows his drive to shift inside the line or makes contact with the track marker posts when such movement is not attributable to the waywardness, untrue or erratic running or behaviour of his or any other horse, shall be deemed guilty of carelessness and may be fined, suspended or disqualified.*
- (b) if due to carelessness or waywardness, untrue or erratic running or behaviour, a horse proceeds inside the running line of the marker posts, the driver of such horse shall restrain that horse and regain its position in the true running line at the first vacant position. The horse of any driver who fails to take this required corrective action may be disqualified or relegated to a position determined by the Stewards and the driver shall be deemed guilty of carelessness and may be fined, suspended or disqualified.*
- (c) if a horse is forced inside the running line of the marker posts the driver of such horse shall endeavour to regain position in the true running line at the first vacant position. Such horse will not be disqualified unless in the opinion of the Stewards the horse gains an unfair advantage.*
- (d) if a horse in the opinion of the Stewards, by virtue of its waywardness interferes with another runner obliging that runner to race inside the running line of the marker posts it may be disqualified from the race or relegated to a position determined by the Stewards."*

A complicating factor in determining the merits of this application is that the audio tape of the Stewards' inquiry was, due to an administrative oversight, re-used. Accordingly, a transcript of the Stewards' inquiry is not available.

The Chief Executive of the Western Australian Trotting Association, Mr R Bovell, in a memorandum dated 29 December 1998, sought a report from the Chairman of Stewards as to why (a) the protest was upheld, and (b) the decision was delayed so long. The Tribunal has been provided with a copy of the memorandum in response from the Chairman of Stewards to the Chief Executive. An extract from that memorandum states:

"This matter was dealt with under the provisions of Rule 439(b) and not 420, therefore was not a protest.

Disqualification

The horse was disqualified from the race because it made contact with the flexi poles racing into the front straight to the finish, and its reinsperson, D A Sheehy, failed to restrain the horse back to the correct side of the flexi poles in accordance with Rule 439(b).

Mr Sheehy gave evidence that the incident was caused by Spring Well's waywardness, and that had he complied with the Rule, the horse most probably would have broken gait. It is noteworthy that the horse did race roughly when restrained earlier in the race.

It was the Stewards opinion that Mr Sheehy, through carelessness, allowed Spring Well to proceed inside the flexi poles, and he then failed to make any significant effort to restrain the horse back to the true running line.

The horse was disqualified because it had progressed into the safety lane to such an extent that it struck the flexi poles, and it was racing in the safety lane for some distance with Mr Sheehy not attempting to restrain back to the true running line. Quite obviously Spring Well would have been disadvantaged had Mr Sheehy complied with the Rule, and restrained back to the true running line. After considering all the circumstances of the incident, it was the Stewards' opinion the horse was not entitled to be placed in the race.

Hearing Time

The race was started at 3.45pm, the gross time of the race was 2.36.5 minutes and by the time the 'all clear' parade commenced it was about 3.53pm. We had to wait until the horses left the track and for Mr Sheehy to attend the Stewards' room to give his evidence. We had made our determination by 4.11pm."

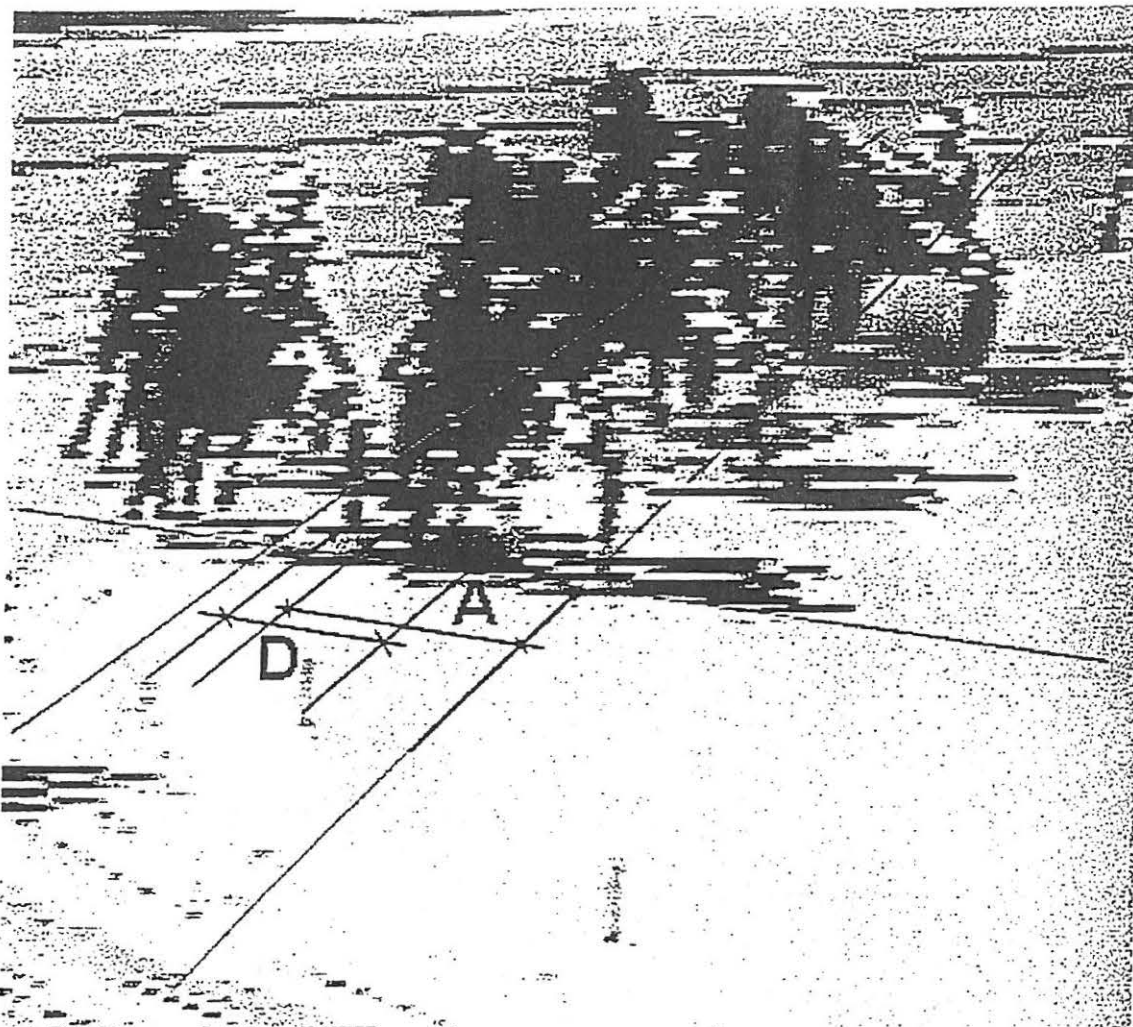
The matter before me today is an application for leave to appeal because the time for appealing had expired at the time of lodging the application. Section 17(2) of the *Racing Penalties (Appeals) Act* empowers the Tribunal to enlarge the time as the Tribunal sees fit. In other words, there is a discretion to be exercised. Although the Act does not spell out the basis on which the discretion is to be exercised, clearly it must be done according to law. It must not be done arbitrarily. There must be demonstrated some good or sufficient reason why in all of the circumstances it is appropriate to enlarge the time to allow the matter to proceed as an appeal.

In my view, based on the above principle, the applicant must demonstrate that there is some good reason for the delay, and that there is merit in the proposed appeal. The applicant in fact addresses those two points in his application, ground 1 pointing to the fact (he says) that the proposed evidence he now wishes to have considered is new evidence, and (he says) that the new evidence clearly establishes his innocence.

The substance of the proposed new evidence was explained to me at the hearing of this application. An exhibit was tendered to explain the proposed new evidence. It is proposed to call evidence from Mr Andrew Marsh, a lecturer in Architectural Science at the University of Western Australia. Mr Marsh made some calculations of wheel distances from a still frame of the relevant part of the race video.

The photograph and the analysis (the exhibit) are reproduced here in these reasons for determination:

Photographic Analysis of Wheel Distance



The aim of this analysis was to determine the distance between the outer buggy and the inside boundary of the track. A photograph showing the position of both horses and buggies was used as the measurement device.

The points of reference are clearly marked on the photograph, being the centre points of the wheels of each buggy and the base of the vertical pole indicating the inside boundary of the track.

From the photograph, it can be clearly seen that the distance between the inner wheel of the outside buggy and the inside boundary of the track (marked as D on the photograph) is less than the distance between the wheels of the inner buggy (marked as A on the photograph).

Using a wheel-centre to wheel-centre distance of 1170mm for A, the relative distance of D was found to be approximately 805mm. Whilst there is some potential error in the establishment of the correct perspective at which to project measurements, the measurement is a relative one, so any bias affects both values.

I am therefore confident that the measured distance is between 825 and 785mm.

Andrew Marsh
Lecturer in Architectural Science
The School of Architecture and Fine Arts
The University of Western Australia
NEDLANDS, W.A. 6709

At the hearing of the application before me, Mr Whiteman, on behalf of the applicant, informed me that the applicant's proposed defence to the Stewards' finding and their charge was to be that he was receiving pressure from the outside horse. It is clear to me that the proposed evidence of Mr Marsh would be relevant and therefore admissible to the facts in support of that line of defence, if the Stewards' inquiry was conducted according to strict rules of evidence. The value or weight of the proposed new evidence would be another matter, for me on appeal or the Stewards if there was to be a re-hearing. One does not have to know the detail or the proposed inferences to be drawn to understand that it would be relevant.

There is no doubt that the proposed evidence was not available to the applicant at the time of the inquiry, which took place minutes after the running of the race. The evidence upon which the Stewards relied in forming their opinion was the viewing of the race patrol films, their eye witness accounts of the race and the applicant's explanations.

The applicant contacted Mr Marsh soon after the day of the race. Mr Marsh subsequently had to travel to Sydney. He reported his opinions to the applicant on 19 February 1999. The application for leave to appeal was lodged on 26 February 1999. There were intermediate steps taken as well, where the applicant sought procedural information as to what he should do. All of that taken together leads me to the conclusion that the applicant acted with due diligence in pursuing his proposed appeal. The time for appealing would be enlarged, if there was any merit in the proposed appeal.

However, in my view, the proposed appeal could not succeed.

Rule 439(b) [as well as sub-rules (c) and (d)] allow for a horse to be disqualified in certain circumstances. The result of an inquiry under those rules can therefore be the same as the result of a protest hearing. A horse can be disqualified or relegated and the placings altered accordingly.

The Tribunal has no jurisdiction to hear an appeal arising out of a Stewards' determination relating to a protest [Section 12(1)(a)] unless leave is granted pursuant to Section 13(2)(b). It is in the public interest that protests are determined expeditiously, the result of the protest announced and the "all clear" sounded to allow winning investments to be paid. The public who place investments on racing, both on and off course, have an expectation that the official result of a race will be known soon after the completion of the race. That expectation far outweighs any private interest which an individual, aggrieved by a Stewards' decision, may have.

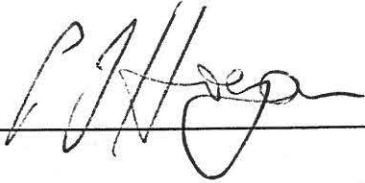
In my view, the principle underlying Section 12(1)(a) of the Act applies to the proposed appeal in this case. Although the Act does confer an automatic right of appeal pursuant to Section 13(1)(a), the circumstances must be rare and exceptional for such an appeal to succeed. The proposed ground of appeal relates only to new evidence.

An illustration of the importance which the industry places on determinations relating to protests, relegations or disqualifications being disposed of quickly can be seen in the facts of this case itself. The Chief Executive sought an explanation from the Stewards why there was a delay of some 18 minutes in reaching their decision.

The proposed new evidence was not available to the Stewards at the time of their inquiry. They may have determined, in their discretion, not to admit it any event. Such expert evidence would have been admissible in the strict legal sense, but the Stewards may have decided that it was not needed, and relied on their own expertise in determining the matter. There is a limit to the extent to which the strict rules of admissibility of evidence will bind the operation of a domestic tribunal, such as the Stewards.

I also had the benefit of viewing the various race patrol films. It is clear that SPRING WELL did, for a considerable distance, make contact with the marker posts at a critical stage of the race. It is not clear that the initial downward movement was caused by pressure from SOCIAL ASPECT.

It is for those reasons that I reached the conclusion that the proposed appeal would not succeed, and therefore leave to appeal was not granted.



PATRICK HOGAN, PRESIDING MEMBER

