

REASONS FOR DETERMINATION
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: PAUL JAMES HARVEY
APPLICATION NO: A30/08/512
PANEL: MR D MOSENSEN (CHAIRPERSON)
DATES OF HEARING 25 SEPTEMBER 2000 AND
23 NOVEMBER 2000
DATE OF DETERMINATION: 23 NOVEMBER 2000
DATE OF REASONS: 19 DECEMBER 2000

IN THE MATTER of an appeal by Mr PJ Harvey against the determination made by the Western Australian Turf Club Stewards on 9 September 2000 imposing a 23 day suspension for breach of Rule 137(a) of the Australian Rules of Racing.

Mr TF Percy QC assisted by Mr R Loiacono, instructed by DG Price & Co, appeared for the appellant.

Mr RJ Davies QC appeared for the Western Australian Turf Club Stewards.

BACKGROUND

On 23 November 2000 following the hearing of this appeal I concluded there was no merit in it and dismissed it both as to conviction and penalty. The suspension of the operation of the penalty automatically ceased to operate. I indicated I would publish reasons in due course, which I now do.

On 9 September 2000 after the running of Race 2 at Belmont Park the Stewards conducted 2 objection hearings. The Stewards' panel for both objections

comprised Mr FJ Powrie, Chairman of Stipendiary Stewards, Mr BW Lewis, Deputy Chairman of Stewards, Mr SJ Carvozzo, Provincial Chairman of Stewards and Stipendiary Stewards RJ Mance and GM Bush. At various stages the Stewards called into the objection hearings Mr P King, rider of OUR EMMA, Ms P Wagg, trainer of OUR EMMA, Mr Harvey, rider of PETITE ANGEL, Mr Z Mathie, trainer of PETITE ANGEL, Mr R Peters, Managing Owner of PETITE ANGEL, Mr J Noske, rider of SANTA RICA and Mr FW Maynard, trainer of SANTA RICA. Mr Harvey remained present throughout.

Early in the first proceeding Mr P King stated his grounds of objection as follows:

'Sir, as we're coming into the straight I was tracking Mr. Harvey's mount PETITE ANGEL directly behind it, Mr. Noske was racing inside him. Just prior to, getting past the 300m Mr. Harvey's horse has drifted outwards leaving a run for, for my mount to go forward. I commenced to take that run Sir, probably got about approximately a half length up inside Mr. Harvey and moving forward at that stage, around about the 200m, Mr. Harvey's then commenced to ride his horse hard under, under the stick. Continued to shift back inwards, from that point onwards to the winning post and in doing so, has crowded and in the end impeded my mount and I've had to check backwards, in the end result to the wash-up because I had another rider directly inside me which was in trouble as well at the same stage, and in the end he's taken my complete run on the winner and I've had to check back and, and finish behind his mount. Prior to this incident Sir, I was going to win quite comfortably I thought. I moved up inside him quickly and my mount was sort of starting to roll along forward at that stage so he's just completely taken my run, which I was entitled. I yelled to Mr. Harvey on three or four occasions, he didn't stop riding, just continued to ride his mount forward and in doing so, he's taken my run from the 250 to the winning post.'

After hearing from Mr Harvey and others the Stewards invited Mr Noske to state his grounds of objection. They were in these terms:

'Sir, as you can see from the video, the last 200m Mr. Harvey has let his horse drift in and has taken Paul King's running, has taken my running. My horse hit the fence on several occasions and I feel that if my horse wasn't impeded it would have kicked back and should have nearly won.'

Mr Harvey was asked if he understood this objection to which he answered:

'Only the same observations I used before that Paul King's mount was running away from horse, he had his horse's head turned out and it was running in on top of Jeff before my horse's even pressured these horses and when, when my horse and Mr. King's did come in contact, I have taken action, I've shifted my horse back out and I think you could just about'

argue that there was enough room for both of these horses to be there near the line.'

The Australian Rules of Racing ('AR') specify that, subject to AR 165, objections shall be made in writing, signed by the nominator, trainer or rider, to one of the Stewards or to the Secretary of the Club or to the Clerk of the Scales accompanied by a deposit (AR161). The Stewards are empowered:

'To determine all questions arising or objections made in reference to racing at the meeting.' (AR8(f)).

AR136 specifies:

- (1) *If a horse:*
 - (a) *Crosses another horse so as to interfere with that, or any other horse, or*
 - (b) *Jostles, or itself, or its rider, in any way interferes with another horse or its rider, unless such jostle or interference was caused by some other horse, or rider, or the horse or rider jostled or interfered with was partly at fault, such horse and any other horse in the same nomination may be disqualified for the race.*
- (2) *If a placed horse or its rider causes interference within the meaning of this Rule to another placed horse, 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 may place the first mentioned horse immediately after the horse interfered with.*
...

AR165(1) specifies that:

'Any objection by the persons mentioned in Rule 161 against a horse or horses, on the ground of –

- (a) of an interference as provided for in AR136(1) ...*
 - (d) of any other matter occurring in the race: or ...*
- shall be made verbally or in writing to one of the Stewards ...*
- (2) *An objection made under paragraph (a) of sub-rule (1) of this Rule shall only be made on behalf of a horse that has been placed by the Judge in accordance with AR157.'*

At the completion of the objections' hearings the Stewards dismissed the second objection but upheld the objection in relation to the placing of OUR EMMA fifth against the first placed PETITE ANGEL. PETITE ANGEL was relegated to fifth and the other placed horses were each in turn moved one place higher. Having announced this outcome, Mr Powrie then stated:

*'Now we'll require all three riders in relation to this occurrence all right.
That's all thank you.'*

It is not clear from the transcript exactly when, and I was not told the coincidence of timing, but apparently sometime later that same day the Stewards consequently convened an inquiry regarding '*an incident in the straight in Race 2*'. Mr Harvey and other riders King, Noske and Carbery were called to the inquiry. The inquiry panel comprised the same Stewards as those who entertained the objections. At the outset Mr Powrie announced:

'There was an Inquiry, sorry not an Inquiry, there was evidence taken in relation to objections lodged by yourself Mr. King and yourself Mr. Noske against your horse Mr. Harvey and it's the intention of the Stewards to include that evidence in the Inquiry at this particular Inquiry. Now what we'll do is that I'll show you the Patrol Films related to the incident Mr. Carbery so that you've got some idea also of what we're looking at, but before we do that, I'd ask the Steward that was head-on to the straight during the course of that race Mr. Mance to give his observations of the final stages of the race.'

Mr Mance described his observations of the final stages as follows:

'Working or viewing from the head-on tower, as horses raced passing the 250m Mr King, Mr Noske originally had been racing on the fence with SANTA RICA. Mr Carbery with EL RAHAWAN had started to make a bit of ground to the inside of SANTA RICA, I didn't think there was probably enough room for Mr Carbery to continue on there. At that stage Mr. King with OUR EMMA has elected to take a run between Mr Noske and Mr Harvey's mount PETITE ANGEL and as he's got between those horses, I thought OUR EMMA lay inwards and at that stage Mr Carbery had to take hold of EL RAHAWAN and as horses continued down the straight, then Mr King in between horses, I thought Mr Harvey allowed PETITE ANGEL then to, to shift inwards and as a result Mr King has had to restrain OUR EMMA and Mr Noske on SANTA RICA racing on the inside has also had to restrain his mount.'

Mr Lewis who was in the main tower with Mr Powrie gave evidence that:

'I believe about the 175m Mr Carbery was attempting to take a run to the inside of Mr Noske. I'd agree with Mr Mance, there did not appear to be sufficient room for Mr Carbery to secure that position fully and as a result, Mr Carbery's had to restrain out of that position. The field's probably gone about another 75m, getting to about the 75m, Mr Harvey's mount, has shifted inwards, I believe tightened Mr King's mount, Mr King has had to check, shift in and bump Mr Noske quite heavily. Watching the race live Mr Chairman I didn't think that Mr Harvey made sufficient effort to keep his mount off the riders to the inside.'

Mr Noske agreed with Mr Mance's description. The patrol film was then shown after which Mr Powrie stated his observations. The riders were asked to comment. Mr King stated:

'Mr. Harvey's horse is probably just starting to shift slightly, my filly's run away from it fractionally and the interference has occurred, you know it's quite clear on the film you can see that she's lost her tail end, back legs through that interference'.

Further, Mr King was put some propositions by the Chairman of the inquiry as to his evidence in the objection. He told the Stewards:

'Well I feel that I would have won the race, you know that's why I protested because I felt that I, the race was taken from me when the run was there, clear for me to take and I've been probably robbed of the race on the day Sir.'

The Chairman then put to Mr Harvey:

'Mr Harvey you've heard the Stewards observations and you've seen the Patrol Films, any comments at all?'

After Mr Harvey replied Mr Powrie put to him:

'What about the crowding because I, I made reference to the fact that the horse was considerably crowded and indeed, to the extent that it made quite heavy contact and Mr. Lewis made reference to quite heavily bumped with SANTA RICA, what about that level of impediment that we're referring to? Do you agree with that?'

Mr Harvey replied:

'Yeah, I, I agree that SANTA RICA was certainly buffeted inside of Mr. King's mount. I think even before my horse's shifted in and Paul King's horse running away from my mount, it's probably taken him right to the rail and the bit of movement from my horse has then caused this buffeting between Mr. King's mount and SANTA RICA. She's, she's certainly shifted in when I felt the contact between my horse and Mr. King's horse, I have as you can see on the film, stopped riding and I, I mean we were probably at this time, 50m from the line and I have stopped riding my horse and taken her out to a degree.'

Mr Powrie then asked Mr Harvey:

'Do you think you stop riding section of the race or the element or point where you did stop riding, do you think that these horses, namely OUR EMMA and SANTA RICA, do you think that they have been fairly tightened up at that stage, or considerably tightened up.'

Mr Harvey replied:

'They've received tightening, but I haven't crossed, although they were tight, my horse hasn't crossed, I haven't let my horse run in across the paths of these horses, even when they, they get to the winning line, you'll still see these two horses inside me. Albeit they were tight and there was buffeting and there was movement from my horse, I haven't been careless to the degree where I've let my horse run across them and finish up on the rail and not do anything about it. When I, I did feel contact between my mount and Mr. King's I have come off.'

As a consequence the Stewards charged Mr Harvey with careless riding under Australian Rule of Racing 137(a), which reads:

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

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

The charge was particularised by the Stewards in the following terms:

'...you have allowed PETITE ANGEL to shift in over the concluding stages of Race 2 the Tetrean Handicap today at Belmont, thereby causing OUR EMMA ridden by Paul King to be severely crowded and restrained and in turn, shift in onto SANTA RICA ridden by Jeff Noske which has been crowded and causing that mare to strike the running rail.'

Mr Harvey pleaded not guilty to the charge. He gave some additional evidence before the Stewards retired to consider the matter. The Stewards subsequently announced their determination in the following terms:

'Mr. Harvey the Stewards have considered the charge, that we've considered some of the points you put before us and you said that, you, you've not crossed the horses inside you and certainly it's quite evident from the evidence and indeed, the, the film that you, you didn't crossed them, but however the charge is one that, of shifting in to the extent, over the concluding stages to be extent that OUR EMMA was severely crowded. We're quite satisfied that your shifting has caused the crowding. In reference to your stop riding and rectified to some degree, that's a quotation, we believe that any stop riding effort by yourself is too late and effectively OUR EMMA has already been crowded at that stage. You made reference to the fact that OUR EMMA hasn't helped the issue and indeed, your words had worsened it and played a role. The Stewards are quite satisfied that the charge under Australian Rule of Racing 137(a) is made out and in relation to that last point that your shift has caused the tightening, we're quite satisfied and indeed, the crowding to the two horses namely, OUR EMMA and SANTA RICA on its inside. As such as I say, we find you guilty of the charge. It remains with us Mr. Harvey to impose'

a penalty, before we do that, is there anything you wish to say to us with regards to penalty?'

Mr Harvey chose not to place any further information before the Stewards before they determined the penalty. In deciding on the penalty the Stewards concluded:

'Mr. Harvey the Stewards have assessed your record and it, it shows that you were suspended for a period of seventeen days at Mt. Barker in February of this year and also it shows that you had a reprimand in March of this year at Pinjarra for allowing your mount to shift out and it also shows that you were suspended for a period of 15 days at Belmont in, June of this year which finished at the end of June. We're certainly conscious Mr. Harvey of the number of rides that you have and that you are certainly in the bracket of upper numbers of rides within the State, but we're also conscious of the fact that in relation to the level of severity that this incident has predisposed to a, a double objection from the point of view of interference and indeed, the striking of the horse SANTA RICA onto the fence, puts that horse obviously in a position of some peril. So it is certainly, isn't at the, the lower end of severity of severeness, although your words, that it's a restrain rather than the preferred words of the Stewards in their observations at that stage, a check.

*...
In, in saying that the Stewards believe that you should be suspended from midnight the 14th September after the Hannans Handicap meeting at Kalgoorlie for a period of 23 days until midnight the 7th October, 2000.
All right.'*

Mr Harvey appealed against both the conviction and penalty and at the same time sought a suspension of operation of the penalty. I granted his application for a stay, which was not opposed, on 13 September 2000.

THE APPEAL

The amended grounds of appeal are:

'A. CONVICTION

1. *The Stewards erred in proceeding to hear and determine the charge against the Appellant as they had already determined as a question of fact the central factual issue adversely to the Appellant in the course of the hearing and upholding of the protest concerning the same incident.*
2. *The Stewards erred in convicting the Appellant of the charge alleged in that they failed to make any finding of fault in relation to the aspect of the charge concerning the horse SANTA RICA.*
3. *The Stewards erred in convicting the Appellant in that they failed to take into account the contributory role of the horse OUR EMMA in causing the crowding the subject of the charge.*
4. *The finding that the Appellant was in any way responsible for the crowding to the horse SANTA RICA was:*

- (a) contrary to the evidence and the weight of the evidence; and
- (b) contrary to the findings of the Stewards in relation to the protest by that horse against the winner; which was dismissed.

B. PENALTY

- 5. The Stewards findings of fact were so inadequate and ambiguous as to preclude them from including any aspect of the interference to the horse SANTA RICA as part of the offence for the purposes of penalty.
- 6. The Stewards erred in including the interference to the horse SANTA RICA in their consideration of penalty as it was wholly inconsistent with their earlier findings of fact in respect of the protest.
- 7. The Stewards erred in failing to take into account for the purposes of sentence the movement of the horse OUR EMMA which on the evidence before them had played a significant contributory part in the crowding with which the Appellant was charged.
- 8. The period of 23 days was excessive in all the circumstances of the case having regard to previous decisions of the Stewards and of this Tribunal.'

When the matter first came on before me on 25 September 2000 Mr Percy QC submitted:

'The test for the upholding or otherwise of protest is not set out in the rules. Essentially, as I understand it, it comes down to this: the Stewards would need to find that there was interference to a horse through the fault of another rider, which has caused it to be inconvenienced to the extent that the placings might have been different.'

Some argument was presented on Mr Harvey's behalf and I was then shown the film of the race. In the course of his argument senior counsel stated:

'So the charge was this: "you allowed PETITE ANGEL to shift in, causing one... crowding and restraint on the part of King on OUR EMMA and secondly... shifting in on to SANTA RICA, which has been crowded and secondly causing that mare to strike the running rail." Now, the Stewards had effectively already determined that, and it is our submission that at that stage it was incumbent upon them to desist from the further hearing of it.'

The matter ought to have gone to be determined by a Steward or Stewards who had not previously come to any factual findings or determinations in relation to the central issues. In saying that and making that submission, I am aware of special position of the Stewards as the investigators, the prosecutors and the judges. But there comes a time when they have actually made findings of fact: they can not be seen to impartially be embarking on the task with propriety. There is a question of this matter which is currently before the ... about to go before the Full Court in the matter of Julien, which is a greyhound matter that Mr Chairman might have some familiarity with. It went to this Tribunal, an order was made that it be sent back to the Greyhound Stewards, it went by way of application for certiorari to Justice Miller, he found there was no problem

with it going back before for the same Stewards. It went back to the Stewards, he was re-convicted, came back here, the penalty was re-imposed and he took it to the Supreme Court again, approximately a month ago Order nisi was granted by Justice Ipp, who on one of the grounds, and I had the peculiar experience of appearing for the Stewards at that particular juncture... on the grounds that having made a determination of a fact adverse to the applicant, it was improper for the same Stewards to continue with the inquiry. What the outcome of that be in due course at the hands of the Full Court we can only wait to see... But what we would say in relation to this matter, irrespective of the special position of the Stewards, once they have made a finding, or come to a conclusion of fact of the central critical issue, not other issues, not...um... peripheral issues, but what was in fact the critical issue: that is the issues in the protest, which were the issues there. There was no question of a careless riding charge per se arising out of the protest, but the issue of whether he allowed the horse to shift in and caused interference to the other runners, was the central issue.'

Senior counsel next relied upon the decision of Mr J Prior the Presiding Member in *Harvey* (Appeal 485). In that matter after having formed the opinion to make the charge, the Stewards asked whether there was anything else. Mr Harvey on that occasion had already put his defence to the protest hearing. He had very little else to say from the time the charge had been levelled. He pleaded not guilty. The Chairman of Stewards in that case in a response to a request from the appellant for reasons why he was charged stated:

'Yes, well the reason, the reasons that we have is that the Stewards as I say in the charge, have formed the opinion that you shifted in approaching the 400m and then thereby, crowded those horses on your inside and in turn causing SIADA BINT to check severely. We've formed that opinion at this stage related to the charge as such, but before we consider the charge in total, we will give you the opportunity to put anything else you wish before us Mr Harvey.'

Mr Prior's reasoning in that case was as follows:

'I am satisfied that the effect of this statement by the Chief Steward gives the impression that the Stewards had formed a concluded opinion on the central issue prior to their full consideration of the evidence available on the charge. This may have had significant effect on the Appellant seeking to adduce further evidence such as to request the rider of HOLLY BELLE being called. In those circumstances, I am satisfied the Stewards fell into fundamental error. On this basis, I would allow this ground of appeal.'

Senior counsel continued his argument by stating that:

'...where Stewards have made a fundamental finding of facts on the critical issue, its inappropriate for them to continue any further. There

'needn't be a full body of Stewards, there were plenty of them here...sitting... it only required one further of them, or two further of them to exercise the jurisdiction and there were plenty of Stewards who could have done that, even if the matter had to be adjourned.'

The Rules are not entirely clear as to the powers or capacity of individual Stewards. Interestingly almost all of the references in both the Australian and the Local Rules are to 'Stewards' rather than to an individual Steward. Rule AR 8A however establishes that the Chairman of Stewards in some matters or the Steward acting as such at any meeting, may exercise several of the powers in AR8 except the power to punish under AR8(n).

Mr Percy QC agreed with me that there is a slight difference between the present case and the *Harvey* (Appeal 485) matter. I asked whether it could be shown that the Stewards had an open mind in relation to the charge and defence that was being put up in response to the charge (p10 of the transcript). Counsel put the proposition as follows:

'...It is just inappropriate for them to take the blokes' livelihood off him...again for something that is an issue that they have predetermined. Its quite... its capable of a very simple resolution. If they find that there is a charge warranted, just get 2 other Stewards to hear it.'

In relation to that proposition I queried:

'To take your proposition to its logical conclusion, going back in point of time, you could be arguing that those same Stewards should not have conducted the inquiry, they shouldn't have got to the point of being in a position to determine to lay a charge, should they?'

Mr Percy QC replied:

'Well natural justice would dictate that they could, but you've got to look at the exigencies of the race... racing industry, it's got to be done. At this stage they have got an open mind, but once they get to that decision to actually charge him, the becomes the cut off point. Ideally I'd suggest what you say is the corollary to my argument; they shouldn't even embark upon the inquiry, if it looks like there might have been some interference, but I say there comes a point where you just can't continue.'

Mr Percy QC acknowledged this was the first time he had known that the matter had arisen for consideration and that:

'...once we know the decision of Julien and the Greyhound Racing Association... we will be much the wiser in due course, once we know the outcome of that case.'

I then asked whether it meant that this matter should not be determined until and unless the outcome of the other matter was known. Senior counsel responded '*Ideally, yes.*' Whilst Mr Percy did not have the instructions to seek an adjournment pending the outcome of the *Julien* case he indicated that if I thought that was appropriate that should happen. Before considering the point I called on Mr Powrie, who at this point of the appeal was representing the Stewards without counsel, for his input. Whilst Mr Powrie claimed that the interference was '*...probably one of the easiest cases you will ever see... The legal question is something that is probably outside of my bounds*'. Mr Powrie explained that the panel was made up of an uneven number of Stewards to avoid a casting vote situation and the approach normally was to try and maximise on the number of Stewards hearing objections to give the public the comfort of giving it being '*...a far better reflection of impartiality...*'

In response to Mr Percy QC's question of how many Stewards were on the panel, Mr Powrie answered:

*'...Stewards, but to think you could turn around and take the three title member of the panel and experienced Steward from Queensland in Mance and the newly appointed Bush, out of the panel and suggest that you could find three Stewards, and I would suggest that it would have to be three, that would hear any issue on the following Monday morning, when you consider that it would be not only Ascot or Belmont, but it could be anywhere, it could be Kojonup at the end of the day. It could be anywhere related to many, many issues. I would see as effectively, unlike Mr Percy suggesting a simple solution, I think it would be absolutely unworkable. But, if you were persuaded that there was merit in that, then I would suggest that this issue be adjourned 'til such time as the *Julien* determination is made.'*

Mr Powrie was not aware of the *Julien* matter but indicated from what he had just heard it may have national implications. Mr Powrie then referred to Local Rule 13 which reads:

'(b) If any Stipendiary Steward or Stewards shall act at any Meeting the opinion of such Steward or Stewards shall prevail in any matter arising at such Meeting and he or they with any other Stipendiary Stewards may hold or continue any inquiry relating to any matter arising at such meeting notwithstanding the absence of any Steward or Stewards appointed by the Committee of the Club.'

and indicated that he thought it meant:

'So whilst you can add... you can subtract some Stewards, I think for the purposes of adding them in, it certainly appears from that rule that at least one of the Stewards that presided must also be on the panel to deal with it. In this case that would mean one of the five persons would have to be involved in any inquiry. But I don't know if it has adjourned or it has reconvened. I am not really sure what the suggestion might be on that? I think if you ask Mr Percy he will tell you that it is all but unworkable.'

I eventually concluded that it was appropriate to adjourn the matter sine die. The Stewards were given liberty to relist it on the following basis:

*'... if they consider that the *Julien* matter, which is pending before the Full Court is not relevant to this present appeal. So Mr Powrie, you can bring this matter back at short notice if you consider that it is inappropriate to defer the present appeal awaiting the processing of the matter, the other matter in the Supreme Court.'*

Eventually, the Stewards did arrange for the appeal to come back on before me on 23 November 2000 despite the fact that *Julien* had not been decided in the meanwhile. At the reconvened hearing the Stewards were represented by Mr Davies QC.

Senior counsel for Mr Harvey continued with his submissions on the merits. He argues that there were 2 findings in the protest hearing. The key question in relation to the charge was whether the riding was careless and according to Mr Percy QC, the factual issues had already been determined. There was nothing further left to be determined. In view of the fact that it was in effect the same matter it was almost inevitably the same result he submits. As to the penalty this was the highest imposed for the last 6 months or more for careless riding. The range was 7 to 21 days in the absence of a fall or injury. The Stewards should have stated the range and then considered the riding mitigating factors.

In response Mr Davies QC argues the inquiry was a widening of the objection hearing in that the Stewards were required to make a judgmental decision as to the quality of Mr Harvey's riding. In the objection there were two component parts, the aspect of interference and whether the protesting horse would have finished ahead but for the interference. In view of the wording of the Rule, '*...in the opinion of the Stewards...*', the '*reasonable test*' applied to the matter. The

appellant can only rely on Mr Prior's decision in *Harvey* supra, which is a quaint decision, based on the particular semantics employed by the Stewards. According to Mr Davies QC the *Harvey* decision is not binding. Bias has not been alleged in ground 1. Contrary to what is alleged in ground 2 the Stewards did make a finding. As to ground 4 nothing found by the Stewards in the inquiry was contrary to their determination of the protest. As to penalty there are no mitigating factors and the potential dangers of the ride reflects the seriousness of the carelessness.

Although ground 2 was argued Mr Percy QC indicated at the end of the appeal that it was not being pursued.

DETERMINATION

This appeal raises, possibly for the first time, the need for the Tribunal to closely consider the functions of and role played by the Stewards in racing. The appeal not only involves an examination of the Stewards at the objection hearings and the subsequent inquiry on the one hand but also an overview of the involvement of the Stewards in the racing scene generally. I will start with the latter aspect.

Role of Stewards

Under its Constitution the Western Australian Turf Club has power to make by-laws regulating the due management and affairs of the Club concerning the lands vested in the Club, membership and the public. The by-laws specify the Stewards shall have such powers, privileges and duties as determined by the by-laws and the Rules of Racing (by-law 48). Under the Australian Rules of Racing acts done or decisions made by the Stewards in the exercise of their duties shall, except where otherwise provided, be final and conclusive (AR4). The Australian Rules, generally speaking, apply universally, whilst the Local Rules are different from state to state.

AR8 gives the Stewards very comprehensive powers in relation to activities at the racecourse. They are authorised to assist in the control of racing including conduct race meetings (AR8(a)), take possession of books and documentation relating to any meeting (AR8(b)), regulate and control, inquire into and adjudicate upon the conduct of all officials, licensed persons or persons attending a racecourse (AR 8(d)). Further, they are empowered to punish for improper

conduct or unseemly behaviour (AR8(d)), may determine all questions arising or objections made in reference to racing at a meeting (AR8(f)), disqualify horses entered for any race, carry out tests (AR8(jj)), order down and substitute riders (AR8(l)), prohibit horses starting in any race (AR8(m)), remove and replace officials (AR8(r)) and disqualify horses (AR8(t)). By-law 77 authorises the Stewards, amongst other things, to refuse admission or expel from any courses if there are reasonable grounds for believing a person's presence be undesirable, prejudicial, adverse or harmful to the proper conduct of racing. The Stewards may inquire into, adjudicate upon and deal with any matter in connection with any race meeting or racing incident (AR10). The Stewards shall determine whether horses have run on their merits (AR135). As earlier stated the Stewards determine if interference has been caused and whether the places should be changed (AR136). The Stewards may punish if they are of the opinion jockeys have ridden carelessly, improperly, incompetently or foully, or have failed to ride horses out to the end of the race. The Stewards may declare any race void (AR139 and LR7). The Stewards receive and adjudicate upon objections (AR161 onwards).

The authority of the Stewards is not confined to the direct supervision or management of actual race meetings and activities on course. It extends to much more than that. To enable them to in effect help 'run' the industry on a day by day basis other express powers are given to them by Rule 8 and elsewhere. For example, the Stewards may enter upon premises occupied or controlled by a licensed person to inspect and search, examine any horse, take possession of any horse and examine the premises and any articles and take possession of the articles (AR8B). The Stewards may punish for dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing and a whole range of other illegal conduct (AR175). The Stewards may inquire into a matter or incident in connection with any organised trial or training track (LR9). The Stewards have the power to determine all questions relating to the Totalisator (LR10).

The Stewards may impose severe penalties. Their power to punish is by disqualification, suspension or a fine up to \$75,000 or a combination of the first 2 and a fine (AR 196).

Under the Local Rules of Racing of The Western Australian Turf Club the Committee may from time to time appoint Stipendiary Stewards to act at

meetings including a Chairman and Deputy Chairman of Stewards (LR4A). AR9 specifies:

'A majority of the Stewards present at any meeting of the Stewards shall have all the powers hereby given to the Stewards, and a Deputy Steward shall be considered to be a Steward. If voting is equal a Chairman shall have a casting vote'.

It is clear from all of these identified provisions, as well as others, that the Stewards are given these very wide powers for very good purpose. Whilst the Committees of Principal Clubs do have '*the control and general supervision of racing within its territory*' (AR7) there is power to refer any matter to Stewards (AR 7(c)). The Stewards in effect run, administer, regulate, control and supervise racing in this State. Their functions are multifaceted, combining administrative, investigative, prosecutorial, adjudicative and punitive duties and responsibilities.

Many of these roles are clearly quite different from those of judges deciding cases in the courts of law. Even those Stewards' roles that do involve adjudication must be performed in a completely different environment and foreign context to other persons acting strictly judicially. Much of the Stewards' adjudication is done under time pressures involving participants who are very well known to them in circumstances where the Stewards often have their own first hand observation to rely on in relation to a matter, particularly in the case of a riding incident. The adjudication role is sometimes tested on appeal to this Tribunal where a decision must be made whether the Stewards have performed their duties not only specifically in accordance with the Rules, but generally subject to compliance with natural justice to the extent that the latter applies. As is stated by Anderson and Owen JJ in HARPER v RACING PENALTIES APPEAL TRIBUNAL OF WESTERN AUSTRALIA AND ANOTHER (1995) 12 WAR 337 at 349:

'As regards the extent to which a regulatory body such as the stewards of a racing club are required to accord natural justice to licensed persons, it has long been recognised by the courts in Australia and elsewhere that there may well be a need to modify or abrogate even quite elemental principles of natural justice to stamp out malpractice and to ensure the proper conduct and encouragement of racing...'.

During an objection Stewards receive a complaint and investigate the matter by obtaining relevant evidence. This is followed by an adjudication on the matter. At a particular point in time the Stewards must exercise their minds and determine

an outcome which will not only affect the parties but will have implications for the connections and the betting public. In the case of objections, Stewards must decide whether or not to uphold the objection and, if so, to determine the ultimate places in the race. These decisions must be made quickly between races.

In the course of their conducting inquiries the nature of the Stewards' proceedings change. The number and nature of the changes which occur in an inquiry is relatively quite dramatic. Initially during an inquiry (and often well before the inquiry) the Stewards take on a fact finding or investigation role. Often an initial part of the process has actually preceded the convening of the inquiry leading to a decision to conduct the inquiry. At some stage of the inquiry the point must be reached where the Stewards decide whether or not to lay a charge. At the point of a charge being laid the Stewards obviously must maintain an open mind as to guilt or innocence. They must remain neutral on the ultimate issue if a not guilty plea is entered pending the adjudication of the charge. Only upon the completion of the proceedings, after having gathered all of the evidence and having evaluated any defence or explanation can the Stewards decide the outcome of their complaint. After a guilty finding the Stewards must then impose a sentence. In other words in performing their inquiry roles those racing officials can be equated to investigators, complainants, prosecutors and adjudicators all in the one process. Subject to what might be decided in *Julien*, the same Stewards have always and are likely to continue to determine the outcome of a charge which they themselves have actually laid and in respect of which some or all of them may have given evidence in the inquiry. In this way Stewards' inquiry proceedings undergo a metamorphosis or chameleon-like change which is foreign to many other processes.

A number of useful observations can be drawn from an analysis of the inquiry process and a comparison with the judicial process. Clearly, horse racing officials do adjudicate on a licensed person's rights despite having participated or been privy to preliminary investigations, having convened an inquiry by calling on someone to attend the inquiry and having fully participated in the inquiry process thereafter. Most importantly they do adjudicate even though they have laid the charge and acted as witnesses in the inquiry. The fact that their roles are mixed does not in itself establish bias provided there is no personal hostility, pre-judgment or other anomaly evident. In the racing context historically there has not been anything inherently unjust in the inquisitorial mode of procedure which

places on the decision-maker (ie the Steward) the primary responsibility for fact gathering and presentation. Clearly some non-judicial decision-makers are not obliged to remain entirely aloof and independent. In this respect they do not have to emulate the judiciary's institutional arrangements for quarantining their judicial functions from any other work they perform.

I do accept the proposition Mr Powrie put forward regarding the impracticality of having other Stewards than those conducting the inquiry appointed to hear the matter. I readily appreciate how it would make matters '*unworkable*' and nothing has been said to contradict this point of view. Further, LR 13(b) (which is quoted earlier) clearly contemplates the Stewards who act at a meeting are the ones whose opinions prevail '*...in any matter arising at such meeting*' and those same Stewards '*...may hold or continue any inquiry relating to any matter arising at such meeting*'. This rule clearly contemplates the possibility of the same Stewards performing the multiple roles of deciding objections, conducting inquiries into the same incident and deciding any such inquiry.

Because the Stewards are the appointed experts in racing they bring to the industry and the affairs of the Club a great deal of knowledge and experience in the course of performing their wide variety of tasks. Stewards have built up a vast resource of racing industry know-how which they must apply to all their functions including their adjudications. Provided they maintain an open mind in relation to their functions up to the point of actually making the final determination as to guilt or innocence they behave properly. There must be a presumption of innocence at all stages until the completion of the hearing subsequent to the laying of the complaint and prior to adjourning to decide the question of guilt or innocence.

Conviction

There was nothing done procedurally in this inquiry to give any hint or suggestion of prior determination of the matter by the Stewards. The film was shown again, Stewards gave fresh evidence and the evidence given in the objection was not simply taken as read but was in fact subject to reconsideration and clarification. Mr Harvey was afforded all the usual opportunities to present his case as to the quality of his ride and to prove his innocence. Nothing at all suggests that there had been any predetermination of the careless riding charge.

Should any Stewards have any firm views about a particular relevant matter, such as what has occurred in a particular riding incident which they have observed, they should make those views known to those who eventually may be at risk during the course of an inquiry. This obligation to communicate these views enables the person potentially at risk the opportunity of taking on board that information, reacting to it and if necessary giving and calling evidence in relation to it. It becomes a value judgment on the part of the Stewards as to precisely how much information needs to be disclosed on each occasion.

But having said this it needs to be emphasised that Stewards' inquiries in the interest of well organised racing must not be fettered by technicalities, legal formalities or practices which are essential in a law court context but out of character in relation to the racing industry. The bias rule forbids prejudgment but its application varies to accommodate the widely varying circumstances in respect of which it applies. Whilst judges cannot approach a case with preconceptions peculiar to the case, the parties or their witnesses the extent or nature of Stewards' judicial detachment is quite different.

To test senior counsel for Mr Harvey's assertion that by the time of the inquiry the Stewards had '*pre-determined*' the matter one must look at the relevant Rules as well as the precise way in which the Stewards conducted both the objections and the inquiry. After comparing AR 136 (read with AR 165(1)) and AR 137(a) I am satisfied that the issues relevant to the objections' hearings were distinguishable from the ultimate question for determination in relation to the inquiry where the charge was laid and the conviction followed. The objections required decisions relating to the relationship and positioning of the horses in the race and whether, through the conduct of the offending animal or its rider, the protesting horses '*would have finished ahead*' of the other horse.

The fact that the Stewards had resolved the protests in favour of OUR EMMA and against PETITE ANGEL did not mean that they had closed their minds to Mr Harvey's obligations under the Rules in relation to the quality of his riding in the race. In view of the particulars of the charge, in order for the Stewards to have formed the opinion as to his ride, they had to determine different issues to the objection. In the inquiry the Stewards had to decide whether Mr Harvey rode carelessly by allowing his mount to shift in at the relevant time, and that this caused crowding and restraint to OUR EMMA which shifted into and impeded

SANTA RICA. There is nothing to suggest that the Stewards approached all stages of the inquiry with anything but open minds in deciding to convict Mr Harvey of riding below an acceptable standard. This is clear from the way the whole inquiry proceeded. It is highlighted by the question asked by the Chairman of Stewards to Mr Harvey immediately after Mr Harvey entered a plea of not guilty. Mr Powrie stated:

'Is there anything you wish to place before the Stewards, any evidence or witnesses at all or anything else you wish to place before the Stewards before we consider the charge itself? '

This was followed by a short answer from Mr Harvey regarding OUR EMMA's role in the incident after which Mr Powrie again queried '*All right, nothing else at all?*'.

This exchange does not support an argument that there was not a presumption of innocence at this stage. The overall test is whether the relevant circumstances are such as would give rise in the mind of a party or a fairminded and informed member of the public, to a reasonable apprehension or suspicion of a lack of impartiality on the part of the decision-makers. I do not believe it would. I agree with all of the submissions made by Mr Davies QC in relation to the conviction.

I do not accept the proposition put by Mr Percy QC at the beginning of the appeal that the test for an objection comes down to there being '*...interference... through the fault of another rider...*'. This ignores the need for the determination that the affected horse finished further behind than otherwise but for the interference. This issue is not one to be decided in a careless riding inquiry. The charge which was ultimately laid against Mr Harvey clearly involved some duplication in terms of factual elements. But there was a widening of the same inquiry which required a judgmental decision as to the quality of the riding and the role which Mr Harvey actually played or failed to play.

The grounds of appeal do not allege that there was a reasonable apprehension of bias. The argument for the appellant ignores the unique nature or role of the Stewards. That role is examined in R v BREWER; ex parte RENZELLA [1973] V.R. 375. That case clearly supports the conclusion I have reached. The Stewards in that case had not disqualified themselves from proceeding with an inquiry into the identity of a winning horse and exercising their powers in relation to the

charges by reason of having sworn affidavits in other court proceedings based on personal observations as to the horse's identity.

The decision in *Harvey* (Appeal 485) can be distinguished in view of the way in which the findings of the Stewards in that earlier case were expressed.

For these reasons I am satisfied the first ground of appeal should fail. There is no merit in grounds 2, 3 and 4. On the facts before them the Stewards were clearly entitled to form the opinion which they did. I agree with Mr Powrie's description of the ride, when he stated during the first part of the appeal the interference '*was probably one of the easiest cases you will ever see*'. If I had to decide the matter in the first instance I would have had no hesitation in convicting Mr Harvey based on viewing the video and reading the transcript.

Penalty

I am equally satisfied there is no merit in any of the grounds of appeal relating to penalty. The blatancy of the incident and the danger to the other riders involved is so clear from the video. I am satisfied none of the errors alleged in grounds 5 to 8 inclusive occurred.

The period of suspension appears to be appropriate compared to other offences. I agree with and adopt all of Mr Davies QC's submissions regarding penalty, not just those mentioned in passing earlier.

Outcome

For these reasons I dismiss the appeal both as to conviction and penalty.



DAN MOSENSEN, CHAIRPERSON

