DETERMINATION AND REASONS FOR DETERMINATION THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	PAUL JAMES HARVEY
APPLICATION NO:	A30/08/518
PANEL:	MR D MOSSENSON (CHAIRPERSON)
DATES OF HEARING:	23 NOVEMBER 2000, 4 & 7 DECEMBER 2000
DATES OF DETERMINATION:	4 & 7 DECEMBER 2000
DATE OF REASONS:	22 DECEMBER 2000

IN THE MATTER of an appeal by Mr PJ Harvey against the determination made by the Western Australian Turf Club Stewards on 17 November 2000 imposing a 22 day suspension for breach of Rule 137(a) of the Australian Rules of Racing.

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

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

Background

On the 11 November 2000 following the running of Race 5 at Ascot the Stewards inquired into a riding incident which occurred in the straight. Mr P Harvey, the rider of MR TANZANIA was called to the inquiry together with 2 other riders. After taking some evidence the matter was adjourned to the 13 November 2000. On 13 November 2000 further evidence was taken but the inquiry was not completed . It continued 4 days later when the Stewards came to the conclusion that Mr Harvey should be charged with a breach of the Australian Rules of

Racing. The charge was put to Mr Harvey, by Mr F Powrie the Chairman of Stipendiary Stewards, in these terms:

> *'... the Stewards believe you should be charged under Australian Rule of Racing 137(a) and that Rule states that:- "Any rider may be punished if in the opinion of the Stewards he is guilty of careless, incompetent or foul riding". Now the charge in terms of that Rule is with careless riding and the careless riding in the opinion of the Stewards is such that in the, Race 5 run at Ascot on the 11 November, 2000 in the Seppelt Moyston Handicap over 1500m when you rode MR TANZANIA that you allowed MR TANZANIA to shift out in the straight, whereby it has carried STORM SHOT outwards from approximately the 125m. STORM SHOT then having to be significantly restrained at, restrained at about the 75m. Now Mr Harvey do you understand the nature of that charge?'*

Mr Harvey pleaded not guilty. The Stewards adjourned to consider the matter of guilt or innocence which was eventually concluded with the following pronouncement:

> *... Mr Harvey the, the evidence that the Stewards previously considered has been relation (sic) to the laying of the charge. The Stewards' observations of that, of the film and indeed, the, the race itself are such that you have continued to use your whip on MR TANZANIA as it shifts. The whip use continuance from the time that STORM SHOT was carried out until after it had been restrained, you have portrayed the continuance of the whip usage as an endeavour to alleviate the shifting of MR TANZANIA. Stewards believe that MR TANZANIA commenced to shift from the 250m until, or until the, the winning post. The continuance of the whip as a straightener appears then not to have worked. You put it forward to the Stewards that you, it was an issue that you could utilise this to stop the horse shifting. You as a professional Jockey Mr Harvey, we would quite rightly believe have expected you could have tried and demonstrated to the Stewards something else from your vast array of skills. The, in reference to the significance of the restrain, Stewards are quite satisfied from the evidence and particularly Apprentice Sansom's evidence at page two paragraph two, where she said she was severely, "fairly severely restrained" actually got another one, and page five paragraph two, where she said she was "stopped in her tracks" and at page six paragraph four, where she makes reference to "pretty severe". Now on that evidence alone, the Stewards could quite simply form the opinion that this is a significant restrain, but quite simply the Stewards in considering the charge, believe that it is a restrain of some significance. Now you put forward the point with, with certain examples that you have been told by the Stewards, warned by the Stewards to ride your horses out to the end of the race Mr Harvey. Now whilst the Stewards accept the evidence as put forward of those inquiries as mentioned, resulted in you being told to ride your mounts out to the end of the race, Stewards are conscious of the provisions of Australian Rule of Racing 137(b) which states that:- "A rider. Any rider may be punished if, in the opinion of the Stewards, (b) he fails to ride his mount out to the end of the race. A race sorry." Whilst that Rule is in place, the, the Rule of 137(a) is also in place which is one of careless riding and the Stewards look to the Tribunal in the case of Patrick Carbery on the*

horse JUST TOD in Appeal Number 362 and the then Chairman Mr Mossenson said in his Determination, "It is clear in my mind that the obligation imposed on Jockeys by this Rule..." and the Rule I refer to is the 135(b) the permissible measures Rules that was the case of issue with the case put forward by Appellant's Counsel, this Rule, "... to seek to achieve the best results in races is qualified by the obligation to ensure that all riding measures taken are both reasonable permissible. Now clearly riders are not given carte blanche under the Rules to ride in whatever fashion they consider will give them the best prospect in a race irrespective of the adverse consequences to others. The consequences of the incident in question clearly were adverse and unfair to Mr Harvey (yourself). No doubt it is these unhappy consequences which explain why the Stewards were justified in upholding the protest. Those same consequences are relevant to the ultimate conviction of Mr Carbery for breaching the Rules, despite the fact that he clearly was riding to win". That from that Mr Harvey the Stewards, although it is an issue of Australian Rule of Racing 135(b) which is reference to all riders taking reasonable and permissible measures to obtain the best possible place, the Stewards see that the statement from the then Chairman Mr Mossenson, that Mr Carbery for breaching the Rules despite the fact that he clearly was riding to win. You made reference in your submission about the fact that you had punters and you had persons to look after from the point of view of riding your horse out to the end and so forth and quite simply in terms of, if I can plagiarise the words of Mr Mossenson, clearly riders are not given carte blanche under the Rules to ride in whatever fashion they consider will give them the best prospect in a race irrespective of the adverse consequences to others. Now in saying that Mr Harvey, Stewards don't accept that under these circumstances and the issues of this Inquiry, the continuance of the riding of the horse MR TANZANIA out in the straight when it was shifting ground, thereby interfering with STORM SHOT or others, was acceptable to the Stewards and as such we find you guilty of the charge. Now Mr Harvey before we consider the charge, is there anything you wish to place before us?'

Some further information was presented and a film was shown to the Stewards. In dealing with the penalty the Stewards then made the following statement:

'Mr Harvey the Stewards have considered the issue related to penalty and the provisions of 196. Now in relation to that the Stewards believe that although you didn't purposely take MR TANZANIA out that the distance shifted by the horse is great and that while the horse might have predisposed to shifting himself, that the essence of the charge is such that you didn't demonstrate to the Stewards that you made any other effort to straighten the horse. As such, that whilst it, the movement purposely out, outward of an improving nature or your example of the rider from a wide barrier cutting across quickly, isn't the same as this scenario. Quite simply the degree and the margin of the difference in which MR TANZANIA shifted ground, the Stewards believe that it has gone on for some considerable time and as such, we believe the degree of carelessness is of some significance for the simple reason is this, is that the obligation in the opinion of the Stewards remains with the rider to straighten his mount before he causes interference. Now the issue of RACING MACHINE being a like set of circumstances, that there are certain other and different elements that were obviously taken into consideration by the then Stewards. The issuing of a reprimand is such that the Stewards obviously saw that you were guilty of certainly some actions

that were outside the bounds of the Rules and quite simply, without regurgitating the, the process of that particular set of circumstances an Inquiry which predisposed to the horse being significantly sore and spelled for a substantial time, that a reprimand was issued on that occasion and I suppose realistically it might even be suggested, without regurgitating as I say, that you might have even been lucky on that occasion to be issued only with a reprimand. The Stewards are fully aware of the pending Carnival and indeed, the lead-up races and the impact of that on anyone rider and particularly on a rider of your status and nature from the point of view of the, the type of races that you quite realistically attract rides in. The Stewards don't agree with you when you use the word minimal in reference to this particular degree of severity of interference and indeed, Apprentice Sansom at page, on page five, makes reference to the fact that she was "stopped in her tracks" and has said herself in her opinion and she was on top of the horse, that she thought that she "might have gone pretty close", her words talking about winning the race. So I mean, we're not talking about something that is minimal here, realistically a horse did not fall or she did not fall off, but quite simply it was still of some significance. We don't agree at all with you that it was minimal. The Stewards have looked at your record and your record shows that at the end of September last year you were suspended for 21 days for careless riding, in February of this year you were suspended for 17 days for careless riding, a reprimand was issued in March of this year, you were suspended for 15 days in June of this year and you were reprimanded on the 8 August this year. Currently in front of the Tribunal is an issue of 23 days suspension, which was incurred on the 9 September, 2000. The Stewards for the record Mr Harvey, would not take that into consideration because it is subject to Appeal. So I say that by way of advising you that we haven't made a misjudgment by taking that into consideration, but I put it on the record that I say that. As such considering your record and taking into consideration the elements of, that I've mentioned of RACING MACHINE, the lead-up Carnival issues and the, the races that are on the way up and indeed, the degree of carelessness and the degree of severity of interference, the Stewards ...believe that an appropriate penalty is 22 days suspension from riding in races and such suspension will commence at midnight the 18 November until midnight the 10 December, 2000. And such penalty would stand in isolation of any other penalty Mr Harvey.'

Mr Harvey has appealed both the conviction and penalty. The appeal proceeded with the following amended grounds:

'A. CONVICTION

1. The Stewards erred in finding the Appellant Guilty of a charge of careless riding rather than imposing a reprimand.

Particulars

(a) The practice of the Stewards has been to deal with cases such as the present one by way of a reprimand without proceeding to the laying of a formal charge.

(b) Reprimands have regularly been imposed even in cases where the rule in question (137(a)) has been breached.

See: Arnold: 11 November 2000.

(c) *The unusual and mitigating factors in the present case were such as to put the matter into the category where a reprimand would have been appropriate. These included:*

(i) *The unintentional nature of the shift and the undisputedly wayward nature of the horse in question; (pp 15-18, 50).*

(ii) *The unexplained nature of the sudden movement outwards; (p5).*

(iii) *The fact that neither the interference or its consequences was severe; cp,Knuckey (Appeal 393) and Carberry (362) and Harvey (485) all of which involved serious falls and injuries.*

(iv) *The fact that the case involved a lack of sufficient remedial action rather than none at all; (pp 18, 50).*

(v) *The Appellant was under strict recent directions from the Stewards to ride his mounts out to the finish line;*

Is it Silver (9 September 2000)
Siledes (1 November 2000)
Insurrectionist (7 November 2000)

2. *The public interest is in a consistency of approach by the Stewards. The present case involved a departure from the usual practice of the Stewards to deal with similar matters by way of reprimand rather than by a charge where there may be reasons to explain the breach of the rule in questions. (sic)*

Particulars

(a) *The case of Arnold was never sought to be distinguished by the Stewards when raised by the Applicant (p 49) and was ignored by them in their reasons for determination; (p 52).*

(b) *Whilst the case of Racing Machine was distinguished by the Stewards on grounds of soreness of the horse the Stewards specifically ignored the decision in Arnold (decided the same day) despite it being specifically in point and relied on by the Applicant.*

(c) *Unless the failure to stop riding is gross, deliberate and unmitigated by any factor pertaining to the horse the appropriate disposition is by way of reprimand.*

(d) *The riding in the present case was (on the Stewards' findings):*

(i) *not deliberate,*

(ii) *caused by the horse itself to some extent, and*

(iii) *the subject of an attempt to remedy the situation by the Appellant.*

(e) *Whilst there was nothing to stop the Stewards laying a charge as in their opinion the rule had been breached, a consistency of approach would have seen the matter dealt with by way of a reprimand.*

2A. *The conviction of the Appellant should be set aside on the grounds of:*

(a) *Bias; and*

(b) *Failure to afford the Appellant Procedural Fairness.*

Particulars

(i) *The Stewards erred in entertaining a communication from a party to the matter, namely a part-owner of the horse STORM SHOT.*

(ii) *The interference to STORM SHOT was a central issue for the determination of the Stewards at the Inquiry.*

(iii) *The letter, insofar as it related to the galloper MR TANZANIA concerned a central issue for the determination of the Stewards.*

(iv) *The Stewards erred in not disclosing to the Appellant the existence of the letter and its contents.*

(v) *The Stewards accordingly failed to accord to the Appellant the necessary degree of Procedural Fairness in their hearing of the charge.*

(vi) *Irrespective of whether the Stewards were influenced by the contents of the letter or not, the Appellant has a reasonable apprehension that the Stewards may not have acted with complete impartiality.*

2B. *The Appellant has a further apprehension that the Stewards may not have acted with complete impartiality on the basis that the undisclosed communication to the Stewards was sent by a Mr Kim Sears, who owns the horse STORM SHOT in partnership with a Mr Lex Piper, a committeeman of The Western Australian Turf Club, which committee is effectively the employer of the Stewards.*

B. *PENALTY*

3. *The penalty imposed by the Stewards was outside a broad discretionary range for offences of its type and manifestly excessive in all the circumstances of the case.*

Particulars

(a) *The case was one toward the lower end of the scale.*

(b) *The Stewards erred in confusing the concept of severe interference with a severe case of careless riding.*

(c) *The Stewards erred in failing to give any or any adequate weight to the unusual, and mitigating features of the case set out in Ground 1(c) above.*

(d) *Absent some serious aggravating feature (eg a fall) the range of penalties was between seven to 21 days:*

Knuckey 393 and Harvey 485

4, *The penalty was vitiated by the inadequate and erroneous approach to the sentencing process adopted by the Stewards.*

Particulars

(a) *The Stewards failed to fix a "starting point" for the offence in terms of its perceived seriousness.*

(b) *The Stewards failed to indicate what discounts were appropriate for the undisputed mitigating features of the case.*

See Parsons (1992) 66 A Crim R 550 as applied in Sestich (App 469)

5. *The sentencing exercise should accordingly be re-exercised by this Tribunal."*

Appeal Grounds 2A and 2B

Only grounds 2A and 2B were argued when the appeal came on before me on 23 November 2000. At the conclusion of the arguments the proceedings were adjourned. I reserved in relation to grounds 2A and 2B

on the understanding that a decision would be handed down before the effluxion of time in Mr Harvey's then other current matter before the Tribunal, namely Appeal 512.

At the outset of the November appeal proceedings Mr Percy QC raises the question of a particular letter that may have come to Mr Powrie's notice prior to the completion of the Steward's inquiry into Mr Harvey's riding on 11 November 2000. It is argued the appellant was entitled to see the letter and to have clarified the role it played with the Stewards before proceeding to deal with the appeal. Grave concerns are expressed on behalf of Mr Harvey that the letter addressed a central issue relating to the behaviour of the horse which Mr Harvey had ridden in the race. Mr Percy QC relies on the authority of *Freedman v Petty & Others and Greyhound Racing Control Board* [1981] V.R. 1001 which is a case involving a hearing of the Greyhound Racing Control Board. That hearing resulted in a bettor being held to be in breach of the Rules and warned off. At the time of the hearing, unknown to the plaintiff, the Board had in its possession a letter and the transcript of earlier Board proceedings. That case relied on the authority of *Kanda v. Government of Malaya* [1962] A.C. 322. where Lord Denning, in delivering the judgment of the Privy Council, said at p.337:

> *'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.... It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not inquire whether the evidence or representation did work to his prejudice. Sufficient that they might do so.'*

In the *Freedman* case questions were put to the plaintiff by the Board's Chairman *'...but he did not know that the Board's mind might be affected by the actual information or what it was'*. The facts and circumstances of the present case, as I will explain shortly, are somewhat different from the *Freedman* case.

Mr Percy QC also relies on *Re Renaud; Ex parte C.J.L.* [1986] 60 ALJR 528 where a court counsellor made representation to a judge privately in a family law case. This was held to be undesirable and inappropriate. Gibbs C.J. said at p.529:

> *'The principle, which forbids a judge to receive representations in private, is not confined to representations made by a party or the legal adviser or*

witness of a party. It is equally true that a judge should not, in the absence of the parties or their legal representatives, allow any person to communicate to him or her any views or opinions concerning a case which he or she is hearing, with a view to influencing the conduct of the case. Indeed, an interference with a judge, by private communication or otherwise, for the purpose of influencing his or her decision in a case is a serious contempt of court: see Halsbury's Laws of England, 4th ed., vol. 9, par. 28 and cases there cited.'

Mason J. at p.531 of that case states:

'It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide.'

At p.532 His Honour goes on to say:

'In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established": Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group (1969) 122 C.L.R. 546 at 553-554; Watson at 262; Re Lusink: Ex parte Shaw (1980) 55 A.L.J.R. 12 at 14; 32 A.L.R. 47 at 50-51. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.'

Then at p.533 he states:

'But the critical question is whether in all the circumstances the parties or the public would reasonably apprehend that the judge would not bring an impartial and unprejudiced mind to a hearing and determination of the custody proceedings between the parties of the child. Or to put it another way, the question is whether the principle that justice must be seen to be done requires that the judge be disqualified.'

In that case a crucial question was whether a fair minded observer would naturally and rationally conclude the counsellor standing as an officer of the Court would ensure that her opinion would carry weight with the judge (p.534).

'The principle of law governing this matter is not in doubt. It is that a judge should not sit to hear a case if, in all the circumstances, the parties or the public might entertain a reasonable apprehension that he or she might not bring an impartial and unprejudiced mind to the resolution of the question involved in it: Reg. v. Watson; Ex parte Armstrong (1976) 136 C.L.R. 248 at 258-263; Liversey v. New South Wales Bar Association (1983) 151 C.L.R. 288 at 293-294. It has been recognised that in a case

such as the present, where there is no allegation of actual bias, the test of reasonable suspicion may be a difficult one to apply involving questions of degree and particular circumstances which may strike different minds in different ways: Re Shaw; Ex parte Shaw (1980) 44 A.L.J.R. 12 at 16; 32 A.L.R. 47 at 54' Livesey at 294.' (at p.535).

These arguments for Mr Harvey led to a copy of a letter being produced by senior counsel on behalf of the Stewards. The contents of the letter need to be stated in full.

22 Ken Street
Wembley Downs
15.4.00

Mr P Neck
Chief Executive Officer
WATC
Perth

Dear Sir,

I am writing to you in my capacity as Managing Part Owner of Racehorses "Bleuvo" and "Storm Shot" both of whom are down to start in the Group II WA Guineas on Sat. 18 November, one of which, 'STORM SHOT' suffered severe interference in the SEPPELT MOYSTON HANDICAP, when "MR TANZANIA" moved out some 15m under pressure in the final 250 metres of the race.

In our considered opinion, the opinion of the Jockey, the Trainer and others considered knowledgeable our horse would have won the race had the interference not occurred – it was very costly as it was also a Sunspeed bonus race for which we were eligible, not to mention the extra value it would have placed on the horse as it was a "star-studded" field of 3 year olds.

There is an inquiry pending which has been put on hold until the jockey – Paul Harvey has received legal advice. It was reported in Tuesday's West Australian that the inquiry may resume on Friday 16 Nov.

Be that as it may, our concern is this:-

In the paper it was also reported that the Stewards had examined the horse and could find nothing wrong. Mr Lou Luciani stated that the horse was sound in its action and perhaps it should be put down to it's mental immaturity which has caused it in his words "to hang out badly".

In any event we now find that "Mr Tanzania" has been nominated and the nomination accepted for the WA Guineas this week. There would appear to have been no remedial action recommended and the horse has not been ordered back to trails which would often be the case.

A study of "Mr Tanzania's" recent history would also show that he caused considerable trouble preparatory to the running of the "Paul

Murray" Handicap at his previous start when he refused to enter the barriers.

A similar situation occurred this Saturday just gone when "Madam Gunda" a horse having his 1st start was tardy in going into the barriers although not delaying the race. She was ordered back to trials – we are not connected to that horse and understand the Stewards decision.

Either way and if we accept Mr Luciani's explanation, the horse has problems and nothing is being done to rectify them – "Mr Tanzania" appears to be an "on pace runner" and there is every likelihood that the same situation could reoccur in the WA Guineas.

We are extremely concerned that this horse has the capacity to "wreak havoc" in the Guineas, ruin a lot of the runner's chances and perhaps cause injury.

If Paul Harvey, our most senior rider and a right handed whip rider cannot control him it would seem highly unlikely that any other jockey could.

The Committee of the W.A.T.C. should be advised that if either of our horses suffer either injury or loss of stake earnings because of interference suffered as a result of "Mr Tanzania' being allowed to run and causing such interference we will seriously look at legal action against those parties considered to be negligent.

In closing I would mention that during our period of involvement in racing we have had a number of horses "stood down" or ordered back to trials and in most cases have appreciated the reasons.

Their (sic) are a number of owners and trainers who would probably agree with out thoughts however would be reluctant to come forward because of fear of reprisal. The way we see it is that unless racing is fair for all there is no point in staying in it and we should be able to express our thoughts without that fear being instilled.

Yours sincerely
Kim SEARS'

The oddity of the date of the letter, preceding as it does by 7 months the actual date of the incident, was never addressed.

Following production of the letter and a short adjournment Mr Powrie gave evidence before me and he was cross examined. During the course of his testimony he explains how the letter came to be placed on his desk. A copy was left by Mr Neck, the Chief Executive Officer of the Turf Club, with an endorsement requesting Mr Powrie to respond to it urgently. It is Mr Powrie's responsibility as Chairman of Stewards to deal with the barring of horses. Because of the timing it was necessary for Mr Powrie to take action to deal with

the letter straightaway. At the time of dealing with the letter the Stewards' inquiry into Mr Harvey's riding which led to this appeal was still part heard. Mr Powrie gives evidence he was not influenced in his handling of the Harvey inquiry by the comments in the letter. Those comments did not affect the Stewards' decision. Further, the only other Steward to whom he mentioned the letter was Mr Bush. This took place prior to the setting up for Mr Harvey's inquiry to continue on 17 November 2000.

It is argued by Mr Davies QC that the central issue to the charge laid against Mr Harvey was as to the nature of the rider's attempts to straighten up the horse. Accordingly the letter had nothing of significance or relevance to add to the inquiry. Senior counsel also relies on the fact that racing is a regulated industry in which the Stewards play a multifaceted role. The inquiry could not be said to be flawed as a consequence.

After careful consideration of the matter during the adjournment which followed the completion of the evidence and submissions in relation to grounds 2A and 2B, I was satisfied that there was no merit in grounds 2A and 2B. I advised the parties of this conclusion on the resumption of the appeal on 4 December 2000. I now publish my reasons for this conclusion.

Appeal Grounds 2A and 2B Reasons

The role of Stewards in racing is significantly different from that of a judge in a court of law. In my reasons recently published in *Harvey* (Appeal 512) I go into some reasonable detail to describe the multifaceted role played by Stewards, how Stewards are different from judges in courts of law and how the rules of natural justice are modified to ensure propriety in racing. I adopt and rely on those comments in these reasons but see no point in repeating them here.

Stewards' functions, in part, are more akin to the role played in disciplinary proceedings referred in *R v Coburn; Ex parte Fomin* (1981) 9 NTR 1 rather than to ordinary judicial officers. The respondent in *R v Coburn* was a senior public service officer presiding over disciplinary charges laid against a prison officer following an escape from the prison. The respondent inspected the prison before the hearing commenced, but after his appointment to head the inquiry. That inspection was in the defendant's absence, but in the presence of the officer who had laid the charges. Muirhead J. held that nothing improper had been done. His

Honour was influenced by provisions freeing the inquiry officer of any obligation to hold a formal hearing, requiring the officer to *'act without undue delay'* and by the provision of a full court-style appeal from any decision adverse to the applicant. This decision is obviously more relevant to the issues in the appeal than *Re Renaud; Ex parte C.J.L.* (supra).

In the course of undertaking his very wide functions the Chairman of the Stipendiary Stewards, and indeed all of the other Stewards of any turf club, would be privy to an extensive range of information which to a greater or lesser degree may possibly have some bearing on any inquiry before them. If the information were material to the proceedings to the extent that it could influence the outcome then it would obviously be incumbent on the Steward armed with the relevant material to disclose the position to the party against whom a charge was ultimately laid. This obligation is to ensure that the party at risk is given proper opportunity to respond to it.

In this present case I am satisfied that the contents of the letter are not material to the charge. Looked at objectively I cannot see how the letter could be said to have in any way influenced the laying of the charge and the ultimate conviction. Because of the nature of the contents of the letter and the surrounding circumstances I am more than satisfied from Mr Powrie's evidence that the letter in fact did not influence Mr Powrie's thinking in relation to the proceedings he was chairing involving Mr Harvey's ride on 11 November 2000. Further it was highly unlikely to do so in view of its peripheral relevance, the motives behind the letter, who the author of it was, the factual matters in substance addressed in the letter and Mr Powrie's wide experience and knowledge of racing. The transcript of the inquiry contains nothing to suggest Mr Powrie and his fellow Stewards maintained anything but open minds until the end. Nothing was identified by senior counsel for Mr Harvey in the transcript or elsewhere to suggest the Stewards had in any way predetermined the matter.

One could be forgiven for thinking that some aspects of the contents in the letter had the potential to be turned to advantage to support the position of Mr Harvey. Arguably the letter supports the propositions that MR TANZANIA was a wayward beast which caused or contributed to the problem which occurred in Race 5 and that the incident did not occur through fault on behalf of the jockey. These propositions are arguably supportive of some of the grounds of appeal,

namely grounds 1(c)(i) and (ii) and 2(d)(ii). After all it is alleged in the letter *'...MR TANZANIA moved out some 15m...'*, the horse has caused problems before, *'... the horse has the capacity to wreak havoc in the Guineas, ruin a lot of runner's chances and perhaps cause injury.'* and *'If Paul Harvey, our most senior rider ... cannot control him it would seem highly unlikely any other jockey could'*. Unlike the *Freedman* case (supra) there was no issue of credibility involved. The Stewards had observed Mr Harvey's ride live as well as on video and they were not confronted with the type of factual issues which were needed to be resolved in the *Freedman* case.

Taking the most legalistic and technical view it could possibly be said that to be on the safe side the letter should have been presented by Mr Powrie to Mr Harvey during the inquiry at some stage prior to laying of the charge. That way Mr Harvey could have been expressly invited to or could have taken the opportunity to comment on it. However, I fail to see how any comment, at any stage of the inquiry, addressing the particular allegations contained in the letter would have been helpful to Mr Harvey's cause. I do not believe it could have placed a different complexion on the incident and would have in any material way influenced the outcome of the Stewards' deliberations.

It has not been demonstrated that in all of the circumstances Mr Harvey or the public might entertain a reasonable apprehension that anything but impartial and unprejudiced minds had been bought to the resolution of the question involved in the inquiry. This is a different case to one where a judge may have received representations in private or communications of views or opinions concerning the court case the subject of a hearing with a view to influencing the conduct of the proceedings. Nothing contained in the letter seeks to influence the outcome of the matter before the Stewards. Rather the letter clearly was written for a different and an unrelated purpose which would not impact adversely on the inquiry involving Mr Harvey. This is despite the fact that it happens to involve the horse which Mr Harvey rode, Mr Harvey is referred to in the letter and some of the facts of that ride are also referred to in the correspondence. I am satisfied the contents are irrelevant or neutral. They have in no way tainted the process nor could they reasonably be perceived as potentially having done so. This again distinguishes the *Freedman* case (supra).

The capacity of Stewards to conduct inquiries and to fulfil racing duties generally would become seriously inhibited if their role were perceived to be tainted

whenever information, however tenuous and peripheral to the substance of their inquiry, came to their notice. Equally, if Stewards were required to disclose each and every fact and circumstance bearing on a matter before them, whether by virtue of an association or relationship to the parties in the course of their normal duties, or as a consequence of a particular incident, it would greatly lengthen and complicate racing inquiries. The capacity of the Stewards to carry out their essential roles under the Rules would be seriously inhibited. In an appropriate case there would be the obligation on Stewards to disclose information, to give a party charged with an offence the opportunity to know what was in the minds of the Stewards and to allow reaction to that material fully. It becomes a question of judgment in each case, as matters of fact and degree, depending on all of the surrounding circumstances. Those circumstances would include the type of inquiry, the charge, the nature and relevance of the information in the hands of the Stewards and the potential for that material to influence the Stewards.

I cannot see how the information in this case would or could have worked to Mr Harvey's prejudice. If the Stewards had to disclose to those called before them during an inquiry all of the background knowledge and experience and all bases upon which they had drawn or were drawing conclusions from their observations of a race or from any material which was presented to them the hearing process would become cumbersome to the point of being quite unworkable. The same unsatisfactory result would occur in relation to information coming to them in connection with carrying out unrelated functions if it coincidently and peripherally referred to the party the subject of the inquiry. Clearly if a material fact or crucial piece of evidence is known to the Stewards which is peculiar to the case before them and which has the potential on its own to affect the outcome of their deliberations, then that material fact or crucial evidence should be disclosed. On the other hand matters which are commonly known in racing, information in the public domain or material which can be regarded as an accepted fact without any debate, would not need to be declared or disclosed. It is difficult to provide any comprehensive formula in this regard. One must leave it to the good judgment of those experienced in the industry to objectively assess each situation and to reasonably determine what material is or is not appropriate to be disclosed in each separate case. In so deciding it would be necessary for the Stewards to consider the nature of the proceedings in question, the role and experience of the parties appearing before them, the circumstances which had lead to the inquiry, the importance of the proceedings and the other surrounding relevant

circumstances of each individual case. Should the material fact or crucial piece of evidence not be disclosed, even if known to only one Steward, it could have the effect of tainting an inquiry. This could occur even if the other Stewards were not in fact influenced by it. This highlights the importance for all Stewards to tread carefully in this regard and to reflect on the implications.

For these reasons I was satisfied there is no basis to set aside the conviction. There clearly was no bias. Mr Harvey was not denied procedural fairness. There was no error in not disclosing the 15 April 2000 letter. The assertions in ground 2B as to a lack of partiality are baseless.

4 December 2000 Stay Hearing

This appeal came back before me on 4 December 2000 for submissions to be made in support of an application for suspension of operation of Mr Harvey's penalty. Before submissions began I announced that I had concluded there was no merit in appeal grounds 2A and 2B. Argument from both sides then ensued regarding the stay. This ultimately led me to conclude the fairest approach, in view of the unusual circumstances, was to make an order suspending the operation of the penalty until 5.15pm on 7 December 2000 and at the same time to list the appeal to continue at that time on that date.

7 December 2000 Hearing

Grounds 1 and 2

I was not persuaded by anything put to me on the final day of the hearing that the Stewards were in error in convicting for careless riding as distinct from imposing a reprimand. The matter was entirely a discretionary one for the Stewards. In view of the seriousness of the incident, the distance MR TANZANIA travelled outwards, the nature of the interference and risk to STORM SHOT and its rider, I was not convinced the Stewards were in error. From viewing the video it looked to me as though Mr Harvey failed to take any measures to address the movement out. At all relevant times he appeared to ride like mad, in his efforts to win, without concern for the safety of others.

I carefully considered all of the factors identified in the particulars to grounds 1 and 2 and raised by senior counsel. I was not persuaded of the merit of any of them.

The Stewards clearly were entitled to form the opinion that Mr Harvey should initially be charged and then, after full inquiry, be convicted of the charge.

For these reasons I dismissed grounds 1 and 2.

Grounds 3, 4 and 5

I was not persuaded by any of the arguments raised on the issue of penalty. The Stewards were not shown to have fallen into any error. I agreed with and adopted Mr Davies QC's propositions in relation to penalty. These included the proposition that *'the ride throws consideration for others out the window'*. I was satisfied the horse's movement outwards was dramatic. Further, it went unchecked over a long distance in what appeared to me, from the video, to be a single minded endeavour of Mr Harvey to win at all cost.

Outcome

Accordingly I dismissed the appeal as to conviction and penalty at the 7 December hearing. But that ruling did not end matters. I was immediately invited to rule on the application of the penalty in the light of the Steward's wording of the sentence and the contemporaneous suspension of Mr Harvey in his Appeal 512. As quoted earlier, at the conclusion of their proceedings, when announcing the penalty, Mr Powrie stated:

> *'...an appropriate penalty... is 22 days suspension from riding in races and such suspension will commence at midnight the 18th of November until midnight the 10th of December, 2000. And such penalty would stand in isolation of any other penalty Mr Harvey.'*

I was told that the Stewards intended that this penalty would be in addition to the penalty in Mr Harvey's other matter, dealt with in Appeal 512. Mr Davies QC argued that was the effect of the statement that the 22 days suspension was to *'stand in isolation'*.

Unfortunately the pronouncement regarding penalty was ambiguous. The Stewards did not make their position clear that they intended, for the two offences combined that Mr Harvey was to serve 45 days out of racing irrespective of the coincidence of the timing of the 2 suspensions. Usually it can be a help to clarify the penalty period involved if the start date and end date are both quoted. On this occasion the position was confusing. Shortly before stating what the *'appropriate*

penalty' was Mr Powrie had referred to and listed Mr Harvey's record. As quoted much earlier he stated:

> *'Currently in front of the Tribunal is an issue of 23 days suspension, which was incurred on the 9th of September, 2000. The Stewards for the record Mr. Harvey, would not take that into consideration because it is subject to Appeal. So I say that by way of advising you that we haven't made a misjudgment by taking that into consideration, but I put it on the record that I say that.'*

By stating that they were not taking the 23 days into consideration it made it difficult to accept the argument that the first period of suspension should be added to the second. It was to be quite independent of the other one.

In the end I was satisfied that Mr Harvey should have the benefit of any doubt arising out of the ambiguity and that the 2 penalties should be served concurrently and not cumulatively. I was persuaded by the argument that there needs to be specific articulation by the Stewards for 2 separate penalties to run cumulatively. The 22 days run from the date specified by the Stewards, namely 18 November. Subject to the amount of time this penalty was stayed, the 22 days continue until their effluxion.

I therefore ruled that the 22 days in respect of the offence dealt with in Appeal 518 were unaffected by the other penalty involved in Appeal 512.

After making that ruling Mr Percy QC sought a suspension of operation of the penalty on the basis that he was instructed to take the matter further to the Supreme Court. I was satisfied in all of the circumstances it was inappropriate to grant it in the light of the Tribunal's Practice Direction No 1. Further, I was satisfied at that stage of the process it was beyond power. S17 of the Racing Penalties (Appeals) Act 1990 sets out the power to grant a stay. It may only be granted *'upon, or prior to, hearing of an appeal…'*. Accordingly the stay application was refused.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of N.S.W.

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