APPEAL NO. 801

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT:	**MR MORGAN LEE WOODLEY**
APPLICATION NO:	**A30/08/801**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)**
DATE OF HEARINGS:	**20 JULY 2017**
DATE OF DETERMINATION:	**25 JULY 2017**

IN THE MATTER OF an appeal by MORGAN LEE WOODLEY against the determination made by Racing and Wagering Western Australia Stewards of Harness Racing on 30 June 2017, imposing a suspension of four weeks for breach of Rule 163(2) of the Racing and Wagering Western Australia Rules of Harness Racing.

Mr M L Woodley represented himself.

Mr D Borovica appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

INTRODUCTION

1 This is an appeal against conviction and penalty.

2 The Appellant was the driver of THE WAR NURSE, which ran in the Owners Only Westbred 2YO Fillies Pace (Group 1) over 2130 metres at Gloucester Park on 30 June 2017. THE WAR NURSE finished second.

3 Prior to the all-clear, the Stewards began an inquiry and questioned Mr Woodley on the drive. As a result of that part of the inquiry, the horse was disqualified. The reason was given at page 6 of the Transcript of the hearing ("T1"). The Stewards said:

> *"Stewards are of the opinion that it has gained an unfair advantage by racing inside marker pegs. We are going to disqualify THE WAR NURSE from its second placing in Race 3. And we still have a protest to deal with, so it will be disqualified and we'll need to speak to you later Mr Woodley".*

4 At the outset it should be stated that going inside the marker pegs was an evasive action taken by Mr Woodley, with no intent on his part to gain the advantage which he did. It was a movement carried out for safety reasons, namely to avoid an incident occurring or about to occur on his immediate outside. The Stewards pointed that out on a number of occasions during the inquiry. The Stewards' inquiry concerned what did or did not happen after going inside the pegs.

5 At the conclusion of the meeting on that same night, the Stewards resumed the inquiry. The focus of the inquiry at this stage was Mr Woodley's drive, not the question of the unfair advantage. Ultimately, Mr Woodley was charged with an offence against Rule 163(2) of the Rules of Harness Racing. The Rule is in the following terms:

> *"If a driver's horse or sulky shifts inside the line of marker posts, the driver shall restrain the horse and without interference to another runner, regain a position in the true running line at the first opportunity."*

6 The particulars were given at T11. The Stewards said:

> *"The particulars of the charge are that you, Morgan Woodley, as the driver of THE WAR NURSE in Race 3 at Gloucester Park on the 30th of June 2017, once found yourself inside marker pegs, you failed to restrain THE WAR NURSE and take up a position in the true running line."*

7 Mr Woodley pleaded not guilty, but he was convicted. He was suspended for 4 weeks, and the penalty was deferred for 5 days. The Stewards applied the Group Racing and Deferment Penalty Policy in arriving at the penalty and in granting the deferment.

THE GROUNDS OF APPEAL

8 The Grounds of appeal relate to both conviction and penalty. They are numbered here for ease of reference:

1. The stewards erred in not believing the reason for the one tap of the whip on the horse
2. The Stewards erred in their interpretation of whether I have met the obligation to restrain the horse
3. The stewards erred in using previous cases penalties that had little relationship to the cause of my particular circumstances in the race.
4. The Stewards erred in not giving sufficient weight to the monetary penalty suffered
5. The Stewards erred in applying the GROUP RACING AND DEFERRMENT (sic) PENALTY POLICY without any regard to its intent and the circumstances of my case
6. The Stewards erred in not ensuring I was fit to proceed to answer the eventual charge after many inquiry adjournments throughout the night, finishing approximately 11:15pm
7. Notwithstanding that an individual ground may not be sufficient grounds for a substantial miscarriage, the combination of errors does lead to a miscarriage and penalty which is manifestly excessive

9 Ground 1 and 2 relate to conviction only. Grounds 3, 4 and 5 relate to penalty. Grounds 6 and 7 relate to both conviction and penalty.

10 There is no merit in ground 6 or ground 7.

11 It is apparent to me that, although the Appellant was not represented at the appeal, the grounds were drafted for him by a lawyer. Ground 6 is not based on any evidence at all and was effectively abandoned by the Appellant himself at the hearing of the appeal. In answer to a question during the appeal, he said: "It's not my strongest ground".

12 Ground 7 is a "catch all" appeal ground. It does not add anything to the necessity to properly consider of each of the grounds individually. If the phrase "substantial miscarriage" in ground 7 is meant to mean "substantial miscarriage of justice", then that phrase has no meaning in this appeal because this is not a criminal law case.

CONSIDERATION OF THE GROUNDS OF APPEAL AGAINST CONVICTION

13 Rule 163(2) creates the obligation on the driver. A failure to comply becomes an offence by way of Rule 163(5), which is in the following terms:

> *"A driver who, in the opinion of the stewards, fails to comply with any provision of this rule is guilty of an offence."*

14 In order to succeed in this appeal against conviction, the Appellant would have to satisfy me that no reasonable Stewards could have come to the opinion that these particular Stewards did. In order to determine that, the facts need to be set out with some clarity. The Stewards did not give lengthy findings of fact. They said at T19:

> *"We are of the opinion that we can sustain the charge and formerly find you Guilty of the charge. As we discussed just recently, we're of the opinion that applying the whip is not consistent with restraining and so we do formerly find you Guilty."*

15 The bare facts as I can best ascertain them from all of the evidence are these:

- The Appellant went inside quite a number of marker pegs from the home turn and stayed there until down the straight.
- The reason the Appellant went inside the marker pegs was that he took evasive action when 2 other carts locked wheels immediately to his outside and slightly forward.
- The Appellant sat inside the marker pegs evaluating the situation while the other runners in the race continued in the racing line.
- While inside the marker pegs, the Appellant applied the whip. He said (and it was not disputed) that he did that to steer rather than to gain an advantage.
- The Appellant got back into the field, into the racing line, when an opportunity presented itself "very late in the piece" (T2).
- When the Appellant got back into the field he had gained ground, rather than lost ground, from the position he was in at the time he went inside.
- THE WAR NURSE ran on and finished second.

16 The inquiry focussed on whether the Appellant had fulfilled his obligation to restrain. During the inquiry, he described his action (or inaction) in various ways. He said:

"...I'm certainly not driving forward..." (T4)

"...I had hold of it. I wasn't just letting her free run..." (T7)

"...So as I say, ignorance is no excuse, but however had I known the rule was actually worded "you must restrain" then I probably would have made a greater attempt to do so.." (T9).

"....To say I didn't restrain, it is probably open to interpretation too because, just because I didn't lay out of the back of cart to restrain doesn't, I did have a good hold on the horse. I certainly never gave her an inch of rein to advance any further. I never urged her to go forward. I was certainly very aware of the situation that I didn't

want to be making any unfair advantage. I didn't want to be placed where I was. I want to be seen to. I didn't want to be, to be making an advantage on any other runners. And to say that I advanced in front of other runners, well in a sense I didn't really advance in front of them, I just sat with a good hold. I was only able to enter back into the field because Mr Reid wasn't on the marker post. I would've never entered back into the field had Mr Reid been on the true rail position. I wouldn't have even entered in behind him, in front of, I would've certainly never entered in front of him. It was only just that he was racing up the track and there it was safe to do so. So I guess the finer points of it are not restraining, well that's slightly open to interpretation I would say…."

17 It was suggested to the Appellant during the inquiry that the horse should lose ground in order to have been restrained. At T13, the Chairperson said:

> *"SCOTT But doesn't, when the rule talks about a driver shall restrain, doesn't restrain mean that the horse should lose ground?"*

And at T14:

> *"SCOTT Yes. I guess, I'm just wondering if there's a difference between restraint and being restrained. I mean as you'd know, you know you could be leading on a horse and have it under some restraint, because it's still going forward. It's still progressing. It's still improving. But you've got it under some restraint. Whereas restrain, surely, surely that means lose ground?*

18 In finding the Appellant guilty, the Stewards took into account the fact that the Appellant did not lose ground. That is not apparent from the reasons given on the finding of guilty, because the only reason given was that the use of the whip was

inconsistent with restraint. However, it is apparent from the comments made by the Chairperson immediately following the imposition of the penalty.

19 The chairperson said at T22:

> *"Oh look we can see that you're disappointed but from our point of view the rule is quite specific in that the horse must be restrained and we don't believe that you've met those obligations. We're not in any way alleging that you did it on purpose, but you've still got some obligations once you find yourself inside those marker pegs to apply restraint and in our opinion that means the horse has to lose ground and we don't feel that you've met that obligation,"*

20 In my opinion, losing ground is not necessary in order to comply with the obligation.

21 There is a positive obligation in Rule 163(2) is on the driver to rejoin the race. If the Driver does not rejoin the race, he or she breaches the Rule. The Rule does not say that the rejoining has to be in an equal or lesser position than where the horse left the race. In taking the approach that the Stewards did, they have read into the Rule words which are not there.

22 Not losing ground, which is what happened in this case, may well be a piece of evidence inconsistent with restraint. However, the Stewards did not use the "not losing of ground" as a piece of evidence on whether the Rule had been breached. Rather, it was elevated to being a part of the Rule itself.

23 In taking the approach which they did, the Stewards did not give consideration to the Appellant's evidence and submissions on whether or not he had restrained. He had put forward explanations as to why he did not lose ground, yet still had his horse under restraint.

24 At T2, the Appellant said that he "*sat there*". At T3 he said:

> *"..They've started going the same tempo as me….".*

25 At T4 he said:

"I don't feel that I, without really being very aggressive to try and get back, I could've got back behind Mr Reid. They'd lost all momentum. They were on the back of Mr Turvey and they'd lost all momentum."

26 At T8 to T9, the following exchange took place:

"SCOTT *Wasn't there an opportunity though for you still to restrain whilst you were racing inside the marker pegs and attempt to return to the position that you'd left, before you went inside the marker pegs? Wasn't that still an option?*

WOODLEY *It certainly would have been an option. It's not one that I felt at the time was realistic. Just because of the speed that the horses beside me were travelling and how well my filly was travelling. It didn't feel like I was going to be able to physically pull her back behind them and by that point in time, because of the circumstances of the way it was and what I'd thought the likely outcome in terms of what we went through with the unfair advantage situation, I thought it was all just going to be in vain. I really felt like I was just going to be travelling in that area until, right until the post,"*

27 At T9, The Appellant said *"I just sat with a good hold."*

28 Throughout the inquiry, as evidenced by the above references, the Appellant maintained that he did restrain the horse. The question whether that restraint as he described it was sufficient in the opinion of the Stewards was never answered.

29 I uphold ground 2 of the Appeal. In my opinion, the Stewards erred in their interpretation of Rule 163(2), by reading into it words which are not there. Put another way, no reasonable Stewards could have come to the opinion which they did in this case, because there was an error of law.

30 I find it not necessary to decide ground 1, or the Appeal against penalty.

DETERMINATION

31 The finding of the Stewards that the Appellant was guilty of an offence against Rule 163(2) is set aside.

32 The Appellant's suspension is set aside.

DISPOSITION

33 There are competing considerations. To refer the matter for rehearing before the Stewards would involve expense and delay. The Appellant has already served 20 days of his penalty as at the date of this determination. The competing consideration is that the matter will never be finally determined unless there is a rehearing. Both the Stewards and the Appellant may have a sense of grievance without a rehearing.

34 Section 11(1)(b) of the *Racing Penalties (Appeals) Act 1990* requires that the Tribunal acts according to equity, good conscience and the substantial merits of the case. Those factors taken together in this case require that there be no rehearing.

PATRICK HOGAN, PRESIDING MEMBER

Seal of the Racing Penalties Appeal Tribunal of W.A.