

**DETERMINATION OF**  
**THE RACING PENALTIES APPEAL TRIBUNAL**

<b><u>APPELLANT:</u></b>	<b>JASON JAMES OLIVER</b>
<b><u>APPLICATION NO:</u></b>	<b>A30/08/568</b>
<b><u>PANEL:</u></b>	<b>MR J PRIOR (PRESIDING MEMBER)</b>
<b><u>DATE OF HEARING:</u></b>	<b>30 APRIL 2002</b>
<b><u>DATE OF DETERMINATION:</u></b>	<b>10 MAY 2002</b>

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IN THE MATTER OF an appeal by Jason Oliver against the determination made by the Stewards of the Western Australian Turf Club on 11 April 2002 imposing 12 days suspension for breach of Rule 137(a) of the Australian Rules of Racing.

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Mr T F Percy QC, with Mr P G Randall, instructed by D G Price & Co, appeared for the Appellant.

Mr W J Delaney appeared for the Stewards of the Western Australian Turf Club.

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At the conclusion of the hearing on 30 April 2002 I reserved my decision and ordered that the stay of proceedings granted by the Chairperson on 15 April 2002 continue until the appeal is determined or as otherwise ordered.

This is an appeal against both conviction and penalty.

The Stewards opened an inquiry into an incident that occurred approaching the 550m in Race 4, the Katrina Mason Handicap over 1300m at Pinjarra Park on 11 April 2002. Called to the inquiry were the following riders:

J. Oliver	Rider of HOT NOVEL
J. Hustwitt	Rider of SMILE SWIFTLY
P Carbery	Rider of TWILIGHT SPY

After hearing from the witnesses and viewing the patrol films of the incident, the Chairman of the inquiry announced the charge against Mr Oliver in these terms:

*"Continuing on with the Inquiry Mr Oliver. At this stage Stewards feel you have a charge to answer and it's a charge under Australian Rules of Racing 137(a) which states any rider may be punished if in the opinion of Stewards a) he is guilty of careless, improper, incompetent or foul riding. And the part of that rule we are concerned with is the careless riding. The specifics of the charge are that near the 550m in race 4 this afternoon you have shifted out with HOT NOVEL tightening SMILE SWIFTLY ridden by Mr Hustwitt which*

*caused that filly to buffet heavily with TWILIGHT SPY, ridden by Mr Carbery and shortly there afterwards SMILE SWIFTLY was restrained off the heels of HELLO ANGEL and lost ground."*

Mr Oliver pleaded not guilty.

The Chairman in announcing a guilty finding stated:

*"We have considered the evidence in its entirety. We are of the opinion that HOT NOVEL's racing characteristics were not a factor in this incident. We are satisfied that whilst SMILE SWIFTLY was racing ungenerously earlier in the race, just prior to this incident we were satisfied that SMILE SWIFTLY was racing tractably. The evidence was such that TWILIGHT SPY racing outside SMILE SWIFTLY was not a factor in the incident. The incident came out to it rather than it shift in. We are of the opinion that the incident is, has been caused by your outward movement Mr Oliver, therefore we find you guilty as charged. Is there any submission you want to make on penalty?"*

Mr Oliver in responding stated:

*"...I didn't think I was the main contributor, maybe charge me with a severe reprimand or something because I haven't been suspended for three years."*

The Chairman announced the penalty in these terms:

*"The aftermath of the movement resulted in quite severe interference to SMILE SWIFTLY and that was a factor in our deliberations but more importantly your excellent record we were extremely mindful of. Taking, balancing those two factors up we believe the appropriate penalty is a suspension of twelve days. Now I understand you've got a ride Saturday, so that will take effect from midnight the thirteenth and will expire at midnight on the twenty fifth and against our decision of course you do have the right of appeal which lies with the Racing Penalty Appeals Tribunal."*

The Amended Grounds of Appeal are:

**A. Conviction**

1. The Stewards erred in convicting the Appellant in that they failed to properly address the question of whether the Appellant had ridden carelessly.

**Particulars**

- (a) The Stewards proceeded on the basis that there had been interference caused by the Appellant's mount and concluded that *ipso facto* there had been carelessness.
- (b) It was necessary for the Stewards to examine the quality of the riding and to make findings in that regard.
- (c) Whilst any interference may stem from carelessness, it is not invariably the case.
- (d) The Stewards erred in not making any specific finding in respect of the quality of the Appellant's riding that led to the interference in question.
- (e) The Stewards finding that the Appellant had made an "... outward movement..." did not address the correct question.
- (f) The correct question was whether the outward movement constituted carelessness.

2. The Stewards erred in convicting the Appellant in that they failed to address adequately all the relevant factual aspects of the case.

#### Particulars

- (a) The Appellant's case was always that there had been a number of factors which contributed to the interference.
- (b) The Stewards addressed only two of these issues, the erratic racing of the horse Smile Swiftly, and the racing characteristics of the Appellant's mount.
- (c) The Stewards failed to address the fact of the slow early pace, the rough-house nature of the race to the stage in question, the need to relieve pressure in the tight racing conditions and the gross over-reaction of Hustwitt's mount.
- (d) The Stewards failure to consider whether there was a valid reason or excuse for the outward movement has led them into error. In addressing the question of whether the outward movement was *careless* (which it does not appear that they did) they were obliged to consider and make findings on all relevant issues raised at the hearing.

#### B. Penalty

3. The Stewards finding on penalty were inadequate for the reasons set out in ground 2 above and the penalty imposed was accordingly excessive as it failed to reflect those particularly significant factors.
4. The Stewards further erred in failing to consider as a *mitigating* factor the matters that they had discounted on the question of penalty, namely the racing characteristics of the Appellant's mount and the behaviour of Hustwitt's mount.

#### Particulars

- (a) A matter falling short of a substantive defence on the facts may nevertheless be a significant mitigating factor.
  - (b) The Stewards erred in deciding that because the two issues had been decided adversely to the Appellant as regards Conviction they were irrelevant as to penalty.
  - (c) In all the circumstances of the case these two matters ought to have been seen as significant mitigating factors and been reflected in the penalty imposed.
5. The Stewards further erred in failing to take into account the nominal nature of the carelessness of the Appellant's riding rather than focusing on the level of the resultant interference.

#### Particulars

- (a) The gravamen of the offence is the degree of carelessness displayed by the rider.
- (b) The resultant degree of interference is a relevant factor but secondary to the quality of the riding.
- (c) Whilst the interference was not at the lower end of the scale the carelessness was, and this is not reflected in the reasons nor the penalty imposed.
- (d) In restricting their consideration on the question of penalty to two issues (the very good riding record and the level of interference) the Stewards fell into error.

6. By reason of the errors set out in Ground 3, 4 and 5, the Penalty imposed was excessive in all the circumstances of the case.

### Appeal as to Conviction

Senior Counsel for the Appellant argued that the Stewards were in error in convicting the Appellant in that they:

1. failed to properly address whether the riding constituted careless riding; and
2. failed to address adequately all the relevant factual aspects of the case.

The Stewards' inquiry the subject of this Appeal was a race day inquiry.

It is important to note that on a race day Stewards have many functions to perform, not only during, but also before and after a race meeting. One of those functions is to view the running of races and to inquire into any aspect of concern to the Stewards, immediately following the running of a race. This includes inquiring into any interference to a runner or runners observed by a Steward. The observance of apparent interference, as a general rule, results in an inquiry being convened immediately by the Stewards. The inquiry may be concluded before the running of the next race or it may take several races before the matter is finalised. The outcome may result in a rider being suspended, reprimanded or in no action being taken.

The Stewards' inquiry usually involves the taking of evidence from the Steward who observed the incident that gave rise to the inquiry, the riders involved and viewing of the various race patrol films. A charge may be preferred, further evidence adduced and a decision made as to guilt. On a conviction, further submissions in respect of penalty are heard before a final outcome is announced. This procedure is common to thoroughbred racing and one that all experienced jockeys would be familiar with.

The Stewards act within a restricted timeframe when laying charges, considering all the evidence and ultimately announcing their reasons for determination. A departure from this procedure would not only result in drawn out proceedings to what is essentially not a major offence in racing, but would also be impracticable in most instances when all relevant witnesses are on course.

Grounds 1 and 2 can be dealt with together.

Ground 1 effectively argues that the Stewards' failed to state what aspect of Mr Oliver's riding was careless. I am satisfied that the Appellant, after being charged, knew what he faced. The charge was adequately particularised in the circumstances. He knew what aspect of his riding the Stewards were referring to as being careless. He mounted his defence accordingly.

The charge, the transcript of the inquiry and the Stewards' reasons for conviction clearly indicate that they found that the Appellant's outward movement at the 550m was the careless riding. This riding they considered was inappropriate and contributed to tightening and buffeting of other horses.

Ground 2 argues that the Stewards failed to take into account all factors that may have contributed to or caused the ultimate interference. All of these matters were canvassed during the inquiry. Whilst the Stewards' reasons for conviction may not refer to each and every one of them, it was their opinion that it was the riding of Mr Oliver described above that was careless and ultimately caused the interference.

Rule 137(a) is couched in the terms "in the opinion of the Stewards". The role of this Tribunal is to determine whether, on the evidence available, the Stewards were entitled to come to the opinion that the riding of the Appellant was careless. The opinion of the Stewards must be reasonable on the evidence available to them.

During the inquiry the Appellant stated:

*"...I have come out probably more than I have wanted to come, but my horse was pulling hard the whole race to (sic) sir and it wouldn't come back. I didn't want to come out, because I knew Jerry was there, but my horse has probably come out further than I wanted it to come out. I didn't want to jeopardise Jerry because he was having trouble with his horse as well..."*

There was no dispute, either at the Stewards' inquiry or during this appeal, that interference occurred to Mr Hustwitt's mount SMILE SWIFTLY, and to a lesser extent, TWILIGHT SPY, the eventual winner of the race. What was in dispute was whether the Appellant was racing so tight that his outward movement was only to relieve pressure for himself and other runners.

From my reading of the transcript, viewing the patrol films on several occasions and hearing the submissions from Senior Counsel and Mr Delaney, I am satisfied that the Stewards were entitled to form the opinion that the Appellant's outward movement on HOT NOVEL was careless and resulted in SMILE SWIFTLY losing ground.

For these reasons, the appeal against conviction is dismissed.

### Appeal as to Penalty

The grounds of appeal focus on the fact that the Stewards, in imposing penalty, appear to have only taken into account two factors, the severe interference to SMILE SWIFTLY and the Appellant's excellent riding record.

The transcript of the inquiry and patrol films however do disclose other relevant factual matters. These include:

- the admission by Jockey Hustwitt, the rider of SMILE SWIFTLY, that his mount was racing erratically at the time and over reacted to the bump
- the "rough house" nature of the race for Three-Years-Old
- that the result of the race was not affected given that TWILIGHT SPY won the race

Senior Counsel for the Appellant also informed me that the Stewards' Report from the race disclosed that a rider was fined for setting an unreasonable pace in front in the early stages of the race.

I am satisfied that the Stewards were in error in not taking these other matters into account or giving them sufficient weight. The excellent riding record of the Appellant, together with these other mitigating factors referred to above, entitled the Appellant to receive the minimum penalty available within the range. I am therefore satisfied grounds 4 and 6 have been made out.

Accordingly, the appeal against penalty is upheld. The penalty of 12 days suspension is set aside and a penalty of 7 days suspension is substituted.

The suspension of operation of the penalty automatically ceases.

*John Prior*



JOHN PRIOR, PRESIDING MEMBER