APPLICATION NO: 737

REASONS FOR DETERMINATION OF THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**GERARD PETERSON (as agent for the connections of HE'S REMARKABLE)**
APPLICATION NO:	**A30/08/737**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)**
DATE OF HEARING:	**24 JANUARY 2012**
DATE OF DETERMINATION:	**24 JANUARY 2012**
DATE OF REASONS:	**7 JUNE 2012**

IN THE MATTER OF an application for leave to appeal by Mr Gerard PETERSON (as agent for the owners of HE'S REMARKABLE) against the determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 19 November 2011 relegating HE'S REMARKABLE from first to second place pursuant to Australian Racing Rule 136.

Mr TF Percy QC and Mr G Yin, instructed by DG Price & Co, appeared for Mr Gerard Peterson.

Mr RJ Davies QC appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

BACKGROUND

19 November 2011 at Ascot was a major race day of great significance to Western Australian racing. The program included two Group One events. Two extra races were added to the usual Saturday fixtures. The first Group One event was Race Eight, the

Railway Stakes. The other was Race Nine, the Winterbottom Stakes.

Australian Group One Races are the premier races for thoroughbreds during the racing season in Australia. They offer the highest prize money. Owners, jockeys, and trainers set their sights on winning Group One races because of the prestige and value associated for the winning horses, especially those horses and mares being set for a career at stud.

HE'S REMARKABLE finished first in Race Eight by a long neck. Following the running of Race Eight the Stewards inquired into the protests of both the fourth runner (WARATAH'S SECRET), against the first runner (HE'S REMARKABLE), and the second runner (LUCKY GRAY), against the first runner. These objections arose out of an incident which occurred about the 600 metre mark. All four jockeys involved in the protests, the respective trainers as well as another jockey were present during the protest hearing. The Stewards' panel for the protest was a most experienced one, comprising the Chief Steward Thoroughbreds, the Deputy Chief Steward, the Acting General Manager Integrity and three other senior Stewards. Three or four different angles of the film relating to the incident were shown during the proceedings. Both protesting riders were invited to state their objections and the other riders were called on to respond.

The protests were determined on the following basis:

> *The Stewards are satisfied that the shift was from HE'S REMARKABLE and that caused tightening to WARATAH'S SECRET which blundered, with this causing LUCKY GRAY to receive indirect interference and that we believe that the interference to LUCKY GRAY was considerably greater than the long neck margin between both runners at the end of the race, however we are not fully satisfied that WARATAH'S SECRET would have beaten HE'S REMARKABLE. So based on this, gentlemen, it is our decision to uphold 2nd verses 1st and dismiss 4th verses 1st meaning that LUCKY GRAY is now declared the winner of the Railway Stakes. That's our decision, so there will be an inquiry into the incident after the running of the last race.*

Due to the objections and the inquiry which followed in relation to Race Eight, Race Nine had to be delayed from its scheduled start of 4.25pm. Initially it was re-scheduled to start

at 4.35pm but as a consequence of the relatively lengthy delay caused by the objections' hearing the starting time was again amended to 4.47pm.

After the conclusion of the race meeting that day there was a further inquiry into the incident in Race Eight. This resulted in a charge being laid against the rider of HE'S REMARKABLE. Mr McEvoy was charged with a breach of careless riding Rule AR137(a) as follows:

> *...that passing the 600m you allowed your mount HE'S REMARKABLE to shift outwards causing WARATAH'S SECRET (Paul Harvey) to be tightened for room between your mount and BIG TED (M Chui), with WARATAH'S SECRET blundering from the heels and as a result RANGER (Pike), LUCKY GRAY (O'Donnell) and BATTLE EMBLEM (Yuill), were checked in consequence.*

Mr McEvoy pleaded guilty to the charge. In addressing penalty he expressed his disappointment in himself, if he were a contributing factor, as well as commenting on certain other contributing factors. The Stewards described the carelessness on the level of "low to mid" but went on to state that:

> *The degree of interference is obviously in complete contrast to that it was very high, four runners were severely interfered with in a Group 1 Race causing the race to be badly marred by the level of interference that resulted.*

As a consequence Mr McEvoy was suspended from riding in races for 28 days. In the concluding stages of the inquiry Mr McEvoy indicated some disappointment in the amount of time imposed but concluded by stating '*I'm sorry that I caused interference...*'

THE APPLICATION

By Notice of Appeal dated 2 December 2011 the applicant sought leave to appeal against the decision to replace the winner on the basis that:

- the relegation from first to second was contrary to the evidence and not reasonably open to the Stewards on the evidence; and

- the decision making process denied procedural fairness resulting in a miscarriage of justice.

Subject to leave being granted, the appeal was to be mounted on the basis of the three amended grounds which I summarise as follows:

1 It was not open on the evidence to conclude the extent of the interference was sufficient to affect the results of the race;

2 Lack of procedural fairness in failing to call one of the riders, not advising the connections of the horse of their rights and putting leading questions to one of the jockeys; and

3 The decision was unsafe in regard to the fresh evidence, being the careless riding inquiry which followed, the series of still photographs of the race and racing tendencies of the horse which were not addressed at the protest hearing.

The leave application was supported by two affidavits. One was sworn by Damian Vincent Wyer, a bloodstock agent and thoroughbred horse racing photographer. Mr Wyer had taken photographs of the race with his sophisticated camera which produced some 57 sequential still photographs which were said to include the incident. The other was from John Bradley Struthers, part owner of HE'S REMARKABLE. Mr Struthers lives in New Zealand and had not previously raced a horse in this State. Mr Struthers deposed to the fact that he lacked familiarity with the way in which our local protest hearings are conducted. He was unaware at the time but had since learned of the tendency of BIG TED to lay inward, which he stated could have been the subject of questioning at the hearing had he been aware of it. Significantly, he stated the value of HE'S REMARKABLE would be $3,000,000 as a Group One winner, but only $750,000 as a Group One second place getter. In addition, the difference in stake money in the race between first and second was said to be $427,900.

At the conclusion of the application hearing I was persuaded by the argument presented by senior counsel for the Stewards. Consequently I dismissed the application. I now set out my reasons for not having allowed the matter to proceed to an appeal.

RACING PENALTIES APPEAL ACT 1990

The relevant provision of the Act is section 13 which reads in full as follows:

13. Appeals which shall be heard by the Tribunal

*(1) A person (in this Part referred to as "**the appellant**") who is aggrieved by a determination, or a finding comprised in or related to a determination, of RWWA, of a steward, of a racing club, or of a committee –*

(a) imposing any suspension or disqualification, whether of a runner or of a person;

(b) imposing a fine;

(c) which results, or may result, in the giving of a notice of the kind commonly referred to as a warning-off; or

(d) in relation to any other matter, where the Tribunal gives leave to appeal,

may, within 14 days after the making of the determination, or in the case of a notice of warning-off the giving of the notice, appeal to the Tribunal.

(2) An appeal –

(a) that by reason of section 12 would not lie to the Tribunal were it not for this subsection, but is an appeal that in the opinion of the Chairperson may arise out of the same incident, or incidents, as an appeal which could have been or has been made to the Tribunal; or

(b) that by reason of the public interest, the Chairperson has determined may be an appeal to which this subsection should apply,

may be made to and heard by the Tribunal, by leave of the Tribunal.

(3) An application, to refer to the Chairperson any question as to whether or not an appeal which would otherwise not lie to the Tribunal is an appeal to which subsection (1)(d) or subsection (2) applies, may be made to the Registrar –

(a) if the case is one of urgency, ex parte on affidavit; and

(b) in any other case, in such manner and on giving such notice, as the Registrar may require,

and shall be determined in the first instance by the Chairperson, and if the Chairperson is of the opinion that the leave of the Tribunal should be sought may be heard by the Tribunal by way of preliminary argument.

(4) On an application made under subsection (3), the Chairperson may give directions as to the further proceedings in the matter, including directions of a kind to which section 17(7) refers or as to the effect to be given to any determination, and effect shall be given to any such direction by any person to whom the direction applies.

The question of jurisdiction in this type of application was addressed in the very early matter of **Cooper & Baker** (Appeal 66) where the Tribunal stated:

> *The granting of leave to appeal involves the exercise of a discretion which the Tribunal is only able to do in favour of an appellant where it can be demonstrated that there are special or unusual circumstances. Examples of such circumstances are:*
>
> *(i) as in the case of Hammer which was cited by Counsel, where there is an appeal alleging and demonstrating a denial of natural justice.*
>
> *(ii) a case which may involve an assertion of bias against the Stewards, and*
>
> *(iii) where it can be shown that the Stewards' panel has in some way been improperly constituted.*
>
> *Leave should not be granted in any run of the mill matter, or in a case where an aggrieved appellant disagrees with the view adopted by the Stewards and seeks to have his own perception or interpretation of an incident adopted by the Tribunal and substituted for that of the Stewards.*
>
> *It is clearly not appropriate to grant leave where the Tribunal is simply being asked to substitute its own opinion in relation to an incident for that of the Stewards. As the Stewards are the experts in their own field in relation to the proper running of a race their decisions on placings should not be lightly interfered with by this Tribunal.*
>
> *No special or unusual circumstances have been demonstrated by the appellants to exist in relation to this matter. Accordingly leave to appeal is refused.*

APPLICANT'S ARGUMENT

Senior counsel for the applicant presented fairly detailed written submissions to support a comprehensive argument which included the following propositions and issues:

- There was '*a significant cloud*' as to whether the Stewards achieved the correct outcome.
- Jockey Pike should have been called to give his evidence.
- The connections who came from a foreign jurisdiction were not asked if they wished to call any witnesses in circumstances where Jockey Pike's evidence was critical. Nor were they asked whether they wished to question Jockey Chui.
- There was a significant amount of stake money involved. That, coupled with the publicity associated with the decision, meant it was a matter of public interest.
- As the home party protested it called into question '*the supervision role*' of the Stewards.
- The erratic history of BIG TED.

- The Stewards were required to conduct an analysis of the actions of the riders.
- The public interest consideration transcends the fact that the stake money had been paid out.
- A more significant analysis was required than that which was given by the Stewards.
- It is in the public interest for there to be confidence in the decisions of the Stewards.
- In view of the fresh evidence the Tribunal was in a significantly advantageous position compared to the Stewards to evaluate the matter.
- The urgency of the situation cannot mask procedural or factual error.

RESPONDENT'S ARGUMENT

By way of response senior counsel for the Stewards argued amongst other things:

- The applicant's propositions failed to take into account the exigencies of the conduct of the race meeting, the nature of protest hearing and the affect of and need for urgency.
- The procedural fairness rules are infinitely variable.
- Protest hearings are addressed in Rule 136(2) which contains the relevant phrase '*...in the opinion of the Stewards*'. As the application seeks leave to appeal in relation to a matter not otherwise provided for and which relates to the granting of the right to challenge the opinion of the Stewards, granting that right in these sorts of matters could have chaotic consequences.
- The real question is would the protesting horse have finished ahead of the other horse but for the interference.
- But for the interference the protesting horse would have won. This was decided by experts, very experienced and all senior Stewards. This was a matter of judgment. As they stated in their reasons, the interference was "*considerably greater than the long neck margin between both runners at the end of the race*". S O'Donnell gave

evidence of having to take evasive action causing him to lose considerable ground, unbalance and hit the fence which pulled him up to three quarter pace. The jockey concluded that he lost as much as six lengths as a consequence and was only short by a long neck at the finishing line.

- This matter involved questions of private interest only, namely it was the money which would have been otherwise entitled to go to the connections and the value of the horse. Weighed up against that was the need for finality and certainty of a racing decision. There was far more benefit from a public perspective in having the decision confirmed.

- The careless riding hearing was a different type of process to the protest in that it had the capacity to be dealt with at a comfortable pace and to be adjourned if necessary. The need for finality of the protests was essential. They had an impact on the public who were reconciled to the disappointment of losing and not being paid out.

- The body of evidence before the Tribunal which the Stewards did not have was not decisive or conclusive.

- The still photographs were not helpful in that they do not reveal at what point in the race things were occurring.

- As to the bad record, the Stewards were well aware of that, as was conceded by Mr Percy. The decision was open to the Stewards on the evidence, particularly that of Mr Harvey. There was no argument that McEvoy having moved out at the critical time in the race had a lot to do with the problem. It cannot be demonstrated that the Stewards were not entitled to reach the opinion which they did.

- Protests are by convention decided before the next race. A protest inquiry requires reaching a conclusion and resolving the matter with a great deal of expedition. In the circumstances that prevailed here, the manner in which the inquiry was conducted was entirely fair. The Stewards did not have time to go into the '*usual niceties.*' There was only some 15 minutes scheduled between races.

Senior counsel then referred to a number of case authorities including the following passage of Tucker LJ in *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118:

> *The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.*

The High Court has approved this passage, together with the following rider added by Kitto J:

> *What the law requires in the discharge of a quasi-judicial function is judicial fairness. That is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances.*

- *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552-553.
- *Mobil Oil Australia Pty Ltd v FCT* (1963) 113 CLR 475 at 504 (Kitto J).

Brennan J in *Kioa v West* (1985) 159 CLR 550 at 627 stated:

> *What the principles of natural justice require in particular circumstances depends on the circumstances known to the repository at the time of the exercise of the power or the further circumstances which, had he acted reasonably and fairly, he would then have known. The repository of a power has to adopt a reasonable and fair procedure before he exercises the power and his observance of the principles of natural justice must not be measured against facts which he did not know and which he would not have known at the relevant time though he acted reasonably and fairly.*

CONCLUSION

I was readily persuaded by the argument that, as there clearly was the need for the Stewards to exercise their powers urgently under the Rules in dealing with the protests, it did reduce some of the scope of their duty in the way they conducted the hearing. The exigency of the situation gave the decision-makers greater flexibility as to the extent of the procedural fairness required on this particular occasion. An urgently conducted hearing with a quick conclusion to both protests was necessary, not just for the sake of the punters who bet on the race, but also for the sake of the industry as a whole. In all of the circumstances the manner in which the hearing was conducted did not result in procedural fairness being denied. I was satisfied that there was no merit in the argument raised as to the lack of natural justice. The Stewards clearly were not biased. It could not be said the composition of the panel was in any way improperly constituted. Rather, an eminently appropriate panel was engaged to address this important matter which required peremptory resolution before the next race.

In my opinion it clearly was open to the Stewards on the evidence to reach the conclusion which they did as to the cause and effect of the incident. The amount of interference was

considerable. The finish to the race was tight. The Stewards are the best judges of the significance and consequences of interference so far as the end result and outcome of a race are concerned. Nothing was presented to persuade me that it was unreasonable to conclude that, but for the interference, LUCKY GRAY would have won. There was no 'cloud' as to the correctness of the decision. The fresh evidence was not persuasive or compelling. It did not alter the appropriateness of the outcome.

The matter for determination was in essence one of private interest. The real issue at stake was of a personal nature significant to those directly involved with the horse. Finally, I was not persuaded that there was anything special or unusual about this case.

DAN MOSSENSON, CHAIRPERSON