RACING APPEALS TRIBUNAL
NEW SOUTH WALES

TRIBUNAL MR D ARMATI
ASSESSOR MR W ELLIS

EX TEMPORE DECISION

WEDNESDAY 21 AUGUST 2019

APPELLANT BLAKE JONES

AUSTRALIAN HARNESS RACING RULE 149(2)

DECISION:

1. **Appeal upheld.**
2. **Appeal deposit refunded.**

1. The appellant appeals against a decision of the stewards of 2 July 2019 to suspend his licence to drive for a period of six weeks for a breach of Rule 149(2). That rule reads as follows:

> "A person shall not drive in manner which, in the opinion of the stewards, is unacceptable."

2. The particulars being "that in race 1, when you were the driver of Mozzarella, the stewards feel you have driven in an unacceptable manner in that there was an opportunity, as the field goes towards the 800 metres, for you to shift that runner out from its position, three back on the marker pegs, to obtain a one-out, one-back position and improve your chances in that race at that stage, allowing you to get an unimpeded run to the finish, in stead of being held up on the marker pegs".

3. The appellant denied a breach of the rule to the stewards and he has maintained a denial of the breach on this appeal.

4. The evidence has comprised the transcript and race vision before the stewards, together with form guides for the horses, Mozzarella, Sports Candy and Artsterical. In addition there is race vision from race 6 at Albury on 23 June 2018.

5. In addition, the Chief Steward on the evening and the Chief Steward for the Riverina district, Mr Quick, gave evidence, as did the appellant.

6. The issues to be determined in this case have narrowed because the concessions made by the appellant, both before the stewards and in his evidence today, are such that it is necessary to analyse whether the option he elected to take was unacceptable. That arises because, as the race unfolded, two options became available to the appellant, the first to do that which the stewards particularised against him and which he did not and the second was the option he elected to take.

7. In relation to the steward's option he conceded that it was open to him that, if he had done so, he would have received an unimpeded run to the finish and, as is always the case, what might have happened is always unknown.

8. The question of analysing that option is to determine whether it was the only option, rather than one of two. The reason for that, to touch upon a bit of law, is that the rule requires the driver to be unacceptable. The Tribunal in Panella on 15 March 2012 analysed the opinion of the stewards required to be formed in relation to that breach and also dealt with the duty that falls upon a driver under rule. That decision remains, in the Tribunal's opinion, a current and appropriate determination of the rule. It has not been suggested to the contrary.

9. Bearing in mind it is an opinion of the stewards' case, otherwise dealt with in McCarthy, 24 january 2014, but reflected upon in Panella in any event, it is a

matter for this Tribunal to determine whether the opinion of the stewards was not reasonably open to them, but, importantly, in relation to driving which might be said to be unacceptable, consistent with the authorities summarised in Panella and merely referred to in passing here, is that the rule is not designed to punish mere errors of judgement or split second mistakes. It is necessary to find that the drive is culpable in the sense that, objectively judged, it is blameworthy.

10. The Chairman of Stewards for the meeting, Mr Quick, is a highly experienced steward. He has been head in the Riverina for some six years and prior to that in thoroughbred and harness racing in Queensland for the previous five years. He is well acquainted with the appellant, the track and the form of the horses involved.

11. He did his form analysis, knowing that Leeton, where this race took place, was a small track. There is some issue whether the straight is 120 or 150 metres, but that is not important at the end of the day. It is a track that they went around twice and this is not an exact measurement, it is some 800 metres in length. It is that, in Mr Quick's opinion, there is a bias in this track which favours the first few horses in a race. Those that lead early have an advantage and it becomes difficult for back markers to win and they rarely do. The turns are tight.

12. The steward acknowledges that the appellant is an experienced driver and, just dealing with that, he is eighth on the premiership. He has been driving since 2007. It is his full-time occupation and he is available to drive for any trainer or owner who selects him.

13. Both the appellant and the steward did a form assessment. They assessed each of the horses, with their knowledge of the track and the quality of the race to be run.

14. The steward was of the opinion that Artsterical was capable of winning and of finding the line and another horse of interest, Sports Candy, had only had four previous starts and had not done particularly well and in fact had been beaten by anything up to 93 metres in races. The steward assessed Artsterical as being a better chance than Sports Candy.

15. The appellant had driven each of these horses prior to this race and in respect of Artsterical he did not think much of that horse. It was an ordinary horse and it was not going to win a lot, conceding it had won one race before. In relation to Sports Candy he felt it had plenty of upside and he thought it would be a horse that he could, in this race, follow if he had to.

16. The horse driven by the appellant, Mozzarella, had not raced for nearly 12 months. Apparently it had been out with an injury. It had previously been driven for the most part on the marker pegs and quietly, although in one particular race, the subject of considerable focus, the Albury race, it is that the horse was able to come away from the marker pegs, with some 900 metres in a mile race and run unimpeded, without cover, around the field and go on to

win that race. In respect of it the appellant was at pains to point out it was at least a four second slower race than this one, that the field was not of the same quality, that it was a different track and a different surface and his assessment of that race at the time was that it was run very slowly, that no one was travelling with any speed he had formed an opinion it was, therefore, appropriate to do that which he did, unlike the way in which that horse is normally driven and the way in which he felt it should be driven.

17. In respect of that horse it had a trial some weeks prior to the subject race. It was not a successful trial. He had driven the horse in trackwork prior to that and it was only travelling fairly and nothing exciting, but in the trial it only battled away and in fact it ended up some considerable distance away by 16.9 metres from the horses that came in ahead of it. It is to be noted, of course, that a trial did not impose the obligation on the appellant to drive the horse in that trial to win or obtain best place.

18. So he went into the race with an opinion that this horse is best driven on the marker pegs and quietly, that it was not rock-hard race fit, that he was reinforced in that opinion from the 11 month lack of racing and its performance both in trackwork and in the trial.

19. He was conscious of the grade of the race and in respect of his horse, Mozzarella started as $1.50 favourite, surprising for a horse that has not raced for 11 months and had a poor trial. The appellant thought perhaps it was given a shorter price than it deserved because he was driving it. That has not been explored in any great detail. Certainly the public thought its prior form and driver were such that it was capable of doing better than the other horses in the race.

20. It is important to recognise his evidence consistently has been that Mozzarella is to be driven fairly quietly. When the horse is driven that way it does better, that its better runs have been when it is in front or sitting on the fence. It is not a horse that likes to do a lot of work and generally he is of the opinion that it is not a horse that is one to come wide on the track too often because her runs are better on the fence. In summary, the appellant's opinion of the horse was that it is not definitely blessed with ability.

21. That sets the scene for the subject race. The steward, Mr Quick, formed the opinion that Mozzarella would have early speed, it having started in barrier 1, the front barrier on the marker pegs, and that it would lead. It was the appellant's intention to do likewise. However, other horses got away better and the appellant was left racing some three back on the marker pegs.

22. Nothing untoward in the race until they got to the 800 metre point, which was the winning post for the first time. It is immediately prior to that that focus must be made. The steward, Mr Quick, was of the opinion that each of the horses in question were all travelling well, under a good hold and there was nothing about them at that point which was of concern.

23. The appellant formed the opinion that Artsterical was in fact under some

pressure, which does not appear to be reflected in the stewards' opinion, nor apparent on the video. However, one point which was not canvassed until the appellant's evidence in chief today is that he observed Mr Druitt on Artsterical pull the plugs prior to the 800 metre mark and was of the opinion that Mr Druitt was having to drive the horse more than he should have been at that point.

24. The appellant at the 800 metre mark is a position three back on the marker pegs. As stated, he concedes and the respondent proves that an option then available to the appellant was to come out to the one-one position and then at an appropriate time improve his chances by having an unimpeded run to the finish.

25. What happened was that he remained on the marker pegs and was held up. The stewards formed the opinion that that was unacceptable. The appellant in essence accepts that. He says:

> "I'd probably get a clear run. There's no doubt about that."

He concedes unimpeded running. The question was put to him:

> "I would have thought dropping into the one-one without any effort, wouldn't have been driving her too hard."

The appellant:

> "Yeah, you're probably right."

26. The issue is, as the Tribunal has expressed, whether the option he elected to take was reasonable and available to him, as the experienced opinion of the Chief Steward and of his panel on the occasion was that he should have moved out. Indeed, it might be said, consistent with what was reflected upon in Panella, that experienced harness racing observers of this race might well have expressed the remark, "Oh, my goodness, why hasn't he come out", particularly on the favourite, when a clear and open capacity to do so for some 200 metres was available to him.

27. It is necessary to analyse what was in the appellant's mind. Allowing for his knowledge of the horses in front, both as to the study of form and having driven them, allowing for the way the race was unfolding, he made certain observations. It is quite clear that he looked about him, perhaps more than is often seen, while he made observations of the horses behind him and was obviously looking at the horses in front of him. At this point it is that both Sports Candy and Artsterical were in front of him, with Artsterical being one-out. The eventual winner, Tropical Storm, was in front of them and in fact remained in that position and went on to win.

28. The appellant formed the opinion that because of the nature of Mozzarella preferring to run on the marker pegs, with the one exception at Albury, and being a horse that he was of the opinion preferred to be driven more quietly and one with not a lot of ability that he had to decide, if he stayed there, what

would happen in front of him. No split second decision was made and that test can be ignored. This was a considered decision, the election to remain.

29. As Mr Quick pointed out in his evidence, he could only win from there if he was lucky. Could he reasonably anticipate that he would have that luck? Bearing in mind that Mr Quick assessed Sports Candy as being a lesser horse than Artsterical, it is noted that the appellant's evidence is that it was his opinion that Sports Candy in fact could do better.

30. He concedes essentially in his evidence that he was driven by hope. He says to the stewards:

> "I had a look and, just sizing it up, I'm sure that Mr Druitt--"

That is on Artsterical in the death seat -

> "--he seemed to be under a fair bit of hard driving. I sort of didn't want to push off and get stuck behind him and get dragged back."

That is by moving out to the one-one position behind Artsterical. He says:

> "I still sort of thought there was more chance of the death seat horse sort of not going as good and getting that run there."

And later:

> "I actually didn't think it was a terrible one to follow. If he sort of pushes out a bit earlier when he sort of had the chance, I probably - maybe Mr Lamb is a little bit--"

And he's on Sports Candy -

> "--didn't push out as earlier as what I thought."

As he went on to say:

> "I thought her best chance was sort of driving probably a bit more for a little bit of luck. She's sort of never been one to come wide on a track too often. I think all her better runs she's been on the fence of led. Yeah, so I just thought at the time and especially she hadn't raced for 12 months so she's definitely not rock-hard fit."

32. In addition, he was concerned that, if he had gone out to the one-one, he would have been forced to go at least three wide and possibly four to go around horses to win the race and he did not wish to do that for the reasons expressed. He says he drove the horse to the best of his ability, bearing in mind he is an experienced and successful driver. In essence, he made a decision that he had a better chance to follow than to move out

33. The issue then for determination is, allowing for all of those facts, whether

the respondent can satisfy the Tribunal that that decision by the appellant to remain, for the reasons he has now expressed and which to some extent were canvassed, was blameworthy. If it was that would make it culpable. If it was culpable, it would be unacceptable.

34. As has been said, there is no doubt that option 1 to go out into the one-one position was available and in all probability would have led to his horse improving its chances and going on. He did not do so because he was of the opinion that at the time all that was unfolding before him and likely to unfold before him would have given him a run.

35. At this point it might be noted on the analysis that in fact the appellant, having stayed on the marker pegs, was able to, as the horses came around the final turn, under strong whipping by him and having pulled the plugs, to move up from being six lengths behind the eventual winner to being some three lengths behind the eventual winner and travelling well, although the driver, Mr Harris, on Tropical Storm took away any chance of continuing to progress forward towards the winning post. Therefore, by remaining on the marker pegs, he had in fact had a chance of coming to a winning position that did not eventuate. As was said before, it will never be known, if he had taken option 1 and gone around the outside, whether he might have been a winner, rather than a second placed driver.

36. The requirement to drive to win or best place possible was almost met so far as win was concerned and as to whether it might have been a best place possible by other tactics remains unknown.

37. The Tribunal, as it has said, agrees completely with the stewards as to the opinion they formed. Having heard what the appellant had to say to them and having heard his evidence and having analysed his reasons, the Tribunal is of the opinion that his option 2 was not blameworthy and was, therefore, not culpable and not unacceptable because, whilst a better option existed, that option was not one which was made without any consideration and can be said to have been unacceptable.

38. In those circumstances his appeal is upheld.

SUBMISSIONS ON APPEAL DEPOSIT

39. The Tribunal orders the appeal deposit refunded.
