

**RACING APPEALS  
TRIBUNAL  
NEW SOUTH WALES**

**TRIBUNAL MR DB ARMATI  
ASSESSOR MR W ELLIS**

**EX TEMPORE DECISION**

**THURSDAY 14 FEBRUARY 2019**

**APPELLANT BLAKE FITZPATRICK**

**AUSTRALIAN HARNESS RACING  
RULE 163(1)(a)(iii)**

**DECISION:**

- 1. Appeal against breach dismissed**
- 2. Appeal against severity upheld**
- 3. 14 days suspension of licence imposed**
- 4 . 50 percent of appeal deposit refunded**

1. The appellant appeals against the decision of the stewards of 22 January 2019 to impose upon him a period of suspension of his licence to drive for a period of 21 days for a breach of Rule 163(1)(a)(iii), which relevantly reads:

“A driver shall not (a) cause or contribute to any (iii) interference.”

It was particularised by the stewards as follows:

“At the Newcastle Harness Racing Club on 22 January 2019 in Race 8, where you were the driver of Stormborn, when leading – when you were the driver of Stormborn at or around the 50-metre mark, have shifted your runner down the track to inside the line of Seddon Dollar, driven by Mr Bourke, and as a result of this a locking of the wheels has occurred and this has resulted in Seddon Dollar being checked for a run.”

2. When confronted with that allegation, the appellant pleaded guilty. By his notice of appeal and by his conduct at this appeal, he now does not admit that he breached the rule.

3. The evidence has comprised the transcript and DVD of the hearing before the stewards and the evidence of the Chairman of Stewards on the night, Mr Rando, and of the appellant Mr Fitzpatrick himself.

4. The issue is whether Mr Bourke had room to move to the inside of Mr Fitzpatrick in the final stages of the race as they drove towards the finishing line at a time when Mr Fitzpatrick’s horse moved down and a locking of wheels occurred. The stewards conducted a protest hearing and upheld that protest, substituting the horse of Mr Fitzpatrick from its first position to second, and elevating Mr Bourke’s horse from second to first.

5. There is nothing about the running of the race up until they reached the home turn. At that point the appellant’s horse was quite clearly leading and being driven out to lead at a distance of, relevantly, at or about the 200-metre mark, about two carts wide. The horse driven by Mr Bourke was about three lengths behind and then, in the description given in submissions, embarked upon a withering finish. There is no doubt from the DVD that Mr Bourke’s horse was coming home at a very fast rate. Mr Fitzpatrick had used the whip on the horse to a stage where he then stopped using it and at a point when the head of the horse of Seddon Dollar was apparent to him and, as he said in his evidence, he heard Mr Bourke’s horse coming up to his inside, he turned his head and saw it and then commenced to strike his horse three or four times with the whip. The effect of that was that the horse ducked in. Tellingly, however, before the stewards’ inquiry he said this: “I wasn’t probably fully aware how much they were shifting out, and obviously instincts when I’ve noticed Mr Bourke to my inside and I have -----”. Question: “Directed back down?” Appellant: “Directed back down, yes.”

6. Accordingly, the breach was, as read out, particularised as “shifted your runner down”. It was not a case of, therefore, the striking of the horse. The issue, apparently, as Mr Fitzpatrick says, is that drivers today using a whip are still required to hold reins in two hands and that the horse, as it were, shifted down.

7. The issue for analysis is, it being an established fact that Mr Fitzpatrick shifted down when the horse was directed to do so, as to what the position of Mr Bourke.

8. Three stewards were on the panel: Mr Rando, who concedes he is a steward of three months' experience, he chaired the meeting; a Mr G. Westwood of thirty years' experience, and a Mr D. Westwood of eight years' experience. The evidence is that none of them had apparently observed the incident or, if they had, they were not going to do anything about it. Because it was not until a protest was raised that the inquiry was commenced and that led to a dealing both with the protest and then an inquiry into the drive.

9. Mr Rando gave evidence and, tellingly, having referred to no direct observations, was of the opinion that there was room for Mr Bourke to have proceeded to the inside of Mr Fitzpatrick. Mr Fitzpatrick maintains that as a strong position and it is obvious from the DVD that that was correct. Mr Bourke had more than enough room to move to the inside of Mr Fitzpatrick, there was a full-cart room available, and it was open to Mr Bourke to drive through that one cart-width with his horse towards the line.

10. However, the evidence establishes that Mr Bourke did not, prior to him being interfered with by the locking of wheels, move his sulky into a position where he was able to drive his horse out without his sulky wheel coming into contact with the sulky wheel of Mr Fitzpatrick. That is, at no stage prior to Mr Fitzpatrick shifting down did Mr Bourke move his outside wheel to an inside line as against the inside line of the sulky of Mr Fitzpatrick. As Mr Fitzpatrick established from Mr Rando in evidence, if Mr Bourke had kept driving on that line, they would have hit wheel-to-wheel. At that point, Mr Fitzpatrick has been at pains to point out, both to the stewards and in this appeal, that Mr Bourke had more than enough room to run to the inside. The locking of wheels, on the evidence, appears to have occurred at or about the 50 metre mark.

11. This is an opinion of the stewards case. It was the opinion of the stewards that the breach of the rule, as they particularised it, had occurred. Mr Rando has given evidence on this appeal that he maintains that opinion. That the effect of the actions of the appellant in shifting down were to cause a locking of the wheels. And that was an interference because it checked the momentum of the run of Mr Bourke.

12. The question then becomes whether the Tribunal is satisfied comfortably on the evidence available to it that that opinion was reasonably open to the stewards.

13. The key point in this matter, in assessing the nature of the interference, is that the appellant is quite correct that Mr Bourke had placed his horse and his sulky in a position, up until the point of interference, where he, if he maintained that line, could not have run through on the inside. But the issue which remains open is that Mr Bourke's horse was being driven, as was described, with a withering finish, with momentum, and the opportunity to take the inside line, which was clearly available to Mr Bourke, was removed from him by the appellant directing his horse down or, alternatively, shifting down in circumstances where it should not, such that the opportunity available to Mr Bourke, with the speed at which his horse was travelling, to move further down the track and take the lead and go past Mr Fitzpatrick's horse was eliminated. There is no doubt of the speed at which it was travelling. If that had been done, Mr Bourke's horse would have won. This Tribunal is not deciding a protest, it is deciding whether the actions of the appellant in having shifted down took away from Mr Bourke – that is, interfered with Mr Burke – and that that interference was represented by the locking of the wheels and therefore the checking of the run.

14. The Tribunal is of the opinion that the stewards were quite correct, that all of the points Mr Fitzpatrick made are correct but that he has not established that the actions of Mr Bourke, which he has sought to do, were such that he has not interfered with his available run. He carries no onus but he has not raised evidential matters to remove the fact that the stewards have established, that the respondent has established, that that run was available, there was interference, the run was no longer available and the Tribunal finds that the rule is breached as particularised.

15. On the issue of the appeal against breach, that appeal is dismissed.

#### SUBMISSIONS MADE IN RELATION TO PENALTY

16. On the issue of penalty, the rule makes no provision for particular penalties. Penalty guidelines exist. As the Tribunal has expressed on many occasions, they are guidelines, not tramlines, but for reasons expressed and not repeated here, regard may be had to them to ensure parity of penalty in the jurisdiction.

17. The penalty guidelines provide that for the circumstances here there is a period of a suspension of 21 days. There is a provision for various increases or reductions in respect of that.

18. At the outset, the Tribunal is not satisfied that on these facts it should assess this matter as having a premium to be applied because of a win-at-all-costs attitude, for two reasons: firstly, the reading of the penalty

guidelines does not satisfy the Tribunal that that is available for this particular matter. And, secondly, that the principles in assessing a civil disciplinary penalty are that the penalty is to be imposed for the breach which has been established, not for conduct which might embrace more serious activities which might warrant more serious penalties. And here suggestions of a creation of danger and greater levels of carelessness, etc, could have led to different and more serious breaches. They have not been alleged and accordingly the premium approach is not adopted.

19. Also, in respect of a guideline approach, or a penalty approach generally, this appellant did not admit the breach before the Tribunal. The 25 percent discount for an admission of a breach before the stewards and before this Tribunal is not available to him. However, he did admit the breach before the stewards and there was some utilitarian value so far as their inquiry was concerned in that admission.

20. Accordingly, without being specific, a subtraction to the appropriate penalty will be given in respect of that admission before the stewards.

21. Also, the penalty guidelines make provision for reductions for good driving histories. That is not available to this appellant. In respect of the last two years alone of his driving history, for a breach of this rule he has been dealt with on 16 occasions, suspended on 9 occasions and reprimanded on 7. That cannot be said to be a good driving record. If the penalty guidelines of 12 months were looked at, it remains a similar conclusion but slightly less figures. The only thing in his favour in respect of that recent history is that he has not been suspended since 1 May 2018 under this rule.

22. In addition, he drives as a professional. He has some 10 to 15 drives at least per week, or at least 8 to 10, it is difficult to determine on the precise facts; it does not have to be. Suffice it to say that he drives a lot. He has driven with success. He has had the requisite 300 drives which might otherwise have got him up to an entitlement to a reduction of some 10 days, noting the guidelines provide 300 drives or 12 months since the last suspension. But the Tribunal is not encouraged by his record, it is not in that sense a good one, it is not unusual in respect of professional drivers but does not greatly assist him. There will be a reduction in respect of those matters.

23. Having regard to his personal circumstances over and above those, as it is said, he has had considerable success as a driver and also he is involved in the industry in a broader way with horses in training and the like.

24. The breach itself is one in which the facts themselves do not demonstrate a sole attribution of blame on this appellant. As the Tribunal said in its findings, the driver of the other horse engaged in the race, Mr Bourke, may well have driven in a different way and taken other opportunities available to him and he is not, of course, the subject of any matter here, but it does

provide some lesser gravity so far as the Tribunal is concerned in respect of the breach as it was found.

25. An issue of parity is raised, and the case of Turnbull, 30 January 2019, Dubbo Harness Racing Club. In the fourth race there it is indicated the following facts: there was interference at the 400 metres where Turnbull's horse had shifted out, making contact to another runner which lost ground. A protest was upheld. A 163(1)(a)(iii) breach was proffered. The facts do not indicate whether there was an admission of that breach or a denial. The report indicates that the breach was relatively minor, in being a relatively minor shifting of ground, and a very good driving record of Ms Turnbull.

26. Firstly, her record is not before the Tribunal to compare to this appellant, so that makes, on a parity consideration, the matter different. Secondly, it was a relatively minor shifting of ground at the 400 metres. This was not a relatively minor shifting of ground, it was a direction downwards. And, secondly, it occurred right at the finish and took away another horse's immediate opportunity to win, whereas in the Turnbull case it was at the 400 metres. Accordingly, the Tribunal finds no comfort from the parity case in which Ms Turnbull was given a reprimand.

27. Certainly, a reprimand is available and that is what is submitted should be imposed on his behalf or, alternatively, a small fine. Such an approach is not supported by the respondent, who invites the application of a suspension in the lines considered appropriate by the stewards but in a very fair submission it was suggested that his good driving record would entitle him to some consideration of a 10-day further reduction on a starting point.

28. The Tribunal has determined, having regard to the gravity of the breach, that there be a suspension of the licence. A reprimand or fine are not warranted on these facts; that that suspension is consistent with the guidelines at a period of 21 days, as an appropriate starting point.

29. On that reduction there will be some allowance for the admission of the breach before the stewards and the fact he has had some 300 drives and there will be in that regard a discount of 7 days.

30. Accordingly, the Tribunal imposes a period of suspension of 14 days.

31. The appeal against severity is upheld.

#### SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

32. The principal matter that brought the appellant here is whether he breached the rule or not. He was unsuccessful in respect of that. The Tribunal however, notes that he was successful in respect of the penalty component.

33. The Tribunal allows 50 percent of the appeal deposit to be refunded to the appellant.

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