RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI
ASSESSOR MR W ELLIS

EX TEMPORE DECISION

WEDNESDAY 14 APRIL 2021

APPELLANT SEATON GRIMA

RESPONDENT HARNESS RACING NSW

AUSTRALIAN HARNESS RACING RULE 168(1)(a)

DECISION:

1. **Appeal dismissed**
2. **Severe reprimand imposed**
3. **50 percent of appeal deposit refunded**

1. The appellant, licensed B Grade driver Mr Seaton Grima, appeals against a decision of the stewards of 5 March 2021 to suspend his licence to drive for a period of seven days.

2. The stewards charged him with a breach of Rule 168(1)(a), which relevantly provides as follows:

> "A person shall not during a race drive in a manner which is in the opinion of the stewards is
> (a) careless."

The stewards particularised that breach as follows:

> "That Mr Grima in the running of race number 5 at the Newcastle meeting on 5 March 2021 allowed Dontgointhewater to progress forward inside the 100 metres to the outside of Call Me Diva and to the inside of The Maharani NZ when in the opinion of the stewards there was insufficient room to do so. Shortly thereafter Mr Grima was obliged to check and as a result Dontgointhewater broke stride."

3. The appellant did not admit the breach of the rule before the stewards and has maintained that on appeal.

4. The evidence has comprised the transcript of the stewards' inquiry, the race day images, the stewards' report of the race, an email which comprised the particularisation of the charge, which was not transcribed, the stewards' reports of Newcastle of 15 January 2021 and Bathurst of 23 March 2021, and in addition, race day images of the race of the subject horse Dontgointhewater of Menangle 27 April 2020; Penrith 12 November 2020 and 26 November 2020. In addition, the Chairman of Stewards at the event, Mr Westwood, and the appellant have given oral evidence.

5. The appellant is a relatively inexperienced B Grade driver, having first been licensed in late 2019. In that regard, he is not expected to drive with the experience of a very senior A Grade driver but is nevertheless expected to drive with a level of experience sufficient to participate in the race in which he did.

6. It is noted also that the race was for two-year-olds and that it was not unexpected that two-year-olds would race greenly.

7. The appellant has driven the subject horse Dontgointhewater on prior occasions and he establishes from the evidence of his drives of 27 April, 12 November and 26 November that the horse only races well if driven on the bit and that to keep the horse driving well on the bit it is necessary to apply the whip, and to drive the horse out otherwise it, being inexperienced and prone to lose attention, will come off the bit and, as demonstrated in 27 April

and 12 November races, not finish well. Whereas, as demonstrated on the 26 November race, which it won, the horse, in a small field, driven constantly and with its attention maintained by the use of the whip, ran on to win comfortably. That was therefore in the mind of the appellant.

8. The appellant also gave evidence that he knew that if horses were wobbling a bit, to quote the evidence, as they entered the home turn, that he must drive with an expectation that horses in front of him, or about him or relevant to his drive may, also wobble a bit.

9. The level of experience, therefore, which was required of this appellant in this drive is coloured by those few remarks, being matters which would be well-known to a driver of this limited experience.

10. Certainly in the way in which he spoke to the stewards – although he had a support person with him – and the way in which he gave his evidence to the Tribunal, the appellant has not demonstrated that he is an inexperienced driver unable to grasp situations and should be given a greater degree of leeway in respect of the way in which he elected to drive on this occasion based on that inexperience.

11. To the contrary, he demonstrated to the Tribunal a full understanding of what was required of him, what was required of him to drive the subject horse, and what was required of him in relation to horses about his drive.

12. The horses entered the home straight. The Tribunal, as is its usual practice, will refer to the other horses by using the driver's name; it is easier. Mr Alchin was driving to the inside of the appellant and forward of him. Mr Geary was driving to the outside of the appellant and forward of him. The appellant, as the horse came around the final turn, applied the whip on an occasion to keep his horse on the bit.

13. The appellant knew that it was his duty under Rule 149 and racing generally, if safe to do so, to drive his horse to win the race or finish in best position. The appellant is quite acutely aware of his need to drive safely and that that qualifies what he can and cannot do in a desire to finish in best possible position.

14. The appellant's evidence is that having kept the horse on the bit and it travelling well, that he then, to keep its attention focused, touched it with the whip, that there was then a gap about three-quarters of a cart width into which his horse proceeded. It is the evidence that he was entitled, if safe to do so and would be safe to continue there, to put his horse between those sulkies of Alchin and Geary.

15. The appellant, when he did so, told the stewards that his horse had seen half a gap and went to go into it. Of course, what a horse may or may not

have seen is not known, but it appears that the horse proceeded to go towards that gap. The appellant has given evidence that he knew that upon entering that gap it was insufficient to enable him to drive through because at most it was three-quarters of a gap, sufficient only for the horse to be there.

16. It is the opinion of the stewards at their inquiry, and reflected in the evidence of the Chairman, Mr Westwood, today, that there was no run available to the appellant between the other two horses' sulkies. It is not the case that the appellant ran out of space by reason of anything that subsequently occurred but that there was insufficient space for him to be where the appellant allowed his horse to be. It was restricted room. In the opinion of Mr Westwood, it was not safe to go there. The space was not sufficient. And, in particular, that, even with the limited experience of the appellant, his experience was sufficient enough for him to know that horses would move about under pressure of the run to the line.

17. The stewards did not observe the incident live; they picked it up by viewing the images. It is, therefore, that the evidence focuses upon a viewing of the images and the evidence of the opinion of Mr Westwood and the expressed evidence of the appellant.

18. It is apparent to the Tribunal that the appellant has applied the whip and the horse has gone into a gap which, while sufficient for the horse, was not sufficient for horse and cart. Having been put in that position, it is now the evidence of the appellant that there was a contact. That is not based upon anything he heard or saw but upon the evidence of Mr Alchin to the stewards that there were a few little clunks. As to what those clunks were, there can only be speculation. That speculation, which has not been expanded upon, in the Tribunal's opinion, may have involved the striking of the feet of the appellant's horse with perhaps the wheel of either of the other two sulkies. But that is speculation. It does not affect in fact what was happening prior to that point nor afterwards.

19. It is quite apparent on the film that Mr Geary's horse shifted down markedly. It is the appellant's opinion that that shift downwards, contrary to the rules which applied to Mr Geary to maintain his line, as it were, to paraphrase a number of rules, was the cause of, firstly, the shaking of the head somewhat vigorously of Mr Grima's horse and then his taking hold and the horse breaking and galloping briefly and then falling out of the race.

20. It is the opinion of the stewards that those actions of Mr Geary were after the event of carelessness which is of their concern. That carelessness, as just described, was striking the horse to go and going into the gap when there was insufficient room to do so. The balancing factor in respect of the appellant's evidence is whether he was entitled to and was able to put his horse into that gap in the circumstances in which he did.

21. The conclusion the Tribunal has to form in respect of carelessness is whether the drive of the appellant was blameworthy – blameworthy in the sense that a driver of his experience has done something which he should not have done. That is, to allow the horse to go into that gap without grabbing hold earlier or done something that he failed to do, which was to grab hold earlier.

22. The matter is not free of doubt and it is a balance of probabilities case on the Briginshaw standard, which requires the Tribunal to have regard to the seriousness of the charge and the likely consequences of it and to view the evidence closely with a view to ensuring that the Tribunal can have that requisite level of satisfaction and comfortable level of satisfaction required.

23. The Tribunal in conclusion accepts that the appellant was entitled to consider that he could place his horse in the gap that he did, but in the totality of the circumstances of his moving the horse forward to keep it on the bit, that in going into that gap, with all of the knowledge he then had, that he should not have done so. It is not that he was entitled to – and he does not express it otherwise – simply go there because it suited him to try and win. But that, in the Tribunal's opinion, what happened subsequently does not detract from the opinion of the stewards that when he put himself into that gap he should not have done so, that in permitting his horse to go into that gap he was careless.

24. Accordingly, the Tribunal dismisses the appeal against the adverse finding and finds that the appellant has breached the rule as particularised.

SUBMISSIONS MADE IN RELATION TO PENALTY

25. The issue for determination is penalty. Rule 256 provides a range of penalties and it is not necessary to set out all of those in this determination. The matter is one which is governed by the penalty guidelines which, as the Tribunal has said, it would give consideration to, and the reasons for that have been canvassed in numerous prior matters.

26. Suffice it to say, the penalty guidelines for this breach have a starting point of 28 days. As has been often expressed, it is necessary to have regard to the actual carelessness itself to determine whether that starting point is appropriate. It could be less, it could be more.

27. At the outset, the Tribunal notes the very generous approach taken by the stewards in respect of their determination of penalty. It was a very fair determination of penalty based upon the facts and circumstances they had before them. They adopted a starting point of 28 days. They reduced it by reason of the less severe nature of the breach by a further 14 days and then

they reduced it by a further seven days by reason of the past offence report. That, in the Tribunal's opinion, was very generous.

28. The offence report itself shows that the appellant was first before the stewards on 28 November 2019, at or about the time – the precise date is not given – he first became licensed. He is a B Grade driver. He is entitled to have penalty considered against him on the basis he does not have the experience of an A Grade driver. And it could be that that is a reason why there is an avenue for a less severe penalty having regard to those circumstances. He is, however, developing substantial experience. He has now had a total of 139 drives and that is reflected, as the Tribunal expressed in its adverse findings, a reason why he is able to express himself with the knowledge and experience that he did during the hearing.

29. The offence report shows that in respect of this rule he has received three reprimands, one on 9 January 2020, one on 24 May 2020 and one on 3 December 2020. The fact that he has had three reprimands of itself indicates that penalties being considered at the lower end of the scale have been considered on the facts and circumstances of those matters. They are not before the Tribunal. But they do not carry with them an indication that he is receiving the message that it is appropriate in respect of the need for him to drive without breaching the subject rule.

30. The Tribunal notes that there has been no plea of guilty, as the guidelines provide, no admission of the breach of the rule, as the Tribunal would prefer to express it, and therefore there is no 25 percent discount for that as against a starting point of 28 days or, indeed, in respect of an assessment of a starting point based on severity.

31. It is necessary to give this appellant a message. And that message is the need for him to ensure that he drives with safety, he does not breach the rules, for his own safety, safety of other drivers and horses.

32. The necessity for that message is somewhat diminished by reason of the fact that the Tribunal forms the opinion – although he did not give evidence on penalty – that he is more now than he was before fully aware of the safety obligations that fall upon him when seeking to exercise his duty to drive for win or best position, particularly with a green horse in circumstances in which it was well within his knowledge that other horses may move about.

33. The Tribunal has to assess an appropriate starting point. The facts of this matter were assessed by the stewards with a 50 percent reduction in the appropriate starting point. The Tribunal sees no reason to set that aside as being inappropriate. Indeed, the Tribunal is of the opinion that the totality of the facts here, when considered against the actual carelessness and what was particularised against him, are able to be reduced to a very low

level by reason of the fact that there is no doubt that other horses were engaged in the actual incident and contributed to it.

34. That did not relieve the appellant of the adverse finding of his carelessness but is relevant to the issue of how he should be penalised for this conduct. And the stewards particularised the actual breach on the basis that shortly thereafter – that is, after the actual critical incident itself, the moving into a position of insufficient room – he was obliged to check and the horse broke stride.

35. That fact of checking and breaking stride is relevant on the issue of penalty because, as the Tribunal found in its decision, Mr Geary on his drive moved down sharply and there was a very minor movement, hardly discernible, upwards by Mr Alchin's drive. As it were, to use the old expression, the gap closed. But it closed essentially after he had put himself in a position which in the opinion of the stewards and the Tribunal is such that he should not have done.

36. But there is a counterbalance to that. Under his duty to drive, he was entitled to move his horse into a gap and seek to go through it if there was safely room to move his horse into that position. That, to the Tribunal's mind, reduces the level of his culpability, his blameworthiness on a penalty consideration, to a very low level.

37. The Tribunal does not determine that a disqualification or, indeed, a suspension is an appropriate outcome for his conduct. The Tribunal is further reinforced in that conclusion by reason of the fact that no one else, except the connections and perhaps the betting public, was inconvenienced because of the failure of the appellant. And that is because it was his horse only that broke and fell back out of position. No other horses were inconvenienced.

38. The Tribunal has the power to take no action whatsoever in respect of this but even perhaps deal with it by way of a bond on a no-conviction basis. The Tribunal, however, is not of that opinion by reason of the fact that he has been dealt with on three prior occasions by way of reprimand for this conduct. For the same reason, the Tribunal determines that a reprimand or a caution is not appropriate.

39. The message being assessed at the lower end of the scale is this: that there be a severe reprimand under Rule 256(2)(i). The further reasons for that are that the appellant has received a sufficient message, in the Tribunal's opinion, that it should not of itself cause him to perhaps lose the ability for further progress in respect of his career. Although, if that was the appropriate outcome for his carelessness, that would be a consequence of his conduct. But having regard to the totality of the facts of this incident, the Tribunal is not of that conclusion.

40. The order is that there be a severe reprimand.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

41. The issue is whether the appeal deposit should be forfeited or refunded in whole or in part. The appellant applies for partial refund, which is not opposed.

42. Having regard to the failure in respect of the principal issue of the non-breach of the rule, there will not be a total refund. In view of the success in respect of the penalty aspect of the matter, there will be a partial refund.

43. The Tribunal orders 50 percent of the appeal deposit refunded.
