

**RACING APPEALS
TRIBUNAL
NEW SOUTH WALES**

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

EX TEMPORE DECISION

FRIDAY 3 NOVEMBER 2017

LICENSEE LEIGH SUTTON

**AUSTRALIAN HARNESS RACING
RULE 149(2)**

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

1. Licensed driver Leigh Sutton appeals against the decision of the stewards of 10 October 2017 to suspend his licence to drive for a period of five weeks. That was for a breach of Rule 149(2), which is in the following terms:

“A person shall not drive in a manner which in the opinion of the stewards is unacceptable.”

They particularised that breach as follows:

“That you, Lee Sutton, have here at Menangle Paceway on 3 October during the running of race seven have led the event, then from a point approaching the 1100 metres you have elected to increase the tempo by your own accord when you became aware that a runner was improving three wide, you have adopted this tactic to indicate your preference to maintain the lead. Approaching the 1000 metres it became apparent to you that the runner improving to the position outside of the leader was indeed Don Boston, a runner that has been racing in good recent form. Then, as Don Boston commenced to issue a genuine challenge for the lead from the 900 metres, you maintained the lead despite the fact Don Boston offered you the option of a favourable trail and offered Smoken Pump Action some respite from the solid tempo recorded thus far, if you were to surrender the lead to that runner. In addition, by doing this you would have been employing tactics that allowed you to drive your runner in accordance with the instructions issued by trainer Darren McCall and that are consistent with Smoken Pump Action’s usual racing pattern. The stewards would deem the tactics you adopted from the 1100 metres to approximately 400 metres to be unacceptable.”

2. When confronted with that allegation, the appellant pleaded not guilty before the stewards. There was subsequently found to be a breach of the rule and a penalty imposed. On his appeal to this Tribunal, he has maintained his denial of the breach of the rule. He has also appealed against severity of penalty.

3. The evidence has comprised the transcript and the DVD, oral evidence from the Chairman of Stewards on the evening, steward Mr Clarke, some race results, some racing sectional times, the form for the subject two horses, race results from a 19 September race and the iForm production for the subject race.

4. The case is an opinion of the stewards case. The issue is whether or not the Tribunal remains of the opinion that that opinion held by the stewards was reasonably open to them.

5. The appellant is an A Grade driver. He is expected to and required to drive to the highest standards. He had driven the subject horse on one prior

occasion. The horse itself had been racing for some considerable time, mostly in Victoria. It had had an 18-month spell, it had come back and raced under other trainers and raced in New South Wales. It had had, prior to the subject race, three starts under the then trainer on the day in question, Mr McCall.

6. The old racing history indicates the horse does better when it races in a forward position. Its more recent form is more mixed. Under Mr McCall, at two drives back it had led and been crossed. In the next race, it was driven from line two and never been better than four back, it had had no success. In its previous three starts prior to that, it had been in a one-one position, it had been outside the leader, it had been forward, it had not been successful.

7. The appellant considered the horse to be one that was best if it was driven by him from the front. He said it was not a high-speed horse, and if he took a sit, it would just bat away in behind them and, whilst not losing ground, would not make any ground. He thought, therefore, that if he was able to maintain the front and free roll, his horse would be better for it. As it is said – and he repeated a number of times – “it’s not a high-speed horse.” “If he had handed up”, as was particularised, “he’s going to get left behind.” As he also said, fairly, from his experience: “you’ve got to try and do your best with what you got, and I felt the best what I had was to try and roll along, try to take the zap out of him a little bit.” That is, out of Don Boston.

8. As to the horse Don Boston, it was the favourite at about \$3.80. Incidentally, Smoken Pump Action was in the 51s. The appellant had some knowledge of Don Boston as a horse that was hot and cold, to use his terms, one which would be driven aggressively and liked to be taken off the fence and come around them, but he says “you wouldn’t know what’s going to happen when it starts from the second row”, which Don Boston did on this occasion. He describes it as an old horse. But, importantly, it was not a horse to which he, the appellant, wished to hand up and, importantly, there was no other horse, on his assessment of form, to which he wished to hand up. He also gave some evidence on the second day of the resumed inquiry about the horse being lame on occasions, but nothing seems to turn upon that. And he was also of the opinion that the driver on the day in question, Mr Abbott, did not get as much out of that horse as another driver, a more experienced driver, Mr Morris, was capable of doing. So that he felt that on recent form Don Boston would be not as good as it had been in other races.

9. Allowing for that experience and allowing for that knowledge of his horse and the other horses in the race, he received instructions from the trainer, Mr McCall. Mr McCall had driven the horse on the first occasion on which it was in his stable when it had in fact led but had been crossed and did not go on to win. There is no doubt and there is no challenge to the effect that Mr McCall told the stewards that the horse was to be driven forward. They

were the only words used by Mr McCall. Those were the instructions given to the appellant. The appellant told the stewards on a number of occasions he was instructed to hold the forward position and maintained strongly before the stewards that he did what he was instructed to do.

10. In respect of those instructions, Mr Clarke, in his oral evidence, said that the stewards considered from the horse's recent form – and in oral evidence today Mr Clarke was at pains to point out reliance upon recent form – that the horse would go forward. As they expected it to go forward, no announcement was made to the public on race day of a change of tactics. Interestingly, it is to be noted in respect of instructions and tactics that the Rules of Racing – in particular, Rule 44 – require that a driver drive in accordance with any change of tactics. And that is the position that Mr Sutton maintains. Whether it was seen by the stewards to be a change of tactics or not, those were his instructions. And consistent with the importance of driving to instructions, subject to driving to the exigencies that arise during the course of a race, it would be proper for this appellant to have done so. Those then are the background facts to the running of the race.

11. It is important to recognise, as the Tribunal just touched upon, that regardless of instructions, regardless of a belief in a driver that the driver's horse and those of others will perform in accordance with their form, that it is absolutely trite to say that races do not always evolve that way. Accordingly, it is necessary, particularly for an A Grade driver, to be able to adopt the drive, the tactics, to meet that which is occurring with the exigencies in the particular race. It is the appellant's position that his drive was in accordance with what occurred and that there was nothing untoward that occurred in the race that affected his consideration of his tactics as the race unfolded.

12. The stewards in their particularisation were very thorough. This, of course, is not a jurisdiction of pleading and a case does not turn or rise and fall upon the respondent, upon whom the burden lies, of establishing that the unacceptable drive, the blameworthiness, was exactly as the stewards chose to particularise it at their inquiry. But it was detailed.

13. In essence, the race started with Mr Sutton driving in line 1 in barrier 1 position and Don Boston was the only horse on the second line and immediately behind Smoken Pump Action. From the time the race commenced Mr Sutton, in accordance with his instructions and his tactical approach and his belief in how the horse should be driven, moved it forward without pressure and at speed. The horse raced without any pressure at all for a considerable distance. This was a 1609 metre race. Another horse took the death position and, as the submissions have indicated, simply sat there without putting any pressure on Mr Sutton's horse.

14. At the 1100 metres Mr Sutton was easily leading with another horse in the death position and, unbeknownst to him because he could not see it, Mr Abbott driving Don Boston moved rapidly through the field around the horse in the death position three wide and moved up to be immediately outside Smoken Pump Action. At that point it was observed to be a horse moving up quickly but not identified as Don Boston. At that point, that horse Don Boston was moving at a speed such that, in accordance with his beliefs as just described, Mr Sutton elected not to give up his position. It is that mischief which the stewards have focused upon.

15. There is no doubt Mr Sutton increased the tempo of the race and did so by reining up Smoken Pump Action, and at the same time it is quite apparent that Mr Abbott was reining up Don Boston. Don Boston raced slightly behind Smoken Pump Action for some distance and eventually moved slightly in front of it. At or about the 900 metres, while continuing to rein up, Mr Sutton pulled the deafeners. It is to be noted – and importantly – that whilst briefly Smoken Pump Action, when the tempo was increased, drew slightly away from the horses behind it – that is, on the marker pegs immediately behind and in the death seat – at the same time while Don Boston was of course coming around at speed. After that tempo increased, it is apparent that the drivers of the other horses then increased tempo because they remained in much the same position throughout the period of concern to the stewards as they did against Smoken Pump Action and Don Boston. In other words, whilst it might be said there was a duel – it could be said there was a duel – between Mr Abbott and Mr Sutton, that the others did not let them get away, and nor did they get away. The other drivers were not spoken to, nor, indeed, Mr Abbott. So it is an assumption that they did not let them get away. Whatever happened, they maintained their positions.

16. When they reached the 800 metres, Mr Sutton gave evidence to the stewards that he formed the opinion at that point that it was too late and too far into the race and too close to the finish, with the two in the positions they were, for him to then give up the lead. In other words, if he had handed up, he would not have been able to drive in accordance with the requirements of the rules to win or for best position. That based upon the matters relating to the horse as not having high speed and, as it was described, as a grinder, in the questions, that at that point he decided he should keep going.

17. As to the tempo of the race, considerable evidence is available in respect of various times. In this race, the first half was 55.9; the middle half, 56.7, and the last half 57.8. The first quarter, 27.6; the second, 28.3; the third, 28.4 and the fourth, 29.4. In fact, the times for Smoken Pump Action were an overall time of 1:55:56, a last 800 in 59.71 and the last 400 in 31.36.

18. As against that, it is noted that the averages between 3 October 2014 and 3 October 2017 for a 1609 metre race at Menangle are as follows: first

half, 57.3; middle half; 58.22; last half, 56.08; first quarter, 27.46; second quarter, 29.84; third quarter, 28.38; fourth quarter, 27.7. The difficulty with those average figures is that, as is conceded by all, the classes of horses racing varies much on an individual day as it does against that three-year period. But importantly, and highly likely, the track and the conditions at the track, such as wind, rain and the like, can have such a marked effect on times. It is more relevant, as was also common ground in the proceedings, to look at the actual times for the day in question, doing as best one can, eliminating different class races.

19. Regardless of that, the times run here do not stand out, again to use the term, as being markedly different to what else was being run on the day. The fourth quarter of Smoken Pump Action of 31.3 is well outside what was a 29.4 for the day and the 27.7 for the average. But critically, in the second and third quarters where there is such criticism, the 28.3 was indeed the fastest second quarter, but not by a great deal, and the third quarter was the slowest. To put all that in some form of context, the Tribunal is of the conclusion that those actual sectional times – the half times and the like – do not raise concerns of such a level that they isolate them from any other consideration that the speed at which Mr Sutton drove could be said to be unacceptable. It is, of course, not an isolated factor, it has to be considered with all other matters.

20. It needs to be said – but little touches on it – that the stewards took no action in respect of the drive of Mr Abbott. It is not for this Tribunal to decide whether the drive of Mr Abbott was culpable or not or unacceptable or otherwise. It must focus upon the drive of Mr Sutton. But the drive of Mr Abbott cannot be ignored. It is his drive which has occasioned this particular drive by Mr Sutton. It must have been apparent to Mr Abbott that Mr Sutton was not going to hand up to him, and despite his endeavours on Don Boston, he gained very little from his challenge. Again, Mr Abbott's drive is not in question. But what it does do is put in context the drive of Mr Sutton to the effect that he did not see or perceive, as he said, that Don Boston was bettering him throughout the critical period to such a degree that that of itself should have caused him to change his tactics or his belief in how best to drive Smoken Pump Action.

21. Then, to go back to the race itself, it is quite apparent that each of Smoken Pump Action, critically, and Don Boston, essentially failed. They became under extreme pressure by about the 350, certainly by the 300 metre mark. They both fell out. The sweepers, as they are described in the industry, came around and ran away quite clearly from these two horses to win by quite substantial margins. Indeed, Smoken Pump Action ended up 26.6 metres behind the winner, but it was apparent that by that stage of the last quarter that horse was not being driven vigorously, and Don Boston ended up at 18.3 metres, 8 metres in front of Smoken Pump Action, but there was some more driving apparent from Mr Abbott in the last quarter.

22. This is an opinion of the stewards case. The Chairman of Stewards, together with his other stewards on the night – Mr Paul and Mr Sharwood – formed an opinion that the drive was unacceptable. Whilst their decision was very brief, they said: “Your tactics appear to be in contrast to the recent racing pattern. Your actions are considered and not split-second and we find you guilty.”

Mr Clarke has maintained that opinion in the witness box today that the tactics adopted, the drive, was not in accordance with what the stewards required of Mr Sutton.

23. The case law, which has been summarised on a number of prior cases, which must be applied to these facts, recognises the expertise of the stewards, in particular, the position from which they were able to make their observations and their considerations, reinforced by the evidence they have subsequently viewed on the DVDs and in respect of the evidence given by Mr Sutton in answer to their questions at their inquiry. The opinion they have formed is that the drive was unacceptable.

24. To be an unacceptable drive under 149(2), as the Tribunal said in Panella on 15 March 2012, it has to be blameworthy. It would be such that there might be some exclamation from an informed observer that the drive was not in accordance with what any informed observer would believe.

25. In an opinion of the stewards case, as was said by the Tribunal in McCarthy (24 January 2014):

“The Tribunal’s function is to determine for itself whether the opinion of the stewards is reasonably held on the basis of the totality of the evidence and to determine that it is reasonable unless no reasonable steward could have come to it.”

26. As the Tribunal has said on other occasions, such as in Elder (18 December 2015), the expression “no reasonable steward” is not a pejorative term, it merely is a way of expressing that if the Tribunal is of a different opinion, then it must form the view that the stewards’ opinion was not reasonably open to them.

27. The critical factors which of course motivated the stewards, and which were much the same as those in Elder, were about driving to instructions, continuing to drive to instructions, feeling the horse was racing as it was expected to do and in accordance with its form and in a position where in the race it was, in the driver’s opinion, best able to race to win or best position, that there is a need to find that that is misplaced. As was said in Elder, it is not the opinion of Mr Sutton that is in issue here, it is the opinion of the stewards and the reasonableness of it. The stewards have formed in

their particulars that there should have been, when the genuine challenge came in, a giving of respite from the tempo thus far, a surrendering of the lead and the employment of tactics that would enable the runner to go in accordance with the instructions and in accordance with the usual racing pattern.

28. The Tribunal comes to a different opinion to that which the stewards formed. Without canvassing and summarising all of the evidence, the Tribunal is satisfied that the drive at the critical points was not unacceptable; it was in accordance with instructions, expected form and what was considered to be the best possible chance for the horse. The Tribunal does not accept that its recent form was such, as it was one which was sought to lead, that continuing to lead under the challenge of Mr Abbott on Don Boston in the circumstances in which it occurred at the time of the race in which it occurred and what was actually transpiring between the two, that it was the only way in which this horse would have been able to be driven either to win or obtain its best possible position, that to have given up would have been to place this horse in a position where it could not come back, that it could not have gone past others, particularly when sweepers started to come in, and that it would therefore have simply fallen away.

29. It is acknowledged that by driving it in the way in which he did, this horse failed. But, as he said to the stewards, "it just wasn't good enough." It is not the case that the horse was driven into the ground and the sectional times, or in this part of the race where the tempo was increased and the lead was not handed up. The form of the horse, and its recent form, despite the fact that there was the challenge of the type, does not convince the Tribunal that the opinion formed by the stewards was reasonably open to them.

30. In those circumstances, the appeal is upheld and the breach is set aside.

31. The only other matter is in respect of the appeal deposit. This was an all grounds appeal. It has been successful. In those circumstances, I order the appeal deposit refunded.
