IN THE RACING APPEALS TRIBUNAL

ANDREW BOURKE
Appellant

v

HARNESS RACING NEW SOUTH WALES
Respondent

REASONS FOR DECISION

TRIBUNAL: **The Honourable G J Bellew SC**
Mr W Ellis OAM (Assessor)

Date of hearing: 27 February 2024

Date of judgment: 5 March 2024

APPEARANCES:

Mr M Hammond – Appellant

Mr S Cullen – Respondent

ORDERS

1. **The appeal is upheld.**
2. **The charge against the Appellant is dismissed.**
3. **The appeal fee is to be refunded.**

INTRODUCTION

1. Following a race conducted at Newcastle on 3 November 2023, Andrew Bourke (the Appellant) was the subject of an enquiry by stewards acting on behalf of Harness Racing New South Wales (the Respondent) in relation to his drive on *"The Creek"* (the horse). That enquiry extended over a number of days, at the conclusion of which the Appellant was charged with an offence contrary to r 149(2) of the *Australian Harness Racing Rules* (the Rules) which is in the following terms:

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

2. The particulars of the charge against the Respondent were as follows:

> *That [the Appellant], the driver of The Creek ... during the running of race 7, failed to make any attempt to ease or slacken the tempo throughout the first half of the mile, which was recorded in 55.2. On exposed form, stewards say that The Creek would not have been competitive in those circumstances, in which stewards say that [the Appellant's] lack of action throughout the said section is unacceptable.*[1]

3. At the conclusion of the enquiry, the Appellant was found guilty of the offence and suspended for a period of 28 days.

4. The Appellant appealed to the Harness Racing Appeal Panel who heard the matter on 28 November. In reasons published on 30 November 2023, the Appeal Panel dismissed the appeal.

5. By Notice dated 29 November 2023, the Appellant appealed to the Tribunal. The appeal was heard on 21 February 2024, at which time the Tribunal reserved judgment. The Tribunal has been assisted in its determination of the matter by Mr W Ellis, an Assessor appointed pursuant to s 8A of the *Racing Appeals Tribunal Act 1983* (NSW).

[1] AB 38.

6. The appeal proceeds before the Tribunal as a hearing *de novo* under s 16 of the *Racing Appeals Tribunal Act 1983* (NSW). Prior to the hearing, the Tribunal was provided with an Appeal Book (AB) containing relevant evidence and associated material. Aside from that material, the Tribunal has had available to it the footage of the race which was viewed in the course of the hearing of the appeal. The representatives of the Appellant and the Respondent were each provided with the opportunity to make submissions in relation to that footage as it was played.

THE CIRCUMSTANCES OF THE ALLEGED OFFENDING

7. At the time of bringing the charge against the Appellant, the Respondent put its case as follows:[2]

> *…[T]hroughout the first half of the event, stewards do believe there were some options available by way of easing the tempo, which in our opinion you failed to explore those. As such, the tempo in the event, which you were a contributor to, you weren't the sole reason for the tempo, but you were a major contributor to it by racing along the marker pegs at that stage …*

8. Included in material provided to the Tribunal was a statement of Chris Bourke. Mr Bourke is the Appellant's father, and part-owner and trainer of the horse. The Respondent did not seek to cross-examine Mr Bourke in relation to the contents of his statement. As a consequence, his evidence is unchallenged.

9. In his statement, Mr Bourke explained[3] that shortly prior to the race, he had been called to the Stewards room for the purposes of attending to what he described as a "paperwork issue". He explained that, as a consequence, there was an inadvertent failure to fit a pulling bit to the horse prior to the race, in circumstances where that forms part of the horse's usual racing gear.[4]

[2] AB 39.9 – AB 39.14.
[3] Commencing at [37]; AB 94.
[4] At [42], AB 94; AB 117.

10. Mr Bourke said he watched the race from the outside of the track, and could hear the horse striking the wheel of the sulky as it went past him.[5] He then went on to say:[6]

> *When The Creek pulls/over races too much, the harness is forced forward on the horse, which in turn moves the gig closer to the horse's hind legs as to what would normally occur. This allows the striking of the wheel to occur.*
>
> *The feel and noise of the striking, then first stirs up the horse, which in a cycle of events, then makes the horse pull/over race even more, multiplying the problem. Once the horse started this cycle and particularly doing so without his regular pulling bit on, Andrew was merely a passenger with no chance of restraining a 500 kg horse so as to sit and then stay behind any other runner. I am with the horse for hours each day. I know the horse very well. I have driven the horse myself hundreds of times in trackwork. There was no chance that the horse was going to settle or be properly restrained or race truly or perform to anywhere near its genuine capability once the unfortunate chain of events as described had been set in motion.*

11. These fact that the horse was striking the wheels of the sulky during the race was supported by statements made by the Appellant himself at the inquiry which was conducted following the race. When asked whether it had been his intention to run the horse at speed, the Appellant said:[7]

> *He was, you know, just pulling hard, he was, and kicking the sulky. He had every right to tire after he pulled so hard.*

12. Subsequently, the Appellant said:[8]

> *He's still kicking the wheels even though – that's why I'm just sort of letting him roll along. If I felt that – if I grabbed hold of him when he was on Mr Morris's back, I would have been obliged to come and race outside him, anyway, because um – yeah, we also left the mini bit off him because of the whole pre-race blood thing. But Dad was in here and it was sort of a rush to get him on the track, so we left that off him, which generally makes him a bit controlled … [O]nce I felt him kick the wheel, sir, there was no – I just knew that he was going to kick the wheels in behind Mr Morris and I was going to have to come out and sit outside him, anyway, because I was not going to be able to hold him.*

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[5] At [44]-[45].
[6] At [46]-[48].
[7] AB 22.15 – AB 22.17.
[8] AB 25.36 – AB 26.4.

13. Following the charge being laid against him, the Appellant said:[9]

> *My horse was kicking and over racing. He had every right to tire as much as he did. Once that horse got in front of him, he sort of just give up real bad. So I honestly thought my horse's ability was better than that.*

14. As has been noted, the Tribunal had the benefit of viewing the footage of the race during the hearing of the appeal. In the course of being given the opportunity to make submissions by reference to that footage, Mr Cullen who appeared on behalf of the Respondent said the following:[10]

> *... [T]here is no contest from the stewards, and there never has been, that [the Appellant] is entitled to have a dib for the lead. They were his instructions. And in accordance with that he drives with some vigour to the first turn. There's no contest there. ... He's entitled to do that. ...* ***What is of concern to the stewards, and in contrast to the way [the Appellant's solicitor] has explained it, is that we say [the Appellant] is never in a position of restraint from his position after rounding the first turn.*** *We say that the driver to his outside is in a position of restraint for a considerable period, until indeed near the 600 metres when he goes forward.* ***There is never a time where [the Appellant] positions himself in the sulky to restrain The Creek. There is never a time after the first turn, we say, that [the Appellant] pulls hard on the reins to restrain The Creek from running the excessively fast times. ... We never say – it's never the stewards' position that The Creek was over-racing.*** *In fact, if that were the case, Your Honour, I don't think we'd be here today.*
>
> *There is no contest running to the first turn. [The Appellant] is entitled to have a shot for the lead. ... He's challenged. He's entitled to hold that lead, if he can, at a reasonable pace. .. He's entitled to have a certain amount of time to attempt to hold that lead. ... There must be a time, though, when that attempt becomes impossible and he must realise that. ... [The Appellant] maintains his position in the sulky. He doesn't restrain, the horse is under no restraint. The horse to his outside is still under restraint ... [The Appellant] is [not restraining]. [The Appellant] is simply allowing The Creek to run along unrestrained. ... [The Appellant's] position in the sulky is unaltered. The Creek is simply running along at a very fast tempo. The driver to his outside is restraining. ... [The Appellant] comes back to the field. They're not driving to him. He's weakening to them. And that is because of the excessive tempo that he allowed The Creek to run at.*

15. It is evident from those submissions that the Respondent places considerable significance on the position adopted by the Appellant in the sulky as being consistent with not applying restraint. This issue is addressed further below.

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[9] AB 38.34 – 38.41.
[10] T 8.43 – T 9.24.

THE COMPETING CASES

16. The Appellant's case is that:

    (i) the restraining bit had, inadvertently, not been fitted to the horse before the race;

    (ii) as a consequence, the horse was over racing to the point where it was repeatedly striking the sulky wheel;

    (iii) he did attempt to restrain the horse, but was unable to do so as a consequence of the horse over racing.

17. The Respondent's case is that:

    (i) the horse was not over racing;

    (ii) the Appellant was never in a position consistent with restraining the horse; and

    (iii) the Appellant took no action to restrain the horse.

SUBMISSIONS OF THE PARTIES

Submissions of the Appellant

18. It was submitted on behalf of the Appellant that on a fair viewing of the footage of the race, it was clear that the Appellant had engaged in "positive driving" and "urging of the horse" for the first 150 metres. It was submitted that this was, of itself, entirely unremarkable, and something to be expected in any race.

19. It was further submitted that from that point (i.e. the 150m mark) the Appellant had ceased driving the horse positively forward, and had sought to restrain it by applying a tight rein. It was submitted that there was a complete absence of any action consistent with positive driving and that, in particular, there was no "loose reining", no "flapping the reins trying to make the horse go faster", and no "whipping the horse for the relevant part of the race". It followed, it was submitted, that for the critical part of the race (being the first 800m) the Appellant had in fact restrained the horse.

20. It was further submitted that a conclusion that the horse was pulling, or over racing, was the only conclusion which was reasonably open on the evidence. In this regard, it was pointed out that the horse's pulling bit had, through inadvertence, not been fitted prior to the race, and that both the Appellant and his father had consistently said that the horse was consistently striking the sulky wheel during the race. This, it was submitted, was an objective indicator that the horse was over racing.

21. It was submitted that in all of those circumstances, the requisite level of culpability had not been established against the Appellant, and that the appeal should be upheld.

Submissions of the Respondent

22. On behalf of the Respondent, Mr Cullen took issue with the proposition that the horse was over racing, and submitted that there was no evidence to support that finding. In that regard, he invited the Tribunal to reject the evidence of Mr Bourke that the bit had not been fitted to the horse prior to the race. Mr Cullen also invited the Tribunal to reject the evidence of the Appellant and Mr Bourke that the horse had been striking the sulky wheel during the course of the race.

23. Mr Cullen submitted that it was necessary to assess the Appellant's culpability over the duration of the entire race, and that the conclusion should be reached that he had driven "single-mindedly". It was submitted that at no stage did the Appellant have a "Plan B". In putting that proposition Mr Cullen made it clear that it was not the Respondent's position that The Creek should have won the race. Rather, the Respondent's position was that the Creek should have been driven in a manner that allowed it to perform to its optimum, aided by a drive that was acceptable under all of the available circumstances. It was submitted that viewed in this way, the Appellant's actions lacked proper initiative.

CONSIDERATION

24. The terms of r 149(2), and the particulars of the charge against the Appellant, have been set out above. Before addressing the evidence, it is necessary to make a number of preliminary observations.

25. First, in order to establish an offence contrary to r 149(2), it is not sufficient for the Respondent to simply prove that the driving was unacceptable in the opinion of the Stewards. What the Respondent must establish to the Tribunal's satisfaction is that the Appellant's conduct was culpable, in the sense of being blameworthy.

26. Secondly, in determining whether that standard has been met, a mere error of judgment, or the adverse results of a split second decision, will not be sufficient.[11]

27. Thirdly, the Tribunal is unable to accept the submission that the Appellant's culpability should be assessed over the entire race. The particulars of the charge make specific reference to the alleged conduct of the Appellant *"throughout the first half of the mile"* or, in other words, the first 800m of the race. That is the case that is put, and that is the case that the Appellant has come to meet. To take into account matters that may have occurred *after* the first 800m would, given the particulars, be procedurally unfair to the Appellant. The determination of whether the charge is made out must therefore be made according to what occurred in the first 800m only.

28. Those observations having been made, the Tribunal turns to the evidence.

29. The Tribunal is satisfied that, through inadvertence, a restraining bit was not fitted to the horse prior to the race. Mr Bourke has set out the circumstances of that in detail in his statement and, as has already been pointed out, what he has said was not the subject of any direct challenge. In the Tribunal's view, there is no basis on

[11] Decision of *Elder,* 18 December 2015 at [23]-[24].

which to reject Mr Bourke's evidence in that respect on the basis that it is untruthful or unreliable.

30. The Tribunal is also satisfied that the horse was repeatedly striking the sulky wheel during the course of the race, and that this is an objective indicator of the horse over racing. That has consistently been the Appellant's position, and is one which is corroborated by Mr Bourke, who explained in some detail the circumstances in which the horse came to strike the wheel. Again, there is no basis on which to reject that evidence as being untruthful or unreliable.

31. Bearing in mind that evidence, the Tribunal is satisfied that the horse was over racing during the first 800m of the race.

32. Having closely viewed the footage of the race, the Tribunal is also satisfied that for the first 150m of the race, the Appellant drove positively, in an apparent attempt to take the lead. Mr Cullen expressly accepted during the course of the hearing that that the Appellant was entitled to do that.

33. From that point (i.e. the 150m mark) onwards, having viewed the footage, the Tribunal is unable to identify any overt action on the part of the Appellant which is consistent with continuing to drive positively in an attempt to gain the lead in the race. As the Appellant's solicitor pointed out during the hearing, there was no "flapping of the reins", whipping of the horse, or any other action on the part of the Appellant which was in keeping with trying to make the horse go faster. Consistent with the absence of any such indications, the Tribunal is satisfied that the Appellant did adopt a position of restraint, by adopting a tight rein and holding the head of the horse with his arms.

34. In this regard, the Tribunal is mindful of the submission made by Mr Cullen that the seating position adopted by the Appellant in the sulky, namely sitting upright (as opposed to leaning back) was inconsistent with restraining the horse. As

previously noted, Mr Cullen placed particular reliance on that circumstance as a factor supporting the Respondent's case. Two observations may be made about that submission.

35. The first, is that for the reasons previously stated, the Tribunal is satisfied that the horse was over racing.

36. The second, is that the position adopted by the driver may not necessarily be conclusive as to whether a horse is being restrained. As Assessor Ellis observed during the course of the hearing,[12] it is not uncommon to see drivers leaning back and still positively competing.

37. In the Tribunal's view, the more reliable indicator of the Appellant's actions is the fact that after the 150m mark was reached, he appeared to have a tight rein on the horse's head. That, in the Tribunal's view, is objective evidence of the application of restraint, and at odds with the case brought by the Respondent which, as particularised, asserts that the Appellant "made no attempt to ease or slacken the tempo".

CONCLUSION AND ORDERS

38. For these reasons, the Tribunal is not satisfied that the charge against the Appellant can be made out and makes the following orders:

    1. The appeal is upheld.
    2. The charge against the Appellant is dismissed.
    3. The Appeal fee is to be refunded.

THE HONOURABLE G J BELLEW SC

ASSESSOR W ELLIS OAM

5 March 2024

[12] T 14.5 – T 14.11