TASMANIAN RACING APPEAL BOARD

Appeal No 13 of 2022-23

Panel:	**Ms Kate Cuthbertson SC (Chair)** **Ms Amber Cohen**	**Appellant:**	**Mr Brodie Davis**
Advisor:	**Mr Mike Stiles**		
Appearances:	**Mr Neil Finnigan (on behalf of the stewards)** **Mr Anthony O'Connell (on behalf of the appellant)**	**Rules:**	**AHRR 149(1) A driver shall take all reasonable and permissible measure…**
Heard at:	**Prospect Government Offices** **171 Westbury Road** **Prospect TAS 7250**	**Penalty:**	**Suspension of 6 Tasmanian race dates**
Date:	**24 July 2023**	**Result:**	**Dismissed**

<u>REASONS FOR DECISION</u>

1. The appellant was the driver of *MAJOR DAVVIN* in Race 6, the Ladbroke's Tasmanian Cup over 2579 metres held on 18 March 2023 at the Tasmanian Trotting Club. Following an inquiry into his drive, which was held over two days on 18 March 2023 and 1 May 2023, Stewards found that the appellant had breached AHRR149(1) which provides:

> *A driver shall take all reasonable and permissible measures during the course of a race to ensure that the horse driven by that driver is given full opportunity to win or obtain the best possible placing in the field.*

2. The particulars of the charge were as follows:

> *We're charging you under 149(1), Mr Davis, Stewards alleging that the manner in which you drove* MAJOR DAVVIN *in the Ladbroke's Tasmania Cup on 18th of March 2023, you failed to satisfy the requirements of the rule by putting a horse under significant pressure from the start for the first 700 metres with the knowledge of the horse's form over distance races. Knowing that its previous start one week earlier where it was running fifth in the heat, which was run at a much leisurely pace in comparison to that of the final. You've driven differently as in the heat. And evidence of the heat run was that you drove -sorry, the evidence you tended (sic) today, in that heat, that you drove the horse in the hope of making a final by giving it its most easiest run. That's the charge and the particulars.*

3. Prior to entering a plea, the appellant asked some questions regarding the charge. Those questions and the responses of Stewards are recorded in the transcript as follows:

> *MR BRODIE DAVIS: In this, if, so this ruling states that, well, it states that I've driven in a failure to finish in the best possible position.*

> *CHAIRMAN: That's what the rule requires you to finish, either win, or to finish in the best possible placing.*
>
> *MR BRODIE DAVIS: If I hand up, does, well, say I hand up, and I finish in the same possible position, what's the difference? Or are we just taking what's happened on the night?*
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> *CHAIRMAN: Well, the difference being simply that you've, in that scenario that you've given the horse a better opportunity to finish in a better finishing position. Remembering that the horse has beaten 130 metres, and under pressure from the 900, from the 1,100 really. So had you of* (sic) *given away the lead, and then the horse gets beat 130 metres, well, you've given the horse every opportunity to perform its best. What stewards are saying, that you've exerted the horse in the first 700 metres to the point where it was non-competitive over the final stages. Under pressure from the 1100 and basically non-competitive from the 900.*

4. Following that clarification, the appellant pleaded not guilty to the charge. Following the inquiry he was found guilty by Stewards and his licence was suspended for 6 Tasmanian race dates.

5. This appeal relates both to the conviction and penalty imposed. The appellant was granted a stay of the suspension pending the determination of the appeal.

Conviction Appeal

6. During the inquiry, Stewards heard evidence from the appellant, another driver, Mark Yole, and trainer of *MAJOR DAVVIN*, Steven Davis. When the inquiry reconvened on 1 May 2023, Stewards summarised the evidence that had been given on the previous occasion as follows:

> *Just for the record, again,* MAJOR DAVVIN *was beaten 129.5 metres at $101.00, and* CHECK IN *beaten 99.4 metres at $9.00. Just to take you back to the initial inquiry on the night, just a few points of this inquiry. Initially Mr Brodie Davis, when questioned, you said you wouldn't hand up. You're looking for a Melbourne horse for cover. You believe the best chance was to hold the front. You did not believe* CHECK IN *was a horse to follow. Mr Steven Davis, you piped in at that point in time and said, "On New Zealand form, you didn't believe he was a horse to follow'". Mr Yole, when questioned, though that it would lead the event being a last start winner which happened to be in the heats and refuted your interpretation of New Zealand form as he believed it was a good form.*
>
> *The check of the New Zealand form showed that he was raced in top flight fields in the majority with reasonable success, particularly over the longer distances. And once leaving New Zealand, moving to New South Wales, the form reads similar.*
>
> *Mr Brodie Davis, you were questioned by Mr Neal, with regard to whether you were aware of the pace that you were running. You said, yes you were. You were comfortable with the race and you felt that the best point at that time was to hold the lead. And the instructions were from the trainer, your father, was, "Hand up to a mainland horse, because they are too good". Word for word. Yes, although you believed that the best, your horse best suited leading, allowing to run along, he's a one-pace pacer. But you did*

add that you believed that the horse raced below expectations. And when questioned, you said, "Well, the early pressure had some play in it".

7. As to the latter point that early pressure had some play in it, the evidence given by the appellant and Steven Davis was not clearly to that effect. During the course of the inquiry, when asked if there was a reason why the horse had raced a little bit below what he expected it to race, Mr Steven Davis referred to it being taken on for a couple of hundred metres.

8. Other evidence given on the first occasion that is not clear from the Stewards' summary includes the following:

   - the appellant indicated that after Mr Yole kept attacking he thought the best option to give him the best chance in the race was to hold the front and not hand up to him;

   - both the appellant and Mr Steven Davis gave evidence that they would struggle to get the horse back far enough to let Mr Yole cross. The appellant indicated plan A was to stay in front until a Melbourne horse came past with a view to handing up because that was going to give him the best chance to cart into the race. That tactic was consistent with instructions he says he was given by Mr Steven Davis;

   - the appellant acknowledged there were other options, including to slow down and get crossed in which case he would probably stay the fence and then just hope for a bit of luck come towards the 800. He also indicated that if other horses had come around quick enough and were a good horse to follow, he probably would have handed up to the right horses, but he did not. He did not consider *CHECK IN* to be good enough to get past;

   - Mr Yole pointed out that *MAJOR DAVVIN* was a 52 rater, which meant it was almost 30 national rating points out of the class as the benchmark for the race was 80 or better. Mr Yole also stated that his horse managed to get a half a length in front of *MAJOR DAVVIN* at the winning post at which point he says the appellant decided to kick up again after he restrained.

9. When the inquiry reconvened, the appellant explained that if he had restrained any more he would probably cause the horse to over race for that portion of the journey. This was confirmed by Mr Steven Davis. Mr Yole explained that he did not think it was unreasonable to challenge for the lead given the form of his horse which he believed was exceptional. He pointed out he had beaten most of the mainland horses in the heat when leading. He reiterated the class difference of his horse compared with *MAJOR DAVVIN*. He explained that he had got half a length in front at the bell and it was not until he asked the appellant the question "are you going to hand the front?" which was after the winning post first time. The appellant answered "no" and Mr Yole explained that was when he restrained.

10. Stewards pointed out during the course of the inquiry that the appellant's drive, *MAJOR DAVVIN*, had never placed in a race over 2,400m. As to its performance in the heat, that was described as its best result and involved it jumping away and easing by the time he had reached the first turn to get cover. In that race, *MAJOR DAVVIN* raced in behind the leader for the remainder of the journey in the heat and secured its best ever finishing position over a longer distance, which was fifth. The appellant was asked what was different about his mindset that created the different racing tactics. The appellant explained as follows:

> *He probably went away better in the cup than in the heat. And in the heat, well, he was just going round and just if we'd gotten easy enough run, hoping though, ran along, that he'd finish off. It was more a drive to see if he'd keep up and make the final, than to give him his best chance to finish close enough.*

11. The appellant was then asked if he was driving to win and after that "we don't care" to which the appellant stated the following:

> *No it wasn't all in. It was after being able to hold the front, if I'd turned into the straight, I'm on the bit. So if I restrained him more and handed up to* CHECK IN*, I thought if they back off any more, I'll over-race, and it'll cost me everything. Because he won't, he doesn't, he's not a horse you can restrain quickly and grab hold. He will push the driver in front.*

12. The Stewards then pointed to Mr Yole's horse leading when it won its heat. He was asked if on that basis he still believed *CHECK IN* was not a good horse to follow. Mr Steven Davis responded as follows:

> *[I]n my opinion, I think he would possibly have done what we did, hand up to the mainland horse which puts us further back. We don't know if he's going to run along. And as Brodie said, he's not a horse that you can – you can restrain a little bit, but he will get on the chewy and start over-racing, and over that trip you'd do yourself no favours at all.*

13. Stewards also asked the appellant if he got to a position in his mind where he thought, well if I keep going here, this is going to be fatal to me? The appellant responded:

> *I knew we were, well, from the start, we're running along. The whole, the lead time, I think, was four or five seconds quicker than average. The whole time rounding the corner, I'm on the bit, so I'm half hesitant to grab hold of too much, because if you over-race, you throw yourself any chance away over 2,600.*

14. Stewards then indicated that the first part of the race was running 2.2 seconds quicker than the race in which *CHECK IN* won.

15. After he entered his plea of not guilty, he explained that he did not feel that he had driven the horse for 700 metres to hold the lead. In contrast, he explained he had driven for 200 to halfway around the corner if that.

16. Following consideration of the evidence, Stewards found the appellant guilty of the charge.

The Appellant's Notice of Appeal and Submissions

17. In his notice of appeal, the appellant stated that he drove to instructions and to the horse's normal racing pattern. He stated he would have severely restrained his horse to hand up the lead to *CHECK IN*, who was under extreme pressure when trying to cross. In his application for a suspension of penalty pending the outcome of the appeal, he further indicated his belief that the Stewards had erred in their decision by finding him guilty of not handing up the lead to a horse that was under extreme pressure trying to take the lead from him when his horse was travelling well.

The Appellant's Submissions on Conviction

18. Before the Board, the appellant noted that the charge he was faced with was a serious one. He noted there was no direct evidence given by Stewards of the race. Criticism was made of the particulars of the charge preferred by Stewards. It was submitted they failed to highlight what the reasonable and permissible measures that the appellant had failed to take in fact were. It was noted that the instructions given to the appellant by the trainer were confirmed during the course of the inquiry. It was submitted that the appellant slapped the horse out of the start, but that Mark Yole was the principal aggressor. The appellant's case was that he had indicated the lead was not available to Mr Yole, that including by turning his head and checking if there was room behind him, but that Mr Yole continued his attack despite that indication. The appellant submitted that he merely let his horse stride and that the attack was not instigated by him. It was submitted he was entitled to hold the lead. The horse's manners were such that it will resent the bit if restrained. The appellant's racing tactics were to go and try and wait and keep it on an even keel.

19. In relation to the instructions to take the lead and hand up to a mainland horse, this meant a horse trained by Emma Stewart. The distance over which this race occurred was longer than MAJOR DAVVIN was used to. The horse had only undertaken a few races over that distance. It was submitted that it was open to the appellant to form the view that CHECK IN was not the best horse to follow. Criticism was also made of the fact that Mark Yole was charged under AHRR149(2) and not the more serious charge pursuant to AHRR149(1). Ultimately, the appellant submitted that the drive was not objectively culpable and that the charge of failing to take all reasonable and permissible measures was unable to be sustained and ought be quashed.

20. Finally, the appellant submitted that alternatively this was a case where the Board should exercise its 'discretion' pursuant to s 34(5) of the *Racing Regulation Act 2004* (the Act) and substitute a finding that the appellant had breached AHRR149(2). Such an outcome it was submitted would be consistent with the finding made in respect of Mr Yole in circumstances where there was no discernible difference in their respective conduct of the race.

Stewards' Submissions

21. The Stewards noted the instructions that had been given to the appellant. However, it was their submission that the appellant was obliged to get the best finishing position. The instruction to hand up to a mainland horse was, in the view of Stewards, unreasonable. There was only one mainland horse in the field that had shorter odds than CHECK IN. There were two other Tasmanian horses also in the market in the race. Of the two mainland horses, the horse trained by Emma Stewart was the favourite and the other was paying $11.00. CHECK IN was paying $9.00. MAJOR DAVVIN was paying $101.00.

22. Stewards also referred to MAJOR DAVVIN's performance in the qualifying race. It was described as a steady race. In that race, the horse had eased by the first turn and sat behind the leader and was sucked along. That heat was a much slower than the one conducted the week before and won by CHECK IN.

23. According to Stewards, the appellant raced into the first turn, had jumped up and down and held the lead. It was acknowledged that the appellant looks to the inside.

That would have enabled him to see the back on inside and that the heat winner in a faster race was not likely to pull in behind the $101.00 front runner. In Stewards' view, it must have been apparent to the appellant that Mark Yole was not intending on taking a position behind the appellant. In the Stewards' view, if the appellant had allowed CHECK IN to take the lead, it could have been sucked into the places.

24. According to Stewards, reasonable and permissible measures available to the appellant were to hand up the lead and take the trail. That would have been consistent with the horse's capabilities, given that MAJOR DAVVIN was not tried and tested over that distance. In Stewards' view, the appellant's drive constituted a serious mistake. The instructions to only hand up to a mainland horse were unreasonable, particularly in light of the performance of some of the local horses. In their view, CHECK IN was one of the best picks to hand up to. The appellant's resistance to CHECK IN's challenge went for far too long and constituted a serious error in the number one race of the season. In their view, the drive was a culpable one and warranted the conviction that was imposed.

Rule 149(1)

25. The scope of AHRR149(1) is well settled. In the decision of *Honan* (NSW Harness Racing Appeals Tribunal, 26 October 1983) Justice Goran stated the following:

> "In the first place the rule does not permit the mere substitution of the steward's view as to how a particular horse should be driven for the view of the driver. Secondly, the rule does not seek to punish a mere error of judgment during a race on the part of the driver....
>
> The rule attempts to ensure not merely that the horse has a winning chance in a race but that, given its inability to win, it will still do the best it can in the circumstances...
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> The rule demands that the measures of the driver must be "reasonable and permissible". Obviously it is not expected that a driver would be permitted to interfere with another horse in order to win with his own horse, but his failure to take a permissible measure to win or to secure the best possible place in the field must be a reasonable failure. It is for this reason that I have said that a mere error of judgment is not a breach of the rule because a mere error of judgment may be reasonable in the circumstances....
>
> There are an infinite number of possibilities when this present rule will apply.... In short, however, the unreasonableness of the driver's tactic must be culpable, - that is blameworthy... Each case will turn upon its own merits, but overall if in taking into account all the circumstances the actions of the driver are unreasonable then he may be considered in breach of this particular rule."

26. In *Mifsud v Racing Victoria Stewards* [2007] VRAT 6, Judge Williams further explained:

> Perhaps to throw my own interpretation into the mix I might view it this way, that the sort of culpable act that is required to amount to a breach of this rule might be such that in normal circumstances a reasonable and knowledgeable harness racing spectator might be expected to explain with words to the effect, "what on earth is he doing?", or "my goodness look at that", or some such exclamation."

Consideration

27. The Board has carefully considered the race film. It was viewed several times in the presence of the parties to the appeal. The Board has also had the assistance of an adviser, Mr Stiles. The Board has also given careful consideration to the submissions of both parties. In our view, the manner of driving disclosed by close consideration of the race film in the context of the appellant's explanation and the other evidence supports the conclusion that the appellant failed to take all reasonable and permissible measures during the course of the race. While the appellant was apparently driving consistently with instructions given by the trainer, those instructions were not appropriate in the context of the strength of the remaining field when compared with the historical performance of MAJOR DAVVIN. MAJOR DAVVIN was not tried and tested over the longer distance, a factor acknowledged by the appellant during his evidence and submissions. His previous performance which qualified him for the final included taking the trail and getting into the places from that position. This would have been an acceptable course to take in this race. It was not taken and the appellant failed to adapt to the clear challenge mounted by the horse driven by Mr Yole, a horse who had performed very strongly in its own heat and had serious form in other jurisdictions and also in Tasmania. The distance over which he resisted the attack mounted by Mr Yole was particularly long. There is no question that the horse was unable to finish strongly as a consequence of the work it had undertaken in the early stages of the race. That work was unnecessary and unreasonable. There were other, more reasonable, options available to it. The course taken by the appellant in this instance was not reasonable.

28. As a consequence, the Board is comfortably satisfied that the appellant failed to take all reasonable and permissible measures during the course of the race. That being the case, there is no basis upon which the Board can consider exercising its power under s 34(5). That power only arises in circumstances where the Board is satisfied the appellant *did not* engage in the conduct that prompted the making of the decision. The appellant's conviction pursuant to AHRR149(1) is affirmed.

Appeal against Penalty

29. When considering penalty, Stewards noted that the appellant's record reflected previous convictions for careless driving and being out of position at the start and other similar offences. They acknowledged that the appellant had not been in the sport for a long time and that he goes around the majority of the time not causing too much trouble.

30. In delivering the decision on penalty, Stewards stated as follows:

> *[For] a breach of this rule, the Stewards are of the belief the starting point is around an eight meeting suspension. We've taken into account your inexperience. There was a not guilty plea, so we can't look too far on reduction there. But we've looked at the racing calendar, the upcoming events, the fact that this race was Tasmania's premier harness racing event. Your record we acknowledge, for the record, that it is a good record. And also, the fact that it's your sole income. Those things all considered, we do believe we can at least take two meeting suspension away, which leaves us with a suspension of your driver's licence for a period of six weeks, six meetings, sorry. You do of course have the right of appeal against the Stewards' decision.*

31. The appellant submitted on the penalty appeal that three meetings would be the appropriate penalty. It was noted that the appellant was inexperienced and still learning his craft. The plea of not guilty was entered after being advised to do so by his adviser. The appellant has been making a go of racing and it was his sole source of income. He has only been driving since September 2022. He has required and received permission to drive in feature races. He is ambitious and intending to make it a full-time occupation, with a view to expanding into Victoria. These factors, it was submitted, were not properly reflected in the penalty imposed.

Decision on Penalty

32. The Board is satisfied that the penalty imposed by Stewards on this occasion was appropriate. This was a feature race. The actions taken by the appellant, albeit consistent with his instructions, were entirely unreasonable in the circumstances. Such conduct during the course of a race must be the subject of a penalty that deters others from taking decisions during the course of a race that cannot be supported by the circumstances that arise or the ability of the horse. It is recognised that the penalty will have a significant impact on the appellant. However, those factors in our view had been appropriately considered by Stewards in arriving at the penalty they did. There are no other factors warranting any further mitigation of penalty in the circumstances. The suspension is not outside the range of penalties ordinarily imposed for breaches of this rule, particularly in such important races. It appropriately marks the seriousness of the offence and sends a message to other drivers that instructions and tactics are one thing, but they have to yield to the particular circumstances of the race. It is incumbent on drivers to make decisions in the best interests of the horse they are driving and with the view to obtaining the best possible place. Failing to do so over such a significant period of time as occurred in this race was a clear breach of the rules.

33. The appeal is dismissed and the decision of Stewards is affirmed. The Board orders, pursuant to ss.34(1A), (2), (4A) and (4B) of the *Racing Regulation Act 2004* that 50% of the appellant's prescribed deposit is forfeited to the Secretary of the Department and that the appellant pay 50% of the cost incurred in the preparation of the transcript of the Stewards' inquiry.

DATED: 22 JANUARY 2024