TASMANIAN RACING APPEAL BOARD

Appeal No 16 of 2022-23

Panel:	**Ms Kate Cuthbertson SC (Chair)** **Ms Amber Cohen**	**Appellant:**	**Mr Troy Madden**
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(2) unacceptable drive**
Heard at:	**Prospect Government Offices** **171 Westbury Road** **Prospect TAS 7250**	**Penalty:**	**Suspension of 3 Tasmanian race dates**
Date:	**24 July 2023**	**Result:**	**Dismissed**

REASONS FOR DECISION

1. The appellant was the driver of *Graphite Stride* in Race 1 Cavalor Equicare Pace 1680 metres mobile on 28 May 2023 at the Launceston Pacing Club. Following an inquiry into his drive which was held on the evening of the race meeting, the Stewards found that the appellant had breached AHRR 149(2) which provides:

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

2. The particulars of the charge were as follows:

> *In charging you under 149(2) Mr Madden, Stewards are alleging that your, what you asked Graphite Stride to do in the first stages of the race is beyond its capabilities and therefore leaving the horse uncompetitive over the final stages. The lead time of 4.9 was well under the average of 5.23 here at Launceston and then following up with a 27.7 and then backing off only to a 29.6. Stewards are alleging at this point that the manner of driving that you put in the first part of the race was to the point where Graphite Stride was rendered non-competitive from the 600 metres mark.*

3. The appellant pleaded not guilty to the charge. Following the inquiry, he was found guilty by Stewards and his licence was suspended for 3 race meetings.

4. This appeal relates to both the conviction and penalty imposed.

5. In a document accompanying his notice of appeal, the appellant stated the following:

> *I am lodging an appeal against conviction and penalty against the Stewards' decision.*

The rule is based upon the opinion of the Stewards and it is my recollection during the inquiry that I tendered evidence that in my opinion does not support the Stewards to form an opinion that my drive was culpable to the extent that it was blameworthy to be captured under this rule.

6. The appellant was granted a stay of the suspension pending the determination of the appeal.

Conviction appeal

7. During the course of the inquiry, Stewards heard evidence from the appellant. At the commencement of the inquiry, the Chairman of Stewards put the following to the appellant:

CHAIRMAN: *Mr Madden, in Race 1 you were the driver of GRAPHITE STRIDE, for trained* (sic) *Ben Yole. You worked forward from the start, took close to half a lap before you got to the lead, you got there..*

MR MADDEN: *Yep.*

CHAIRMAN: *... and then worked well to be quick time of 26 point something for the first quarter, sub 27. And then 29 for the second quarter, you didn't back up after getting to the lead. GRAPHITE STRIDE then was under pressure a fair way out from home and then tired to be beaten approximately 44 metres. How do you think the horse went, first off?*

MR MADDEN: *I thought he went good.*

CHAIRMAN: *Right. What about yourself, how do you think the other drivers (INAUDIBLE). You want to see?*

MR MADDEN: *It was only a mile race, I've come out, I was instructed to go forward with the horse, I kicked up on the inside, kept me working a bit longer than I wanted to. When I did find the breeze, Mr Yole said he wasn't gonna hand up, which I understood. I went and grabbed hold, he was half a lengths back off near the front, and then I decided, well, I don't want to be caught in the breeze, I pushed forward with him. Approaching 1000 metres out after the winning post, grabbed hold, tried to give him a breather and then they approached me three wide in an attacked down the back and they just was too strong for him in the end.*

CHAIRMAN: *So you tried to get him a breather after you took the lead?*

MR MADDEN: *Yeah, definitely I've grabbed hold of him, once I've, worked, once we did find the front. (INAUDIBLE) that easy, third quarter, then hold him as long as I could, but as I said they come early about 900 out, attacked, therefore put him under pressure going down the back straight.*

8. The race film was then viewed. The appellant was then asked by one of the presiding Stewards the following question:

> *do you think that, when you're probably going to sub 58 for your first half, do you think that the horse was capable of running that and then finishing off?*

9. The appellant responded that he thought *Graphite Stride* was good over a mile and he was sure the horse would win the race.

10. Following viewing the race film, it was noted by Stewards that of the 5 horses going forward after the start, the appellant's horse was the widest. It was noted that the appellant crossed to the leading one out line. The appellant stated that he felt he was going to hold the lead at that stage and went to grab a hold when he was still half a length in front. The Chairman of Stewards noted that the appellant still seemed to be running on despite the appellant's indication that he had tried to grab the hold. The appellant responded that he thought he was rating it pretty well. He stated that he knew he worked a little bit for the front but also knew it was only a mile and thought that he could do what he did and was going alright.

11. The appellant was asked whether he had asked too much of *Graphite Stride* in the early stages. The appellant responded as follows:

> *As I just explained we done what we had to do to push forward to the front as instructed, well, go forward, the horse is a good win, that would rate the horse over a mile, ran forward and, as I said, I tried to give him a breather, thought it was travelling good, then as it was the others were just too strong for him.*

12. As to his instructions, the appellant provided the following evidence:

> *MR MADDEN:....I had to go forward, I was instructed to go forward therefore we went forward. We had to work a bit harder than what we wanted to. I grabbed hold to sit in the breeze, Mr Yole's still dropped back a bit and decided I didn't want to be stuck in the breeze, my only chance was to keep him there, keep pushing on and go to the front. Therefore and then once we went to the front hang on to him, save as much as I could and finished the race off as best we could.*
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> *MR GRIFFIN: Thank you.*
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> *CHAIRMAN: So you said the tactics was to go forward, which you did, Mr Yole's tactics normally is very broad, he's asked you to go forward. Did you, is there anything further he said other than go forward?*
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> *MR MADDEN: No. Not at all.*
>
> *CHAIRMAN: So he didn't say go forward…*
>
> *MR MADDEN: He said the horse was as good over, he's a good mile rating horse. Get into him, go forward with him, then the rest was up to me.*

13. The Stewards then questioned whether with the benefit of hindsight the appellant had overcooked the race and asked too much of *Graphite Stride* early. The appellant responded as follows:

> *MR MADDEN:* *As I said we (INAUDIBLE) bit harder than what I'd liked to, they held us wide over the mile, I wasn't going back on him, I was, just had it in my mind to go forward and I stuck to me plan and went forward. The race was ran bit harder than what we'd liked it to have ran, therefore we tried to get him, get a breather as soon as we could, oh as much as we could, as long as we could. He come early therefore we found ourselves approaching the 600 under pressure and…*
>
> *CHAIRMAN:* *So you had to work early, you said that, you were racing four and five wide around that first turn and you said in your own evidence, that you worked harder than you would have liked early, could he have just come around and sat in the breeze and just sat there and give the horse a breather then.*
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> *MR MADDEN:* *I decided that when I was in the breeze, it wasn't, and the lead was half a lengths back off me. I was going to do it tough in the breeze, than what I would have worked a little bit more and took the front to sit on the fence home.*
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> *CHAIRMAN:* *Probably Mr Yole realised you were going quick early, and he wanted to get a breather early, that's probably why he was sitting up, not..*
>
> *MR MADDEN:* *As I said we found ourselves in the breeze, he was half a lengths off me, so I pushed forward to finish in the race in the death.*

14. There was a brief adjournment of the inquiry during which the Stewards received a veterinarian report indicating there were no abnormalities with *Graphite Stride*.

15. There was then some discussion about the section times. The relevant times were 27.7 and 29.6 for the first two quarters, the third quarter was 30.5, and the last section was 31. The appellant pointed out that he did back off the horse as demonstrated by the slower second quarter time and that the slower third and fourth quarters were further evidence of having dropped off again going down the back. The appellant suggested that was evidence that he had taken hold of the horse.

16. After the charge was read to the appellant and the plea of not guilty entered, the appellant stated the following:

> *I thought the horse was capable of the race that we put up, I thought I had the horse win the race, we went out to lead, took the lead, we went out to go forward, we ended up crossing the front, so decided not to sit in the breeze, be better to go to the front after the stage we was at, finish the race off. I thought I had the horse to win the race.*

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

Appellant's submissions on conviction appeal

18. Before the Board, the appellant submitted that he was instructed to go forward during the course of the race. It was noted that Stewards did not confirm those instructions with the trainer, Mr Yole, or seek his views as to the appellant's drive. It was asserted that the appellant had slowed the speed of the race after the first quarter. It was submitted that the appellant's actions in slowing the pace indicated that he was driving to give the horse every possible chance. It was submitted that the evidence the appellant gave during the course of the inquiry indicated that he had thought through the race fairly well. It was submitted that the appellant had saved "petrol" by slowing down the speed in the second quarter.

19. In relation to the asserted lead time, it was submitted that it was Mr Yole who was driving the number 3 who hit the buzzer first and that as a consequence the appellant was not the one responsible for that time. In the first 80 metres it was submitted the appellant was entitled to go forward. In respect of the fast first section, it was submitted that the appellant was not solely responsible for that time either. It was submitted that it was either Mr Yole or the appellant who hit the buzzer in unison.

20. The appellant pointed out that the charge suggested the appellant's drive had been rendered non-competitive at the 600 metres mark. It was submitted that the appellant had let the horse go and had not reigned it up forward with his hands. It was also submitted that the appellant was still going strong at the 800 metres mark. It was, however, accepted that the horse was uncompetitive in the last 500 metres. It was submitted that once the horse was beaten it was appropriate that drivers give up and it was not appropriate to push it on at that point.

21. Considerable reference was made to the horse's previous drives. The overall time of this race was noted to be comparable to other races that it had participated in.

22. It was also noted from the form guide that the horse had done well in races where it had raced from the front. The horse had drawn the number 5 barrier, which inevitably meant that fulfilling his instructions required the appellant to travel some more ground than might otherwise have been the case. It was submitted that the drive was not an aggressive drive but a considered one. It was also submitted that the appellant's body language was not supportive of an assertion that the appellant was not giving up the lead although it was accepted the appellant might be criticised for not sitting in the death but that could only be considered an error of judgement and not one capable of being captured by the rules.

Stewards' submissions

23. Stewards advised that the trainer had confirmed the instructions given to the appellant were to go forward. It was noted that horses 4 and 5 both went out together and although the appellant may not have bumped the trigger, he was racing at a similar pace. Stewards submitted that the lead time cited in the particulars of the charge was accurate in that respect.

24. It was noted that it was not until the 1300 metres mark that the appellant got to the inside of the track. Consequently it had been travelling wider and further than the other horses.

25. While Stewards submitted that they did not have a problem with a driver entering a race with an intention to drive to their instructions and according to a particular tactic,

it was also the responsibility of the driver to exercise his or her own initiative and adapt when those tactics were not appropriate.

26. According to the Stewards, the body language of the horse driven by Mark Yole made it clear to the appellant that the lead was not there to take. The Stewards accepted that going back to last would be detrimental but the appellant had the option to go to the death seat. From there the decision making was all his. To the extent the appellant allowed the horse to run its own race, the Stewards say this indicated a failure to attempt to restrain the horse at all and it was not appropriate in circumstances where the horse had worked so hard in the early stages of the race. According to Stewards, the drive undertaken by the appellant caused it to separate from other runners. There was no attempt to get back to the field until it had started to fade at the 800 metres mark.

27. Stewards submitted that it must have been the case that the appellant had done some homework and recognised that he was racing against some strong horses. Given the form of the horse, it would have been in its best interests to have given it some respite from when it got into the death or the breeze. The Stewards described the horse as honest but one that needed to be driven within its capabilities. The Stewards submitted that the appellant had made the decision to go outside the leader and to run and made the choice to charge forward. It was submitted that if the appellant had given the horse some sort of rest he would not have attracted the charge, let alone been convicted.

Rule 149(2)

28. This rule is not concerned with mere errors of judgement or split second mistakes. The approach to be taken has been summarised by Judge Williams sitting in the Victorian Racing Appeals Tribunal in *Mifsud v Racing Victoria Stewards* [2007] VRAT 6, where he stated as follows:

> This rule is not intended to penalise what might be described as mere errors of judgment or split second mistakes. The Tribunal is well aware of the authority constituted by the previous decision in 1983 by Judge Goran in the case of *Honan* where it was thought desirable to bring into focus the sort of considerations that lie behind rules such as rule 149(1) and (2) and Judge Goran made a number of observations.
>
> It is certainly relevant to restate here that the first, second and fourth of the observations that he made apply. I will read those:
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> "(a) the rule does not permit the mere substitution of the Stewards' view as to how a particular horse should have been ridden for view of the rider".
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> Of course in the harness racing world we would substitute "driven for the view of the driver":
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> "(b) the rule does not seek to punish a mere error of judgement during the race on the part of the driver; and
>
> …
>
> (d) the driver's conduct must be culpable in the sense that objectively judged it is found to be blameworthy" ….

> 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."

29. Notably, AHRR 149(2) refers to "the opinion of Stewards". In this jurisdiction, where an appeal is in the nature of a rehearing to be heard and determined upon the evidence of the original hearing subject to any other evidence admitted pursuant to s 30(6B) of the *Racing Regulation Act 2004*, the question for the Board is whether it is comfortably satisfied that the appellant's drive was unacceptable in accordance with the tests set out above.

Consideration

30. 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. In our view, the manner of driving disclosed by a close consideration of the race film supports the conclusion that the appellant's drive was unacceptable. It is apparent that the appellant was driving consistent with his instructions, that is to go forward. However, he did more than that. During the early stages of the first quarter of the race the appellant drove wide to draw level with the number 3 horse driven by Mr Yole. Rather than taking the death or the breeze, the appellant persisted in attempting to go around and take the lead on the inside. This took a considerable period of time and speed. By the time the appellant had obtained the lead, it appears the horse was spent. By the final quarter, *Graphite Stride* is well and truly beaten and apparent efforts by the appellant to get the horse to continue to drive forward were of no effect.

31. The Board has also reviewed the form guide for the race. *Graphite Stride*'s last win was on 22 January 2023 where it led from the gate. The sectionals in that race demonstrated a slow first sectional and faster, but even, second, third and fourth quarters. Similar patterns are evident in other races where *Graphite Stride* has done well. None of its previous races involve such a fast first quarter. The attempt to gain the lead was not a short lived one, but was undertaken for a considerable period of time and at a very fast pace. Rather than give the horse respite early, the appellant persevered with the attempt to gain the forward position for far too long. In those circumstances, the Board is comfortably satisfied that this was not a mere error of judgment, but blameworthy conduct. It must have been apparent to the appellant that his horse would have to work too hard to get the lead in the circumstances. As a consequence the Board is comfortably satisfied that the appellant's manner of driving in the race as identified by Stewards was unacceptable.

Appeal against Penalty

32. When delivering the decision on penalty, Stewards stated as follows:

> *Mr Madden, normally the starting point for offences under this rule is that suspension of your driver's licence for four meetings. You haven't pleaded guilty, however we've gone back through your record and there's only one blemish on your record for a similar rule back in 2006. So, someone that goes around as often as you we'd got a good record, so there should be some leniency there, so we're going to take one meeting off, but we cannot go any*

lower legally than a suspension of your driver's licence for a period of three meetings.

33. The appellant had earlier submitted that a reprimand would have been fair in the circumstances. He stated that he was out there to win the race and that nothing else bad had flowed from his manner of driving. It was pointed out to him that under the rules of racing the idea was not just to win a race, but to finish in the best possible place. It was also pointed out by Stewards that sometimes things happen in races, but that drivers need to make decisions on the run. It was noted that the appellant had been charged under the lesser rule in that regard.

34. In respect of penalty, the appellant submitted that he is not a frequent driver. Although he drives for reward he is relatively inexperienced. Driving is not his sole income as he is a builder by trade. He is also a hobby owner and B-grade trainer. He works for Ben Yole as a stable hand and takes the occasional drive. It was submitted that the penalty imposed by Stewards did not take into account his inexperience and that he had been driving to instruction.

35. The appellant was also handed another suspension in respect of another race. Due to the position taken by Stewards in respect of the order in which the penalties were imposed and the way in which the suspensions were to be served, the appellant had in fact missed out on one meeting that he otherwise ought to have been able to participate in as a consequence of the stay being granted in respect of this matter. It is submitted that this meeting was lost to him through no fault of his own and ought to be taken into account when assessing the appropriate penalty.

36. The Stewards emphasised the importance of this rule and others like it in upholding the good image of racing. It was submitted that it was the responsibility of all participants to ensure the integrity of the races, including by driving in a manner that is acceptable and appropriate to the circumstances of each race. It was noted that the appellant gives Stewards no trouble. He was noted to be polite and from the Stewards' point of view, the race did not fall the appellant's way and he was caught four wide. It was assessed by Stewards that it would be reasonable to go closer to the marker pegs but that he had worked harder than he had wanted to do in order to achieve that. From that point on, Stewards submitted that the appellant had failed to take into consideration the strength of the field and the work that he had done to that point. In those circumstances, it was submitted that the penalty was appropriate.

37. As noted, Stewards took into account during the inquiry that the appellant had not been found guilty of a breach of this rule for some considerable time. The report discloses previous suspensions in relation to careless driving in 2019.

38. In our view, the suspension imposed by Stewards was appropriate in the circumstances. It is not outside of the range of penalties ordinarily imposed for breaches of this rule. The penalty appropriately marks the seriousness of the offence and sends a clear message to the other drivers that instructions and tactics are one thing, but they must 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 it obtaining the best possible place. The appellant's drive did not do this. He pursued the lead for an extended period of time from a position wide of the marker pegs and gave the horse no opportunity to race the entirety of the event in a competitive fashion. It is accepted that the appellant missed a race date that he ought to have been able to participate in pursuant to the suspension of penalty granted. That, however, is not a matter that should affect the decision as to penalty.

Stewards and the Director of Racing are well aware of those circumstances and may give consideration as to how that issue may be addressed in the implementation of the penalty.

39. 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: 9 OCTOBER 2023