

TASMANIAN RACING APPEAL BOARD

Appeal No 10 of 2017/18

Panel:	Kate Cuthbertson (Chair) Rod Lester Wendy Kennedy	Appellant:	Natalee Emery
Appearances:	Adrian Crowther on behalf of the Stewards Barrie Rattray on behalf of the Appellant	Rules:	Australian Harness Racing Rule 149(1)
Heard at:	Launceston	Penalty:	6 race date suspension
Date:	18 December 2017	Result:	Appeal against Conviction – Dismissed Appeal against Penalty – Dismissed Penalty – 6 race date suspension

REASONS FOR DECISION

1. Ms Emery was the driver of *Modern Chic* at Launceston Pacing Club in Race 5 “Shirley Martin Mother of Pearl 2200m” on 19 November 2017. Following an inquiry into her drive, the Stewards found that Ms Emery 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:

“And the particular of this charge is that you, as the driver of Modern Chic tonight in Race 5, had in the early stages of the race after gaining a favourable one out one back position, then elected to leave that position after travelling a short distance around the first turn, nearing the 800m mark. During that stage of the race the pace was very fast and you then commenced, committed to a three wide position and then, which has then resulted in your mare racing three wide for the rest of the way, an action which Stewards state, under the circumstances given the exposed form of your horse and the runner preceding you, Ima Ginger Rogers, we state that your actions in doing so were not reasonable, not a reasonable decision to move three wide at that stage, and not a permissible decision to move three wide at that stage.”

3. Ms Emery pleaded not guilty to the charge. Following the inquiry she was found guilty and handed a six-race date suspension by way of penalty.

4. This appeal relates both to the conviction and penalty. The appellant was granted a stay of the period of suspension handed down by Stewards.

Appeal against Conviction

Inquiry Evidence

5. During the Inquiry, the Chairman of Stewards stated as follows:

CHAIRMAN: Good. I just wanted to speak you in relation to your driving tactics on Modern Chic. Just watching the race from the Chairman's tower I noticed that Modern Chic began out of barrier 5, and then slotted across into a favourable one out one position. Courageous Katee, drew 1, wasn't able to hold its ground, and was quite easily crossed by Rocknrollhighlight, driven by Mark Yole. Mr Steven Davis, driver of Ima Ginger Rogers also progressed forward and established himself in the position outside the leader. You were then able to angle pretty much straight on to his back going past the winning post or might have been shortly before the winning post. I then noticed that on the first turn that Mr Davis was racing probably half to three-quarters of a length away from the leader, Rocknrollhighlight. You had established yourself in the one-one position and about halfway around the first turn or thereabouts you elected to pull three wide.

MS EMERY: Yes.

CHAIRMAN: And then attempted to progress forward. You were then unable to progress forward and gain the position outside the leader. As soon as you shifted out, Mr Collins on Courageous Katee vacated the position on the rails and took up the position you left, your mare was then out on a limb. When it became evident you weren't able to get in, you then restrained back to the rear of the field. That's the observation of the race as I saw it. Do you have any questions on the observation I have given?

MS EMERY: No, Sir.

CHAIRMAN: Can you give us an explanation of why you've left the one out one back position so early in the race?

MS EMERY: A very bad drive, Sir. Very bad drive. I, the mare's been held up last two starts in her races and she is going, well, she hasn't been able to get out, type of thing. She is more one paced. Before the start I asked Ben what he wanted to do and he said, "look, drawn 5, try and work forward and, you know, probably go, get outside because she is probably a bit up and going". Just bowling along.

As soon as I pulled out I thought Mr Davis was wanting cover. That's the only reason I went, and when I did I give my mare a couple of flicks on the butt to get around quick, and then when I knew it wasn't there I tried to slot back in but my position had already taken, and I just, what do you do? Yeah, you're just out.. a very bad drive. That's what I've said when I came back in to the trainer as well.

6. Ms Emery later explained during the inquiry that the reason why she left her position was ...

...because Mr Davis took hold and he was racing quite back, and I thought he was wanting a bit of cover.

CHAIRMAN: Okay. That wasn't my immediate impression. I don't, the film might bear that out, but I don't believe I recall him restraining, indicating that he was looking for cover.

MS EMERY: The pace would have slowed, the pace slowed up a little bit and he was just sort of sitting, sitting back. I mean, he wasn't restraining his horse to get back or anything, and I just made a snap decision which was the wrong decision at

the time, to pull out and give my one on the butt and hopefully she could get around now, and as it was it couldn't. I tried to get back. Just a very bad drive.

7. She also stated:

...I've driven a bad race because obviously the death wasn't up, up for grabs. If it hadn't been up for grabs I would have stayed there. I would never have pulled out thinking if I'm not going to, if I'm not going to be able to get in that position. Like why would you do that?

Yeah, I lobbed in a good position and it's been a snap decision. You've got a split-second decision out there whether to stay there or whether to come out because I think that the death's there, and as it was it wasn't. If I had a horse that had like a fair bit of quicker speed I'd probably get around Mr Davis, and that's why when I came out I drove her aggressively to try and get there. At no stage did Mr Davis even sing out to me or pull his stick to indicate that the death wasn't there.

8. Ms Emery later in her evidence said that *Modern Chic* hardly ever raced in the death seat which is why she elected to go around. The Chairman of Stewards noted that *Ima Ginger Rogers* had won five of its last 10 starts from the front position. The applicant was questioned about her willingness to pull out during a quickly run lead-time and take a position in those circumstances.

9. Following consideration of the evidence, Stewards found the charge proved indicating the following:

We have considered the matter as to whether the charge will be sustained or not. We considered the evidence put forward by you in defence to the charge and the totality of the evidence tabled at this inquiry. We are comfortably satisfied that your actions in leaving the favoured one out one back position at the stage of the race you did were not reasonable and permissible and constitute a culpable or blameworthy error. So, we do sustain the charge against you and we state your actions were not reasonable for the following reasons:

- the very fast pace of the race at the time you moved three wide, that you were not compelled to move three wide to get out in front of an advancing runner and your actions were not one of a split second error of judgement;*
- the form of your mare, which had not won in 24 starts since 19 May, the fact that you attempted to take the position outside the leader from a favoured in form runner, that your decision to go three wide was a significant contributing factor in your drive finishing ninth of ten, beaten 53 metres.*

So we do find you guilty of the charge on those (sic.) basis.

The Appellant's Submissions

10. The appellant was represented by Mr Rattray, who made the following submissions on the her behalf:

- *Modern Chic* at the time was racing at 3 or 4 class level and had previously run feature races. In comparison, *Ima Ginger Rogers* had only ever won around the Devonport track. Its participation in this race represented a jump in class. No change of tactics was noted by the trainer of *Ima Ginger Rogers*. It was submitted that when a horse goes from one class to another, one would not expect it to choose to hold the breeze.

- During a previous race in which both horses participated, *Ima Ginger Rogers* had led and finished 10th with *Modern Chic* running 3rd.
- The appellant had decided to take the breeze as the horse had been held up in its last two runs. The appellant had formed the opinion that the horse was working its way back into form so decided to take a forward position. It was submitted that this was not an unusual racing pattern for *Modern Chic*.
- The appellant had made a snap decision to come out. She did challenge again, but was unable to gain the lead position.
- An unacceptable drive was characterised by a series of mistakes rather than a single decision made on the best available information. Going to the three wide position at that point in the race was appropriate because it was assumed that *Ima Ginger Rogers* would drop off and be looking for respite.
- If the appellant had known that the driver of *Ima Ginger Rogers* was not going to hand up, the manoeuvre would not have been undertaken.

Stewards' Submissions

11. Stewards noted that *Ima Ginger Rogers* had won five of its last 12 starts. Its established pattern was to race forward. It had won from that position in previous races. It was also noted that the driver of *Ima Ginger Rogers*, Mr Davis, was an aggressive driver. On that basis, the assumption made by the appellant that Mr Davis would hand up was difficult to understand.
12. On the other hand, Stewards submitted that *Modern Chic* had been competitive or successful when it had had a cheap run. The pace of the race was such that the field had already stretched out and *Modern Chic* had gained a favourable position. In the Stewards' opinion, on the exposed form of *Modern Chic* and given it had been most successful when driven conservatively, it was appropriate to remain in the one out one back position during the early stages of the race.
13. In their view, the appellant's decision to go into the three wide position and leave the cover was culpable.
14. The race book in relation to this matter was handed up by Stewards. The tactics noted in respect of *Ima Ginger Rogers* were that it would take a forward position. The notes in respect of *Modern Chic* are as follows:

“No GS. Slot in. OLT.”

15. The evidence was that these were the assumptions made by Stewards of the likely racing tactics of the horses involved in this particular race based on their previous form. Two possible tactics are noted in respect of *Modern Chic*: slotting in or racing outside the leader throughout.

Race Film

16. The Board had available to it the film of the race. The film is consistent with the description of the race given by Stewards during the course of the inquiry and noted in their report as follows:

“After leaving the one out one back position on the first turn Modern Chic (N. Emery), then challenged Ima Ginger Rogers (S. Davis) for the position outside the leader down the back straight, before being very briefly restrained and then again pushing forward to challenge unsuccessfully before later being restrained to the rear. The mare was then under pressure from the 800 metres and tired to finish 9th, beaten in excess of 50 metres.”

17. The Stewards’ report goes further to state that the charge was laid against the appellant

“for failing to take all reasonable permissible measures, the particulars being that she had left the favoured one out, one back position during a very quickly run part of the race and then persisted with a challenge for the position outside the leader, which Stewards state, was a significant contributing factor in her drive then tiring to finish second last, and her actions in doing so were not reasonable when the reasonable and permissible opportunity to maintain her position in the favourable one out one back trail was present and available, and then that she persisted to challenge for the position outside the leader when the reasonable option was to restrain and take cover and save ground, to then finish in the best possible placing.”

18. It was then noted that Stewards were comfortably satisfied that the appellant’s actions constituted a culpable or blameworthy error and the charge was sustained.

The Decision

19. The scope of AHRR 149(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...

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.”

20. The Board is comfortably satisfied that the appellant’s drive was one that was culpable and blameworthy in the circumstances. The appellant is an experienced driver, having driven for over 20 years. The Board accepts that the initial pace of the race was quick

and that the position the appellant was in was a favourable position. The Board is also satisfied that the form of *Modern Chic* was such that it was not reasonable to expect it to be able to challenge in those circumstances. To challenge so early in the drive while the pace was still fast was highly culpable. There was nothing to suggest that the driver of *Ima Ginger Rogers* would hand up the lead.

21. The Board formed the view that it was an unacceptable drive from an experienced driver. The appellant noted as much during the course of the inquiry, herself describing the drive as a “*bad drive*”. The appeal against conviction is dismissed.

Appeal against Penalty

22. During the inquiry, the appellant stated in respect of penalty that in hindsight she recognised she had done the wrong thing, but at the time thought she was doing the right thing. She told Stewards that a suspension was going to cost her dearly because the income she derives from harness racing is like an extra wage to her. She told Stewards she had been driving for 20 years, that she is of good character and not a reckless driver. She regarded herself as someone who takes into consideration all her fellow drivers. Stewards noted that she had not previously been charged with reckless driving. It was noted that the appellant drives 5 or 6 times a meeting and that her record, which went back 10 years, did not disclose any previous breaches of AHRR 149(1).
23. When imposing penalty, the Stewards noted the serious nature of the charge and the feature race status of this particular race. It was noted that such matters usually result in significant suspension. It was also noted that eight race meetings was a commonly imposed period of suspension, but given the appellant’s good record she was entitled to some credit. It was noted that she had pleaded not guilty, but in light of her good record Stewards were satisfied that a suspension of six race dates was appropriate and the minimum that could be considered for an offence of that nature.
24. The appellant submitted that the penalty imposed was harsh in light of the appellant’s personal circumstances. She has a young family that she supports. The income she derives from harness racing is a significant contributor to the family income. It was submitted that the appellant’s error was made on the spur of the moment and that the penalty imposed by Stewards failed to take that into account.
25. Stewards submitted that the penalty was appropriate in the circumstances. It was also submitted that deterrence was an important consideration as AHRR 149(1) was a key integrity provision. Given the blameworthy nature of the drive, the penalty needed to be commensurate with the seriousness of the charge and the blameworthiness of the drive.

The Decision - Penalty

26. The appeal against penalty is also dismissed. The Board has taken into account all submissions but agrees with Stewards that the penalty imposed was appropriate to the circumstances of the drive and the appellant’s lack of prior relevant matters. Breaches of these rules are serious and strike at the heart of the integrity of racing. It is not suggested that there were any integrity issues at play in respect of this particular drive. It is, however, necessary to enforce to drivers the need to undertake their drives in a manner that affords their horse the best opportunity. It has not been demonstrated that the penalty imposed was outside the range of penalties appropriate to such a drive.

Conclusion

27. The Board affirms the decision to convict the appellant of the breach of AHRR 149(1) and to impose a six-race date suspension. Pursuant to ss.34(1A), (2)(a), (4A) and (4B)(a) of the *Racing Regulation Act 2004*, the Board orders that:
- (a) 50% of the prescribed deposit paid by the appellant is forfeited to the Secretary of the Department; and
 - (b) the appellant pay 50% of the cost incurred in the preparation of the transcript of the Stewards enquiry held on 19 November 2017.