

**Appeal J Ford v RIU - Written Decision of Appeals Tribunal dated 12 March 2018 - Chair, Prof G Hall**

**Rules:**

**Repondent(s)/Other parties:**

**Name(s):**

**Decisions:**

**BEFORE AN APPEALS TRIBUNAL OF THE**

**JUDICIAL CONTROL AUTHORITY**

**UNDER THE RACING ACT 2003**

**AND IN THE MATTER** of the New Zealand Rules of Harness Racing

**BETWEEN**

Jason Ford, Licensed Horseman

**Appellant**

**AND**

Racing Integrity Unit (RIU)

**Respondent**

**INFORMATION:** A09897

**COMMITTEE:** Prof G Hall (Chairman)

Mr G Thompson (Committee Member)

**APPEARING:** The Appellant in person

Mr M Jones, assisting the Appellant

Mr S Renault, Stipendiary Steward, for the Respondent

**DATE OF ORAL DECISION:** 1 March 2018

**DATE OF WRITTEN DECISION:** 12 March 2018

**WRITTEN DECISION OF APPEALS TRIBUNAL**

[1] Mr J Ford has appealed the decision of the Raceday Committee of 6 February 2018 at the Amberley TC meeting where in Race 4 he was charged with a breach of r 868(2) of the Rules of Harness Racing. The charge was found proved and Mr Ford was suspended for 4 months and fined \$400.

[2] The matter was heard at Addington raceway on 1 March.

[3] We delivered an oral decision on that day allowing the appeal and indicated we would deliver a written decision setting out our reasons.

[4] After hearing from the parties, we ruled that the RIU would present their case first.

**Respondent's case**

[5] Mr Renault commenced his submissions by stating r 868(2) was aimed at ensuring that the integrity of Harness Racing was protected. A driver has two main obligations: to drive his horse in a manner that is both reasonable and permissible in order to gain the best possible finishing place. An investor was entitled to have a driver do his or her best to gain a return from that investment.

[6] The race in question was run over 2600 metres. TIME FOR DIAMONDS drew 2 on the front line and settled three back on the inside before shifting away from the marker line on the final bend. The horse was held up in the early stages of the home straight before gaining clear racing room near the 150 metres and finished strongly to run second.

[7] Rounding the final bend, MOTU GREAT SENSATION had a clear lead over the rest of the field. BK DAWN, driven by Ms P Wakelin, left her trailing position as the field neared the 400 metres and improved outwards to the parked position. This manoeuvre forced ARRAN CHIEF, which was giving ground, wider on the track. Shortly after passing the 400 metres, Mr B Borcoskie, the driver of MOTU GREAT SENSATION, began to urge his horse with the left rein, however he continued to maintain the lead and was the leading horse as the field straightened for the run home.

[8] As a result of BK DAWN shifting outwards, the trailing position behind the leader MOTU GREAT SENSATION became available for TIME FOR DIAMONDS. At this stage of the race Mr Ford had two options: to maintain his position on the marker line and wait for the passing lane, which was to become available upon entering the home straight; or to shift outwards from the marker line and follow BK DAWN to take up the 1x1 position. Mr Ford chose the latter option.

[9] Mr Ford did not immediately follow Ms Wakelin out into the two-wide line. Mr Renault believed he was in two minds as to whether to improve outwards or stay following MOTU GREAT SENSATION. The back straight camera showed that he appeared to be inside BK DAWN.

[10] Stewards had "major concerns with the manner Mr Ford drove rounding the final bend." Mr Ford had taken the option to improve outwards onto the back of BK DAWN. At this stage of the race he had ARRAN CHIEF, which was weakening to his outside. Wider out was the improving SUNSET PEAK, driven by Mr J Morrison and on his back was ARYA, driven by Ms S Ottley.

[11] Mr Ford's movement outwards into the 1x1 had resulted in him being surrounded by horses and he was not in a position to shift wider on the track. He was blocked for clear running until the 150 metres. Mr Renault said Mr Morrison had held his line for some distance, despite Mr Ford trying to shift him wider.

[12] Mr Renault said had Mr Ford waited behind the leader MOTU GREAT SENSATION, he would have had a guaranteed run in the passing lane. MOTU GREAT SENSATION, whilst being reined along by its driver, at no stage gave ground. It maintained its position in front and was the lead horse as the field straightened for the run home. This would have meant TIME FOR DIAMONDS would have had a clear and unobstructed run from around the 240-metre mark at the start of the passing lane. Instead, the horse was held up for clear running until near the 150 metres when Mr Ford was able to shift SUNSET PEAK wider on the track.

[13] When questioned in the initial interview regarding his decision to shift outwards, Mr Ford was asked, "Did you realise you could have got the passing lane?" Mr Ford replied, "Yeah, I did but I just thought I was going to get a go out on the outside and I would have won it but just John Morrison wouldn't give me any room on the outside. There was no room, there was nothing."

[14] When further questioned, Mr Ford replied to a statement that Mr Morrison did not have to give him any room, "No he doesn't have to but I pushed him out in the end. I managed to get him out but I did the wrong thing I should have stuck to the inside. Came off there."

[15] Mr Renault said, "Clearly Mr Ford accepted that he took the wrong option."

[16] Mr Ford was also asked, "Did you feel Mr Borcoskie was stopping in your face?" Mr Ford replied, "Yeah I did. I felt as if he was coming back, that's why Philippa [Ms Wakelin] went out around him." Mr Renault emphasised that the video did not show MOTU GREAT SENSATION coming back at all. The horse maintained its position.

[17] As a result of Mr Ford's actions to shift his horse away from the marker line the horse that had been following TIME FOR DIAMONDS, WE'LL MEET AGAIN, driven by Mr J Smith, took up the vacated position of TIME FOR DIAMONDS and utilised the passing lane a short time later and won the race. Had Mr Ford maintained his position behind MOTU GREAT SENSATION, Mr Renault believed the outcome of the race "would more than likely be entirely different." TIME FOR DIAMONDS was beaten  $\frac{3}{4}$  of a length. Whilst the outcome would not be known, had he stayed in the trail it was reasonable to suggest that he would have won the race.

[18] Mr Ford's defence, as summarised in the JCA raceday decision, was that the leading horse was starting to struggle and he was going to be held up. The replays clearly show that MOTU GREAT SENSATION was not starting to struggle. Mr Ford had elected to shift outwards into heavy traffic. He would have been aware that the passing lane would be available to him as soon as the field straightened for the run home. Mr Ford had displayed bad judgement in shifting ground outwards.

[19] The raceday decision states, "Mr Ford in answer to a question from Mr Renault, stated that he knew that when he moved out to follow Ms Wakelin, there was nowhere to go at that stage but that there was a half gap on the inside of SUNSET PEAK, which he intended to push his way out of. He said he did this and because SUNSET PEAK was travelling on equal terms for a while it took 50m to complete the move. He also conceded that it was not a good look that Mr Smith had taken up his position behind MOTU GREAT SENSATION and had then got the run in the passing lane to eventually win the race." Mr Renault submitted that this evidence confirmed that Mr Ford had displayed bad judgement. To move out at such a crucial stage of the race when he knew that when he moved out there was nowhere to go at that stage, but there was half a gap on the inside of SUNSET PEAK was simply unacceptable driving from Mr Ford. There was never a run available on the bend. The run that was guaranteed was in the passing lane, once the field straightened for the run home.

[20] Mr Renault asked the Committee to consider a comment by Haylen J, in a ruling dated 20 May 2009: "Perhaps to throw my own interpretation into the mix I might view it this way – that the sort of culpable action 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 exclaim with words to the effect 'what on earth is he doing' or 'my goodness look at that' or some such exclamation."

[21] That statement, Mr Renault believed, demonstrated how r 868(2) should be applied and represented a common-sense application of the rule. This quote was seen to be very relevant to the case of Mr Ford. Any reasonable and knowledgeable spectator viewing this race, Mr Renault said, "could surely express the same sentiment, what on earth is he doing, he has the passing lane available to him in a short while. Why has he shifted outwards and been held up?"

[22] The JCA Committee on the raceday said in their decision: "The Committee determined that Mr Ford's impression that the lead horse was giving ground, due to the fact that it was being slapped with the reins, was misconceived, as it held the lead into the straight and past the entrance to the passing lane. We find that had Mr Ford stayed in the trail of the lead horse he would have received the passing lane run, as the eventual winner, WE'LL MEET AGAIN did, after taking up the vacancy left by Mr Ford. We are in no doubt that had Mr Ford opted to take up the trail position, and had not moved off to follow Ms Wakelin, TIME FOR DIAMONDS, would have received the passing lane run and, in our opinion, and on the balance of probabilities, gone on to win the event."

[23] The JCA committee added: "The Committee is satisfied that it was reasonable and permissible for Mr Ford to take up the position of the trail and obtain the passing lane, as was his right, at the 250m, therefore giving his horse every opportunity to win the race or obtain the best possible placing. Mr Ford's action to shift out and follow Ms Wakelin out into the 1-1 position amongst heavier traffic was not what we considered a prudent driver would have done and not in the best interests of the horse, its connections and betting public."

[24] Mr Renault said the assessment of the JCA Committee on the day was correct. Mr Ford was guaranteed a run behind MOTU GREAT SENSATION, which was not starting to struggle, but had made a deliberate decision to follow Ms Wakelin wider on the track and in so doing shifted into traffic.

[25] Mr Ford questioned Mr Renault as to how far Ms Wakelin had shifted out in the straight. He suggested to Mr Renault it was 1 to 2 cart widths. Mr Renault believed it was half a cart width and commented that the inside horse may have shifted down a little as well at that time.

[26] Mr Jones said to Mr Renault the trailing horse had shifted out yet he had only charged Mr Ford who had done the same. Mr Renault replied that when Ms Wakelin had come out she had got clear running. Mr Ford did not, and would not get clear running. On that basis it was reasonable for Mr Ford to stay behind the leader.

### **Appellant's case**

[27] Mr Ford stated from the 500 metres it was evident that the leading horse was "not going quick." At the 400 metres he looked ahead and saw Ms Wakelin come out. At that time the leading horse was being shaken up and he thought it was getting the stick.

[28] At that point in the race he was in two minds as to what to do. The leader was being tapped up and a number of horses were fanning wider on the track looking for runs. He decided to shift out and follow Ms Wakelin. He said Mr D Dunn had followed him and must have had the same intent as him.

[29] Mr Ford said he did not know at the time he decided to come out whether the horse in front would go on with it for, say, 100 metres or whether it would take him all the way to the passing lane. A key factor in deciding to follow Ms Wakelin was that her horse was running on whereas the leading horse was not.

[30] Mr Ford also alleged that Ms Wakelin had come out 2 cart widths in the straight and he believed this had cost him 2 or 3 lengths and the winning of the race. He thought when he shifted he would "get a go" from following Ms Wakelin.

[31] Mr Ford said TIME FOR DIAMONDS had won on the grass and he was expecting it to finish off the race well. The horse was best saved for one last run. It was used to being pulled out to the right as it trained behind a galloping pacemaker. This was another reason why he had shifted outwards. He acknowledged he had not factored in the fact there were other horses out there when he came out.

[32] Mr Ford demonstrated on the videos that Mr Borcoskie was tapping up MOTU GREAT SENSATION from the 450 metres mark. He emphasised the passing lane did not commence at the top of the straight but some 30 metres later and he was aware of that at the time. He said MOTU GREAT SENSATION had finished seventh some 7.6 lengths from the winner.

[33] Mr Jones spoke on behalf of Mr Ford. He said that had Mr Smith, who took the position in the race vacated by Mr Ford, not won the race, he doubted the charge would have been laid against Mr Ford. He said that Mr Borcoskie was never on the markers on the bend and this had given Mr Smith a run earlier than he should have received. Mr Smith had got "a slingshot" from being 3 back whereas Mr Ford would have been in the trail and would have been held up and would have lost momentum. He emphasised the bends were tight and the straight was short (some 250 metres).

[34] Mr Jones said Mr Ford got out at the 150 metres and that was ample time for the horse to have made up ground and won the race if it was good enough. He believed the winner was holding TIME FOR DIAMONDS on the line.

[35] Mr Jones analysed the race. He said at the 450 metres MOTU GREAT SENSATION was flat and was under a drive. Mr Morrison was to the outside of the field and was improving quickly. Ms Wakelin had shifted out 2 wide. In his view, the appellant had “summed up his options perfectly” at the 350 metres. He had seen the leading horse was stopping and would hold him up. He had decided to follow an improving horse, with the horses outside Ms Wakelin also improving at this time.

[36] Mr Jones believed Mr Ford was held up for some 30 metres behind Ms Wakelin when she moved out half a cart width. He improved his position at the 150 metres when he got a run outside Ms Wakelin. Prior to this he had been on the back of Ms Wakelin, who was improving, and the Stewards should expect a driver to get on the back of an improving horse. Mr Ford had thought for some 50 to 60 metres as to what to do and had used “common-sense”. Mr Ford had summed up the situation and had used his initiative and improved his position.

[37] Mr Jones said that to say Mr Ford's actions were unreasonable was “ludicrous”. His decision-making was of a high standard. His horse had got a run at the 150 metres and had every chance to win. He had “not been held up by a tiring horse and looked a Charlie”. He had competed with Mr Morrison prior to the 150 metres and had tried to shift him out. Mr Morrison's horse, SUNSET PEAK, was a good horse had could have been expected to have gone past Ms Wakelin. Mr Ford's horse had had every show.

[38] Mr Jones said he was not surprised Ms Wakelin had come out, as she probably did not want to get held up.

[39] Mr Renault questioned Mr Jones as to how far Mr Borcoskie had shifted after straightening. He thought perhaps  $\frac{3}{4}$  of a cart width. He believed Ms Wakelin had shifted half a cart. Mr Ford said he now accepted Ms Wakelin had shifted 1 cart width not the 2 he had previously stated. He emphasised again that it had cost him a couple of lengths.

[40] Mr Renault stated he believed Mr Jones' estimates were correct. He questioned Mr Ford as to where he thought he would get a run after he had shifted wider. Mr Ford replied he thought the run would be behind Ms Wakelin.

[41] Mr Ford viewed the videos and agreed with Mr Renault that the first time Mr Borcoskie had shaken the reins at the horse was at the 400 metres. Mr Ford said Ms Wakelin had come out at about this time and re-emphasised that from the 450 metres MOTU GREAT SENSATION had appeared to be struggling and was “not going quick”. He said he did not have a concern when he shifted out that he would be blocked. He thought he would get a run at some stage. When questioned by the Committee as to whether Mr Borcoskie had not faded as quickly as he had expected, he replied in the affirmative.

### **Summing up**

[42] Mr Renault said Mr Ford had 100 metres to decide his options once Ms Wakelin came out of the trail. He elected to shift outwards. Mr Borcoskie was “never stopping in his face”. He was still the leading horse when the field turned for home.

[43] Mr Ford in shifting out had nowhere to go. He was in heavy traffic and was relying on luck. He should have realised he would have access to the passing lane. He disagreed with Mr Jones and said, had a horse on the outside won, the charge would still have been laid. Mr Ford was simply hoping for a gap to appear. He had got a gap at the 150 metres, however he would have got a run some 80 to 90 metres earlier had he stayed where he was and not shifted. He should have stayed in the trail and waited for the passing lane.

[44] Mr Ford's decision to shift out was an error on his part. He was not able to gain clear running because there were horses all around him. He was not guaranteed a run out there; he was guaranteed one in the passing lane.

[45] When questioned by the Committee, Mr Renault said the Stewards had never questioned Ms Wakelin on the day or after laying the charge.

[46] Mr Jones said Mr Ford had decided to follow Ms Wakelin after summing up the situation and seeing Mr Borcoskie was struggling. If he stayed on the markers Mr Ford had far more chance of being held up than he did by shifting out. The lead horse had not quickened from the 600 to the 400 metres. The wide horse (Mr Morrison) could have gone past Ms Wakelin and offered Mr Ford a run.

[47] Mr Jones submitted the appellant's decision was not unreasonable in the circumstances. He had done what a competent driver would do. He had taken away the opportunity of his being held up by following an improving rather than a struggling runner.

[48] Ms Wakelin had thought it best to come out. Mr Ford had made the same decision. It was the right decision. TIME FOR DIAMONDS had not been good enough to win. The best horse on the day won the race. Mr Ford had done what Mr Jones would expect an experienced horseman to do. He had used his common-sense.

### **Decision**

[49] A well-known expression is “Hindsight is a wonderful thing”. It is very apt in this case. A run, as the videos demonstrate, came on the pylons. Mr Smith, who had been racing behind the appellant at the time Mr Ford decided to shift out, took up the appellant's position and went on to win the race when the leading horse carried him up to the passing lane, and indeed shifted wider and presented a run for him to the inside a little earlier than at the start of the lane.

[50] The issue before us is whether or not Mr Ford took all reasonable and permissible measures. We have no difficulty in reaching the conclusion that he did. Mr Renault is correct when he states Mr Ford had two options: to follow Ms Wakelin outwards; or to remain in the trail. He chose the first; the second may have won him the race.

[51] The issue is whether his shifting wider was a reasonable measure. There is no doubt it was permissible in terms of the Rules of Harness Racing. Mr Renault has emphasised Mr Ford was shifting into heavy traffic, to a position in the field where he would not be sure of a run. However, there was a guaranteed run in the passing lane that he shunned.

[52] Mr Ford has explained his reasoning. He decided to follow a horse that was improving rather than one that was tiring. Mr Jones, who we note is a very experienced horseman, has said the decision is one that he would have expected an experienced horseman to make. In other words, the decision by Mr Ford was the correct one in the circumstances in which Mr Ford found himself. We note that Mr Ford is in fact inexperienced. (He told the raceday Committee that had had 30 drives, with 5 wins.)

[53] We do not disagree with Mr Jones. Ms Wakelin was going forward. Mr Borcoskie was urging his horse. There was no guarantee MOTU GREAT SENSATION would take the appellant to the passing lane. Mr Ford assessed it was not likely and that the better option was to follow Ms Wakelin. This is similar to many decisions drivers take in the heat of the moment in a race. Again to state the obvious, with hindsight the better decision transpired to be to remain in the trail. Mr Ford was not to know this at that time. He summed up the situation and made a decision to shift out and follow Ms Wakelin. He understandably assumed that a run would be likely to eventuate, as Ms Wakelin's horse was improving. In so determining, in his mind he had removed the possibility of being held up behind a tiring horse and, to use Mr Jones' words, his "looking a Charlie". To use Mr Renault's words, he was doing "his best to ensure investors [on his horse], gained a return from that investment."

[54] Whether Ms Wakelin shifted out half to one cart width and thus denied Mr Ford a run for a short distance in the home straight is in our view irrelevant when it comes to determining the outcome of this appeal, as opposed to our determining whether or not TIME FOR DIAMONDS would have won the race, which is simply not the issue before us.

[55] Mr Ford's decision-making, and thus his drive, was not in breach of r 868(2). The appeal is successful.

[56] We order that Mr Ford's filing fee be refunded. There is no order as to costs.

Dated at Dunedin this 12th day of March 2018.

Geoff Hall, Chairman

**Penalty:**