RACING APPEAL PANEL OF NEW SOUTH WALES

APPELLANT: MR BOBBY EL-ISSA

Appeal Panel:	**Mr R. Beasley SC; Mr C. Clare, Mr C. Tuck**	
Date of Appeal hearing:	**13 June 2017**	
Date of decision:	**28 June 2017**	
Appearances	**Appellant:**	**Mr P. O'Sullivan, Solicitor**
	Stewards:	**Mr M. Van Gestel, Chairman of Stewards**

REASONS FOR DECISION

Principal Member, Mr R. Beasley SC

Introduction

1. This appeal arises out of the running of the Goulburn Express Freight Maiden Handicap over 1600 metres, run at the Goulburn Racecourse on 17 March 2017 ("**the race**").

2. The Appellant, Mr Bobby El-Issa, was the rider of Soul Testa in the race. Soul Testa finished 6th in a field of 12 starters. It finished approximately 2.1 lengths from the winning horse. The margin to 5th was a nose, with 0.3 lengths to the 4th horse. Soul Testa started as a $5 chance (third favourite).

3. Following the running of the race, the Stewards conducted an Inquiry into the Appellant's ride. That Inquiry was adjourned on 17 March until 16 May 2017. On that date, the Appellant was charged with a breach of AR 135(b) of the *Australian Rules of Racing*. The breach was based on five Particulars (set out below) relating to the Appellant's ride on Soul Testa from about the 600-metre mark onwards. The

Appellant was found guilty of a breach of the rule by the Stewards. He was penalised by way of a 4 months' suspension of his licence to ride.

4. In this appeal to the Panel, the Appellant challenges both the finding of guilt, and the severity of the penalty imposed.

5. The Appellant was represented by Mr P. O'Sullivan, solicitor. The Stewards were represented by Mr Marc Van Gestel, the Chairman of Stewards. The Appeal Book, which consisted of the transcript of the Stewards' Inquiry, and the Exhibits tendered at that Inquiry, was also tendered on the appeal. Film of the race was tendered, and viewed by the Panel multiple times. The appeal to the Panel is by way of a re-hearing and fresh evidence may be given: s.43(1) *Thoroughbred Racing Act*. Oral evidence on the appeal (discussed below in relation to the findings in relation to each Particular) was given by Mr C. Polglase (a Stipendiary Steward and Chairman of the Stewards' Inquiry into the race), the Appellant, and Mr Ron Quinton, the trainer of Soul Testa.

AR 135(b)

6. Before turning to the evidence and my findings in relation to each Particular, it is necessary to briefly consider the relevant rule. AR 135(b) and (c) are in the following terms:

> AR 135(b) *The rider of every horse shall take all reasonable and permissible measures throughout the race to ensure that his horse is given full opportunity to win or to obtain the best possible place in the field.*
>
> (c) *Any person who in the opinion of the Stewards has breached, or was a party to breaching, any portion of this rule may be penalised, and the horse concerned may be disqualified.*

7. There was agreement between Mr Van Gestel and Mr O'Sullivan as to the applicable principles in relation to AR 135(b). Reference was made to the decision of the Panel in relation to the appeal of jockey Chris Munce dated 5 June 2003, where the then Chairman of the Racing Panel, Mr T E F Hughes QC said the following:

"*The task of administering this rule is not always easy. One must keep in mind that on its true interpretation it is not designed to punish a jockey unless on the whole of the evidence in the case the tribunal considering a charge under the rule is comfortably satisfied that the person charged was guilty of conduct that, in all the relevant circumstances, fell below the level of objective judgement reasonably to be expected of a jockey in the position of the person charged in relation to the particular race. The relevant circumstances in such a case may be numerous. They include the seniority and experience of the person charged. They include the competitive pressure under which a person charged was riding in the particular race. They include any practical necessity for the person charged to make a sudden decision between alternative causes of action. The rule is not designed to punish jockeys who make errors of judgment unless those errors are culpable by reference to the criteria that I have described*."

8. The Panel was also referred to the appeal of licensed jockey Damian Browne, a decision of the Queensland Racing Disciplinary Board of 18 March 2014, from which the following principles were outlined concerning AR 135(b):

(i) Although a rider charged with the breach of AR 135(b) can be expected to provide an explanation for their ride, the onus is on the Stewards to establish a breach of the rule.

(ii) Given the seriousness of the offence, the standard of proof is at the Briginshaw standard: the Stewards or Appeal Panel must be comfortably satisfied on the basis of the relevant evidence that the rule has been breached.

(iii) It is the quality of the ride and the circumstances of the particular race that has to be assessed.

(iv) That assessment is made on an objective basis.

(v) A mere error of judgement by a rider will not constitute a breach of the rule.

9. Finally, the Panel was reminded of the judgement of Justice Haylen in the Appeal of Allan Robinson dated 1 October 2009, in which his Honour stated the following:

"*AR 135(b) is one of the rules central to the integrity of racing. Unless there is compliance with this rule, allowing the betting public to invest on the basis that every horse will be given a full and fair opportunity to win or obtain the best possible place, the industry as a whole will suffer*": Appeal of Allan Robinson, 1/10/09 at [25].

10. AR 135(b) requires the Panel to exercise its evaluative judgement about the quality of a ride bearing in mind what may be a variety of relevant circumstances. In those circumstances, it is unsurprising that in some instances people exercising their judgement within reasonable parameters may reach a different view as to whether a particular ride is culpable under the rule or not.

Particulars 1 and 2

11. I will consider Particulars 1 and 2 together, as they are closely related. The evidence that was given, and the submissions that were made concerning Particular 1 also covered the circumstances concerning Particular 2. The Particulars were in the following terms:

> "*1. Near the 600 metres, you failed to position your mount to the outside of the heels of Duchess of Dubai when it was reasonable and permissible for you to do so, which would have provided your mount clear and uninterrupted running.*
>
> *2. That after leaving the 600 metres you elected to position your mount to the inside of the heels of Duchess of Dubai, resulting in your mount being badly held up and having to be checked from the heels of The Pound Keeper, rounding the home turn and losing ground*."

12. The essence of Mr Polglase's evidence in relation to these Particulars was that at about the 600 metre mark the Appellant on Soul Testa was trailing the horse Duchess of Dubai, a $41 chance in the race. Mr Polglase's view was that at this point of the race, rather than staying on the heels of Duchess of Dubai, the Appellant should have taken his horse to the outside of Duchess of Dubai and obtained clear running. When the Panel was shown the film of the race, it was submitted that the Appellant should have done what jockey Mr J. Penza did on Timeless Melody (the $4.80 second favourite) who took his horse to the outside of the Appellants at the 600 metres, and thereby obtained a clear run once in the straight.

13. In his submissions to the Panel, Mr Van Gestel contended that the only reasonable option for the Appellant was to go to the outside of Duchess of Dubai, in which case he would have obtained clear running in the straight. He was critical of the decision

of the Appellant to stay behind the heels of Duchess of Dubai, and submitted that he should have known that that horse was a $41 outsider, and also that The Pound Keeper was a $26 outsider. Mr Van Gestel submitted that the decision to go to the outside was not one that required any instantaneous decision-making or quick thinking from the Appellant. He had time, it was submitted, to take the only reasonable option of going to the outside. Instead of this, the Appellant made a conscious decision to go to the inside. By taking an inside run, the Appellant failed to obtain clear running from the 600-metre mark and in fact got held up behind horses he should have known were outsiders in the race.

14. Mr El-Issa's evidence was that he was told by the horse's trainer, Mr Quinton, that Soul Testa was a "mongrel" of a horse. His riding instructions were only to do his best. Mr El-Issa, in his evidence, sought to attribute a large number of defects to the horse, simply from the word "mongrel". In my opinion, not all of those defects could in fact be attributed to the horse simply from one word from the trainer. However, I accept that the gist of what was conveyed by Mr Quinton to the Appellant was that the horse was not a particularly good horse, and not easy to ride.

15. Before dealing specifically with Particulars 1 and 2, it should be stated that it is clear that the Appellant did not consider that he rode a good race on the horse. Following the running of the race, he sent a text to the trainer's son, in which he conceded that it was a "bad ride from me". Specifically, in relation to the Particulars, however, the Appellant also conceded in a text sent to the trainer's son that he "should have come outside": Exhibit 5.

16. Further, at the Stewards' Inquiry on 17 March 2017, the Appellant also conceded that he "went for the wrong run" and "should have just went to the outside": T-5.203-.205 and T-5.243-.244. These concessions, in my view, are fairly viewed as being made by the Appellant with the benefit of the hindsight of knowing what occurred in the race after he had decided to take an inside run.

17. It should be noted also that the Appellant conceded at the Inquiry on 17 March 2017 that he would have won the race with clear running. In my view, the Appellant may have conceded too much against himself in that evidence. Having viewed film of the

race multiple times, it is not clear to me that Soul Testa would have won the race, had it been taken to the outside at the 600-metre mark. It is quite likely, however, that the horse would have run 5th, and possibly 4th.

18. Mr El-Issa's explanation for taking an inside run rather than going to the outside, can essentially be boiled down to his view concerning the horse's ability. As he thought he was on an average horse, he did not want to go for a wide run. He considered it would be suicide to take off at the 600-metre mark (this is not in fact alleged in the Particulars as something the Appellant should have done, as distinct from going to the outside). In short, the Appellant's evidence to the Panel was that he decided the best route to take Soul Testa was the "shortest route home", being the inside running. This was substantially consistent with the evidence that the Appellant gave at the Stewards' Inquiry: see, e.g. T-26.1285-.1295; T-27.1345; T-28.1349-.1353; T-28.1367-.1379.

19. In his evidence to the Panel, the trainer, Mr Quinton, described the horse as one having "very limited ability". He described it as a horse with "bad manners" which had raced erratically when ridden by a previous jockey. At the Stewards' Inquiry, he described the horse as a "bugger of horse", and not the "truest of animals": T-6.292-.294. It is fair to say that Mr Quinton was not critical at all of the Appellant's ride. He had no issue with the Appellant seeking to take an inside run at the 600 metres on Soul Testa, rather than taking the horse to the outside. He stated to the Panel that he didn't like horses making long runs on the outside. He had "no qualms" about Mr El-Issa attempting to take a shortcut.

20. Essentially, for the reasons given by both the Appellant and Mr Quinton, Mr O'Sullivan's submission was that not only was the decision made by the Appellant to seek an inside run, as distinct from going to the outside, not a culpable error, there was in fact no error of judgment at all.

Particulars 1 and 2 – Resolution

21. The first thing that should be stated was that an investigation was conducted by the Stewards into the betting on the race. No integrity concerns came out of that investigation.

22. In my view, in hindsight, the Appellant should have gone to the outside of Duchess of Dubai at about the 600-metre mark. The Appellant, as mentioned above, said in his evidence that he "would have won the race" if he had "come out": T-2.98-.99. I am not convinced, having watched the race, that this would have been the case – as indicated above, with an unimpeded run Soul Testa may well have finished 5th or 4th.

23. I further consider that the Appellant's decision not to take the outside run was, with the benefit of hindsight, an error of judgement. In my view, however, it was not a culpable error of judgement in breach of the rule. Going to the outside may have been the best option that the appellant had on Soul Testa at 600-metre mark. This does not of itself make the decision to stay on the inside to take the shortest route home a decision that is a culpable error in breach of AR 135(b).

24. As stated by Mr Hughes QC in the Appeal of Chris Munce, there are a number of "relevant circumstances" that must be considered when deciding whether there has been a breach of the rule. In reaching my conclusion, I have taken into account that the Appellant is a senior and experienced jockey. I have also taken into account that he did not, at the time he chose not to go to the outside, have to make an instantaneous or sudden decision. However, amongst the relevant factors to be considered is the fact that he was clearly told by the trainer that Soul Testa was not a particularly good horse. Perhaps none of the horses in the race were particularly talented racehorses – this race was, after all, a Maiden at Goulburn. The Appellant gave to the Stewards and to the Panel a reason as to why he chose to stick to the inside. That was because, on a horse of limited ability, he thought the inside running, or shortest route, would give the horse its best chance to win the race. As things turned out, that proved to be an error of judgment but, in my opinion, not one that falls foul of the rule.

25. There no doubt may be cases where the failure to take a horse to the outside at or about the 600-metre mark in a race, is an error of judgment that constitutes a culpable error under the rule. Those circumstances might include where a jockey is riding a horse that is clearly "cantering", "bolting" or travelling very easily, and for an inexplicable reason an inside run is sought rather than an outside run that would

provide clear running. The circumstances might include where a horse is clearly a champion or superior horse, compared to other horses in the field, and a rider inexplicably seeks an inside run, rather than taking an available outside run at a similar position in the race. These are possible circumstances which might lead to a failure by a jockey to take an outside run being a breach of the rule. Those circumstances do not exist here. The Appellant was on an average horse and provided a reason to the Stewards and the Panel which cannot be described as "far-fetched", as to why he made the decision to take the inside running. In the end, that was not the best decision, and is no doubt why the appellant described his ride as a "bad ride".

26. Not every ride in which an error is made is caught by AR 135(b). I am not comfortably satisfied that Particulars 1 and 2 make out a breach of the rule.

27. Before leaving these Particulars, some comment should be made about the allegation (which is not particularised) that the Appellant should have known that Duchess of Dubai was a $41 outsider.

28. The submission seemed to be that knowing the horse was a $41 outsider, it was inexplicable that the appellant would stay behind that horse rather than go to the outside.

29. I would accept that jockeys in all races will have an awareness of the other horses, their pattern of racing, and perhaps their general level of ability. In some races, for example Group races, the jockeys might be expected to have detailed knowledge and understanding of all the other horses in the race. This particular race, however, was a Maiden Handicap at Goulburn, where a number of the horses had had no official starts, and most only a handful of starts. I am not convinced that the Appellant could have been expected to predict, at least with any great confidence, how all of the horses in this race would be likely to perform.

Particular 3

30. Particular 3 is in the following terms:

> *"That on straightening, after being held up, you failed to immediately ride your mount with sufficient purpose and vigour to take a run between First Courier and The Pound Keeper when it was reasonable and permissible for you to do so, such failure resulting in First Courier shifting out around the heels of Canford Calling and resulting in your mount having to be steadied from the heels of First Courier."*

31. Mr Polglase's evidence in relation to this Particular was that his expectation was that the Appellant should have driven his horse with purpose between First Courier and The Pound Keeper. Viewing the film, Mr Polglase pointed out to the Panel that the gap between First Courier and Pound Keeper was open for about 5 to 6 strides. Mr Polglase conceded that Soul Testa was a little reluctant to shift out to take the gap and may have had an inclination to lay in, but this was a minor impediment. In Mr Polglase's view Soul Testa was not hanging in.

32. Mr El-Issa's evidence was that his horse wanted to duck in behind First Courier. He said that the gap between First Courier and The Pound Keeper was open for a very short period of time, and his horse couldn't take that run.

33. Mr Quinton's view was that Soul Testa was simply not travelling well enough to take the run that opened up between First Courier and The Pound Keeper. When viewing the film, Mr Quinton also pointed out to the Panel that in his view, as the gap was opening up between First Courier and The Pound Keeper, Soul Testa was travelling "awkwardly".

34. Mr Van Gestel's submissions in relation to this Particular was that the Appellant acted unreasonably in not placing his mount under immediate pressure to take the run between First Courier and The Pound Keeper. He denied that there was evidence that Soul Testa "ducked in" behind First Courier.

35. Mr O'Sullivan's submission was in line with the evidence of Mr Quinton. He submitted that Soul Testa was not going well enough to take a gap that was open for a very short period of time.

Particular 3 – Resolution

36. My own observations from viewing the film were that the horse Soul Testa was laying in, but not hanging in. I am not convinced that the horse wanted to "duck in" behind First Courier. If Soul Testa was going very well, in my opinion, the gap that opened up between First Courier and The Pound Keeper was open for just a long enough time for Soul Testa to have taken that run. Based on the evidence of Mr Quinton, however, and to some extent the Appellant, I am not comfortably satisfied to the *Briginshaw* standard that Soul Testa was in fact travelling well enough to take the gap that opened up between First Courier and The Pound Keeper. As such, in my view there was no error of judgment to be made here – the horse was not going well enough to be driven through the gap as alleged by the Stewards.

Particular 4

37. Particular 4 is in the following terms:

> *"That for some distance near the 200 metres, you failed to position your mount to the outside of the heels of Polar Blast to obtain clear running between Polar Blast and First Courier, when at all relevant stages it was reasonable and permissible for you to shift to the outside of Polar Blast, such failure resulting in your mount being held up on the heels of Polar Blast for some distance thereafter."*

38. Once again, the Panel had the opportunity to view the relevant part of the film of the race on multiple occasions. Having viewed that film, Mr Van Gestel's submission was that the Appellant made no attempt to go to the outside of Polar Blast. His submission was that the Appellant should have turned the horse's head to get it off the rails so that it could run to the outside of Polar Blast as it approached that horse. Mr Van Gestel disputed the Appellant's suggestion at the Stewards' Inquiry that Soul Testa was hanging in hard. The horse may have been laying in, although it was surprising in those circumstances that the Appellant hit the horse three times with the whip in his left hand. In any event, as Soul Testa approached the rear of Polar Blast, the horse was steered to the outside of that horse in order to take a narrow run. This demonstrated that the horse was still capable of being steered, and as such the Appellant should have shifted out earlier than he did.

39. The Appellant's evidence was that the horse was hanging in quite severely. He was riding it as hard as he could to catch the leading horses. Mr Quinton's view about this aspect of the Appellant's ride was that it was "perfectly reasonable". He said the Appellant was clearly trying to catch the leader, made up ground, and then shifted out when he had to. Mr Quinton's view was that it was important for the Appellant to get momentum up on Soul Testa and then get it out. He felt the horse was also laying in.

Particular 4 – Resolution

40. In my view, Mr Quinton has correctly described what occurred. The Appellant vigorously rode Soul Testa in this relevant part of the race, got its momentum up, and struck the horse three times with the whip. The horse then had to move to the outside as it caught the horse Polar Blast (perhaps as that horse started to tire). As that happened, and Soul Testa shifted to the outside of Polar Blast, because the gap between Polar Blast and First Courier was narrow, Soul Testa did suffer a slight check.

41. In my opinion, in not moving the horse to the outside of Polar Blast, the Appellant made an error of judgment. However, he was riding the horse in a vigorous fashion, the horse was laying in, and at the 200-metre mark he was still a couple of lengths off Polar Blast. While there was an error involved in not moving immediately off the fence, in my view it was not a culpable error. It is unclear to me that it cost the horse anything in terms of its finishing position.

Particular 5

42. Particular 5 is in the following terms:

> *"That after obtaining a narrow run between Polar Blast and First Courier near the 100 metres, in all of the circumstances, you then rode your mount with insufficient purpose and vigour over the final 100 metres to ensure your mount, which was finishing the race off strongly, was able to obtain the best possible place in the field, when it was reasonable and permissible for you to do so."*

43. My first observation concerning this Particular relates to the claim that the horse was "finishing the race off strongly". In my view for a period of time between about the 150-metre mark and the 75 metre mark the horse Soul Testa was making up some

ground. I am not sure I would describe at least its final 50 metres as "finishing the race off strongly".

44. Leaving that aside, Mr Polglase described the Appellant's ride in the last 100 metres as being one where no real vigour was shown. The horse was only hit once with the whip. Mr Polglase said, based on his experience of seeing the Appellant ride on many previous occasions, that he was at about 50%-60% of full vigour.

45. Mr El-Issa denied that he was not showing vigour on the horse. He said he was trying his best. At the Stewards' Inquiry, he gave this evidence:

> B. El-Issa Maybe it wasn't as vigorous as you would have liked me to be, but the horse was hanging and I was really trying to get away from its heels and when I got that run the bird had flown and, yeah, I was going through the motions a bit, but I was trying my best on it."
>
> Chairman: When you say "going through the motions" –
>
> B. El-Issa: I was trying my best on it.
>
> Chairman: I think you used the term you got a bit tired on it.
>
> B. El-Issa: Maybe I did get a bit tired.
>
> Chairman: Is that a submission-?
>
> B. El-Issa: I'm just looking back because he was hanging, pulling. I was pushing him. He missed the kick, you know.
>
> Chairman: He was actually finishing his race off quite well there in all the circumstances.
>
> B. El-Issa: Do you think so? I don't think he was.

46. In my view, the Appellant was not attempting to say that he was not riding the horse with vigour. I think he was attempting to say that by the time he gained clear running the race was over.

47. Mr Quinton's evidence was that it was clear the Appellant did not punish the horse with the whip. His view, however, was that the Appellant was riding the horse

vigorously with hands and heels. His own view was that the horse was not making further progress in the last part of the race.

48. Mr Van Gestel's submission was that when a horse is in a competitive position, jockeys must ride them with full vigour. Mr O'Sullivan's submission was that the Appellant was riding vigorously with hands and heels, and if it was not 100 per cent vigour it was sufficient vigour such that the rule was not infringed.

Particular 5 – Resolution

49. My observation of the Appellant's ride in the last 100 metres is that, first, he clearly did not stop riding the horse, and clearly did not ride it "quietly".

50. In my opinion, looking at the Appellant's ride, and looking at the way the other jockeys were riding their horses, he was still riding Soul Testa vigorously with hands and heels. I do not agree with Mr Polglase's assessment that the vigour shown was only 50-60 percent of the vigour Mr El-Issa was capable of. I do, however, accept that it might have been, by some short measure, less than the absolute 100 per cent vigour that Mr El-Issa could show, and that he did not hit the horse, for example, multiple times with the whip.

51. In my view, in the final 100 metres of the race the Appellant was riding the horse in a vigorous hands and heels manner. I consider his vigour was sufficient to avoid a breach of the rule. It was vigour sufficient enough that in my view it would not be appropriate to make a finding that he has breached the rule by not throwing more at the horse, assuming that was possible. I do not consider that it is appropriate to police this rule by attempting to make an assessment whether the vigour shown by a jockey is 100 percent, or 95 per cent, or some other percentage. I do not consider such a precise assessment in percentage terms can accurately be made. A relevantly culpable ride under the rule in my opinion will be one where the Panel is comfortably satisfied that a rider has shown insufficient vigour in his or her manner of riding. I am not so satisfied here. To the contrary, the Appellant was riding with vigour. I am also not comfortably satisfied that any different form of riding by the Appellant in the last 100 metres would have made any difference to the way the horse finished off the race.

52. In my opinion, Particular 5 has also not been made out as establishing a breach of the rule.

Conclusion

53. For the above reasons, in my view none of the Particulars has demonstrated a breach of the rule. In those circumstances, the appeal against the finding of guilt must be allowed.

Mr C. Clare

1. I have read the Principal Member's Reasons for Decision.

2. I agree with the Principal Member's reasoning in relation to each of the Particulars. Accordingly, I also agree that the appeal against the finding of guilt should be upheld, and the penalty set aside.

Mr C. Tuck

1. I have read the Principal Member's Reasons for Decision.

2. I adopt the general outline of facts, and what the Principal Member has said concerning the principles that are applicable to AR 135(b).

3. Like Mr Beasley SC and Mr Clare, in my view Particular 3 does not establish a breach of the rule. While I consider the Appellant's lack of vigour to take the gap that opened up between the horses First Courier and The Pound Keeper was an error of judgement, I do not believe that Soul Testa had sufficient momentum to take the run between them.

4. Likewise, while I agree with the Principal Member and Mr Clare that the Appellant made an error of judgement in relation to particular 4, I also agree, for the reasons stated by Mr Beasley, that the error was not a culpable one.

5. In relation to Particular 5, while it was a borderline decision, I consider that the Appellant showed sufficient vigour to avoid a breach of the rule. I am also not convinced that the horse was finishing the race off in any event in the last 50 or so metres.

6. Where I differ from Mr Beasley and Mr Clare is in relation to Particulars 1 and 2. In failing to take Soul Testa to the outside at the 600-metre mark, the Appellant, in my view, made a culpable error of judgement. Instead of taking clear running that was available on the outside, he allowed Jeff Penza on his horse to take that run, which pocketed the Appellant on Soul Testa. In my opinion, the decision to try and take an inside run was not reasonable, and was a breach of the rule.

7. I note that the appeal against the finding of guilt is upheld by majority. In those circumstances, it is unnecessary for me to make any detailed comments concerning penalty. I do indicate, however, that while I am satisfied that the Appellant's ride on Soul Testa was in breach of AR 135(b) for the reasons given above, I do not regard the breach to be of the most serious kind that might be caught by the rule, and note that I have found only the matters outlined in Particulars 1 and 2 to be a breach. Accordingly, I would have imposed a lesser penalty than a 4-month suspension.

Orders

The Panel orders (by a majority, Mr R Beasley SC, Mr C. Clare; Mr C. Tuck disagreeing)

(1) The appeal against the finding of guilt is upheld.

(2) The finding of guilt under AR 135(b) is set aside.

(3) The penalty of a 4-month suspension is set aside.

(4) The appeal deposit is to be refunded.