

## RACING NEW SOUTH WALES APPEAL PANEL

### IN THE MATTER OF THE APPEAL OF TOMMY BERRY

Appeal Panel:	<b>Mr R Beasley SC – Principal Member</b> <b>Mr K Langby</b> <b>Mrs J Foley</b>
Appearances:	<b>Racing NSW: Mr P Dingwall, Deputy Chairman of Stewards</b> <b>Appellant: Mr P O’Sullivan, Solicitor</b>
Date of Hearing:	<b>26 November 2018</b>
Date of Reasons	<b>26 November 2018</b>

#### REASONS FOR DECISION

1. On Friday 16 November 2018, the appellant, licenced jockey Mr Tommy Berry, rode the racehorse *Collectively* in race 2, the Friday Night Racing Plate over 1550m at Canterbury Park racecourse.
2. Following the race, the Stewards’ conducted an inquiry, and charged Mr Berry with careless riding in breach of AR 137(a). The particulars of the offence were:  
  
*“...approaching the 200m, you improved your position between Welsh Legend and Flying Mojo where there was insufficient room and a short distance after, Flying Mojo was crowded and lost the running to which it was rightfully entitled”*
3. Mr Berry pleaded not guilty, but was found to have breached the rule. His carelessness was graded as “low”, with a consequence of causing Flying Mojo to have “lost [its] rightful running”. On the application of the careless riding penalty guidelines, he was penalised with a 6-meeting suspension.

4. On appeal, the Stewards were represented by Mr P Dingwall, Deputy Chairman of Stewards. Mr Berry was represented with leave by Mr P O'Sullivan, solicitor.
5. The appeal book was tendered and marked as Exhibit A, and the film of the race, taken from multiple angles, was Exhibit B. Mr Berry also gave evidence explaining his ride.
6. At the commencement of the appeal, Mr O'Sullivan indicated that Mr Berry conceded that he "crowded" Flying Mojo, and hence admitted breach of AR 137(a). Where he differed from the Stewards was that he did not agree he had caused that horse to lose its rightful running. That is an important matter. Breach of the rule with consequence of "crowding" attracts a reprimand for a low grade of carelessness, as distinct from the 6-meeting penalty imposed. Mr Berry's disagreement with the Stewards is consistent with his position at the Inquiry. He agreed his horse bumped Flying Mojo, but made it clear that he did not agree that he had cost or taken that horse's rightful running – see T 3 L 126-130 and T 9 L415 to 42
7. Having seen the film many times, it is clear that in attempting to take a run between Welsh Legend and Flying Mojo, Mr Berry's mount did bump Flying Mojo, and caused that horse to be forced to its left.
8. The disagreement in the appeal is in relation to how the Panel should interpret the phrase in the particulars of the charge "lost the running to which it was entitled", and the equivalent phrase in the careless riding penalty guideline "lost rightful running".
9. Mr O'Sullivan submits that at the time of the bump, and even before, Flying Mojo was tiring (the horse ran second last). It was incapable of taking a run forwards relative to the other runners in the race. It had no rightful running to lose or have taken, as it was heading backwards relative to the other horses, including the appellant's horse. He says the phrase "lost rightful running" should be interpreted so as to apply when some kind of careless riding conduct causes a horse to miss out on

being able to take a run that it was actually capable of taking. Flying Mojo, he submitted, was not capable of taking any such run at the 200m when contact was made.

10. Mr Dingwall for the Stewards had a different view. He says that the bump clearly knocked Flying Mojo off its line, and that is sufficient for that horse to have “lost its rightful running” within the meaning of that term in the particulars and penalty guideline. He says it is irrelevant that Flying Mojo was tiring. The horse was still running on an established line, and was entitled not to get knocked off that line.
11. In the Panel’s view, it is clear that contact was made between Mr Berry’s horse and Flying Mojo, and that this contact was caused by Mr Berry attempting a run when there was not quite sufficient room. That contact clearly knocked Flying Mojo off it’s line.
12. We also agree Flying Mojo was tiring at the time. The bump did not cost it the race. It finished second last, and probably would have without a bump.
13. Some reference was made to the horse Welsh Legend shifting out, and De Valera shifting in as some kind of contributing factor. The Panel does not see that as relevant, as Flying Mojo was a beaten runner in any event.
14. In relation to the phrase “lost rightful running” in the particulars of the charge and in the penalty guideline, the Panel takes the view that it should take a common-sense approach to that phrase, and one that emphasises safety. Taking those two matters into account, we prefer the interpretation of Mr Dingwall.
15. While we agree that Flying Mojo was tiring when bumped by Mr Berry’s mount:
  1. that contact occurred because Mr Berry took a run when there was insufficient room; and
  2. the bump knocked Flying Mojo off the racing line it was on, and hence entitled to.

16. We do not think it matters that Flying Mojo was not capable at the time of the bump of racing forwards relative to other runners. It was running on a line, and was knocked off that line. Mr Berry's conduct, we are comfortably satisfied, cost Flying Mojo its rightful running.
17. We therefore consider that breach of AR 137(a) is established on the same grounds or particulars as the Stewards – that is, low grade careless riding with the consequence of causing a horse to lose its rightful running.
18. Applying the penalty guideline, the penalty is a 6-meeting suspension, which was that imposed by Stewards. We see no reason to depart from the guideline in this appeal.
19. The Panel makes the following orders:
  1. The Panel notes Mr Berry's change of plea to admitting breach of AR 137(a).
  2. Breach of AR 137(a) confirmed.
  3. Appeal against severity of penalty dismissed.
  4. Penalty of a 6-meeting suspension confirmed, such suspension commencing on 25 November 2018, and expiring on 3 December 2018, on which day the appellant may ride.
  5. Appeal deposit forfeited.