

BETWEEN **SLOAN FROST**
 Appellant

AND **MOTORCYCLING NEW ZEALAND**
 Respondent

AND **TONY REES**
 First Interested Party

AND **MITCHELL REES**
 Second Interested Party

**DECISION OF SPORTS TRIBUNAL
DATED 6 DECEMBER 2017**

Hearing: 28 November 2017

Tribunal: Sir Bruce Robertson (Chairperson)
 Dr James Farmer QC
 Rob Hart

Present: Sloan Frost, Appellant
 Harriet Bush, counsel for Appellant
 Virginia Henderson, Motorcycling NZ
 Nigel Stirling and Richard Gordon, counsel for Respondent
 Tony Rees and Mitchell Rees, Interested Parties

Registrar: Neela Clinton

1. The Appellant, Mr Sloan Frost, is a superbike competitor. He appealed to the Tribunal against two decisions of the Judiciary Committee of Motorcycling New Zealand (MNZ), which is the governing body in New Zealand of the sport of motorcycle racing.
2. The two decisions of the Committee (dated 25 September 2017) related to an appeal by Tony Rees, another superbike rider, and a second appeal by Mitchell Rees, also a superbike rider. The Judiciary Committee allowed those appeals which were about decisions made by the Chief Steward in relation to races in the New Zealand Superbike Championships at two meetings, the first at Taupo and the second a week later at Hampton Downs.
3. These decisions resulted in Sloan Frost, who had been declared Superbike Champion for 2016-2017, losing that title.

Jurisdictional Issues

4. The Tribunal records at the outset that there were two jurisdictional points taken by the parties.
5. The first was by MNZ, which challenged the power of the Tribunal to review the rulings of the Judiciary Committee, it being said that the members of the Committee were “vastly experienced in their understanding and application of the rules contained in the Manual of Motorcycle Sport” and, except where the decision is irrational or so unreasonable that no reasonable decision-maker could have made it, the Tribunal should not substitute its own interpretation of the Manual in place of the Committee’s interpretation. That would have meant that the Tribunal was not a truly appellate body. However, before the hearing, MNZ abandoned that position.
6. The second jurisdictional point was raised by Mr Frost who argued through his counsel that there was no power under the rules to appeal a Steward’s decision or actions directly to the Judiciary Committee and that Tony and Mitchell Rees should have first sought a ruling from a Protest Committee. It was argued that access to the Judiciary Committee could only be by appeal from a decision of a Protest Committee. For reasons set out below, the Tribunal has rejected that argument.

Issues arising on First Appeal

7. Mr Frost first argued he was denied natural justice by the Judiciary Committee which, he says was guilty of apparent bias, both in terms of its composition and how the hearing was conducted.
8. In addition, the Judiciary Committee was also dealing with the misconduct complaint made by Tony and Mitchell Rees against the decisions taken by the stewards at the affected races. The Tribunal notes that the membership of the Judiciary Committee was the same, though ultimately as a result of a protest by Mr Frost the issues were not part of the same hearing. Further, as discussed in more detail below, this meant that the stewards were not available to give evidence to support the decisions made by them.
9. As discussed below, Mr Frost also alleged bias against the members of the Judiciary Committee and particularly its Chairman on a number of grounds. It was agreed by the parties that, if the Tribunal upheld that claim, it was empowered to decide the substantive issues that had been the subject of the original appeals by Tony and Mitchell Rees, rather than refer the matter back to the Judiciary Committee for reconsideration which, in a bias situation, would have raised further difficulties. The Tribunal has proceeded on that basis.
10. The Tribunal has concluded that the Committee's decision was flawed and it must be declared invalid on the grounds of apparent bias. However, the Tribunal will start with the substantive issues first before considering the bias allegations. Whether bias is found or not, the issues will have to be dealt with by the Tribunal.

Race 2 at Taupo

11. In Race 2 at Taupo, Mr Frost had been leading at the end of lap 4 but was in second place on lap 5 when he crashed. The Chief Steward (Mr Warren New) gave instructions that the red flag, which had the effect of stopping the race, should be displayed. At the time that it was shown, all superbike competitors (other than Mr Frost, who had crashed) had completed lap 5.
12. That brings into play rule 6.21B of the 2016 Manual of Motorcycle Sport, which governs the rules of racing. That rule provides that after the red flag has been displayed the race will be restarted and considered as being more than one part. Rule 6.21Ba and b provide that the race positions "at the end of the lap preceding the stopping of the race will be the grid position if a restart takes place"; the distance of the restarted race is then to be that required to make up the initial full race distance.

13. After the race was stopped, Mr New's evidence before the Tribunal was that he instructed the Time Recorder, Ms Nicole Bol, to take the results at the end of lap 4 and therefore to start what had been a 15 lap race at the beginning of lap 5. However, Ms Bol recorded the race as finishing at the end of lap 5 (which meant that the second part of the race was 10 laps and not 11 as Mr New contemplated). It also meant, on Ms Bol's approach, that Mr Frost, who was not able to start the second part of the race on his original bike, should have received no points for either part of the race. On Mr New's approach, Mr Frost would have received full points for the first part of the race because he was in first place at the end of lap 4.

Race at Hampton Downs

14. The following week at Hampton Downs before the meeting started, Mr Trevor Heaphy, who was a steward for the meeting but had not been present at Taupo, noticed when looking at the Taupo results that the Appellant had in fact been allocated 5 points for race 2 which did not appear to make sense, irrespective of whether the first part of the race finished at the end of lap 4 or lap 5. He drew this anomaly to Mr New's attention. After looking into the matter further, Mr New concluded that an error had been made based on his view that the race had concluded at the end of lap 4.
15. Having regard to the terms of rule 6.21B and to the evidence that we heard, the Tribunal considers that Mr New was mistaken in ruling that the race finished at the end of lap 4 and should be restarted at the beginning of lap 5. We conclude that Ms Bol was correct in taking the end of lap 5 as the end of the first part of the race. Along with Mr New and Mr Heaphy, we do not see how Mr Frost could have been awarded 5 points for the race, regardless of the approach.
16. An issue arose as to whether Mr New had the power to correct results, a week after the conclusion of the Taupo meeting. The argument for MNZ was that Mr New's appointment as Steward terminated at the conclusion of that meeting and he could not take any steps or make any decision regarding the race results subsequently. In giving evidence to the Tribunal, Mr New said that at Hampton Downs he was taking steps to correct or enforce a decision that he had made at Taupo (the race result) and that had been implemented incorrectly.
17. In relation to this issue, MNZ relied on the terms of rule 7.1.2, which provides that the Steward of a meeting may "*prior to the end of the meeting*, take reasonable steps to

remedy a previous decision at that meeting”. Mr Frost (supported by Mr New in his evidence) relied on rule 7.1.1 which empowered the Steward, in relation to any matter “concerning the operation of the meeting, other than under protest” (inter alia) to investigate it or to “take such steps as the Steward feels are appropriate”. That rule has no temporal limitation.

18. A consequential jurisdictional issue was whether any decision made by the Steward could be appealed directly to the Judiciary Committee or whether it should first be the subject of a protest to a Protest Committee before it could be taken further on appeal to the Judiciary Committee. Rule 7.5.1 provides in this respect that a person “affected by a decision of the Steward and/or Protest Committee may Appeal the decision to the Judiciary Committee” (with a further right of appeal from the decision of that Committee to this Tribunal).

Conclusion

19. In relation to these two issues the Tribunal concludes:
- (a) Having regard to the terms of Rule 6.21B and to the evidence that the red flag was posted on lap 6, we find that Ms Bol correctly recorded the placings of the riders and that Mr Frost should not have received any points for that race.
 - (b) Assuming (without deciding to that effect) that at Hampton Downs Mr New was simply correcting an erroneous implementation of a decision as to race placing that he had made at Taupo, Tony Rees was entitled to appeal that decision directly to the Judiciary Committee and was not required to go through a protest committee process first.

Second Appeal

Race 3 at Hampton Downs

20. As to the second appeal, this was brought to the Judiciary Committee by Mitchell Rees and related to Superbike Race 3 at Hampton Downs. The race was red-flagged and stopped, red-flagged later a second time and stopped. The stewards at that point took a decision not to start the race for a third time and awarded each of the two parts of the race half points, making full points for the race.
21. The Judiciary Committee, on appeal, decided that it was correct for the stewards to award half points for the first part but not for the second part. In their view, the race

not having been declared a full race, only quarter points for the second part should have been awarded. Half points for that part should only have been awarded if the race had been completed as scheduled or if two thirds of the race distance had been completed and the race was declared a full race under rule 6.21C. Otherwise, the position was that a third part could have been started. The Judiciary Committee commented in its Decision that, because the Stewards did not attend their hearing, they were unable to ascertain the reason that the race was not further restarted.

22. This rather complicated scoring was said to be the result of the wording of rule 6.21Bd which reads: "Half points will awarded to each part." The Judiciary Committee's view of this apparently simple sentence was that it is "recursive" so that if the race is stopped a second time the rule "is read from the beginning until the situation being dealt with is reached". The effect of that, as reflected in the Committee's decision to award only quarter points for the second part, is that the second part is in effect a second race but one for which only quarter points were available unless it was completed or declared a full race.
23. Our interpretation is different. We think the words just quoted are clear. There were *2 parts to one* race, notwithstanding that it was not declared a full race and notwithstanding that a third part could have been embarked on but (rightly or wrongly) was not. What is clear on the facts is that neither part of what became a 2 part race reached two thirds of the total race and so the race could not be declared a full race under rule 6.21Ca.
24. The Tribunal finds therefore that the Judiciary Committee was incorrect to say that because the race was not declared a full race the correct allocation to the second part was quarter, not half, points. It is our interpretation of rule 6.21Bd that each of the 2 parts should have been scored half points.

Apparent bias and other process issues

25. Of a number of specific unfair process complaints advanced by Mr Frost, the first process complaint was that the hearing had been overly vigorous and that the Chairman, Mr Bernard Harnett, in particular had not given fair consideration to the Appellant's evidence and had shown signs of having made up his mind beforehand. It was alleged that Mr Harnett had often cut across Mr Frost and had argued against what he was trying to say. It was alleged also that Mr Harnett had pulled faces. Mr Harnett and the other Committee members denied any impropriety. Mr Harnett said

that the effect of his challenging the submissions being made by Mr Frost was that this enabled the Appellant to repeat his submissions and that he had done this very effectively.

26. Mr Stirling and Mr Gordon, counsel for MNZ, provided us with a copy of a recent Judgment of the Court of Appeal – *Nottingham v. Real Estates Agents Authority and Honey* [2017] NZCA 1, Judgment 27 February 2017. The Court recorded exchanges between the chairman of a tribunal and a party that were at the very least discourteous and commented that, although regrettable, comments by the chairman could not be viewed as establishing bias. Lawyers are well used to Judges in the courts testing the arguments of counsel in a manner that might appear to a lay person to indicate a closed mind. We were taken through relevant parts of the transcript of the hearing conducted by the Committee and are not satisfied that this aspect of bias has been made out by Mr Frost.
27. The Tribunal is however troubled by two other features of the way in which MNZ and the Committee proceeded.
28. First, there is the way in which the Committee is constituted and in the way in which committee members appear to view their role. Rule 7.3.1 provides that the Committee is to be “an independent Judiciary Committee [appointed] in accordance with the Constitution”. Somewhat inconsistently with that requirement, rule 7.3.1.2 provides that the “three members of the Judiciary Hearing Committee” are to be appointed as follows: 1 nominated by the complainant, 1 nominated by the alleged offender and 1 by the General Manager of MNZ. In the present case Tony and Mitchell Rees initially nominated Mr Harnett but later, because MNZ’s intended nominee was not available, Mr Harnett became the nominee for MNZ and was appointed also as chairman of the Committee.
29. The significance of Mr Harnett’s nomination as a member and chairman of the Judiciary Committee was that originally he had been assisting Tony and Mitchell Rees to prepare their appeals against the decision by Mr New and, we infer, their conduct complaints against him and Mr Heaphy. Mr Harnett sought in evidence to down play the extent to which he had given assistance in this respect but Mr Frost’s evidence, which was not challenged in this respect, was that Mr Harnett had said to him: “just between us”, he had had the Rees’ documents from the first Committee hearing (which was set aside by the Tribunal by consent because it had proceeded without hearing from Mr Frost). Mr Harnett told Mr Frost that he had been helping

Tony and Mitchell Rees with their appeal, although they ultimately decided not to use him (presumably because by then he had been appointed to the Judiciary Committee). The Tribunal concludes that in those circumstances, Mr Harnett should not have been appointed to the Judiciary Committee to rehear the appeals. We rule also that, having been appointed, he should have declared a conflict of interest under rule 7.3.5.

30. This problem was compounded by Mr Harnett's statement when giving evidence to the Tribunal that as an appointee to the Judiciary Committee he "would advocate the position" of the person nominating him – in this case MNZ. This is significant because MNZ, contemporaneously, was dealing with the Rees appeals against the steps taken by Mr New and Mr Heaphy to "correct" what they thought had been a wrong implementation of the decision taken about Race 2 at Taupo, and also taking "code of conduct" action before the Judiciary Committee against Mr New and Mr Heaphy alleging that they had acted improperly in respect of the same matters that are the subject of Mr Frost's appeal to this Tribunal.
31. Due to issues of whether the latter had received adequate and timely notice of the code of conduct allegations made against them, Mr New and Mr Heaphy did not attend the hearing of the Rees appeals, which Mr Frost (rightly) felt disadvantaged him. The Committee's initial intention was to hear the allegations and the appeal sequentially at the same sitting in that order but, on Mr Frost's application, the order was reversed.
32. At the hearing before the Tribunal, we were advised that the Judiciary Committee had come to a conclusion on the code of conduct allegations which had been referred to the board of MNZ for ratification but that no further steps had been taken awaiting a decision of the Tribunal on Mr Frost's appeal. This serves to confirm that the appeal and the code of conduct allegations were seen by MNZ and by the Committee as being inter-related.
33. The Tribunal is satisfied that Mr Frost was entitled to feel that he was not getting a fair hearing and that there was at least apparent bias against him in the Committee. For that reason, the Tribunal orders the Committee's decision be set aside.
34. Counsel for both parties said if the Committee's decision was set aside, the Tribunal should determine the substantive matters, which it has.

Decision

35. The result of Mr Frost's appeal is as follows:
- (a) The decision of the Judiciary Committee allowing the appeals by Tony Rees and by Mitchell Rees is declared invalid and set aside.
 - (b) The initial decision of the Chief Steward at the Taupo meeting that the first part of Race 2 had terminated at the end of lap 4 was incorrect. It terminated at the end of lap 5. It follows that Mr Frost should not have been awarded any points for Race 2. It also follows that the action taken by Mr New at Hampton Downs "to correct the errors" made in scoring Race 2 was invalid.
 - (c) The decision to award quarter points for the second part of Race 3 at Hampton Downs was incorrect. In the absence of a declaration that Race 3 was a full race, the points awarded for the second part of the race should have been one half, as with the first part.
36. The Tribunal does not know how the above decisions translate into Championship results. That will be a matter for MNZ.
37. The code of conduct allegations are not before the Tribunal and, as stated, the board of MNZ has yet to make a decision on the Committee's recommendations. However, the Tribunal considers it may assist if it makes a specific finding in this Decision that, based on the evidence before the Tribunal and specifically including Mr New's and Mr Heaphy's evidence, the Tribunal, considers they acted bona fide in taking the decisions and action they did in what they believed was a correct interpretation of the Rules. The Tribunal considers it would be invidious and not in the interests of sports administration if decisions taken by officials in good faith which on an appeal process turn out to be wrong were then to be the subject of misconduct allegations.

DATED 6 December 2017



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Dr James Farmer QC
Deputy Chairperson