

MOTORSPORT NEW ZEALAND (INC)

In the matter of the National Sporting Code

**And in the matter of a Judicial Inquiry
pursuant to Arts 118-120**

Between the Parties

MotorSport New Zealand Inc (Appellant)

Scott McKelvie (Respondent)

NOTICE OF DECISION

1. MOTORSPORT NEW ZEALAND (INC) under the powers set out in Articles 118 to 120 of the National Sporting Code, having considered matters brought to its attention, and by mutual agreement between MotorSport New Zealand and Mr Scott McKelvie, determined to hold a hearing before the Judicial Committee appointed by the Executive.

2. THE PURPOSE OF THE HEARING

MotorSport New Zealand agreed to hold a hearing pursuant to the provisions of Articles 118 to 120 of the National Sporting Code to determine various issues in respect of Car No 27 at Race 1 of the Production Racing Series Meeting at Pukekohe Raceway on 8 November 2008, as follows:

1. Was the airflow meter of Car No 27 modified by there being no vortex generator?
2. If the airflow meter of Car No 27 was modified by there being no vortex generator, was that modification a breach of Schedule PR13.6 and/or 14.4?
3. If the airflow meter of Car No 27 was modified by there being no vortex generator, was that modification "*performance affecting*"?
4. If Car No 27 was modified in breach of Schedule PR13.6 and/or 14.4, which of Schedule CH39.8 and 39.9 applied?
5. In the circumstances, was the penalty imposed on Mr McKelvie by the Event Director and confirmed by the Stewards manifestly excessive and/or unreasonable?

3. FURTHER INFORMATION

The Judicial Committee was tasked to conduct a hearing in relation to this matter to consider the issues identified in accordance with the National Sporting Code (NSC) Articles 118-120, and in particular Article 120.

The Judicial Committee considered those matters which were set out in the Notice, in the context of the relevant provisions of Schedule PR (particularly 13.6 and 14.4) and Schedule CH (particularly 39.8 and 39.9) and the other rules and regulations the Committee considered relevant (such as Production Racing Series Articles, Technical Regulations or Championship Articles), and such other matters that the Committee considered necessary, including the wider implications of such matters to the Sport as a whole as it was empowered to pursuant to the terms of reference.

4. HEARING PROCEDURE

The Hearing was conducted in accordance with National Sporting Code (NSC) Article 120 with such necessary modifications as were imposed upon it by its terms of reference.

5. BACKGROUND

This matter came before the Judicial Committee in an unusual way.

In the normal course of events matters are referred to the Committee by the Executive of MotorSport New Zealand Inc.

This matter was referred to it by way of consent and a settlement agreement between the Sport and Mr McKelvie.

As such the referral and the terms of reference, and indeed the whole process of the Committee was otherwise than would be as provided under the Articles of the National Sporting Code. However, it was the wish of the parties that the matter be conducted in this way and the parties both agreed to the jurisdiction of the Committee to determine the matter.

The hearing was not held *de novo*. Instead this Committee was asked to consider and answer certain issues that were set out in the Notice of Hearing, based on submissions and evidence that was presented to it at the hearing. See 6 below.

Subject to the Further Information set out in the Notice of Hearing, these were the only issues that the Committee was asked to determine.

Given that the issues had been carefully drafted and agreed between the parties lawyers as part of a settlement agreement it must follow that the questions as put and the terms of reference as outlined in the Notice of Hearing were exactly as the parties wanted them and, correspondingly, that no other restrictions or requirements (other than the requirement to follow procedure and to observe the principles of natural justice) were imposed on the Committee. This is in line with the empowering articles of the Judicial Committee.

6. PRELIMINARY JURISDICTIONAL POINT

As a preliminary jurisdictional point the parties agreed to adopt the series of question posed to the Committee as set out in the Settlement agreement rather than the wording provided in the Notice of Hearing.

7. FACTS

The facts can be shortly stated.

After the conclusion of Race 1 of the Production Racing Series held at Pukekohe on 7-9 November 2008, Car 27 was inspected by a MotorSport Technical Officer who concluded that the air flow sensor on the car appeared not to comply with the regulations (Schedule PR 13.6 and 14.4). This was written up as an infringement and the matter was heard before the Event Director (ED) at the Meeting.

The hearing concluded that Car 27 did not comply with either of the regulations.

The ED ruled:

“Your airflow sensor was found to have been modified as there was no “Vortex Generator”...

The competitor was fined and excluded from the race results pursuant to Schedule CH.

That decision was protested to the Stewards of the event who, on rehearing the matter, dismissed the protest and confirmed the penalties applied by the ED.

In their decision the Stewards found that:

“the Vortex Generator on Car 27 was not in accordance with the regulations...”

The McKelvies did not Appeal this decision, but later sought an Inquiry which was declined by the Sport's Executive.

Thereafter civil proceedings were issued and, after confidential negotiations, settled on the basis that this hearing would be held on the basis outlined above.

Accordingly the matter was heard by the Committee with each party presenting its submissions, the hearing of witnesses and cross examination.

8. FINDINGS

The terms of reference for this hearing were drafted as part of a settlement agreement between the parties. As such those terms and the issues to be put to this Committee were penned and structured by agreement between the lawyers who were then acting for the parties.

While this is unusual it was done by consent between the parties. What is clear however is that the scope of the Committee's enquiry and the procedures that it was to follow were predetermined by those parties at a time that they were legally represented and professionally advised.

And they were happy with this.

And, as we were advised on many occasions during the hearing, to stray from those terms of reference would be at our peril.

So it must be that the parties were satisfied with the scope of the Committees inquiry and that all necessary restrictions and qualifications as were required, in order for the matter to be heard, had been imposed upon this Committee.

Accordingly the Committee was otherwise free to deal with the matters as it saw fit.

There were no definitions provided of the words and terms used in the questions referred to the Committee for answer.

Accordingly our first task was to determine what exactly were the “airflow sensor” and the “vortex generator” as these terms have been used in this matter to date and which form the crux of the issues to be determined.

Having heard the submissions of the parties, listened to the witnesses and heard the cross examination certain points became very clear.

1. The airflow sensor is the part identified by Lloyd Robinson of Mitsubishi Motors as Mitsubishi Part Number MR578399, (item 4 on the diagram titled “Air Cleaner” tabled by Mr Robinson).

This was also identified as Part E5TO8073 as was marked on the part produced by Mr McKelvie and attested to as being the air sensor from car 27.

An identical new part with the same part number was also produced to the Hearing. This was a Mitsubishi part, in a suitably identified Mitsubishi parts box, complete with Part Number. This was produced to the hearing by Motor Sport NZ. It was verified as such by Mr Robinson from Mitsubishi.

We note that this part contains no serviceable sub-assemblies. It is supplied by Mitsubishi as a complete unit.

2. We then heard considerable evidence on what part was it that was referred to as the "vortex generator". Indeed this was the cornerstone of the McKelvie's case. It was their submission that the vortex generator was the triangular piece that sits in the middle of the airflow sensor. While it appears that this may be strictly correct, that part is not the part that was missing from the vehicle neither was it ever a part that the parties were interested in (at least until after the hearings), nor was it referred to in any of the hearings that were held. While it might properly be described as the "Vortex Generator" it was not THE "Vortex Generator" at the centre of the parties attention in these proceedings. The term has been misused to describe what we have now found is properly termed 'the rectifier' and it was common ground that it was this part that was the missing part from the air flow sensor on Car 27.

Accordingly for the purpose of these proceedings we have determined that the term "Vortex Generator" refers to that part of the airflow sensor that is correctly identified as a rectifier, but which was incorrectly labeled as the Vortex Generator in the findings. To do anything else would be to create a nonsense of these proceedings.

3. At this hearing, as in the previous hearings, Scott McKelvie accepted that the airflow sensor was not in standard form when removed from his car. His part E5TO8073 was compared to the same new part produced from Mitsubishi and he conceded the difference was the absence of the rectifier.

It was this rectifier that was NOT present when the part MR578399 was inspected after Race 1.

4. Schedule PR 13.6 states "The air induction system shall be Standard, excepting the filter element."
5. The air induction system on Car 27 was not standard when inspected because the rectifier (referred to as the Vortex Generator) was missing.
6. Because it was missing the car was non compliant.
7. The addition or removal of material within the path of the air inside the induction system will have an effect on the airflow, and so will have some impact on the performance of the vehicle, therefore the absence of the rectifier within PN MR578399 was performance affecting, regardless of whether the impact was small or large or even negative.
8. The Committee would have reached the same conclusion even accepting the submissions of the McKelvie's in relation to the definition of the Vortex Generator.

The issues as set out in the Notice of hearing can be dealt with in any order, There was no restriction placed on this by the terms of reference, indeed the Notice of Hearing expressly empowers the Committee to do this. Accordingly, even assuming that the answer to Question 1 was no, the answer to Question 4 is:

"Car No 27 was modified in breach of Schedule PR 13.6 by virtue of the airflow sensor being modified with the removal/absence of the rectifier and accordingly CH 39.8 applies because the addition or removal of material within the path of the air inside the induction system will have an effect on the airflow, and so will have some impact on the performance of the vehicle."

9. There was much discussion at the hearing about the Respondents only preparing for the matters that were in the questions outlined in the settlement agreement and hearing documents; that any other matters would effectively be an ambush and catch them unprepared. The Committee accepts that such an approach would be

unacceptable. Nowhere here has the hearing deviated from the issues or introduced new material not previously considered. By way of comparison the Sport was never given to believe that the Respondents whole case would revolve around a part that was never the subject of any investigation or hearing and which only came into focus as the result of the honest but mistaken application of a descriptor which correctly identified the right part by the wrong name. For the matter to be determined on the basis of such a technicality when the parties clearly know and understand the nature of the part that they are dealing with would be wrong.

Were such a precedent to be set then the Sport would be required to provide a set of specifications and an agreed terminology to every part in every vehicle in order to be able to enforce its rules. Such a requirement would be unduly onerous and add complexity and cost to a sport whose rules strive to be simple and to provide certainty to all competitors and officials alike.

10. The final matter to be reviewed and determined was the matter of penalty. The Respondents made much of the fact that the penalty was out of step with other penalties that had been handed down in the series. The Committee is of the view that penalties are applied on a case by case basis by the Official who has the best opportunity to assess the case and hear the witness. Provided the penalty is within the range or permissible penalties, and in the absence of any evidence to suggest that there was any gross miscarriage of justice on review if the matter is found to have been proved interfering with the penalty is just that...interfering and fiddling.

The penalty applied by the ED and confirmed by the Stewards was well within the parameters set by the Sport and the Committee would be fiddling to interfere with the decision that was made and confirmed by two other judicial bodies. Accordingly we find the penalty was neither manifestly excessive nor unreasonable.

9. RULING

For the reasons and based on the findings set out above and applying the definitions we have determined appropriate, the Committee answers the questions put to it as follows:

1. Was the airflow meter of Car No 27 modified by there being no vortex generator?

Yes

2. If the airflow meter of Car No 27 was modified by there being no vortex generator, was that modification a breach of Schedule PR13.6 and/or 14.4?

Schedule PR 13.6 and PR 14.4

3. If the airflow meter of Car No 27 was modified by there being no vortex generator, was that modification "*performance affecting*"?

Yes

4. If Car No 27 was modified in breach of Schedule PR13.6 and/or 14.4, which of Schedule CH39.8 and 39.9 applied?

CH 39.8

5. In the circumstances, was the penalty imposed on Mr McKelvie by the Event Director and confirmed by the Stewards manifestly excessive and/or unreasonable?

No

10. COSTS

The Committee has the discretion under Art 120(j) to award costs in proceedings of this nature. We so order and direct the General manager of MotorSport New Zealand to calculate the costs of the Committee, the costs of the parties attending the hearing on behalf of MotorSport NZ and the administrative costs associated with the hearing and that these be paid by the Respondent.

11 APPEALS

The parties rights of appeal are set out in Part XI of the National Sporting Code. The time limits for appeal are strictly enforced. As this is a written judgment the time limits will run from the time that delivery is confirmed on the Parties.

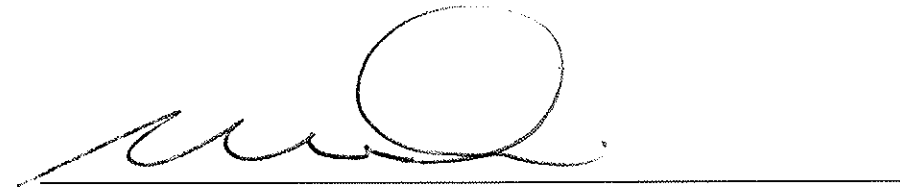
DATED THIS 26 DAY OF JULY 2010

Signed on behalf of the Committee

M Fine
Chairman

MD Chandler
Member

P Te Punga
Member



M. FINE
CHAIRMAN