

BETWEEN THOMAS EMMERSON

Appellant

**AND KARTSPORT NEW ZEALAND
INCORPORATED**

Respondent

**DECISION OF 18 NOVEMBER 2010
ON CHALLENGE TO JURISDICTION**

Tribunal: Barry Paterson QC (Chairman)
 Nick Davidson QC
 Alan Galbraith QC

Registrar: Brent Ellis

Introduction

1. Mr Emmerson seeks to appeal a decision of the KartSport New Zealand Appeal Board dated 7 August 2010 (the appeal decision).
2. The respondent, KartSport New Zealand Incorporated (KartSport) does not accept that the Tribunal has jurisdiction to hear the appeal.
3. The reasons for the challenge to jurisdiction are set out in KartSport's statement of defence. Mr Emmerson was invited to make written submissions in reply which he has done. The Tribunal is able to determine the jurisdictional matter on the basis of this written material.

Sequence of Events

4. At a meeting held over 15 and 16 November 2008, the executive of KartSport varied rule I29.1 dealing with permitted fuels (Rule I29.1 was in April 2010 Rule L4.1). For category 1 (the open class), it specified certain fuels and the variation noted that "the use of bio-fuel blends is not permitted." Mr Emmerson uses bio-fuel blends in his kart.
5. The Christchurch Kart Club held a race meeting on 25 April 2010. Mr Emmerson competed in the 125cc Rotax Max Light Class but, because of the fuel restriction, was unable to compete in the open class heats. At 1.50pm on that day, he filed a complaint with the stewards (the complaint) in which he stated the substance of the complaint as:

Open class results as the race has been conducted in accordance with a rule (L4.1) that does not have its substance and genesis in any manner in accordance with the constitution section B.2 and B.1 – 8.14 inclusive.

He suggested that the matter be resolved by the "results of class not to stand and rule amended".

6. A panel of stewards endorsed on the complaint its findings, namely:

The panel believes that KartSport has acted within the rules of the constitution. Results therefore stand.

7. Mr Emmerson then appealed to the Appeal Board and there was a hearing in Auckland on 7 August 2010 at which Mr Emmerson represented himself, called evidence from one witness and presented a number of statements in support of his position.

8. The written appeal decision which is dated 7 August 2010 includes the following:

Thomas Emmerson's Form of Complaint (FOC #407605) was against the results of the Open class heat 1, annual points championships, Christchurch Kart Club on 25-4-10.

KartSport New Zealand submitted that Thomas Emmerson had entered the 125cc Rotax Max Light Class at this event, supported by documented evidence. KartSport New Zealand therefore submitted that Thomas Emmerson had no right to protest the result of the Open class, as per clause C4.1 of the KartSport New Zealand Judicial Code, as he was not a competitor in the Open class. The appeal board accepts the interpretation of rule C4.1 made by the Executive under rule B6. The appeal board recommends that this interpretation be made clear within rule C4.1.

The Chief Steward of the event did however accept the Form of Complaint (albeit outside of rule C4.1) and subsequently a Stewards Hearing was held and a decision given.

Following the decision Thomas Emmerson then chose to exercise his right under C6.3 to appeal the decision of the Stewards Hearing and KartSport New Zealand accepted, without prejudice, that the appeal be heard.

The appeal board accepts that the original hearing should not have been heard on the basis that Thomas Emmerson had no right on the day to protest the Open class as he was not a competitor in that class and therefore did not meet the requirements of C4.1.

However as the Chief Steward allowed the protest, heard the matter and made a decision, the appeal board believes that it is correct to allow Thomas Emmerson the right of appeal under C6.3 and therefore, without prejudice, determines that the appeal board has jurisdiction to hear the appeal.

9. The outcome was expressed in the appeal decision in the following terms:

The Appeal Board determined that the Open class at the Christchurch Kart Clubs annual points championship held on 25.04.10 was conducted in accordance with the current KartSport New Zealand codes, rules and specifications and further that the specific rule L4.1 was notified and implemented by the KartSport New Zealand Executive in accordance with the KartSport New Zealand Constitution and therefore the appeal is lost.

10. Mr Emmerson's submissions, which are not contradicted by those of KartSport state that the decision was communicated to him as follows:

- (a) he was verbally advised of it at the hearing on 7 August 2010;
- (b) he received an email copy of it on 8 August 2010;
- (c) a hard copy was posted to him on 9 August 2010;
- (d) the decision was posted on KartSport's website on 11 August 2010;
- (e) he received a hard copy of the decision on 12 August 2010.

11. Mr Emmerson says that he fastposted his notice of appeal to this Tribunal on 25 August 2010. It was received by the Tribunal on 30 August 2010. The envelope contained the following notation by NZ Post:

Item may have been delayed due to insufficient postage.

Grounds of Challenge to Jurisdiction

12. KartSport challenges the Tribunal's jurisdiction on two grounds:
- (a) Mr Emmerson, pursuant to rule C7.3 of KartSport's rules, was required to apply to this Tribunal within 15 working days

of the announcement of the decision by KartSport and he did not do this;

- (b) The change to Rule I29.1 was validly made by the Executive of KartSport and can not be challenged on the grounds alleged by Mr Emmerson.

Mr Emmerson's Position

- 13. Mr Emmerson's response will be discussed more fully below but, in summary, his response to the jurisdictional challenge is:
 - (a) His notice of appeal was filed within time because KartSport did not announce the decision at the earliest until 11 August 2010, when it appeared on KartSport's website; and
 - (b) he has a right to appeal the decision of the Appeal Board because of the provisions of Rule C7.3 of KartSport's constitution.

Discussion

- 14. Mr Emmerson seeks to challenge the validity of KartSport's fuel rule under a procedure initiated by a race-day challenge or protest. The Appeal Board determined that he did not have the right to do this but nevertheless considered his appeal because the stewards' panel had considered the complaint. The Tribunal is of the view that this action may also raise a jurisdictional point which needs to be considered. That point is whether the Appeal Board can, in effect, validate a protest, if it was not a legitimate protest, by considering an appeal from it on the merits.
- 15. Mr Emmerson initiated his challenge under Rule C4. This rule reads:

C4.1 RIGHT TO PROTEST

The right to protest lies only with a competitor; nevertheless, an official acting in his official capacity may even in the absence of a protest take such official action as the case warrants.

A competitor wishing to protest against more than one fellow competitor must lodge as many protests as there are competitors involved in the action concerned.

16. It is necessary to consider this rule within the context of Section C of KartSport's manual. While the manual is, no doubt, set out in a very convenient way for members of KartSport, it lacks clarity as to whether Section C is part of the constitution itself or comprises a separate code made in accordance with the provisions of the constitution. The distinction is not relevant to this case but it would seem from the material supplied to the Tribunal that Section C, which is the judicial code, is a separate code made in accordance with the provisions of the constitution.
17. In the main, Section C deals with events. It specifies the duties of various officials at those events and with particular reference to this appeal to the duties of the stewards at the event. They settle all claims that might arise during an event subject to the rights of protest (refer C4). A protest by a competitor is to be made to the Clerk of the Course. Section C clearly sets out how competitive events are to be managed and the rules that apply to those events and to competitors and karts. The section applies to the eligibility to compete as well as to incidents which arise during an event. It provides for penalties for breaches of the Regulations, Codes, Rules, and Specifications. It does not apply to changes of the constitution.
18. In context, the right to protest under Rule C4.1 applies to breaches of the Regulations (those contained in Section B), Rules (the Competition Rules which term is undefined) and Specifications (defined as Technical Specifications as covered in the manual).

19. A protest under Rule C4.1 must be addressed to the Clerk of the Course. It must be made within certain tight time limits. The intent of the time limits in the hearing provisions and the delay of the prize giving ceremony all suggest that protests are to be disposed of in a very limited time frame after the event. They are to be disposed of on the basis of the Regulations and Rules and Specifications in force at the time of the event. The decision is to be made by the stewards.
20. The nature of the protest in the contextual framework of Section C leads the Tribunal to the view that the decision on a protest is to be made by the stewards on the basis of the Regulations, Rules or Specifications under which the event is being held. That the right to protest is confined to a competitor confirms this view. It is not necessary in determining this case to decide whether a person who is prevented by starting in breach of a Regulation, Rule or Specification has a right to protest, but it is evident that Section C4 when properly interpreted does not give a prospective competitor, who has been prevented from starting because of a Specification, the right to protest on the basis that the Specification under which the competition was held had not been properly promulgated or made.
21. In the circumstances, the correct response from the stewards was to reject the complaint on the grounds that KartSport had not infringed any of the Regulations, Rules or Specifications currently in force. This is, in effect, what the stewards decided (see para. 6 above).
22. An appeal from the stewards' decision could only have been on the grounds that the decision was wrong, i.e. that KartSport had not acted within the existing Specification. The Appeal Board, trying to be fair to Mr Emmerson, considered the complaint about the validity of the Rules but exceeded its jurisdiction in doing so.

23. The point, therefore, is whether this Tribunal should, out of fairness to Mr Emmerson, also consider the basis of his complaint, namely that the Rule I.29.1 was *ultra vires*. The Tribunal is of the view that it would be wrong to do so and that it has no jurisdiction to do so. It interprets its jurisdiction under Rule C7 to be to consider appeals from the Appeal Board which have arisen from legitimate protests under Rule C4.1. This is not the case, as Mr Emmerson did not have the right to have the relevant Rule declared *ultra vires* using the procedure in Rule C4.1.
24. The fact that the Appeal Board elected to consider the merits does not give this Tribunal jurisdiction to do so where the Appeal Board had no jurisdiction to consider the merits.
25. Mr Emmerson also has a problem with the date of receipt by the Tribunal of his appeal. Under Rule C7.3, Mr Emmerson had 15 working days to apply to the Tribunal for an appeal "following the announcement of the decision of a KartSport New Zealand Appeal Board".
26. There is no right in Rule C7.3 to extend the 15 working day period. Under the Tribunal's own rules, it has a power to extend the time only if there is no time limit prescribed in the KartSport Rules. In other words, the Tribunal can not extend the 15 working day period unless KartSport's own Rules provide for an extension. They do not.
27. The notice of appeal was received by the Tribunal on 30 August 2010. It appears as though it may have been delayed in the post because of insufficient postage.
28. Applying the usual rules which apply to such time periods, the date from which the time began to run must be excluded but the last day is included. This means that if 30 August 2010 is to be within the 15 working day period, the earliest date on which the period could have started would be 10 August 2010.

29. Mr Emmerson's position is that the decision was not announced until 11 August 2010, the date on which it was posted on KartSport's website (see para. 10 above). The basis of this submission is that the normal and ordinary meaning of "announcement" is when the information is made public. The normal dictionary meaning of "announce" is "make publicly known".
30. If the strict dictionary meaning is applied, Mr Emmerson is correct. However, in the Tribunal's view, the strict dictionary meaning is not applicable when the intent of Rule C7.3 is considered. Rules stipulating times to appeal invariably commence on the date that the final decision is made known to the parties. In the Tribunal's view, the period would have commenced no later than 9 August 2010 being the day after the email copy of the decision was sent to Mr Emmerson. There is an argument that it may have commenced when he was verbally advised of the decision on 7 August but he could not be expected to appeal on the basis of a verbal decision. In these circumstances, the preferable view is that the 15 working day period commenced on 9 August 2010. The 15 day period therefore ended on 27 August 2010.
31. Mr Emmerson's notice of appeal was, therefore, filed out of time. If the Tribunal had not determined on the grounds already mentioned that it lacked jurisdiction, it would have had to rule that it lacked jurisdiction because the time provisions had not been observed.
32. The question of the validity of the Rule does not in itself go to jurisdiction. It is, however, not necessary to determine this matter in view of the previous findings. It is appropriate to make one observation.
33. In his attack on the validity of the rule, Mr Emmerson relies upon the objects of the society set out in Rules B8.1 to B8.14 of the

constitution. These provisions set out the objects, functions and the powers of KartSport.

34. The Executive of KartSport is entitled to act in accordance with the provisions of its constitution. Rule B12.2 gives the Executive the right to change Codes, Rules and Specifications without adopting the consultation rounds referred to in Rules B12.2.2 to B12.2.7. The Executive says that it operated under this Rule and if the two-thirds majority required by the Rule was obtained it is difficult to see how it can be challenged.
35. However, the Tribunal does not express a view on the validity of the Rule. This is because, for the reasons already given, it does not have jurisdiction in this appeal to consider the validity of Rule L4.1.

Decision

36. For the reasons given, the Tribunal declines jurisdiction.

Dated 18 November 2010



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B J Paterson QC
Chairman