

**BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND**

ST 01/08

BETWEEN **MOTORCYCLING NEW ZEALAND ("MNZ")**

Respondent

AND **TIM CURR**

Appellant

**FINAL DECISION OF TRIBUNAL
EXCEPT AS TO COSTS**

Dated 21 November 2008

Hearing: **Tuesday 9 September 2008**

Present:

For Appellant: Noel Curr

For Respondent: Bruce Corkill QC

For Tribunal: Nicholas Davidson QC (Deputy Chairperson)
Dr Lynne Coleman
Carol Quirk

Registrar: Brent Ellis

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A. INTRODUCTION

1. This appeal was brought against decisions of the Board of Motorcycling New Zealand Incorporated ("MNZ") dated 27 December 2007 and 16 January 2008.
2. The **former decision** upheld allegations against Tim Curr that he had ignored the directions of an MNZ Steward, and that in so doing he rode dangerously in relation to the Steward, and later rode dangerously in the pits. Two other allegations, of assault on a Steward and uplifting his MNZ licence before an event finished, were not upheld.
3. By the decision dated **16 January 2008**, the Board imposed a suspension of one year for ignoring the directions of a Steward, concurrent with two years suspension for riding "*dangerously/recklessly by charging at or close to the Steward*", plus one year's partial suspension of competition licence, and imposed a \$150.00 fine for riding dangerously in the pits.
4. The appeal process was lengthy, and the Decision explains the reasons for this.

B. THE DISCIPLINARY PROCESS

Origins

5. The disciplinary process arose out of the Senior National Moto-Cross Championships held in Taranaki on 18 November 2007, beginning with an Interim Suspension. The appellant received notice of an intention to hold a disciplinary hearing, set for 22 December 2007 in Auckland, to which he was invited to respond by written submissions, or by appearance. MNZ subsequently allowed his attendance by telephone. There was an express prohibition on his being represented by counsel, or an agent.
 6. The notice given by the appellant alleged as follows:
 - "a. *That you assaulted Guy Merewether, an MNZ Steward.*
 - "b. *That you remained on the track after being ordered off by the Steward, Guy Merewether (rule 6-11).*
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- "c. *That you rode your bike in a careless and/or dangerous manner in that you rode your bike towards Guy Merewether at speed on two occasions (Rule 6-11)*
- "d. *That you rode your bike in a careless and/or dangerous manner in that you rode your bike at an unsafe speed in the pits (Rule 6-11).*
- "e. *That you uplifted your Competitor's Licence and logbook before the end of the event (Rule 5-2-6)."*

7. He was provided with a number of documents by way of disclosure, including a DVD showing part of the incident which gave rise to these allegations.

The MNZ hearing on 22 December 2007

8. The hearing was conducted on 22 December 2007, in circumstances which to any disinterested observer, and to this Tribunal, raise some concern. Tim Curr attended by telephone, while he was otherwise engaged in his full time occupation as a spray-operator in Marlborough vineyards. He was on a cellphone and facing what were very serious allegations.
9. A record of the hearing process was kept by MNZ in some detail. It does not purport to be an exact record but was useful in establishing where the contest lies on the facts.

The MNZ Decision dated 27 December 2007

10. There was documentary evidence regarding what witnesses saw at the time. For example, there was an e-mail from Mr Henderson of 20 November 2007 which described the actions of the Steward, some of which is now irrelevant having regard to the allegation of assault not being upheld. It alleged that the Steward had to "*jump for safety*" on the next lap after an incident involving several riders, and then an allegation that Tim Curr "*rides too close for comfort at (the Steward)*".
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11. A handwritten statement of 18 November 2007 signed by Mr Sanderson alleged that Tim Curr *"disobeyed the black flag when it was shown to him on two different laps ..."*.
 12. Mr Siciliano made an Assistant Steward's report on 18 November 2007 and recorded that he did not see the incident, but picked up information from witnesses. The Steward made a statement, and alleged that Tim Curr's bike had the rear wheel on top of the bottom radiator shroud and radiator of a competitor's bike, and he and *"the Honda rider"* attempted to lift Tim's bike off when the incident occurred. The Steward said he told Noel Curr that his son was black flagged and went to find a black flag, but when he could not do so, he used a black bag on a pole. The Decision of the Board recorded that in Race 3 of Round 4 of the 250 Class at New Plymouth, *"four or so riders"* crashed shortly after the first corner, and that a number of spectators, including the Events Steward Guy Merewether, and Noel Curr (Tim's father) went to assist the downed riders. (To differentiate, this Decision refers to *"Tim"* and *"Noel"* Curr). The Decision recorded that Tim Curr lifted his bike up, remounted, and went to kick-start it to continue racing. His bike was on top of Hayden Clark's bike and the Board concluded that *"Tim made no effort to push his bike clear, but instead remounted and tried to restart his engine while still on top of Hayden Clark's bike"*.
 13. He alleged that Tim Curr rode his bike towards him and he had to move quickly out of the way. He then wrote on a pit board to indicate a black flag was being shown, and he said that Tim Curr rode directly at him again.
 14. The Board had convened on 30 November 2007, and based on its perceptions of the seriousness of the allegations, temporarily suspended Tim Curr under Rule 7-3-5 of the MNZ 2007 Manual of Motor Cycle Sport, pending the outcome of the investigation. Although he asked that this be lifted so he could compete in the National Super Cross Championship and the New Zealand Grand Prix in January 2008, the Board refused to do so.
 15. The Decision recorded that the Steward's explanation was accepted, and that he tried to push Tim Curr's bike off Hayden Clark's bike, by the rear
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fender, and that the risk of damage was obvious with one bike riding over another. The Decision also recorded that the appellant's explanation provided for his not pushing his bike clear of Clark's bike was that there was *"nothing in the Rules that states that this cannot be done"*. This response was clearly influential in the reasoning of the Board, which recorded in paragraph [9] that it was *"unimpressed by Tim's unsporting attitude, and considers that he showed a total disregard for another's property"*.

16. The Decision also recorded that while the Steward was holding the rear fender of Tim's bike Noel Curr *"yelled at the Steward to let go, and knocked the Steward's hands off the rear fender"*, and that Tim Curr, seated on his bike, swung his right leg over the rear fender *"as if to dismount"*, and in doing so he made contact with the Steward. His explanation was accepted that this was accidental as he lost balance while dismounting.
 17. This was not the view of the Steward, and the Decision records that he believed the kick was deliberate. He acknowledged that he reacted strongly. This was in part associated with the finding that his hands had been *"physically knocked off the rear fender by Noel Curr"*. There followed a brief physical altercation, but the Board did not go into that as it considered it was not directly relevant to Tim's conduct. The Steward *"told Tim that he was disqualified from the race"* and while there seems to have been some dispute about the exact words used by the Steward, the contention for Tim and Noel Curr was that the Steward said *"you(re) f.....g out"* or words to that effect. The Board was not so concerned with the exact wording because it held that Tim admitted he understood the Steward was disqualifying him from the race. Instead he continued to race and the Steward sought a black flag to signal that disqualification. He could not find one, so he mounted a laptop computer bag on a flag pole (with a green flag) and signalled to Tim when he next passed. Tim Curr continued racing. His explanation was that he was not required to stop and retire because it was not a proper black flag, but admitted, according to the Decision, that he understood it was supposed to represent such a flag – paragraph [16]. On the next circuit, the Steward signalled to Tim
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that he was disqualified with a pit board marked "*# 7 Black Flagged*" in felt pen. This was action taken under Rule 6-19 according to the Board decision. Tim Curr again continued racing. His explanation was that he could not read what was on this board, but this explanation was not accepted. A photograph shown to the Board demonstrated Tim Curr passing close to the Steward holding the pit board.

18. Noel Curr had also written "*don't stop*" on a board to encourage Tim to keep racing. The Board concluded that Noel Curr knew the Steward was directing retirement, and placed some significance on the fact that Noel Curr and others could read "*from a far greater distance than Tim*" what was written on the Steward's pit board.
19. It was alleged that Tim came very close to the Steward, something Mr Alan Henderson described as a "*near miss*". The photograph admitted to evidence in this Tribunal showed a close passing of the Steward. The Board decision recorded that Tim acknowledged that this was a "*near miss*", and that the Steward was standing on the track in his way. Hence the Board found that "*Tim rode his bike at speed at, or in extremely close proximity, to the Steward as a deliberate act of defiance*". It was held to be dangerous, and there was a risk of the berm blowing out, or his being "*bumped off his line*". This was held to be reckless and dangerous, with a risk of serious injury.
20. Then it was held that in the pits he rode with Noel Curr as a pillion passenger down a hill to where he was pitted, and almost collided with a child riding a bicycle up the hill, before being spoken to by a flag marshal and the child's father. He apologised to them for his actions. Tim said that he was in first gear and revved his bike to warn the child of his approach. The Board concluded on the evidence that he had driven at excessive speed. He was held to be "*riding dangerously in the pits*", but under Rule 6-11 this was treated as "*careless riding*". The Board thought that he was "*hyped and angry*", and "*not thinking clearly*".

The Sanction imposed by MNZ on 16 January 2008

21. The breaches upheld were then the subject of sanction by Decision dated 16 January 2008. The breaches were recorded as:
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"(a) *He ignored the directions of an MNZ Steward to stop and retire from a race. This direction was communicated to him on at least three separate occasions and by 3 separate means. Tim acknowledged to the Board that he understood what the Steward was directing him to do on each occasion;*

"(b) *In ignoring the directions of an MNZ Steward, he rode dangerously/recklessly by charging at, or close to, the Steward at speed on his bike on at least two occasions; and*

"(c) *He rode carelessly in the pits and, in doing so, nearly collided with a child on a bicycle; and*

"[2] *Two further allegations that he had: (1) assaulted a Steward, and (2) uplifted his competition licence before the event had finished, were dismissed. Tim was given until 10 January 2008 to make any submission(s) as to what penalty (if any) is appropriate."*

22. It appears that the appellant's submissions as to sanction were focussed on why the findings in the decision of 27 December 2007 were incorrect. The Board concluded from what was received that *"Tim has no remorse whatsoever for his actions, and believes that he was fully justified and entitled to behave as he did"*.

23. The risk of injury resulted in the finding of *"charging the Steward"* being described as *"the primary offence"*. Bringing to account the obligation to ensure events are run safely, and protecting officials, and the *"obvious lack of remorse or comprehension that what he did was wrong"*, a suspension of two years was imposed from **30 November 2007**. While he can be reinstated after that time, his competition licence was partially suspended for one year, so he can compete only in club events during what was called the *"probationary period"*, and was excluded from international, national, or island championships, NZ Grand Prix, or any major event as defined in the MNZ Manual. Then he can be reinstated to

full competition licence status if there is no further disciplinary action, and a letter is received from the Marlborough Motor Cycle Club or any other club to which he belongs which attests to his good character and conduct during the probationary period.

24. Ignoring the Steward's direction on three different occasions was held to have been in deliberate defiance of the Steward, and the Board held that while his defence was that the Steward had acted wrongly in purporting to disqualify him, officials do make errors, which must be dealt with through the disciplinary process, not in a peremptory way. The same reasoning applied with regard to the defence that the laptop bag on the green flag was not a proper black flag. This was seen as a technical argument, given the acknowledgement that Tim Curr knew it was intended as a black flag. For this he was suspended for one year, concurrently with the two year penalty.
25. Riding carelessly in the pits was held to be a careless but not a deliberate act, but he is not the sole offender in this regard. There is clearly a problem with riding in the pits, and MNZ recognised it must address this. To avoid making an example of Tim Curr in this regard, a fine of \$150.00 was imposed.

C. THE CASE ON APPEAL

Grounds of Appeal

26. The appeal was mounted for Tim Curr by his father, Noel Curr, who raised a large number of factual and legal challenges to the Board's decisions. These were developed in great detail before, during, and after the hearing.
 27. The foundation for an appeal to this Tribunal is contained in MNZ Rule 7-4-3, on these grounds:
 - a. That natural justice was denied;
 - b. That the decision-maker acted outside of its powers and/or jurisdiction;
 - c. That substantially new evidence has become available after the decision which is being appealed was made;
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- d. The penalty was either excessive or inappropriate.

An appeal to this Tribunal is heard and determined in accordance with the Rules of this Tribunal. The grounds of appeal under the MNZ's Rules mirror closely those available under the Rules of the Sports Tribunal of New Zealand. There is no distinction of any significance.

28. The grounds of appeal advanced were expressed in layman's terms although drawing on a number of principles as set out below, and grew in scope and detail through to the hearing.

Scope of Appeal

29. Noel Curr filled dual roles as advocate, and as a witness. The case he presented was expansive, and must be measured against the grounds on which an appeal can be brought to this Tribunal. The scope of the appeal must be understood, beginning with the grounds of appeal being expressed to include **all** those grounds set out in Rule 7-4-3, above. It is necessary to examine the "*appeal brief*" advanced by Noel Curr, a letter of 7 March 2008, and the material presented to the Tribunal at the hearing in Wellington on Tuesday 9 September 2008, and subsequently.

Appeal Brief

30. The "**Appeal Brief**" was against "**all the findings of the MNZ Board**" and alleged:
- "A. *No opportunity to hear Tim's side of the affair prior to suspension Rule 7-2-9(a), Rule 7-2-9(d), Rule 7-2-9(g).*
 - "B. *Board introduced additional material other than original complaint. Guy Merewether had no jurisdiction once an event finished.*
 - "C. *New television footage of race concerned.*
 - "D. *Penalty far in excess of previous (sic) cases, side car racers cleared of similar charges and points reinstated, MNZ Steward made to apologise to rider he insulted during racing."*
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Letter of 7 March 2008

31. A letter **of 7 March 2008** went further. Noel Curr referred to a decision of this Tribunal involving himself (**Noel Curr v MNZ**, ST19/07, decision 11 April 2008) drawing parallels, and saying that "*natural justice was withheld, and bias/predetermination due to the Discipline Panel (Board) membership being the same, thus insuring (sic) the process was fatally flawed.*" This last element (with further expansion) became a theme of Noel Curr's submissions, that the Board which determined breach and sanction could not be held impartial and thus the Decision(s) should simply be set aside by this Tribunal, and that be an end to it.
32. This submission must be measured against Rules 42 and 43 of this Tribunal, which allow for rehearing, and that the Tribunal may make any decision available to the body appealed from, or may refer it back after setting a decision aside.

Hearing

33. At the hearing, the grounds of appeal were developed in considerable detail and we refer to these under "*The Hearing*", as follows.

D. THE HEARING

34. Prior to the hearing, it became necessary for the Tribunal to issue Directions and a Minute regarding the relevance and admissibility of evidence which Noel Curr sought to put before the Tribunal. There was a concern held by him that not all relevant MNZ material was provided to him, including the detail of sanctions for other disciplinary matters. In effect, Noel Curr treated the appeal as a rehearing in its entirety, as he closely addressed the facts and the sanction imposed, but with a primary submission that the decision of the MNZ Board should be set aside for bias and/or predetermination.
35. The Tribunal has considered each ground of appeal which Noel Curr advances, which he described as "*fatalities*" of the MNZ disciplinary process, which expression means "*fatal flaws*", so as to invalidate the Decisions.
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Breach of Natural Justice – Bias/Predetermination by MNZ arguing 5 day limitation on appeal

36. Noel Curr has alleged breach of natural justice under different heads.
37. First, Noel Curr alleged that there was a deliberate and wrongful attempt to restrict the right of appeal, which is relevant to an allegation of bias or predetermination which he makes. MNZ correspondence of 28 September **2007** indicated an MNZ understanding that there was a 15 day period to bring an appeal, yet a strikeout application was filed by MNZ in this Tribunal, alleging a 5 day period. The heart of Noel Curr's argument was that MNZ knew all along of the 15 day time limit and sought to take advantage of a printing error.
38. Noel Curr wrapped this up in very serious allegations of "*malfeasance, duty of care, breach of fiduciary duty*", and a failure to know and comply with the Rules, which flows on to other allegations. To show how firm was his view, the Tribunal records part of the submission as follows:

"1st fatality

- *The Person or persons instructing council appears to have done so to*

1. – Pervert the course of justice.

*In English, **perversion of the course of justice** is a criminal offence in which someone acts in a manner that in some way prevents justice being served on either themselves or on a third party. Perverting the course of justice is an offence in common law. It carries a theoretical maximum sentence of life imprisonment, although no sentence of more than 10 years has been handed down in the past one hundred years.*

Perversion of the course of justice takes the form of one of three acts:

Fabrication or disposal of evidence

Intimidating a witness or juror

Threatening a witness or juror

It is also criminal to conspire with another to pervert the course of justice and to intend to pervert the course of justice.

Statutory versions of the offence exist in Australia, Canada and New Zealand. See, for example, Section 319 of the Crimes Act 1900 (NSW), [1], where the maximum penalty is 14 years imprisonment.

2. *by an act of Malfeasance*

malfeasance, n. intentionally doing something either legally or morally wrong which one had no right to do. It always involves dishonesty, illegality, or knowingly exceeding authority for improper reasons. Malfeasance is distinguished from 'misfeasance,' which is committing a wrong or error by mistake, negligence or inadvertence, but not by intentional wrongdoing. This distinction can apply to corporate officers, public officials, trustees, and others cloaked with responsibility.

3. *Duty of care*

n. Obligation that a sensible person would use in the circumstances when acting towards others and the public. If the actions of a person are not made with watchfulness, attention, caution, and prudence, their actions are considered negligent. Consequently, the resulting damages may be claimed as negligence in a lawsuit.

4. *Fiduciary duty*

fiduciary 1)n. from the Latin fiduciary, meaning 'trust' a person (or a business like a bank or stock brokerage) who has the power and obligation to act for another (often called the beneficiary) under circumstances which require total trust, good faith and honesty. ..."

39. These are very serious allegations, which the Tribunal rejects in the context of what appears to be a clear attempt to utilise the Rules as printed, and in the absence of proof this was a deliberate and obstructive
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act, such could not constitute a finding to the effect and consequence that Noel Curr contends.

40. Mr Corkill QC, who made succinct and helpful submissions, acknowledged that there was a misprint in the Rules, which founded the application to strikeout, but when the error was identified this was quickly reversed. The Tribunal accepts that this reversal demonstrated proper conduct rather than bad faith. Taking a pragmatic view, what was clearly an error could never have survived scrutiny and Noel Curr has demonstrated that he will leave no stone unturned, in his scrutiny of process and fact. The Tribunal accepts Mr Corkill's submission.

Breach of Natural Justice Bias/Predetermination – Mr Cressey's involvement in the hearing process

41. A further allegation regarding breach of natural justice based on bias or predetermination is that Mr Cressey of the Board should not have been involved in the hearing process, as he was affected by a conflict of interest with the Curr family as a whole, and the "*Curr Race Team*". This was based on an allegation that there was a commercial dispute about parts. MX Imports (owned by Mr Cressey) offered Tim Curr the use of specialised racing parts at a discounted rate in return for signage. There was a dispute as to the commercial dealing at the time of the disciplinary process. Noel Curr's evidence was that one of the parts had been returned, and there was a continued legal pursuit of the price of that part for some \$206.00, at the time of the disciplinary process affecting Tim Curr, and at the date of the hearing. Baycorp was involved.
 42. Several invoices were raised by MX Imports. Noel Curr expected to see Mr Cressey at the AGM in 2007. He took the piston he wanted to return but when Noel Curr was dismissed from the AGM, took it home. Mr Cressey thus heard nothing so he wrote on 11 June, and then the invoice was referred to Baycorp. Baycorp wrote on 11 July 2007. A cheque and the piston were delivered to Mr Cressey. Noel Curr said that there were no other communications with Mr Cressey after that time.
 43. Because there was uncertainty about the economic relationship between Mr Cressey in his business, and Noel Curr as at the date of the disciplinary
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hearings, Mr Cressey swore an affidavit of 16 September 2008. This showed that on 8 July 2007 he sent Noel Curr an account for \$431.20, and at the end of July that was returned to him with a cheque for \$265.10 and a returned piston kit. An explanation for the return was made. The cost of the piston kit was deducted. Mr Cressey entered the amount in his bank deposit book on 30 July 2007 and banked the cheque that day. He onsold the piston kit. He wrote to Baycorp on 3 August 2007, recording:

*"Noel Curr has made payment of \$265.10. He returned product (a motorcycle piston kit) worth \$166.10) claiming that it wasn't what he ordered although he has had it for the past 5 months – see his note **attached**."*

44. There is a protocol for Board members adopted by Motorcycling New Zealand, to which every Board member accedes. Under Clause 3 "*Conflicts of Interest*" there is an emphasis on the importance of making clear existing or potential conflicts of interest for its members to be declared and documented. The examples given relate to the provision of services, gaining of financial advantage, and where an issue under consideration involves the Board member's own club, team, sponsor or business. A Conflicts of Interest Register is to be maintained, to be tabled at each Board meeting with new entries entered in the Minutes of that meeting. Where a conflict of interest is identified and registered, the Board member may not participate in the Board discussion on that topic, or topics closely related. The member concerned should leave the room during such discussions as a matter of preference. Further, in disciplinary matters Rule 7-2-7 provides "*No person may sit as a member of the Board in the determination of any matter in which he or she is in any way interested.*"
45. A disciplinary meeting on 17 August recorded that Mr Pavletich and Mr Cressey left the meeting due to a conflict of interest. Mr Cressey's concerns were "*not related to this particular issue, but a conflict nevertheless.*" The submission by Noel Curr includes that Mr Cressey "*failed to register a conflict of interest, as he had registered a conflict at a previous hearing and the dispute was ongoing.*" Further he alleges that Mr
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Cressey was a "sponsor" of Tim, and should have registered a conflict of interest for that. Noel Curr developed an argument essentially in line with authority, addressing the approach of a "reasonable informed observer" assessing whether the "impartiality of the decision making might have been affected". The essence of Noel Curr's submission, exactly as he put it, is contained under "an analogy" as follows. It is reproduced exactly as Noel Curr put it:

"Bernie Ekelstone sponsors 'Ferrari F1 Team' with his companies products- F1 considers a penalty on Ferrari driver 'M Shoumaker, Eckelstone stands down from F1 board on this issue, the fact that he didn't know Mickel Shoumaker is immaterial, he would be perceived as a Ferrari sponsor and as such would be perceived as biased."

46. Noel Curr submitted that the commercial association between Mr Cressey's business and the Curr Race Team was not limited to the disputed invoice, and there were commercial dealings for engine performance and equipment upgrades.
 47. Mr Corkill QC submitted that the facts when analysed show that there was an issue between Noel Curr and Mr Cressey, not Tim Curr. He submitted that there needed to be some robustness exercised by the Tribunal dealing with an organisation such as MNZ, given the inevitable relationships between people through shared interest in the sport. He said there was no dispute in existence in December 2007. In any event, he submitted that the fact a decision-maker is "involved" with someone in the disciplinary process does not mean that person is disqualified from sitting in a disciplinary context. He said there was no point taken about the allegation of interest or bias or conflict of interest during the original hearing process, and that was fatal to the appellant now. It is true that failure to take such a point may prove fatal to later challenge but given that Tim Curr was unrepresented this point finds little favour with the Tribunal. Indeed, representation was forbidden. We go on to consider the merits and resolution of this ground of appeal.
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48. This leaves Mr Cressey's position as one who had been in a form of dispute, seeking to recover a debt, but who appears to have been satisfied before the disciplinary process. Noel Curr did not see it that way, of course, because of the apparent pursuit of the debt. To this must be added Noel Curr's evidence that there were strong words between him and Mr Cressey. Mr Cressey has had to answer that, and has done so in a teleconference when he gave evidence and said he thought Noel Curr had let him down badly.
 49. Finally, even if a breach of natural justice is established, that is not the end of the issue. If the Tribunal finds there is a deficiency in process, it can rehear *de novo* or send the issue back to MNZ for reconsideration absent the person allegedly disqualified.
 50. The issue devolved to whether the dispute existed at the time of the disciplinary process, and whether, in itself, the existence of a prior dispute which left a sense of dissatisfaction for Mr Cressey and Noel Curr should be held to breach the obligation of impartiality, whether addressed as actual or apparent bias.
 51. Mr Cressey's affidavit indicates that the reference to Baycorp came some time after 25 June 2007, and Baycorp then proceeded with recovery steps, and he removed himself from the disciplinary process because he did not think he should sit in judgement of **Noel Curr** while at the same time involved in a dispute and possible litigation against him over the unpaid debt. In his affidavit of 1 September 2008, he emphasised that he had never met nor associated with Tim Curr, and he had no attitude towards Tim which precluded his being involved, in his view.
 52. By the time of the disciplinary process involving Tim Curr, which clearly involved Noel Curr to a degree, while he had no issues with Tim Curr as such, he certainly would not be seen to be a disinterested observer, as without some attitude to Noel Curr, who was involved in the incident in question.
 53. In **Muir v Commissioner of Inland Revenue** 2007 3NZLR 495, the Court of Appeal examined the circumstances in which the plaintiff asked the trial judge to recuse himself for critical comments made in his
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judgment, and because of an association with an unrelated forestry investment company. The claim was that of bias. The specific contention was that the investment held by the Judge was sufficient to amount to a pecuniary interest requiring automatic disqualification on the grounds of presumptive bias. The Court of Appeal emphasised that a two-stage enquiry was necessary, first to establish the exact circumstances that had a direct bearing on the allegation of bias, and the second as to whether such circumstances might lead a fair minded lay observer reasonably to apprehend that the Judge might not bring an impartial mind to resolution of the case. The apprehension of bias principle requires identification of whatever it is which might lead a judge to decide a case other than on its legal and factual merits and articulation of a logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

54. The Court went on to comment that where a judge has a direct pecuniary interest of anything more than the most minimal character, it is difficult to see how the reasonable observer would not consider that to be "*bias*". But there are arguments to the contrary. The Court noted the High Court of Australia had recently held there was no separate and freestanding rule of automatic disqualification on the basis of a pecuniary interest. The majority of the Court preferred to rely exclusively on the test of "*reasonable apprehension*", and the same test applying to disqualification for an association, as to whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case.
 55. As to the apprehension of bias, the Court of Appeal referred to a recent publication by the Council of Chief Justices of Australia in "*Guide to Judicial Conduct*" 2nd edition, 2007, which provides at page 11 "*The ultimate issue is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case*".
 56. The Court concluded that the factual enquiry into the actual circumstances suggesting apparent bias should be rigorous and the complainant cannot lightly throw the "*bias*" ball in the air.
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57. The second enquiry is to ask whether the fair-minded lay observer would reasonably apprehend the judge might not bring an impartial mind to resolution of the instant case. *"This standard emphasises to the challenged judge that a belief in her own purity will not do; she must consider how others would view her conduct"*.
 58. The fact that there was an adverse association, or a prior ruling by that person, does not necessarily mean that a person in a judicial capacity cannot remain impartial in any such proceedings. As the Court said, *"the reasons for this are straightforward. It is common sense that people generally hate to lose, and their perception of a judge's perceived tendency to rule against him or her is inevitably suspect"*.
 59. It is trite that in the context of disciplinary bodies, it is often very difficult to find a complete disassociation.
 60. The circumstances in which Mr Cressey came to sit on a matter involving Tim Curr, while seemingly separate from issues regarding Noel Curr, remains a residual concern. Mr Cressey was frank with the Tribunal, and approached the matter in a considered way. He took the view that he had concluded the commercial dealings with the Curr Racing Team, and in any event, his dispute was not with Mr Tim Curr. But the involvement of Mr Noel Curr was deeply engrained in the disciplinary process, both as a witness and as an advocate for his son.
 61. Real caution needs to be expressed, and taken, by MNZ and other sports about this degree of involvement of any participating disciplinary panel members. This is not at all a criticism of Mr Cressey, who has clearly acted in a careful way in evaluating his position. It is simply a caution. Dispassionate disciplinary members, seen as such, are critical to a sound and fair process.
 62. However to go further and treat this matter as one of apparent bias such that the decision should be set aside, and referred back to MNZ, would fly in the face of need for resolution of this appeal, and the circumstances in which Tim Curr acknowledged most of the conduct alleged against him. Indeed it is a striking feature of the appeal the extent to which he did so.
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63. The Tribunal has therefore decided not to reach a view as to bias which would compel return of this matter to MNZ or put the decision aside, but to address the question of breach against the detailed submissions made to it by Noel Curr, the evidence of Tim Curr, and the submissions by MNZ.
64. In the letter to the Board of 7 March 2008, Noel Curr had referred to what he alleged to be breaches of natural justice and bias/predetermination due to the Board membership being the same "*thus insuring (sic) the process was fatally flawed*". He went on "*bearing the above facts in mind, we believe it would be wise for the Board to revisit Tim's suspension etc and be extremely mindful of proceeding under such circumstances with particular regard to the costs borne by members*". The Tribunal will not in these circumstances return the matter to MNZ but will address breach and sanction.

Breach of Natural Justice – Opportunity To Be Heard And Be Represented

Representation

65. The allegation was that Tim Curr had no opportunity to represent himself, nor be represented, at the initial disciplinary hearing.
 66. Noel Curr submitted that Rule 7-2-9(d), the Rule against representation, was in effect "*unconstitutional*". Tim Curr did not seek to engage a lawyer but there was no opportunity to instruct one in any event at Christmas/New Year. Given the seriousness of the issues which arose here, and the potential in other cases, the Tribunal has some reservations about this Rule, but as it has decided to reconsider the matter, this point is simply referred to MNZ for consideration as to whether it reflects fairly the right to be heard.
 67. The Rules provide for some disciplinary issues to be dealt with on an urgent basis, where allegations are serious, and immediate action is needed. While it is always a fundamental proposition in law that there should be an opportunity to be heard, in the circumstances of the interim suspension, this issue, while the subject of comment, does not pervade the question of the subsequent disciplinary decisions.
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Ultra Vires - Two hearings – Interim and Final

68. Noel Curr then said that having participated in a decision to impose an interim suspension, there was no jurisdiction to have a second hearing. He added to this an allegation that this was a Board meeting at which the CEO Mr Pavletich was involved. Mr Corkill QC submitted that by Rules 7-3-5 and 7-3-2(b) suspension is allowed before the full hearing, and specifically under Rule 7-2-9 no hearing is required.
69. The Rules contemplate interim, and final, decisions and the law does not preclude such. A decision maker must reflect carefully on events the subject of an Interim Decision, and only if it can be shown that there was no proper consideration of the facts on the merits would the earlier process come under scrutiny. This is not the case here.

Ultra Vires – Board members entitled to participate in a Board decision and how a Decision is reached

70. Noel Curr submitted that the decision made was *ultra vires* (outside of its powers) because under Rule 7-2-4 Board decisions have to be carried by a majority with no casting vote held by the President, and that the Constitution provided that only elected members can vote, not those appointed by the Board itself. Under Rule 7-2-4 Mr Corkill QC submitted the decision is taken by majority and that Noel Curr's submissions were based on a new Constitution, which took effect on 1 January 2008. The Tribunal accepts this submission as correct.
71. Rule 7-2-3 records that the Board will exercise disciplinary powers by a panel of three Board members and in the event Rule 7-2-7 applies, which precludes any person sitting as a member of the Board "*in the determination of any matter in which he or she may be interested*", the Board **elects** the third panel member. A majority vote is taken with no casting vote. The decisions were of four members. There was no majority decision reached, both being unanimous. While technically in breach, the four member panel does not invalidate the Decisions in the view of the Tribunal but if this is wrong the power to rehear is available is exercised.
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E. REVIEW OF THE EVIDENCE

72. The Tribunal has concluded that none of the grounds raised is such as to warrant quashing the Decisions, and that it would be inappropriate to send the issues back to MNZ. Indeed the latter course would fly in the face of the trenchant criticism of MNZ process by the appellant. Quashing the Decisions would not be appropriate given the straightforward issue of breaches. For these reasons set out above, the Tribunal considers it must address the merits of the MNZ Decisions, both as to the findings of breach and sanction.
73. Noel Curr said that after the accident he went onto the track, as the video footage shows, and when Tim Curr mounted his bike and went to start, Noel Curr stood back and said "*away you go Tim*". He said that the Steward then tried to pull Tim Curr off his bike, but he was pushed away. With reference to the video clip, Noel Curr talked through the Steward's actions, in his words that he took Tim Curr "*by the scruff of the neck*". Noel Curr gave evidence he said "*let him go*" and pushed him away, and the Steward said "*you are f...ing out*". He described the circumstances in which the laptop bag was held up on the green flag, and a "*little sign*" on a pit board was held out. Noel Curr's perspective was that the Steward had "*lost the plot completely*".
74. On the incident in the pits he said the father or guardian had complained that Tim Curr had "*nearly run over his child*". Tim apologised and that was an end to it.
75. Tim Curr's evidence was that he heard the Steward say "*you're out, you're out, you're f...ing out*", and the Steward grabbed him and tried to pull him off his bike, and kicked him. He said the Steward was "*not thinking rationally*". He said that when he was pulled back by the Steward, his left leg spun around and hit the Steward. He said he thought he had done nothing wrong, but he knew that the Steward was implying that he was "*out of the race*" or "*out of the meeting*". He said that the Steward "*acted in a way he shouldn't have done*", and described him as "*quite angry*". In these circumstances, where he felt the Steward was "*out of line*", he said his response came in the heat of the moment, and he had to make a
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decision whether, following what he regarded as unwarranted conduct by the Steward, he should stop racing, or carry on. For better or worse, he carried on, and on two laps came past the Steward first holding out the laptop bag, and then holding a board which he says he could not read. However, Tim Curr acknowledged that they understood that the Steward was intending his actions to constitute showing a black flag. He went on to say that "*you have to finish the race to get points*" and he thought it better to carry on and take whatever decision was given after the race.

76. Returning to the pits he said a child of about 5 or 6 years was on a bicycle, which was too big for him, and wobbled one way, whereupon Tim Curr revved on the clutch (his bike having no horn), and then the child wobbled the other way. He said spectator control was more lax than it should have been, and he did not think he was riding at a dangerous speed but he was in a hurry to return to the team vehicle as they were about to travel home. When he revved his bike, he said "*the kid got a real fright*", but he did not fall off. The boy's father was upset. He apologised to him and shook hands. He said that while spectators should not have been there, "*you deal with it*". Mr Corkill QC cross-examined Tim Curr on this issue, that the child was "*quite vulnerable*".
77. Under cross-examination, Noel Curr said that he considered the Steward had acted inappropriately and this was what went wrong. He acknowledged he was not "*neutral*", but only because he was a team manager. He also acknowledged his own conduct has been under the spotlight. Mr Corkill QC put it that the Rules were quite clear that a Steward is in control over a meeting, to which Mr Tim Curr said "*yes when (he is) in control*".
78. Tim Curr said he saw the Steward with the computer bag, and thought "*no-one would give him a black flag*". He said if he thought it was a "*real*" black flag, the Steward would need the "*right tool*". In the circumstances of what he said was being "*grabbed*" and "*kicked*", he said he regarded the laptop on a green flag as warranting his response being "*are you serious?*" As there were other officials there, and no-one else was involved with the Steward in these two communications, this raised a doubt in his mind
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about his correct response to the Steward's conduct. However, Tim Curr acknowledged that he connected what had been said to him as he began to ride away from the pile-up, and the holding out of the bag. He denied emphatically reading the sign, as he was looking inwards, not to the outside of the track, and at the speed he was travelling he gave it no focus.

79. As to riding a dangerous line or "*charging*" at, or close to, the Steward he said the Steward put himself at the apex of a corner, and he did not see him there until he had come about halfway around. He said there was "*no way*" he was going to hit the Steward, and was not trying to hit him. The Steward, by the photograph exhibited to the Tribunal was not "*jumping away*". On the earlier pass, the Steward had the flag out with the laptop on it, and he was thus not so close. After the third lap, the Steward was not visible, and Tim Curr said this confirmed what he thought, that this was not a "*real*" disqualification. There are no grounds to disturb the findings of breach although the Tribunal expressly does not find that the appellant charged **at** the Stewart, rather that he rode close to him.
80. Tim Curr agreed with the proposition that he had made a decision to keep racing and ran a risk by carrying on as to whether the consequences would "*come back to bite him*". He acknowledged that what he told this Tribunal was what he told the Board at the disciplinary hearing. The Tribunal considered he was frank when giving evidence before it, if forthright and initially a little defiant. However, his attitude became more reflective as the hearing developed and he did not try to undo the fundamental findings against him.
81. It follows that the breaches were established and the appeal against the penalties imposed is now addressed.

F. SANCTION

82. Tim Curr has an exemplary record apart from these incidents. The submission was made on his behalf that whatever occurred, it was contributed to by the Steward's behaviour. He said that to be confronted with this sort of conduct when he was so "*pumped with adrenaline*" complicates making "*rational*" decisions.
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83. The Board in its decision did not refer to other cases, and those that first were referred to the Tribunal were limited to captions. As a result, further material was sought. The Tribunal has read these Decisions, and draws on these while recognising that every case turns on its own facts.
84. Tim has been out of competition for 11 months. He has lost sponsorship, and gets nothing by way of discount, products, or support. He has been a professional or semi-professional rider for some years, and this gives him some form of lifestyle, including travel, fuel and bikes, travel allowance and sponsorship. But he has always held down a job. He has missed two seasons of South Island Moto-X Championships, where he had been successful as runner-up in 2006 in the 250cc class and third in the 125cc class. He has always attended regional championships. He has raced 25-30 weekends all over New Zealand for the past 12 years, and thus is much affected by the stigma of the suspension, the effect on sponsorship arrangements, and comes against a background of, in 14 years, claiming 13 National and Island titles, and representing New Zealand in Australia, Austria, Germany, Italy and Latvia, finishing 22nd at the Under-19 Junior World Championships. He missed a complete New Zealand Super-Cross Championships with a full weekend's racing where he was 3rd in the previous year, and has missed the South Island Super-Cross Championship, and the NZ Moto-X Grand Prix.
85. Tim Curr says that this decision has "*tainted him*" and all commercial connections have been lost. While he is still training two other competitors, most of his involvement with the sport has come to an end. Under questioning, he said that racing has been a "*massive part of my life*", that he had learned his lesson, and that the circumstances of this suspension and severance from the sport had changed his whole life. He emphasised the friendships made by him in the sport, and the rupturing of them as a result of his suspension. The Tribunal was struck with his heartfelt description of the effect on him, which has been dramatic.
86. Noel Curr made submissions that there was no case to analogise with this where he says the rider was "*attacked*" by a Steward. The Tribunal does not treat the incident in this way. The setting was complex. It was highly
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charged and there was a clear misapprehension by the steward of Tim Curr's actions, no assault being found. The steward did not "*attack*" Tim Curr on the evidence.

87. Much was made of the steward's conduct. While we reject the submission that Tim Curr was entitled to ignore the steward, there are elements of what occurred which remain unsatisfactory. For example, in the circumstances of a decision taken to disqualify Tim Curr, the lack of the correct black flag is a concern, and this was clearly a heated situation to a degree misunderstood, which negated the element of clear, dispassionate and prompt decision making required.
 88. Ms Simms as operations manager for MNZ filed a further affidavit of 17 September 2008. This affidavit gave a full summary of disciplinary hearings conducted by the Board to the best of her belief, and she attached a bundle of documents, describing disciplinary processes between December 2001 and 7 July 2008. Mr Corkill's submission was that Ms Simms' affidavit of 9 May 2008, together with her further affidavit, was comprehensive as to MNZ treatment of disciplinary breaches.
 89. Noel Curr pressed hard for details of other sanctions. Mr Corkill QC made submissions regarding several sanctions imposed, but his overall submission was that on the totality of the information and the "*seriousness of multiple breaches*" the sanctions imposed here were consistent with the penalties imposed by the Board on other occasions. The most severe was a four-year suspension imposed in October 2005, ranging down to a one month suspension. There were lesser penalties outside of suspension. Mr Corkill QC put it correctly that the issue is whether the penalty was "*excessive or inappropriate*", pursuant to the ground of appeal, in terms of other decisions of the Board and on this Tribunal's assessment. Mr Corkill QC said that in accordance with appellate principle the issue was whether the Board was "*plainly wrong*" in exercising its discretion, and the fact it is a specialist body with intimate knowledge of the sport and issues of concern must count. He put it at paragraph 10 as follows:
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“So, the appropriate test should be whether the penalty imposed was within the range of penalties available to a Board acting fairly and reasonably in the circumstances.”

90. Mr Corkill QC is concerned that a great deal of personal information had been placed before the Tribunal about other cases, and these matters, now historical, should not result in publication of names and identification of other persons. The Tribunal accepts this. It does not need to record names from other cases.
 91. An incident at Paeroa in February 2006 followed contact between two bikes, and one rider ran over to another and kicked his helmet, before riding off. The kick was not described as powerful, but the conclusion that an assault had occurred led to a suspension of seven months, but that came on top of a six month period of interim suspension. In another incident arising from the North King Country Motorcycle Club Moto-Cross meeting on 18 September 2005, the Tribunal found a rider’s actions to be extremely serious, with a four year suspension able to be reduced to two years on conditions as to apology, exemplary behaviour, and with a warning of potential expulsion. The circumstances of breach were that a steward and one other party were subjected to physical and verbal abuse. The incident described did not result in injury, but involved physical and verbal contact, with some threats and aggression. There was a serious incident, but without real danger accompanying it.
 92. Another incident occurred on 6 March 2004 at Palmerston North, where during the New Zealand Championships a rider was on the ground when he was kicked and required medical intervention. An assault was admitted and suspension imposed for six months, together with a fine. A suspended sentence of two years’ licence ban was also imposed.
 93. In another incident, a breach of Rule 6-19 was found, and a licence suspension of three months was imposed.
 94. A further incident involved a form of assault on an official, and resulted in a decision given on 1 July 2003, whereby MNZ fined the competitor who had been indefinitely suspended by the Victoria Motorcycle Club. The issue involving that club was left between it and the competitor.
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95. In a further incident, in Hawkes Bay Motorcycle Club in January 2003, a rider ignored a black flag on one occasion, made verbal threats to MNZ officials and rode aggressively towards that official with the intention of scaring him. The rider's licence was suspended for 15 months. There was aggressive verbal contact, and the rider threatened to strike the steward.
96. All decisions referred to the Tribunal were considered, and the above references are simply part of that consideration. The Tribunal has examined the question of sanction in the context of all other cases referred to.
97. The decision of the MNZ Board of 16 January 2008 recorded that in the submissions received, *"Tim has no remorse whatsoever for his actions"* and believed he was fully justified and entitled to behave as he did. The decision goes further to record that Tim Curr seemed to regard the allegations as *"trifling and the disciplinary process as a waste of everyone's time"*.
98. The Board recorded this stance as follows:
- "The Board rejects Tim's assessment of the situation and regards the allegations as very serious"*.
99. The most serious was the allegation of *"charging the steward"*, given the potential for serious injury or worse, and the Board treated this as *"the primary offence"*. The Board carefully assessed the approach to the appropriate penalty, beginning with the obligation to ensure that events are run safely and the need to protect all persons attending including officials, from harm. The Board treated the seriousness of this offence, together with Tim Curr's *"obvious lack of remorse or comprehension that what he did was wrong"* to warrant the totality of suspension imposed.
100. Ignoring the steward's direction was also regarded as serious, because there were three different occasions when directions were given, and he was held to have deliberately defied the steward. This offence was treated as serious because stewards often have to make decisions based on the facts known to them at the time, and incorrect decisions can result. Even though the steward considered he had been assaulted, and that was not
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the case, competitors have to comply with directions, and the Board put it succinctly in this way:

"The Board cannot condone competitors taking matters into their own hands because this may invariably lead to the Steward losing control of the event, and the event descending into chaos and disorder. Safety may also be compromised. Motorcycle racing is a dangerous sport and MNZ takes its legal duty to manage any associated risk very seriously and will continue to do so."

101. Under Chapter 7 of the Rules, there appears no express power to impose a probationary period of competition, although it is a rational measure and may be seen as within the greater penalty available and thus lawfully imposed. The probationary period imposed does allow for observation of Tim Curr's conduct during limited competition, but depends upon correspondence from a third party which may or may not be forthcoming, for which there may be other and contested reasons. While the Constitution applicable from 1 January 2008 does expressly allow for sanctions of a constructive character, such was not the case under the Constitution applicable prior to that time, and relevant at the time of these breaches, and the Tribunal has reservations whether it was available in this case. That aside, we can see no further benefit or requirement for a probationary period, given the length of the suspension resulting from this appeal, the impact by way of punishment on Tim Curr and thus deterrence to others.
 102. The Tribunal has read every decision referred to it. Instances of threatened and actual assault stand out, as do defying an official. Exposing others to danger is the salient reference point. It concludes that a penalty in the range of 12 months to 2 years is warranted, and is proportional.
 103. Tim Curr is a young man, who clearly is talented in his sport, and a hard worker. However, without doubt, there are two serious elements of the facts with which this Tribunal has had to contend. The first is the decision made by Tim Curr to ride on contrary to the directions of the official. We did not choose to have the Steward before us. We did not consider it
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necessary. The reason is that Tim Curr acknowledged that he understood what he was being told by the Steward, but chose to ignore it because he felt the decision was wrong and intemperate. The Tribunal does not need to make a decision in that regard, but it does note the highly charged setting in which the incident occurred, and the "*heat of the moment*". That does not excuse the rider in deciding to ignore the directions of the Steward. There can be nothing in the point, unless the Steward's actions were so clearly inaccurate that no reasonable competitor should have been obliged to comply with them. This is certainly not in that category.

104. The more serious finding against Tim Curr was that he "*charged*" close to the Steward. Any conduct which was a deliberate riding **at** an official would, of course, constitute not just a breach of the Rules of the sport, but go beyond that. Having reviewed the evidence, the Tribunal concludes that this was riding at speed very close to the Steward not "*aiming*" at the Steward, but it must be recognised that there was danger in it. The Tribunal cannot ignore this.
105. It is difficult without a line of disciplinary decisions addressing the issue to gain a sense of proportionality with other offending. Had injury resulted, the sanction would have been much heavier. Falling short of that, but recognising the "*near miss*" as Tim Curr described it, the Tribunal remains cautious about interfering with the sanction imposed by the sport. Allowing what it believes it should for the way Tim Curr addressed matters at the hearing, it considers that with his youth, a degree of contrition, but more particularly recognition of his error, there is scope for some reduction in sanction given the severe impact on him.
106. Mr Corkill QC, with commendable balance, acknowledged that this Tribunal is allowed a different and more reflective perspective of the conduct in this case.

G. FORMAL DISPOSITION

107. In those circumstances, the Tribunal allows the appeal **as to the sanction imposed only**. It substitutes a suspension of 15 months for the breach of riding dangerously near the steward to expire on 28 February 2009 after allowing for the effect of Interim Suspension, this suspension concurrent
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with the 12 months' suspension imposed for ignoring the steward's instructions, which remains the same. No probationary period is imposed. Tim Curr must recognise that these serious breaches count against any leniency should he reoffend. He is an intelligent young man and should be able to respond by conducting himself well, and competing with all his obvious talents, not distracted by personality issues or unproductive brushes with officials. He must not be drawn into disputes which blunt his competitive opportunities. The other sanction of the \$150 fine for riding carelessly in the pits remains undisturbed.

H. THE EVOLUTION OF THIS APPEAL

108. At several times in this process, Noel Curr complained about the delays associated with the hearing. We consider this must be explained.
 109. This Tribunal is directed to achieve the "*just, speedy and inexpensive determination*" of any proceeding, and it endeavours to meet this important standard.
 110. In this case, the process has been much affected by a number of matters, and the Tribunal briefly addresses these.
 111. First, a change in the composition of the Tribunal was required through unavailability. Aside from that, there was a request from Noel Curr for TV footage from the race, and Mr Pavletich as CEO of MNZ responded on 19 March 2008 that the DVD requested would be made available if the production company still had it in their library. A teleconference on Wednesday 19 March 2008 dealt with this, and it was expected this would facilitate the hearing process. However, this did not eventuate as planned, and Noel Curr requested a teleconference regarding the issue of film footage and other material. Mr Corkill QC then advised that the production company did not have the DVD in the library, and the film footage was in raw form and on four cameras, so it would take some time for the film company to go through the material to see if there was anything relevant. There would be cost involved, and MNZ's position was that Noel Curr would have to meet the costs. At the same time, Mr Corkill QC referred to Mr Noel Curr's correspondence of 29 March 2008, referring to categories of evidence that the appellant sought this Tribunal consider.
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112. Noel Curr's position was that "*to get to the truth over this matter all footage be freely available*", and that is why he sought another teleconference of the Tribunal to address this.
 113. Teleconferences were held on 7 and 21 April to address a number of issues, and these extended to Noel Curr's reference to other incidents where sanctions had been imposed, following which Noel Curr wrote on 16 April 2008 seeking to clarify a "*side-car offence*" at Paeroa in 2000, and then referring to matters involving Junior New Zealand Championships at Patatonga in 2000, and the MNZ Moto-Cross Grand Prix in 2000, when it was suggested a Steward had assaulted a rider.
 114. Mr Corkill QC made comment about these matters.
 115. Noel Curr then set out why the matters raised by him were relevant, and sought further information about another incident.
 116. At this stage, a fixture was contemplated for 26 May 2008, even though there were clearly a number of matters far from resolved, to make ready for a hearing. For example, Legge Works were to send film footage to Noel Curr in the last week of April, and Noel Curr would send an edited version with some raw footage to Mr Corkill QC. There remained a question about other sanctions imposed.
 117. The Registrar wrote to the parties on 2 May 2008, reviewing the process and what was required to get to a hearing. Mr Corkill QC complained on 8 May 2008 that items Noel Curr was to have forwarded to him had not been received, and he considered the fixture could not proceed, as there was prejudice to MNZ by the delays which had occurred.
 118. The Tribunal wrote on 14 May 2008, expressing concerns about the ability to proceed as scheduled, and asking whether Noel Curr agreed that an adjournment should be granted. However, Noel Curr did not respond. Therefore, in the absence of a response from Noel Curr, the Tribunal ordered on 19 May 2008 that the fixture be adjourned.
 119. On 22 May 2008, Noel Curr advised that he was "*close to resolving the video copies with the IT people and will know more tomorrow*". He was also concerned with any suggestion that he was the "*only one being slow*"
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with providing information exchange". He added to this by e-mail of 5 June when expressing concern about the lack of material from MNZ, "certainly no Minutes and Conflict of Interest Register, which have significant bearing on the process and the course I follow from here on in". He sought a teleconference.

120. On Thursday 12 June 2008, Noel Curr confirmed that video material was being sent via courier that day, as it could not be sent electronically. He complained again he had not received all Minutes, and the Register recording members' interests, and also complained that information regarding another disciplinary process was *"incomplete/inaccurate"*.
 121. On 18 June 2008, Noel Curr advised that after receiving a letter from Mr Corkill QC, he still considered material supplied by him was *"extremely relevant should the Tribunal choose to re-hear the case, which in our opinion is unnecessary as the facts of the case being fatally flawed over process is quite clear and the breaches of natural justice are such that there would be no need to go any further as the precedents have been set by NZ law, the NZ Sports Tribunal in previous cases, and also by the MNZ Appeal Committees"*.
 122. In case that was not accepted, he then went through the *"reasons for the video footage"*, dealing with Barret Park television footage, Bathurst V8 Super Car race, helmet cam footage, Barret Park Google Earth satellite photo, and a memorandum from MNZ of 10 April 2008. Noel Curr considered a number of matters he had been seeking were not being made available.
 123. By 18 June 2008, there was a clear argument regarding admissibility of material, and Mr Corkill QC indicated that a Ruling from the Tribunal was sought. He opposed the relevance of some material from Noel Curr, and said that all relevant evidence was before the Tribunal.
 124. By early July 2008, the Tribunal was looking for a date of hearing, and a timetable had been set for submissions to be received by the appellant by 16 July, which was missed because of a misapprehension by Noel Curr that the time directed by the Tribunal was 14 days. Looking ahead, and to address the availability of the Tribunal members, Noel and Tim Curr, and
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Mr Corkill QC, the Tribunal looked to a hearing on Tuesday 9 September 2008. The Tribunal through the Registrar sought a teleconference on Tuesday 29 July to discuss procedural matters and to ensure all steps were completed before the hearing on 9 September.

125. On 29 July 2008 there was debate about admissibility of evidence, and provision of other evidence, and a Minute followed, with a teleconference set for Tuesday 12 August to address these several issues.
 126. On 11 August 2008, the Tribunal through the Deputy Chair anticipated a teleconference on 12 August, and a teleconference was held on that day.
 127. A Minute was issued on 15 August 2008. A number of points were addressed.
 128. There then intervened the tentative argument by MNZ that the Tribunal had no jurisdiction and the appeal was out of time. However, MNZ conceded that this was not the case and this point fell away. This was confirmed on 29 August 2008.
 129. There remained a question of witness statements being provided by Noel Curr, and this was addressed in an e-mail from the Registrar on Friday 29 August 2008, leading up to a hearing on 9 September 2008 in Wellington.
 130. On 8 September 2008 an affidavit from Ms Simm of MNZ was received, and the hearing then took place on 9 September. However, there were still matters outstanding, and on 12 September Noel Curr wrote to say that the information received from MNZ through Ms Simm was inadequate, and he said that the information received at the hearing was not complete, and that what he had discovered "*would tend to support five of the first six articles (sic) in my presentation*" being :
 - a. Pervert the course of justice;
 - b. By an act of malfeasance;
 - c. Duty of care;
 - d. Fiduciary duty;
 - e. Misrepresentation.
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And Noel Curr added "*that facts were suppressed or presented in such a form as to disadvantage us and also there was the assumption of 'apparent bias' towards us*".

131. The correspondence continued with Noel Curr writing on 12 September referring to discussions with his legal advisor and other "*club committee members*" and asking for reference back to this Tribunal, as "*additional information request*".
 132. The written material received from Noel Curr is very extensive, but the point of this reference is to demonstrate the way this hearing process continued. For example, on 16 September 2008 information regarding the alleged bias/predetermination point was received, being a cheque butt, bank statement, and Baycorp report, under cover of e-mail 15 September 2008 from Noel Curr.
 133. Because the evidence of Mr Cressey became important, the Tribunal issued a Minute of 19 September 2008, and in this it said "*it must be understood that the hearing, aside from the further process described above (in the Minute) is not open to constant further material*".
 134. Again there were problems in arranging a hearing time, and a teleconference took place on Tuesday 30 September 2008 when the Tribunal had a Memorandum from Mr Corkill QC and affidavits from Miss Simm and a second affidavit from Mr Cressey.
 135. Then following an e-mail from Noel Curr of 1 October 2008, another disciplinary process was referred to, and the Tribunal received a Memorandum from Mr Corkill QC of 6 October 2008.
 136. Perhaps it was not surprising that Noel Curr then complained about delays, but reference to this sample of the communications will demonstrate that this hearing has been complicated in the extreme. The Tribunal addressed this by Minute of 9 October 2008, following a request for some interim communication that Tim Curr should be the subject of a direction by the Tribunal that he could compete in the National Motor-Cross Championships. The Tribunal said "*as to the decision, the Tribunal has received a stream of communications following the hearing in Wellington,*
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addressing the question of sanction and earlier disciplinary decisions of the sport, together with further information and responses regarding the involvement of Mr Cressey in the disciplinary process. The communications were concluded only last week. The Tribunal has to consider these in the context of the long narrative history of this appeal, and this will occur in the next few days."

137. In such a prolonged, fractured, and complex appeal process, which saw the hearing having to be adjourned, and rulings given about many procedural issues, it is not surprising that delays occurred, however regrettable. The Tribunal does not sit full time, but it makes itself available as early as it can in every instance.

138. The allegations were extremely serious in this case, alleging procedural error on the part of MNZ, and descending into considerable detail. The saving grace in this appeal was the frank recognition by Tim Curr of what he did, although seeking to minimise its effect and seriousness.

I. COSTS

139. Costs are reserved, although the Tribunal has a grave concern about the costs already incurred by MNZ and potentially by Tim and Noel Curr. The Tribunal reflects on the scale of the appeal as mounted, and considers that a more restrained approach may have avoided some of the extreme conflict at the heart of this appeal. The Tribunal will not address the question of costs without further submission.

Dated this 21st day of November 2008



Nicholas Davidson QC
Deputy Chairperson (for the Tribunal)
Lynne Coleman
Carol Quirk
