BEFORE THE SPORTS DISPUTES TRIBUNAL
OF NEW ZEALAND

STD 03/05

BETWEEN	**D P O'CONNOR**
	Applicant
AND	**MOTORSPORT NEW ZEALAND INC**
	Respondent

Tribunal:	Hon Barry Paterson, QC (Chairman), Ron Cheatley and Adrienne Greenwood
Date of Hearing:	Monday, 25 July, 2005

DECISION OF THE TRIBUNAL

Dated the 7th day of September 2005

Representation: Applicant in person
R Armstrong for Respondent

INTRODUCTION

1. At all relevant times, Mr O'Connor held a licence from Motorsport New Zealand ("Motorsport") to compete in events under the jurisdiction of Motorsport. He wished to enter his car in a Taranaki Car Club event held at Taupo on 26 July 2003. Motorsport refused to allow the car to compete.

2. At issue in this hearing is whether Motorsport, through its scrutineer and subsequently technical manager, acted correctly in rejecting the car on grounds of safety.

JURISDICTION

3. The dispute comes before the Tribunal by agreement of the parties in accordance with Rule 6.1(f) of the Tribunal Rules. They have agreed that this is a special case which the Tribunal should hear and determine in accordance with its Rules.

4. In their agreement to which the Tribunal is a party, the parties have agreed that the decision of this Tribunal shall be final and binding on the parties and that neither party may appeal the decision to any Court of law or to any other body. The parties have also agreed to comply with the decision of the Tribunal, and that the decision shall be enforceable by either party in the Courts of New Zealand under the law of contract.

FACTS

5. Motorsport is recognised by the Federation International de l'Automobile (FAI) as the sole international sporting power for the enforcement of the International Sporting Code and the control of motor sport in New Zealand. It has a National Sporting Code ("the Code") to ensure that motor sport competitions in New Zealand are fair and safe.

6. Under the Code, Motorsport prescribes, from time to time, for competing vehicles safety requirements together with procedures and requirements to be adopted and complied with by all organisers, officials and competitors therein as to scrutineering competing vehicles for compliance with all such safety requirements (Rule 58(1) of the Code).

7. Mr O'Connor imported his car which was manufactured by Jedi Racing Cars. The car was assembled in New Zealand. Mr O'Connor's evidence was that officials of

Motorsport viewed this car during assembly. However, it is apparent that this viewing was unofficial and, in the Tribunal's view, nothing turns on these possible viewings during the assembly stage.

8. In preparation for the Taupo race, Mr O'Connor presented the car to the local scrutineer in New Plymouth on 19 July 2003. It was Mr O'Connor's evidence that the scrutineer was not prepared to certify the car for "unspecified reasons". The evidence as to what occurred at the inspection in New Plymouth is incomplete as Motorsport did not call the New Plymouth scrutineer to give evidence. Mr O'Connor's evidence was that he left the car with the scrutineer and went back two days later. At that stage, the scrutineer was not sure whether the car complied and he proposed to refer the matter to Motorsport's technical office in Wellington. Mr O'Connor's evidence was that the scrutineer did not raise the issue of the roll bar but was concerned at other matters, including the seat belts, the reclining seats, a pinched brake hose and the expiry date of the fire extinguisher certificate. There was an allegation that the scrutineer was not certain which schedule of the Code applied to the car. The scrutineer retained the car's log book.

9. It appears that the need to obtain roll bar homologation was raised by Motorsport's technical manager after 21 July 2003. Mr O'Connor was advised that such homologation would be necessary. He accepts that this was a correct decision. His application for roll bar homologation was lodged on 24 July 2003. Motorsport did not grant homologation on the basis of that application and the roll bar homologation subsequently obtained was after Mr O'Connor made modifications to the roll bar.

10. Attached to the application for homologation and part of it, was a report from Designa Works Limited ("Designa") signed by Mr Kevin Fisher. This report was designed to show that the roll bar would withstand the stress minima stipulated in the Code. The conclusion of the report included:

> "Hence it is concluded, that on the basis of these results, the roll bar structure will "withstand" the simultaneously applied loads and not exceed the material yield stress or ultimate tensile stress."

11. The application for roll bar homologation was rejected by a memorandum from Motorsport's technical manager, Mr Leach, on 10 September 2003. There was obviously some communication between Motorsport and Mr O'Connor before that date. On 2 September, Designa in a letter to Mr O'Connor, which obviously was forwarded to Motorsport, noted that if the lifting eye was included in the stress analysis, the lifting eye would not comply with the stress minima contained in the

Code. In the memorandum of 10 September 2003, Mr Leach referred to this further report from Designa and said:

> This further analysis and results shows that the lifting eye itself will not withstand the prescribed loads and will deform. In doing so it will allow the top of the main roller bar to be subject to any remaining loads".

12. The “lifting eye” is a small hoop added to the roll bar to facilitate the towing or salvaging of the car. It is crucial to the dispute which arose between the parties. The reason for this lifting eye is described in a letter from the manufacturer, Jedi Racing Cars, to Mr O’Connor. After explaining that the design of the car left no exposed part of the roll hoop, previously used to manhandle, lift, tow or salvage the car, Jedi Racing Cars remedied the position by putting:

> “a slot into the top of the rear cover and welded a small hoop onto the roll bar”. The small hoop is not an extension of the roll bar, and is purposely made from smaller diameter tubing. It is strong enough not to detach but may deform if subject to extreme impact. It is a simple handling device whose functions are self evidence. The roll hoop itself protects the driver and is designed to meet the appropriate British regulations.”

13. On 17 September 2003, Mr O'Connor's solicitor wrote to Motorsport and amongst other things submitted that the handle or lifting eye was a separate item not prohibited and not affecting the roll bar or its function as a safety device. In essence, his submission was that the lifting eye or hook was an accessory to and not part of the roll bar. The roll bar as defined by the Rules did meet the Rule requirements. The solicitor requested that certification be issued to the car.

14. Motorsport replied by a letter from Mr Leach. It rejected the solicitor's submissions and maintained Motorsport's position that the safety structure did not meet the minimum specification stipulated by the Code.

15. On 9 October 2003, Mr O'Connor wrote to the President and Executive Committee of Motorsport stating that he was unable to obtain roll protection homologation for his car "which wholly complies with our code". Evidently at the suggestion of the Chief Steward, Mr O'Connor was in effect seeking the guidance of the Executive to review the decision of Mr Leach in refusing to grant roll protection homologation. In his letter Mr O'Connor stated:

> "The question to consider is, does the addition of a grab rail contravene the code or compromise the integrity of the roll bar? The purpose of the handle is made clear by the manufacturer. The code allows all manner of secondary functioning itself to be attached to it ie seatbelt mounts, body brackets, roof attachments, head supports, firewalls, etc. The consulting engineer has demonstrated and certified that this handle does not compromise the roll bar

> strength, is not likely to detach, and cannot deflect in a way that may harm the driver."

16. In the letter Mr O'Connor also asked why had it taken Motorsport staff two months to reply to his numerous written requests for a response to his application and suggested that competitors who disagreed with Mr Leach were often subjected to long delays. He suggested that Mr Leach was abusing his authority and intimidating applicants and officials so that they would submit to his will.

17. Mr O'Connor in this appeal not only makes allegations against Mr Leach but also makes allegations against the subsequent handling of his complaint by Motorsport. We deal with the facts surrounding his "appeals" later in this Decision. It is sufficient to say at this stage that the executive committee of Motorsport supported Mr Leach and determined that the additional hoop to facilitate towing of the car must meet the construction criteria of the main roll hoop. It accepted that in an ideal impact scenario, the added towing hoop would deform harmlessly, however its primary concern was that in a less than ideal scenario, the towing hoop could tear from the structure and become a potentially dangerous object that might strike the driver of the car. It noted that its primary concern was the safety of Mr O'Connor in his vehicle.

18. Mr O'Connor did not obtain homologation on the basis of the original lifting eye. He subsequently obtained roll bar homologation by modifying that eye. The modification made to the car was to remove the original eye handle and have a replacement one welded on with additional gussets. The replacement handle was certified by the engineer as meeting the stress requirements equal to that of the original roll bar.

ISSUES

19. In his original appeal document, Mr O'Connor sought a declaration that roll protection homologation should have been granted on his original application and that the Rules were applied in a manner that was discriminatory against him. Among the relief he sought was direct and indirect costs and damages. At the hearing, he noted his frustration at the handling of the matter by Motorsport and his inability to compete for a period of six months. However, as Motorsport was an organisation consisting principally of like competitors and voluntary officials, he was not inclined to seek monetary damages in a civil court. If he succeeds, he sought full recovery of his costs which totalled $6,225. Motorsport seeks costs if Mr O'Connor does not succeed on the appeal.

20. In the circumstances, the issues which we have to consider are:

(a) Was Motorsport entitled to decline roll protection homologation on the original application?

(b) Did Motorsport discriminate against Mr O'Connor?

(c) Should costs be awarded to either party?

THE HOMOLOGATION ISSUE

21. When Mr O'Connor presented his car to the scrutineer on 19 July 2003 he did not believe that roll bar homologation was necessary. One reason for this was that a sister car had passed scrutiny for racing without having roll bar homologation. In fact, it had been approved to race at Taupo by the same local scrutineer who declined to approve Mr O'Connor's car. Mr O'Connor now accepts that roll bar homologation was mandatory. Article 4.4 of Appendix Two of Schedule A of the Code states:

> "(1) Roll Protection homologation by Motorsport NZ is mandatory. All vehicles fitted with roll protection shall have a Motorsport NZ approval certificate contained within the vehicle's log book."

22. The roll bar in this case has a main hoop and a back stay. The main hoop is a continuous piece of tubing. "Roll Protection" is defined in Article 2 of Schedule A of Appendix Two of the Code. It is common ground in this case that the roll bar of the Jedi does not fall within the definitions contained in Article 2. The roll bar is an alternative design (free concept) which is covered by Article 4.4(12) of the same Schedule. That Article provides that a Roll Protection design that varies, in any way, from the specification of the Schedule is classified as "Free Concept". The relevant portion of that Article states:

> "The design must be shown to withstand the following stress minima, in any combination, applied on top of the structure;
>
> 1.5W* lateral;
>
> 5.5W* fore and aft;
>
> 7.5W* vertical. (W* = weight of the car + 150 kg)"

23. Article 4.4(3) of Schedule A of Appendix Two of the Code, in part states:

> "The primary function of Roll Protection is to achieve substantial reduction in body shell deformation and hence reduce the risk of serious injury during competition."

The same Article also states:

> "A secondary benefit from the installation of Roll Protection is improved chassis rigidity.

No other function is given for the Roll Protection.

Article 4.4(3) describes the essential design and construction features which must be incorporated. The only relevant one is:

> "(c) Members of the structure must not unduly impede the entry or exit, or access to, the occupant/s of the vehicle."

24. The duties of a scrutineer are set out in Article 84 of the Code. The relevant provision is that a scrutineer is "entrusted with the checking of competing vehicles for safety and for non-compliance with the various classifications, rules and regulations…".

25. Mr O'Connor's position is simply that the lifting eye or handle is not part of the roll bar and that homologation should not have been rejected because the roll bar itself exceeded the stress minima contained in Article 4.4(12) of the Schedule A of Appendix 2. In other words, the handle or lifting eye was a separate item not prohibited and not affecting the roll bar or its function as a safety device. The roll bar did meet the relevant requirements of the Code, as was obvious from the first certificate of Designa Works.

26. Motorsport on the other hand takes a contrary view. Its view in effect is that the lifting eye is part of the roll bar and as it will not withstand the prescribed loads, and will deform, the stress minima were not met. In its submission to the Tribunal, Motorsport submitted that the scrutineer had no choice but to reject the vehicle. Although the point is not material, it does seem as though the local scrutineer did not reject the vehicle on the grounds of the roll bar. It was Mr Leach who subsequently did this. A factor which appears to have influenced Mr Leach was the high profile legal proceedings after a spectator's death in a Queenstown race. His evidence was that there was a safety issue.

27. The simple issue for the Tribunal to determine is whether the handle or lifting eye was part of the roll bar or not. If it was, then the Motorsport's position was correct. If

the handle was not part of the roll bar, then Mr O'Connor was in our view entitled to roll bar homologation.

28. While we understand the safety argument of Motorsport, we are not persuaded that for the purposes of the Code and in particular roll bar homologation, the lifting eye was part of the roll bar although it was fixed to it. A part fixed to another part may be part of the overall vehicle but is not necessarily part of the part to which it is fixed. An obvious example is that a wheel does not become part of an axle because it is fixed to the axle. The Tribunal is influenced in its view by the functions of Roll Protection as set out in Article 4.4(3) of Schedule A of Appendix Two of the Code. The primary function of a roll bar is to achieve substantial reduction in body shell deformation and thus reduce the risk of serious injury during competition. The Tribunal does not accept that the basic roll bar which complied with the stress minima had its primary function diminished because of the handle. There is not evidence to this effect and we are satisfied that the handle would not in any way interfere with the primary function of reducing body shell deformation. The only other benefit referred to in Article 4.4(3) is the purpose of improving chassis rigidity. Once again, this would in no way be affected by the presence of the lifting eye. In our view, the lifting eye was not part of the roll bar and homologation should have been granted.

29. Although there were no submissions on this point, we have considered whether the scrutineer or Motorsport could have refused to allow the car to compete because of safety concerns. Apart from specific powers relating to particular parts of the car, there is no general overreaching power authorising a scrutineer to reject a car for safety reasons, unless the powers under Article 84 are construed widely. Article 84 of the Code entrusts scrutineers with checking of vehicles for safety. We do not believe that Article 84 gave the necessary power in this case. There are three reasons for this view. First, Appendix Two Schedule A deals with driver safety and driver and vehicle requirements. It is a very comprehensive schedule dealing with vehicle requirements. There are particular sections for brakes, fire extinguisher systems, fuel tanks, roll protection, road wheels, safety harness, seats, steering, suspension and tyres. There is no general provision which would entitle a scrutineer to reject a car for racing on some safety provision not covered by the Schedule. If Motorsport wants its scrutineers to have such a right, it should include a specific provision in Schedule A. Secondly, the evidence before us suggests that the handle would depress and would not become a safety issue. Thirdly, we note that the car was manufactured by Jedi and was designed to meet the appropriate British regulations.

30. It is therefore our view that Motorsport incorrectly denied Mr O'Connor roll bar homologation.

DISCRIMINATION

31. Mr O'Connor bases his discrimination allegations on three matters. First, there is the history and the manner in which Motorsport considered his application for roll bar homologation. Secondly, he says he was discriminated against because other cars were allowed to race with similar configurations. Lastly, he appealed to Motorsport's National Court of Appeal but this Court failed to process or progress his appeal.

32. The history of Mr O'Connor's dealing with Motorsport in respect of roll bar homologation commenced with his application on 24 July. Motorsport communicated its decision on 10 September 2003. On 17 September, Mr O'Connor's solicitor wrote a lengthy letter challenging the decision. This was replied to by Mr Leach in an undated letter, but obviously written prior to 9 October 2003. It was somewhat dismissive of the solicitor's letter and was a far from helpful letter in the circumstances. On 9 October 2003, Mr O'Connor, evidently on the advice of the Chief Steward, wrote directly to the President and Executive Committee of Motorsport asking that it review the position. He received a reply dated 22 December 2003 from the Motorsport manager advising that the Executive concurred with the decision of the technical department.

33. The evidence tendered on the appeal process was somewhat inconclusive. Mr O'Connor lodged an appeal on 4 January 2004. Under cover of a letter some seven months later dated 2 August 2004, the Chairman of Motorsport's National Court of Appeal issued a direction. That direction noted the rejection of the homologation and the fact that Mr O'Connor had now redesigned the roll bar and homologation had been granted. The Chairman expressed concern that the Court would be dealing with an appeal that was largely academic in nature. The direction also noted that Motorsport was of the view that the Court did not have power to hear an appeal as it did not arise out of a penalty or out of participation in a competition. Submissions were called for. Mr O'Connor made submissions. The National Court of Appeal evidently did not make a decision on the point and Mr O'Connor heard nothing further from it. He stated that he understood that the Chairman of that Court had retired in December 2004.

34. Mr O'Connor's other grievance was that some other classes, particularly Formula V and Formula Ford appeared to be able to compete with similar lifting handles. Further, a sister Jedi had been allowed to compete without roll homologation.

35. Although we can understand why Mr O'Connor made the allegations and we are of the view that there were some shortcomings in the manner in which Motorsport handled this matter, we do not find for Mr O'Connor on the discrimination issue. We accept that the initial delay was caused because Motorsport wanted to obtain information from England. The application was considered at a time when there was some unease because of the Queenstown prosecutions which have already been referred to. While there was no explanation for the delay of approximately 2½ months from Mr O'Connor's letter to the Executive and its reply, we do not think that this factor alone is sufficient to suggest discrimination. We are somewhat surprised by the manner in which the Executive handled the situation. If it in actual fact considered the matter under Part X of the Code it was required to hold a hearing and accord natural justice to Mr O'Connor. This obviously did not happen. It appears as though it considered the matter informally, as Mr O'Connor was not given a hearing. This approach may have been taken because Mr O'Connor's letter of 9 October 2003 sought the President's guidance in resolving the impasse. However, in the circumstances it would have been preferable for the Executive to have conducted a hearing in accordance with Part X of the Code.

36. The sister car was allowed to race by the same scrutineer in New Plymouth who was not prepared to certify Mr O'Connor's car. However, on Mr O'Connor's own evidence that scrutineer did not raise roll bar homologation as an issue. It is likely, in our view, that he was unaware of any possible problem with the lifting eye because he had already approved the sister car with a similar lifting eye. It was Mr Leach who raised the lifting eye problem. The evidence suggests that the other classes of cars referred to by Mr O'Connor come under other provisions in the Code. We note however that it does appear that one class may also come within the provisions of Article 4.4 of Appendix Two of Schedule A of the Code. However, we do not infer from the manner in which these cars have been allowed to compete that there was discrimination against Mr O'Connor when he was asked to apply for roll bar homologation.

37. The evidence is incomplete as to why the National Court of Appeal did not proceed with the matter. If it ruled that it had no jurisdiction, Mr O'Connor should have been advised. While arguably Motorsport should not be held responsible for the delays in the National Court of Appeal, we note that it has a responsibility under Article 121(1)

of the Code to "establish and keep established a National Court of Appeal". If Mr O'Connor is correct and it has not done this, it should attend to the matter. However, the fact that it may have not maintained a National Court of Appeal is not in our view evidence of discrimination against Mr O'Connor. This ground of appeal cannot succeed.

COSTS

38. Mr O'Connor having succeeded on the homologation issue would in normal circumstances be entitled to costs. We are of the view that an award should be made in his favour but not for the full amount claimed. A large portion of his costs claim is the fee paid to his solicitor for advising on this matter. It is not normal to obtain full recovery of legal fees in this country. We are of the view however that Mr O'Connor is entitled to be reimbursed for the additional fees he paid to his consulting engineer as well as having reimbursed the travelling expenses of himself and his engineer and the filing fee paid on the appeal.

39. In the circumstances, we are of the view that an award of costs in favour of Mr O'Connor should be for the sum of $2,750. This award takes into account that Mr O'Connor did not succeed on his discrimination claim.

DECISION

40. The decision of the Tribunal is:

(a) Mr O'Connor was entitled to roll bar homologation when he applied for it on 24 July 2003.

(b) Motorsport New Zealand is to pay the sum of $2,750 to Mr O'Connor for costs.

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Hon B J Paterson QC
Chairman of Sports Disputes Tribunal