

**BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND**

ST 16 / 08

BETWEEN **CHRISTOPHER COX**

Appellant

AND **KARTSPORT NEW ZEALAND**

Respondent

DECISION OF TRIBUNAL

Dated 7 August 2009

Tribunal: Nicholas Davidson QC (Deputy Chairperson)
Anna Richards
Tim Castle

Hearing: 11 May 2009
Christchurch

Present: Graham McKenzie and Lance Hickey for
KartSport New Zealand
Christopher Cox, Appellant
Jeremy Cox, Representing Christopher Cox
Lynda Cox, Assisting representation

Registrar: Brent Ellis

DECISION

A Background

The initial protest/complaint

1. This appeal is the culmination of a process which began with a "*complaint*" lodged by an official arising out of the Spirit of Nation Mainland Series KartSport meeting held in August 2008, in Invercargill. While described in KartSport documentation as a "*complaint*", it is a protest under KartSport Rule D4.1.
2. The protest was against Christopher Cox, the driver of Kart 1, and was lodged in the name of Mr Robin Williams as Clerk of the Course. We refer to Christopher as such, to distinguish him from his father Jeremy Cox who represented him. His mother Lynda also assisted this Tribunal.
3. The protest was expressed in this way "*Kart 1 passed Karts 55 and 66 under Yellow Flag Point 4 - Rule E 3.6*".
4. The "*Form of Complaint*" had a space for "*Suggested Resolution*" and Mr Williams wrote "*disqualification*".
5. The Stewards found a breach of the Rules was established and imposed a relegation penalty "*to behind Kart 55*".

The appeal to the KartSport Appeal Board

6. An appeal was lodged under the KartSport Rules (discussed below) and an Appeal Board established under Rule D6.2 of the KartSport New Zealand Judicial Code. The Appeal Board included Mr Lance Hickey as Chair, and was made up of five members.
7. Christopher was represented by Jeremy Cox and KartSport by Malcolm McLeod, a Grade One Race Official, as Chief Steward of the meeting.
8. The Appeal Board recorded that after "*the presentation of evidence*" and in accordance with the KartSport Rules (thus rejecting a

submission to the contrary), a breach of Rule E3.6 was established when Kart 1 passed Karts 55 and 66 "***where it was not possible to establish if the track was visibly clear to the next flag point***".

9. It also found that the subsequent grid draw was drawn up in accordance with Rule D3.2 although it had been argued that the grid draw did not match the penalty of relegation imposed.
10. However the Appeal Board found that the penalty was "*not suitable for the offence*" and that the relegation should be removed from Christopher's logbook and a fine of \$500 substituted under Rule D9.3a. The appeal fee was not refunded; although the appeal was successful in part, as to penalty.
11. An appeal was filed with the Sports Tribunal against the finding of breach and the penalty imposed.

B The scope of this appeal

12. Before we consider the many facets of the Appeal raised on behalf of Christopher, we first identify where this Tribunal sits in the appellate structure within the Rules of KartSport New Zealand.
13. The Appeal to an Appeal Board is "*the final avenue of judgment within KartSport New Zealand empowered to settle any dispute . . .*", pursuant to Rule D6.1. That right of appeal under Rule D6.3 is "*against a sentence or other decision pronounced on them (competitors) as a result of a Steward's Hearing*". The right to appeal also applies to a "*sentence or other decision pronounced on them by KartSport New Zealand*", distinguishing the decision of a Steward's Hearing.
14. The right to appeal to this Tribunal lies under Rule D7.1, which "*constitutes the final court of judgment available to KartSport New Zealand Licence holders*". The right to appeal must be preceded by either a KartSport New Zealand Appeal Board hearing and decision, or a KartSport New Zealand Inquiry and decision.

15. The Tribunal has the power to inquire and direct, but the grounds of appeal under Part C of the Tribunal's Rules are those set out in the Constitution, Rules, and Regulations of (in this case) KartSport, **or otherwise are restricted to one or more of the following grounds:**
- (a) Natural justice was denied;
 - (b) The decision-maker or decision-making body acted outside of its power and/or jurisdiction (*ultra vires*);
 - (c) Substantial new evidence became available after the decision, which is being appealed, was made;
 - (d) In the case of a decision relating to misconduct, the penalty was either excessive or inappropriate.
16. If **jurisdiction** is established, the Tribunal has the discretion to admit new evidence and may rehear the matter under Rule 42 of the Sports Tribunal Rules in force at the applicable time, but otherwise its procedure is governed by the principles of natural justice and a practicable method of resolution having regard to efficiency, time and cost.
17. It is fundamental that this Tribunal not act outside its jurisdictional bounds established by the principles set out above. **It is not a general right of appeal**, although parties can agree that a matter come before this Tribunal, and the Tribunal may accept jurisdiction. KartSport did not take a jurisdictional point but this Tribunal must not become a vehicle for general appeal unless there is reason to accept a particular case, or the Rules of the Sport provide.
18. The Appeal was primarily concerned with the finding of a breach of the Rules by overtaking under a yellow flag. Rule E3.6 provides:
- "YELLOW FLAG:** *When a driver arrives at any place on the track where a yellow flag is presented, reduce speed, hold position and acknowledge where possible to other drivers by raising one hand. Overtaking is forbidden until the incident is*

passed and the track is visibly clear to the next designated flag point. A waved yellow flag – extreme caution.”

19. The Appeal also raised several other points relevant to the administration of KartSport. The Cox family hoped that the Tribunal would provide some guidance to KartSport in the application of its Rules. This extended to a contention that Christopher’s group placement in another race was inconsistent with the penalty imposed. The good faith of the family in challenging the process and result is unquestionable. The Tribunal accepts that there was a high degree of motivation held by the Cox family to ensure a fair and even application of the Rules across KartSport. Where we make any comment, however, it must be distinguished from reasons for our decision.
20. KartSport was vitally concerned to remind this Tribunal that it should not become a substitute for decisions made by officials in the course of competition, sometimes called *“field of play” decisions*, including whether a yellow flag should have been shown, and raised an issue whether the Tribunal could or should consider the Flag Marshal’s qualifications. The Tribunal will not consider whether a yellow flag was correctly shown to competitors unless there are exceptional and, so far unidentified, circumstances which warranted that course, possibly where the person on the Flag is not an official, but even this is expressed with care, as sporting participation is contractual, and acceding to the directions of those who are plainly intended by organisers to officiate is fundamental to orderly participation and competition.
21. The *“Appeal Brief”* recorded that the decisions given at the protest hearing and before the Appeal Board were (as we have paraphrased), against the weight of evidence, subject to numerous inconsistencies, contrary to KartSport Rules and Guidelines, a denial of (natural) justice, and ultra vires. Whether we can examine *“weight of evidence”* depends on the extent to which we can properly explore the evidence.

22. Many issues were raised by or on behalf of the appellant about process before the Stewards Panel and the Appeal Board. Some issues can be addressed as matters of principle, for example the application of the Yellow Flag Rule, and the appropriate sanction for breach **if** that finding is undisturbed. **They are not evidential issues.** The appeal has, at its core, a question of fact which is allied to the correct application of the Rules.
23. The appellant and KartSport both addressed the questions of fact in evidence. Sometimes, if witness availability is not an issue and review of the facts is open to us, this Tribunal will rehear de novo (in full, as if determining the issue afresh). Here we had witness statements from earlier processes and **some** evidence before us in person. But this was not a full rehearing. We could not hear from all relevant witnesses. The appeal came to us many months after the race in question. We have had to do the best we can melding the various sources of evidence available to us, and giving appropriate weight to evidence available, but **not** given in person before us.
24. The "overriding" issue was said to be that the "*actual use of the yellow flag*" was "*not required*" and all decisions subsequently made were "*incorrectly applied*". Whether the yellow flag was correctly shown in the first place is not for this Tribunal.
25. The Rules do not stipulate for a further flagging before racing resumes, so a legitimate inquiry is **when** racing and overtaking may resume, but the Appeal raises a primary issue of whether this was an "**overtaking**" as contemplated by the Rules.
26. The Appeal Brief recorded that KartSport had "**no where proved that Kart 1 could not see to the next flag point, but more importantly ignored the evidence showing that Kart 92 was not under a yellow flag incident and therefore KartSport should not be considering Rule E3.6**".
27. The need to isolate the two "*passings*" is necessary. The findings were that Kart 1 "*passed*" Kart 55 and 66; then it passed Kart 92.

The protest and appeal relates to the passing of Karts 55 and 66. Kart 92's position at the time of that passing is relevant but the protest was not directed to the passing of Kart 92. Then the meaning of the incident being "*passed*" must be considered.

28. **Ancillary matters** raised by the Appeal Brief were that:

- The decisions of the Appeal Board were "*not explained in accordance with KartSport Rules*";
- The reasons for the Appeal Board decision were not made available, so that a sound decision could not be made regarding whether to appeal or not. (This point was overtaken by process in this Tribunal but we make the observation that reasons for decisions by sporting bodies such as KartSport must be expressed sufficiently for those affected to understand their factual and Rule foundation);
- Issues were raised about the "*competency and motives of the Chief Stewart . . .*" and "*the motives of the Flag Marshall who KartSport had deemed to be an official of the event*". We do not become involved in such assessment unless relevant. That is not the case here. We have heard nothing to impugn KartSport's conduct.
- That the "*subsequent action taken was incorrect in terms of the grid draws*". This is truly ancillary and does not affect the primary decision on breach, which we explain further;
- Reference to other decisions of KartSport, where there had been, it was alleged, "*bad sportsmanlike behaviour*" but KartSport had not been willing to take this into account. This is relevant only to penalty.

Outcome sought

29. The "*outcome*" sought was expressed as follows:

- (i) That KartSport "*recognise any official's inconsistencies and lack of knowledge of KartSport Rules*";

- (ii) *"KartSport recognise their own mistakes in the handling of this case";*
- (iii) *"KartSport apologise to Chris Cox and reissue free of charge a new Licence book that does not show incorrect penalties applied".*
- (iv) KartSport refund the \$500 KartSport Appeal fee; the \$500 penalty; and the \$500 fee for the appeal to the Sports Tribunal.

C The factual setting for the appeal

- 30. We explore material on the record, then that put before us.
- 31. The facts were in dispute. A map of the track, identifying the position of Flag Marshals at flag points F4 and F6, was produced to the Tribunal by KartSport.
- 32. The size of the track and speed of the Karts may be gauged by the fact that Karts lap in about 35 seconds. This emphasises how difficult it is to reconstruct factual events, affected by the passage of time, and to assess for example where a Kart was placed on the track at a particular moment, the relative position of other Karts, and the observation available to a Karter as to whether he may resume racing when the yellow flag has been shown.
- 33. The first factual issue is whether after a yellow flag was shown at F4 by Mr Barry Leitch, standing with his son Damon, Christopher **overtook** Karts 55 and 66. The yellow flag was shown when the driver of Kart 92 was seen to lose his racing line at the bend immediately beyond F4.
- 34. There was no dispute that Christopher saw the yellow flag and acknowledged it by raising his arm. He also acknowledged that he went past Karts 55 and 66 when they went wide on the damp track after F4, but says that this was not a deliberate *"overtaking"* manoeuvre.

35. Christopher maintained that he was no longer under the control of the yellow flag because the incident which involved Kart 92 was effectively "over", **and** it does not take a further direction from the officials before the driver is free from yellow flag control, but requires a judgment of the driver, which in this case he says was correctly made under the Rules.
36. To gain a fuller factual understanding we traverse the history of the disciplinary process and along the way comment on the procedure adopted.

The initiation of the protest

37. This issue involves the legitimacy of the disciplinary process. The Clerk of the Course Mr Williams spoke to Mr and Mrs Cox, and advised that while he had not seen the incident involving Christopher, others had spoken with him, and based on that he had prepared a formal complaint (protest).
38. We think it important to note that the Cox family said that Mr Williams was a Grade 2 official taking on the role of Clerk of the Course for the first time, and while of limited experience in "*making out*" complaints he "*performs his stewarding role to the highest standard*" and is fully respected in the "*Karting fraternity*".
39. The point taken on appeal was that KartSport Rule D4.1 means that only a **competitor** can make a formal protest, not an official. The Clerk of the Course here proceeded on the strength of representation from some other competitors and the flag marshal. We discuss this further under "*Decision*".

The Protest Hearing

40. A Report made by Mr Cox following the protest hearing recorded that Mr McLeod as Chief Steward told the hearing that while he had not seen the incident he had spoken with Christopher, his father, Barry and Damon Leitch, and another. The Steward, Mr Jennings, did not see the incident.

41. Mr Williams made a note recording that as Clerk of the Course he observed three karts in heat 1 of the Junior Yamaha field *"from the end of the intrusion fence near flag point 5"*. John Jennings was in the Officials Stand at Macaulay Ford Corner. Kart 92 was stopped on the edge of the track endeavouring to restart. The yellow flag was out.
42. Mr Williams said *"I believed I saw Kart 1 passing a kart prior to them passing the intrusion fence at Macaulay Ford corner. I radioed John Jennings to ask if he had observed a yellow flag incident. He replied that he had his back to it as he was observing Kart 92 which was attempting a restart"*. Barry and Damon Leitch told him they had seen Kart 1 pass Karts 55 and 66 under a yellow flag and he asked them if they would be witnesses. He says he was approached by Aaron Murch to the same effect. He said he passed his Clerk of the Course duties to Neil Anderson and went to the Tech Shed to write a notice of complaint and was then approached by Alastair Marshall, the father of Kart 66's driver about Kart 66 being passed under a yellow flag. Both Aaron Murch and Alastair Marshall said that they would be witnesses. Mr Williams spoke to Christopher and *"his parent"*.
43. Mr Jennings of the Stewards Panel made a written statement that Kart 92 had left the track and was on the outside of the sweeping corner leading to the pit straight. *"The restarting of the Kart was at the start of the pit straight"*. While there was some issue as to whether Kart 55 was ahead of Kart 66, Kart 1 was third in the group. Mr Jennings' reasoning was that the view of the driver at F4 at the acute left hand corner was obscured by a safety fence and the Stewards Stand and only well into the sweeping corner would the driver see *"the attempted restarting"* of Kart 92. Mr Jennings was by this reasoning in no doubt that the passing manoeuvre took place before the point where Kart 92 was being restarted, and thus that the track was not visibly clear to the next flag point, so that Christopher could not make the necessary observation of the track being *"clear"*.

44. The Chief Steward's Report shows that there was a complaint of unfair process with an assertion that the Panel had mixed up KartSport and Motorsport NZ Rules, and had not "*listened to*" evidence for Christopher.
45. As recorded, Christopher told the hearing that he was following Karts 55 and 66, the latter attempting to overtake the former "*on the outside*". Christopher said that he saw the yellow flag and raised his hand but neither of the drivers of Karts 55 or 66 responded in this way. Those two karts entered the next corner where 55 slid on the damp track and both cars drifted to the outside. Christopher said that "***in avoiding a potential accident between them***" he stayed on his race line (inside) and "***came out in front of both karts***", then looked for the incident giving rise to the yellow flag, but no karts were visible to him other than Kart 92, on the straight, said to be driving at speed and whose driver signalled that he be passed, which Karts 1, 55 and 66 did, put by Christopher as "*opposite the pit chute*".
46. Christopher's explanation was that if there was an "*incident*" (still identifiable as such) observable to him, he would have let Karts 55 and 66 back in front but as he neither sought to overtake those karts, nor was there an observable incident which would require him to take his place behind them, he continued racing. He was asked to clarify his explanation and did so using a track map, which was admitted into evidence before this Tribunal.
47. Steven Thompson as the driver of Kart 55, said in a written statement, produced to the Tribunal, that he slid out with Kart 66 outside him, and that Kart 1 went inside. He said that there was no incident that required a yellow flag as he understood it.
48. According to the appellant's version of the protest hearing, Alistair Marshall gave evidence that he thought Kart 66 was in front of Kart 55, having passed under the yellow flag and that Kart 1 passed both Karts 55 and 66 further into the corner. His view was from the pits and he said that Kart 92 was just getting back on to the track after fishtailing, back on the "*corner*".

49. Called in support of the Protest, Vaughan Marshall as the driver of Kart 66 said Kart 55 slid out having passed him under a yellow flag, and Kart 1 thus was able to pass both karts under the yellow flag. He said the driver of Kart 92 was just push starting his kart on the exit of the corner at the time.
50. Barry Leitch said Kart 66 was in front approaching F4. Kart 55 overtook Kart 66 under a yellow flag and Kart 1 then overtook them both. He said Kart 92 was push starting at the exit of the corner at the time. An issue arose as to which corner was being described. The map shows a small bend between F4 and the next corner, and Mr Leitch said in evidence before the Tribunal that he was describing an overtaking by Kart 55 at **that** bend.
51. Damon Leitch described the facts in much the same way. Like Barry Leitch he thought that Kart 66 was on the inside and Kart 55 on the outside.
52. Dean Sutherland as the driver of Kart 92 came to the hearing at Christopher's request. He said he had gone too fast into the corner after F4 and came off the track, got his kart back on the track, push started at the exit to the corner, and when under his own power saw the leaders approaching and signalled for them to pass on the inside. Under questioning he said he was going at speed when the leaders passed him.
53. The Chief Steward said that Christopher could not pass "*until the next flag point was reached*". Mr Cox said that while this may be applicable in Motorsport it was different in KartSport. There was some discussion, the other stewards agreeing with Mr Cox, but the Chief Steward said this issue did not affect the Panel's decision.
54. The Panel found that there had been an unlawful overtaking but rather than disqualification, relegation would be imposed. It was thus implicit that the yellow flag was still applicable, that there was an overtaking, and that the track was not visibly clear to the next flag point either because Kart 92 was positioned before the next flag point or the track could not be observed as clear given the fact of

the bend and the intrusion fence. There seems little reference to that part of the Rule which refers to an incident having been "*passed*", nor whether this was by the Rules a deliberate overtaking.

The Appeal before the Appeal Board

55. The notice of appeal raised several points, all of which we have carefully considered.
56. The **process** before the Appeal Board would not usually come under scrutiny by this Tribunal, unless there is an unfairness alleged or the Appeal Board in some other significant regard had erred. The appeal before this Tribunal placed emphasis on the process and it is necessary to identify what occurred.

Mr Cox's version of events before the Appeal Board

57. Mr Jeremy Cox said that he made an opening statement which centred on the issues identified above, followed by Mr McLeod making an opening statement for KartSport. The evidence put before the Appeal Board included witness statements and protest hearing notes. Christopher gave evidence. Mr Cox gave evidence from the "*My Laps*" timing system with track measurements to prove the position of Kart 92 on the track. Mr McLeod gave evidence, and called Mr Williams to do so.
58. With regard to the "*witness statements*" Mr Cox made the following submissions. Mr Anderson's statement was submitted irrelevant, and Mr Cox said that it should not have been used because it suggested that Mr Cox "*misconducted himself*" at the protest hearing. Mr Jennings' statement was criticized on the grounds that it contained errors and that it was "*a statement of his own thoughts*". The statements from Alistair and Vaughan Marshall were not admitted following objection. The Chief Steward's report was said to have a number of errors in it. Mr Williams told the Appeal Board he did not see the incident, and could not assist either at the original hearing or on appeal. Mr Cox asked that Mr Anderson be called to confirm some points he made, but that was not upheld.

Mr Cox says the position of Kart 92 was proven by the appellant with three witnesses and extensive My Laps information, but this did not come out in the decision.

59. Mr Cox submitted that there was "*no need to have the yellow flag showing*", but the employment of the yellow flag is not reviewable by us, rather the consequences of that.
60. Mr Cox divided the issues on appeal into three parts.
61. The "*first part*" was that no KartSport official witnessed the incident and under Rule D4.1 the protest was therefore invalid. We address this further below.
62. The "*second part*" of the case on appeal was that the decision of the Stewards panel was against the weight of evidence and that some of the KartSport witnesses "*stood to gain from a favourable outcome to the complaint*". This latter point is, in context, a caution to those in the disciplinary process to carefully assess the facts. Inevitably in a sport such as KartSport there are close relationships. Witnesses must be assessed if there is an allegation of bias, but this must be based on a foundation, not just that a "*fellow competitor*" or family is involved.
63. There was a criticism of the "*basic lack of knowledge of the Rule that the formal complaint listed*", but this of itself means little unless it translates into the finding.
64. Jeremy Cox resisted the proposition that when Kart 1 passed Karts 66 and 55 this occurred at a point "*where it was not possible to establish if the track was visibly clear to the next flag point*". The submission for Christopher was that there was "*no incident*", and if the flag was still held out it was for "*longer than necessary*". It was not contested that there was "***an overtaking under a yellow flag in these quite exceptional circumstances***" but whether it was **unlawful overtaking** was very much in issue.
65. Because Kart 92 was said to have been proven to be under its own motive power and "*a considerable way along the straight*" the

appellant argued the yellow flag did not apply, at this point. Mr Jeremy Cox said there was no dispute with the position of Kart 92 asserted by Christopher and the evidence given.

66. It was submitted that although KartSport was said to have clarified where Kart 1 was placed when the "overtaking" took place there was no contest allegedly raised by KartSport when Chris asserted he could see ahead to the next flag point. The decision to the contrary was said not to be based on evidence.
67. There was an associated argument that a protest against Kart 55 was not upheld, in the same circumstances, so there was an inherent inconsistency in the outcomes. Kart 55, it was said, was in much the same position as Kart 1.
68. The witnesses were set against one another on each side. Jeremy Cox said KartSport essentially relied on the evidence of the driver of Kart 66 and his guardian, and the Flag Marshals' evidence (Messrs Leitch) "*was flawed and should have been discounted*". For Christopher, the Kart drivers of Karts 55, Kart 92 as well as Christopher, provided evidence. It was said that the Protest Panel should have found in favour of Kart 1.
69. The "*third part*" of the argument before the Appeal Board was that the move from disqualification to relegation was not reflected in the subsequent grid draws and this constituted an "*admission*" that the Appeal was won.
70. The advice of the Appeal Board decision of 25 November 2008 recorded:

"At the conclusion of the presentation of evidence, the board excused both parties in order to deliberate and came to the following conclusions.

1. *That the form of complaint was raised in accordance with the KartSport New Zealand Manual refer rules D4.1, D2.16 & D2.1.*

2. *That a breach of E3.6 had taken place in that when Kart # 1 passed Karts 66 and 55 at a point where it was not possible to establish if the track was visibly clear to the next flag point.*
3. *That the subsequent grid draws were drawn up in accordance with the KartSport New Zealand Manual refer rule D3.2.*

The Board found the penalty applied by the Stewards Panel not suitable for the offence and subsequently instructed the National Steward (Laurie Lester) to remove the penalty from Christopher Cox's log book and apply a fine of \$500.00 for the offence as per KartSport New Zealand's Manual refer Table of Penalties D9.3a."

The appeal before this Tribunal

71. We have set out the basis for the appeal and its evolution. KartSport filed a statement of defence to the appeal centred on the following (again paraphrased):
 - The Flag Marshal determined there was an incident and displayed a yellow flag and only "*in exceptional circumstances*" should this Tribunal "*second guess*" such a decision.
 - The fact that a competitor does not believe the yellow flag should have been shown is irrelevant. **The Tribunal has accepted this proposition.** It does not, however, dispose of the issues whether there was an overtaking, and whether it was permitted under the Rules.
72. KartSport says that the yellow flag was displayed, and that the appellant did overtake. It referred to the Appeal Board's finding that at the time of overtaking the appellant was not in a position to have a clear view of the track being visibly clear to the next designated flag point. KartSport sought to produce photographic evidence to show that the appellant when passing under the yellow flag did not have clear vision to the next flag point.

Minute of 24 April 2009

73. The Tribunal issued a Minute dated 24 April 2009, having identified what it understood to be the six key issues arising from a teleconference on 7 April. The Tribunal anticipated it would hear from witnesses where the parties chose to call them, either in person or by telephone link. The difficulty with witnesses not present, and referring to visual aids, was emphasised by the Tribunal.
74. Mr Cox wrongly thought (and said) that the hearing contemplated by the Tribunal Minute did not cover many aspects of the case which the Cox family wanted considered. After what the Tribunal said it thought was some misunderstanding of its intended process, Mr Cox by email of 5 May 2009, said that without having taken legal advice, the explanation by the Tribunal of intended process had helped him in his understanding of the Tribunal's intentions.
75. The Tribunal then received a "*Response to KartSport letter 28 April 2009*", recording that the "*central issue*" was not whether the Flag Marshal was correct to display the yellow flag but whether it was "***withdrawn***" in a timely manner, and repeated other concerns canvassed above.
76. Leading up to the hearing we were advised that Steven Thompson could not attend either in person or by teleconference so a second written statement was sent to us. All this was against a background of a direction from the Tribunal of 7 April 2009 that if any reply evidence was required, responding to statements exchanged on 28 April 2009, that was to be lodged with the Tribunal and exchanged by 6 May 2009.

D Hearing before the Tribunal

77. KartSport New Zealand was represented by Mr Graham McKenzie, National President and KartSport NZ Appeal Board Chairman Lance Hickey, with witnesses Barry and Damon Leitch of Invercargill.

78. Jeremy, Lynda and Christopher Cox attended, with statements from Dean Sutherland, and Steven Thompson. The Tribunal advised that it would accept a witness statement from Steven Thompson but the weight to be given it would be a matter for assessment by the Tribunal. There was no practical way to conduct a complete rehearing for availability and cost considerations, even if a rehearing in full was otherwise warranted.
79. The appellant did not have legal representation, although the availability of pro bono lawyers was advised to him through the Registrar. Jeremy Cox made effective written and oral submissions, assisted by Christopher's mother Lynda. The material provided to this Tribunal included a volume of written material associated with the earlier processes, and further material prepared for this Tribunal.
80. Although Christopher is a young man, still at school, he gave clear evidence and demonstrated a grasp of the Rules and issues before this Tribunal.
81. Documents from the earlier processes were discussed. Mr Jeremy Cox emphasised that the issues went beyond Christopher (which this Tribunal accepts), and that the appeal was motivated by the respect held by the Cox family for the sport and its officials, but that there were issues of consequence arising for KartSport. Mr Cox referred to a "*root cause analysis*", being required, and while Christopher sought a "*clear licence book*" the family wanted the sport to learn from this process.
82. Christopher gave evidence that he "*took avoiding action*" and "*simply found himself in front*". He then passed Kart 92 as he could see that there was no impediment to his racing. He said that he "*was not overtaking*", he was "*past the incident*", and he "*had a clear field of vision*". Mr Cox said that neither at the protest nor the appeal hearing was Christopher questioned about visibility to the next flag point, under the Rules. His contention is that the driver has the right to make a judgment call about the continued application of the yellow flag, and the driver must be shown **not** to

have had such vision. This puts the onus on those who allege that there was a breach to show the track was not visibly clear.

83. This should not involve too complex an approach, but it may involve a good deal of evidence. The breach alleged must be proven. This will involve showing the track was not clear **and** the incident was not "*passed*". The evidence must be considered as a whole, including that of the Karter to see if the breach is in the end proven.
84. Mr McKenzie made the submission that the evidence was that Christopher did pass under a yellow flag referring to Karts 55 and 66. He produced track photos taken in December 2008.
85. Barry Leitch gave evidence for KartSport that he has been involved in motorsport over many years. This was an F permit meeting for which he had been a Flag Marshal on many occasions. He said that Kart 66 was in front of Kart 55 at his flag point, **and acknowledged the yellow flag and slowed down**. Kart 55 went through and then Kart 1 passed Kart 55. He said that Kart 1 passed at the apex, when Kart 55 slipped to the outside of the track. **He says at the point of the overtaking by Kart 1 Kart 92 was just back** in his Kart although he was not precise about how far into the straight he was positioned.
86. Damon Leitch, a young karter with some 10 years experience, says he has been a Flag Marshal on many occasions and stood with his father at F4. He confirmed what his father described, but he did not see Kart 1 pass Kart 66.
87. Mr Hickey as President of KartSport NZ was on the Appeal panel. He referred to the diagram presented to Christopher through Mr Cox before the Appeal Panel. The drawing placed the Karts where Christopher said the "*passing*" took place.
88. Mr McKenzie submitted the evidence should be construed on the basis that Kart 1 passed Kart 66 before the Karts reached the corner and at the corner Kart 1 passed Kart 55.

E Decision on whether protest lawful

89. The relevant Rules of KartSport include a description of Grades 1, 2, and 3 Race Officials, and Technical Officers who are also "*Machine Examiners*". All race officials are "*Stewards*", "*Clerks of the Course*" and "*Machine Examiners*". Section D has a list of "*Event Officials*" who include "*Stewards of the Event*", "*Clerk of the Course*", "*Technical Stewards*", "*Flag Marshalls*" and others.
90. The Rules distinguish between "*Permitted events*" where there should be at least three Stewards and a Clerk of the Course, and unpermitted events when there should be the minimum number of Stewards required in the venue Safety Plan and a Clerk of the Course. By Rule D2.2 the Stewards officiate as a panel under the authority of the Chief Steward as Chairman. The Clerk of the Course "*shall remain in close contact with the Chief Steward throughout the event in order to ensure the smooth running of the event*". For Permitted events, under Rule D2.3 Stewards, Clerks of the Course, Technical Officers and the Machine Examiners shall be drawn from the KartSport NZ List of Officials but the other Officials should be nominated by the organisers subject to the approval of KartSport NZ through the event permit.
91. For unpermitted events (Club Days) at least one of the Stewards of the event and the required number according to the Safety Plan and Clerk of the Course shall be from the KartSport NZ List of Race Officials. The Chairman of the Stewards Panel must be a KartSport NZ Steward and the other members of the event if not KartSport NZ Stewards will be Assistant Stewards for the duration by the Chief Steward.
92. The qualifications for a permitted event include all those persons on KartSport NZ List of Officials but subject to the approval of KartSport NZ – Rule D2.4. For unpermitted events up to two of the Stewards may be Assistant Stewards.
93. Under Rule D2.7 the duties of the Stewards of the Event are set out and the authority of the Stewards is at Rule D2.8. They have

"supreme authority for the enforcement of the Rules . . .".

They are also members of the Panel of Stewards and members of the Protest Hearing Panel and shall collectively decide what penalties to enforce in the event of a breach of the Rules. The Clerk of the Course under Rule D2.9 may be the Secretary of the event and have assistants. The Clerk of the Course is to advise the Stewards of the event any improper conduct of, breach of, Rule by or protest on the part of a competitor. The Clerk will receive protests and transmit them to the Stewards.

94. The Flag Marshals under Rule D2.16 are under the orders of the Clerk of the Course when an event begins.

95. The right to protest is contained under Rule D4.1:

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

96. Rule D4.2 provides that every protest should be in writing and accompanied by a fee, the amount of which should be set annually by KartSport NZ. This fee may only be returned if the protest is upheld.

97. Although Mr Cox properly identified the words *"lies only with a competitor"* we conclude that there is an overriding authority so that protests **may be** initiated by officials although the primary focus is on protests by competitors. **The issue involves safety** and there is clear warrant for officials to take the formal protest action.

F Decision on breach

98. Our conclusions on the evidence are:

- (i) The yellow flag was shown when Kart 92 left the track;
- (ii) Christopher observed and acknowledged the yellow flag;
- (iii) He "overtook" in the sense he passed Karts 55 and 66.

- (iv) Whether this was deliberate, or a failure to slow down, or an "overtaking" as the result of the other Karts drifting wide is a question of fact. The drivers of Karts 55 and 66 assist in this regard to the extent of their evidence that they went wide.
 - (v) Christopher's evidence that he did not overtake (in breach) is to be assessed against any other evidence on this point. He responded to the yellow flag and we do not find this principal element of his defence disposed of. We have his evidence as to why he passed Karts 55 and 66. A Tribunal must not deal in fine balance when considering a disciplinary charge and we conclude that this was not an "overtaking" within the Rules. He had no obligation to let those Karts back in front under the Rules.
99. In our view, it was for KartSport to establish that there had been a breach and in order to do so they had to establish all elements of the breach. One of these elements was that there had been an "overtaking" within the meaning of the rules and KartSport did not establish that before the Tribunal. It appears to us that KartSport did not properly address or consider this aspect at the KartSport appeal hearing. The failure of KartSport to address that issue is itself a breach of natural justice. While the Tribunal has the power to remedy procedural breaches in earlier hearings into the same matter, here KartSport was unable to establish before the Tribunal one of the required elements, namely that there had been an "overtaking".
100. The appeal is thus upheld on the primary ground. Christopher acknowledged the yellow flag and there has to be some finding that having done so, he ignored it. This was not adequately determined in the KartSport processes. We do not consider protest against Kart 55 can influence our decision. It would require a fuller inquiry than available to us.
101. Whether the incident was "passed" and the track was **otherwise** "clear", and visibly so, does not strictly require a decision. The Rule cannot mean **no** Karts are on the track to the next flag point as that

would mean the Rule had no effect before the next flag point. The word "*passed*" strictly means "*passed by*" but must logically also mean when an incident is "*over*"; the reason for caution gone. Both legs must thus be in place, the incident "*passed*" or "*over*", and a visibly clear track. We would not disturb the KartSport decision on these issues. Kart 92 was just getting underway on the evidence, **when Kart 1 passed Karts 55 and 66**. The incident was not "*over*", on our analysis.

Grid positions - comment

102. Mr Cox lodged a document headed "*Outcome of appeals from 2007 National Spring Championships*". He referred to "*Appeal Number Three*" being "*senior rotax heavy*", in respect of a protest by a fellow competitor for "*weaving and blocking*". The decision, upheld on appeal, was that Kart 11 was excluded from the results of the Finals. Mr Cox said that under the CIK format a competitor who is disqualified has the opportunity to choose the pre-penalty grid position or the post-penalty grid position, but Christopher was not given the option of grid positions nor did the Cox family know the Rule existed. Although there had been reference at the Appeal Board Hearing to a "*choice*" and was first put on Grid 2 being post-penalty, but then put on pole which is the pre-penalty grid position. The Cox family said it was inconsistent if he lost his appeal that he should not have lost his rights in the final. This does not prove the Decision was flawed. We understand the point, responsibly made. This is for KartSport to address.

Formal Disposition

103. The finding of breach is quashed.
104. Christopher's Log book is to be cleared, or a new book issued.
105. The fine/penalty of \$500 is overturned. That sum is to be returned to Christopher by KartSport.
106. Christopher sought that KartSport repay to him the KartSport appeal filing fee of \$500 and the Tribunal appeal filing fee of \$500.

Our decision is that KartSport shall refund to Christopher one half of the KartSport appeal fee, namely \$250, because the appeal succeeded on one ground only. We also direct that KartSport refund to Christopher one half of the Tribunal appeal filing fee, namely \$250. That is a total of \$500 to be refunded in relation to the filing fees.

Costs

107. Having regard to the way in which we have disposed of this appeal, we make no order to costs.

Comment

108. KartSport has acted with propriety in a complex setting. The Cox family has acted with restraint in this Appeal. The Rules could well be clarified by commentary to address the issue of "*overtaking*" and when the yellow flag continues to restrain racing. For some drivers, having passed the incident, racing resumes. For others, not at that point, the prohibition still applies.

Dated this 7th day of August 2009



Nicholas Davidson QC
Deputy Chairperson (for the Tribunal)
Tim Castle
Anna Richards