

32nd America's Cup

Jury

Decision number ACJ001

4th June 2004

Applicants: **Question 1:** K Challenge
 Question 2: Mascalzone Latino

Jury Members: *Chairman* Bryan Willis

 Members Professor Gabrielle Kaufmann-Kohler
 Graham A McKenzie
 Henry L Menin
 David Tillett

IN THE MATTER of the Protocol Governing the 32nd America's Cup

AND

IN THE MATTER of Questions submitted concerning an interpretation of the Protocol provisions relating to Designers.

A. The Applications – Jury Notice 001

- [1] Questions were received from three separate Applicants regarding Protocol clause 13.5.
- [2] All three Applicants at the time of application requested that their identity be kept confidential.
- [3] The Jury initially ruled that in the particular circumstances concerning the request for confidentiality that it would exercise its discretion and grant anonymity prior to referring the Applicants' questions to Alinghi, Oracle BMW Racing, ACM, the Regatta Director and the Chief Measurer which questions were accordingly referred to them on 13 February 2004, under Jury Notice 001.
- [4] When the Jury granted confidentiality at the time the Questions were first submitted, the Jury Rules of Procedure had not been put in place in terms of Article 21.7 of the Protocol. Such Rules of Procedure are now in place.
- [5] In terms of Article 7.1 of the Rules of Procedure as now adopted, none of the Applicants would now be entitled to confidentiality. In the interim, one of the Applicants, Mascalzone Latino also publicly identified themselves. K Challenge who submitted Question 1 and Mascalzone Latino who submitted Question 2 have since withdrawn their request for confidentiality.
- [6] The Question 3 application has been withdrawn and is accordingly at an end.

B. Request for comments on the Rules of Procedure – Jury Notice 002

- [1] On 17 February 2004, by way of Jury Notice 002, the Jury invited comments from Alinghi, Oracle BMW Racing, ACM, the Regatta Director and the Chief Measurer with reference to the Rules of Procedure that were being drafted including the issues of confidentiality of Applicants and answering hypothetical questions.
- [2] Submissions were made by Alinghi, Oracle BMW Racing and ACM. These submissions were considered by the Jury in reaching this decision (see sections E and F below).
- [3] Having considered these submissions, the Jury issued the Rules of Procedure in accordance with the Protocol.

C. Single Jury Decision

- [1] In circumstances where both of the Applicants were requesting an interpretation of Article 13.5 of the Protocol requiring each Competitor to engage separate and independent Designers, the Jury concluded that it was in all parties interests that the two questions be dealt with by this single decision.
- [2] The two Applicants' questions also raised issues concerning the Jury's jurisdiction, the appropriateness of the Jury giving answers to hypothetical questions and confidentiality.

D. The Applicants' Questions

The two questions asked were:

Question 1 submitted by K Challenge

Regarding Protocol 13.5

'What defines a designer in this particular cup cycle?

If an individual who is capable of design work and is hired and identified as a designer within a team but does not do any actual design work are they considered a designer in regards to 13.5? If this same person in the above situation leaves the potential challenger without performing any design work are they restricted from working for another Challenger in any capacity? If this same person in the above situation leaves the potential Challenger without doing any design work and subsequently works for and does design work for a potential or official Challenger is the original potential Challenger restricted from becoming an official Challenger in any way?'

Question 2 submitted by Mascalzone Latino

Regarding Protocol 13.5

'If a person were to complete the following duties for an America's Cup Challenger, would they be considered a designer per protocol 1.1(l).

- (1) Preparing schedules and budgets for the campaign
- (2) Visiting technical facilities to determine suitability
- (3) Interviewing prospective design team members

- (4) Assisting where practical in obtaining sponsorships
- (5) Having designer's name and experience used in promotion of the prospective Challenger

Identifying technical resources required, computing, software etc. Including supplying a generic, non-ACC shape to technicians for the purpose of evaluating software performance or facility suitability. The geometry that was used was not an actual ACC hull, but something close for the purposes of testing the software. No results from these runs have been evaluated or validated by the designer.'

E. Comments Requested in Jury Notice 002

Comments were requested by the Jury in respect of the following:

- [1] To what extent, if any, should the Jury accept submissions from parties that are not Competitors?
- [2] To what extent, if any, should the Jury give answers to hypothetical questions that are not based on actual specific facts?
- [3] To what extent, if any, should the Jury offer the facility of allowing the names of authors of Questions to remain confidential?

F. Submissions in Response

- [1] The Jury received submissions in response from Société Nautique de Genève represented by Team Alinghi SA known as Alinghi ('Alinghi'), Golden Gate Yacht Club represented by Oracle BMW Racing ('OBR') and America's Cup Management Limited ('ACM').
- [2] Alinghi submitted that the Jury should decline to answer the hypothetical questions, which will in effect redraft Article 13.5 of the Protocol. Alinghi submitted that the Applicants should submit a sworn notarised declaration to enable the Jury to apply the tests set out in Articles 1.1(1) and 13.5 of the Protocol. Nevertheless, Alinghi provided some general observations on the interpretation of these Articles and a view on the questions asked.
- [3] Alinghi in response to Jury Notice 002 submitted that it is inappropriate for individual employees or agents of Competitors, respective Competitors, the Event Authority, the Challenger Commission, the Measurement Committee or the Race Committee to make submissions or to be heard by the Jury, other than as an authorised representative of their employer or principal, as the case may be. Alinghi submitted that intending Challengers with a demonstrated interest and intention of challenging should be entitled to make applications to the Jury. With regard to hypothetical questions, Alinghi submitted that they should not be answered and in respect of anonymity, it should only be granted in exceptional circumstances.
- [4] OBR submitted that the Jury was not at the time of its submission on 1 March 2004 fully established and declined to make a submission at that time but reserved the right to do so if and when such questions are properly before the Jury after it is fully established.
- [5] OBR did provide submissions in respect of Jury Notice 002 concerning guidance on the Rules of Procedure. OBR supported the Alinghi submission in its entirety and the ACM submission in general. OBR also provided some additional submissions on jurisdiction.

OBR submitted that it was opposed to the Jury accepting hypothetical questions and to in general granting anonymity.

- [6] ACM provided submissions on certain specific aspects that were largely consistent with those of Alinghi or OBR.

G. The Jury's Decision

Jurisdiction

- [1] The Jury has been appointed and individual agreements have now been entered into with ACM. The Jury is therefore now fully established. Rules of Procedure have been adopted in terms of Article 21.7 of the Protocol.
- [2] Article 21.4 of the Protocol empowers the Jury on a range of matters including those under Article 21.4(a) 'to resolve all matters of interpretation of any of the documents and Rules referred to in Article 12'.
- [3] Article 21.4(f) of the Protocol also empowers the Jury 'to determine the jurisdiction of the Jury in accordance with the terms of this Protocol'. In terms of Article 21.4(a) and (i), the Jury considers it has the necessary jurisdiction under the Protocol to consider the Applicants' questions.
- [4] Neither of the Applicants at the time of their applications were a 'Competitor' as defined in the Protocol in that they were not a Yacht Club whose challenge has been accepted by SNG (Protocol Article 3, Terms of Challenge paragraph 4).
- [5] Article 3.4 of the Protocol provides that SNG 'will accept bona fide registrations of interest for the purpose of receiving communications'.
- [6] Article 5.6 of the Jury Rules of Procedure provides 'when the Jury deems it appropriate, it may grant leave to a bona fide registrant, under Article 3.4 of the Protocol, to file an Application'.
- [7] No party took the view that the Jury did not have jurisdiction in respect of bona fide registrants and the Jury has assumed it has jurisdiction.
- [8] Questions 1 and 2 were submitted by K Challenge and Mascalzone Latino respectively who are bona fide registrants with ACM under the Rules of Procedure. With reference to the submission from Alinghi and Article 5.6 of the Rules of Procedure, the Jury considers these Applicants as registrants who have a significant and demonstrated direct interest in or likelihood of becoming a Challenger. The Jury is of the view that Questions 1 and 2 raise issues that need to be resolved in order to facilitate their becoming a Challenger. In reaching this view, the Jury recognises that there can be no certainty that the parties involved will in fact become Challengers.
- [9] There are a limited number of AC Designers and the Jury considers it may be important to prospective Challengers to know prior to lodging a challenge whether a particular person complies with the Designer requirements of the Protocol.
- [10] Leave is granted accordingly.
- [11] In making the present decision, the Jury accepts the submission from OBR that there are potential difficulties in accepting applications from persons or entities who have not yet agreed to be bound by the Protocol and Terms of Challenge. As a result, the Jury will exercise substantial restraint in the granting of leave to file applications from persons or entities who are not Competitors in terms of the Protocol. It is prepared to

grant leave in this case because it holds that it is in the best interests of the competition and of all Competitors to resolve the issues raised in the Questions.

Hypothetical

- [12] The Jury is not required to answer hypothetical questions (Article 5.7 of the Rules of Procedure). The Jury accepts that, in some cases, to answer them could amount to providing a more detailed definition and amend the 32nd Americas Cup Protocol, which is outside the Jury's jurisdiction.
- [13] The Jury is prepared in appropriate cases, to give interpretative opinions based on actual facts where there is no dispute as to those facts. In giving interpretative opinions, this can in appropriate cases, include specified 'what if' questions which are not hypothetical but rather based on a clear concise genuine interpretative requirement. The Jury considers that Questions 1 and 2 fit within this category. The Jury considers that it is in the interests of the 32nd America's Cup to answer such questions, which may give greater certainty prior to a bona fide registrant or Competitor taking a particular course of action.
- [14] The Jury does not consider that in answering Questions 1 and 2 it in effect redrafts Article 13.5 of the Protocol. The Jury is not prepared to treat or consider such an interpretation as an extension of the provisions of the Protocol.
- [15] On the basis of the Jury's interpretation, it is incumbent on the applicant to determine the situation of a particular individual and to correctly apply the Jury's interpretation. Such interpretations must be read in conjunction with the particular questions and must not be construed to have a wider application.

Confidentiality

- [16] The Applicants of Questions 1 and 2 filed their applications prior to the Rules of Procedure being drafted and adopted. Article 7.1 of the Rules of Procedure provides for the granting of confidentiality and once granted the identity is to be kept confidential. K Challenge and Mascalzone Latino as the Applicants of Questions 1 & 2 have now waived their request for confidentiality.
- [17] The Jury has noted the strong views of Alinghi and OBR against anonymity. It is the Jury's intention to be as open and as transparent as possible. While any application for anonymity or confidentiality will be considered on its merits the granting of such requests will be a rare exception. The Jury will need to be fully satisfied under Article 7.1 of the Rules of Procedure that there truly is a 'substantial risk of serious damage if their identity is disclosed' before allowing non-disclosure of an applicant's identity.
- [18] If the Jury decides that an application for confidentiality will not be granted, they will be advised and given an opportunity to withdraw their submission as provided for in Article 7.1 of the Rules of Procedure.

Article 1.1(1) and 13.5 of the Protocol

- [19] The definition of a Designer is contained in Article 1.1(1) of the amended Protocol governing the 32nd Americas Cup which is dated 21 January 2004. The definition of Designer needs to be read in conjunction with Article 13.5 of the Protocol.
- [20] If a person 'applies substantial intellectual creativity and judgement to the determination of the shape or structure of the following ...' then the person is a Designer in respect of the items listed in Article 1.1(I) of the Protocol. If the person does not, they are not a Designer.

- [21] The title or designation or remuneration of a person does not determine whether that person is a Designer. These matters are not decisive. The relevant fact is the application of substantial intellectual creativity and judgement to the shape or structure of the components listed in Article 1.1(l).
- [22] In terms of the situations and duties described in Questions 1 and 2, the person does not appear to have applied substantial intellectual creativity and judgement in the determination of a Competitor's hull, deck, cockpit, mast tube and other components as described in the Protocol and as such, is not a Designer in terms of the Protocol.
- [23] With regard to each of the questions raised in Question 1 from K Challenge the answer is 'no', the person is not a Designer.
- [24] With regard to each of the questions raised in Question 2 from Mascalzone Latino the answer is also 'no', the person is not a Designer.

Costs

- [25] The costs of the Jury are fixed at €2000 for each of K Challenge and Mascalzone Latino. These costs are to be paid by the Applicants within 21 days of the date of this decision. Recognising that none of the parties are at present Competitors as provided for in the Protocol, the Jury reserves the right on future occasions, to require payment in advance of application fees and costs prior to determining an application from a party who is not a Competitor.

H. Ruling Summary

- [1] The Jury has jurisdiction to deal with Questions 1 and 2.
- [2] The answer to the issues raised in Question 1 is 'no', i.e. the person referred to in Question 1 is not a Designer.
- [3] The answer to the issues raised in Question 2 is 'no', i.e. the person referred to in Question 2 is not a Designer.
- [4] The total costs of the Jury for proceedings in connection with each of Questions 1 and 2 are fixed at €4000. Each of K Challenge and Mascalzone Latino shall pay €2000. Such payment shall be made to Americas Cup Management within 21 days of this decision.