



AMERICA'S CUP 32

AMERICA'S CUP JURY

JURY NOTICE JN082

Application from AC Management SA
Regarding Personal Microphones on Yachts



Case ACJ033

13th May 2007

To: Challengers and Defender, ACM, Chief Measurer, Regatta Director (“**Parties**”)

Applicant: AC Management SA (“ACM”)

An Application in respect of an Interpretation of Article 17.4 of the Terms of Challenge

AND

An Application from ACM regarding Personal Microphones on Yachts

The Application

[1] On 5th May 2007 ACM filed an Application requesting an urgent interpretation of Clause 17.4 of the Terms of Challenge (“ToC”). The Application concerned a request by ACM to Competitors to place personal microphones on both the Navigator and Tactician of a yacht or, alternatively if requested by the Competitor, on any other two crew members of the afterguard.

Jury Notice JN079

[2] On 6th May 2007, the Jury issued Jury Notice JN079, which provided as follows:

“The Application

[1] On 5th May 2007 ACM filed an Application requesting an urgent interpretation of Clause 17.4 of the ToC concerning the wearing of on-board personal microphones by Competitors' crew members.

[2] ACM sought an interpretation as to whether they are entitled to require Competitors to place personal microphones on both the Navigator and Tactician or alternatively upon request of the Competitor, on any other two crew members of the afterguard.

Directions and Timetable

[3] Any Party wishing to respond to this Application shall submit their Response by 23h00 on Tuesday 8th May 2007.

[4] Should ACM wish to reply to any Responses, it shall submit its Reply by 18h00 on Wednesday 9th May 2007.

No Further Responses

[5] Unless the Jury directs otherwise there will not be any further opportunity to respond or reply to this Application other than as provided for within the above timetable.”

Submissions by Alinghi

[3] On 7th May 2007 Team Alinghi SA known as Alinghi (“Alinghi”) filed a submission, supporting the Application made by ACM.

[4] Alinghi included as part of its submission as Exhibit 1 a statement from Brad Butterworth as to the benefit of on-board personal microphones.

[5] Alinghi submitted that Article 17.1 of the Protocol permits ACM to specify which crew members of a Competitor are to wear personal microphones. They also submitted that Article 5.9 of the Protocol regarding Neutral Management requires ACM to ensure equality between Competitors in terms of the number of personal microphones and the crew positions in which microphones are to be worn by crew members.

Submissions by the Challenger Commission

[6] On 8th May the Challenger Commission filed a Response to the Application.

[7] The Challenger Commission submitted that for more than one year ACM has accepted the position of the Challenger Commission that ACM has no authority to specify either the names or positions of crew members who are to wear personal microphones. In support of this contention the Challenger Commission included a copy of an email dated the 13th May 2006 from Alessandra Pandarese in her capacity as Chairman of the Challenger Commission to Dyer Jones, the Regatta Director.

[8] The Challenger Commission submitted that the timing of the Application requesting an interpretation immediately before the start of the Louis Vuitton Cup Challenger Selection Series Semi-Final was disruptive and should be rejected under the Doctrine of Laches (unreasonable delay in making an assertion or claim, which may result in refusal).

[9] The Challenger Commission also submitted that Clause 17.4 of the ToC refers only to the number of crew members who must wear personal microphones but makes no reference to the position of crew members on a yacht. They included an email dated 12th May 2006 from Alinghi to Alessandra Pandarese which they contended supported the Challenger Commission’s view that ACM does not have the authority to specify persons, or positions of crew members, who may be required to carry a personal microphone.

[10] The Challenger Commission further submitted that Article 17.1 of the Protocol does not give ACM the authority to change unilaterally the long established practice of not specifying the crew members who are required to carry microphones.

[11] The Challenger Commission stated that the effect, if not the purpose, of ACM’s Application violated the Neutral Management provision contained in Article 5.9(b) of the Protocol.

Submissions by BMW ORACLE Racing

[12] On 8th May 2007 Oracle Racing, Inc (operating as BMW ORACLE Racing) (“BMW ORACLE Racing”) filed a submission opposing the interpretation of Article 17.4 of the ToC suggested by ACM and supporting the submission made by the Challenger Commission.

[13] BMW ORACLE Racing submitted that a Competitor will not be in breach of Article 17.4 of the ToC if the microphones are on crew members and are switched on. Under such Article, ACM does not have the right to specify which crew members wear the personal microphones.

[14] BMW ORACLE Racing also submitted that ACM needed to act in a way that provides Competitors with the comfort that ACM is not assisting the Defender or other Challengers with reconnaissance. They further submitted that the Challengers have legitimate concerns as to what constitutes good media coverage as opposed to what is simply providing reconnaissance information.

[15] BMW ORACLE Racing submitted that at a Challenger Commission meeting in January 2007 when an ITV representative and the Regatta Director were present, it was acknowledged that ACM did not have the power to specify who would wear microphones.

[16] BMW ORACLE Racing submitted that the best way the matter should be dealt with is not by ACM’s Application but rather by working out solutions directly with the Competitors.

Mediation

[17] On 8th May 2007 the Jury Chairman advised all Competitors by email that the Jury would see if it was possible to resolve the matter by mediation. ACM and the Parties who had filed submissions did not object to mediation.

Mediation Outcome

[18] On 9th May 2007 the Jury Chairman advised all Competitors that it had not been possible to resolve the matter by mediation and that the mediation procedure was terminated.

ACM Request for an Extension to Timetable

[19] On 9th May 2007 ACM filed a request to extend the timetable for them to reply to the Responses from the Challenger Commission and BMW ORACLE Racing. An extension was granted by the Jury in Jury Notice JN081 dated 9th May, which provided as follows:

***“Request for Timetable Extension*”**

[1] On 9th May ACM filed a request for an extension of the time by which they may reply to the Responses from other Parties.

[2] The grounds for applying for an extension were that:

(a) a mediation process was commenced yesterday and then terminated without resolution today, being the same date as the Reply deadline, and

(b) ACM required more time to enable them to respond in detail on the merits of the Challenger Commission and Oracle Racing Responses.

Extension of Timetable

[3] The period of time allowed for Parties to provide Responses was from the time of the Application (19h01 5th May) to the deadline (23h00 8th May) which was 76 hours, whereas the time allowed for the Applicant's Reply was (by 18h00 9th May 2007) which was 19 hours.

[4] Recognising that it is the Applicant seeking a time extension, and the timetable differences above, the Jury grants the requested extension. The timetable in JN079 is hereby amended; ACM shall submit their Reply by 18h00 on Friday 11th May 2007"

Submissions in Reply by ACM

[20] On 11th May 2007 ACM filed a Reply to the Responses from the Challenger Commission and BMW ORACLE Racing.

[21] ACM submitted that there was no time limit for filing a request for interpretation to the Jury and that an application for interpretation should not be considered a protest for the purposes of Article 21.10 of the Protocol. Accordingly ACM submitted that its Application was permitted and admissible.

[22] ACM further submitted that audio coverage is a key element of TV coverage and that having personal microphones on-board a yacht enhances such coverage and is crucial for entertaining and compelling viewing. ACM provided four exhibits in support of its Reply, being an email from Keith Catchpole (ACTV Head of Technical Operations) and three emails from TV production companies (TVE (Spain); La7 (Italy) and Versus (USA)), dated 1st April 2007, 11th May 2007, 9th May 2007 and 10th May 2007 respectively.

[23] ACM submitted that the primary object of Article 17.4 of the ToC is to "*produce an attractive and compelling media broadcast*" and that no Party has opposed this point. ACM believes it has the authority to determine which crew members are to wear personal microphones under Article 17.1 of the Protocol although in an effort to meet Competitors' concerns, ACM submitted that it has shown flexibility with regard to which persons should wear the personal microphones.

[24] ACM submitted that the wearing of personal microphones is not a question pertaining to Article 5.9 of the Protocol regarding Neutral Management. Rather, it is covered by Article 17.1 of the Protocol and accordingly ACM's request to wear microphones has been consistent for all Competitors. ACM acknowledged in its Reply that it is not possible to ensure equality of treatment between the Challengers and the Defender to the extent that the Defender does not participate in the Louis Vuitton Cup Challenger Selection Series, but that the only solution to this would be to cease offering any TV coverage during the Louis Vuitton Cup Challenger Selection Series, which ACM does not believe is something that anyone is seriously considering.

[25] ACM submitted that it does not consider the ToC to be a unilateral document; when a syndicate submitted a challenge to the 32nd America's Cup, it agreed to be bound by the Protocol and the ToC. ACM submitted that the Protocol prevails over the Terms of

Challenge and accordingly Article 17.4 of the ToC should be interpreted in light of Article 17.1 of the Protocol.

Submission by BMW ORACLE Racing objecting to ACM's Reply

[26] On 12th May 2007 BMW ORACLE Racing submitted that ACM's Reply did not comply with the Jury Rules of Procedure in that it contained evidence created after the Application and Responses were lodged. Three of the four Exhibits provided by ACM in support of its Reply were dated 9th, 10th and 11th May 2007, such dates being after those of the Application and Responses.

[27] BMW ORACLE Racing submitted that its Response dated 8th May addressed the interpretation request raised by ACM and BMW ORACLE Racing requested that the Jury disregard all new matters and new evidence raised by ACM in its Reply.

Relevant Clauses

[28] ACM requested an interpretation of Article 17.4 of the ToC which provides:

*"17.4 **Personal Microphones:** In order to produce an attractive and compelling media broadcast, personal microphones supplied by ACM shall be worn and switched on by Crew members. ACM shall advise the number of Crew members on each yacht, not to exceed five unless more are agreed by the Competitor(s), who shall wear personal microphones. The number shall be equal for each competing yacht."*

[29] Clause 3 of the ToC contains a "purpose and intent" provision and provides the following:

"PURPOSE AND INTENT

The general underlying purpose and intent of these Terms of Challenge is provided in Article 3 of the Protocol..."

[30] Article 3.5(a)(i) of the Protocol provides:

"The Terms of Challenge shall ... include a requirement to comply with the terms of this Protocol."

[31] Clause 29 of the ToC provides that:

"ENFORCEMENT

ACM shall be the only entity entitled to seek the enforcement of these Terms of Challenge against a Competitor. No Competitor shall be entitled to protest non-compliance with these Terms of Challenge or seek the enforcement of these Terms of Challenge against another Competitor."

[32] Article 17.1 of the Protocol provides:

*"**Must carry broadcast equipment:** During racing in the Event, television, audio and other electronic equipment shall be carried on competing ACC Yachts and/or crew as determined by the Event Authority. The amount and manner of placement*

of such television, audio and other electronic equipment on yachts and crew shall be consistent for all Competitors.”

[33] Pursuant to the authority granted to ACM under Article 3.4 of the Protocol, ACM issued the Terms of Challenge (ToC).

Decision

[34] The Jury interprets Clause 17.4 of the ToC to mean that ACM is entitled to advise the number of crew members on a Competitor’s yacht who shall wear and switch on personal microphones, but not to specify which crew members shall wear such microphones. The Jury further determines that Clause 17.4 of the ToC is consistent with Article 17.1 of the Protocol.

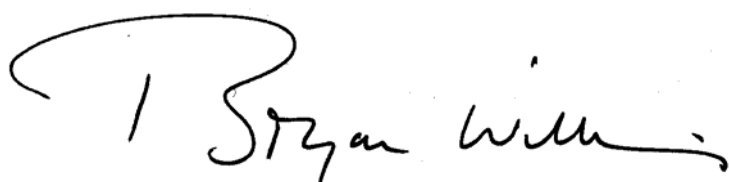
[35] The Jury interprets Article 17.1 of the Protocol to mean that the Event Authority may determine whether the electronic equipment (i.e. personal microphones) will be placed on the yachts or the crew or both, but not where on the yachts nor on which crew members.

Decision on BMW ORACLE Racing’s Objection to ACM’s Reply

[36] Since the decision in paragraphs [34] and [35] above accords with BMW ORACLE Racing’s own submission, there is no prejudicial effect of the Jury having considered the Exhibits to ACM’s Reply.

Costs

[37] Pursuant to Article 21.3 of the Protocol and the Jury Guidelines for the Award of Costs, the Jury considers that the decision is of universal application. No costs are awarded.

A handwritten signature in black ink that reads "Bryan Willis". The signature is written in a cursive style with a large, sweeping initial "B".

Bryan Willis

America’s Cup Jury:

Graham McKenzie, Henry Menin, Henry Peter, David Tillett, Bryan Willis (Chairman)