THE AMERICA'S CUP ARBITRATION PANEL

ACAP 01/08

IN THE MATTER of the Protocol governing the 31st America's Cup

AND

IN THE MATTER of an application by Seattle Yacht Club/One World Challenge (OWC) seeking interpretative rulings on the application of Articles 11.5, 11.6, 13.3(a) & 15.3(c) and directions under Article 22.8 of the Protocol

The application, submissions and evidence

[1] By Notice of Application, dated 20 December 2001, supported (after amendment) by a Statement of Grounds and Particulars, dated 11 February 2002, OWC sought a series of interpretative rulings on the application of Articles 11.5, 11.6, 13.3(a) and 15.3(c) to the events and matters set out in those documents.

[2] Pursuant to directions given by the Panel at various times, the following submissions have been filed. Participants are referred to by their shortened names.

a) Submissions of GBR Challenge, dated 27 March 2002.
b) Submissions of Prada, dated 27 March 2002.
c) Submissions of Oracle Racing, dated 28 March 2002.
d) Joint submissions of TNZ, Prada, Victory Challenge and Alinghi.
e) Supplementary submissions of TNZ (undated).
f) Further submissions and submissions in reply of OWC, dated 5 April 2002.
g) Further submissions of TNZ, dated 19 April 2002.
h) Further submissions of TNZ, dated 26 April 2002.
i) Supplementary submissions of Prada, dated 26 April 2002.
j) Further submissions in reply of OWC, dated 8 May 2002.

[3] In addition, the following affidavits and affirmations have been filed.

a) By OWC (in chief):

1) Laurie Davidson	7 February 2002
2) Robert Hook	7 February 2002
3) Richard Karn	7 February 2002
4) Wayne Smith	7 February 2002
5) Neil Wilkinson	7 February 2002
6) Phil Kaiko	8 February 2002
7) Ian Mitchell	8 February 2002
8) Bruce Nelson	8 February 2002
9) Victoria Parker	8 February 2002
10) Craig Phillips	8 February 2002
11) Peter Sowman	11 February 2002
12) Gary Wright	11 February 2002

b) By TNZ:

1) Michael Drummond	15 April 2002
2) Ross Blackman	19 April 2002
3) Nicholas Holroyd	24 April 2002
4) Andrew Kensington	24 April 2002
5) Andrew Claughton	26 April 2002
6) Thomas Schnackenberg	26 April 2002

c) By Prada:

1) Guido Cavalazzi, 26 April 2002.

d) By OWC (in reply):

1) Laurie Davidson, May 2002.
2) Robert Hook. May 2002.
3) Richard Karn, May 2002.
4) Ian Mitchell, May 2002.
5) Jeremy Scantlebury, May 2002.
6) Wayne Smith, May 2002.
7) Wayne Smith, May 2002.

[4] It is not proposed to set out the contents of these documents in these reasons. We will address the salient matters arising from them. It may be noted that, in addition to Article 13.3(a), reference has also been made to Article 13.3(b), it being alleged by GBR and TNZ and denied by OWC, that the facts also indicate breaches of this provision.

Some preliminary considerations.

[5] It has been asserted in some of the submissions that the Panel should undertake a general fact-finding enquiry into possible Protocol breaches by OWC. The Panel has no jurisdiction to undertake such a task. Its powers of adjudication come from the Protocol and

are co-extensive with it. The Panel is not a court of general jurisdiction nor is it established as a commission of enquiry.

[6] The present application is brought under Article 22.3(a) which provides one of the heads of power given to the Panel by that Article. Article 22.3 is the sole source of the Panel's adjudicative powers. It is correctly submitted by OWC that the Panel is not empowered to determine disputes between ACXXXI Participants and individual persons for, e.g., breaches of confidentiality undertakings or infringements of intellectual property rights. The right to bring proceedings for such breaches in courts of appropriate jurisdiction is reserved to the Participants and their representatives by Article 10.4(e).

[7] It may also be noted that, although there are areas of factual dispute in the material placed before the Panel, these disputes fall for resolution only within the jurisdictional framework of Article 22.3(a). The Panel has before it no application under any other sub-paragraph of that Article. In particular, although TNZ has put in issue some of the facts advanced by OWC, it has itself made no application to resolve a dispute in accordance with the terms of Article 22.3(c).

[8] Article 22.3(a), so far as relevant, empowers the Panel "to resolve all matters of interpretation of any of the documents and rules referred to in Article 14…including, where necessary, the determination of the facts relevant to the matter of interpretation." It is only in this limited area that the Panel makes findings of fact in this present application.

[9] It is convenient, also, to refer to Article 23.2 of the Protocol, which requires that "In the interpretation of this Protocol all the provisions hereof shall be construed in such manner as will best promote the purpose and object underlying this Protocol or the particular provision and best insure that they are given their true spirit, meaning and intent."

[10] Moreover, in interpreting the Protocol it is necessary to bear in mind the fundamental condition of the Deed of Gift that "the Cup is donated upon the condition that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries." For a competition to be friendly, it should be scrupulously fair.

[11] It is appropriate, also, to note that, as stated in the introduction to OWC's application, "after the end of any America's Cup regatta, designers and others who were engaged by a challenger, a candidate for the defence, or the defender for that regatta may choose to become involved with a different challenger, candidate for the defence, or defender for the next America's Cup." Designers are able to do this, if they take steps to comply with the "nationality" requirements of Article 11.2. It is inevitable that such designers, because of their special expertise in their field and the experience obtained in the designing of the previous participant's ACC yacht will carry with them recollections of many aspects of that design. This is knowledge which, as OWC submits, cannot be erased from their minds. In the Panel's view, this is a necessary consequence of the now accepted international mobility of designers. It is, nevertheless, an unfortunate consequence, in that it can be inimical to the basic concept that a competing yacht should truly be, in all respects, the product of the competing country. In interpreting this Protocol, this is an essential background consideration, in that care is called for in preventing any unwarranted extension of this consequence.

[12] A further background consideration is the obvious fact that many current Participants will also have competed in previous AC competitions and, in doing so, will have established significant private technical records, which will form an important basis for the production of improved ACC yachts for subsequent competitions. This bank of knowledge cannot be regarded as relating simply to previous ACC yachts produced by that Participant but, in the Panel's view, constitutes, relevantly, "design information" to be used by it in the production of new yachts for current competition. It is not surprising that, as the evidence indicates, designers transferring from one syndicate to another, at the end of the ACXXX competition, were required to enter into confidentiality agreements in order to protect the previous employer's property rights in this design information.

[13] With these preliminary considerations in mind we turn to consider the questions raised by OWC in its application.

Question 1: Engagement of Designers formerly engaged by Others.

[14] Certain of OWC's designers had worked for TNZ and others for America True, America One and Prada, in ACXXX. In all cases the actual termination of their contracts occurred in 2000, after the date of the Final Race of ACXXX.

[15] Article 11.5 of the Protocol provides that " A designer, as more particularly defined in 'The 1966 Resolutions', may only design or be engaged, or associated in any other capacity, for one Challenger or one Candidate for the Defence (but not both), from the date of the Final Race in 2000 until the conclusion of the Match."

[16] In the case of the previous TNZ designers, with the exception of Mr Davidson, it is accepted that no design work was done by them for TNZ after the relevant date. The question is posed, however, were they, by reason of their continuing contracts, after the relevant date, "engaged" or "associated" with both a candidate for the defence and a challenger.

[17] It is not disputed that the Panel's decision in the matter of Robert Hook, ACAP01/2, answers this question. Any contractual obligations that remained related only to ACXXX and not to ACXXXI. Article 11.5 accordingly does not apply. The same result follows in the case of the designer previously engaged by Prada.

[18] It is a fortiori in the case of those designers who had previously worked for America One and America True. Those entities are not participants in ACXXXI, with the result that, in any event, the Article cannot apply.

[19] As to the designer Laurie Davidson, some suggestion was made, in the TNZ evidence, that he engaged in ACXXXI design work for TNZ after the relevant date. His evidence in reply satisfies the Panel that he did not do so. In the result, no breach of the Article is established, his explanation not having been challenged and there having been no application for him to be cross-examined.

[20] OWC is entitled to the rulings sought under this heading, viz., that the designers in question were not in breach of Article 11.5 by virtue of the temporary continuation of their ACXXX contracts after

the date of the Final Race in 2000.

Question 2: Design and Performance Knowledge.

[21] The ruling sought by OWC is that "Article 15.3(c) allows a designer or any other person engaged by OWC to have and use *knowledge* of the design and performance of 'old' ACC yachts developed by another entity."

[22] Article 15.3(c) provides, so far as relevant:

"Each person or entity whether then a Challenger, Candidate for the Defence, or not, shall engage separate and independent designers having no involvement with any other Challenger's or Candidate for the Defence's program to develop an ACC yacht its appendages, rigs and sails…or a yacht capable of being measured as an ACC yacht without significant modification. Design or performance information or equipment (including appendages, rigs and sails but excluding standard fittings which are generally available) of or in relation to such yacht of a person or entity may not be shared or exchanged with another person or entity except information which may be gleaned without assistance from the other person or entity in formal or informal or head-to-head competition. The acquiring or obtaining of an ACC yacht its appendages, rigs or sails (but not their plans, specifications or other design information), or a yacht capable of being measured as an ACC yacht without significant modification, which was…made or built, before the completion of the Final Race in 2000 shall not be an infringement of this Article 15.3(c)."

[23] OWC's submission is to the effect that, inevitably, "designers and others carry with them knowledge of design and performance information about ACC yachts with which they have been previously involved" and will "either consciously or subconsciously make use of their knowledge when developing or sailing any new ACC yacht." The thrust of the submission appears to be that the retention and use of such acquired knowledge does not prevent designers being "separate and independent", nor does it involve any relevant "sharing" or "exchange" within the meaning of the Article.

[24] TNZ responded to this submission as follows:

“All participants would accept that it is inevitable that designers and others carry knowledge and will use that knowledge whether consciously or subconsciously when developing or sailing any new ACC yacht. Ex Team New Zealand members are bound by confidentiality provisions prohibiting the retention, disclosure, dissemination or use of Team New Zealand Confidential Information. In the absence of a Trade Secrets legislation in New Zealand the Common Law relating to restraint of trade is relevant and the principle of “tools of trade” applies, in other words a designer can never be prevented from utilising his knowledge on how to design an ACC yacht. However, specific facts and design information or data relating to yachts should not be used under this principle of law as they are not tools of trade. It is our submission that the correct interpretation of Article 15.3(c) is that a designer or any other person engaged for the America’s Cup who is subject to the confidentiality restrictions of a previous syndicate can only use knowledge on how to design an ACC yacht for a new syndicate, not specific facts or data relating to the yachts of the previous syndicate.”

[25] It is the Panel’s view that, in the absence of wording to this or substantially similar effect in Article 15.3(c), it is not appropriate to read into the Article such a prohibition. A Participant who considers that a previous employee has breached a confidentiality agreement, by using such specific knowledge retained in his memory, may have a curial remedy under the general law but, in our opinion, has no remedy under the Protocol (see Article 10.4(e)). It must be remembered that the Protocol is an agreement which embodies the terms upon which the parties to it have expressly agreed. Where matters upon which they might reasonably have agreed are omitted from the Protocol, it is reasonable to assume that such omission was deliberate. In such circumstances the Panel should not imply such terms although, it must, interpret the terms which are included, in accordance with both general principle and the requirements of Article 23.2.

[26] Accordingly, the Panel finds that OWC is entitled to the ruling sought, as set out above in paragraph 21.

Question 3: Possession of written design and performance information.

[27] The question posed by OWC is “does Article 15.3(c) of the Protocol allow the designer

or any other person engaged by OWC to have personal possession of written (hard or soft copy) information about:

. the design and/or performance of any ACC yacht (including its appendages rigs and sails), which yacht was

. developed by or for any other challenger for, or candidate for the defence of, or defender of, any past America's Cup: with which entity

. the designer or other person was then involved?"

[28] This question is asked in the context of concessions by OWC, confirmed by the affidavits of the relevant designers, that they had in their respective possession, whilst engaged in design work for OWC, (a) measurement certificates for the yachts NZL 57 and NZL 60 (both TNZ ACXXX yachts), (b) carbon fibre materials data certificates issued to TNZ by its suppliers in respect of ACXXX yachts and (c) sail and mast design and performance information relating to the sail design program of Prada for ACXXX.

[29] It is asserted by OWC that this information, although in the possession of the relevant designers, was not used in any way for the hull, mast or sail design of its ACXXXI yachts, it being submitted that, in these circumstances, mere possession by the relevant personnel cannot constitute infringements of the Article.

[30] It is submitted, however, on behalf of TNZ, GBR Challenge and Prada that the acquisition by OWC of such written material must constitute an infringement of Article 15.3(c). It is also submitted by TNZ and GBR Challenge that a breach of Article 13.3(b) is necessarily involved. It is convenient to deal first with the submissions relating to Article 15.3(c).

[31] The interpretation of Article 15.3(c) was considered by the Panel in ACAP01/04 (the Oracle case). The case dealt with the proposed acquisition of "plans, specifications and other design information" of "old" ACC yachts in conjunction with their purchase. In holding, in its interim decision, that such acquisitions would constitute infringements, the Panel made the following statements in respect of the meaning and operation of the Article:

"25.Once it is accepted that the last sentence in Article 15.3(c) is concerned only with 'old' ACC yachts, the sentence, including the words in brackets, are capable of only one meaning,

There is no ambiguity. While the acquiring of an ‘old’ ACC yacht does not infringe Article 15.3(c), acquiring the plans, specifications or other design information of an ‘old’ yacht does.

26. This conclusion is entirely consistent with the purpose and object of Article 15. Such an acquisition is an exception to the Rule which requires a competitor to engage separate and independent designers who comply with the nationality requirements of the Protocol. But to prohibit the acquisition of plans, specifications or other design information relating to an ‘old’ yacht is also consistent with the fundamental requirement that all design information must come from the designer engaged by the Challenger or Candidate for the Defence, and that the designer must be from the country of the Challenger or Candidate for the Defence. To allow a participant to have access to the design information of a yacht built by another participant, whether past or present and whether from the same or a different country, would be clearly contrary to the spirit and intent of this requirement. We have no doubt that it was for this reason that the words in brackets in Article 15.3(c) were included.”

[32] The Panel went on to indicate, in Paragraphs 28 and 29 of the decision, that this prohibition was not limited to an “old” yacht acquired from a current team but applied whether such a yacht was acquired from a current team or any other entity. The Panel further stated that (Para. 29) “the third sentence of Article 15.3(c), including the words in brackets, prohibits a Challenger or Candidate for the Defence acquiring the plans, specifications or other design information relating to an ‘old’ yacht, whether or not the club also acquires an ‘old’ yacht.”

[33] In Paragraph 8 of the Panel’s final decision in ACAP01/04 the Panel further said, in respect of Article 15.3(c), “…the Article, in the first sentence, requires a participant to engage ‘separate and independent designers’, the clear intention being that design information shall not be shared. That intention is made clearer in the second sentence which expressly prohibits sharing or exchanging of ‘design or performance information or equipment.’ That prohibition, in the absence of any express exception, applies to any ACC yacht, whether ‘old’ or ‘new’.”

[34] We would add that should the word “such” in the second sentence of the Article be taken to limit its application to the ACC yacht, the subject of the development program referred to in the first sentence, the result would be the same. Design and performance information, as already discussed in Para.12 of these reasons, relevant to a previous ACC yacht of a current Participant, also constitutes such information relevant to the program of that Participant to develop a new ACC yacht; it thus falls within the prohibition of the second sentence of the Article.

[35] The Panel does not understand, from the submissions of OWC, that it wishes to challenge or seek a reconsideration of the Panel’s interpretation in ACAP01/04. Rather, it seeks to distinguish it, for present purposes, in the following ways.

[36] First, it submits that the acquisition of the TNZ measurement certificates could not, relevantly, be the acquisition of design information. This contention is based upon the Panel’s holding, in ACAP01/04, that measurements to be found in such a certificate were merely “statistical information that is readily ascertainable by simply measuring the yacht, its sails and rig.” However, that ruling was given in the context of the acquisition of the “old” yacht, to which the certificate applied. Here there was no such acquisition and, consequently, nothing to be measured. The information was not, therefore, readily ascertainable. In these circumstances, the certificates were capable of providing to OWC, if used, information as to the vital measurements of NZL57 and NZL60, which was clearly the private property of TNZ and which was otherwise unavailable to OWC. The Panel is satisfied that it was, in these circumstances, “ design information”.

[37] Secondly, it is submitted that the mere possession of information owned by TNZ by employee designers of OWC could not constitute an infringement of the Article by OWC. Such possession could not be regarded as possession by OWC. The Panel rejects this submission. The designers were employed by OWC as experts, with knowledge that they had demonstrated that expertise in prior work for TNZ in ACXXX. There was a clear obligation on the part of OWC to ensure that they did not bring with them to their new employment any written design or performance information, the property of TNZ, which could be utilised in breach of Article 15.3(c). In these circumstances, the Panel is satisfied that possession by the designers was possession by OWC.

[38] Thirdly, it is submitted that no breach of the Article can occur unless the information is actually used in the production of OWC yachts. This submission is also rejected. Article 15.3(c) makes it clear that acquisition of wrongly shared information is, in itself, sufficient to constitute a breach.

[39] Fourthly, it is submitted that the acquisition of performance information does not fall within the prohibition of the third sentence of the Article. This submission has already been rejected in ACAP01/04.

[40] Fifthly, it is submitted that the Panel's decision in relation to Mr. Hook in ACAP01/02 appears to conflict with its decision in ACAP01/04, in that consistency would require that Article 15.3(c) should be held to apply only to ACXXXI related design and performance information. There is no conflict. Article 5.3(c) deals with ACXXXI activities but prohibits, in the course of such activities, the sharing and exchange of design and performance information relating to "old" ACC yachts.

[41] Sixthly, it is submitted that, in so far as the words of the Protocol do not expressly prohibit designers from retaining personal possession of material from previous AC campaigns, when transferring to another syndicate in a current campaign, the Protocol should not be interpreted to impose such a prohibition. The Panel does not agree. Undoubtedly, Article 15.3(c) could have been expressed with greater clarity, but when it is construed against the background matrix previously discussed and in light of Article 23.2, the prohibition sufficiently appears, at least when the material concerned is manifestly private to the designer's previous employer.

[42] In the result, in the Panel's opinion, the answer to this question is mandated by Article 15.3(c). Mr Davidson's admitted possession of the TNZ measurement certificates, whilst in the employ of OWC, involved OWC in a breach of this Article, irrespective of his sworn assertion that they were not used in the design of OWC's ACXXXI yachts.

[43] The same reasoning applies to the possession by Mr Wayne Smith, whilst engaged in work for OWC, of carbon fibre material certificates relating to TNZ's ACXXX yachts. Despite submissions to the contrary, the Panel is satisfied that these certificates contain significant design information. It is noted that Mr Smith testifies that he did not refer to the certificates nor show them to any other OWC employee, in the course of his work for OWC. However, his possession of them, whilst so employed, in itself, involved a breach by OWC of the Article.

[44] The retention of Prada's sail design material by Mr Spanhake whilst in OWC's employ, however briefly, must also constitute such a breach. This finding is made notwithstanding the contention that no use was made by OWC of this material.

45] It follows that Question 3 must be answered in the negative. The possession by OWC of the measurement certificates for NZL57 and 60, the carbon fibre certificates and the sail design material each constitutes a breach of Article 15.3 (c).

[46] These findings render it strictly unnecessary to consider whether breaches have occurred in respect of Article 13.3(b). However the Panel observes that, for such breaches to be established, proof would be necessary that the acquisition of the material was the result of an "intentional illegal act", performed on behalf of OWC, for the purpose of attempting to "gather design and yacht performance data…about (TNZ's) yachts through illegal (or) clandestine means" (Article 13.1). In the Panel's view, the evidence would fall short of establishing such breaches.

Questions 4,5,6 and 7: Use of Documents.

[47] These questions relate to the use by OWC designers of various types of information emanating from other competitors in ACXXX. Most relate to TNZ material. It is convenient, first, to consider the use of material from other sources.

[48] First, OWC has volunteered that one of its designers had in his possession photographs showing the mould for the construction of the hull of America True, obtained by him when working for that syndicate in ACXXX. He may have shown them to other designers, who were later engaged by OWC. The photos were stored at the designer's home and were not referred to or used in any way relating to OWC's yachts. In the Panel's opinion, the evidence does not establish that these photographs were, relevantly, design information. No evidence has been placed before the Panel to suggest that the photographs depicted any special or unique design characteristics. Accordingly no Protocol breach was involved.

[49] Secondly, OWC has volunteered that use was made of design drawings for America True. It accepts that it may have committed a breach of Article 15.3(c) in so doing. The yacht was purchased

by it and used for training purposes in its ACXXXI campaign. America True's principal designer was engaged to work for OWC. He brought the subject drawings with him and had the right to keep and use them so far as the America True syndicate was concerned. Limited reference was made to the drawings for repair and maintenance work on the yacht . OWC's new yachts are not copies or developments of America True. However, the America True drawings were also used to establish an appropriate "title block" and drawings list for the organisation and "labelling" of subsequent design work. This was not part of the actual designing of the OWC yachts but, in the Panel's opinion, the obtaining and use of the drawings was a breach of Article 15.3(c) as explained in ACAP01/04. The fact that the OWC designer using these plans, had, himself, developed them in the design of America True does not prevent a relevant "sharing" having occurred between the two entities involved.

[50] Thirdly, it is conceded by OWC that Mr Davidson, whilst in its employ, had in his possession a book of photographs showing tank testing for TNZ's ACXXX campaign. It is not disputed that he returned them to TNZ. He says that he made no use of them for design purposes whilst employed by OWC, but briefly and casually showed them to others at OWC's premises. These persons might briefly have flicked through them as a matter of passing interest. TNZ, in its evidence, has raised concerns about Mr Davidson's possession of the photographs, asserting that they were capable of providing significant design information and querying whether such limited use would have been made of them. At this stage, it is sufficient for the Panel to find that their continued possession by Mr Davidson involved OWC in a breach of the Article. There was, in the circumstances, a "sharing" of design information.

[51] Fourthly, OWC advises that Mr Ian Mitchell, a former employer of TNZ in ACXXX, who became a designer for OWC, produced "as an initial point of reference for discussion by a group of OWC designers and crew" a document which was a representation of the general deck (cockpit area only) lay-out of NZL60 as sailed in the ACXXX Match. This document came, or was derived, from material he had kept from the time of his TNZ employment. He asserts that the document contained no information which could not have been obtained from publicly available photographs of NZL60.

[52] This view of the significance of this document is disputed by TNZ , it being asserted that the document either directly showed or necessarily led to the inference that Mr Mitchell had access to

much highly significant technical information relating to the construction of NZL60, which information he has retained after leaving TNZ. It is not necessary for the Panel to pursue this aspect. It is clear that Mr Mitchell admits to having copied a TNZ file when leaving TNZ employment and to having made, from that copy, his drawing of the deck layout. This constitutes a breach of the Article.

[53] Fifthly, OWC has disclosed that a designer, who had been a designer for TNZ in the previous America's Cup, had in his possession what was referred to as a rig drag analysis spreadsheet. This had been constructed when the designer was with TNZ. A copy of the original spreadsheet, produced by TNZ, contained performance and design information about the TNZ yachts. Had this spreadsheet been in the possession of the designer, while he was engaged by OWC, there would have been a breach of the Protocol. However, the designer has deposed that, when he left TNZ, he deleted all TNZ rig geometry from the spreadsheet. This statement has not been challenged by TNZ by any request to cross-examine the designer or by seeking the production of the spreadsheet as it now is. In the absence of any such challenge, the Panel accepts that the TNZ information was deleted, with the result that there has been no breach of the Protocol.

[54] Sixthly, OWC informs the Panel as to the obtaining by it of "video footage of informal racing against Yacht Club Punta Ala / Prada." This matter is referred to the Panel because of its decision in ACAP01/07, in light of which OWC accepts that the filming constituted an "apparent breach of Article 13.3(a)." It is clear that the race was not an "official race" and that the exception in Article 13.4(c) could not apply.

[55] The facts are stated in Paragraph 3.1.3 of Appendix B to OWC's statement of 11 February 2002. They need not be further referred to. It is clear that a breach of Article 13.3(a) occurred. However, the breach occurred in February 2001, well before the situation in relation to consensual filming by Participants in unofficial racing was clarified by the decision in ACAP01/07. It is also clear that the filming was for the purpose of crew training. The breaches were unintentional and no reference has been made to the film since February 2001. No future reference will be made.

[56] In the circumstances, the relevant breach will be recorded but the Panel considers that no penalty should be imposed.

[57] In the result, the Panel finds that OWC has committed breaches of Article 15.3 (c), by reason of its possession, as previously set out, of the measurement certificates of NZL57 and 60, the carbon fibre certificates for those yachts and the sail design information in relation to Prada's ACXXX yacht; also, by reason of its possession and use, to the extent previously indicated, of the design drawings of America True, the tank testing photographs for the TNZ ACXXX campaign and the retention of cockpit design material in respect of NZL60, with the creation therefrom of the deck layout sketch. The breach of Article 13(a), as previously stated, attracts no penalty.

Penalty.

[58] On penalty, the Panel has taken into account:

1) The design of a successful America's Cup yacht is a complex process, which includes the elimination of a number of lines of enquiry. The evaluation of a particular line of enquiry is at a cost to the syndicate that has undertaken it, both in terms of money and time. The obtaining of another syndicate's design information gives to the syndicate obtaining it an advantage to which it is not entitled. How it might use this information in the evolution of its yacht's design will always be difficult to determine objectively. Consequently, in the Panel's view, the mere wrongful possession of such information must call for the imposition of a significant penalty.
2) This, no doubt, is one of the reasons why the Protocol has enacted the strict prohibition against the sharing of design information in Article 15.3(c), a prohibition that is fundamental to the America's Cup contest, and must be strictly observed.
3) The Panel accepts the unchallenged evidence given by the OWC witnesses, to the effect that the material wrongfully in their possession was not utilised by OWC for design purposes. However, where design information from a previous participant is in the possession of a designer, it may be impossible for another participant to prove that that information has been used.
4) In the present circumstances, OWC's culpability lies in failing to ensure that the designers it was engaging from other syndicates did not have in their possession any design information from the syndicates by whom they had previously been employed. Failing to

take that elementary but necessary precaution has resulted in breaches that can only be regarded as serious.

5) Because of the importance of the prohibition in Article 15.3(c), the Panel considers that a deterrent penalty is necessary to emphasise to participants that there is a strict obligation on any syndicate that engages a designer from another syndicate in a current or past America's Cup contest, to ensure that that designer has no relevant design information in his or her possession. A financial penalty, in the Panel's view, does not sufficiently emphasise the seriousness of the breaches or the necessary deterrent element.

6) The Panel takes into account, as a mitigating factor, that it was OWC that brought before the Panel the facts that have resulted in the findings that it was in breach. Had it not done so, a more severe penalty would have been warranted.

[59] The Panel has concluded that the penalty to be imposed for the breaches it has found to have occurred is that one point is to be deducted from OWC's total score in the round robins of the Louis Vuitton Cup.

[60] In accordance with Article 6.4, the Panel rules that, upon the satisfaction by OWC of this penalty, the breaches dealt with in this judgement shall not render it ineligible to become the Challenger under the Deed of Gift for the Match.

Costs.

The costs of the Panel on this application are fixed at US$13,500. These costs shall be paid by Seattle Yacht Club/One World Challenge to the Registrar within 21 days of the date of this decision.

Dated this 16th day of August 2002.

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The Hon. Michael Foster QC, Chair

Master John Faire

Mr Donald Manasse

Professor Henry Peter

Sir David Tompkins QC