



# AMERICA'S CUP 32

## AMERICA'S CUP JURY

### JURY NOTICE JN084

Alinghi Application claiming Measurement Committee acted outside its jurisdiction

Case ACJ034

20<sup>th</sup> June 2007



To: Defender and Challenger, ACM, Regatta Director, Chief Measurer ("**Parties**")

**Applicant: Société Nautique de Genève represented by Team Alinghi SA ("Alinghi")**

**An Application in respect of the jurisdiction of the Measurement Committee in relation to Public Interpretation No. 41 and Protocol Article 20.1.**

### **The Application**

[1] On 16<sup>th</sup> June 2007 Alinghi filed an Application seeking an order that the Measurement Committee's answer to Question 1 in ACC Public Interpretation no. 41 of the America's Cup Class Rules ("ACC Rules") was an unauthorised amendment and that the Measurement Committee be directed to comply with the Protocol and revise their answer to such question. Alinghi also sought an urgent hearing.

### **Jury Notice JN083**

[2] On 17<sup>th</sup> June 2007 (but incorrectly dated 30<sup>th</sup> April 2007) the Jury issued Jury Notice JN083 providing directions and a timetable together with a notice of an oral hearing to be held on Monday 18<sup>th</sup> June 2007. Such Jury Notice provided:

#### ***"The Application"***

*[1] On 16th June 2007 Alinghi filed an Application seeking a Decision that the Measurement Committee has made an unauthorised amendment to the America's Cup Class Rule by its Answer to Question 1 in its Public Interpretation No.41, and that the Measurement Committee be directed to revise that answer.*

#### ***Directions and Timetable***

*[2] If Emirate Team New Zealand (ETNZ ) wishes to respond to this Application it shall submit its Response by 19h30 on Sunday 17th June 2007.*

*[3] If the Measurement Committee wishes to respond to this Application it shall submit its Response by 16h00 on Monday 18th June 2007.*

*[4] If Alinghi wishes to reply to ETNZ's Response, it shall do so by 12h00 on Monday 18<sup>th</sup> June 2007.*

#### ***Oral Hearing***

*[5] There will be an Oral Hearing commencing at 19h00 on Monday 18th June 2007 in the Jury Hearing Room.*

*[6] Alinghi, the Measurement Committee, and ETNZ may attend, each with two representatives. Observers from these three Parties may also attend, unless they are evidentiary witnesses.*

*[7] Eliminated Competitors may each appoint one representative to attend as an Observer, but shall not have the opportunity to make submissions without first applying to the Jury. Permission to make a submission will be granted only in exceptional circumstances.*

*[8] Peter Rusch, representing the AC Media Office, may attend the hearing.*

### **Confidentiality**

*[9] Alinghi has requested that paragraph 7 of the Application remains confidential. Paragraph 7 describes some background information. The Jury does not accept that all clauses should be subject to a confidentiality order but accepts that some clauses might be. Alinghi is ordered to identify to the Jury by 12h00 on Monday 18th June, those clauses it considers essential to an order of confidentiality. The jury will then give further directions.*

*[10] The image of an America's Cup Class Component Compliance Plate for an Alinghi mast (Appendix 4) shall be confidential to Alinghi, the Measurement Committee and the Jury, until further order by the Jury.*

*[11] Alinghi's request for the Application to remain confidential is granted to the extent that all persons attending the hearing are required to keep confidential all matters concerning this Application until a Decision is announced."*

### **Submissions by Emirates Team New Zealand**

[3] On 17<sup>th</sup> June Emirates Team New Zealand ("ETNZ") filed a submission in response to the Alinghi Application.

[4] The ETNZ submissions included that under Article 21.4(e) of the Protocol, the Jury had power to determine the limits of the jurisdiction of the Measurement Committee but that in terms of Article 20.1 of the Protocol, the Measurement Committee had exclusive jurisdiction to interpret the ACC Rules. ETNZ also submitted that there was a heavy onus on Alinghi to show that the Measurement Committee had exceeded its jurisdiction before the Jury could properly take the matter further. They further submitted that extrinsic evidence should not be received or relied on by the Jury. ETNZ accepted that an early hearing should be held.

### **Submissions by the Measurement Committee**

[5] On 18<sup>th</sup> June 2007 the Measurement Committee filed a submission in response to the Alinghi Application.

[6] The Measurement Committee submissions included that they complied with all relevant parts of the ACC Rules. The Measurement Committee also submitted that they had not exceeded the power or authority granted to them by Article 20.1 of the Protocol when they answered Question 1 in ACC Public Interpretation no. 41.

[7] The Measurement Committee also submitted that contrary to Alinghi's view, in their opinion Article 20.1 of the Protocol "prohibits" them from interpreting the ACC Rules as they were intended and that they were "constrained to enforce the ACC Rules as written" (paragraph 6.4). They also submitted that "the intent of the rule is not part of the Public Interpretation process" (paragraph 6.16).

[8] The Measurement Committee also included in Appendix 1 of its submission an Alinghi proposed answer to ACC Public Interpretation no. 41 Question 1 and in Appendix 2, an email from Mr H. Ross to T.F. Ehman of the 13<sup>th</sup> June 2005. These appendices were submitted to the Jury initially on a confidential basis but with Alinghi's agreement to waive confidentiality, the documents were released to the other parties at the hearing.

[9] The Measurement Committee also included in Appendix 3 of its submission responses to a number of the specific paragraphs included in the Alinghi Application.

### **Alinghi Submission in Response**

[10] On 18<sup>th</sup> June 2007 Alinghi filed a submission in Response to the ETNZ submission. As a result of ACC Public Interpretation no. 42 being released by the Measurement Committee which was based on ACC Public Interpretation no. 41, Alinghi sought to amend paragraph 2 of its Application whereby they sought an order that the answer to Question 1 in ACC Public Interpretation no. 41 and answers to ACC Public Interpretation no. 42 constituted an unauthorised amendment to the ACC Rules by the Measurement Committee. They also sought a further order from the Jury directing the Measurement Committee to comply with the Protocol by revising such answers.

[11] Alinghi submitted that ETNZ was seeking to defend the ACC Public Interpretations nos. 41 and 42 for its own competitive purposes and they had not challenged Alinghi's fundamental interpretative analysis.

[12] Alinghi also submitted that Alinghi had not requested the Jury to substitute its own interpretation to that of the Measurement Committee but they had questioned whether the Measurement Committee, in making the ACC Public Interpretations, was outside its jurisdiction.

[13] Alinghi further submitted that the Measurement Committee and the Jury were entitled to take into account the intent of the parties in drafting the ACC Rules. Alinghi also provided further submissions on its use of the dual stay system and how it would operate.

### **Oral Hearing**

[14] The oral hearing commenced at 19h00 on Monday 18<sup>th</sup> June.

[15] Alinghi was represented at the hearing by Hamish Ross and Grant Simmer. The Measurement Committee was represented by Ken McAlpine and Don Martin. ETNZ was represented by Jim Farmer QC and Nick Holroyd.

[16] Opening statements were given by Hamish Ross and Grant Simmer of Alinghi, Ken McAlpine of the Measurement Committee and Jim Farmer QC of ETNZ.

## **Evidence and Submissions from Alinghi**

[17] Dirk Kramers, the Chief Engineer from Alinghi gave evidence as to what occurred at various times of measurement by some members of the Measurement Committee of some of the Alinghi masts, including on 14<sup>th</sup> March 2007.

[18] Hamish Ross then provided submissions concerning jurisdiction and the way in which Alinghi considered the Measurement Committee had incorrectly interpreted ACC Rule 44.1(f) and the subsequent ACC Public Interpretations. He submitted that the exceptions to such rule could and should be read independently from the basic rule.

[19] Grant Simmer made submissions concerning the initial design of the Alinghi mast and dual stay system from a technical perspective and the interpretation that he considered applied.

## **Evidence and Submissions from the Measurement Committee**

[20] Tom Ehman Jr was called as a witness by the Measurement Committee. Tom Ehman gave evidence as to what he considered occurred when ACC Rule 44.1(f) was modified as a result of ACC Public Interpretation no. 7. Tom Ehman stated that on 11<sup>th</sup> June 2005 in his capacity as the then Chairman of the Challenger Commission, he sent to all Challengers an email that in his opinion set out what was intended to be achieved in amending ACC Rule 44.1(f). He also stated that he was not sure what "reasonable expectation" meant and it had never entered his mind that post race, a party might give consideration as to whether letting the boom out breached the rule.

[21] Ken McAlpine and Don Martin presented further submissions in respect of ACC Rule 44.1(f) and their interpretation.

## **Submissions from ETNZ**

[22] Jim Farmer QC presented submissions from ETNZ. He submitted that with regard to the question of intent, the correct approach was to put the words in context as to what they meant with the other kind of intent being what the drafters had in mind. He also submitted that ACC Rule 44.1(f) should be read as a whole and that the exceptions should not be read independently of the basic rule.

[23] He submitted that there was only one issue that the Jury was required to consider, and that was whether the Measurement Committee had exceeded its jurisdiction in answering the questions in its ACC Public Interpretations. It was submitted that the explanations and answers given by the Measurement Committee did not amend the ACC Rule and the Measurement Committee had not exceeded its jurisdiction.

## **Conclusion of Hearing**

[24] The hearing concluded at 23h00. After a short adjournment the parties present at the hearing were advised that a decision would be provided at 11h00 on Tuesday 19<sup>th</sup> June 2007. On 19<sup>th</sup> June the Jury Chairman advised that the Jury had decided by a majority of 3 to 2 that the Measurement Committee had exceeded its jurisdiction in its interpretations of ACC Rule 44.1(f) and that the Alinghi Application was upheld. Subsequently at 14h00 on 19<sup>th</sup> June, the Jury Chairman read initial reasons for that decision. He advised that a full written decision would follow.

## **Decision Background**

[25] Alinghi, in its Application of 16<sup>th</sup> June which was subsequently amended in their Response of 18<sup>th</sup> June, sought an order that the answer to Question 1 in the Measurement Committee ACC Public Interpretation no. 41 and the answers to ACC Public Interpretation no. 42 constituted an unauthorized amendment to the ACC Rules. Alinghi also sought a further order directing the Measurement Committee to comply with the Protocol and revise such answers.

[26] Article 20.1 of the Protocol provides that “All matters relating to ... the interpretation of the ACC Rules ... shall be determined by the Measurement Committee. The Measurement Committee shall have no power or authority to amend, alter, cancel or add to the ACC Rules or the Racing Rules but shall be entitled to interpret the words used in such documents.”

[27] Article 20.2 of the Protocol provides that decisions of the Measurement Committee within its jurisdiction shall be final but that any matter relating to the jurisdiction of the Measurement Committee shall be solely determined by the Jury.

## **Decision**

[28] The Decision by the Jury was by a majority being Graham McKenzie, Henry Peter and David Tillett. Bryan Willis and Henry Menin were the minority Jury members.

[29] The question to be determined by the Jury was whether, in the Measurement Committee providing its interpretations of Rule 44.1(f) of the ACC Rule, it had, in terms of Article 20.1 of the Protocol, amended, altered, cancelled or added to the ACC Rules.

[30] Paragraph 5.2 of the Measurement Committee submission of 18<sup>th</sup> June provided a definition of “interpretation” which includes: to render clear or explicit, to explain.

[31] ACC Rule 44.1(f) was not well drafted and the Jury fully appreciated the difficulties the Measurement Committee was faced with in being in charge of interpreting words that were unclear and which resulted in extensive questions from Alinghi.

[32] ACC Rule 44.1(f) should be read and interpreted in its entirety and the Jury did not consider it appropriate to construe the exceptions separately from the basic rule.

[33] The Measurement Committee advised that it had interpreted the words in ACC Rule 44.1(f) as written and did not have regard to their intent.

[34] In the Measurement Committee providing its interpretation, the Jury considered that the Measurement Committee in terms of Article 20.1 of the Protocol amended, altered or added to ACC Rule 44.1(f) by adding a concept of “time” and “reasonable expectation” when a yacht may need to ease the stays forward to allow the boom to go out. Very close to the start of the America’s Cup Match, this interpretation introduced a new subjective test that effectively required a determination of the racing yacht’s crew’s decision and interpretation thereof after the race. Justification for such subjective test is not supported by the ACC Rule.

[35] The Jury considered that this was not the correct approach and that in interpreting such rules the Measurement Committee must take into account the purpose and intent of those rules.

[36] The Measurement Committee should have taken into consideration the purpose and intent of the words as drafted and the purpose and intent of the drafters of the rule, as modified.

[37] In having regard to the purpose and intent, the Measurement Committee should also have regard to the genesis of Version 5 of the ACC Rules.

[38] The Measurement Committee called as its only witness Tom Ehman Jr. In his evidence Tom Ehman, in reviewing the genesis of ACC Rule 44.1(f), noted that it had never entered his mind that the Measurement Committee may be called upon to decide post-race whether there had been a reasonable expectation that the boom should go out.

[39] Version 5 of the ACC Rules was published on 15<sup>th</sup> December 2003.

[40] Rule 44.1(f) of the ACC Rules provided “whilst racing;

(f) backstays, topmast backstays and check stays shall not be lowered or removed from the mast or the fly block ...”

[41] On 7<sup>th</sup> June 2005 the Measurement Committee issued ACC Public Interpretation no. 7. This Interpretation permitted the connection of the lower end of the topmast backstay to the runner fly block during the course of a race.

[42] The Measurement Committee in their submission noted that this permitted a rig handling technique that was not anticipated by the Competitors.

[43] Tom Ehman Jr, the then Chairman of the Challenger Commission and Rules Compliance and External Affairs BMW ORACLE Racing (the co-author of the Protocol), forwarded an email on the 11<sup>th</sup> June 2005 to all Challengers copied to ACM Regatta Director, Technical Director Ken McAlpine, Jury Chairman, Hamish Ross of Alinghi (Defender) and Michel Hodara (ACM) and noted:

***“Running Backstays***

*Another proposed agreement that would require unanimous consent of all Competitors, and which should be discussed by the CC Sunday or Monday, has arisen as the result of the Measurement Committee’s Public Interpretation no. 7 concerning ACC rule 44.1(f) concerning the removal and reattachment of running backstays while racing.*

*Following the issuance of PI No. 7, Alinghi wrote BMW ORACLE saying, “Alinghi will support a proposal that returns the Class Rules, after the recent Public Interpretation, to what everyone intended, but as we have discussed this will require the approval of all Competitors.”*

*The original intention, of course, was that while racing running backstays had to be and remain hooked up both to the mast and the hull, both to eliminate the harangue*

*factor with removing/lowering and reattaching/hoisting backstays while racing as well as for the obvious safety reasons.*

*Following Alinghi's suggestion, which is supported by BMWOR (as co-drafters of the new ACC Rule), I spoke with Ken McAlpine and he would welcome such an amendment.*

*Current 44.1(f) language:*

*"[Whilst racing:] running backstays, topmast backstays and check stays shall not be lowered or removed from the mast or the fly block;"*

***Proposed new language:***

*ACC Rule 44.1(f) be amended to read: "[Whilst racing]" running backstays, topmast backstays and check stays shall remain permanently attached to their fixing points on the mast and the hull and in the same load bearing position throughout the race. For the avoidance of doubt, a detachment as the result of gear failure does not infringe this rule, provided re-attachment is effected as soon as practicable, nor does easing the runners forward to allow the boom to go out."*

*The words in red above is additional language suggested by Alinghi. I do not see that the language is necessary, but am not fussed to include it although I think then we must include something like the language in blue.*

*The concept and whether we can all agree is the important thing; if so, no doubt we can find the right words.*

*I do not know which Competitor asked the question, but inasmuch as it was asked as a PI and not a CI I would hope and assume that they, too, might support this amendment."*

[44] It was considered that this email assists understanding the purpose and intent of the original rule which is consistent with that of the other Protocol author (Alinghi) referred to in paragraph 7.5 of the Application and Submission.

[45] It is further noted that Mr Ehman did not consider the words "permanently" and "in the same load bearing position throughout the race" as necessary to achieve the purpose of amending ACC Rule 44.1(f). In other words they did not add anything to the fact that the backstays, topmast backstays and check stays should remain "*attached to their fixing points on the mast and the hull*". The purpose of the rule was thus to avoid the stays being unhooked (and thereafter reattached) or lowered or hoisted.

[46] It is further noted that Hamish Ross of Alinghi on 13<sup>th</sup> June 2005 forwarded an email to Mr Ehman Jr copied to various parties including the Technical Director as follows:

***"Subject: Re: 44.1(f) amendment unanimously approved***

*Tom*

*"Hull" is a defined term and does not include the deck (or cockpit). What we are trying to achieve is to ensure a constant anchor point and not allow movement in*

*the running rigging other than may be necessary to allow normal boom movement. I question whether reference to the Hull will not lead to unintended effects causing new issues.”*

This statement confirms the aforesaid purpose and intent, namely to make sure that there is constant anchorage and that the anchor point cannot be moved or removed, and not allow movement in the running rigging other than may be necessary to allow normal boom movement.

[47] ACC Rule Amendment 1 was issued on 14<sup>th</sup> June 2005 following unanimous agreement of the Competitors and included a new rule 44.1 (ACC Rule 44.1(f)). It is noted that the first version of the Rule dealt only with the permanent attachment of the running backstays and therefore did not address the parties' intention which was to prohibit the removing/reattaching or lowering/hoisting (that is raise, by means of a rope or pulley and tackle, or other mechanical device, see Shorter Oxford English dictionary) of the running backstays, topmast backstays and check stays.

[48] It is up to the Measurement Committee to interpret the meaning of ACC Rule 44.1(f) and the Jury cannot and will not substitute its view of such meaning. Such interpretation must have regard to the aforesaid purpose and intention.

[49] As the Jury has determined that the Measurement Committee did exceed its jurisdiction under Protocol Article 20.1 and the answers to Question 1 in ACC Public Interpretation number 41 and answers to ACC Public Interpretation number 42, the answers constitute an unauthorized amendment to the ACC Rules. They are accordingly referred back to the Measurement Committee so that they may revise them.

## **Costs**

[50] In terms of the Jury Guidelines on the Award of Costs, no award of costs was made.

A handwritten signature in black ink that reads "Bryan Willis". The signature is written in a cursive, flowing style with a large loop at the beginning.

Bryan Willis

America's Cup Jury:

Majority: Graham McKenzie, Henry Peter, David Tillett

Minority: Bryan Willis (Chairman), Henry Menin