



AMERICA'S CUP 32

AMERICA'S CUP JURY
JURY NOTICE JN016
JURY DECISION ACJ003
20th May 2005
21 pages



El Reto Application – 2 questions

Applicant: Team El Reto on behalf of the Real Federaciòn Espanola de Vela represented by Team El Reto (“El Reto”)

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

AND

IN THE MATTER of an Application filed by El Reto concerning an interpretation of Articles 13.5 and 13.6 of the Protocol.

The Application – Jury Notice JN004

[1] An Application was filed by El Reto on 25th January 2005.

[2] The Application asked two questions:

Question (i) Is a Competitor permitted to employ a designer who has previously been engaged by a potential challenger, without restriction on what the designer has done for the potential challenger?

Only in the event that the answer to (i) is no:

Question (ii) Is El Reto able to continue its engagement with Mr Kaiko as designer?

[3] The Application included an interim submission to the Jury asking whether the designer Mr Kaiko should be suspended by El Reto in the interim pending the final decision of the Jury.

[4] On 27 January the Jury under ACJ004 gave notice to the Competitors and other parties on the Service Address List in terms of the Protocol of the El Reto Application.

[5] The El Reto Application raised the question as to whether Mascalzone Latino, which was at that time a prospective Challenger but had not become a Competitor as provided for in the Protocol, should be entitled to respond to the El Reto Application.

Jury's Decision concerning the interim request and timetable

- [6] On 27th January the Jury advised El Reto that it would not answer the question on the interim submission referred to in paragraph 3 above, being a matter for El Reto as to whether it should or should not suspend Mr Kaiko before receiving the Jury's Decision.
- [7] In providing notice of the El Reto Application to the Competitors and other parties on 27th January the Jury set the timetable of:
- 3rd February for a Response as to whether Mascalzone Latino should be given an opportunity to give a Response;
 - 10th February for other Responses; and
 - 17th February for El Reto to file a reply to the Responses.

Submissions concerning a Mascalzone Latino Response

- [8] On 1st February Team Alinghi SA as the representative for Société Nautique de Genève ("Alinghi") submitted that Mascalzone Latino should be entitled to respond. Alinghi submitted that this would assist the Jury in making and seeking a reliable independent determination of fact. Alinghi also submitted there was no material difference between making an Application and receiving a submission from a potential Competitor with a direct interest in the matter with there being no discernable material difference with regard to the way in which the Application was made in Jury Decision ACJ001.
- [9] No other submissions were received on this point within the initial timetable timeframe.
- [10] On 6th February the Jury advised all Competitors and other parties that the Jury proposed to give an opportunity to Mascalzone Latino to submit a Response. Any party wishing to oppose this proposal was required to submit their reasons to the Jury by 8th February.

Competitors Response concerning a Mascalzone Latino Response

- [11] On 7th February, BMW Oracle submitted that it supported the proposal to give Mascalzone Latino an opportunity to submit a Response.
- [12] On 8th February, Luna Rossa also submitted that it was in favour of giving an opportunity for Mascalzone Latino to submit a Response.
- [13] Emirates Team New Zealand on 8th February also submitted that it was appropriate for Mascalzone Latino to respond.
- [14] K-Challenge as representative of Cercle de la Voile de Paris on 9th February provided a submission on question (i) only. This submission is taken into account in a later part of this Decision where the Jury answers this question.

Jury Decision concerning Mascalzone Latino's entitlement to respond

- [15] The Jury determined that Mascalzone Latino should be given an opportunity to submit a Response.

- [16] As in the Jury's first Decision (ACJ001, 4th June 2004), the Jury considered Mascalzone Latino to be a bona fide registrant with ACM pursuant to Article 3.4 of the Protocol.
- [17] In the circumstances of the Application, the Jury considered that Mascalzone Latino had a direct interest in the Application. With reference to clause 5.6 of the Rules of Procedure, the Jury considered that there were no material differences between making an Application and inviting a Response from a bona fide registrant which was still within the 29th April 2005 deadline of being entitled to challenge and become a Competitor. It was further considered to be in the interests of addressing the merits of the Application to allow Mascalzone Latino the opportunity to respond.
- [18] On 8th February the Jury advised Mascalzone Latino it had the opportunity to respond by 13th February.

Mascalzone Latino's timetable Response

- [19] On 9th February Mascalzone Latino advised that it wished to submit a Response, but due to previous travel and work commitments of its legal adviser it would not be able to submit a Response until after 13th February.
- [20] On 10th February the Jury re-scheduled the timetable in order to give all parties an opportunity to consider Mascalzone Latino's Response before filing their Response and set a new timetable of:
- 18th February for Mascalzone Latino to submit a Response;
 - 25th February for the other parties' Responses; and
 - 3rd March for El Reto's Reply.
- [21] On 11th February BMW Oracle advised that it wished to reserve the right to make a submission after Mascalzone Latino had made a submission.
- [22] The Jury advised that in accordance with the amended timetable, BMW Oracle was entitled to submit a Response by 25th February.

El Reto's Response to the amended timetable

- [23] On 11th February El Reto filed an Application for interim relief and submitted that the original timetable should be maintained.
- [24] The interim relief sought concerned the particular Designer, Mr Kaiko. Was El Reto required in the interim to suspend him from carrying out design work until the Jury's Decision had been received?
- [25] El Reto was concerned that further delays could mean that it may not be ready or not sufficiently ready for the 2005 Pre-Regattas. For these reasons, El Reto submitted that the original timetable set by the Jury on 27th January should be maintained.

Jury's Decision on El Reto's Application for interim relief and retention of original timetable.

- [26] On 17th February the Jury ruled that the interim relief sought by El Reto was not necessary to protect the Applicant from irreparable harm within the meaning of Rule 13.4

of the Rules of Procedure. In the Jury's view, El Reto could protect itself by spontaneously refraining from employing Mr Kaiko as a Designer.

- [27] The Jury also noted that El Reto in its Application on page 1 point 2c stated "El Reto and Mr Phil Kaiko have agreed that Mr Kaiko will not make any design work for El Reto while this procedure is pending".
- [28] The Jury ruled that the amended timetable set on 10th February referred to in paragraph [20] above would remain. It was recognised that time was of the essence for El Reto but in setting the timetable it was necessary to balance the needs of El Reto against giving a reasonable time for parties to respond and the need for the parties to consider any Response from Mascalzone Latino before submitting its own Response.

Mascalzone Latino's submission

- [29] On 18th February Mascalzone Latino on behalf of Real Yacht Club Canottieri Savoia filed a Response to the El Reto Application.
- [30] An order for confidentiality was sought concerning the presentation of certain documentary evidence relating to design information and correspondence pursuant to Rule 8.1 of the Rules of Procedure. Documentary evidence containing 26 exhibits was separately provided to the Jury by hard copy for consideration.
- [31] The Mascalzone Latino submissions were extensive. Mascalzone Latino submitted that it was a bona fide registrant with a significant and demonstrated direct interest in the Jury's ruling and that it was likely to become a Challenger within the Protocol deadline.
- [32] Mascalzone Latino provided submissions concerning its involvement with Mr Kaiko during the end of 2003 and 2004. It submitted that he had designed certain tank drawings, a section of the mast and provided input on the mast spreadsheets and participated in computational fluid dynamics (CFD) tests by the University of Florence who provided a report.
- [33] Mascalzone Latino referred to a number of invoices submitted by Mr Kaiko and paid by Mascalzone Latino.
- [34] Mascalzone Latino submitted that Mr Kaiko during his nearly one year with the team, did perform design work as defined in Article 1.1(1) of the Protocol and if Mr Kaiko had not "applied substantial intellectual creativity and judgement" in terms of such Article, he would have been in breach of his agreement with Mascalzone Latino which work it submitted, was consistent with the level of compensation that had been paid to him.
- [35] Mascalzone Latino also submitted that the declarations of Mr Kaiko and Mr Cutler attached to the El Reto Application were in total conflict with all of the documentary evidence it had submitted to the Jury, some of which was quoted as part of its submission.
- [36] Mascalzone Latino submitted that because Mr Kaiko had performed design work for Mascalzone Latino, if it became a Challenger within the 29th April Protocol deadline, then he was prohibited from having any involvement with other Competitors. If it did not become a Challenger by such deadline, it submitted that Mr Kaiko would then be free to work for El Reto or any other Competitor.

Jury's Decision on Mascalzone Latino's Application to keep certain evidence confidential

- [37] In ACJ001 the Jury noted that its intention is to be as open and transparent as possible. While a request to keep the name of an Applicant confidential would be considered on its merits, the granting of such a request would remain exceptional.
- [38] This Application for confidentiality concerned documentary evidence.
- [39] Many of the 26 exhibits attached to the submission of Mascalzone Latino in respect of which confidentiality was sought did, in the Jury's view, contain sensitive financial and technical information relating to the inner workings of Mascalzone Latino. Mascalzone Latino had in its Application and its submission which was made available to all parties, endeavoured by reference to extracts of the exhibits, to give a reasonable indication to all parties of the substance of the matters contained in the exhibits.
- [40] The Jury determined that in order to prevent a breach of confidence and as a matter of equity, and fairness pursuant to Article 8.1 of the Rules of Procedure an Order to keep the exhibits of Mascalzone Latino confidential would be granted.

Reply of El Reto

- [41] On 25th February, El Reto filed a substantial Reply together with an Application to maintain all evidence that it filed in support of its Reply to remain confidential.
- [42] El Reto submitted that with reference to the purpose of Articles 13.5 and 13.6 of the Protocol and as a matter of interpretation, a Competitor is entitled to employ a Designer who has previously been engaged by a potential challenger, irrespective of what the Designer has done for the potential challenger. It submitted the meaning of "Competitor" does not include "prospective Competitors".
- [43] El Reto submitted that the Jury has no jurisdiction over potential challengers and that it is not reasonable to argue that a prospective challenger has the same rights under the Protocol as an actual Challenger. El Reto also submitted that the Protocol is not applicable to potential challengers.
- [44] El Reto submitted on question (ii) that Mr Kaiko wrongly interpreted that the Protocol was applicable to Mascalzone Latino but he nevertheless made it clear he would not do any design work for Mascalzone Latino until Mr Kaiko had a final signed agreement .
- [45] El Reto also submitted that the work carried out by Mr Kaiko was not design work as defined by the Protocol and the work done for the tank and rig programme and on the mast section was not that of a Designer as defined.
- [46] El Reto submitted that as technical knowledge was necessary to evaluate the work carried out by Mr Kaiko, it requested the Jury take the advice of the Technical Director.
- [47] It was submitted that Mascalzone Latino had no rights to file a Response and its Response and evidence should be rejected and not taken into consideration.

Jury's Decision to refer the technical evidence to the Technical Director and El Reto's request to keep certain evidence confidential

- [48] On 27th February, the Jury advised all parties on the Service Address List that it proposed to send all technical evidence submitted by El Reto and Mascalzone Latino to

the Technical Director of the 32nd America's Cup with the requirement that the Technical Director maintain confidentiality and provide a report to the Jury.

- [49] El Reto and Mascalzone Latino were directed to advise the Jury by 2nd March as to whether they supported this proposal and if they did not, to provide reasons.
- [50] El Reto and Mascalzone Latino advised that they supported the Jury's proposal. Accordingly, on 2nd March the Jury ruled that the technical evidence presented by El Reto and Mascalzone Latino be submitted by them to the Technical Director, Mr McAlpine by 5th March.
- [51] On the same basis and reasoning that the Jury had ruled that the Mascalzone Latino exhibits be kept confidential as referred to in paragraph [40] of this Decision, the Jury ruled that the El Reto exhibits (five affidavits and annexes) also be kept confidential pursuant to Rule 8.1 of the Rules of Procedure.

Mascalzone Latino's request for the basis upon which technical evidence filed by El Reto was made

- [52] On 4th March, Mascalzone Latino pursuant to Rules 5 and 6 of the Rules of Procedure requested to be informed of the grounds that entitled El Reto to file the technical evidence that it included in its Response of 25th February.
- [53] Mascalzone Latino submitted that there was no ground for filing the technical evidence in the Application provided that El Reto argued that Mr Kaiko has not done any design work for Mascalzone Latino.
- [54] The Jury did not formally respond to this request as the respective Responses from El Reto and Mascalzone Latino and the technical information either had been or were in the course of being separately provided to the Technical Director. If the matter became material, the Jury would address it at the appropriate time. In any event, the technical evidence was to be considered as a part of the evidence.

Mascalzone Latino's request for the right to reply to El Reto's Reply of 25th February

- [55] As Mascalzone Latino was not on the Service Address List, it did not officially receive at the same time as the other parties a copy of the El Reto submission of 25th February.
- [56] On 9th March, Mascalzone Latino was accepted as a Challenger for the 32nd America's Cup and as such became a Competitor as defined in the Protocol.
- [57] On 12th March, Mascalzone Latino submitted that it wished to have the opportunity to reply to El Reto's submission of 25th February.
- [58] On 13th March the Jury formally provided to Mascalzone Latino, a copy of El Reto's Reply of 25th February.

Technical Director's report

- [59] The written report of the Technical Director dated 11th March concerning the technical evidence was released to the Jury on 13th March.
- [60] The Technical Director's report included consideration of the Mascalzone Latino submissions together with the 26 exhibits which the Jury had accepted as being

confidential. It also included consideration of El Reto's submissions together with the 5 exhibits from El Reto which the Jury had also accepted as being confidential.

[61] Both El Reto and Mascalzone Latino advised they wished to receive a copy of the Technical Directors report.

Jury's Decision on Mascalzone Latino's request to respond to El Reto's Reply and release of the Technical Directors report

[62] On 16th March, after prior discussion El Reto and Mascalzone Latino both agreed that the Technical Director's report could be released to them. It was accepted that such report contained references to confidential information from each of them and it was accordingly released to El Reto and Mascalzone Latino.

[63] For confidentiality reasons, the report was not released to other parties on the Service Address List.

[64] El Reto and Mascalzone Latino were invited to provide a Response to the Technical Director's report by 17th March.

[65] The Jury ruled that in the special circumstances of this case, Mascalzone Latino would also be given an opportunity to respond to El Reto's reply of 25th February by 17th March.

Mascalzone Latino's Response

[66] On 17th March, Mascalzone Latino filed a Reply to El Reto's submission of 25th February, together with a Response to the Technical Director's report of 11th March.

[67] Mascalzone Latino also requested that further evidence that was to be provided separately be kept as confidential pursuant to Rule 8.1 of the Rules of Procedure.

[68] The Mascalzone Latino submission was provided only to the Jury and El Reto.

El Reto's submission

[69] On 17th March, El Reto submitted its Response to the Technical Director's report of 11th March.

[70] El Reto also sought confidentiality in respect of 3 new affidavits.

[71] The El Reto submission (but not the 3 affidavits) was provided to Mascalzone Latino and all parties on the Service Address List.

[72] El Reto submitted that with reference to the Technical Director's report and the affidavit evidence, there was no evidence that Mr Kaiko was a Designer in terms of Articles 13.5 and 13.6 of the Protocol.

Further Mascalzone Latino request for directions

[73] On 23rd March, Mascalzone Latino advised the Jury that Mr Kaiko had been contacting certain Mascalzone Latino witnesses and asking them questions. Mascalzone Latino objected to this as it did not believe it was legitimate or procedurally correct.

[74] Mascalzone Latino requested procedural directions including directions that Mr Kaiko refrain from contacting its witnesses.

Jury's Response to Mascalzone Latino's request for direction

- [75] On 27th March, the Jury advised Mascalzone Latino that it did not support its assertion that it would be improper for Mr Kaiko, or for that matter, El Reto to contact any willing witnesses.
- [76] The Jury ruled that any party would be entitled to approach any willing witness to obtain evidence that might assist the Jury in making its Decision.
- [77] The Jury accepted that the deadline for making submissions had passed. In the event that a party wished to submit additional evidence, it would hence be required to make an Application to the Jury.

New evidence Application by El Reto

- [78] On 29th March, El Reto submitted an Application to the Jury requesting the right to provide new evidence.
- [79] The new evidence concerned Mr Kaiko and the work that had been done on mast shapes with the University of Florence.
- [80] El Reto also requested the right to file a new Reply to Mascalzone Latino's Response dated 17th March.
- [81] El Reto also requested advice on the next procedural steps and when a Decision could be expected. El Reto submitted that although it believed a hearing was not necessary, it would not oppose a hearing if the Jury considered it necessary.

Jury Decision – Jury Notice JN007

- [82] On 4th April, the Jury issued Jury Notice JN007.
- [83] In such Jury Notice, the Jury noted the significant number of submissions and witness statements that had been filed by El Reto and Mascalzone Latino. El Reto had also requested to present new evidence and to file a further Reply. The Jury noted its concern at the amount of time that resolution of the application and delivery of a Decision by the Jury was taking.
- [84] The Jury advised that it would immediately answer question (i) submitted in the El Reto Application and would require an oral hearing in order to answer question (ii).
- [85] In answer to the questions submitted by El Reto:

(i) Is a Competitor permitted to employ a designer who has previously been engaged by a potential challenger, without restriction on what the designer has done for the potential challenger?

Answer:

No. The Competitor is prohibited by Protocol 13.5 from engaging a Designer as defined by 1.1(I) of the Protocol, provided that the potential challenger becomes a Competitor. If the potential challenger does not become a Competitor, there is no restriction.

The Application continues...

Only in the event that the answer to (i) is no:

(ii) Is El Reto able to continue its engagement with Mr Kaiko as designer?

Answer:

Having considered the Responses and submissions received from a number of parties including in particular a considerable number of affidavits presented by El Reto, and Mascalzone Latino, the Jury has decided under Rules of Procedure 6.3 that a hearing is necessary to resolve this issue.

- [86] The Jury advised in JN007 that the cost of the hearing could exceed €50,000 which may be awarded at the conclusion of a hearing as the Jury considered just and equitable pursuant to Article 21.3 of the Protocol.
- [87] El Reto was given the opportunity to withdraw question (ii) in which case no hearing would be necessary. El Reto was required to advise the Jury by 5th April of any such withdrawal of question (ii).
- [88] Initial directions were given in JN007 should a hearing proceed including witnesses being limited to those persons who had already submitted affidavits. El Reto was also given the opportunity to present an affidavit from Professor Arnone from the University of Florence.

El Reto's request for additional time

- [89] On 6th April, El Reto requested an extension from 5th April to 11th April to make a Decision as to whether to withdraw question (ii).
- [90] El Reto advised that the content of Jury Notice JN007 was unexpected and that El Reto needed to discuss the matter at its next Executive Committee meeting to be held on 7th April.

Jury's Response to El Reto's request for additional time

- [91] On 6th April, the Jury advised that the time by which El Reto could decide to withdraw question (ii) was extended to 8th April.

El Reto's Decision on continuing with question (ii)

- [92] On 8th April, El Reto advised that it wished to maintain question (ii) and filed an Application to amend its original Application and ask three amended questions, to submit new evidence and obtain a further report from the Technical Director.

Jury's Response to El Reto's Application to amend question (ii) and submit new evidence

- [93] On 12th April the Jury issued Jury Notice JN008, which declined El Reto's Application to amend its Application and to submit new evidence.

- [94] Jury Notice JN008 provided:

"In response to Jury Notice JN007 of 8th April, and pursuant to Rule 6.6 of the Jury Rules of Procedure, El Reto has made an Application to amend its original Application by asking three questions and applying to submit new evidence.

The Application to amend is considered by the Jury to be asking three new questions relating to the existing evidence rather than requesting an amendment to the application as is envisaged by Rule 6.6.

The Jury considers that even if it were to permit the Application to amend, an oral hearing would still be required to enable the substantive evidential issues that have been raised to be properly addressed.

The justification submitted by El Reto in support of its Application to amend, is the need to obtain an answer from the Jury in a timeframe in which the possibility of Mr Kaiko being retained by El Reto can occur.

The Jury has already expressed concerns in Jury Notice JN007 about the amount of time this matter has taken. If this Application to amend were to be permitted, it would require the opportunity for other parties to respond, and for El Reto to reply to those responses. The Jury considers that further delays in answering this Application to amend are not acceptable.

The Jury therefore declines the Application to amend.”

El Reto’s request concerning hearing issues

[95] On 18th April El Reto submitted an Application concerning the hearing.

[96] The El Reto Application included a request to:-

- receive a new statement by way of a letter from Professor Arnone;
- dispense with the requirement of Mr Perry and Mr Vogel being present at the hearing;
- to include the declaration of the Technical Director and have him present at the hearing;
- to order that the hearing be held in private and that the only parties entitled to attend are El Reto and Mascalzone Latino.

Jury Notice JN011

[97] On 19th April the Jury issued Jury Notice JN011.

[98] Jury Notice JN011 provided procedural directions in respect of the hearing and answered the key points contained in El Reto’s submission of 18th April.

[99] Jury Notice JN011 provided:

- “1. Pursuant to Article 9.2 of the RoP, the Jury orders that the hearing be held in the presence of the representatives of El Reto and Mascalzone Latino (“ML”) (hereinafter the Parties).
2. Each Competitor, the Race Committee, the Measurement Committee and the Event Authority (ACM) may appoint two observers (Article 9.1). These parties if they wish to do so, may present a closing statement in accordance with the time allocation to be set by the Jury. If the parties wish to be heard beyond a closing statement, on or before 25 April they will submit such request to the Jury, indicating the reasons for such a request and the scope and time required. An observer authorised by the Jury representing the America’s Cup Press office will also be permitted to be present. The Technical Director will be present at the hearing.
3. The Jury may order that parts of the hearing shall be held in private and the Jury may enforce conditions (Article 9.2). Orders of confidentiality of some evidence have already been granted by the Jury (Article 8.1).

4. *The hearing will commence on 2 May in London. The premises location will be separately advised. It will start at 09h00 UT and will end no later than 3 May, 12h00 UT.*
5. *The scope of the evidentiary hearing will be limited to the following issue: Did Mr. Kaiko apply substantial intellectual creativity and judgment to the determination of the shape or structure of ML's hull, deck, cockpit, mast tube, geometry of the mast rigging, appendages or sails.*
6. *On or before 25 April, each party shall submit a list of their witnesses indicating the scope of their testimony and the specific part of Mr. Kaiko's work for ML, addressed in their testimony.*
7. *As directed in JN007, the witnesses shall be limited to those persons who have already submitted affidavits. Witnesses shall not be required to appear where the other party has waived cross-examination and the Jury does not direct such witness to appear.*
8. *El Reto pursuant to JN007 remain entitled to present an affidavit from Professor Arnone. A letter sent directly from Professor Arnone to the Jury Chairman will not be accepted. Any such affidavit or letter is required to be submitted through either of the Parties and a copy sent to the other party on or before 25 April. If evidence is to be submitted from Professor Arnone, the provisions of no. 12 below shall apply.*
9. *On or before 27 April the Parties shall indicate the approximate time they will need to examine, respectively cross-examine, each witness, bearing in mind that direct examination will be limited as specified in no 14 below.*
10. *Each party will have time allocated by the Jury to it. Each party shall be responsible for organizing and managing the time allocated to it, being as specified by the Jury who will retain control over the hearing. The Jury will monitor the use of the allocated time.*
11. *On April 29, the Chairman of the Jury, by delegation of all members of the Jury, will hold a telephone conference with the representatives of the parties to discuss any outstanding matters with respect to the organization of the hearing, including the time allocation.*
12. *Each of the Parties shall be responsible for summoning its own witnesses to appear, except where the other party has waived cross-examination of a witness and the Jury does not direct such witness to appear.*
13. *Each party shall advance the costs of appearance of its own witnesses. The Jury may decide upon the appropriate allocation of such costs in the decision.*
14. *The examination of each witness shall proceed as follows:*
 - a. *the party summoning the witness may briefly examine the witness, if it is considered necessary to complete the witness statement or to explain previous statements made by a witness;*
 - b. *the adverse party may then cross-examine the witness;*
 - c. *the party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination; and*
 - d. *the Jury may examine the witness at any time, either before, during or after examination by one of the Parties.*
15. *Following the witness examination, the Parties may present a closing statement.*

16. *The Jury may, at any time, give such directions as it deems best to facilitate the hearing (Article 12 RoP) and shall, at all times, have complete control over the procedure. The Jury, as a matter of discretion, may:*
 - a. *refuse to hear a witness if the Jury considers that the facts with respect to which the witness shall testify are either proven by other evidence or are irrelevant;*
 - b. *limit or refuse the right of a party to examine a witness if the Jury considers that a question has been addressed by other evidence or is irrelevant; or*
 - c. *direct that a witness be recalled for further examination at any time;*
 - d. *adapt the Parties' time allocation.*
17. *It shall not be improper for counsel, with or without party representatives, to meet with witnesses and potential witnesses for the purpose of establishing the facts relevant to the hearing, preparing witness statements and preparing for hearings.*
18. *Each of the Parties shall arrange for their own witnesses interpretation of testimony that is not provided in English. They shall each advance their own costs thereof."*

Mascalzone Latino's submission on procedural issues related to the hearing

[100] On 25th April Mascalzone Latino filed a submission on procedural issues for the hearing.

[101] The submission included a request that the El Reto evidence that had been kept confidential be made available to Mascalzone Latino for the hearing and with some limited exceptions the Mascalzone Latino evidence that had also been kept confidential be made available to El Reto.

[102] Mascalzone Latino submitted that in order to be able to fully and properly conduct an examination and cross-examination of witnesses, it was not appropriate to maintain confidentiality of the substantive contents of the El Reto evidence, with some possible limited exceptions.

[103] Mascalzone Latino requested advice on what new evidence had been filed by El Reto on 5th April.

[104] They also identified what witnesses Mascalzone Latino would include at the hearing and on what matters they would testify.

El Reto's submission on procedural issues relating to the hearing

[105] On 25th April El Reto submitted a Response to JN011.

[106] El Reto identified its witnesses for the hearing and the evidence they proposed to give.

[107] El Reto opposed the request from Mascalzone Latino to release confidentiality in respect of the affidavits filed by Mr Kaiko, Mr Cutler and Mr Whittaker.

[108] El Reto submitted that the affidavits of Mr Perry and Mr Vogel could be released from the current confidentiality requirement in respect of Mascalzone Latino only. It also submitted that if Mascalzone Latino did not withdraw their requirement to make these witnesses available for cross-examination they would withdraw their affidavits as they did not consider they were essential for the hearing and the cost of them attending the hearing could not be justified.

[109] El Reto submitted a written declaration through the Jury Chairman from Professor Arnone and Doctor Schneider dated 24th April 2005.

Mascalzone Latino's Response to the El Reto submissions on procedural issues

[110] On 26th April Mascalzone Latino submitted a Response to the El Reto submissions of 25th April.

[111] Mascalzone Latino confirmed its 25th April submission. It considered it should have access to El Reto's confidential affidavits and that there should be disclosure of the confidential evidence.

Jury Notice JN012

[112] On 27th April the Jury issued Jury Notice JN012 in Response to the Mascalzone Latino and El Reto submissions on procedural hearing issues.

[113] Jury Notice JN012 provided:

- “1. *In response to Jury Notice JN011 El Reto and Mascalzone Latino have each provided submissions dated 25 April on procedural issues in respect of the hearing to be held on 2/3 May 2005. The submissions included advice of their respective witnesses and requests for disclosure of evidence that has to date remained confidential to the party filing the evidence, the Jury and the Technical Director.*
2. *Mascalzone Latino filed a further response to the submission of El Reto dated 25 April on 26 April.*
3. *In response to such submissions and pursuant to the Rules of Procedure the Jury provides the following directions.*

Procedural directions

4. *El Reto's request that the hearing be held in private because of the technical issues and the amount of commercial information that could arise from the witnesses' declarations has already been addressed in paragraph 3 of JN011.*
5. *Each of El Reto and Mascalzone ("ML") (hereinafter "the Parties") shall prepare a bundle of all their as filed submissions, affidavits, witness statements or declarations and numbered documents. Such bundle shall include all of the 26 exhibits provided as a part of the ML submissions of 18 February, the five affidavit exhibits provided with the El Reto reply of 25 February and the new evidence referred to in the El Reto response of 5 April. The Parties shall exchange these bundles by 28 April 2005 to ensure they are available prior to the conference call on 29 April. Five hard copies of the bundles shall also be prepared for use by members of the Jury and made available to them at the commencement of the hearing. The bundles are not to be forwarded to any other Competitor or to the observers at the hearing. The existing orders for confidentiality (RoP 8.1) shall otherwise continue to apply.*
6. *These bundles shall be provided for the exclusive purpose of this ACJ003 and on the specific basis and undertaking (which shall be deemed to have been accepted and given by the Parties by receiving such respective bundles) that they will not be used in any other legal proceeding before any jurisdiction, other than the Jury (including a state court or tribunal).*
7. *The Jury notes that Mr Arnone's and Mr Schneider's additional declaration following the directions contained in JN007 and JN011 has been provided to El Reto.*

8. *The Jury notes that Mr Vincenzo Onorato, Mr Tom Weaver, Mr Silvio Arrivabene, Mr Andrea Arnone and Mr Andrea Schneider will be able to appear in person on behalf of ML.*
9. *The Jury notes that Mr Phil Kaiko, Mr John Cutler and Mr Richard Whittaker will give oral evidence at the hearing on behalf of El Reto.*
10. *The Jury acknowledge El Reto's intention to withdraw Mr Aaron Perry and Mr Scott Vogel's affidavits if ML should not waive cross-examination. ML shall by no later than 30 April advise El Reto and the Jury as to whether they have waived the right to cross-examine these two individuals. If ML does waive the right to cross-examine these witnesses the Jury will not require them to appear (RoP 11.4).*
11. *The Jury accepts ML's request that Mr Dunning will be available for cross-examination by phone conference (RoP 11.3).*
12. *The Jury acknowledges the Parties agreement that the order of witnesses should take into consideration that Mr Onorato and Mr Arnone have to leave in the afternoon of 2 May and the Jury will facilitate this request.*
13. *In the event that a witness due to be cross-examined does not participate to the hearing, the Jury will assess his witness statement according to the Jury's power of assessment of the evidence taking into account all the relevant circumstances, including the fact that the witness was not heard.*
14. *Any other procedural matter will be dealt with exclusively during the telephone conference with the Parties referred to in JN011, which is to be held on Friday, 29 April at 11h00 BST (10h00UT). This will include the order of witnesses and an indication by the Parties of the time they will need to examine and cross-examine each witness as referred to in paragraph 9 of JN011.*

Telephone Conference Directions

[114] A telephone conference was held by the Jury Chairman on 29th April with Counsel from El Reto and Mascalzone Latino. The order of appearance of witnesses and other procedural matters for the hearing was agreed.

Hearing

[115] An oral hearing was held at the Royal Thames Yacht Club, Knightsbridge, London on the 2nd and 3rd of May.

[116] The question to which the hearing was devoted was; "is El Reto able to continue its engagement with Phil Kaiko as designer?"

[117] The Jury advised that it interpreted this question to mean, is El Reto in breach of Protocol 13.5 by employing Phil Kaiko, having regard to whether Phil Kaiko was a Designer for Mascalzone Latino as defined by Protocol 1.1(1) as interpreted in Jury Decision number ACJ001. The hearing proceeded on this basis.

[118] The Jury noted that the issue to be decided was did Phil Kaiko apply substantial intellectual creativity and judgement to the determination of the shape or structure of Mascalzone Latino's hull, cockpit, mast tube, geometry of the mast rigging, appendages or sails.

[119] The Jury noted that in keeping with the Jury's policy of transparency, recognising John Cutler was to be a witness, one of the members of the Jury Henry Menin and John Cutler are co-author's of a CD about match racing.

Counsel at the Hearing

[120] Jose Maria Barnat Altes represented El Reto. Alessandra Pandarese and Adam Lewis represented Mascalzone Latino.

Observers

[121] Observers present were Hamish Ross (Alinghi), Richard Slater (BMW Oracle), Luis Saenz (Luna Rossa), Bruno Castellini (+39) and Dyer Jones (Regatta Director). In addition Peter Rusch of the AC Press Office was present. Ken McAlpine, the AC Technical Director was also present as an independent expert witness.

[122] Although in terms of JN012, El Reto and Mascalzone Latino had been required to exchange all evidence, including evidence that had been claimed as confidential, the Hearing proceeded on the basis that the existing orders for confidentiality (RoP 8.1) would otherwise continue to apply.

Witnesses

[123] On behalf of El Reto oral evidence was given by Phil Kaiko, John Cutler and Richard Whittaker. On behalf of Mascalzone Latino evidence was given by Vincenzo Onorato, Professor Andrea Arnone, Doctor Andrea Schneider, Sylvio Arrivabene and Harry Dunning (by telephone conference).

[124] Mr McAlpine gave evidence and addressed his report of 11th March and was made available for cross-examination. Mr Ross provided some closing comments on the intent and purpose of the Protocol provisions. All Competitors representatives who were present were given the opportunity to make closing comments if they wished, but except for Mr Ross none chose to do so.

[125] At the conclusion of the hearing, the jury noted that at no time did any participant object to the conduct of the proceedings.

Decision

Relevant provisions and definitions

[126] Article 13.5 of the Protocol provides -

Designers restricted to work for one Competitor: Subject to the other provisions of this Article 13, each Competitor shall engage separate and Independent Designers, who have had no involvement with any other Competitor's program for this Event, to develop an ACC Yacht's Hull, deck, cockpit, mast tube, geometry of the mast rigging, appendages or sails (excluding battens and sail hardware), or those same components of any other yacht capable of being measured as an ACC Yacht without significant modification. Working for the same Competitor as in the 31st America's Cup for a period of up to 90 days after the last race of the 31st America's Cup match (2 March 2003) shall not constitute working for a Competitor.

[127] Article 13.6 of the Protocol provides –

Design information and equipment not to be shared: Subject to the other provisions of this Article 13, Competitors, including through the assistance of third parties, shall not share or exchange ACC design or performance information or equipment except hardware (not being Hulls, decks, cockpits, mast tubes, appendages or sails) which is available for purchase by all Competitors on similar terms. This restriction shall not apply to design and performance information which may be gleaned without assistance from the other person or entity in formal or informal or head to head competition or otherwise as permitted in this Protocol. Nothing in this Article shall prevent a supplier to two or more Competitors disclosing improved construction methods or technology developed solely by the supplier, provided the designs, methods or technology developed by the Competitors are not disclosed or exchanged.

[128] Article 1.1(l) of the Interpretation section of the Protocol defines Designer as –

Designer means a person who applies substantial intellectual creativity and judgement to the determination of the shape or structure of the following: a yacht's hull, deck, cockpit, mast tube, geometry of the mast rigging, appendages or sails (excluding battens and sail hardware). For the avoidance of doubt, designer does not mean a person who designs any component other than those listed above, or who develops, modifies, operates, analyses the results of, or produces instructions for the use of any design tool, or resource including but not limited to computer software or hardware, tow tanks or wind tunnels or any other testing facility.

[129] Article 1.3 of the Protocol provides . . . "the meaning of any word used in this Protocol and any document governing the Event, unless defined in article 1.1, shall be determined by reference to the Oxford English Dictionary, Second Edition (1989) – CD Rom Version 3.0 (Oxford University Press 2002) or any latter published version."

[130] With reference to the definition of Designer contained in article 1.1(l) of the Protocol the current published version of the Concise Oxford English Dictionary provides the following definitions –

"Applies, applied – (inter alia) bring into operation or use or put all one's efforts into a task".

"Create" – bring into existence.

"Creative" – relating to or involving the use of imagination or original ideas in order to create something.

"Intellectual" – of, relating to, or appealing to the intellect. Having a highly developed intellect.

"Substantial" – of considerable importance, size, or worth.

"Judgement" – the ability to make considered decisions or form sensible opinions.

Tank rudder details, tank bulb details and tank fin details

[131] Evidence provided by El Reto and Mascalzone Latino included drawings from Mr Kaiko in respect of tank rudder, bulb and fin details. Evidence was presented to the Jury that the drawings concerned generic appendages.

[132] There was no substantive evidence before the Jury that tank testing drawings of hulls or hulls themselves had been produced.

[133] For the reasons set out in the Technical Director's report of 11th March, the Jury was satisfied that on the evidence presented, the work carried out by Mr Kaiko in respect of the tank test appendages rudder, tank bulb, fin etc and related accessories did constitute design work, but fell within the exceptions of Article 1.1(I) of the Protocol because they were design tools for tow tanks and therefore not Design as defined.

Base mast section

[134] Evidence was given that Mr Kaiko supplied a base mast section to the University of Florence for a testing programme. Mr Kaiko in evidence stated that such base mast section came from his work in a previous Americas Cup campaign and as such was an old rather than a new section.

[135] The University of Florence also held a base section of an old mast. The two base sections were computer analysed in different wind conditions and a discussion of the results followed.

[136] Professor Arnone and Doctor Schneider led the University of Florence work and gave evidence at the hearing. During the course of such evidence, Doctor Schneider advised that there had been an exchange of a number of emails with Mr Kaiko and Mr Cutler during October and November 2004. All except one of such emails had not been included in any of the documentary evidence signed by Mr Kaiko and Mr Cutler on behalf of El Reto. Copies of some emails, which discussed the exploration of possible outcomes of the University of Florence mast testing work had been excluded. The Jury considered such emails to be material and relevant. Mr Kaiko had also in his affidavit of 24th January 2005, supporting the El Reto Application, made no reference to his mast section work.

[137] The Jury views with significant concern the lack of full disclosure of all material and relevant evidence. While on their own the additional emails that emerged at the hearing were not necessarily determinative of the outcome, they represented material evidence that should have been disclosed. Such non-disclosure gives rise to the implication that Mr Kaiko and/or Mr Cutler were concerned that if they had included such evidence, it would not support their position.

[138] The emails from Mr Kaiko to Doctor Schneider and copied to Mr Cutler included a discussion of three alternatives for improvement of the performance of the masts, with the identification of one of those alternatives followed by an email from Mr Kaiko that he could "produce some new geometries", but not for several days. Mr Kaiko also noted the results from the tests were "interesting" and that he regarded certain of the findings as "important". Mr Kaiko in his evidence when cross-examined about such emails acknowledged that if he had produced such new geometries, in his view he would have become a Designer as defined in the Protocol.

[139] Evidence before the Jury was to the effect that Mr Kaiko had commenced his relationship with Mascalzone Latino on the basis that he would not do Design work in terms of the Protocol until he had a written contract, but following a meeting with the Mascalzone Latino team principal Mr Onorato in July, there was conflicting evidence that such qualification continued. The evidence is clear, however that after the July meeting work levels stepped up to the extent that Mr Kaiko claimed in emails that he had been working "flat out" and "12 hours a day" and Mr Cutler had separately commented in an email that Mr Kaiko had been working "full speed for 31 days". There was also evidence before the Jury that an additional agreed monthly retainer payment that was paid to Mr Kaiko moved to include both a retainer and substantial additional payments for work that was carried out. Such additional payments had been described by Mr Kaiko in an invoice as payment for "design services" There was no doubt Mascalzone Latino believed that from

July, Mr Kaiko was performing Design work for them as defined . Following the July meeting with Mr Onorato, Mr Kaiko submitted the old mast section for testing and comparison and engaged in discussions with Professor Arnone and Dr Schneider concerning the outcome of those tests, in addition to making suggestions for changes to the shape of the masts to improve their performance.

[140] El Reto in effect maintained that in order for Mr Kaiko to satisfy the application of substantial intellectual creativity and judgement test contained in the Protocol, he was required to provide actual delivery of the outcomes of his work before he could become a Designer as defined.

[141] The Jury considers that the application of substantial intellectual creativity and judgement, can occur without requiring there to be a physical or a material product such as a drawing or construction of an actual hull, mast, etc. The important issue is whether substantial intellectual creativity and judgement was applied. Such words describe an abstract mental process. A Designer who creates a shape for a hull, mast, appendage, etc. in his mind has applied substantial intellectual creativity and judgment in terms of the Protocol. When he communicates that idea to another, whether in a physical form or orally there is then evidence of the application of such substantial intellectual creativity and judgment.

[142] The Jury interprets Article 13.5 of the Protocol to include the words “as a Designer” i.e.:

Designers restricted to work for one Competitor: Subject to the other provisions of this Article 13, each Competitor shall engage separate and Independent Designers, who have had no involvement [as a Designer] with any other Competitor’s program for this Event, to develop an ACC Yacht’s Hull, deck, cockpit, mast tube, geometry of the mast rigging, appendages or sails (excluding battens and sail hardware), or those same components of any other yacht capable of being measured as an ACC Yacht without significant modification.

[143] In the Jury’s opinion the Protocol does not require the Jury to decide the benefit or efficacy of the particular work that has been carried out in order to be satisfied that substantial intellectual creativity and judgement has been applied. Provided such application has occurred that is sufficient to meet the Designer criteria defined in the Protocol. It does not require geometric calculations, physical drawings to be prepared or other physical evidence to support the application of substantial creative intellect or judgement. If the mental process can be shown to have taken place that is sufficient.

[144] In the Jury’s opinion once a person chooses to work in and become a part of a Americas Cup Yacht design team, they are then immediately placing themselves in a position whereby there is a real likelihood they will come within the definition of Designer.

[145] The Jury is satisfied that on the evidence before it that Mr Kaiko did apply substantial intellectual creativity and judgement in respect of the work carried out by him to determine the shape or structure of the mast tube. Such application occurred as a result of his continuing work including such matters as analysing the outcome of the results from the University of Florence and contributing in a substantive way to optimising the ideal shape for a mast tube.

[146] The Jury is satisfied that on the evidence before it, when it first engaged Mr Kaiko in its team, El Reto was initially unaware of the matters that became the subject of the Application. Notwithstanding its decision, the Jury is satisfied that El Reto’s actions were not improper.

[147] As advised in Jury notice JN013, which notice provided a transcript of the oral summary of the Decision delivered on 3rd May, the Jury is satisfied that while engaged by Mascalzone Latino, Mr Kaiko was a Designer as defined by Protocol 1.1(l) and the interpretation by the Jury in its Decision ACJ001. As a consequence, El Reto is prohibited by Protocol Article 13.5 from employing Phil Kaiko as a Designer. The answer to El Reto's question (ii) is "no".

Costs

[148] Jury Notice JN013 invited submissions on the award of costs by 13th May.

[149] Submissions were received from Alinghi, AC Management Limited ("ACM"), El Reto, Mascalzone Latino and the Challenger Commission.

[150] ACM submitted that with regard to question (i), the majority of the costs and expenses should be borne by El Reto. With regard to question (ii) ACM submitted that all costs and expenses associated with answering this question should be borne entirely and exclusively by El Reto. ACM noted that all Jury costs and expenses paid by them as the Event Authority as defined in the Protocol, will be deducted from the Net Surplus Revenue ultimately distributed to all Competitors (pursuant to Article 4.3(a) and (b) of the Protocol) and it would not be fair or equitable, that costs and expenses of matters before the Jury that have no universal application or benefit to other Competitors be paid by ACM.

[151] Alinghi submitted that it supported and endorsed the Jury's draft paper of 14th February 2005 titled "Jury Guidelines for the Award of Costs". Alinghi submitted that all of the Jury's costs and expenses arising from a hearing should be borne by one of the parties to that hearing and unless there are exceptional circumstances, should be borne by the unsuccessful party. Alinghi acknowledged that there is often some benefit conferred on all Competitors in having the Jury's guidance on issues, but the value of such benefit will vary. Alinghi considered that it was difficult to conceive of a situation that would justify all Competitors bearing part or all of the costs of a hearing.

[152] El Reto submitted that the answer to the questions contained in the El Reto Application are for the benefit of all Competitors and that the costs should be met by ACM as the Event Authority. El Reto further submitted that if this approach was not accepted, as Mascalzone Latino will benefit from the outcome of the Decision, they should meet part of the costs.

[153] The Challenger Commission submission was presented on the basis that it represented the views of all Challengers. In terms of the Protocol, the Challenger Commission does not appear to be entitled to file such a submission at this point in the Application. Nevertheless, it could effectively have been submitted through any of the Competitors. It was in fact filed through the address of Luna Rossa which is a Competitor. The Challenger Commission submitted that the principles set out in their earlier submission concerning the Jury's draft "Jury Guidelines for the Award of Costs" dated 14th February 2005 should be applied in both this case and all Jury cases. The Challenger Commission submission drew a distinction between 'General Costs' which should be met by the Event Authority and 'Special Costs' that should be met by a particular Competitor. The Challenger Commission submitted the exception to Special Costs being met by the Competitor should be where the Jury considers that its Decision was of universal application or for the benefit of a significant number of Competitors, or the event.

[154] Mascalzone Latino followed the same costs distinction descriptions referred to in the Challenger Commission submission. Mascalzone Latino submitted that all Special Costs should be met by El Reto with regard to both question (i) and (ii). It also submitted that

should the Jury consider question (i) to have a universal application or be for the benefit of a significant number of Competitors or the event, the costs of question (i) should be included as General Costs and met by ACM with any minimal costs awarded, met by El Reto.

[155] The total costs and expenses of the Jury with regard to the El Reto Application including the hearing are approximately €180000. The Jury apportions such costs and expenses as to the sum of €54000 in answering question (i) including all matters addressed in and up until the time of Jury Notice JN007 and €126000 in answering question (ii) following JN007.

[156] Pursuant to Article 21.3 of the Protocol, “the Jury shall award costs to be paid by one or more parties to any Application or any other Competitor the Jury considers just and equitable”. Rule 14 of the Rules of Procedure provides “all matters before the Jury are subject to an order for costs”.

In determining what it considers just and equitable, the Jury takes into account all the circumstances of the case, including the outcome of the proceedings, the procedural conduct of the parties and the degree to which its Decision will benefit other Competitors. More generally, the Jury considers that by keeping disputes outside of the Courts, the Jury’s activity contributes in any event to the purpose and intent of the Protocol, which is “to promote a competitive sporting regatta for all Competitors, to realise the sporting and commercial potential of the America’s Cup and to encourage world-wide growth and interest in the America’s Cup as the premier event in the sport of sailing, consistent with the provisions of the Deed of Gift” (Article 2 of the Protocol).

[157] With reference to the draft, “Jury guidelines for the Award of Costs” the Jury considers that answering question (i) was of wider benefit and was of universal application for the benefit of a significant number of Competitors. Moreover, the wording of the Protocol could raise some legitimate doubts as to the correct answer to question (i). With regard to question (i), costs are awarded of €27000 to be paid by El Reto to ACM within thirty days of the date of this Decision.

[158] The Jury answered question (i) in Jury Notice JN007 dated 3rd April. JN007 advised that a hearing would be necessary to answer question (ii) and that the costs of the hearing could exceed €50000. El Reto were given the opportunity to withdraw question (ii). They chose not to do so and a hearing was accordingly held. El Reto’s approach to its Application included resisting Mascalzone Latino’s inclusion and the exchange of evidence and the submitting of allegedly ‘new’ evidence at a late stage of the proceeding. El Reto’s procedural conduct also resulted in significant time being required to address the procedural points raised.

[159] The Jury considers that in answering question (ii), there is an element of universal application and it is of benefit to Competitors with regard to the practical application of the definition of Designer in Article 1.1(l) of the Protocol. With reference to El Reto being given the opportunity to withdraw their Application after question (i) was answered and its procedural approach, the Jury considers it just and equitable that a substantial portion of the Jury’s costs and expenses should be met by El Reto. The Jury awards costs of €107000 to be paid by El Reto to ACM within thirty days of the date of this Decision.

[160] The net effect of the Jury’s orders on costs is that a total of €134000 costs and expenses are to be paid by El Reto with the balance being met by ACM.

Ruling Summary

[161] The answers to the two questions submitted by El Reto are:

Question (i):

“(i) Is a Competitor permitted to employ a designer who has previously been engaged by a potential challenger, without restriction on what the designer has done for the potential challenger?”

Answer:

No. The Competitor is prohibited by Protocol 13.5 from engaging a Designer as defined by 1.1(l) of the protocol, provided that the potential challenger becomes a Competitor. If the potential challenger does not become a Competitor, there is no restriction.

Question (ii):

“Only in the event that the answer to (i) is no:

(ii) Is El Reto able to continue its engagement with Mr Kaiko as designer?”

Answer:

No. The Jury is satisfied that while engaged by Mascalzone Latino, Mr Kaiko was a Designer as defined by Protocol 1.1(l) and the Interpretation by the Jury in its decision ACJ001. As a consequence, Protocol article 13.5 prohibits other Competitors from engaging Mr Kaiko.

[162] Total costs awards of €134000 are to be paid by El Reto to ACM with in 30 days of the date of this Decision.

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

Bryan Willis

America's Cup Jury: Gabrielle Kaufmann-Kohler, Graham McKenzie, Henry Menin, David Tillet, Bryan Willis (chairman)