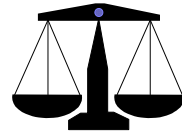




# AMERICA'S CUP 32

## AMERICA'S CUP JURY JURY NOTICE JN061



24<sup>th</sup> February 2007  
Luna Rossa Challenge  
Application concerning the taking of  
still images of ITA-94

Jury Decision ACJ023

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

**Applicant: Yacht Club Italiano represented by Luna Rossa Challenge (“Luna Rossa Challenge”)**

**An Application in respect of the Protocol governing the 32<sup>nd</sup> America’s Cup**

**AND**

**An Application filed by Luna Rossa Challenge concerning the taking of still images of ITA-94**

### **The Application**

[1] An Application was filed by Luna Rossa Challenge on 31<sup>st</sup> January 2007 seeking interim relief and a confidentiality order in respect of certain photographs taken of ITA-94 from an ACM boat. Two photographs of the ACM boat were filed in support of the Application.

### **Jury Notice JN056**

[2] On 1<sup>st</sup> February 2007, the Jury issued Jury Notice JN056. Such Jury Notice included an interim order not to publish or distribute the photographs referred to in the Application, an opportunity to respond to such interim order and other directions and timetable. Jury Notice JN056 provided:

**“... The Application**

*[1] On the 31<sup>st</sup> January 2007 Luna Rossa Challenge filed an Application seeking interim relief and a confidentiality order in respect of photographs taken of ITA-94 from an ACM boat. Two photographs of the ACM boat were filed in support of the Application.*

*[2] Luna Rossa Challenge’s Application also requested orders requiring ACM to identify the photographer, his accreditation status, any possible association with Competitors and certain other orders including non-disclosure in respect of the photographs.*

### **Interim Relief Request**

[3] Rule 6 of the Jury Rules of Procedure (“**RoP**”) provides for requests for confidentiality. Rule 11 of the RoP provides for provisional remedies including that of the Jury making an order for provisional or interim relief (RoP 11.1).

[4] The Jury considers that RoP 11 best applies to the Luna Rossa Challenge Application for relief. A confidentiality order in terms of RoP 6 would not effectively provide the type of provisional relief requested by Luna Rossa.

[5] The Jury is mindful that in terms of RoP 11.2, unless there is a case of utmost urgency, on the filing of an Application for interim or preliminary relief the Parties will be first invited to express their position in respect of such relief.

[6] With reference to Luna Rossa Challenge’s Application and the provisions of RoP 11.2 and 11.4, the Jury is satisfied that an order for interim relief should be granted to preserve the current position, but the Jury will provide the opportunity for ACM and any other Party to respond to the interim order. The Jury considers that there will be no prejudice to ACM or to any other Party in respect of the making of such interim order. In making such an order the Jury is not making any finding in respect of the merits of the Application.

### **Interim Order**

[7] An interim order is hereby granted whereby ACM is ordered not to publish or distribute in any manner and shall safely secure in ACM’s control the original and any copies of all the photographs referred to in the Luna Rossa Challenge Application. Upon safely securing any photographs, ACM is ordered to inform the Jury Chairman forthwith of their location and in whose custody they are held.

### **Opportunity to Respond to the Interim Order**

[8] ACM and any of the other Parties who may wish to respond to this interim order may do so, with their Response to be submitted by 17h00 hours (Valencia time) on Friday 2<sup>nd</sup> February 2007.

[9] Should ACM or any other Party respond to this interim order within the timetable referred to in paragraph [8] above, then Luna Rossa Challenge may reply to any such Responses, with such Reply to be submitted by 12h00 hours (Valencia time) on Saturday 3<sup>rd</sup> February 2007.

[10] This interim order shall remain in place until such time as it is revoked by the Jury.

### **Other Directions and Timetable**

[11] A Party wishing to respond to matters other than the order for interim relief shall submit their Response by Wednesday 7<sup>th</sup> February 2007.

[12] Should Luna Rossa wish to reply to any such Response, the Reply shall be submitted by Friday 9<sup>th</sup> February 2007.

*[13] Should any Party consider that they are disadvantaged by and will not have sufficient time to meet the above timetable, they are entitled to file a Request for further time. Such request shall provide the reasons and the grounds for not being able to meet such timetable.*

### **No Further Responses**

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

### **ACM Response to the Interim Order**

[3] On 2<sup>nd</sup> February 2007, AC Management SA (“**ACM**”) as the Event Authority filed a Response in respect of the interim order.

[4] In its submission, ACM confirmed and undertook that it would not “*publish or distribute in any manner (...) the original and any copies of all the photographs referred to in the Luna Rossa Challenge Application*”, as set out in Jury Notice JN056. ACM further confirmed that it had asked the photographer who took the pictures not to publish or distribute them (until a Jury decision had been published in respect of the Application), and that the photographer had confirmed that neither he nor the newspaper he represented would do so.

[5] ACM submitted that the photographs in question were not taken by an ACM official photographer, but by a Media Organisation, as such term is defined in Article 1.1 of the Protocol.

[6] ACM further submitted that ACM had no right or authority to prohibit or otherwise prevent a Media Organisation from taking photographs on the water, and that a Media Organisation was permitted to charter a boat and take photographs on the water without infringing any rule. ACM also submitted that it had no right to request a Media Organisation to refrain from publishing or distributing any photographs it had taken, and that Article 11.4 of the Protocol takes this into account by providing that the reconnaissance rules binding the Competitors do not restrict the lawful and permitted activities of any media representative accredited by the Event Authority.

[7] ACM submitted that it had asked the Media Organisation to provide it with a copy of the photographs but that the Media Organisation had refused.

[8] ACM also submitted that it never had possession of the originals or copies of the photographs concerned and that it took all available measures to conform to the interim order set out by the Jury in Jury Notice JN056.

### **Pending Submission of Areva Challenge**

[9] On 2<sup>nd</sup> February 2007 Areva Challenge filed a copy of an email to the Jury Chairman advising that copies of four of the photographs in question had come into the possession of Areva Challenge and that such copies had been destroyed. Areva Challenge advised that a separate full submission would be made by the 7<sup>th</sup> February timetable for Responses.

## **Areva Challenge Submissions**

[10] On 5<sup>th</sup> February 2007 Areva Challenge filed a submission in respect of the Application.

[11] Areva Challenge submitted that it agreed with Luna Rossa Challenge that without a Team's approval, ACM boats should not be used for ACM photographers, media photographers or any other photographers or videographers to take photographs or videos of America's Cup yachts outside of the Race Area (as such term is defined in Regatta Notice 1).

[12] Areva Challenge further submitted that ACM should advise a Team when it intends to allow a photographer to use ACM boats and if the photographer intends to photograph or video that Team's racing yacht.

[13] Areva Challenge stated in its submission that it should not have viewed, obtained or accepted copies of the photographs of ITA-94 and that as a result, it had violated Article 11.2 of the Protocol. Areva Challenge further submitted that it had remedied the violation the day after it had occurred and that it had taken "appropriate action".

[14] Areva Challenge further submitted that there was no consequence to the violation of the Protocol, as no useful design information had been obtained, retained or used from Luna Rossa Challenge. Areva Challenge submitted that it had deleted three of the four photographs which it had received, and that it had reduced the fourth photograph to a low level of quality. Although the fourth photograph had been printed out on a low level office printer, it was subsequently discarded. Areva Challenge submitted that such actions indicate that there may not have been the "principal intent and purpose" to gain design information, as required for there to be a violation of Article 11.2(f) of the Protocol. Although there had been a violation of the Protocol, the activity was not conducted seriously or with a real intention to use the design information obtained.

[15] Areva Challenge also submitted that it had gained no advantage and that neither Luna Rossa Challenge nor any other Competitor had suffered any disadvantage as a result of the violation of the Protocol by Areva Challenge.

## **Jury Notice JN058**

[16] On 6<sup>th</sup> February 2007 the Jury issued Jury Notice JN058 extending the timetable for Parties to Respond to the Application, from 7<sup>th</sup> February to 10<sup>th</sup> February 2007. Jury Notice JN058 provided:

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

*[1] On the 1<sup>st</sup> February 2007 the Jury issued Jury Notice JN056 which required that Parties wishing to Respond to the Application (other than in respect of the order for interim relief), must do so by Wednesday 7<sup>th</sup> February 2007.*

*[2] Jury Notice JN056 further provided that should Luna Rossa wish to Reply to any such Response, its Reply shall be submitted by Friday 9<sup>th</sup> February 2007.*

[3] Although the Jury has not received any formal Request for further time to meet the above timetable, it has taken note of the following extract from the Pending Submissions of Areva Challenge, dated 2<sup>nd</sup> February 2007:

*“... I currently expect that the full submission of AREVA Challenge, including an admission of a Protocol violation, will be filed early next week. At that time I will suggest to the Jury Chairman that the February 7 time for response be extended, so that all parties may respond to the AREVA Challenge submission with their responses to the Application by Luna Rossa...”*

[4] In circumstances where Areva Challenge considers that an extension of time will be required by a Party to Respond to the Application, the Jury considers that it is in the interests of all Parties for an extension of time to be granted. The interim order remains in place and the Jury considers there can be no prejudice to any Party in granting an extension.

#### **Extension of Timetable**

[5] The time by which Parties wishing to Respond to the Application must do so is extended to 10<sup>th</sup> February 2007.

[6] Should Luna Rossa wish to Reply to any Response which may be filed by a Party, the time by which it must do so is extended to 16<sup>th</sup> February 2007 ...”

#### **Areva Challenge Request for Revision or Clarification of Timetable**

[17] On 6<sup>th</sup> February 2007 Areva Challenge filed a Request for Clarification with regard to the Jury providing an extension of timetable in Jury Notice JN058.

#### **Jury Notice JN059**

[18] On 7<sup>th</sup> February 2007 the Jury issued Jury Notice JN059 which provided the clarification requested by Areva Challenge on 6<sup>th</sup> February concerning the extension of timetable. Jury Notice JN059 provided:

#### **“... Clarification of Extension of Timetable**

[1] On 6<sup>th</sup> February 2007 Areva Challenge filed a request for clarification with regard to the Jury providing an extension of timetable in Jury Notice JN058. In all previous 32<sup>nd</sup> America's Cup cases, when Parties are given the opportunity to respond to an Application (Jury Rules of Procedure, Rule 4.3), they are also entitled to respond to all or any part of what has then been submitted.

[2] In extending the timetable in Jury Notice JN058, should a Party wish to respond to the Application, such Response may also include a Response to the ACM submission of 2<sup>nd</sup> February and also to the submissions made by Areva Challenge, including submissions on penalty ...”

## **Alinghi Submissions**

[19] On 9<sup>th</sup> February 2007 Team Alinghi SA as the Defender (“**Alinghi**”) filed a submission in respect of the Application.

[20] Alinghi submitted that ACM was not subject to the terms of Article 11 of the Protocol and that Article 11 only restricted the activities of “Competitors”.

[21] Alinghi further submitted that neither the Protocol nor the Terms of Challenge (“**ToC**”) should be applied to restrict the activities of the media, and that neither document could be enforced against third parties.

[22] Alinghi submitted that Areva Challenge had breached the terms of the Protocol by virtue of it receiving photographs in breach of Article 11.2(g), but that when assessing any penalty against Areva Challenge, the Jury should take into consideration Areva Challenge’s voluntary disclosure of the breach and of its co-operation to limit any adverse effect of the breach.

## **Response and Submission of ACM**

[23] On 9<sup>th</sup> February 2007 ACM filed a Response and submission in respect of the substantive parts of the Application.

[24] ACM submitted that at no time did the Luna Rossa Challenge chase boat inform the ACM boat drivers or the photographer concerned, that Luna Rossa Challenge was testing new equipment. ACM acknowledged however that on both of the applicable occasions the Luna Rossa Challenge chase boat did ask the ACM boat to go away.

[25] ACM further submitted that the photographs taken had almost no media value and that the French newspaper did not use the photographs and removed them from its databases.

[26] ACM submitted that as the Event Authority, it has a duty to promote the Event, in accordance with Articles 2 and 4.1(vi) of the Protocol. In order for it to promote the Event, ACM referred to Article 17.1 of the ToC which provides:

*“... All media and broadcast rights and telemetry positioning data in the Event are vested solely and exclusively in ACM. Such rights shall include, but not by way of limitation, all rights to promote the Event, to broadcast the Event and the results and race statistics of the Event. Copyright in all such media shall vest in accordance with the provision of Clause 18.12 ...”*

[27] ACM further submitted that even though there was no rule prohibiting photographs being taken in such circumstances, it would normally refrain from letting photographers on board its vessels to take pictures of a Competitor’s yacht where such Competitor had clearly informed ACM that it was testing new equipment in privacy outside of the Race Area. ACM submitted that it does not accept that it was restricted in its duty to promote the Event by refusals of Competitors to be photographed and that furthermore, ACM had no right to prohibit or prevent a Media Organisation to take photographs on the water.

[28] ACM submitted that it agreed with Luna Rossa Challenge that ACM was not a party to the reconnaissance obligations set out in Article 11.2 of the Protocol, and that it had not used the photographs.

[29] ACM further submitted that the provisions of Article 18.10 of the ToC apply only to moving images and not to still images, and that accordingly the provisions of Article 18.10 of the ToC are not relevant to the Application. ACM maintained in its submission that the provisions of Article 11.4 of the Protocol are relevant to the Application, and that such Article makes a clear exception to the distance restriction rules contained in Article 11.2(f) as far as Media Organisations are concerned.

[30] ACM also submitted that it acted in accordance with the duty of the Event Authority to promote the Event and that it did not infringe any provisions of the Protocol, nor of the ToC.

### **Reply by Luna Rossa Challenge**

[31] On the 16<sup>th</sup> February 2007 Luna Rossa Challenge filed a Reply which also considered the respective Responses and submissions that had already been filed.

[32] In its Reply, Luna Rossa Challenge maintained that it made it clear to the ACM boats that it did not consent to photographs being taken of its yacht on the water, and that on both occasions it requested the ACM boat to leave the area. However such requests were not complied with.

[33] Luna Rossa Challenge submitted that the one photograph which it did obtain from Areva Challenge contained design information which could be useful to any Competitor and that although the photographs had been destroyed by Areva Challenge, Areva Challenge had time and the opportunity to use the information contained in the photographs to its advantage.

[34] Luna Rossa Challenge further submitted that the design information was visible even after the photograph had been reduced in size, and that the distribution of the photograph to certain key personnel within Areva Challenge demonstrated that there was principal intent and purpose by Areva Challenge to gain design information.

[35] Luna Rossa Challenge further submitted that it accepted the apology put forward by Areva Challenge.

[36] Luna Rossa Challenge submitted that Alinghi's submission dated 9<sup>th</sup> February was inaccurate because the actions of ACM to generate and facilitate media interest are restricted by rules such as the Neutral Management requirement imposed by Article 5.9 of the Protocol.

[37] Luna Rossa Challenge also submitted in its Reply that ACM had agreed to enter into an undertaking put forward by Luna Rossa Challenge (and referred to as the "Out of the Race Area Undertaking") and that as a result of this, it was inconsequential and immaterial for Luna Rossa Challenge to Reply to the rules and legal arguments put forward by ACM in both its interim submission dated 2<sup>nd</sup> February and its submission dated 9<sup>th</sup> February.

[38] Luna Rossa Challenge further submitted that it accepted that part of ACM's submission of 2<sup>nd</sup> February which provided an undertaking as per the Jury's interim order in Jury Notice JN056.

[39] Luna Rossa Challenge submitted in its Reply that as it was satisfied with the undertakings provided by ACM, it requested approval from the Jury to withdraw its claims against ACM, and requested the Jury to rule on the Application and to decide on the facts and the involvement of Areva Challenge.

[40] Luna Rossa Challenge also submitted that the Jury should not award any costs against Luna Rossa Challenge.

## **Decision**

### **Breach of Protocol by Areva Challenge**

[41] Article 11.2(f) of the Protocol provides that in respect of images, Competitors are prohibited from engaging in the following:

- “(f) without the consent of the Competitor, observing or capturing images (photos, videos or by any other means) of another Competitor's ACC yacht from another vessel with the principal intent and purpose to gain design or performance information of an ACC yacht that is:*
  - (i) outside the racing area designated in the Notice of Race (whether at the Venue or at another regatta for ACC yachts); or*
  - (ii) inside the designated racing area and within 200 meters of the Competitor's yacht.”*

[42] Article 11.2(g) of the Protocol provides that Competitors are prohibited from engaging in the following:

- “(g) the acceptance of any information from a third party that, under this Article, would have been improper for the Competitor to obtain directly.”*

[43] Areva Challenge has admitted in its submission of 2<sup>nd</sup> February 2007 that copies of four of the photographs in question had come into its possession.

[44] The Jury determines that Areva Challenge has breached Articles 11.2(f) and 11.2(g) of the Protocol.

[45] The Jury notes that Areva Challenge sought to mitigate the effects of its breach of the Protocol by admitting the breach shortly after it became aware of it, and by destroying the photographs in question.

[46] Areva Challenge team members chose to view the photographs and to make the photographs available to other members of the team, including designers and members of the afterguard. Areva Challenge properly acknowledged that such a breach was a “gross error of judgment.”

[47] Whilst the Jury does credit the prompt action of Areva Challenge and its legal and rules adviser's frank submissions when the breach was discovered the fact remains that a serious breach of the Protocol has occurred.

### **Penalty**

[48] Under Article 21.4(c) of the Protocol, the Jury is empowered to impose any penalty on a Competitor that the Jury believes to be just and equitable, having regard to the nature, manner and effect of the breach. Penalties may include a fine, loss of points, and reduction in the number of sails permitted by Article 15 of the Protocol that can be used by a Competitor.

[49] The Jury is mindful that the effect of the penalties provided for in Article 21.4(c) of the Protocol may be different for each Competitor and will depend on such matters as their financial resources and how far they progress through the Challenger Selection Series and the Match.

[50] The penalty imposed by the Jury for such breach is that in terms of Article 21.4(c)(vii) of the Protocol, the number of sails permitted by Article 15.1(a) of the Protocol to be used by Areva Challenge for the Challenger Selection Series (being the Louis Vuitton Cup Rounds Robin 1 & 2, Semi-Final and Final) shall be reduced by two sails, from 45 to 43.

### **Luna Rossa Challenge's Claims Against ACM**

[51] In its Reply dated 16<sup>th</sup> February, Luna Rossa Challenge requested approval from the Jury to withdraw its claims against ACM.

[52] The Jury accepts such withdrawal.

[53] Because Luna Rossa Challenge and ACM have reached a resolution of the dispute between them that is satisfactory to both Parties and because the original allegations of breaches of the Protocol and the Terms of Challenge by ACM are no longer a matter in dispute, the Jury makes no findings as to those matters.

### **Interim Order**

[54] Jury Notice JN056 granted an interim order whereby ACM was ordered not to publish or distribute in any manner and to safely secure in ACM's control the original and any copies of all the photographs referred to in the Luna Rossa Challenge Application. The interim order is discharged effective from the date of this decision.

### **Costs**

[55] Pursuant to Article 21.3 of the Protocol and the Jury Guidelines for the Award of Costs, the Jury considers that Areva Challenge should meet all of the costs of this Application.

[56] The Jury awards costs of €21,000, such payment to be made by Areva Challenge to the Event Authority within thirty (30) days of the date of this decision.

## Summary of Decision

[57] Areva Challenge has breached Articles 11.2(f) and (g) of the Protocol. The penalty for such breach is that the number of sails Areva Challenge is permitted to use during the Challenger Selection Series is reduced by two sails, from 45 to 43.

[58] The interim order granted in Jury Notice JN056 is released.

[59] Costs are awarded of €18,000, to be paid by Areva Challenge to the Event Authority within thirty (30) days of the date of this decision.

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

Bryan Willis

America's Cup Jury:

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