



18<sup>th</sup> December 2012

**JURY CASE AC19  
JURY NOTICE JN059**

**DECISION  
and**

**DIRECTIONS ON PHOTOGRAPHS, PENALTY and COSTS**

1. On 19<sup>th</sup> November 2012, the Jury received an Application from Luna Rossa Challenge 2013 (LR), representing Circolo della Vela Sicilia.
2. LR “protests against the Defender, Oracle Racing, GGYC” (OTUSA) for a reconnaissance incident on 8<sup>th</sup> November in the waters off Auckland, New Zealand, claiming a breach of Protocol Article 37.2(g).
3. The Application was filed on 19<sup>th</sup> November 2012 by LR on [jurycomms@americascup.com](mailto:jurycomms@americascup.com) and sent to the Trustee, the Competitors, America’s Cup Race Management (ACRM), America’s Cup Event Authority (ACEA), the Chief Measurer and the Umpire Team Director (“the Parties”).

**DIRECTIONS No. 1 (JN053)**

4. On 21<sup>st</sup> November 2012 the Jury issued Directions No. 1 inviting the Parties to submit a Response to the LR Application via [jurycomms@americascup.com](mailto:jurycomms@americascup.com), no later than 18h00 (UT) 5<sup>th</sup> December 2012.
5. Such Directions also provided that LR may submit a Reply to any Responses, no later than 18h00 (UT) 12<sup>th</sup> December 2012.
6. JN053 also determined that, after the issuing of the Decision for this Case, Parties would be invited to file submissions on how the Jury should award costs, and, if applicable, on any penalty to be imposed.

**APPLICATION BY LUNA ROSSA CHALLENGE 2013**

7. LR claimed that Matthew Mason, a member of OTUSA, had been observing and taking photographs of LR AC72 for OTUSA on 8<sup>th</sup> November 2012 from a distance of less than 200 metres and that such action constituted illegal reconnaissance and a violation of Protocol Article 37.2(g).
8. LR’s Application also included images taken by their team member Jean-Antoine Bonnaveau of Mr Mason taking photos of LR AC72, as well as a calculation of the distance from which Mr Bonnaveau had taken his images. With this distance being 105 m,

and Mr Mason's boat positioned in between Mr Bonnaveau's camera and LR AC72, LR concluded that the distance between Mr Mason and LR AC72 had to be less than 105 m.

9. LR also submitted that their email correspondence with OTUSA confirmed that Mr Mason was indeed engaged by the Defender, that he had indeed been observing LR AC72 for OTUSA that day, and that OTUSA had received the results of his observations.
10. Having regard to this alleged conduct LR requested the Jury to rule that OTUSA had breached Protocol Article 37.2(g); that a penalty be imposed on OTUSA; and that OTUSA be ordered to pay any ensuing Jury Costs.

#### RESPONSE BY ORACLE TEAM USA

11. Oracle Team USA (OTUSA) filed a Response on 5<sup>th</sup> December 2012. OTUSA submitted that "Article 37.2(g) prohibits Competitors from navigating a vessel to within 200m of another Competitor's yacht. There is no language in the Protocol that prohibits a Competitor from observing or photographing another Competitor's yacht when within 200m of it."
12. OTUSA also submitted that in order for OTUSA's action to fall under the definition of "navigate" in the OED they "had to ... 'manage, steer, control or direct the course...' of the OTUSA Protector ... to within 200m of the yacht", which was not what the OTUSA Protector did.
13. According to OTUSA it was LR AC72 that "navigated, seemingly intentionally, on a course that brought it close to the OTUSA Protector, which had been stationary for 15 minutes originally some 1500 meters off to the side (not in front of) LR." LR had therefore created the situation themselves.

#### RESPONSE BY EMIRATES TEAM NEW ZEALAND

14. Emirates Team New Zealand (ETNZ) filed a Response on 5<sup>th</sup> December 2012. They submitted that their experience with OTUSA was that they would "deliberately driv[e] an RIB in to a position some distance ahead of the other team's yacht then stopping and remaining stationary directly in line with the yachts track so when it comes past they are very close and inside the 200 metre prohibited area, then making no effort to move whilst observing the yacht at close quarters and frequently taking photos."
15. ETNZ submitted that the "test to determine if the technique .... of deliberately positioning a vessel directly in the path of another team's yacht so it passes within 200 metres is prohibited is whether it constitutes 'navigating' that vessel within the prohibited distance under Article 37.2(g)." In ETNZ's view OTUSA's actions clearly involved "navigating" as per the definition of the Oxford English Dictionary (OED).
16. ETNZ further pointed out that one of the conditions for a breach of Protocol Article 37.2(g) is that the vessel be navigated within 200 m of another team's yacht "for the purpose of observing it". In their minds there could be no other reason for the OTUSA support boat's presence in New Zealand waters than to observe other Competitors' yachts. OTUSA could not be said to have unintentionally breached the rule because they had been taking photos rather than making an effort to drive the boat out of the 200 m zone as soon as possible.
17. ETNZ concluded that the incident between LR and Mr Mason was a breach of Protocol Article 37.2(g), because it was clearly a result of his intentional actions and no effort was made to move the OTUSA support boat outside the prohibited zone before taking photos.

18. ETNZ also submitted that a number of similar incidents had occurred.

#### REPLY BY LUNA ROSSA CHALLENGE 2013

19. LR disagreed with OTUSA's interpretation of the term "navigating": "It is quite simple boat that is floating (not moored, not anchored, not sunk) is navigating. Assuming a boat was completely stopped on the water, it still navigates, this is, '*steer, control, or direct the course*'. A boat that kills it speed and then goes backwards or simply drifts, never stops navigating."
20. LR submitted that their evidence on the other two requirements that need to be met to constitute a breach of Article 32.7(g), "within 200 metres" and "for the purpose of observing" was not even argued against by OTUSA.
21. LR refuted the OTUSA argument that LR altered course toward the stationary Protector for no apparent reason, by stating that "the only practicable, and habitual, exit from Auckland harbor to the Hauraki Gulf is precisely the Rangitoto Channel" and submitting an illustration of their AC72's track out of Auckland Harbour. They added that it was the obligation of the observing boat to "cease to observe to avoid an infraction" of the rule.
22. LR repeated that OTUSA had received the results of what LR considers to be OTUSA's illegal reconnaissance of LR AC72.

#### LETTER FROM OTUSA

23. On 10<sup>th</sup> December 2012 the Jury Chairman received a letter from OTUSA regarding Jury Case AC19, with copies distributed to all Parties via [jurycomms@americascup.com](mailto:jurycomms@americascup.com).
24. In the letter OTUSA submitted that ETNZ, in their Response to the Application, as well as LR in their Reply, introduced new claims of Protocol breaches by OTUSA and that it was a violation of the Jury Rules of Procedure (ROP) to do so.
25. OTUSA requested that the Jury either disregard both ETNZ's Response and LR's Reply, or give OTUSA the right of reply.
26. In its Decision (JN058), released through [jurycomms@americascup.com](mailto:jurycomms@americascup.com) on 14<sup>th</sup> December 2012, the Jury noted that no Protests had been filed alleging breaches relating to other incidents, and the extent to which the Responses and Reply may be in breach of the ROP would be addressed in the Decision on Jury Case AC19.
27. The Jury stated that it would confine its deliberations and decide the matter based on the breaches alleged in LR's Application of 19<sup>th</sup> November 2012 and on the two Responses to those allegations.

#### DISCUSSION and CONCLUSIONS

28. While the Response by ETNZ and the Reply by LR were not in breach of the ROP, as their observations were relevant to the outcome of this Application, any additional allegations of breaches of the Protocol are not considered in this Decision.
29. Protocol Article 37 is a Reconnaissance provision, commonplace and an important part of recent America's Cup Protocols. Similar provisions were included in the Protocols of AC31 [Article 13] and AC32 [Article 11]. It is an Article expressly stated to apply from the time of publication of the Protocol, and throughout the world.

The Article provides for broad based prohibitions on Competitors from engaging in certain actions in an attempt to gain information about another Competitor. These prohibitions apply unless consent is given by the other Competitor.

The Article provides a basis by which and the extent to which Competitors can conduct their activities in private.

30. Protocol Article 37.2(g) prohibits Competitors “without the prior consent of the affected Competitor, navigating a vessel within 200 m of another Competitor’s yacht for the purpose of observing it” [...“in an attempt to gain information about another Competitor”].
31. There is no dispute that
  - a) the vessel (a “Protector”) in question belonged to, or was commissioned by, OTUSA, a “Competitor” as defined by the Protocol;
  - b) Matthew Mason, a member of the OTUSA team, was aboard the vessel and had been asked by OTUSA to observe LR’s yacht;
  - c) the incident took place on the Hauraki Gulf in New Zealand where LR currently train, and where OTUSA do not train;
  - d) the Protector stopped when a considerable distance from LR’s yacht;
  - e) LR’s yacht approached the vessel and came within 200 m;
  - f) the vessel made no attempt to move to a position outside 200 m;
  - g) Matthew Mason took photographs of LR while the Protector was within 200 m of LR’s yacht.
32. The pivotal question is whether OTUSA’s vessel was “navigating” within 200 m.
33. Protocol Article 1.3 states that “The meaning of any word used in this Protocol ... shall be determined by reference to the Oxford English Dictionary...” (OED). The OED distinguishes between two uses of the verb “navigate”: transitive and intransitive. It is logical that the transitive meaning is appropriate in Protocol Article 37.2(g): “to sail, manage, steer, control, or direct the course of (a vessel)”. This meaning does not necessarily have a directional component.
34. OTUSA submitted that “to breach art. 37.2(g) OTUSA had to ‘...manage, steer, control or direct the course...’ of the OTUSA Protector *to within 200m of the yacht*” (italics ours), suggesting that their Protector needed to be moving towards something in order for the driver to be “navigating a vessel”. The Jury disagrees with that view.
35. The Jury therefore concludes that the word “navigate” as it is used in Protocol Article 37.2(g) is to be interpreted such that a vessel is still being “navigated” while it is stationary if there is someone in command of it with the ability to manoeuvre the vessel.
36. The Jury accepts that LR’s yacht sailed a reasonable course that was not for the purpose of provoking an incident.
37. The Jury is satisfied that the taking of photographs during the incident was “an attempt to gain information about another Competitor” and that there was no prior consent by LR.

## DECISION

38. The Jury is satisfied that OTUSA breached Protocol Article 37.2(g).

## DIRECTIONS No. 2

### Directions - photos

39. OTUSA is directed to supply on a confidential basis all photographs taken while the Protector was or may have been within 200 m of LR's yacht. The photos are to be transmitted to LR and to the Jury Chairman respectively, by a means to be agreed between OTUSA and LR by 18h00 UT 22<sup>nd</sup> December 2012.

### Directions - penalty

40. Parties are invited to make submissions on the appropriate penalty, if any. Such submissions should be sent to [jurycomms@americascup.com](mailto:jurycomms@americascup.com) by 18h00 UT 24<sup>th</sup> December 2012.

### Directions - costs

41. Submissions are invited on how the Jury should award costs in respect of all aspects of this Case having regard to the Jury Guidelines on the Award of Costs and Expenses (published 13<sup>th</sup> August 2011). Submissions must be sent to [jurycomms@americascup.com](mailto:jurycomms@americascup.com) by 18h00 UT 24<sup>th</sup> December 2012.



DAVID TILLET

JURY: David Tillett (Chairman), John Doerr, Josje Hofland, Graham McKenzie, Bryan Willis.