



3<sup>rd</sup> September 2013

**JURY CASE AC33  
JURY NOTICE JN117**

**Protocol Article 60 and Oracle Team USA  
Protecting the Reputation of the America's Cup  
DECISION**

**DIRECTIONS AS TO HEARING (JURY NOTICE JN102)**

1. On 19<sup>th</sup> August 2013 the Jury issued Jury Notice JN102.
2. Jury Notice JN102 stated that on 4<sup>th</sup> August 2013 the Jury received a report from Richard Slater of Oracle Team USA (OTUSA) concerning a contravention of the AC45 Class Rule C1.5(a) and Racing Rules of Sailing, America's Cup Version (RRSAC) rule 78.1. The report was in respect of yachts Oracle Racing Team Spithill, Oracle Racing Team Coutts, and yacht BAR (chartered to Ben Ainslie Racing by Oracle Racing Team) during certain regattas.
3. Jury Notice JN102 also stated that the Jury had made an enquiry and two members of the Jury carried out an investigation over the period 13<sup>th</sup> – 16<sup>th</sup> August 2013 interviewing 16 members of OTUSA and five employees of America's Cup Race Management (ACRM). Jury Case AC30 followed.

**HEARING**

4. Jury Notice JN102 stated that the Jury had decided to conduct a hearing to determine if the Competitor, OTUSA has breached Article 60.1 of the Protocol. The hearing was scheduled for 26<sup>th</sup> August 2013.
5. On 20<sup>th</sup> August 2013 the Jury issued Jury Notice JN107 advising that the date of hearing changed to 29<sup>th</sup> August 2013.

**FURTHER REPORT FROM THE MEASUREMENT COMMITTEE (JURY NOTICE JN112)**

6. On 24<sup>th</sup> August 2013 the Jury issued Jury Notice JN112 attaching a further report from the Measurement Committee (MC). The report referred to the different length of

king posts and the depth of engagement of the spigot of the upper main king post fittings on OTUSA AC45 Yachts, boats 4 and 5. The conduct or activity referred to in such report, including racing with such modified equipment would now be a part of and included in the hearing to determine if the Competitor OTUSA had breached Article 60.1 of the Protocol.

7. Jury Notice JN112 also included directions that America's Cup Event Authority (ACEA) was required to provide a written submission by 28<sup>th</sup> August 2013 as to what they considered was the effect of the conduct or activity referred to with reference to Protocol Article 60.1 on 'the best interests of the America's Cup, or the sport of sailing'. ACEA filed a submission on 28<sup>th</sup> August 2013.

#### INFORMAL DIRECTIONS HEARING

8. An informal hearing took place on 28<sup>th</sup> August 2013 concerning the timing and procedural aspects of the hearing which OTUSA wished to discuss. OTUSA's Counsel Phil Bowman and Thomas F. Ehman were present.

#### NEW HEARING DATE (JURY NOTICE JN113)

9. On 28<sup>th</sup> August 2013 the Jury issued Jury Notice JN113, which stated that to enable the Jury to provide a written Decision following the hearing under RRSAC Rule 69 in Jury Case AC31, which Decision OTUSA wished to consider before proceeding with the hearing of this Case, the date of hearing was changed to 30<sup>th</sup> August 2013.

#### COURT REPORTER TRANSCRIPT AND JURY CASE AC31 DECISION

10. Jury Notice JN113 provided the court reporter uncertified rough draft transcript of all of the proceedings to date in Jury Case AC31 and the Decision in AC31 was to be made available on a confidential basis to OTUSA, ACEA, ACRM and Emirates Team New Zealand (ETNZ). Jury Notice JN113 stated 'the parties to Case AC31 have agreed that such transcript be included in this Case and OTUSA have agreed it form a part of the evidence and record in this Case'. OTUSA subsequently raised objection to this.

#### ORDERS

##### JURY CASE AC31 Hearing Transcript

11. The court reporter uncertified rough draft transcript of the proceedings in Jury Case AC31 was ordered to remain confidential until further order.

##### Appearance of Witnesses

12. The following witnesses were ordered to be available to give evidence:

Nick Nicholson (Chairman Measurement Committee)  
Russell Coutts (OTUSA CEO)  
Grant Simmer (OTUSA General Manager)  
Jimmy Spithill (OTUSA Skipper)  
Mark Turner (OTUSA Shore Team Manager)

Richard Slater (OTUSA Rules Advisor)  
Andrew Henderson (Rig Team Manager)  
Parties and the Jury are entitled to call other witnesses at the hearing.

#### THE HEARING

13. On 29<sup>th</sup> August 2013 the hearing took place at the ACEA Meeting room, Pier 23 San Francisco. Present at the hearing were:
  - Phil Bowman and Thomas F. Ehman representing OTUSA
  - Steven Barclay and Sam Hollis representing ACEA
  - Russell Green and Ausra Deluard representing ETNZ
  - Jury members David Tillett (Jury chairman), Graham McKenzie, John Doerr, Josje Hofland, Bryan Willis (Panel chairman)
  - Jury Secretary Christaine Admiraal.
14. The Jury also included as a part of the record, Jury Case AC31 and the documents referred to in paragraph 18 of Jury Notice JN115 issued on 29<sup>th</sup> August 2013 being:
  - Jury Notices relating to Case AC30: JN093 JN096 JN098
  - Documents attached to Jury Notice JN098 :
    - OTUSA's report dated 4<sup>th</sup> August 2013
    - Measurement Committee's 'Additional Report' dated 15<sup>th</sup> August 2013
    - Measurement Committee Report dated 4<sup>th</sup> August 2013
    - Measurement Committee Report to the Jury dated 11<sup>th</sup> August 2013
    - Measurement Committee Report to the Jury dated 24<sup>th</sup> August 2013.

#### SUBMISSIONS OF OTUSA

15. OTUSA submitted that 'the conduct found to have occurred here does not constitute a violation of Protocol Article 60.1, and that even if it did, the imposition of additional penalties or sanctions would not be just, equitable or in the best interests of the America's Cup or the sport of sailing.'
16. OTUSA further submitted that Article 60.1 is not intended to regulate conduct governed by other rules, and is intended to apply only to 'public statements' or other expressive conduct that might bring the sport into disrepute.
17. OTUSA claimed that 'there is no evidence of any wrongdoing by OTUSA as opposed to a small number of individuals acting well outside of their authority' and in circumvention of OTUSA's well-defined internal procedures.
18. OTUSA submitted that all the evidence showed OTUSA had used its best efforts to ensure its team members did not violate any of the rules.
19. OTUSA further submitted that even if the Jury found that violations of the AC45 Class had occurred, Rule RRSAC Rule 69 fell within Article 60.1 and OTUSA did not 'use its best efforts to ensure that' its team members did not violate the rules, penalising them further would not be just and equitable or in the best interests of the America's Cup or the sport of sailing. OTUSA had voluntarily and swiftly taken the maximum penalty by withdrawing from the ACWS Regattas.

20. OTUSA submitted that they had fully cooperated in the Jury investigation, they have devoted 'enormous team resources to this matter ... during the most critical time of preparation for the AC34 Finals' and those involved had 'been or will be penalised by the Jury and OTUSA'. They also submitted there has been and will be massive disruption to the team.
21. OTUSA submitted that the Jury has to consider if the violation impacts performance and results. If it does not, they submitted, Article 60 is not violated.
22. OTUSA also submitted they accepted that theoretically RRSAC rule 69 and Protocol Article 60 could apply to the same case.
23. OTUSA recognised in the oral submissions that there is an 'honour code' in the way the sport of sailing is organised and the Measurement Committee cannot police everything.
24. Late on 2<sup>nd</sup> September, Richard Slater of OTUSA submitted via the jurycomms72 distribution system 'Report to Jury in relation to Emirates Team New Zealand Submission 30<sup>th</sup> August 2013 Item #3 - Engineering report'. It was received out of time after the hearing, was unexpected and without leave to submit late. ETNZ were not given an opportunity to respond. Having regard to the reasons for the decision, it would not have affected the outcome of the case.

#### SUBMISSIONS OF ETNZ

25. At the hearing ETNZ provided both written and oral submissions.
26. ETNZ provided a written Engineering Report from their Technical Director, Nick Holroyd in response to the OTUSA submission filed on 29<sup>th</sup> August 2013. The report claimed that 'using ETNZ tuning techniques there would be significant performance advantages from a longer kingpost - 15% more forestay load, 8% forestay sag, better sail shape through the wind range.'
27. ETNZ provided their view on the background to Protocol Article 60.1. They submitted that it was 'introduced at the insistence of the Defender who we understand drafted the rule' and for reasons of haste and their view that they preferred the planned ISAF Code of Conduct, they voted against the Article 60 amendment. The amendment was passed on 20<sup>th</sup> November 2011.
28. ETNZ submitted Article 60.1 was very wide in its application, that it clearly applied and there was no ambiguity to 'prevent its application to OTUSA's intentional misconduct.' They submitted that 'not only did OTUSA engage in conduct that may impair public confidence, but it also is responsible for making that conduct publicly known.' They also submitted that the words 'may impair' indicated Article 60 'is broadened to include actual and potential damage to reputation.'
29. ETNZ submitted that Article 60.1 prohibits Competitors from not only making public statements but also prohibits them from engaging in conduct or activity ... on or off the water ... that may impair public confidence.
30. ETNZ submitted that Article 60 should be construed as analogous to a white collar crime investigation where it is necessary to decide whether to penalise employees or

the company. They submitted it does not have to be the corporation who is a fault to be responsible. The question to be asked is was it for the benefit of the company (OTUSA) and was it within the scope of employment even if contrary to instructions or policy. That it had been disruptive was not an excuse.

31. ETNZ submitted they questioned the information contained in the report filed by ACEA on 28<sup>th</sup> August 2013. With regard to sponsors they submitted the reaction of sponsors is often not immediate and 'currently ETNZ sponsors are waiting to hear the final outcome.' They also submitted the America's Cup 'has often seen controversy but not outright cheating.'
32. With regard to television statistics where viewership had increased they submitted such numbers 'can tell an incomplete story without context' and cited viewership numbers on YouTube. They also did not agree with the ACEA statistics on the media analysis.
33. ETNZ submitted that 'it is our contention which is shared by prominent members of the media and AC observers that the whole episode has already damaged the brand and reputation of the AC and sailing as a sport.'
34. With regard to the evidence provided at the hearing ETNZ stated that there had been 'honest answers, but nobody is taking responsibility'. While ETNZ did not make any submissions on penalty and left that to the Jury, they did submit that failure to penalise appropriately 'will likely cause the America's Cup to suffer significant and irreparable harm.'

#### SUBMISSION BY AMERICA'S CUP EVENT AUTHORITY (ACEA)

35. In its submission dated 28<sup>th</sup> August 2013 ACEA submitted that in Jury Notice JN112 'the Jury has required ACEA, as the current commercial rights holder for the America's Cup, to provide this submission as to what ACEA considers is the effect of certain conduct or activity with reference to Article 60.1 of the Protocol.'
36. ACEA submitted that it 'makes no comment on the effects of this conduct or activity on the sport of sailing more generally.'
37. ACEA submitted its relationship to Golden Gate Yacht Club (GGYC) and OTUSA was that it had been appointed by GGYC as its agent, and that OTUSA is the Competitor selected by GGYC to represent GGYC in the Match.
38. ACEA submitted that it had advised its sponsors in writing of the decision of OTUSA to withdraw from four ACWS Regattas and the reasons for withdrawing. It added that no subsequent action was taken 'by any sponsor (or any of ACEA's other commercial partners) as a result of OTUSA's conduct that is detrimental or adverse to the interest of ACEA and/or the 34<sup>th</sup> America's Cup.'
39. ACEA submitted increased figures for broadcasts, ticket and hospitality sales, merchandise revenue and spectator numbers for the month of August 2013, as well as media analysis figures showing that of the 8,252 articles covering the Louis Vuitton Cup and/or the America's Cup, 894 referred to the OTUSA conduct.

40. ACEA submitted their 'research suggests that the effect on rights holders.... from one-off or irregular misconduct cases tends to be limited, whereas the effect on the team and/or individual responsible for any misconduct can be substantial'.
41. ACEA submitted that 'where the regulatory sports authority takes quick and effective disciplinary action in misconduct cases, the adverse impact for the sport and its commercial rights is minimized'. It also submitted that lack of such action could cause the misconduct to become or be perceived to have become more widespread 'with the consequence that the sport or the event itself suffers reputational and commercial fallout.'
42. ACEA submitted that '[t]he risk to commercial rights holders is that corruption left unchecked becomes systemic, thereby affecting commercial outcomes.'
43. ACEA submitted that the 'lack of negative impact on the commercial interests of ACEA and/or the 34<sup>th</sup> America's Cup from OTUSA's conduct may be because the ACWS is a separate event from the Louis Vuitton Cup and/or the Match.' There is 'no substantial competitive link between the ACWS and either the Louis Vuitton Cup or the Match' and the entry process, entry fee, rules, venues, courses, sponsors, broadcasters, teams, crews and yachts are all different.
44. ACEA submitted that therefore 'the public response to OTUSA's conduct has been negligible' and that 'provided there is no generally perceived issue of corruption in the sport, OTUSA's conduct should have no measurable impact on the future commercial interests of the America's Cup or other rights holders in sailing'.

#### DISCUSSION ON WHETHER THE CONDUCT WAS AGAINST THE BEST INTERESTS OF THE AMERICA'S CUP OR THE SPORT OF SAILING

45. Some OTUSA team members who gave evidence had different views from ACEA who submitted there was no measurable negative effect in respect of the misconduct. Grant Simmer, General Manager of OTUSA, in his evidence stated that the team is damaged in reputation, in terms of the outside sailing world, owners and sponsors. 'Sponsors had not pulled out but Oracle [Inc] is really upset'. He believed 'their name has definitely been damaged'. Grant Simmer also stated that another significant sponsor 'is really upset'.
46. Sir Ben Ainslie in his evidence stated that with reference to his own reputation it is not good to be associated with this. He was 'concerned about sponsorship' for future America's Cup campaigns and the 'timing could not be worse'. He also stated it was 'not good for the reputation of sailing.'
47. A letter dated 30<sup>th</sup> August 2013 from Jerome Pels, the Chief Executive Officer of the International Sailing Federation (ISAF), was also submitted to the hearing. ISAF made it clear that the purpose of their submission was with reference to 'the importance of the America's Cup and the philosophy underpinning the integrity of the ISAF Racing Rules of Sailing', but would not comment on any case before the Jury. ISAF submitted that 'the integrity of the competitors must be kept at the highest standards ... any breach in the rules seriously damages the reputations of those involved with the Cup and is detrimental to the welfare and best interest of the event and the sport of sailing.' They submitted that 'competitors in the America's Cup are

heroes and role models for the youth of the world and they have a great responsibility towards the sport of sailing'. OTUSA in its oral submissions stated that they agreed with the ISAF letter.

48. In Jury Case AC31 (JN096), the Jury accepted the Measurement Committee's finding that 'the modifications appeared to be intentional efforts to circumvent the limitations of the AC45 Class Rule, and therefore serious in nature' (JN096, paragraphs 2-3). The evidence before the Jury established that the incidents in respect of the king posts have resulted in OTUSA engaging in conduct or activity that was prejudicial and against the best interests of the America's Cup and the sport of sailing. The incidents are serious and unprecedented in the America's Cup.
49. The Jury considers that there was evidence before it that clearly established that, in terms of Article 60.1, the conduct or activity 'may impair public confidence ... in the integrity and good character of any Competitor.' It does seem likely that the impact of the conduct may have a greater effect when the outcome of this and the RRSAC Rule 69 decision (Case AC31) is publicly announced. In any event Article 60.1 is broadly drawn and the words 'may impair' mean that it is not necessary to establish that impairment to public confidence has actually occurred. The evidence that the Jury received clearly established that the conduct that is at present in the public domain has been detrimental to the America's Cup and the sport of sailing.

#### THE EVENT

50. The 34<sup>th</sup> America's Cup Event is defined in Protocol Article 1.1 (y) as '... the Regatta, the AC World Series and any Special Events'.

#### THE AC45 CLASS

51. The AC45 is a one-design manufacturer's class with a closed rule. Class Rule A.2.5 states: 'Anything not specifically permitted by the class rule is prohibited'.
52. Competitors were required to enter into an agreement with America's Cup Race Management (ACRM) for the purchase of an AC45 yacht, and Competitors were required to race in all regattas of the Event.
53. There were 9 regattas (in two series) in the ACWS, the first of which was in Cascais 6<sup>th</sup> to 14<sup>th</sup> August 2011. The last four regattas were: Newport 28<sup>th</sup> June to 1<sup>st</sup> July 2012 (which was the final regatta in the 2011-2012 series), San Francisco 21<sup>st</sup> to 26<sup>th</sup> August 2012, San Francisco 2<sup>nd</sup> to 7<sup>th</sup> October 2012, and Naples 17<sup>th</sup> to 21<sup>st</sup> April 2013.
54. Oracle Team USA (OTUSA) entered two AC45 boats, namely 'Boat 4 Spithill' and 'Boat 5 Coutts'. Before the commencement of the last three regattas, OTUSA prepared, at their base 'Pier 80' in San Francisco, an AC45 (number 9) for charter to Ben Ainslie Racing (BAR). This AC45 yacht had previously been chartered by OTUSA to the French 'Aleph' team and was in need of significant repair.

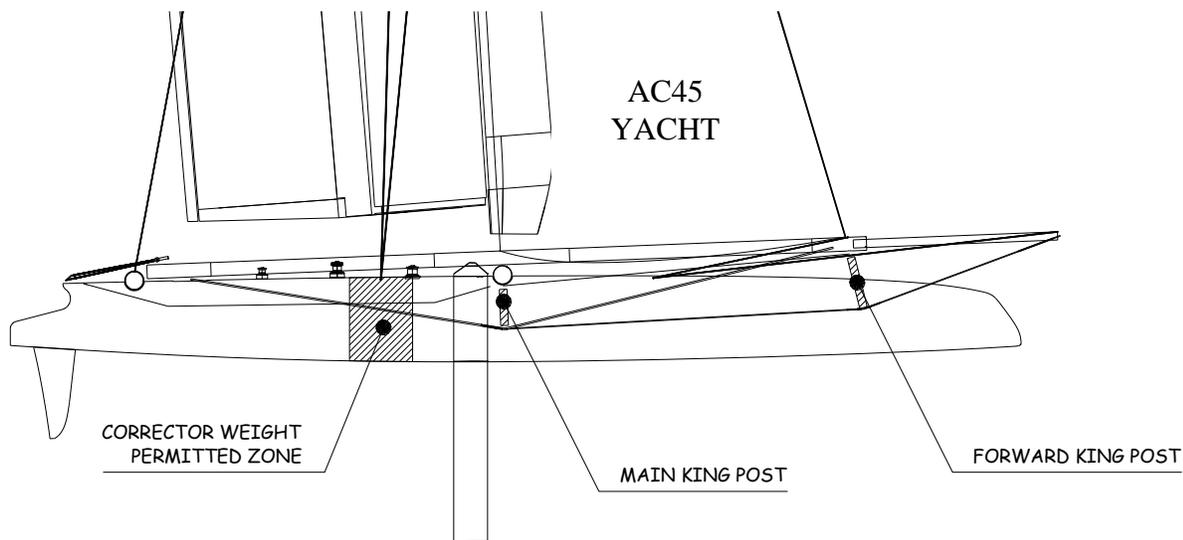
## THE FIVE INCIDENTS

55. Five incidents concerning the three OTUSA AC45 yachts breaching the AC45 Class Rule were the subject of an investigation by the Jury, following the receipt by the Jury of reports from the Measurement Committee and OTUSA. A hearing was then opened under rule 69 of the RRSAC.

The five incidents were:

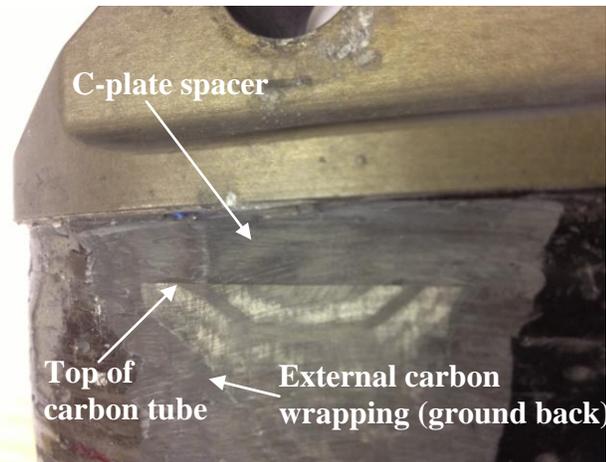
56. A Kevlar bag containing lead tailings was placed inside the forward king post on boat 4 at the Newport regatta. The placement of the bag was established at the Jury hearing but the Jury was unable to discover when it was removed, who removed it or why it was no longer in the forward king post.
57. Heavy ferrous tailings in a plastic bag found inside the main king post in boat 4. Notwithstanding the Jury investigation which included interviews of OTUSA personnel and questions in hearings, the Jury was unable to discover when it was placed there or who put it there.
58. Lead tailings and resin were added to the forward king post on boat BAR.
59. The lengths of the main king posts used on boats 4 and 5 were found to having been extended by the addition of 8mm carbon composite plate ('C-plate') without receiving authorisation from the Measurement Committee.
60. Top end fittings with 80mm spigots were found fitted to the main king posts of boats 4 and 5. All other boats that raced in the ACWS regattas were found to have fittings with 15mm spigots which had been supplied by the manufacturer Core Builders Composites Limited, a wholly owned subsidiary of Oracle Racing Inc. No permission was sought of the Measurement Committee to change the spigots as is required by the AC45 Class Rule. In spite of extensive investigations and a hearing, the Jury was unable to discover who was involved and to what extent they were involved with the breach.

## DIAGRAM AND PHOTOGRAPHS OF RELEVANT PARTS





*Comparison of main kingpost end fittings. 'Of the fleet currently assembled for the Youth Americas Cup, only OTUSA 4 and OTUSA 5 had the fittings shown on the right.'*



*Top of OTUSA 4 main king post*

## PERFORMANCE ENHANCEMENT

61. OTUSA submitted that adding weight in the king posts or extending the length of the main king posts or using longer spigots, were not 'performance enhancing'.
62. ETNZ submitted such matters were performance enhancing.
63. The Jury believes that adding weight to the king posts is performance advancing albeit probably to a small degree. If a boat is required to carry corrector weights to make an AC45 Class Rule compliant, then it would be beneficial to take weight away from the corrector weight area and place weight as low as possible; both the king posts are lower than the corrector weight area so transferring weight to the king posts would achieve that aim. Furthermore, if the sailors wanted to find ways to 'get the weight forward' (which was the case in Newport with boat 4) then to take weight away from the corrector weight area and place that weight in the forward king post would contribute to that aim.
64. Similarly the extended king posts (extended with C-plate), would help straighten the spine if it was dipped down in the middle which the Jury was told was a problem with boats 4 and 5.
65. Inserting 80mm spigots would add one third of a kilo of weight and in particular improve reliability as the short length of spigot had been identified as being a problem with the AC45 class. To claim this was of no advantage ignores the fact that if the changes were offered to all boats, they would more than likely accept them.
66. Had OTUSA identified problems of king posts splaying ends, or the spine not being straight when under tension, and had a proposed solution (longer spigots or longer main king post), they should have involved the Measurement Committee in seeking a solution for all boats, such as a Class Rule or building specification change. Such a request from OTUSA for a Class Rule change is even more necessary as there

was a direct shareholding relationship between Core Builders Composites Limited (which supplied all the AC45 Yachts) and Oracle Racing Inc.

67. Inspecting the one 80mm spigot that has recently been broken out from the tube for inspection following the Jury directions, there is clear evidence of grinding (the anodising is ground off). It seems these two spigots were 'recovered from the bin', ground to fit, and used in the king posts for 4 and 5.
68. In addition, 'to equalise with the other boats' (quote from Andrew Henderson) a C-plate of 8mm thickness has been added to the king posts of boats 4 and 5 extending their length. The result of these modifications was that boats 4 and 5 kingposts were about 8mm longer, and were all about 0.3kgs heavier, and had a better (longer) spigot (80mm as opposed to 15mm) than all the other king posts in the ACWS fleet. In addition, the end with the C-plate added had been repaired which had the effect of covering the join.
69. It also seems inconceivable that boat riggers initiated these changes without the knowledge of managers, or the direction of sailors, if not skippers.
70. Any sailing team would, given the choice, move weight from the designated corrector weight area to the king posts where it is lower and therefore adds righting moment more effectively, especially if the team wanted to get weight forward as both king posts are forward of the designated corrector weight area. This may seem a trivial gain, but all successful sailing teams pay attention to every detail concerning performance or reliability, especially if they are well resourced.
71. Nick Nicholson, Chairman of the Measurement Committee commented '[I have] never known a sailor to make a change that would make the boat slower'.
72. The Jury holds the view that each of the modifications were made in the belief that they would enhance performance; whether they would actually enhance performance is not directly relevant.
73. The performance enhancement would likely be small, but making many small enhancements is the nature of winning races at the top level of the sport, particularly in a one-design class with a 'closed' rule.

#### DISCUSSION ON PROTOCOL ARTICLE 60.1

74. Protocol Article 60.1 applies to OTUSA (as the Defender Candidate), being a Competitor as defined in Article 1.1(p). Under Protocol Article 60.1 each Competitor shall not 'engage in any other act or conduct or any activity ... that is prejudicial or detrimental to or against the welfare or the best interests of the America's Cup, or the sport of sailing, or that may impair public confidence in the honest and orderly conduct of the America's Cup ...'
75. The language of Protocol Article 60.1 is broad and covers a wide range of situations. It was introduced as an amendment to the Protocol on 20<sup>th</sup> November 2011. ETNZ submitted that they objected to the haste at which the amendment was introduced and voted against it. However it was passed by the required majority of votes. ETNZ submitted that the Article 'is very wide in its application and certainly covers the conduct being considered today by the Jury.'

76. OTUSA submitted that Protocol Article 60.1 is 'clearly intended to cover only conduct that does not otherwise breach any Rules or other Protocol Articles' and the primary focus is public statements. Such a limited interpretation espoused by OTUSA is at odds with the unequivocal language of Article 60.1. OTUSA submitted that if the Article 'was intended to provide a penalty to Competitors for breaches ... it could easily have so provided.' OTUSA accepted the Article was broadly drawn. Words that do not exist cannot be construed as being added to a clause. The Jury does not consider Article 60 to be ambiguous.
77. It is not appropriate to speculate as to the intention of the drafters. As the Jury has stated in Jury Case AC16 the Jury will not attempt to give effect to the intention of the drafters. They must apply the words as they are written and effectively construing the plain reading of the words as written to give some other claimed intended effect 'is not a matter the Jury can correct' (JN051, paragraph 47) as a matter of construction.
78. In Jury Case AC06 the Jury stated 'when a text is unambiguous it would clearly be inappropriate for the Jury to consider the intent of its author.' (Jury Notice JN024)
79. The Jury therefore concludes that the conduct which is the subject of these proceedings comes within the scope of Article 60

## DISCUSSION ON PENALTY

### MANAGEMENT

80. The Jury was left with the clear impression that team policy documents were left 'on the shelf'. OTUSA supplied a Policy Manual which was referred to in each team member's contract of employment, which included a clause 'Abide by the law and the Protocol governing the 34<sup>th</sup> America's Cup'. Statements within these documents requiring rule compliance are not sufficient to discharge corporate responsibility. These statements must be followed up with practices and procedures to ensure compliance. The work on the boats was done by individuals employed by OTUSA. There is corporate responsibility to ensure that individuals are aware of the rules needed to discharge their duties in a compliant manner.
81. OTUSA has not used its best endeavours to ensure that the relevant members were aware of the applicable rules and provide proper direction and supervision. An example of this was in respect of the Newport Regatta. Mark Turner stated in his testimony "Andrew Walker was in charge as far as I'm concerned". However, Andy Walker in his evidence said he was still a 'boat builder' and believed he was on an equal footing with Bryce Ruthenberg who was in charge of rigging. Andrew Walker did not seem to understand that as the Newport Shore Manager he was in charge.
82. The breaches were for the benefit of OTUSA. The conduct which was the subject of the rule breaches was passed from one individual to another to transfer them between boats, suggesting a corporate failing in addition to the failing of individuals.
83. The Jury does not accept OTUSA Management's claim they had adequate systems in place to ensure that employees complied with the Class Rule and that it was effectively the actions of a small number of misguided employees whom they had or

would take action against. Most of those involved are experienced professional sailors or boat builders. The stark reality is a series of breaches occurred over a period of time which clearly demonstrated that their systems were not adequate or robust as demonstrated by multiple breaches at multiple events. It is not just the benefit of hindsight that it is evident that elementary and necessary precautions were not taken to prevent such breaches occurring.

84. The Jury failed to discover which individuals were responsible for all the breaches, resulting in concerns there may have been more. For example, there was evidence of a bag of lead being inserted into a king post but no evidence of who removed it or what happened to it. There were emails referring to 'fill king posts' as if there was an intention to fill both king posts on boat BAR, but no evidence as to whether one king post was filled and emptied.

## SERIOUS BREACHES

85. The seriousness of the breaches cannot be understated. The Chairman of the Measurement Committee when asked how did he feel when he found what had occurred stated in the hearing 'I felt old, used and stupid ... our trust in the team had been betrayed, trust had been abused. If we can't deal in an atmosphere of a certain amount of trust, we simply cannot do our job.' This comment exemplifies the concerns expressed by a number of experienced America's Cup sailors, OTUSA management, and indeed the Jury.
86. Grant Simmer, the General Manager of OTUSA and a three times winner of the America's Cup said that when he was advised of the situation on 26<sup>th</sup> July 2013, he was 'bitterly disappointed'. He further stated there had been 'tremendous damage' to the team and that he had never come across a situation like this in nine previous America's Cup campaigns.
87. Sir Ben Ainslie, a four times Olympic Gold Medallist and helmsman of BAR stated he was surprised, disappointed, disgusted and angry at what had happened.
88. Sir Russell Coutts, the OTUSA Chief Executive Officer, an Olympic Gold Medallist and a four times winner of the America's Cup said he was 'shocked and disappointed'. He described it as a 'stupid thing to do' with the impact on the team over the past month being 'hugely distracting' and 'having to spend time on this lost days on the water at a critical time.'
89. The Jury completely understands the reactions of these respected professional sailors.
90. The breaches of the Class Rule were implemented with the intention of increasing performance of three AC45 boats. The modifications were used in the field of play, they were multiple and were put into place over a period of time in several ACWS Regattas.
91. The conduct relates to on-the-water breaches whilst racing in multiple regattas and according an on-the-water penalty is appropriate.
92. The Jury considers that to adequately reflect the seriousness of the matter, to emphasize to Competitors and sailors there is an absolute obligation to comply with

Class Rules, a penalty involving racing in the Match in addition to a substantial fine is appropriate. Ordering a fine alone is not a sufficient penalty.

93. The Jury is aware that the yachts in which the modifications occurred were AC45 Yachts as distinct from AC72 Yachts that will contest the Match. The definition of Event in Protocol Article 1.1(y) includes both the ACWS Regattas in which the three AC45 Yachts competed as well as the Match.
94. During the course of the hearing OTUSA acknowledged that they had not found the answers to the questions that arise out of the five incidents. They believed they had taken the required action to identify the relevant people. OTUSA's Counsel submitted that the team had tried to get answers but there was one person who should know the answer. He submitted the person was 'not cooperative' and they did not think they were going to get any more answers and the person was 'currently suspended and will go'. OTUSA has no plans to continue their internal investigation as they do not believe they can take the matter further.

#### MITIGATION

95. The Jury has also taken into account a number of mitigating factors including their co-operation with the investigation (in particular Grant Simmer), the disruption to the team, the interruption of their two boat sailing programme, the loss of a valued wing trimmer on their Match yacht, the stress and the reputation damage to innocent members of the OTUSA team.
96. The Jury has no intention to impose a penalty that will determine the outcome of the Match, which should best be determined on the water and not in the Jury room. But for these mitigating factors the penalty would have been heavier.

#### PENALTIES – PROTOCOL ARTICLE 15.4

97. Protocol Article 60.2 allows the Jury to 'impose such penalties or orders as it believes to be just and equitable' including the penalties in Article 15.4(d). The Jury has carefully taken into account the penalties that were imposed in Case AC31 in accordance with RRSAC rule 69.
98. Protocol Article 15.4 provides the Jury with a wide range of powers as to an imposition of a penalty. (Article 15.4 'The Jury shall act both as a jury under the RRSAC and as an arbitral body, with [power to] ... impose penalties ... it believes to be just and equitable including: censure, fine, order loss of existing or future points, scores or races, award points or races to another Competitor, disqualify a Competitor from any race, series or the Event, order the suspension or expulsion of any individual from the Event.')

#### ORDERS on PENALTY

99. Pursuant to Protocol Article 15.4(d)(iv), OTUSA shall be penalised one point for each of the first two races of the Match in which they would otherwise score a point.
100. OTUSA are ordered pursuant to Protocol Articles 15.4(d)(ii) and 15.3(b) to pay a fine of US\$250,000. Such fine is to be paid to the following charities:

(a) US\$125,000 to the Andrew Simpson Sailing Foundation which charity has been established following the death of Andrew (Bart) Simpson on an AC72 in San Francisco in May 2013, for the purpose of assisting young people to get involved in sailing through mentoring and support.

(b) US\$125,000 payable to a section 501(c)(3) charitable organisation selected by the Mayor of San Francisco to provide support to at-risk youth in the San Francisco Bay area.

101. OTUSA are required to provide to the Jury confirmation of payment of the fines in the above paragraph prior to the commencement of the Match.

#### ORDERS ON CONFIDENTIALITY

102. The court reporter uncertified rough draft transcript from Jury Case AC31 that formed part of the record of this case shall remain confidential.

#### COSTS

103. Parties may make submissions on the Award of Costs having regard to the Jury Guidelines on the Award of Costs and Expenses (published 13<sup>th</sup> August 2011) via [jurycomms72@americascup.com](mailto:jurycomms72@americascup.com) no later than 6<sup>th</sup> September 2013.



David Tillett

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