
**AMERICA'S CUP ARBITRATION PANEL**

**ACAP36/06**

**IN THE MATTER**
of the Protocol
governing the 36th America's Cup

**IN THE MATTER**

*of an Application by*

Circolo della Vela Sicilia ("**CVS**")
Luna Rossa Challenge Srl ("**Luna Rossa**")
Challenger of Record 36 Srl ("**COR36**")

(hereinafter altogether the "**Applicant**")

*against*

Royal New Zealand Yacht Squadron ("**RNZYS**")
Team New Zealand Limited trading as Emirates Team New Zealand ("**ETNZ**")

(hereinafter altogether the "**Respondent**")

*regarding* an alleged breach of confidentiality obligations

28 February 2020

# AMERICA'S CUP ARBITRATION PANEL Case 06

# DECISION

**THE APPLICATION**

1. On 25 January 2020, the Applicant filed an application against the Respondent. In such application, the Applicant requested the Arbitration Panel of the 36th America's Cup ("ACAP36" or the "Arbitration Panel" or the "Panel") "to determine whether the Respondent, which has released media statements about the mediation process pending between it and the Applicant [i.e. Mediation Case ACAP36/05/Med], has breached the confidentiality rules applicable to the mediation proceeding and discussions" (the "Application"). The Applicant and the Respondent are referred to therein as the "Parties".

2. In the Application the Applicant submitted that the Respondent has breached its duty of confidentiality under the ACAP Rules of procedure (the "RoP") and of ACAP's Directions 02 of the Sole Mediator dated January 10, 2020 (the "Directions 02") when it published the Media Statement dated 8 January 2020 on its website (the "Media Statement") and when making some declarations on the matters referred to mediation which were published by the "Stuff" website. The Applicant also submitted that "the Respondent's statements contain incorrect, misleading and partisan information and comments which are intended to disparage the position of the Applicant" and therefore "breached the fundamental rules of the sport of sailing set out in the World Sailing "Racing Rules of Sailing"" and its fiduciary duties as Trustee of the 36th America's Cup pursuant to the Deed of Gift.

**THE RESPONSE**

3. On 4 February 2020, Respondent filed a Response to the Application in which it "reject[ed] the Applicant's claim that it has breached the confidentiality rules applicable to the mediation proceedings and discussions" or that it made other "misleading", "disparaging" or "incorrect" statements in a media statement […] and an article on the "Stuff" website".

4. In its Response the Respondent submitted that (i) ACAP does not have jurisdiction because the Application was filed out of time, (ii) the Rules of procedure (as at 11 February 2019) (the "RoP") do not govern mediation proceedings and even if they do, the Respondent "has not breached any of those rules relating to confidentiality because it did not disclose any confidential information", (iii) "There is no legal basis for the Applicant's claim in relation to statements said to be misleading, disparaging or wrong" and, in any event, the Respondent's statements "were none of those things", and (iv) "Even if a claim were made out, there are insuperable hurdles to the relief sought".

5. On 7 February 2020 the Applicant requested an extension of time to 14 February 2020 to file a Reply to the Respondent's Response. The Panel granted such extension of time on the basis that there was not prejudice to the Parties.

**APPLICANT'S REPLY**

6. On 12 February 2020 the Applicant filed a Reply to the Response in which it reiterated (i) that the Media Statement constituted a breach of paragraphs 7.1, 8.2, 16.1 and 16.2 of the ACAP Rules of Procedure and of Directions 02 and (ii) that "the Respondent's statements contain incorrect, misleading and partisan information and comments which are intended to disparage the position of the Applicant and which were a breach of the fundamental rules of sailing as well as of the Respondent's fiduciary duties as Trustee of the 36th America's Cup presented by Prada 2". In its Reply, the Applicant also submitted that its Application had been timely submitted to this Panel in full compliance with the terms of Article 5.4 of the Rules and that the Respondent had breached its confidentiality obligations and it reiterated its request for relief.

**RESPONDENT'S REPLY**

7. On 13 February 2020 the Respondent requested leave to Reply to the Applicant's Response. This was opposed by the Applicant. Leave was granted to the Respondent to file such a Reply by 16 February 2020 on the basis that no prejudice to either Party derived therefrom. On 14 February 2020, the Respondent filed a Reply to the Applicant's Reply in which it submitted its position regarding (i) the Panel's jurisdiction (with regard to the Stuff article dated 22 December 2019 (the "First Stuff Article")), (ii) the effect of Art. 7.1 of the RoP, (iii) the fact that the statements made by the Defender were not about the mediation, (iv) new Exhibit 15 filed by the Applicant, (v) the Racing Rules of Sailing (the "RRS") and the new Exhibit 16 filed by the Applicant and (vi) costs.

**PARTIES' REQUESTS FOR RELIEF**

8. Both Parties' requests for relief being very specific and detailed, the Arbitration Panel considers relevant to quote them in full below.

9. The Applicant's requests for relief are the following:

34. In light of the above the Applicant seeks the following relief from the Panel:

a) to declare and confirm that the Respondent is in breach of its duty of confidentiality as set out in the Protocol, the Rules, and Directions 02 of the Sole Mediator;

b) to order the Respondent immediately:

i. to remove, or to take all possible steps to procure the removal, of the Media Statement and any other statements or comments which it has made about or concerning the Mediation, other than the Joint Press Release, from any media, document or other transmission in which they have been made or recorded, in particular (and without limiting the foregoing) from any website over or to which it has access or control;

ii. not to make any further public comment on or about the Mediation without the express written agreement of the Applicant, save as directed by the Panel and / or the Sole Mediator; and

iii. to upload, on the same media(s), an explanatory statement containing a formal apology in the following terms for its behaviour with the same relevance as the Media Statement:
*'The RNZYS and ETNZ have made various inappropriate and incorrect statements regarding the mediation currently taking place concerning the wind limits within which racing may be conducted and other issues governing the racing in Auckland for the 36th America's Cup. Those statements have been removed from the RNZYS and ETNZ websites pursuant to an order of the 36th America's Cup Arbitration Panel and will not be repeated. RNZYS and ETNZ apologises to the Challenger of Record for making those statements.'*

c) to order the Respondent to indemnify the Applicant in respect of any damages suffered due to the Respondent's breach of confidentiality obligations as will be quantified during this Arbitration;

d) to determine and impose an appropriate penalty on the Respondent in accordance with Article 53.10 of the Protocol; *and*

e) to issue an order as to costs, fees and expenses associated with the proceeding.

10. The Respondent's requests for relief are the following:

76. The Applicant seeks various orders that are best described as "injunctive". There is no proper basis for these orders:

(a) An order that ETNZ take steps to remove the Media Statement from any website over or to which it has access or control is pointless and futile:

(i) The Media Statement was released nearly a month ago and its content is well and truly in the public domain. This cannot be undone by removing it from ETNZ's website.

(ii) The Media Statement has been reported on and quoted by numerous news outlets and media organisations over which ETNZ has no control at all. For example:

- *Hawkes Bay Today*, America's Cup win row (11 January 2020);[4]
- *Weekend Herald*, Challengers face split in wind dispute (11 January 2020);[5]
- *Stuff*, America's Cup: Wind dispute escalates with split appearing in challenger ranks (10 January 2020);[6]
- *Sail-World*, America's Cup: Challengers split emerges over wind limits and Match Conditions (9 January 2020);[7]
- *The Herald*, America's Cup: Split emerges between challengers over wind dispute (10 January 2020);[8]
- *Live Sail Die*, ETNZ provides clarification of next steps for America's Cup wind limits (10 January 2020);[9]
- *Scuttlebutt Sailing News*, America's Cup: It's always something (8 January 2020);[10]
- *ANSA Vela*, Kiwi-Luna Rossa, schermaglie sul vento (11 January 2020);[11]
- *Ashburton Guardian*, Dispute over wind causes trouble (11 January 2020).[12]

As a matter of law, no mandatory order is appropriate where it would be clearly futile, or would not benefit the applicant, or achieve the purpose for which it was sought.[13] The extent of local and international reporting of the Media Statement demonstrated above shows that removal of the Media Statement would not benefit the applicant as the Media Statement has already been widely reported by sailing and general news organisations and that would not be changed by the order.

(b) An order that ETNZ not make further public comment on or about the mediation without the express written agreement of the Applicant, save as directed by the Panel, is unnecessary. There is no evidence that ETNZ intends to breach the confidentiality directions relating to the mediation – as set out in Directions 02 – and we are instructed that ETNZ will continue to comply with those directions.

(c) The proposed apology is, ironically, misleading. ETNZ made no inappropriate or incorrect statements regarding the mediation in the Media Release. The aspects of the Media Release said by the Applicant to be misleading are statements relating to its role as representative of the Challengers, and are not statements concerning the mediation.

(d) The Applicant has provided no evidence of damages. It is inconceivable that the Media Release could have caused the Applicant any loss cognisable by law.

11. Words used in this decision have the meaning as defined in the RoP.

**FACTUAL BACKGROUND**

12. The following is a brief summary of the most relevant facts, which have occurred in the present arbitration proceedings.

13. On 22 December 2019 (4:48am NZ time[1]), as a consequence of the failure of the Parties to reach an agreement on all terms of the Match Conditions (in particular regarding the wind limits and the racing format of the Match) by 20 December 2019 (pursuant to Article 17.1 of the Protocol), the Respondent filed a request for mediation.

14. On 22 December 2019 (5:11am NZ time), the Stuff website published an article containing the following statements (the "1st Stuff Article"):

> *""We don't know what their game is," a frustrated Team New Zealand legal and rules advisor Russell Green told Stuff".*
>
> *"Whether they are trying to develop specialist equipment for the lower wind limit, we don't know. But we just think under 20 knots is ridiculous ... that is unrealistic for Auckland."*

15. On 23 December 2019 (1:30am NZ time), the Applicant lodged a request for mediation of the Match Conditions.

16. On 23 December 2019, a joint statement – agreed upon between the Applicant and the Respondent – was published on the America's Cup website:

> ***Defender and Challenger of Record Request Mediation of the Match Conditions***
> *As the Defender and Challenger of Record were unable to agree and finalise the Match Conditions by the Protocol deadline of 20th December 2019, the two parties have agreed to engage in the official mediation process with a view to reaching agreement as soon as possible.*
> *The mediation will be conducted by the America's Cup Arbitration Panel who will then decide the unresolved issues by 20 March 2020 if the mediation is unsuccessful.*
> *Currently the differences involve the wind limits within which racing may be conducted and other issues governing the racing in Auckland.*

17. On 8 January 2020, the Stuff website published an article containing the following statements made by American Magic (the "2nd Stuff Article"):

> "*They've had 2 to 2 ½ years to sort it out. It's consistent with most of the negotiations between Luna Rose* [sic] *and Team New Zealand*"

It does not seem to the Panel that the Applicant relied on this press article in its Application. However, it is included as part of the historical background.

18. On 9 January 2020, the Respondent published the following media statement on its website (the "Media Statement"):

> *"By way of background, the America's Cup Deed of Gift requires racing rules and conditions to be agreed by mutual consent between the Defender and Challenger but with the*

[1] The Respondent, in its Response (§15), states that this request was made that day at 4:48**pm**; however D's Exhibit 9 shows that the request was emailed to David Tillett at 4:48**am**.

*modernday America's Cup involving multi challengers this is modified by the Protocol under which all teams enter. Under the AC 36 Protocol, the Challenger of Record has the responsibility to represent all Challengers and that responsibility involves consulting with other Challengers before taking a position with the Defender on issues such as race conditions.*

*The Defender does not deal with the other Challengers direct on such issues but works on the basis that the Challenger of Record is presenting the collective position of the Challengers when undertaking such negotiations, not just the view of its own sailing team, Luna Rossa. In fact, in the various negotiations Emirates Team New Zealand has had with the Challenger of Record there have been many practical examples where the COR has made specific reference to the views of the other Challengers when taking a particular stance.*

*Emirates Team New Zealand was therefore very surprised to learn that the current stance of the Challenger of Record in relation to wind limits does not reflect the collective position of all Challengers. The Defender's position on the Wind Limits is what is needed to ensure a quality event in Auckland for the benefit of the New Zealand public, international visitors and the world audience."*

19. On 10 January 2020, the Sole Mediator issued Directions 02 ("Directions 02"), which in particular provided as follows:

*"2. The ACAP Rules of procedure (version as at 11.02.2019) provide that*

*"**7. CONFIDENTIALITY***

*7.1. As a matter of principle: (i) the proceedings before the Arbitration Panel will be transparent and not confidential between the Parties and (ii) all Arbitration Panel decisions will be published. The Arbitration Panel may however decide otherwise in its discretion if special circumstances so justify.*

*7.2. The Arbitration Panel may issue or withdraw an order for confidentiality as it considers just and equitable. The Arbitration Panel will only grant such an order in exceptional circumstances. If, following an Application for confidentiality, the Arbitration Panel decides that it will not grant such an order, the Arbitration Panel will advise the relevant Party, who may elect to withdraw any evidence or submission (in such a case, the withdrawal shall occur within not more than 48 hours, unless the Arbitration Panel decides otherwise) or to proceed without confidentiality".*

*3. The confidentiality principles foreseen in the above-mentioned clause apply to the present mediation proceedings because it is handled by the Arbitration Panel, although the latter has decided that the mediation process will be handled by its Chairman acting as Sole Mediator.*

*4. Accordingly, these mediation proceedings, including the content thereof (either of a substantial or procedural nature):*

*a. "will be transparent and not confidential between the Parties" to such proceedings, i.e. between ETNZ and COR36, and the Sole Mediator, but*

*b. a contrario, shall remain confidential towards any other person or entity, including the other Challengers (subject to points 6 through 8 hereunder)".*

20. On 17 January 2020, the Sole Mediator sent an email to the Parties in which he stated that he did "not consider [it] appropriate to deal with the issue of confidentiality and the Statements made [subject-matter of the present proceedings] as part of the mediation process dealing with the Match

Conditions" and that accordingly he considered "that this matter cannot be mediated further and that if [the Applicant] wish[es] to pursue it, a formal application would need to be lodged".

21. On 5 February 2020, following the mediation process conducted under Article 19.1 of the Protocol by the Chairman of the Arbitration Panel (acting as Sole Mediator) David Tillett, the Parties agreed to settle their differences in relation to the Match Conditions on the terms contained in a Settlement Memorandum, as published on the Arbitration Panel Electronic Case Facility (ECAF).

**ACAP JURISDICTION**

22. As decided by the Panel in Directions 01 dated 29 January 2020, Pursuant to art. 53.4 b), the Arbitration Panel is empowered "to resolve disputes (other than those concerning the racing rules or the class rules) between RNZYS and the Challenger of Record". The present dispute is between RNZYS (the Respondent) and the Challenger of Record (the Applicant). The Arbitration Panel therefore has jurisdiction over these arbitration proceedings and, accordingly, the RoP apply to these arbitration proceedings.

**ADMISSIBILITY OF THE APPLICATION**

23. Art. 5.4 of the RoP provides that "an Application to the Arbitration Panel shall be filed within ten (10) days from when the Applicant was or could reasonably have been aware of the circumstances justifying the Application". Two media statements are complained of by the Applicant. One is dated 22 December 2019 (the First Stuff Article) and the other 10 January 2020 (the Media Statement). In terms of Art. 5.4 of the RoP, the Applicant knew or should have known on 22 December 2019 of "the circumstances justifying the Application" but did not file until 25 January 2020. In circumstances where mediation was underway and the breach of confidentiality and compliance with the mediation are intertwined. The Panel considers that the "circumstances justifying the Application" is when the Sole Mediator communicated to the Applicant (by email dated 17 January 2020) that "this matter cannot be mediated further and […] if you wish to pursue it, a formal application would need to be lodged". It is therefore from that date, pursuant to Art. 5.4 of the RoP, that the 10 days time limit to file an Application started to run. The Application was filed by the Applicant on 25 January 2020, i.e. within 8 days from the circumstances justifying the Application. Accordingly, the Application has been lodged in time... The Application is therefore admissible.

**EXPEDITED BASIS**

24. The Applicant requested the Panel to "proceed on an expedited basis under paragraph 5.10 of the Rules". The mediation between the Parties resulted in an agreement and settlement of the Match Conditions (including wind limits) dispute. The Arbitration Panel does not deem that the circumstances of the present dispute require to be expedited. The Panel has however used its best efforts to issue a decision in a timely manner.

CONFIDENTIALITY OBLIGATIONS APPLICABLE TO THE PARTIES AND ALLEGED BREACH THEREOF

***Confidentiality under the RRS***

25. Pursuant to Art. 16.1(e) of the Protocol, "The conduct of the Event shall be governed by […] the racing rules as agreed and adopted by COR/D in consultation with World Sailing […]". The said racing rules have not yet been adopted by COR/D. Accordingly, they do not apply and therefore, in particular, Rule 69 of the World Sailing Racing Rules of Sailing (referring to misconduct and raised by the Applicant) does not apply.

***Confidentiality under the Protocol***

26. The Protocol does not contain a general obligation of confidentiality.

***Confidentiality under the RoP / Applicability of the RoP to mediation proceedings***

27. The Protocol (Art. 53.8) provides that the Arbitration Panel shall "draft its own procedural rules". The RoP have been "adopted pursuant to Article 53 of the Protocol […] for all matters within the Arbitration Panel jurisdiction under the Protocol" (Introduction to the RoP, p.1 thereof). The scope of the Panel's jurisdiction is defined at Art. 53.4 of the Protocol. Such Art. 53.4 starts as follows: "The Arbitration Panel shall be empowered as follows: […]". Art. 53.4.m) provides that the Panel's powers (i.e. jurisdiction) shall include: "to mediate at the request of the parties any dispute it considers appropriate for mediation". Mediation is therefore within the scope of the Panel's jurisdiction.

28. Since the RoP are applicable to "*all matters within the Arbitration Panel jurisdiction under the Protocol*", it could be considered that the RoP are also applicable to mediation proceedings under Art. 53.4.m) and that therefore the confidentiality obligations provided for in Art. 7 of the RoP apply thereto as a matter of principle.

29. Mediation is not mentioned specifically in the RoP. Art. 2.1 of the RoP, in dealing with jurisdiction, provides that the Arbitration Panel have the powers foreseen in Art. 53.4 of the Protocol. Art. 53.4 m) of the Protocol empowers the Arbitration Panel to mediate at the request of the parties any dispute it considers appropriate for mediation. Art. 19.1 of the Protocol is however a case where arbitration is mandatory for the parties and therefore where the Arbitration Panel has to accept conducting mediation if so requested by the Applicant and/or the Respondent.

30. Art. 1.2 of the RoP, in defining "Application", refers to "*a written request for a decision by the Arbitration Panel in relation to a dispute…*". The mediation which occurred in December 2019 / January 2020 concerned the Match Conditions (including wind limits) and derives from a request by the Respondent and the Applicant to the Arbitration Panel to conduct a mandatory mediation as provided for in Art. 19.1 of the Protocol.

31. The RoP do not automatically apply to a mediation under Art. 19.1 of the Protocol, and it is therefore for the mediator, on case by case basis, to decide which procedural rule will be applicable depending upon the circumstances. The Procedural Rules issued by the Sole Mediator in that context will include any confidentiality obligation. In the case at hand, these confidentiality obligations only became known when the Directions 02 were issued by the Sole Mediator,

therefore not when – earlier - Respondent (and thereafter the Applicant) filed their respective requests for mediation.

32. Furthermore, while the RoP, in making reference to "matters" or "proceedings" could be construed as being applicable to mediations, they do not include any separate, specific or express rules for these mediations (see above). The Arbitration Panel therefore considers that when the two media statements were published by the Stuff the matter was not yet a "*proceedings conducted by the Arbitration Panel*" in the sense of Art. 16.1 of the RoP. In addition, no application fee under Art. 5.1 of the RoP was paid so that the mediation did not amount to "proceedings" as referred to in Art. 5 and 6 of the RoP.

33. As a matter of principle, the confidentiality obligations provided for in Art. 7.1 of the RoP apply to all arbitration proceedings from the moment in time when they are initiated by a Party. As a result, before any proceedings are filed, Art. 7.1 of the RoP does not impose confidentiality obligations on the Parties such that public comments cannot be made. What the principle means is that while transparency of any proceedings between the Parties still applies, once an Application is filed then the RoP provisions apply including Art. 8.2, 16.1 and 16.2 which provisions specify what can be made public and set limits to dissemination of information. For the aforesaid reasons, the mediation is not the type of process governed by the RoP, and the said confidentiality obligations of Art. 7 of the RoP do not therefore apply.

34. As a result, the Panel does not consider that from the time the request for mediation was filed the confidentiality provisions in Art. 7.1 and 7.2 of the RoP applied or that Art. 8.2,16.1 and 16.2 of the RoP were then applicable. For confidentiality to apply to mediation process, there must be an order made by the Panel under Art. 7.2 of the RoP. Bearing in mind the principle expressed in Art. 7.1 of the RoP that proceedings "*will be transparent and not confidential between the Parties*" a confidentiality order will only be made by the Panel under Art. 7.2 of the RoP in "*exceptional circumstances*". If it was otherwise, it could quickly amount to the Panel imposing a significant restriction on legitimate freedom of expression.

35. As a result, the confidentiality provisions contained in the RoP did not apply automatically to the mediation at hand, but only as from when the Sole Mediator issued its Directions 02 on 10 January 2020. No confidentiality obligations therefore applied before the issuance of these Directions.

36. The Media Statement issued by the Respondent and the statements made during an interview to Stuff have both been published before Directions 02 and the confidentiality order were issued. As a result, the Arbitration Panel finds that the Respondent has not breached any confidentiality obligation under the RoP or any Directions it has issued.

***What the media statements said***

37. The Arbitration Panel understands that the Applicant was both upset and offended by the media statements. The Respondent could have withdrawn the statements and that may have been the end of the matter. The Panel does not intend to explore the rights and wrongs of what the media statements said before the confidentiality order was issued (in Directions 02), other than to observe that what was said does not appear to extend to a disclosure or release of confidential information that was to come before a mediator. It is also noted that at the time of the media statements there

was a considerable amount of material in the public domain including comments from another Challenger.

***Confidentiality (and other obligations) under the Deed of Gift / Fiduciary duties of the Trustee of the 36th America's Cup***

38. The Deed of Gift dated 24 October 1887 does not specifically provide for any confidentiality obligations. In the Panels view the media statements complained of, did not and could not amount to a breach of the "*friendly competition between foreign countries*" in the Deed of Gift dated 24 October 1887.

39. In its submissions, the Applicant claimed that the Respondent has breached its obligations pursuant to the Deed of Gift and more specifically to the fact that the America's Cup is a "*friendly competition between foreign countries*". The Applicant refers with that regard to The Mercury Bay decision pursuant to which "*the trustee of the America's Cup is obligated to act in good faith and in the spirit of friendly competition*".

40. The Mercury Bay decision sets some limits, which will depend on the circumstances, to what action is within the spirit of friendly competition pursuant to the Deed of Trust. The Panel is not of the view that such limit has been superseded here. In the Panel's view the media statements complained of did not and could not amount to a breach of the "*friendly competition between foreign countries*" in the Deed of Gift. There is in fact no evidence of malice or bad faith from the Respondent. After the Panel issued its confidentiality order, the Respondent or any other Party did not make media statements in breach of that order. As a consequence, the Respondent did not breach its the obligations pursuant to the Deed of Gift, and as outlined in The Mercury Bay decision.

**DECISION AND ORDERS**

41. Confidentiality did not apply until such time as the Sole Mediator issued its confidentiality order under Art. 7.2 of the RoP by way of its Directions 02 dated 10 January 2020. The media statements that the Applicant complained of in its Application (i.e. the 1st Stuff Article and the Media Statement) both occurred before such confidentiality order was made. As a consequence, the Respondent did not breach its obligations under the Deed of Gift, the Protocol, the RoP, The Mercury Bay decision or its fiduciary duties.

42. The relief sought by the Applicant is declined.

43. Any other claim made by the Parties are dismissed.

**COSTS**

44. With regard to Art. 14.5 of the RoP, the Panel invites the Applicant and the Respondent to file a written submission on any award of costs by 5 March 2020 with regard to the provisions of Art.14.3 of the RoP.

**CONFIDENTIALITY**

45. As ordered in Directions 01 dated 26 January 2020 (of this Case No. ACAP36/06), ECAF has not been used for this Case.

46. As however stated in the same Directions 01, this Decision will be published. The Parties are reminded that all documents including the Applications, Responses, Replies and documents filed in the context of this case shall however remain confidential.

David Tillett, Graham McKenzie, Henry Peter

36th America's Cup Arbitration Panel