

INTERNATIONAL COURT OF APPEAL (I.C.A.)

of the

FEDERATION INTERNATIONALE DE L'AUTOMOBILE

**Appeal brought by the
Royal Automobile Club of Belgium (RACB)
on behalf of its licence-holder Pekaracing NV
against Decision No. 18 taken by the Panel of Stewards
on 5 December 2009 concerning the event run at Zolder (Belgium), and
counting towards the FIA GT Championship 2009**

Case 26/2009

Hearing of Tuesday 23 February 2010 in Paris

The FIA INTERNATIONAL COURT OF APPEAL (“the Court”), comprised of Mr Edwin GLASGOW CBE, QC (United Kingdom), who was elected President, Mr Jean LUISI (France), Ms Waltraud Wünsch (Germany) and Dr Michael Grech (Malta), met in Paris on Tuesday 23 February 2010 at the Fédération Internationale de l'Automobile, 8 place de la Concorde, 75008 Paris.

Ruling on the appeal brought by Royal Automobile Club of Belgium (RACB) on behalf of its licence-holder PEKARACING NV (the “Appellant”) against Decision No. 18 taken by the Panel of Stewards on 5 December 2009, excluding car No. 4 of competitor Pekaracing NV from race No. 8 held at Zolder (Belgium) on 25 October 2009 and counting towards the FIA GT Championship 2009 for failure to comply with Article 258.5.2.1 of Appendix J to the International Sporting Code, the Court has heard the statements and examined the arguments of the RACB and the FIA.

Attending the above hearing were:

on behalf of the RACB/Pekaracing NV:

Me Geoffroy Leblanc (Avocat)
Mr Jorge Segers (Team Manager)
Mr Alex Roberge (GM / Pratt & Miller, Representative)

on behalf of the FIA:

Mr Sébastien Bernard (FIA Sport, Head of Legal
Department)

The parties presented written submissions and, at the hearing on 23 February 2010, set out oral arguments and replied to the questions put to them by the Court. The hearing took place in accordance with the adversarial principle, with the aid of simultaneous translation; no objection to any element of the simultaneous translation was raised by anyone.

REMINDER OF THE FACTS

1. During a post-competition engine check, the FIA Technical Delegate on 24 November 2009 found that the cylinder heads and cylinder block of car No. 4 of competitor Pekaracing NV were not in compliance with Article 258.5.2.1 of Appendix J to the International Sporting Code (“ISC”).
2. Article 258.5.2.1 of Appendix J stipulates the following:

5.2.1) The engine must retain the original cylinder block, cylinder heads, valve angles, number and location of camshafts and firing order.
The machining of the cylinder block and cylinder heads is permitted.
The oil sump is free and may include the crankshaft bearing caps.

The addition of material to the block or heads is not permitted. However, it is permitted to sleeve a block that originally is not fitted with sleeves, by welding if necessary, and to add parts through screwing or bolting.
It is also permitted to modify or close the lubrication holes in the cylinder head, close standard injector holes, or use helicoils.

Injection and firing systems are free.
3. On the basis of the FIA Technical Delegate’s report, the Stewards took Decision No. 18 dated 5 December 2009 (the “Contested Decision”), excluding Pekaracing NV from the race results.

PROCEDURE AND FORMS OF DECISIONS REQUESTED BY THE PARTIES

4. The Appellant lodged an appeal with the Secretariat of the ICA on 8 December 2009.
5. In its Grounds of Appeal, the Appellant contends that the Court should:
 - declare the appeal admissible and well-founded;
 - declare the Contested Decision null and void;
 - annul the penalty imposed by the Contested Decision, or, in the alternative, replace it with a less severe penalty than the one imposed.
6. The FIA, in its Defence dated 12 February 2010, contends that the Court:
 - declare the appeal admissible;
 - confirm the Contested Decision.

ADMISSIBILITY

7. The Court acknowledges that this appeal was filed in conformity with the Rules of Procedure of the FIA International Court of Appeal.
8. The Court also finds that it has jurisdiction in the matter.
9. Therefore, the Court declares the appeal admissible.

ON THE SUBSTANCE

a) Arguments of the parties

10. The Appellant does not dispute the Stewards' finding that Article 258.5.2.1 of Appendix J has been breached and recognises that the cylinder heads and cylinder block of its engine did not correspond to the cylinder heads and cylinder block described in the car's homologation form. However, the Appellant argues that the Stewards should not have found it to have been at fault in respect of this violation given that the breach was due to the fault of GM, its engine manufacturer, and Pratt & Miller, the official race vehicle constructor of GM for Corvette (both of whom we will collectively refer to as "GM"). Following an administrative error by GM, the photographs included in the car's homologation form represented not the machined cylinder block and heads actually used by the Appellant, but a prototype cylinder block and prototype cylinder heads, which had not yet been submitted to the final machining process necessary for their use. These errors were a consequence of GM's mistaken belief that the homologation form was to include descriptions of the original pieces before machining. The Appellant relies on the fact that GM recognised its sole responsibility in the matter in an e-mail to Pekaracing dated 1 December 2009.
11. The Appellant adds that, in any event, it could not have prevented this violation, as it was bound by an agreement with Pratt & Miller which did not allow it to make any modifications to the engine. The Appellant therefore did not intervene in any way in the construction of the engine, and all engine modifications were performed by GM. Moreover, due to this agreement, the Appellant was not in a position even to be aware of the infringement, as it was not allowed to open or disassemble the engine for inspection, and so could not verify the engine's conformity. Consequently, the Appellant submits that no fault should be found against it.
12. The Appellant further contends that the fact that the infringement was caused by genuine error and not by an intention to cheat is evidenced by the fact that it would have been impossible for the Appellant to compete with the pieces as described in the homologation form, as these pieces were prototypes which are unusable without subsequent machining.

13. The Appellant argues that the principle laid down in Article 258.2.6 of Appendix J, according to which each participant has the responsibility to ensure his vehicle's conformity with the FIA Technical Regulations, must be interpreted reasonably and should not be construed as imposing an impossibility on the competitor. This was previously recognised by the International Court of Appeal in its decision of 14 October 2009 (ICA 21/2009, *FFSA/ Hexis Racing AMR*). Since the Appellant was not in a position to access its engine, it claims that it would be inequitable to blame it for a fault committed by GM.
14. In light of the above, the Appellant seeks an order that the Court annul the Contested Decision. In the alternative, should the Court decide that the Appellant must nevertheless be sanctioned, the Appellant requests that the penalty of exclusion be replaced by a less severe sanction. The Appellant argues that the penalty of exclusion is not a mandatory penalty and claims that it is disproportionate in view of the fact that the Appellant had no intention to cheat or deliberately violate the FIA Regulations; that it played no role in committing the infringement; and that the violation did not result in any competitive advantage.
15. The FIA affirms that the Appellant should be held responsible for an infringement committed by its equipment manufacturer, and requests that the Court confirm the Contested Decision. Article 258 of Appendix J stipulates that it is up to the competitor to make sure that his vehicle is in compliance with the regulations, and that the competitor must be able to prove his vehicle's conformity at any moment. According to the FIA's submission, holding otherwise would "leave the door open" to the arbitrary acceptance of any kind of extenuating circumstance to mitigate the responsibility of the competitor and would violate the principle of sporting equity.
16. The FIA further refers to Article 123 ISC, which states that any competitor "shall be responsible for all acts or omissions on the part of their driver, mechanic, or passengers, but each of these shall be equally responsible for any breach of this Code or of the national rules of the ASN concerned." It argues that the responsibility for acts of agents, officials, etc. arising from this article is not a liability for fault, but simply an objective responsibility established by the mere existence of a situation of non-compliance. The FIA claims that any established case of non-compliance must incur a sanction, without the need to find any element of intent. As each competitor is under the obligation to respect the technical regulations of the Championship, strict liability suffices to incur a sanction. The FIA notes that this is the most reliable and fair way of ensuring that the sporting rules are respected and that all competitors are granted equal chances.
17. The FIA argues that the International Court of Appeal has consistently upheld this reasoning. It refers to the decisions of 12 June 2001 and 7 May 2003 (ICA 4/2001, *MCA/ Lister Storm Racing*, and ICA 2/2003, *MSA/ Team Maranello*, respectively), in which the Court confirmed a sanction of exclusion despite the

fact that the competitor had not had any intention to cheat. Even in cases where the Court did lighten a sanction of exclusion (as it did for instance in its decision of 6 October 2009, ICA 20/2009, *QMMF/ Barwa Rally Team*), the Court nevertheless maintained a severe sanction upon the competitor (such as relegation to the bottom of the classification) and was not prepared to substantially modify the sporting results of the race.

b) Conclusions of the Court

18. It is common ground between the parties that the Appellant did not intentionally breach the regulations in this case. The Appellant did not know that anything wrong had been done by anyone and it could not, as a matter of fact, therefore have done anything to put it right. Indeed, it was prevented by the terms of its agreement with GM, who had provided the homologation documents to the FIA and the engine to the Appellant, from doing anything at all to modify the engine. The Court recognises those facts.
19. It is not suggested that the Appellant could have obtained any competitive advantage, or that it intended to obtain one – GM’s statement in their letter dated 1 December 2009 states that as a fact and it is not challenged. The Court accordingly accepts that statement.
20. The factual explanation, as given by GM in their statement is that the photograph which they mistakenly submitted for homologation was of an unfinished part, which was not fully machined and which would never have been used in production of a finished engine.
21. The Appellant has candidly and properly accepted that the engine did not conform to the homologation form. Plainly, it could not possibly have conformed because the material homologation was of a part which the Appellant could not have obtained, because it was not produced, and was not intended to be produced, as a finished part.
22. Having made that admission, the Appellant has explained why they were not at fault and they adopt, without any alteration, addition, subtraction or comment, the explanation of GM as to how and why it, and not the Appellant, was at fault.
23. It is legally correct to state, and the Court so finds, that a lack of fault on the part of anyone cannot make an engine compliant. That is so because Article 258 is, and has to be, a strict requirement. Non-compliance is a purely factual matter, proof of which does not require fault. Fault is irrelevant to the question of whether or not an engine complies. However, it does not follow, and the Court does not accept the FIA’s contention, that the Appellant’s explanation that the fault lay with GM is wrong. Nor does the Court understand how it can be fair for the FIA to go as far as to claim that it is “totally opposed” to the

Appellant's explanation which seems to the Court to do nothing more than truthfully and accurately to adopt GM's own candid admission.

24. The Court is unable to accept the FIA's contention that the Appellant's denial of fault, while accepting their responsibility for this unintended breach of homologation, would "leave open the door to the most arbitrary reasons for accepting any kind of extenuation circumstances...". In the Court's view, that seems to be an overstatement of the case. The Court considers that there could be a very large number of extenuating circumstances which would have nothing whatever to do with the exceptional issues arising in this case.
25. FIA justifies its assertion of "fault" on the part of the Appellant by relying on Article 123 ISC. Again, the Court does not accept that a rule which necessarily makes an entrant "responsible for all acts or omissions on their driver, mechanic, or passengers...", irrespective of fault, can apply to the manufacturer of the engine who cannot, in the Court's judgment, be fairly described as one of the Appellant's drivers, mechanics, or passengers. The Court finds that in this case Article 123 ISC adds nothing of relevance to the strict obligations imposed by Article 258 of Appendix J to which we referred above. Article 258.2.6 of Appendix J clearly imposes on the competitor the obligation to comply.
26. The Court also rejects what was asserted in the FIA's written submission in respect of the "pertinent parallel" of doping. Indeed, the Court does not consider that it would be fair to draw a parallel between what is universally and properly accepted as a breach of the most serious and culpable nature, with a case of technical non-compliance with another party's mistaken homologation of a part which was never intended to be used.
27. Finally, the Court was rightly reminded on behalf of the FIA that enforcement of all the regulations is imperative in order to ensure equal chances among the competitors. The Court agrees with this submission. However, the Court does not accept that it is relevant here, where there is not, and could not be, any suggestion that a technical failure to fit a part which was never made, and was never intended to be homologated, gave or could have given this entrant any competitive advantage. If that is right, as the Court finds it must be, the Court does not consider that any question of "equal chances among competitors" arises in this case.
28. The Court has been referred to four earlier decisions of this Court. While not strictly bound by precedent, the Court considers that it is of the essence of fairness that any sporting tribunal should be consistent in its decisions.
29. The first decision to which the Court's attention has been directed by the FIA is that in the appeal by the MCA on behalf of Lister Storm Racing dated 12 June 2001 (ICA 4/2001, *MCA/ Lister Storm Racing*). In summary, the issue in that appeal was whether the fact that an accident might, without it being proved, have caused an admitted breach of Article 258.5.3.2, prevented the Stewards

from penalising that breach. In a case where the breaking of a seal unquestionably allowed air to pass directly into the inlet manifold without passing through the compulsory restrictor, it appears to the Court to have been wholly correct for the stewards and the Court in that case to have required the entrant to prove his assertion that this obvious and admitted breach was due to an accident, and therefore to the fault of another person and not him. Indeed, it seems to us to be implicit in that finding that the Court would have allowed the appeal, at least to some extent, if the entrant had proved that the accident had been the cause of the breach. To that extent, the Court considers that this decision in fact assists the Appellant's arguments and not those advanced on behalf of the FIA.

30. The second decision relied on by the FIA is the decision dated 7 May 2003 in ICA 2/2003, *MSA/ Team Maranello*, which related to a clear breach of the rules governing *parc fermé* in a case where there was an issue over the quantity of fuel in the tank. Save for the Court's underlining of the fundamental principle that a breach of such a rule is clearly still a breach (and potentially a significant one) despite the lack of an established intention to cheat, this Court is unable to agree that it is relevant to the present case.
31. The third decision is that of 6 October 2009 in ICA 20/2009, *QMMF/ Barwa Rally Team*. This case does appear to the Court to be relevant and to some extent helpful. Again in summary, the Court found that there had been a breach of Article 254(4) of Appendix J in that case because the crankshaft had been machined and lightened in a manner which would have been permissible for a car competing in Group A but not under Group N regulations, which require vehicles to remain "strictly series production models". Further, the Court found that the machining in that case could have had the effect of improving performance. What was relevant in that decision was that the prohibited modifications and "fault" had been on the part of the engine supplier, without any intention on the part of the entrant to gain the unfair advantage that he did. This Court duly notes that, taking those factors into account, the Court in that case did mitigate the sanction imposed by the stewards in that case.
32. The Court finally turns to the decision in case ICA 21/2009, *FFSA/ Hexis Racing AMR*, dated 14 October 2009, to which the Court has been referred by the Appellant. The undisputed finding in that case was also that the non-conformity with the car's homologation form had been due to failings, again in the homologation process, for which Aston Martin Lagonda accepted responsibility. The entrant in that case also accepted legal responsibility for the non-compliance but contended that it was not culpable – or at fault. While the FIA did not refer, in its written submission, to this decision, it helpfully confirmed at the oral hearing that its approach to both cases should be and is the same.
33. In that case, the FIA had contended that, "...*even though it is ultimately the responsibility of the competitor to ensure that his car corresponds to the*

homologation form, errors in transcribing technical figures onto a form alone should not justify exclusion... where the (competitor) did not modify the parts... ”. Accordingly the Court in that case decided that the sanction of exclusion had been disproportionate and substituted a financial penalty of € 10,000. Adopting a similar approach to the present case, as we are invited to do by both parties, this Court concludes that the sanction of exclusion should be annulled and substituted by a financial penalty. However, the Court takes account of the facts that (i) in the Hexis case, the mistake in homologation was simply a clerical error of figures on the form whereas in this case, an image of the wrong part was submitted; and that (ii) the failing which led to the mistake in homologation in this case is more serious than that which gave rise to the penalty in the Hexis decision.

COSTS

34. The Appellant having accepted its responsibility for the infringement, the Court considers that the Appellant should bear the costs in accordance with Article 24 of the Rules of the International Court of Appeal.

ON THESE GROUNDS,

THE FIA INTERNATIONAL COURT OF APPEAL:

- 1. Declares the appeal admissible;**
- 2. Confirms the Contested Decision with respect to the finding that Pekaracing NV breached Article 258.5.2.1 of Appendix J to the 2009 International Sporting Code;**
- 3. Annuls the sanction of exclusion imposed by the Contested Decision and substitutes it with a fine in the amount of 20,000 Euros upon the Appellant in accordance with Article 153 of the International Sporting Code;**
- 4. Leaves it to the Sporting Authority to draw the consequences of the present decision.**
- 5. Orders the Appellant to pay the costs, in accordance with Article 24 of the Rules of the International Court of Appeal.**

Paris, 23 February 2010

The President